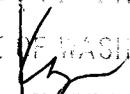


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DIVISION II

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STATE OF WASHINGTON
BY  _____
DEPUTY

NO. 37120-1-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

Guadalupe Solis-Diaz

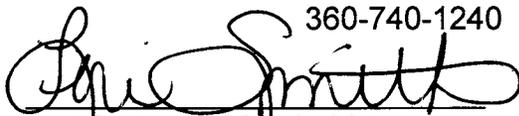
Respondent.

On Appeal from the Lewis County Superior Court

RESPONDENT'S BRIEF

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR
345 W. MAIN STREET, 2ND FLOOR
CHEHALIS, WA 98532
360-740-1240

by:



Lori Smith, WSBA 27961
Deputy Prosecutor

PRR 11-14-08

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I. STATEMENT OF THE CASE

Except for shading the recitation of facts with improper commentary, Appellant's statement of the case is adequate for the purpose of responding to this appeal.

II. ARGUMENT

A. THE TRIAL COURT DID NOT ERR WHEN IT SUPPRESSED TESTIMONY OF ROBERT APGOOD REGARDING HEURISTIC REASONING.

Solis-Diaz argues that the trial court lacked authority to suppress evidence as a sanction for discovery violations involving defense witness Robert Apgood.¹ Solis-Diaz is incorrect. Solis-Diaz claims that suppression cannot be a remedy for a discovery violation. This is an incorrect statement of the law. While suppression of evidence may be a remedy of last resort, it, like dismissal, is nonetheless a remedy that the court may use, albeit sparingly.

A trial court is given broad discretion regarding the admission or exclusion of evidence. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). The remedies for discovery violations are set out in CrR 4.7(h)(7)(i), which states that if a party fails to comply with an applicable discovery rule, the court may

¹ Appellant refers to Apgood as "Applewood." Brief of Appellant 26. But the correct name is "Apgood." 5RP 87.

“grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.” CrR 4.7(h)(7)(i) (emphasis added). Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly. State v. Hutchinson, 135 Wn.2d 863, 882-884, 959 P.2d 1061 (1998). But decisions based upon CrR 4.7 are within the sound discretion of the trial court. State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993); State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). Likewise, qualifications of an expert are to be judged by the trial court and its determination will not be set aside in the absence of a showing of an abuse of discretion. Nordstrom v. White Metal Rolling & Stamping Corp, 75 Wn.2d 629, 642, 453 P.2d 619 (1969). Even if the court commits an error regarding suppression of evidence, the appellant must show the error was prejudicial. State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982). Therefore, error is not reversible unless it materially affects the trial's outcome. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Such is not the case here.

In this case, the State apparently became aware on the day of trial that the Defense expert, Mr. Robert Apgood, would testify

regarding "heuristic reasoning." 5RP 69.² The prosecutor explained to the court:

PROSECUTOR: Mr. Apgood is the expert for the defense. He's generally going to be testifying to the video, video quality and whatnot. But he said something to me that caught my attention that I'm going to be objecting to. He was going to testify to heuristic reasoning which is essentially . . . it is when the brain, according to him, when the brain sees something and something is missing, automatically fills it in.

I was looking over his curriculum vitae, it didn't appear to me he had any type of training related to testimony in that area. All his training seems to be either legal or computer based. I think this would be a mental process, so I think it is outside of his area of expertise.

5RP 69 (emphasis added). Defense counsel then tried to explain:

DEFENSE COUNSEL: [B]asically what it is, it is a process whereby people and computer systems take a set of rules and intrinsic facts, process or procedural, and build on them. Meaning that if they see something and everything is not there, then they fill in the blank spaces, basically drawing on other data to come to a conclusion about new information that's not self evidence. It is something he's been -- he does have a law degree, but initially was working for computer companies dealing with computer programs and logic systems that corrected these issues in the programming that he did to make things

² There are five volumes of trial transcripts. The 11/28/07 report of proceedings (RP) is designated as 1RP; the 11/29/07 RP is designated as 2RP; the 11/30/08 RP is designated as 3RP; the 12/3/07 RP is designated as 4RP; and the 12/6/07 and 12/7/07 RPs are designated as 5RP.

more efficient, I guess, would be the best way to say it. . . we can put him on the stand, swear him in, and lay the proper foundation, explain where he's coming from and what his expertise is on it.

