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No. 68409-4-I
King County Superior Court No. 11-1-06978-3 KNT

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

ANTHONY ARCHULETA, JR.,
Defendant-Appellant.

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

The Honorable Barbara Mack, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The trial court erred in admitting gang evidence under ER 404(b) when she found that there was no nexus between the crime and a gang.
2. Officer O'Neill's testimony regarding Anthony's gang membership was introduced to prove an element of the crime and invaded the province of the jury.
3. Without the gang evidence, there was insufficient evidence to find Anthony guilty.

II.
ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Where there is no nexus between the charged crime and gang membership, is the evidence still admissible?
2. Is it improper to admit gang evidence in order to establish an element of the crime?
3. Absent the introduction of the gang evidence, was there sufficient untainted evidence for the jury to find that Anthony was Velia's accomplice?

III.
STATEMENT OF THE CASE

Anthony Archuleta, Jr.¹ was charged with first degree Burglary, alleged to have occurred on August 5, 2010. CP 1-5. The State alleged that he entered Vanessa Rodriguez's apartment and stood by while his sister, co-defendant Velia Archuleta, assaulted Rodriguez. The State's theory was laid out in closing as follows:

Sure it was Velia Archuleta who did the assault, but we heard testimony that Anthony Archuleta, Jr. was standing by looking angry, standing by assisting Velia Archuleta's assault of [Rodriguez]. Not by laying hands on [Rodriguez], not by yelling at Velia by continuing to assault [Rodriguez] but because of his status as a high ranking member of Rancho San Pedro gang.

1/23/12 RP 9.

Vanessa Rodriguez testified that she was assaulted in three separate incidents on August 4 and 5, 2010. 1/10/12 RP 140.

On August 4, 2011, a man named Pancho Francisco Gallegos slapped Rodriguez in the face four times. 1/10/12 RP 90. Pancho is 15 years old. 1/10/12 RP 161. She stated that these slaps did not leave any visible marks on her. *Id.* After that fight, Rodriguez stated on Facebook that Pancho "u hit like a bitch." 1/10/12 RP 161.

¹ The Archuletas will be referred to as follows: Anthony, Velia and Archuleta, Sr., their father.

Although not entirely clear, it appears that same day Rodriguez had “tipped a hat off” of Henry Barrera. 1/10/12 RP 92. As a result she and another person named Carlos began fighting. *Id.* Carlos ran to a car and Rodriguez followed. As the car pulled away, she fell and scraped her knee. 1/10/12 RP 93. Afterwards, Rodriguez posted the following on Facebook:

Put handz on me bitch itz all good you can't faxe me. Pero I put handz on u I break your face puto.

1/10/12 RP 162.

Later that evening the defendants came to Rodriguez's apartment. 1/10/12 RP 103. Rodriguez testified that Velia was her “boyfriend's daughter” and Anthony was his son. 1/10/12 RP 87. On August 5, 2012, however, Velia and Archuleta, Sr. were not in a relationship.” 1/10/12 RP 87. She said she first met the defendants in August 2010. 1/10/12 RP 88. She stated that she knew Archuleta, Sr. was in the Rancho San Pedro gang. *Id.* She said that the defendants were also members of the gang. 1/10/12 RP 89.

Rodriguez was decidedly unclear on what time the defendants arrived at her home. 1/11/12 RP 10-21. But at trial she said they arrived at 10:00 p.m. 1/10/12 RP 104-05, 107. Five to ten minutes after the assault, Rodriguez posted a message about it on her Facebook page.

1/10/12 RP 108. The Facebook time stamp said that the post went up at 10:48 p.m. 1/10/12 RP 109. The Facebook message stated:

Lmfao people are funny these dayz talking shit and not even knowin' what the fuck they fighting 4...grow da fuck up children.

1/10/12 RP 160. Rodriguez explained that "lmfao" stood for "laughing my fucking ass off." *Id.*

Rodriguez said that both defendants entered her apartment without knocking – the door was open because it was warm outside. 1/10/12 RP 113. Anthony stood by the end of the couch. 1/10/12 RP 114. According to Rodriguez, Anthony asked why she was calling him and his sister snitches. He then stood by while Velia hit and punched her. Anthony did not encourage Velia. 1/10/12 RP 119. She waited 3 days to call the police because she considered the defendants "family." 1/10/12 RP 123.

