No. 37331-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

FRANCISCO AMEZCUA PICAZO

Appellant.

FILED
COURT OF APPEALS
DIVISION II
09 JAN 28 PM 12: 37
STATE OF WASHINGTON
BY
DEPUTY

RESPONDENT'S BRIEF

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

by: Lori Smith
Lori Smith, Deputy Prosecutor

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE.....1

ARGUMENT.....1

A. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUPPORT BOTH CONVICTIONS FOR ASSAULT IN THE FIRST DEGREE......1

1. Substantial Evidence Supports the Conclusion That Amezcua Picazo Committed the Crimes......2

2. Substantial Evidence Supports the Conclusion That the Defendant Assaulted Joseph Haviland With the Intent to Inflict Great Bodily Harm.....7

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED GENERAL EVIDENCE ABOUT GANG CULTURE AND EVIDENCE OF THE DEFENDANT'S GANG AFFILIATION......14

C. THE PHOTO MONTAGE EVIDENCE WAS PROPERLY ADMITTED BECAUSE IS WAS NOT IMPERMISSIBLY SUGGESTIVE.....21

D. AMEZCUA PICAZO HAS NOT SHOWN THAT TRIAL COUNSEL WAS INEFFECTIVE.....25

CONCLUSION.....32

TABLE OF AUTHORITIES

Federal Cases

Campbell v. Knicheloe, 829 F.2d 1453, (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988).....28

Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995).....27

Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).....26

Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 29 (2002). 28

Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) 22,24

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) 26,27,28

United States v Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) 17

United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2045, 80 L.Ed.2d 657 (1984) 25

United States v. Higginbotham, 539 F.2d 17 (9th Cir. 1976).....23

United States v. Layton, 855 F.2d 1388 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989).....28

Yarborough v. Gentry, 540 U.S. 1,124 S.Ct. 1, 157 L.Ed.2d 1 (2003).....28

Washington Cases

Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994).....15

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) 14

State v. Austin, 59 Wn.App. 186, 796 P.2d 746 (1990).....9,10

State v. Benn, 120 Wn.2d 631, 845 P.2d 289 (1993).....27

State v. Boot, 89 Wn.App. 780, 950 P.2d 964 (1998) 14,16,17,18,20

State v. Bowen, 48 Wn.App. 187, 738 P.2d 316 (1987).....17

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed. 2d 858 (1996).....26

State v. Briggins, 11 Wn.App. 687, 524 P.2d 694 (1974), *review denied*, 84 Wn.2d 1012 (1974).....29,31

State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995).....9,10

State v. Camarillo, 115 Wash.2d 60, 794 P.2d 850(1990).....1

State v. Campbell, 78 Wn.App. 813, 901 P.2d 1050(1995) 14,16,17,18,19,20,28

State v. Carlin, 40 Wn.App. 698, 700 P.2d 323 (1985).....30

State v. Carpenter, 52 Wn.App. 680, 763 P.2d 455 (1988).....27

State v. Ciskie , 110 Wn.2d 263, 751 P.2d 1165 (1988).....25

State v. Clark, 2 Wn.App. 45, 467 P.2d 369 (1970).....9,10

State v. Daniels, 87 Wn.App. 149, 940 P.2d 690 (1997).....9,10

State v. Delmarter, 94 Wash.2d 634, 618 P.2d 99 (1980).....2

State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990).....16

State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).....16

State v. Eacret, 94 Wn.App. 282, 971 P.2d 109 (1999).....21,23

State v. Elmi, 138 Wn. App. 306, 156 P.3d 281 (2007).....9,10,13

State v. Ferreira, 69 Wn.App. 465, 850 P.2d 541 (1993).....7

State v. Goebel, 40 Wn.2d 18, 240 P.2d 251 (1952).....15

State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975).....22,24,30

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).....14

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996).....28,29

State v. Hendrix, 50 Wn.App. 510, 749 P.2d 210, *review denied*, 110 Wn.2d 1029 (1988).....24