5RP 70. The trial court then stated:

THE COURT: Is there some reason why this is coming up now? He's been on the witness list for months, hasn't he? Now we get to this point, if we take an offer of proof then we go and we're going to run into yet another day. I don't see any way --is there some reason why I'm just being presented with that now rather than at some point --did he not provide his report to the prosecutor as far as that goes?

DEFENSE COUNSEL: Actually, we did present his curriculum vitae this morning. I know he's been available for consultation by [the prosecutor]. In fact, [the prosecutor] advised me --I talked to Mr. Apgood I think last week.

THE COURT: This is the reason why people do reports so that you don't have to play let's see if I can guess the right question to ask so an area of alleged expertise can be exposed. There was no report done here by Mr. Apgood, is that correct?

DEFENSE COUNSEL: No, he did not write a report. He viewed the video. I sent him the video, he viewed that.

THE COURT: This is an area that is just ripe for cross examination. To say, okay, he's going to come into court one day and testify on heuristic reasoning and how it applies to several police officers or law enforcement officers who view a video which allegedly has the defendant in it. It's not something we hoist off on the State and say, okay, do what you can with it on a moment's notice. I'm not going to

allow that testimony. The rest of it you can go ahead with, but the heuristic reasoning part of that, no.

5RP 71, 72 (all emphasis added). The Court clarified its reason for excluding the testimony on heuristic reasoning:

THE COURT: [Y]ou didn't provide notice of that [the heuristic reasoning]. I wouldn't have known that unless you had told me. How is [the prosecutor] supposed to know that? Does he just guess? Oh, I know, by looking at this I guess he's an expert in heuristic reasoning. Is that something you would do? How do we know he's not--he doesn't have some expertise in something else that's relevant to this case, but we have --the State has no idea what it is.

* * *

THE COURT: [I]n an expert situation if you have a report done you're supposed to disclose not only the report, if there is one, but also the areas in which the expert is going to be testifying. You don't wait until the day of trial and either hope no one has found out about it or spring it on the State in this fashion. So my ruling is that he can testify to everything else that [the prosecutor] has said is not objectionable, but not that. I would really question whether this would meet the Frye Test³ in any event. That's another issue that should have been brought up prior to trial and it was not. So the end result is he's not going to be allowed to testify to that.

5RP 72, 73. Thus, what defense "expert" witness Robert Apgood was supposedly going to testify about was something called

³ Washington has adopted the Frye standard for the admissibility of novel scientific evidence. State v. Copeland, 130 Wn.2d 244, 261, 922 P.2d 1304 (1996); Frye v. United States, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir. 1923). Under that standard, scientific evidence is admissible only if it has achieved general acceptance within the relevant scientific community. Frye, 293 F. at 1014.

"heuristic reasoning." The trial court, as noted in the passages from the transcripts above, decided to suppress any testimony on "heuristic reasoning" because the State had not received any notice about such testimony and furthermore the court noted that it questioned whether such a theory would even meet the Frye test. Id.

Admissibility of expert testimony pursuant to ER 702 depends on whether the witness qualifies as an expert, whether the opinion is based upon a theory generally accepted in the scientific community and, whether the expert testimony would be helpful to the trier of fact. State v. Cauthron, 120 Wn.2d 879, 890, 846 P.2d 501 (1993). The decision of whether to admit expert testimony rests solely within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Id. "If the reasons for admitting or excluding the opinion evidence are 'fairly debateable', the trial court's exercise of discretion will not be reversed on appeal." Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979). There has been no abuse of discretion here-- either in the sanction of suppressing the evidence or in the ruling made by the court regarding the proposed testimony by witness Robert Appgood.

As noted by Solis-Dias, a court may also look at several factors to determine whether suppression is an appropriate remedy for a discovery violation. Those factors are: "(1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith." State v. Hutchinson, 135 Wn.2d 863, 880, 959 P.2d 1061 (1998). Here, the trial court addressed factors one and three in its ruling, noting that the State was surprised because it had gotten no report and no other notice until the day of trial regarding the use of "heuristic reasoning." As for element two, the impact of suppressing such evidence on the trial and the outcome of the case, the trial court hinted at what the outcome would be and that is that such evidence would likely not have met the Frye test for admissibility in any event. 4RP 73. The trial court's concern in this regard appears to be spot-on. Indeed, the State searched all of Washington caselaw via Westlaw and could not find a single case mentioning "heuristic reasoning." A search of "all States" caselaw turned up a single case which cited a law review article on the insanity defense. State Farm Fire & Cas.Co. v. Wicka, 474 N.W.2d