Rodriguez testified that at the time of the assault she was still in love with Archuleta, Sr., but there were restraining orders that prevented her from seeing him. 1/10/12 RP 137.

Emerald Cervantez, Rodriguez's mother, testified that she witnessed Velia's assault on her daughter. 1/11/12 RP 40. She confirmed that Anthony did nothing but stand in the apartment and ask Rodriguez why she called him a snitch. *Id.* Cervantez said that the assault happened about 9:20 to 9:25 p.m. 1/12 RP 45. She also stated that the two remained

in the apartment for about 20 minutes. When asked if she might be incorrect regarding the time, Cervantez said that she would “stick to” that time. 1/12/12 RP 54.

Rodriguez did not report the alleged burglary for three days. When Officer Ashbaugh contacted Rodriguez she was visibly upset and her face was bruised. 1/10/12 RP 43. Rodriguez said that the bruises were caused by Velia and not the other altercations that she had with Pancho and Carlos. 1/10/12 RP 121.

Prior to trial, the trial judge held a hearing regarding the admissibility of the “gang evidence” in this case. The State had moved to amend the information to add a “gang enhancement.” The State alleged the Velia, Anthony and their father, Anthony Archuleta, Sr., were members of the Rancho San Pedro gang. The State asserted that Archuleta, Sr. was a leader of an offshoot of the Ranchos, called the “Pee Wees.” 12/15/11 RP 23. The defendants objected to the amendment and also moved to exclude any reference to gang membership under ER 404(b). The State argued that the evidence was admissible to prove “motive.”

The trial court conducted a lengthy pretrial hearing on the issues. At the close of the hearing, the prosecutor argued that the only way he could demonstrate that Anthony was an accomplice was “through gang

evidence.” 1/3/12 RP 61. The trial judge found by a preponderance of the evidence that the defendants were members of a gang. She stated that evidence of Anthony’s gang membership was being “introduced for purposes of res gestae.” She said:

It is relevant to prove this particular crime under these circumstances the intent of Mr. Archuleta. It is prejudicial. There is no question about that, however, under the circumstances of this case, it is not more prejudicial than probative, it is more probative than prejudicial. It is the only way to explain the conduct of Mr. Archuleta, Jr.

1/4/12 RP 6. She also stated:

This information will be very limited to establishing the gang membership and to testimony about delegation and limited testimony about how gangs operate.

Id. But she did not permit the State to add a “gang aggravator” because she said that there was no “nexus” between the crime and the gang.

1/03/12 RP 99.

Just before the State called Officer Bryan O’Neill, the purported “gang expert”, the defendants renewed their objections to the evidence. Defense counsel first argued that, as to Anthony, Officer O’Neill could not point to any other incident where Anthony was present at the scene of a crime in order to observe and direct the behavior of other gang members.

1/11/12 RP 93. Defendants also pointed out that Officer O’Neill’s testimony was tantamount to an opinion that the defendants were guilty.

1/11/12 RP 97. The defendants moved to preclude Officer O’Neill from

testify that the defendants were members of a “criminal street gang.” 1/11/12 RP 98. The State argued that it was essential to let Officer O’Neill talk about “criminal street gangs because it’s not criminal to be a member of an organization.” *Id.* Further, the prosecutor stated that without that evidence “it leaves the jury to think that they are being prosecuted for being a member of an organization which is lawful.” *Id.*

The trial judge stated that she would “let you begin down that avenue.” *Id.*

Officer O’Neill testified that he is the Auburn Police Department’s “gang intel officer.” 1/11/12 RP 108. The State asked Officer O’Neill about “validation.” 1/11/12 RP 111. He said that the Auburn Police Department “validated” criminal street gangs under standards more “stringent than the state guidelines.” 1/12/12 RP 111. He said:

We have 13 criteria. And of those 13 criteria -- I suppose I could pull out a piece of paper, I could give it to you one by one, but there is the admission of being a gang member, there’s using a gang nickname or a moniker, having gang tattoos, some of them, like having a gang tattoo or being caught writing gang tagging somewhere, or identifying yourself, for us, is worth more than -- we have a point system on this, it’s more than one point, because you’re making a strong statement whether it’s through, you know, inking your own skin or saying something to a police officer in that regard that you’re a gang member. So those are worth two points. And then the remainder, whether you’re wearing gang clothing, you’re seen associating with gang members, you’re targeting potentially rival gang members, there’s any number of the remaining 13 that are

worth one. So for our purposes, we're looking for three points to make certain someone's a gang member.

