

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 40896-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Ulises Flores-Martinez,**

Appellant.

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Lewis County Superior Court Cause No. 10-1-00036-9

The Honorable Judge James Lawler

**Appellant's Opening Brief**

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### ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence and statements obtained in violation of Mr. Flores-Martinez's Fourth Amendment rights.
2. The trial court erred by admitting evidence and statements obtained in violation of Mr. Flores-Martinez's right to privacy under Wash. Const. Article I, Section 7.
3. The police unlawfully entered two residences without a warrant while searching for suspects following the incident at Safeway.
4. Mr. Flores-Martinez was unlawfully seized because police lacked a reasonable suspicion based on specific articulable facts that he was engaged in criminal activity.
5. Mr. Flores-Martinez was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
6. Defense counsel deprived Mr. Flores-Martinez of the effective assistance of counsel by failing to seek suppression of illegally obtained evidence.
7. The trial judge abused his discretion by admitting irrelevant evidence in violation of ER 402.
8. The trial judge abused his discretion by admitting prejudicial evidence in violation of ER 403 and ER 404(b).
9. The trial judge abused his discretion by failing to conduct a complete 404(b) analysis on the record.
10. The trial court erred by admitting evidence of Mr. Flores-Martinez's alleged gang membership.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Both the Fourth Amendment and Article I, Section 7 prohibit police officers from invading a home without a search warrant or an exception to the warrant requirement. Here, the police made warrantless entries into two residences while searching for Mr. Flores-Martinez. Did the unlawful entries violate Mr. Flores-Martinez's rights under the Fourth Amendment and Article I, Section 7?
2. A seizure not amounting to arrest is unlawful unless based on a reasonable suspicion that the person seized is engaged in criminal activity. Here, the officers lacked a reasonable suspicion that Mr. Flores-Martinez had been involved in criminal activity when they paraded him and thirteen others in front of two witnesses. Did the suspicionless seizure violate Mr. Flores-Martinez's rights under the Fourth Amendment and Wash. Const. Article I, Section 7?
3. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel in a criminal case. In this case, defense counsel failed to seek suppression of illegally obtained evidence prejudicial to Mr. Flores-Martinez. Was Mr. Flores-Martinez denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
4. Evidence that is irrelevant and prejudicial should not be admitted at a criminal trial. Here, the trial judge admitted evidence of gang affiliation without proof that Mr. Flores-Martinez belonged to an organization that qualified as a criminal gang, and without balancing the evidence on the record. Did the trial court err by admitting irrelevant and prejudicial evidence?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Kenton Bozeman and Bernardo Trevino got into a scuffle outside of the Safeway in Chehalis. Bozeman had been in his car waiting, with his small child, for his partner Amber Perez to come out. RP (5/25/10) 34-36, 84. Trevino approached, along with Angel Velazquez. Bozeman got out of the car, and all three argued. RP (5/25/10) 35, 39-40, 61, 73, 85-88; RP (5/26/10) 196. Both Trevino and Bozeman threw punches. RP (5/25/10) 45-46, 61, 73, 89-90, 111; RP (5/26/10) 188, 212.

Trevino and Velazquez were with a group of five to nine males, one of whom was Ulises Flores-Martinez. RP (5/25/10) 41, 83; RP (5/26/10) 202, 211. The group stayed a bit further back. At one point, Flores-Martinez approached; he either tried to break up the fight, or he taunted Bozeman and Perez with threats and racial slurs. RP (5/25/10) 41, 43, 47, 91; RP (5/26/10) 184, 188, 200. The entire group then got into a white Cadillac Escalade and left the area. RP (5/25/10) 41, 55.

Perez called the police, who came and spoke with her at Safeway. RP (5/25/10) 139. Bozeman was not there, as he had driven off after the Escalade, with his child still in the car. RP (5/25/10) 55-57, 94, 113.