324, 327 (Minn. 1991), citing Perlin, Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning, 69 Neb. L.Rev. 3,23 (1990). And a "Google" search of the term "heuristic reasoning" turned up a number of references to various and assorted permutations of the term, including "The Heuristic Reasoning Manifesto," by Praveen K. Paritosh, Qualitative Reasoning Group, Electrical Engineering and Computer Science, Northwestern University, Evanston, IL 60208⁴, in which the abstract of the article begins with the statement, "We argue for heuristic reasoning as a solution to the brittleness problem." [!] And, turning to the dictionary definition of "heuristic," we find the following:

- 1) serving to indicate or point out; stimulating interest as a means of furthering investigation.
2. encouraging a person to learn, discover, understand, or solve problems on his or her own, as by experimenting, evaluating possible answers or solutions, or by trial and error: *a heuristic teaching method*.
3. of, pertaining to, or based on experimentation, evaluation, or trial-and-error methods.
4. *Computers, Math*, pertaining to a trial-and-error method of problem solving used when an algorithmic approach is impractical - *n*.
5. a heuristic method of argument.
6. the study of heuristic procedure.

Webster's Unabridged Dictionary at 898 (Random House 2d. Ed., 1998)(emphasis in original). What these various searches for the

⁴ <http://www.qrg.northwestern.edu/papers/Files/HeuristicReasoningManifestoQR06.pdf>

term "heuristic reasoning" indicate is that there does not seem to be any kind of scientific "certainty" or consensus in *any* scientific community regarding such reasoning, and certainly it has not been dealt with in any Frye -type hearings in the legal community--at least not that the State has been able to find. Nor has the State has found any authority describing this term the way Mr. Appgood apparently described it to the deputy prosecutor in this case. 5RP 69. In short, there is no "impact" of excluding this testimony in this case because this "theory"-- as described by the witness here-- does not appear to have any basis in any literature that the State has been able to find. Since such "voodoo science" would never have been allowed in this case in the first place, the "expert's" testimony was properly suppressed--either as a discovery sanction or as it would have been otherwise excluded under ER 702. "[I]f the judgment of a trial court can be sustained on any grounds, whether those stated by the trial court or not, it is our duty to do so." State v. Williams 104 Wash.App. 516, 524, 17 P.3d 648 (2001), *citing*, State v. Armstead, 40 Wash.App. 448, 449-50, 698 P.2d 1102 (1985) (quoting *State v. Ellis*, 21 Wash.App. 123, 124, 584 P.2d 428 (1978)). Likewise, the trial court's ruling on the

suppressed evidence in this case should be sustained and the convictions affirmed.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT LIMITED THE CROSS EXAMINATION OF WITNESS THOMAS BECAUSE THE OTHER PLEA BARGAIN EVIDENCE WAS ON A DIFFERENT CASE.

Solis-Diaz claims that the trial court erred when it did not allow him to cross examine Mr. Thomas as to the details of a plea bargain that Thomas received on another case. Brief of Appellant, 28. Solis-Diaz further claims that the trial court should not have believed the prosecutor when he stated that the plea bargain was granted to Thomas on a different case. Solis-Diaz's argument is without merit.

The scope of cross examination lies within the trial court's sound discretion and the reviewing court will not disturb a trial court's decision absent a manifest abuse of that discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929(1994). Cross examination should be limited to the subject matter of the direct examination and the credibility of the witness. But inquiry into other matters may be allowed. In re Detention of Duncan, 142 Wn.App. 97, 107, 174 P.3d 136 (2007), citing ER 611(b). The evidence a party seeks to admit to show bias, ill will, interest, or corruption

must be specific enough to be free from vagueness. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). A trial court properly excludes evidence that only vaguely tends to show bias in an indefinite and speculative way. Jones, 67 Wn.2d at 512.