State v. Johnson, 124 Wn.2d 57, 69, 873 P.2d 514 (1994).....17

State v. Johnson, 147 Wn.App. 276, 194 P.3d 1009 (2008).....13

State v. Kinard, 109 Wn.App. 428, 36 P.3d 573 (2001).....21

State v. Linares, 98 Wn.App. 397, 989 P.2d 591 (1999.....21

State v. Louther, 22 Wn.2d 497, 156 P.2d 672 (1945).....7

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).....26,27

State v. Neidigh, 78 Wn.App. 71, 895 P.2d 423 (1995).....28,29,30,32

State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995).....17

State v. Ramires, 109 Wn.App. 749, 37 P.3d 343 (2002).....23,24

State v. Salamanca, 69 Wn.App. 817, 851 P.2d 1242, *review denied* , 122 Wn.2d 1020, 863 P.2d 1353 (1993).....7

State v. Salinas, 119 Wash.2d 192, 829 P.2d 1068 (1992).....1

State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982).....16

State v. Saunders, 91 Wn.App. 575, 958 P.2d 364 (1998).....29

State v. Shelton, 71 Wn.2d 838, 431 P.2d 201 (1967).....8

State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990).....14

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).....26,27

State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984).....21,22,24

State v. Vickers148 Wn.2d 91, 59 P.3d 58 (2002).....21,23

State v. Walton, 64 Wash.App. 410, 824 P.2d 533 (1992).....2

State v. Wilson , 125 Wn.2d 212, 883 P.2d 320 (1994)
.....7,8,9,10,12,13

State v. Woo Won Choi, 55 Wn.App. 895, 781 P.2d 505
(1989),*review denied* , 114 Wn.2d 1002, 788 P.2d 1077(1990).....8

Statutes

RCW 9A.36.011(1)(a).....7,8,12

Court Rules

ER 401.....15,21

ER 404.....14,15

STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUPPORT BOTH CONVICTIONS FOR ASSAULT IN THE FIRST DEGREE.

Amezcua Picazo claims there was insufficient evidence to support both convictions for Assault in the First Degree with a Firearm. This argument is not persuasive.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. Salinas, 119 Wash.2d at 201, 829 P.2d 1068. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850(1990). The reviewing 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 Wash.App. 410, 415-16, 824 P.2d 533 (1992). Circumstantial evidence is given equal weight with direct evidence. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). As further explained below, sufficient evidence was presented in this case to support both convictions for Assault in the First Degree.

1. Substantial Evidence Supports the Conclusion That Amezcua Picazo Committed the Crimes.

Viewing the evidence in the light most favorable to the State, and leaving credibility determinations to the jury, there was sufficient evidence presented here to show that Francisco Amezcua was the person who committed these crimes. Here, the State presented sufficient evidence to allow the jury to "connect the dots" to determine that the person known as "Cyclone" committed these crimes and that "Cyclone" was in fact the Defendant, Francisco Amezcua Picazo.

Witness Joseph Haviland was the driver of the vehicle when it was shot at by Amezcua Picazo. Haviland said that the shooter got about four or five feet from the car. RP2 21. Haviland said he only saw the shooter's face from the nose down. RP2 22, 82. Haviland said that from the tone of the

shooter's voice he sounded Hispanic, and that he had a medium build. RP 2 22. Haviland said the shooter appeared to be about 150-200'ish pounds and was about 5'10" - 5'11" tall. RP2 22,23. During a second viewing of a photo montage, witness Haviland looked at the montage for about ten seconds and then pointed directly at one of the photos and said, "that's him." RP2 94. The picture that Haviland identified in the second viewing of the montage was the defendant, Francisco Amezcua- Picazo. RP2 98. The reluctance by Haviland in identifying Amezcua Picazo could surely have been from Haviland's fear about getting involved in this case. RP2 69.

During the trial, witness Aaron Malone identified in court the defendant, Amezcua-Picazo, as being the person known as "Cyclone." RP2 157. Aaron Malone also said that Cyclone was the boyfriend of Miranda McDaniel. RP2 164. Cyclone's name was "tagged" all over Miranda McDaniel's car. RP2 169. Malone also described an earlier incident that happened involving Cyclone's girlfriend's car in which a person Malone was riding with jumped out and broke the windows in Miranda McDaniel's car. RP2 169. Malone figured that the shooting was done in retaliation for the damage done to Cyclone's girlfriend's

car. RP2 175, 176. Malone also said about the shooter's identity, "I don't know. I don't know to this day. I know when I did get in touch with Robbie that he said it was Cyclone." RP2 175. Malone believed that Amezcua Picazo would be the person who would have a motive for the shooting: "I thought, yes, there was a very good possibility [the shooter was Cyclone] because it was his girlfriend's car this whole thing had revolved around. He would be the only one to be upset about the situation." RP2 175, 176. After the shooting, when Malone saw Robert Huey again not long after the shooting, Malone asked Huey, "what the hell happened. He [Huey] said it was Cyclone, Cyclone shot you." RP2 178, 198. Malone told the police that Cyclone had shot him. The police knew that Cyclone was a member of the LVL gang. RP2 180, 181.