Bozeman returned, and directed the police to a house with a white Escalade parked in front of it. RP (5/25/10) 140. The police removed the

occupants from the residence, handcuffed them, and ordered them to the ground. RP (5/25/10) 76, 144. After taking these actions, they determined that they were at the “wrong” house, and that none of the people they’d detained had been involved in the incident. RP (5/25/10) 76, 140, 144; RP (5/26/10) 156.

Next, the police went to an apartment some blocks away, which one of the responding officers described as “a house full of Hispanics.” RP (5/25/10) 25. This house also had a white Escalade parked in front of it. RP (5/25/10) 140. At the second house, the police kicked in the door. RP (5/26/10) 208. Residents “who matched the description” were brought out of the house by police one at a time so that Bozeman and Perez could look at them and make identifications. RP (5/25/10) 26, 77, 97, 141-143. This included at least fourteen occupants of the apartment. RP (5/26/10) 163. As he was walked outside, Mr. Flores-Martinez told the officer in broken English that he had not been at the Safeway. RP (5/25/10) 26-27, 143. Perez identified Flores-Martinez and Velasquez, and said they had both been involved in the incident. RP (5/25/10) 60, 142.

The state charged Mr. Flores-Martinez with Malicious Harassment and Harassment (threat to kill). CP 1-2. Defense counsel did not file a suppression motion based on the search of the residence, the seizure of Mr. Flores-Martinez, and the identification procedures used.

Prior to trial, the defense moved to exclude any reference to alleged gang membership. The court allowed the testimony. RP (5/25/10) 8-13, 50-55. Perez told the jury that gang signals were flying, that the males wore the gang's color blue, and that Trevino and Velazquez claimed they were in the "LVL" gang. RP (5/25/10) 41, 48, 64-65. Bozeman said that while he had never seen the sign used before, he knew that the parties threw "LVL" gang signs and shouted the gang's name. RP (5/25/10) 91-92.

The state introduced a surveillance video of the incident. Sgt. Gwendolyn Carrell testified that the video did not show any gang signs. RP (5/26/10) 160. She also stated that "LVL" is a subgroup of a gang called "Serenos." RP (5/26/10) 154. She did not elaborate further on the nature of the gang or the subgroup; nor did she confirm that Mr. Flores-Martinez was a member of the gang. RP (5/26/10)

The jury convicted Mr. Flores-Martinez on both counts. CP 55, 56. After sentencing, Mr. Flores-Martinez timely appealed. CP 57-64, 65-74.

## ARGUMENT

**I. MR. FLORES-MARTINEZ’S CONVICTION WAS ENTERED IN VIOLATION OF HIS FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES AND HIS RIGHT TO PRIVACY UNDER WASH. CONST. ARTICLE I, SECTION 7.**

**A. Standard of Review and Scope of Appeal**

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). The validity of a warrantless search or seizure is reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008).

Although the Court of Appeals “may refuse to review any claim of error which was not raised in the trial court,” the Court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell*, \_\_\_ Wash.2d \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2011). This includes both nonconstitutional issues and constitutional issues that are not manifest. *Id.*

In addition, an appellant may raise a manifest error affecting a constitutional right for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d

1, 8, 17 P.3d 591 (2001).<sup>1</sup> An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

B. The state and federal constitutions generally prohibit warrantless searches and seizures.

The Fourth Amendment to the federal constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.<sup>2</sup> Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.<sup>3</sup>

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<sup>1</sup> The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

<sup>2</sup> The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

<sup>3</sup> It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the

Under both provisions, searches and seizures conducted without authority of a search warrant “are *per se* unreasonable... subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008). The state bears the burden of showing one of those exceptions applies. *State v. Williams*, 148 Wash.App. 678, 683, 201 P.3d 371 (2009). Where the state asserts an exception, it must produce the facts necessary to support the exception. *State v. Johnston*, 107 Wash.App. 280, 284, 28 P.3d 775 (2001).