In the present case, Solis-Diaz engages in wild speculation about the "*possibility*" that witness Thomas somehow could have thought the plea bargain he received in an unrelated case had an impact on his testifying in the present case. Brief of Appellant 29. But the Deputy Prosecutor --an officer of the court--assured the trial court that the plea bargain was unrelated to this case. Solis-Diaz claims that the trial court improperly relied upon the word of the prosecutor. Frankly, the State is speechless as to this assertion. Lawyers have a duty of candor toward the court. RPC 3.3.⁵ Surely the trial court is allowed to rely upon a representation made by an officer of the court--here, the prosecutor--when discussing an issue particularly within the knowledge and control of the prosecutor (a plea bargain). Id. This argument by Solis-Diaz is his attempt to show potential "bias" of the witness in an indefinite and speculative way. Jones, 67 Wn.2d at 512. As such, the trial court properly

⁵ "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; * * * or, offer evidence that the lawyer knows to be false." RPC 3.3 (2009).

exercised its discretion in limiting the scope of the cross examination and Solis-Diaz's claim to the contrary is without merit.

C. THERE WAS NO ERROR REGARDING "PERSONS IN THE COURTROOM."

Solis-Diaz, in another rather convoluted and surprising argument, also argues that "evidence" of alleged gang members who were watching the proceedings in the courtroom should not have been "admitted." But Solis-Diaz's argument uses caselaw regarding rulings on real evidence--not rulings that involve excluding spectators from the courtroom, which is the real issue here. To follow Solis-Diaz's argument on this issue, the court in essence would have had to actually close the courtroom to certain individuals who chose to watch the proceedings that day. Such a ruling would have been completely inappropriate, as both the defendant and the public have rights to an open, public, courtroom: "the right to a public trial can serve the public or the defendant, [and] the public's right and the defendant's right "serve complementary and interdependent functions in assuring the fairness of our judicial system." State v. Sadler, ___ Wn.App. ___, 193 P.3d 1108, 1115-1119 (2008).

In this case, the complained of "evidence" is that the State asked witness Jesse Dow if certain persons were in the courtroom. It does not appear anywhere in the record as to why this line of questioning was pursued, but defense counsel *did* object to these questions. 1RP 49, 50. In any event, witness Jesse Dow was simply asked by the prosecutor who he had gotten into a fight with. Dow replied, "Josh Rhodes and Bobby." 1RP 49. Dow was asked what Solis-Diaz's association with Josh Rhodes was and Dow said, "I don't know if there is any. I don't know for sure if there is any. 1RP 50. Dow was then asked, "[t]hen why do you think it is retaliation?" 1RP 50. And Dow responded, "[w]ell, because it's pretty obvious to me. I don't know, I don't know what else it could be. I don't know, why else, I mean pretty evident." 1RP 50. Dow was then asked, "[i]s Josh Rhodes in the courtroom today? And Dow replied, "Yes." 1RP 50. Dow then pointed to Josh Rhodes. Dow was then asked about two other persons, one of whom was Aiden Sanchez and the other was Richard Molina. Dow pointed out Molina as being present in the courtroom. 1RP 50, 51. Defense counsel again objected. 1RP 51. The prosecutor then asked Dow, "[a]re these all guys associated with the LVL gang?" Dow said, "[a]s far as I know, that's the only thing I can think of why. . . I have

no clue why else we would be getting shot at down there.” 1RP 51. Finally, when asked if he had seen Solis-Diaz hanging out with Josh Rhodes, Mr. Sanchez or Mr. Molina, Dow said ,”no.” 1RP 51.

Thus, the witness himself said that he had never seen any of these individuals “hanging out” with Mr. Solis-Diaz. Yet Solis-Diaz now claims that by allowing such “evidence” of these persons in the courtroom, that putting on such “evidence” was an attempt by the State to convict Solis-Diaz “by guilt of association and character.” Brief of Appellant 29,30. But, as stated above, Solis-Diaz's remedy for this supposed error would have involved closing the courtroom to certain persons. There is no evidence to show that these individuals were in the courtroom for any other reason besides watching the proceedings. Observing courtroom proceedings is allowed in criminal cases and selectively closing the courtroom to certain non-testifying persons is not allowed, and Solis-Diaz's argument on this issue is wrong.