1/11/12 RP 113. As to validating gangs, he said:

We don't use the same exact criteria, what we're looking for is predicate acts, acts that we feel are directly related, gang motivated by members we have identified as members of that criminal street gang. So if -- if there's, let's say, four or five individuals we confirmed as street gang members, looking into their history, we read some reports or look at incidents relating to their activities, and if we can show a nexus to -- or to the gang, that these acts are gang motivated, then those are predicate acts. And if there's, you know, a good laundry list of those, I think it's pretty obvious that they're working in concert as a criminal street gang.

1/11/12 RP 114.

The State was then permitted to discuss "gang validation" reports for the Rancho San Pedro gang, and for Velia and Anthony. 1/11/12 RP 117. O'Neill was then permitted to testify about the history and origins of the Rancho San Pedro gang, Velia and Anthony's "monikers", and his "validation" of them as gang members. 1/11/12 RP 121. He testified that Archuleta, Sr. was the leader of the gang and that Anthony was the de facto leader when his father was not around. *Id.* He opined that Anthony as a "shot caller" – someone who directed the actions of other members – in the gang. 1/11/12 RP 122. He said that shot callers did not generally do the "dirty work" of the gang but rather ordered others to do the job or supervised the work. 1/11/12 RP 123.

He also testified that “snitching” was taken “very seriously” in gangs. 1/11/12 RP 124. According to O’Neill, if a gang member is snitching, that person “needs to be dealt with.” *Id.* The defense objected to further discussion of the issue of “snitching” on other gang members because there was no evidence of that in this case. 1/11/12 RP 126. After a lengthy discussion of the objection, O’Neill was allowed to testify that “snitching” was treated very harshly. 1/11/12 RP 137. He also testified that in his experience an assault on someone who is suspected of snitching is “consistent with gang behavior.” 1/11/12 RP 156.

Officer Ashbaugh was also asked: “Are you aware of Mr. Anthony Archuleta Jr.’s leadership, if you will, in the RSP’s?” 1/10/12 RP 37. Defense counsel’s objection to this question was overruled. Thus, Officer Ashbaugh was permitted to testify that:

I know that he would be what’s considered like a lieutenant of the gang, so he’s – outside of his – outside of his father, he’d be about the highest ranking member.

Id.

The defendants presented documentary and videotaped evidence that on August 5, 2012, Velia was at work until 9:00 p.m. She then waited outside with a coworker until her mother and brother picked her up between 9:30 and 9:45 p.m. 1/12/12 RP 71. They then went to the Auburn

Walmart to try to cash a check. Velia was on the store video between 9:53 and 10:07 p.m. 1/12/12 RP 11-29.

When the Auburn Walmart refused to cash her check, the three went to the Federal Way Walmart. 1/12/12 RP 107. They then went to El Rinconcito in Auburn for food. 1/12/12 RP 109. After that they returned to Velia's apartment where they remained for the rest of the evening.

A. JURY INSTRUCTIONS

The trial court gave the following limiting instruction:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of an allegation that the defendant is a member of a criminal street gang, and that his or her actions were motivated by his or her membership in that gang. This evidence may be considered by you only for the purpose of considering the issue of intent or motive, if any, the defendant may have had to commit the crime charged. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 50.

B. CLOSING ARGUMENT

In closing the State argued that Velia and Anthony entered Rodriguez's apartment with the intent to beat her up for snitching. The State emphasized that Rodriguez's accusations were credible because, as gang members, Velia and Anthony have to "combat snitching." 1/23/12

RP 16. They had to “stamp it out” even “to people that they consider friends, family. . .” *Id.* The prosecutor said:

That’s why you had such a high ranking member of the gang escort Velia Archuleta, to assure that it was done in accordance with Rancho San Pedro and their belief that snitching should be stamped out.

1/23/12 RP 16.

The State acknowledged that mere presence at the scene of a crime is not enough to establish that a person is an accomplice. 1/23/12 RP 27.