Evidence derived from an unconstitutional search or seizure must be suppressed as fruit of the poisonous tree. *United States v. Williams*, 615 F.3d 657, 668-669 (6th Cir. 2010) (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Exclusion is required unless the connection between the illegal police conduct and the evidence is so attenuated as to dissipate the taint. *Id.* The test is whether the evidence was discovered by exploitation of the illegality, or instead by

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state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

means sufficiently distinguishable to be purged of the primary taint. *Id.* A reviewing court must consider temporal proximity (between the illegality and discovery of the evidence), the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.* (quoting *Brown v. Illinois*, 422 U.S. 590, 603-604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)). The prosecution bears the burden of proving that tainted evidence is admissible. *Taylor v. Alabama*, 457 U.S. 687, 690, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982).

- C. The police unlawfully entered two residences without a search warrant while searching for Mr. Flores-Martinez.

Under both the state and federal constitutions, “the closer officers come to intrusion into a dwelling, the greater the constitutional protection.” *State v. Chrisman*, 100 Wash.2d 814, 820, 676 P.2d 419 (1984) (citing *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)<sup>4</sup>).

This is especially true in Washington, because Article I, Section 7 explicitly protects the ‘home.’ ...[T]he home receives heightened constitutional protection [and is] a highly private place... In no area is a citizen more entitled to his [or her] privacy than in his or her home.

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<sup>4</sup> In *Payton*, the U.S. Supreme Court held that police may not enter a home to make a routine felony arrest without a warrant.

*State v. Young*, 123 Wash.2d 173, 184-185, 867 P.2d 593 (1994). It is appropriate to analyze protection of the home separately, “because it is a distinct concept... [T]he fact the search occurs at a home is central to the analysis.” *Id.*, at 185 and n. 2.<sup>5</sup>

In this case, the officers unlawfully invaded two different residences while seeking Mr. Flores-Martinez.<sup>6,7</sup> The officers did not have an arrest warrant or a search warrant; instead, they were hunting for the suspects soon after the incident. RP (5/25/10) 26, 58-59, 76, 140, 144; RP (5/26/10) 162. They approached and entered two different houses— apparently because each house had a white Cadillac Escalade parked in front of it. RP (5/25/10) 58-59, 140. Bozeman led them to the wrong house first. RP (5/25/10) 76, 140, 144; RP (5/26/10) 162. At that first house, the officers handcuffed innocent people and forced them to the

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<sup>5</sup> A person’s home can be invaded even though officers make no physical entrance into the house. *Id.*, at 185 (citing *State v. Holeman*, 103 Wash.2d 426, 429, 693 P.2d 89 (1985)). Thus, an officer outside a house violates Article I, Section 7 by reading *Miranda* rights to a juvenile inside the house (thereby effecting an arrest), even if the officer does not cross the threshold into the residence. *Id.*, at 429.

<sup>6</sup> Although the illegal searches and seizures were not challenged below, the Court of Appeals should review the matter either as a matter of discretion or as a manifest error affecting Mr. Flores-Martinez’s right to privacy and his right to be free from unreasonable searches and seizures. RAP 2.5; *Russell*, *supra*; Article I, Section 7; U.S. Const. Amend. XIV.

<sup>7</sup> In addition, Mr. Flores-Martinez contends that counsel’s failure to challenge illegal police conduct in the trial court deprived him of the effective assistance of counsel.

ground. RP (5/25/10) 144. At the second house, the police kicked in the door and paraded “14 plus” occupants out to participate in a crude “lineup.” RP (5/25/10) 24-26; RP (5/26/10) 163, 208.

In the absence of a search warrant, an arrest warrant, or an exception to the warrant requirement, the entry into the residence was unlawful. Accordingly, Mr. Florez-Martinez’s statements and the identification made by Bozeman and Perez should have been excluded from the trial. *Young, supra*. The convictions must be reversed, the evidence suppressed, and the case remanded for a new trial. *Id.*

- D. The police unlawfully seized Mr. Flores-Martinez when they ordered him out of the residence and paraded him and at least thirteen other Hispanic males in front of Perez and Bozeman.