Then one day when Malone was riding with the police in Centralia in an unmarked police car. They happened upon Cyclone and another person who were walking down the street. RP2 187-190. Cyclone made gang signs and Malone got scared and told the police he was riding with that that was the person who had shot him. RP2 187-190. At trial Malone said, "I told the cops that Cyclone shot me on belief of someone else." RP2

191. However, the police did not know that until later. RP2 191. Malone was also concerned about his safety if he testified. Malone said that he had been threatened by "Chongo"--another gang member--if Malone testified against Cyclone. RP2 158,159.

Witness Robert Huey testified that he knew Cyclone through his brother's baby's mom, Miranda, who is "with" Cyclone. RP3 12. So the jury heard that Robert Huey knew Cyclone. Id. Huey was at the scene on the night of the shooting, and he saw Haviland's car stop at the stop sign, and then Huey saw someone walk out from the corner. RP3 26, 27. Huey then heard gun shots. RP3 26, 27. Huey said he saw someone jump back and start shooting at the car carrying Malone and Haviland. RP3 29. Huey took off running, and as he was running through the alley, he passed the shooter and Huey said, "[i]f you didn't know him, I wouldn't guess who it was if I wouldn't have known the person, but I figured it was who it was. . . . yeah, it is Cyclone." RP3 30, 31.

At the police station a couple of days after the shooting, Amezcua Picazo admitted to Detective Buster that he was also known as Cyclone. RP3 72. In the court room Detective Buster

also identified Amezcua-Picazo as the person known as Cyclone. RP3 73. Buster also verified Aaron Malone's story about seeing Cyclone on the street when Malone was riding with him in the police car, saying that Malone "freaked out" when he saw Cyclone. RP3 77, 78. When they saw Cyclone on the street that day, Detective Buster asked Malone if that was who shot him and Malone said, "yes." RP3 79. As further proof that the person known as Cyclone was Francisco Amezcua Picazo, his fiance, Miranda McDaniel, also said she knows Francisco Amezcua Picazo as Cyclone, and that she knew he was in a gang. RP3 107. McDaniel also has a tatoo of "Cyclone" on her wrist. RP3 108.

As set out above, this evidence, as elicited from Haviland, Malone, Huey, McDaniel, and the police-- when viewed in the light most favorable to the State-- is sufficient to prove that the Defendant, Francisco Amezcua-Picazo--known as Cyclone--was the shooter in this case. Much of this evidence hinged on the credibility of the witnesses. But such credibility determinations are the province jury, and will not be second guessed by the appeals court. Camirillo, supra. Here, the jury obviously believed the State's witnesses when they testified that Amezcua

Picazo was the shooter. Accordingly, Amezcua Picazo's convictions should be affirmed.

2. Substantial Evidence Supports the Conclusion That the Defendant Assaulted Joseph Haviland With the Intent to Inflict Great Bodily Harm.

Amezcua-Picazo also argues that the State did not present sufficient evidence to show that he had the "intent to inflict great bodily harm"--required to prove Assault in the First Degree--on the driver of the vehicle, Joey Haviland. Brief of Appellant 26. This argument is also without merit.

Specific intent to cause great bodily harm is an essential element of first degree assault. RCW 9A.36.011(1)(a). Specific intent may not be presumed, but can be inferred as a logical probability from all the facts and circumstances. State v. Wilson , 125 Wn.2d 212, 217, 883 P.2d 320 (1994); State v. Louther, 22 Wn.2d 497, 502, 156 P.2d 672 (1945); State v. Salamanca, 69 Wn.App. 817, 826, 851 P.2d 1242, *review denied* , 122 Wn.2d 1020, 863 P.2d 1353 (1993). "'Evidence of intent. . . is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.'" State v. Ferreira, 69 Wn.App. 465, 468, 850 P.2d 541 (1993)(quoting State

v. Woo Won Choi, 55 Wn.App. 895, 906, 781 P.2d 505 (1989), *review denied* , 114 Wn.2d 1002, 788 P.2d 1077(1990)). A fact finder may infer intent to harm from an event's facts and circumstances, and the State may show intent through the manner of assault. State v. Shelton, 71 Wn.2d 838, 839, 431 P.2d 201 (1967).