Again, the circumstances under which a court may close a courtroom are extremely narrow and certainly there were no circumstances put forth here that would allow the courtroom to be closed to the certain individuals that were present that day. See e.g., State v. Sadler, supra. And, the State is at a loss to see how

the prosecutor's questioning the witness about whether these persons were present in the courtroom somehow equaled "guilt by association," when the witness himself said he had *never seen Solis-Diaz with any of these persons*. 1RP 51. And this witness also said that he did *not* know for sure whether Solis-Diaz was in a gang. 1RP 49. Thus it was clear from the testimony that the witness did *not* know if these persons were even *in* a gang or whether Solis-Diaz even knew these persons watching the proceedings. 1RP 49-51. So, all we have is Solis-Diaz guessing about why these persons were in the courtroom. Solis-Diaz argues that it was error because the court failed "to ascertain why the individuals were in the courtroom." Brief of Appellant 31. But requiring persons who are behaving themselves and are apparently simply observing court to give reasons why they are there is simply unheard of in our presumed-to-be-open courtrooms. "The right to an open public trial ensures that the defendant receives a fair trial, *in part by reminding the officers of the court of the importance of their functions*, encouraging witnesses to come forward, and discouraging perjury." Sadler, 193 P.3d 1115, (emphasis in original), *citing Waller v. Georgia*, 467 U.S. 39, 46-47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)

In sum, to begin with there is no solid proof that the persons in the courtroom were either in a gang or that these persons ever associated with Solis-Diaz. But even if they were, as mere observers in the courtroom, they could not be selectively excluded from this public trial. Id. The cases cited by Solis-Diaz are not on point, and Solis-Diaz's argument on this issue is without merit and his convictions should be affirmed.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING “GANG” EVIDENCE BECAUSE IT WAS RELEVANT TO PROVE THE DEFENDANT’S MOTIVE AND INTENT.

Solis-Diaz argues that the trial court erred in denying his motion to suppress the gang membership evidence. Solis-Diaz's argument is not persuasive.

A trial court's rulings on ER 404(b) evidence are reviewed for abuse of discretion. State v. Campbell, 78 Wn.App. 813, 821, 901 P.2d 1050(1995). A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In order to preserve an evidentiary issue, a party objecting to the admission of the evidence must have made a timely and specific objection in the trial court. ER 103; State v.

Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). To admit evidence of prior acts, a trial court must determine: (1) the prior bad act occurred by a preponderance of the evidence, (2) the evidence is offered for an admissible purpose, (3) it is relevant to prove an element or rebut a defense, and (4) the evidence is more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487(1995). Under ER 401, evidence is relevant if it has “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. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, in cause any undue delay, waste of time, or needless presentation of cumulative evidence.

ER 404(b) states that evidence of other crimes, wrongs, or acts, while not admissible to prove the character of a person in order to show action in conformity therewith, “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). The rule’s list of purposes for which

evidence of other crimes or misconduct may be admitted is not intended to be exclusive. State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952). In addition, “[t]o be relevant, the purpose for admitting the evidence must be of consequence to the outcome of the action and must make the existence of the identified fact more probable.” State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Put another way, prior bad acts are admissible only if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. State v. Boot, 89 Wn.App. 780, 788, 950 P.2d 964 (1998),¹ citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Evidence of a defendant’s gang membership may be relevant to show motive where there is a sufficient nexus between gang affiliation and motive for committing the crime. State v. Boot, 89 Wn.App. 780, 789, 950 P.2d 964, Review denied, 135 Wn.2d 1015 (1998). Motive is an inducement, which tempts a mind to commit a crime. Boot at 789 (citing State v. Bowen, 48 Wn.App. 187, 191, 738 P.2d 316 (1987)). In State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995), the court explained, “motive goes beyond gain and can demonstrate an impulse, desire or any other

moving power which causes an individual to act.” Under ER 401 and 403, the required nexus is that the evidence has a “tendency” to prove or disprove a fact of consequence to the action and that the evidence have probative value that is not substantially outweighed by unfair prejudice. Evidence of gang membership lacks probative value “when it proves nothing more than a defendant’s abstract beliefs.” State v. Campbell, 78 Wn.App. 813, 822, 901 P.2d 1050, review denied, 128 Wn.2d 1004 (1995). Such evidence does have probative value, however, when it proves premeditation, intent or motive. United States v. Abel, 469 U.S. 45, 48, 54, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984)(bias and motive of witness); State v. Johnson, 124 Wn.2d 57, 69, 873 P.2d 514 (1994)(motive); Boot, 89 Wn. App. At 789 (premeditation).