So, the prosecutor turned to the gang evidence to argue as follows:

However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. So let’s take a look at that. More than mere presence. How do we know that Anthony, Jr. should be held accountable for the Burglary in the First Degree when we know that he was just standing there? Anthony Anthony, Duke moniker, Archuleta, Jr. He’s a shot caller from the Rancho San Pedro gang. Now, you remember from testimony from Brian O’Neill that a shot caller is somebody who really runs the streets, runs the lower ranking members in the gang, tells them what to do, how to do it, why to do it, et cetera, and that’s Anthony Duke Archuleta, Jr. Dad is Anthony, Sr., named Peewee, which is part of the name PeeWee -- PeeWee Surenos gang. Velia is known as Gata. She’s a lower ranking member of the RSP’s. Again, these are all validated gang members from Auburn Police Department. Officer Brian O’Neill in his expert opinion, it is known that shot callers sometimes escort junior members of a gang on gang-related tasks. Again, in Officer O’Neill’s expert opinion, he’s seen this before, it is not uncommon for this to happen. Make sure that the job is carried out and ensures that nothing goes wrong. Nothing did go wrong in this case. Mission accomplished. They broke into this house and they beat up

Vanessa Rodriguez. Co-defendants' acts are consistent with the expert testimony. Now, let's look at his verbiage, his statements. Through Vanessa's testimony we heard Anthony say, where's Vanessa, why you calling us a snitch. Vanessa, Anthony was in a rage. I have never seen him -- or I never saw him like this before, he was in attack mode. Again, corroborates what Vanessa. Anthony looked really mad. Never saw him like that before. Said something about snitch. Said, why did you call us a snitch, like 10 times, snitch, snitch, snitch. They need to be suppressed. We can't have anybody calling us a snitch, can't have anybody snitching on us, you've got to stop this behavior.

1/23/12 RP 27-28.

The jury convicted Anthony as charged. CP 34. Judgment and sentence were entered. CP 80. This timely appeal followed. CP 80.

IV. ARGUMENT

A. THE TRIAL COURT ERRED IN ADMITTING GANG EVIDENCE UNDER ER 404(B) WHEN SHE FOUND THAT THERE WAS NO NEXUS BETWEEN THE CRIME AND A GANG

ER 404(a) establishes the general rule that evidence of a person's character is inadmissible for the purpose of proving that the person was likely to have acted in conformity with that character on a particular occasion. In the criminal context, the rule is generally applied to bar evidence of the defendant's bad character when offered to show that the defendant was likely to have committed the particular crime in question. ER 404(b) prohibits evidence of prior acts to prove the defendant's

propensity to commit the charged crime. But evidence of a defendant's prior acts may be admitted for other limited purposes under ER 404(b), including to establish "motive, opportunity, intent, plan, knowledge, identity or absence of mistake or accident." Thus, evidence of membership in a group may be relevant evidence of premeditation and a defendant's motive when there is a sufficient nexus between the group affiliation and the motive for committing the crime. *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964, *review denied*, 135 Wn.2d 1015, 960 P.2d 939 (1998).

The trial court erred in admitting the gang evidence. Most importantly, she found that there was no nexus between Anthony's membership in the gang and the alleged burglary. The trial judge said that there was evidence that the two defendants were in a gang, but that she could not see the nexus between the crime and the gang. 1/03/12 RP 95-97. That finding should have ended the matter. If there is no connection between the gang and the crime then there is no need to introduce Officer O'Neill's testimony.

Instead, the trial judge found that the evidence was relevant as "res gestae." But, "[U]nder the res gestae or 'same transaction' exception to Rule 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for

events close in both time and place to the charged crime.” *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002, 113 P.3d 482 (2005). Here, the evidence of gang membership did not complete the story for the crime or provide context for the assault. Ms. Rodriguez was not in either the RSP’s or some rival gang. Thus, any gang evidence was irrelevant.

The “limiting” instruction did not ameliorate this error. It stated that the gang evidence was limited to the issue of motive. But the trial court had determined that the evidence was *not* relevant to motive.

Given the lack of relevance of the “gang evidence”, its admission was highly prejudicial. Anthony did not assault Ms. Rodriguez. There was no evidence that he aided Velia in any way except by being present. Thus, his conviction should be reversed and remanded for a new trial.