The *mens rea* for Assault in the First Degree is "intent to inflict great bodily harm." And while "[a]ssault in the first degree requires a specific intent. . . it does not, under all circumstances, require that the specific intent match a specific victim. . . . once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 to any unintended victim." State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994)(emphasis added). However, "[u]nder a literal interpretation of RCW 9A.36.011, once the mens rea is established, RCW 9A.36.011, not the doctrine of transferred intent, provides that any unintended victim is assaulted if they fall within the terms and conditions of the statute." Wilson, 125 Wn.2d at 219.

The decision in Wilson was further clarified when another court explained that, "[a]lthough the court did not expressly address

the statute's effect on the common law layer of intent, it implicitly did so by stating, "[r]eading the various assault statutes, *in combination with the common law definitions for assault*, we are persuaded that Wilson assaulted [the unintended victims] when . . . [he] discharged bullets from a firearm into the [unintended victims]." State v. Elmi, 138 Wn. App. 306, 315,316, 156 P.3d 281 (2007)(emphasis added)(noting that in the attempted battery and reasonable apprehension forms of assault, case law does not hold that the specific intent must match a specific victim), citing State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995); State v. Daniels, 87 Wn.App. 149, 940 P.2d 690 (1997); State v. Austin, 59 Wn.App. 186, 796 P.2d 746 (1990). Thus, the common law definitions of assault are also properly considered when determining whether unintended victims have been assaulted under the Assault in the First Degree statute.

Here, to begin with, when Amezcua-Picazo is describing "the State's theory of the case" in his brief, he sets out the factual basis for the theory in a very confusing way, stating

> that the owner of the car had stopped at the defendant's girlfriend's house in order to vandalize her car, (3) that the defendant was in the back seat of the car driven to the defendant's girlfriend's house, (4) that the defendant either saw or determined that the

> defendant was in the car that had stopped to vandalize his girlfriend's vehicle, and (5) that the defendant thus had motive to harm the defendant and did so when he was given the opportunity.

Brief of Appellant, 27 (emphasis added). What Amezcua Picazo says in this passage is, "the defendant determined that the defendant was in the car and the defendant had motive to harm the defendant." Id. This is nonsensical. Thus, the State assumes that Amezcua Picazo did not intend to use the word "defendant" where he did in the above-references passage from his brief. Instead, It appears that Amezcua-Picazo is trying to argue that because it was the passenger, Aaron Malone, who Amezcua Picazo had the "beef" with when he fired shots at Haviland's occupied car that he did not have the intent to inflict great bodily harm on the driver, Joey Haviland. But our case law does not hold that specific intent must match a specific victim. Wilson, Elmi, Byrd, Daniels, Austin, supra.

The evidence presented in this case shows that Amezcua Picazo knew that the vehicle he shot at was occupied by at least two people. Amezcua Picazo knew the vehicle was occupied because the vehicle was moving, and thus it was obvious that the car contained at least a driver. RP2 166; RP3 26. And Amezcua Picazo knew there was also a passenger in the car because he

walked up to the passenger side window and said, "what's your name?" RP2 166. When Amezcua Picazo walked up to the car window, his body language and voice was "very hostile." RP2 166. Then, as the vehicle moved away from the shooter, the shooter fired multiple gun shots at Haviland's car in the dark. RP2 19,23. Hearing the shots, driver Haviland "ducked down and drove blindly." RP2 24. Haviland said he heard "pop, pop, pop"--somewhere between five and seven times. RP2 25. Haviland heard "ting and bang" as the shots hit his car. RP 25. Haviland also heard the shattering of glass as the bullets hit the back window of his car. RP2 33. One of the bullets also hit the gas tank in Haviland's car. RP2 33. The physical evidence supported Haviland's testimony when the police found shattered glass and bullet casings at the scene. RP2 110. Haviland said that at the time he heard the bullets flying and glass shattering that he was "in kind of a state of shock." RP2 26. Obviously, Haviland was terrified by the bullets hitting his car.