Both the Fourth Amendment and Article I, Section 7 apply to brief detentions that fall short of formal arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d (1975), *State v. Martinez*, 135 Wash.App. 174, 180, 143 P.3d 855 (2006). A seizure occurs following an officer’s display of authority whenever a reasonable person would not feel free to leave or otherwise disregard the officer’s request. *State v. Harrington*, 167 Wash.2d 656, 663-664, 222 P.3d 92 (2009); *State v. Beito*, 147 Wash.App. 504, 509, 195 P.3d 1023 (2008). The presence of more than one officer may discourage a reasonable person from disregarding the officer’s requests. *Harrington*, at 663-664.

Furthermore, a person is seized when directed to wait in a particular place. *See, e.g., State v. Mendez*, 137 Wash.2d 208, 223, 970 P.2d 722 (1999) *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (Defendant was seized “when Officer Hensley first uttered the command for him to get back into the car”).<sup>8</sup>

To justify a warrantless seizure, the police must be able to point to specific and articulable facts giving rise to an objectively reasonable belief that the person seized is engaged in criminal activity.<sup>9</sup> *State v. Xiong*, 164 Wash.2d 506, 514, 191 P.3d 1278 (2008); *State v. Allen*, 138 Wash.App. 463, 470, 157 P.3d 893 (2007).

In this case, the police unlawfully seized Mr. Flores-Martinez when they entered the residence without a warrant, ordered him out of the building, and directed him to parade in front of witnesses along with thirteen other Hispanic males. RP (5/25/10) 26; RP (5/26/10) 163. A reasonable person would not have felt free to disregard the officers’ commands. *Harrington, supra*. Numerous armed officers were present,

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<sup>8</sup> *See also Martinez*, at 179 (“Officer Henry ‘seized’ Mr. Martinez when he ordered him to sit on the utility box and wait...”); *State v. Ellwood*, 52 Wash. App. 70, 73, 757 P.2d 547 (1988) (“a seizure did occur, as the State concedes, when Detective Deckard told Ellwood and his companion to ‘[w]ait right here’”).

<sup>9</sup> Pending execution of a residential search warrant, an occupant of the residence may be detained. *State v. Smith*, 145 Wash.App. 268, 275-276, 187 P.3d 768 (2008). However, no Washington case has extended this authority to encompass arrest warrants.

the testimony suggested that they entered with a show of force, and that they forced Mr. Flores-Martinez to appear in the crude “lineup” despite his protestations of innocence. RP (5/25/10) 26-27.

The seizure was unlawful because the officers lacked a reasonable suspicion that Mr. Flores-Martinez, in particular, had been involved in the incident at Safeway. If the officers had been provided a helpful description of the alleged perpetrators, they would not have handcuffed innocent people and forced them to the ground at the first residence. Nor would they have required “14 plus” Hispanic males to exit the residence for viewing by Bozeman and Perez.

Because the officers lacked a reasonable suspicion that Mr. Flores-Martinez was involved in criminal activity, the seizure violated his rights under the Fourth Amendment and Article I, Section 7. Mr. Florez-Martinez’s statements and the identification made by Bozeman and Perez should have been suppressed. *Harrington, supra*. The convictions must be reversed, the evidence suppressed, and the case remanded for a new trial. *Id.*

**II. MR. FLOREZ-MARTINEZ WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash. App. 29, 146 P.3d 1227 (2006).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also *State v. Pittman*, 134 Wash. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

C. Defense counsel was ineffective for failing to seek suppression of the fruits of the unlawful search and seizure.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel should have sought suppression of the evidence obtained from the illegal seizure.

First, there was no legitimate strategic or tactical reason to allow the evidence to be admitted. Counsel's failure to seek suppression meant that the jury heard Mr. Flores-Martinez's obvious lie to the police (that he had not even been at the Safeway), and that Bozeman and Perez were able to identify him shortly after the incident. RP (5/25/10) 60, 142-143.