B. OFFICER ONEILL’S TESTIMONY REGARDING ANTHONY’S GANG MEMBERSHIP WAS INTRODUCED TO PROVE AN ELEMENT OF THE CRIME AND INVADED THE PROVINCE OF THE JURY

“Membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting.” *Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir.), *cert. denied*, 522 U.S. 913, 118 S.Ct. 295, 139 L.Ed.2d 227 (1997), *overruled in part on other grounds*, *Santamaria v. Horsley*, 133

F.3d 1242 (9th Cir. 1998) (en banc); *see also*, *People v. Killebrew* 103 Cal.App.4th 644, 658, 126 Cal.Rptr.2d 876 (2002).

Here, that was precisely the argument made by the prosecutor in closing. He argued that the “gang” evidence was proffered to prove a substantive element of a crime – that Anthony was an accomplice. He argued that because Anthony was a shot caller in the same gang as his father and sister, Anthony was an accomplice to her assault. The State argued that gang membership alone established that Anthony was there to see to it that his sister assaulted Rodriguez.

Worse yet Officer O’Neill was allowed to testify that Anthony was a “validated” gang member. A direct or an implicit statement of guilt, elicited in a manner that seeks a conclusion on the ultimate issue rather than a factual opinion on the ultimate issue, is a comment on the defendant’s guilt. *See, e.g., State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967) (holding that asking the proprietor of a burglarized tavern whether or not he thought the defendant was one of the parties who participated in the burglary was a question calculated to elicit an opinion on whether or not the appellant was guilty); *State v. Haga*, 8 Wn. App. 481, 490, 492, 507 P.2d 159, *review denied*, 82 Wn.2d 1006 (1973) (holding that an ambulance driver’s testimony implied his opinion that a murder defendant was guilty where the prosecutor’s questions were

phrased to elicit a conclusion rather than facts from which the jury could decide).

O'Neill was permitted to testify that Anthony was a member of the RSP gang and, by virtue of his birth, was a "shot caller" in the gang. Because the State argued that gang membership alone was proof that Anthony was Velia's accomplice, the testimony was an opinion on the ultimate issue.

In *United States v. Mejia*, 545 F.3d 179, 190-91 (2d Cir. 2008), the Second Circuit was prescient and described precisely Detective O'Neill's testimony and its dangers.

An increasingly thinning line separates the legitimate use of an officer expert to translate esoteric terminology or to explicate an organization's hierarchical structure from the illegitimate and impermissible substitution of expert opinion for factual evidence. If the officer expert strays beyond the bounds of appropriately "expert" matters, that officer becomes, rather than a sociologist describing the inner workings of a closed community, a chronicler of the recent past whose pronouncements on elements of the charged offense serve as shortcuts to proving guilt. As the officer's purported expertise narrows from "organized crime" to "this particular gang," from the meaning of "capo" to the criminality of the defendant, the officer's testimony becomes more central to the case, more corroborative of the fact witnesses, and thus more like a summary of the facts than an aide in understanding them. The officer expert transforms into the hub of the case, displacing the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant's guilt.

Mejia, 545 F.3d at 190-91. That Court went on to also describe precisely how and why testimony such as Detective O’Neill’s is improper:

In such instances, it is a little too convenient that the Government has found an individual who is expert on precisely those facts that the Government must prove to secure a guilty verdict – even more so when that expert happens to be one of the Government’s own investigators. Any effective law enforcement agency will necessarily develop expertise on the criminal organizations it investigates, but the primary value of that expertise is in facilitating the agency’s gathering of evidence, identification of targets for prosecution, and proving guilt at the subsequent trial. When the Government skips the intermediate steps and proceeds directly from internal expertise to trial, and when those officer experts come to court and simply disgorge their factual knowledge to the jury, the experts are no longer aiding the jury in its fact-finding; they are instructing the jury on the existence of the facts needed to satisfy the elements of the charged offense. See *United States v. Nersesian*, 824 F.2d 1294, 1308 (2d Cir. 1987) (“In the past, we have upheld the admission of expert testimony to explain the use of narcotics codes and jargon.... We acknowledge some degree of discomfiture [when] this practice is employed, since, uncontrolled, such use of expert testimony may have the effect of providing the government with an additional summation by having the expert interpret the evidence.”). It is as though the law enforcement agency in question is a standing master for the criminal court, and the officer expert its representative charged with reporting that master’s findings of fact. Not only are masters a creature of civil rather than criminal courts, see Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 *Cornell L.Rev.* 1181, 1200, 1204 (2005) (describing the advent of masters in fifteenth-century English courts of equity), that sort of usurpation of the jury’s role is unacceptable even in the