Given the fact that Amezcua Picazo shot multiple rounds at Haviland's car in the dark--including shooting out the back window of the car and shooting the gas tank--this evidence shows that Amezcua Picazo was firing at the entire vehicle--and all of the

circumstances surrounding the shooting show that Amezcua Picazo knew very well there were two people in the vehicle. Any one of those bullets could have hit both the driver and passenger. Indeed, Haviland was just plain lucky that none of the many flying bullets hit him. Nonetheless, Haviland was most certainly placed in reasonable apprehension that great bodily harm was about to be inflicted upon him when he had to dodge bullets as he was trying to drive away. These facts show that when Amezcua-Picazo fired multiple shots in the dark at Joey Haviland's car, he was acting with intent to inflict great bodily harm on anyone in the vehicle.

Indeed, Amezcua Picazo *concedes* that there was intent to inflict great bodily harm against the passenger, Aaron Malone. Brief of Appellant 26. But because "RCW 9A.36.011 . . . provides: intent against one is intent against all," the intent to inflict great bodily harm was transferred to the driver, Joey Haviland. Wilson , 125 Wn.2d at 214. Once the intent to inflict great bodily harm is established, often by proving that the defendant intended to inflict great bodily harm on a specific person [here, Aaron Malone], the mens rea is transferred under RCW 9A.36.011 to any unintended victim. Wilson , 125 Wn.2d at 218. Amezcua-Picazo's argument to the contrary is without merit.

Amezcua-Picazo also tries to distinguish the reasoning of Wilson from the present case because, according to him, Wilson should not apply here because here the driver of the vehicle was not actually wounded by a bullet. But an assault does not require bodily injury. Again, in this case the jury could infer from Haviland's testimony that the shots fired at his vehicle caused him "reasonable apprehension and imminent fear of bodily injury." State v. Johnson, 147 Wn.App. 276, 289, 194 P.3d 1009 (2008), citing , State v. Elmi, 138 Wn.App. 306, 316, 156 P.3d 281 (2007) ("doctrine of transferred intent . . . applies to defendants who assault an unintended victim with intent to create an apprehension and fear of bodily injury.") Again, it is a miracle that the driver, Joey Haviland, was not actually struck by one of the bullets that Amezcua Picazo fired into the vehicle. Haviland certainly feared that he might be hit by one of the bullets: Haviland said he "ducked down" to try to avoid being hit by the gun fire. And again, one of the bullets went into the gas tank. RP2 19,23,24. These facts, taken in the light most favorable to the State, show that there was sufficient evidence presented to prove that when Amezcua Picazo shot five times at Haviland's occupied car, he did so with intent to inflict bodily harm

on anyone inside the vehicle. Amezcua Picazo's convictions should be affirmed.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED GENERAL EVIDENCE ABOUT GANG CULTURE AND EVIDENCE OF THE DEFENDANT'S GANG AFFILIATION.

Amezcua Picazo claims that the trial court erred when it allowed the State to present evidence about Amezcua Picazo's gang affiliation. This argument is without merit.

A trial court's rulings on ER 404(b) evidence are reviewed for manifest abuse of discretion. State v. Campbell, 78 Wn.App. 813, 821, 901 P.2d 1050(1995); State v. Boot, 89 Wn.App. 780, 788, 950 P.2d 964 (1998). 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).

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. Put another way, evidence is presumed admissible and should be excluded only when its probative value is substantially outweighed by the danger of unfair prejudice. ER 403; Carson v. Fine, 123 Wn.2d 206, 225, 867 P.2d 610 (1994).

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). In other words, 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), citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Evidence of gang culture and of a defendant's gang membership may be relevant to show motive where there is a sufficient nexus between gang evidence and the motive for committing the crime. State v. Campbell , 78 Wn.App. 813, 822, 901 P.2d 1050(1995)(gang evidence highly probative to show motive and intent to kill); State v. Boot, 89 Wn.App. 780, 789, 950 P.2d 964, r*eview denied*, 135 Wn.2d 1015 (1998)(gang evidence admitted because it showed motive). However, 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). But such gang affiliation evidence does have probative

value 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. Campbell, supra (motive and intent); State v. Johnson, 124 Wn.2d 57, 69, 873 P.2d 514 (1994)(motive); Boot, 89 Wn.App. at 789 (premeditation, motive).