In State v. Campbell, supra, the State sought to introduce evidence of the murder defendant’s gang and drug selling activities to establish its theory that “the defendants killed the victims because the victims did not accord them the appropriate respect and were usurping the defendant’s economic drug turf, and because the defendants thought of themselves as being members of a superior gang.” Id. At 817-18. Based upon its determination that “there was a nexus between gang culture, gang activity, gang

affiliation, drugs, and the homicides” at issue, the trial court allowed the State to introduce evidence of gang affiliation, as well as expert testimony on gang culture to show premeditation, intent, motive and opportunity. Id. The Court of Appeals in Campbell affirmed, finding that the trial court properly allowed the gang evidence because the trial court “admitted the challenged evidence for legitimate purposes of consequence to the action. The fact that Campbell was a member of a gang and a drug dealer provided the basis for the State’s theory of the case. . . The challenged evidence clearly was highly probative of the State’s theory—that Campbell was a gang member who responded with violence to challenges to his status and to invasions of his drug sales territory.” Campbell, 78 Wn.App. at 821-22. In State v. Boot, 89 Wn.App. 780, 789, 950 P.2d 964 (1998), the trial court admitted evidence of the defendant’s gang affiliation as probative of motive and premeditation. On appeal, the reviewing court affirmed, concluding that the evidence was more probative than prejudicial because it showed the context in which the murder was committed, and demonstrated that the defendant had a deliberate intent to kill the victim. Boot at 789-90.

Similarly, the trial court in the instant case did not abuse its discretion when it allowed the State to admit evidence regarding the defendant's gang affiliation. The shooting in this case was inextricably intertwined with the fact of Solis-Diaz's gang ties. And the gang evidence here went to Solis-Diaz's motive and intent to commit these crimes. But even if there was error in admitting the gang evidence, any error should be deemed harmless because the evidence in this case was simply overwhelming.

The test to determine whether an error is harmless is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Put another way:

An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred . . . A reasonable probability exists when confidence in the outcome of the trial is undermined.

State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)(citations omitted). The doctrine of harmless error promotes "public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of

immaterial error." Delaware v. Van Arsdall, 472 U.S. 673, 681 (1986).

In the present case, Solis-Diaz, in a "404(b) motion," objected to the admission of any gang evidence. 1RP 13. The trial court denied the defense motion, ruling as follows:

I'm going to overrule the objection to the extent it is an objection, and I understand it, we have talked about this in chambers. But this is a state's theory that the retaliation is the motive here for the allegation that forms the basis for the trial. That's exception under 404(b), also concludes [sic] under ER 403 that the prejudicial value is outweighed to a substantial extent by the probative value of the evidence. Now this is a motion in limine of course and that's my ruling. But if you want me to review it, I can do that if at a later date something changes.

1RP 13. Thus, in this ruling, the trial court clearly ruled that it was admitting evidence of Solis-Diaz's gang membership for the purpose of showing Solis-Diaz's motive for committing the crimes, and furthermore the trial court appropriately weighed the evidence and clearly found that the "prejudicial value is outweighed to a substantial extent by the probative value of the evidence." Id. This ruling by the trial court was the correct ruling and was also proper in that the court properly weighed the probative versus prejudicial element. 1RP 13. In this case, the gang evidence was obviously relevant to show the motive for the crimes. Although the State is

not required to prove motive as an element of the offense, evidence showing motive is nonetheless admissible. Boot, 89 Wn.App. at 789; State v. Powell, 126 Wn.2d 244, 260, 893 P.2d 615 (1995). Gang evidence is admissible to prove ongoing gang rivalry between victims and defendants. Campbell, 78 Wn.App. at 822. Here, evidence of Solis-Diaz's gang affiliation explained his motive and intent, and the circumstances of, the drive-by shooting and the assaults in this case. Simply put, without the gang evidence, the State would not have been allowed to prove its theory of the case. While the State certainly would have still been able to prove that Solis-Diaz was the person who leaned out the car window and fired the bullets, the crime simply did not make sense without the gang connection. Solis-Diaz's arguments to the contrary are simply without merit and are not supported by the record in this case.

Solis-Diaz also claims there was no balancing of the evidence under ER 403 or 404(b) and that there was no limitation what evidence could be presented and what evidence would be suppressed. While the defense did object in general to the "gang evidence," there was no further request to limit this evidence. And in fact at least once the defense itself asked one of the officers on cross examination about gangs. 2RP 185-188. Indeed, defense

counsel specifically asked Officer Fitzgerald whether Solis-Diaz "actively claimed gang membership." 2RP 185. As such, Solis-Diaz is to blame for emphasizing at least part of the gang evidence.