civil context, see James Wm. Moore, 9 Moore's Federal Practice § 53.13[1], at 53-78 (3d ed. 2005) ("The 2003 amendments [to the Federal Rules of Civil Procedure] abolish the authority of trial courts to appoint trial masters respecting matters to be decided by a jury unless a statute provides otherwise."). The Government cannot satisfy its burden of proof by taking the easy route of calling an "expert" whose expertise happens to be the defendant. Our occasional use of abstract language to describe the subjects of permissible officer expert testimony, e.g., *Locascio*, 6 F.3d at 936 ("We have ... previously upheld the use of expert testimony to help explain the operation, structure, membership, and terminology of organized crime families."); *United States v. Lombardozi*, 491 F.3d 61, 78 (2d Cir. 2007) ("This Court has also permitted expert testimony regarding the organization and structure of organized crime families in [RICO] prosecutions"), cannot be read to suggest otherwise.

Mejia, 545 F.3d at 191 (emphasis added).

Here, Officer O'Neill's testimony that Anthony was a "validated" gang member was introduced to prove that Anthony was Velia's accomplice. But the issue of accomplice liability is a question for the jury. Thus, O'Neill's testimony invaded the province of the jury.

C. WITHOUT THE INTRODUCTION OF THE IMPERMISSIBLE EVIDENCE, THERE IS INSUFFICIENT EVIDENCE TO CONVICT ARCHULETA

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494,

499, 81 P.3d 157 (2003); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888, *review denied*, 95 Wn.2d 1021 (1981); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“A person is legally accountable for the conduct of another person if he is an accomplice to that person in the commission of the crime.” *State v. McDonald*, 138 Wn.2d 680, 690, 981 P.2d 443 (1999) (quoting *State v. Davis*, 101 Wn.2d 654, 657, 682 P.2d 883 (1984)); *see also* RCW 9A.08.020. A person is an accomplice to another in the commission of a crime if he or she solicits, commands, encourages or requests the other person to commit the crime; or if he or she aids or agrees to aid such other person in planning or committing the crime. RCW 9A.08.020(3). Additionally, the State must prove that the individual acted with the specific knowledge that his or her actions would promote or facilitate the commission of the crime. *Id.*

“[P]hysical presence and assent alone are insufficient to establish accomplice liability.” *State v. Amezola*, 49 Wn. App. 78, 89, 741 P.2d 1024 (1987). The State must also establish that the defendant was “ready to assist in the commission of the crime.” *Id.* This generally requires a

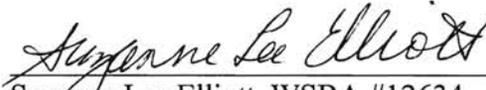
showing that the accomplice had “the purpose to promote or facilitate the particular conduct that forms the basis for the charge.” Officer O’Neill’s testimony regarding Anthony’s gang membership was introduced to prove an element of the crime and invaded the province of the jury. Absent the improper admission of the “gang evidence” as discussed above, there was insufficient evidence that Anthony was Velia’s accomplice. There was no other evidence to establish his aid, encouragement or facilitation of the crime.

V. CONCLUSION

For the reasons stated above, this Court should reverse Anthony’s conviction.

DATED this th 29 day of October, 2012.

Respectfully submitted,


Suzanne Lee Elliott, WSBA #12634
Attorney for Anthony Archuleta, Jr.

CERTIFICATE OF SERVICE

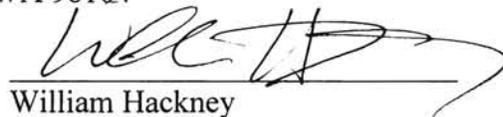
I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Mr. Anthony Archuleta, Jr. #336613
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

And I hand delivered one copy to:

King County Prosecutor's Office
Appellate Unit
516 Third Avenue, W554
Seattle, WA 98104

30 Oct 2012
Date


William Hackney