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)). "[M]otive goes beyond gain and can demonstrate an impulse, desire or any other moving power which causes an individual to act." State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). While 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; Powell, 126 Wn.2d at 260.

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. Similarly, 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. Gang evidence is also admissible to

prove ongoing gang rivalry between victims and defendants. Campbell, 78 Wn.App. at 822.

Similar to the reasoning of the Campbell Court, the trial court in the present case did not err when it allowed expert testimony about gang culture, and when it admitted evidence about Amezcua Picazo's gang membership. In its oral ruling allowing the State to present evidence about gangs and gang affiliation the trial court held:

> They [the State] can establish their motive however they want to. If it falls flat, it falls flat. I don't see that necessarily that gang affiliations, at least here in Lewis County, has yet reached a level that hearing gangs you find guilt. So. . . I'm going to balance the evidence pursuant to evidence rule 403. I'm going to find that its probative value outweighs the danger of unfair prejudice.

RP3 57. Thus, the gang evidence in this case was allowed primarily because it was relevant to prove motive. This was a proper reason for admitting the evidence. Here, like in Campbell, the State's theory of the case was that Amezcua Picazo shot at Aaron Malone in a gang retaliation shooting, for a previous incident in which Malone was with another gang member who had smashed the windows out of Amezcua Picazo's girlfriend's car --a car that had Amezcua Picazo's nickname "Cyclone" tagged all over it. RP2

168, 169. Even Amezcua Picazo's girlfriend admitted that Amezcua Picazo was known as Cyclone, and that he was indeed in a gang. RP3 107. Here, the evidence that Amezcua Picazo was in a gang and the expert testimony about gang culture was all relevant to prove motive and intent, and formed the basis for the State's theory of the case: that the shooting was gang member Amezcua Picazo's retaliation for an earlier gang-related act of vandalism to his girlfriend's car. RP2 167-170; State v. Campbell, supra . Thus, the gang evidence in this case was properly admitted.

Amezcua Picazo cites several cases in support of his argument that admission of the gang evidence prejudiced him. However, the cases cited by Amezcua Picazo do not discuss the admissibility of gang evidence specifically--even though Washington Courts have agreed that such evidence is admissible for some purposes (*i.e.,* to show motive, as in this case). See e.g., Campbell,supra; State v. Boot, supra. Because Amezcua Picazo ignores the Washington case law regarding admission of gang-related evidence to show motive or intent, his argument that such evidence is not admissible should be found to be without merit.

The evidence regarding gangs was properly admitted and Amezcua Picazo's convictions should be affirmed.

C. THE PHOTO MONTAGE EVIDENCE WAS PROPERLY ADMITTED BECAUSE IS WAS NOT IMPERMISSIBLY SUGGESTIVE.

Amezcua Picazo also claims that the photo montage shown to two witnesses in this case was improperly suggestive. This argument, too, is without merit.

The decision to admit a photo montage is an evidentiary issue, and is within the sound discretion of the trial court. State v. Kinard, 109 Wn.App. 428, 432, 36 P.3d 573 (2001). Thus, a trial court's decision will be upheld if there were tenable grounds or reasons for it. Id. "An out-of-court photographic identification violates due process if it is 'so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.'" State v. Vickers148 Wn.2d 91, 118, 59 P.3d 58 (2002), quoting State v. Linares, 98 Wn.App. 397, 401, 989 P.2d 591 (1999)(citing State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984)). To meet the burden of establishing a violation, an appellant must show that the procedure was impermissibly suggestive. Vickers, 148 Wn.2d at 118. A suggestive procedure is "one that directs undue attention to a particular photo." State v. Eacret, 94 Wn.App. 282, 283, 971

P.2d 109 (1999). If the appellant cannot make this showing, the inquiry ends. Eacret, 94 Wn.App. at 285. In general, matters of "[u]ncertainty or inconsistencies in the [identification] testimony affects only the weight of the testimony and not its admissibility" and thus are submitted to the jury. State v. Gosby, 85 Wn.2d 758, 760, 539 P.2d 680 (1975); see also State v. Vaughn, 101 Wn.2d at 610.