But even if there was error in admitting some of the gang evidence, any error should be deemed harmless because the evidence in this case--even without the gang evidence-- was overwhelming. There were many eye witnesses to the drive-by shooting, there were bullet holes and shell casings found, and there was a security video from a nearby gas station in which Solis-Diaz was identified as the passenger in the white car which was used in the shooting, and some witnesses were able to identify Solis-Diaz as the shooter after being shown photo montages.

Jesse Dow, Shenna Fisco, Cassandra Norskog, Jonathan Freeman, Marcus Volk, Sean Thomas, and Doug Hoheisel all witnessed or heard the shooting. Jesse Dow saw "Pollo" and his passenger --later learned to be Solis-Diaz--both walk back to the trunk of their vehicle, likely getting the gun used to commit the shooting. 1RP 42-57. Shenna Fisco also saw the two individuals go to the trunk of the car. 1RP 95. Jesse Dow testified that he could only figure it was a shooting done in retaliation for an earlier altercation. 1RP 48. Jesse Dow said there was no doubt in his

mind that Solis-Diaz was the shooter. 1RP 52. Dow said he saw the car pull up and saw Solis-Diaz roll the window down halfway and pull the gun out and start shooting. 1RP 56, 57. Dow identified the vehicle used in the shooting from a video taken at the gas station that evening. 1RP 59. Dow had also picked Solis-Diaz out of a photo montage. 1RP 81. Shenna Fisco also was very confident that the shooter was Solis-Diaz. 1RP 96; 2RP 24,25. Shenna Fisco saw the car go by and heard the shots fired and said that the person who was shooting the gun as the car drove by was the same person she had seen earlier at the gas station--the defendant Solis-Diaz. 1RP 97. A third person, Cassandra Norskog, was also at the Tower Tavern on the night of the drive-by shootings. 2RP 58. Cassandra saw Shenna and Dow drive up in their maroon car and they yelled "watch out" and the car following them opened fire. 2RP 58-62. Cassandra watched shots coming from the white vehicle--shots coming from the passenger side-- and the bullets came close to hitting her. 2RP 62-65. A fourth person, Doug Hoheisel, was also at the Tower Tavern on the night of the shooting. Hoheisel saw a white car drive up with a young Spanish man hanging out the passenger window who started shooting five to eight rounds. 2RP 80. Hoheisel saw the muzzle "flash." 2RP

83. Jonathan Freeman also heard popping sounds and saw a "blur of a white car" and saw muzzle flashes that evening outside the tavern. 2RP 96-102. Another individual, Seth Devlin, said his car was shot when it was parked at the tavern that evening, and pictures of the bullet holes in his car were entered into evidence. 2RP 104-111. Marcus Volk was at the tavern that evening and he heard the gunshots and saw a light colored car go by and he saw shell casings in the street afterwards. 2RP 116-118. Sean Thomas was standing on the sidewalk when the shooting occurred. He saw shots coming from a white car and saw the bullets land. 2RP 135-142. Sgt. Patrick Fitzgerald watched the security video taken at the South Tower Shell Station and he identified Guadalupe Solis-Diaz, also known as "Junior" and also known as "Indio" as the passenger in the white vehicle. 2RP 158-159. Officer Humphrey identified Solis-Diaz from the video as being the person who was looking in the trunk of the white vehicle. 3RP 30. Probation officer Jennifer Helm also picked Solis-Diaz out of the security camera video. 3RP 118, 199;5RP 43, 46. And Jesse Dow had also identified Solis-Diaz from a photo montage shown to him. 3RP 129.

Given the number of witnesses to the shooting, given the identification of Solis-Diaz as being the passenger in the white car

connected with the shooting, and given the security video, and the bullets and shell casings found in the street and in another vehicle at the scene, the evidence--even without the gang affiliation testimony-- was overwhelming that Solis-Diaz was the shooter here. Accordingly, any error in admitting gang evidence was harmless beyond a reasonable doubt.

In sum, the Defendant has not shown that the trial court abused its discretion when it admitted the gang evidence in his case. This evidence was admissible to show motive and intent. But, even if it was error to allow such evidence, any error should be found harmless. The decisions of the trial court and the verdict of the jury should be upheld.

E. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING DEFICIENT PERFORMANCE AND THE RESULTING PREJUDICE NECESSARY TO SUCCEED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Solis-Diaz claims that he was denied the right to effective assistance of counsel when his attorney allegedly failed to object to gang evidence and speculation about a possible motive for the crimes and for allegedly failing to "pin down the defendant's alibi and allowing his past criminal record into evidence." Brief of Appellant 34. These arguments, too, are without merit.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. “The essence of an ineffective assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-pronged test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); see also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a

reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilty.") There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed. 2d 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that the defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn.App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. At 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless . . . for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated, "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, *i.e.*, "that but for counsel's unprofessional errors, the result would have been different." Strickland, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a

constitutional violation. Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Decisions by trial counsel concerning methods of examining witnesses are trial tactics. Hendrickson, 129 Wn.2d at 77, 78. And decisions by trial counsel as to when or whether to object are trial tactics. State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995). Counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn.App. 687, 692, 524 P.2d 694 (1974), *review denied*, 84 Wn.2d 1012 (1974). When the claim is based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or

tactical reasons supporting challenged conduct; (2) that the objection to the evidence would likely have been sustained; and that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

Solis-Diaz claims ineffective assistance of counsel because he says his counsel failed to object to rumor and hearsay evidence and failure to "pin down" his "alibi" and for allegedly allowing his past criminal record into evidence. Brief of Appellant 34-38. His claims are without merit.

Defense counsel's decisions about whether to object are trial tactics and cannot be a basis for an ineffective assistance claim. Neidigh, 78 Wn.App. at 77. Much of Solis-Diaz's argument that he received ineffective assistance of counsel is based on his counsel's alleged failure to object to certain evidence. However, the record does not support these claims. Solis-Diaz's attorney *did* object to the gang evidence, despite his claim to the contrary. 1RP 13. His attorney *did* object to the State's calling attention to certain others in the courtroom. 1RP 50. Thus, Solis-Diaz's claims about his attorney's failure to object to the gang affiliation evidence are simply not based in fact. And as far as defense counsel's alleged failure to

"pin down" Solis-Diaz's "alibi" defense, a reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. Strickland, 466 U.S. 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). Here, defense counsel did put several witnesses on the stand. If there was no clear "alibi" testimony, it is most likely because Solis-Diaz did not *have* an alibi—a fact overwhelmingly supported by the many witnesses putting Solis-Diaz at the scene as the passenger who shot a gun out the window of the white car that fateful evening. 2RP p. 2 *et seq.* In truth, Solis-Diaz's counsel did the best job he could do with the facts that he had. He was surely not ineffective, and Solis-Diaz has not shown that he was; nor has Solis-Diaz shown how he was prejudiced by his counsel's performance.

But even if defense counsel committed any error, such error would surely be harmless given the overwhelming evidence of guilt in this case (as outlined in the previous section above). Solis-Diaz's arguments to the contrary are unpersuasive and his convictions should be affirmed in all respects.

III. CONCLUSION

The trial court did not abuse its discretion when it suppressed testimony of defense witness Robert Apgood pertaining to "heuristic reasoning." Suppression was the appropriate remedy here, particularly when it is extremely unlikely that such evidence would have been admissible at all under ER 702 and Frye. Nor did the trial court abuse its discretion when it limited the cross examination of witness Thomas. There was no error regarding "persons in the courtroom." Our courtrooms are presumed to be open to the public, and Solis-Diaz does not show how the trial court could have justified closing the courtroom to those selected courtroom observers. There was no abuse of discretion in the court's decision to allow "gang evidence" because such evidence was relevant to prove Solis-Diaz's motive and intent for the shootings. But even if such evidence was improperly admitted, any error was harmless given the overwhelming evidence presented in the case. Finally, Solis-Diaz has not met his burden to show that his counsel was ineffective. Accordingly, the convictions should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 14th day of November, 2008.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by: 
LORI ELLEN SMITH, WSBA 27961
Deputy Prosecuting Attorney

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,)
Respondent,)
vs.)
GUADALUPE SOLIS-DIAZ,)
Appellant.)
_____)

NO. 37120-1-II

DECLARATION OF
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DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

LORI SMITH, Deputy Prosecutor for Lewis County, Washington,
declare under penalty of perjury of the laws of the State of Washington
that the following is true and correct: On November 14, 2008, I mailed a
copy of the Respondent's Brief in this matter by depositing same in the
United States Mail, postage pre-paid, to the Attorney for Appellant at the
name and address indicated below:

**GEORGE A. STEELE
ATTORNEY AT LAW
P.O. BOX 2370
SHELTON, WA 98584**

DATED this 14 day of November, 2008, at Chehalis, Washington.


Lori Smith