Photographic identification is not inherently unconstitutional; rather, the court should independently evaluate the facts of each case to determine if the identification was permissible. State v. Clark, 2 Wn.App. 45, 46, 467 P.2d 369 (1970). The danger to be avoided is misidentification. Id. The court needs to be certain that it is the witness, and not the police, who is identifying the suspect. Id. Multiple viewings of a suspect in photo montages is not per se suggestive. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)(recognizing risks involved in using photo montage procedures such as showing multiple arrays where the defendant is the only picture in all the arrays, but recognizing that such weaknesses can usually be addressed in cross examination and that only overly suggestive procedures that create a substantial risk of misidentification must be suppressed); United States v.

Higginbotham, 539 F.2d 17 (9th Cir. 1976)(recognizing that risk of abuse is possible, but finding that even where a witness had first made a tentative identification, showing witness two sets of photographs was not overly suggestive). A defendant challenging a photomontage must show that the montage directed undue attention to a particular photograph. State v. Ramires, 109 Wn.App. 749, 761, 37 P.3d 343 (2002). Generally, courts have found montages impermissibly suggestive only when the defendant is the sole possible choice in light of the witness's earlier description. State v. Ramires, 109 Wn.App. at 761. None of the improper factors listed in the case law are present in this case.

Here, the trial court made the following ruling regarding the photo montage: "I will tell you . . . having now looked at the photo montage, I don't find it is obviously impermissibly suggestive. So, to the extent I need to make a finding, I'm finding that." RP2 12."

In this case Amezcua Picazo has not made the preliminary showing that the photomontage was impermissibly suggestive. State v. Vickers , 148 Wn.2d at 118. Nor has he shown that the montage directed undue attention to a particular photograph. Eacret, 94 Wn.App.at 283. Because the identification procedure here was not suggestive, the inquiry ends because uncertainty may

affect weight, but not admissibility. State v. Vaughn, 101 Wn.2d at 610-11; State v. Hendrix, 50 Wn.App. 510, 513, 749 P.2d 210, *review denied*, 110 Wn.2d 1029 (1988). This Court should likewise find that the photo montage here was not impermissibly suggestive.

Here, Haviland was shown a photo montage, but he was not able to point out the shooter the first time he saw the montage--he could only point to someone with the basic build of the shooter. RP2 37. Then, also fairly close to the night of the shooting, Haviland viewed the montage a second time at the police station. RP2 40, 41. During this second viewing, Haviland put his initials below photo number 5, saying to the officer, "yeah, that's as much as I can remember of what he looked like." RP2 40,41.

The fact that Haviland was shown the montage more than once does not mean that the montage was per se overly suggestive. Simmons v. United States, supra. And none of the facts here show that the montage directed undue attention to a particular photograph. State v. Ramires, supra. Furthermore, any inconsistencies or uncertainty in the identification of the Defendant goes to the weight of the testimony and not its admissibility, and is thus a matter for the jury. State v. Gosby, 85 Wn.2d at 760. Accordingly, the photo montage identification evidence was

properly admitted and Amezcua Picazo's arguments to the contrary are without merit.

D. AMEZCUA PICAZO HAS NOT SHOWN THAT TRIAL COUNSEL WAS INEFFECTIVE.

Amezcua Picazo also claims that his trial counsel was ineffective for his alleged failure to object to certain evidence. This argument, too, is without merit.

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). 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. Cronic, 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. An appellate court is not likely 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. Indeed,

> [w]hat 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). In other words, 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). As the Supreme Court has stated, "[t]he 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). 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). Amezcua Picazo has not made these showings in the present case.

Amezcua Picazo claims his counsel was ineffective for failing to object to admission of the testimony regarding gangs. In the first place, failing to object is usually seen as trial tactics or strategy and cannot be the basis for an ineffective assistance claim. Neidigh, supra. Secondly, as previously set out above, the gang evidence was properly admitted, so objecting to it would most likely have been futile. Indeed, all of the complained-of attorney conduct in this case amounts to trial strategy and trial tactics, and defense theories of the case. Such strategic decisions by trial counsel cannot form the basis of an ineffective assistance of counsel claim. Hendrickson, supra. Amezcua Picazo also complains that defense

counsel was ineffective for failing to object to Aaron Malone's "speculation as to the identity of the person who shot him." Again, decisions on when or whether to object are trial tactics, and are not a basis for an ineffective assistance claim. State v. Neidigh, supra .

Amezcua Picazo then quotes from State v. Carlin, 40 Wn.App. 698, 701, 700 P.2d 323 (1985), a case which discusses the impropriety of "expressions of a defendant's guilt." But the complained-of conduct here was not an "expression of the defendant's guilt" like it was in Carlin , because the complained-of conduct in Carlin was that a witness opined that a dog found the defendant after following a "fresh guilt scent." Carlin, supra (emphasis added). Use of the word "guilt" in Carlin distinguishes that case from the circumstances here. Here, the complained-of conduct is witness Aaron Malone's identification of the defendant as the shooter, including how Malone deduced that the shooter was the defendant. RP2 174-176. This was a "statement of identification" and any equivocation or "waivering" by Malone about the shooter's identity goes to the weight given to the testimony, not the admissibility of such testimony. Gosby, 85 Wn.2d at 760. So, this was for the jury to sort out. Because such evidence was admissible, trial counsel likely knew that objecting to it would be

futile. Counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, supra.

Another basis for admission of the complained-of testimony is that the testimony was relevant to Amezcua Picazo's motive for the shooting. RP2 174-176 (the example used by Appellant). But even if objection to this evidence had been made and sustained, the outcome of the trial would not have been different because there was other evidence submitted showing that Amezcua Picazo was the shooter: Robert Huey, Joey Haviland, Miranda McDaniel, and the police officers all gave testimony pointing to either "Cyclone" or Amezcua Picazo as the shooter. Other testimony further showed that Amezcua Picazo was also known as Cyclone, and that Amezcua Picazo was in a gang, and that a prior incident involving Cyclone's girlfriend Miranda McDaniel's car was likely the motive for the shooting. RP2 12-43; RP3 91-93 (Haviland); RP3 8-30 (Huey); RP3 99-108 (McDaniel). Moreover, any weaknesses in Aaron Malone's identification of Amezcua Picazo was fodder for cross examination--which trial counsel *did* do. RP2 194-203.

In sum, the statement of identification by Aaron Malone was not improper in the first place, has not been shown to be prejudicial in the second place, and thirdly, failure to object to this testimony

was not ineffective because whether and when to object is part of trial strategy. Neidigh, supra. However, even if trial counsel had objected to this evidence, it is unlikely that the trial court would have sustained the objection. Because the outcome of the trial would have been no different, Amezcua Picazo fails to show he was prejudiced by the admission of the statement made by Aaron Malone. Accordingly, Amezcua Picazo has not shown that his trial counsel was ineffective, and his convictions should be affirmed.

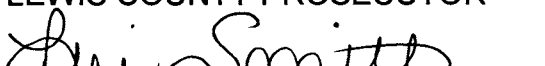
CONCLUSION

Sufficient evidence supports both convictions for Assault in the First Degree. When viewed in the light most favorable to the State, the evidence shows that Francisco Amezcua Picazo was the shooter, and that he acted with intent to inflict great bodily harm on anyone in the vehicle when he fired five shots at Haviland's occupied car. The trial court did not abuse its discretion when it allowed into evidence testimony about gang culture in general, and about Amezcua Picazo's gang affiliation in particular. Such evidence has been allowed by our courts when it goes to show motive or intent, as it did in this case. Neither did the trial court abuse its discretion when it admitted evidence regarding the photo montage. Amezcua Picazo has not shown that the montage was

impermissibly suggestive. Finally, Amezcua Picazo has not shown that his trial counsel was ineffective. Because none of Amezcua Picazo's claims have merit, his convictions should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 27th day of January, 2009.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

by: 
Lori Smith, WSBA 27961
Attorney for Defendant

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. FRANCISCO AMEZCUA PICAZO Appellant.	)))))))	NO. 37331-9-II DECLARATION OF MAILING

LORI SMITH, Deputy Prosecutor for Lewis County, Washington, on behalf of Respondent State of Washington, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: on **January 27, 2009,** I served a copy of the RESPONSE BRIEF upon the Appellant by depositing the same in the United States Mail, postage pre-paid, addressed to the attorney for the Appellant addressed as follows:

John A. Hays
1402 Broadway
Suite 103
Longview, WA 98632

FILED
COURT OF APPEALS
DIVISION II
09 JAN 28 PM 12: 37
STATE OF WASHINGTON
BY
DEPUTY

Dated this 27 day of January, 2009, at Chehalis, Washington.

Lori Smith, Deputy Prosecutor
WSBA No. 27961
Attorney for the Respondent
Lewis County Prosecuting Attorney's Office