Second, a motion to suppress would likely have been granted, as outlined above.<sup>10</sup>

Third, the result of the trial would have been different had the evidence been excluded. The jury could assume that Mr. Flores-

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<sup>10</sup> Even if Mr. Flores-Martinez lacked standing to protest the illegal warrantless entry, he unquestionably had standing to object to the unlawful seizure of his person.

Martinez's lie to the police (that he had not been present at Safeway) showed consciousness of guilt. Suppression of the lie would only have helped the defense case. In addition, the in-court identification provided by Perez and Bozeman was bolstered by the fact that they had picked him out of the crude "lineup" on the day of the incident. Suppression of the out-of-court identification would have diminished the strength of their testimony.

Counsel's failure to object deprived Mr. Flores-Martinez of the effective assistance of counsel. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Saunders, supra*.

### **III. THE TRIAL JUDGE ERRONEOUSLY ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE OF MR. FLORES-MARTINEZ'S ALLEGED GANG AFFILIATION.**

#### **A. Standard of Review**

Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wash.2d 727, 750, 202 P.3d 937 (2009); *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes when the court relies on unsupported facts, takes a view that

no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Hudson*, at 652.

An erroneous ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wash.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Id.*, at 579.

- B. The trial judge abused his discretion by admitting evidence suggesting Mr. Flores-Martinez belonged to the “LVL gang,” because the prosecution did not prove by a preponderance of the evidence that the group actually existed, that he belonged to it, and that it qualified as a real criminal gang.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Under ER 404(b), “[e]vidence of other... acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes,

such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

Before evidence of prior acts may be admitted, the trial court is required to analyze the evidence and must ““(1) find by a preponderance of the evidence that the [conduct] occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.”” *Asaeli*, at 576 (quoting *State v. Pirtle*, 127 Wash.2d 628, 648-649, 904 P.2d 245 (1995)). The analysis must be conducted on the record.<sup>11</sup> *Asaeli*, at 576 n. 34. Doubtful cases should be resolved in favor of the accused person. *State v. Trickler*, 106 Wash.App. 727, 733, 25 P.3d 445 (2001).

Evidence that an accused person is affiliated with a gang is subject to analysis under ER 401, ER 402, ER 403 and ER 404(b). *Asaeli*, at 576-577. Before admitting testimony relating to gang affiliation, the trial court must find (by a preponderance of the evidence) that the group actually exists, that the accused person belongs to it, and that the group really

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<sup>11</sup> However, if the record shows that the trial court adopted a party’s express arguments addressing each factor, then the trial court’s failure to conduct a full analysis on the record is not reversible error. *Asaeli*, at 576 n. 34.

qualifies as a criminal gang. *Asaeli*, at 577. For example, in *Asaeli*, the Court of Appeals determined that the prosecution had not established the existence of a gang:

Although the use of individuals' street names, the possible presence of red, blue or brown gang colors at the time of the shooting, and the distinctive spelling of Kushmen Blokk may suggest gang association, this evidence may reflect gang-like traditions that the defendants merely absorbed into their culture...[E]ven assuming the State demonstrated that the defendants were associated with Kushmen Blokk, it was not established by a preponderance of the evidence that Kushmen Blokk was a gang.

*Asaeli*, at 577-578.

Here, the trial court erroneously overruled Mr. Flores-Martinez's objection to the admission of evidence suggesting that he had some affiliation with an alleged gang. Defendant's Motion in Limine, Supp CP; RP (5/25/10) 8-12. As in *Asaeli*, the prosecution did not establish that Mr. Flores-Martinez belonged to the "LVL gang," and did not prove that the group actually qualified as a criminal gang. Instead, at best, the prosecution showed that some of the people at Safeway made hand gestures (characterized as gang signs), referred to "LVL," and wore blue clothing. RP (5/25/10) 41, 48, 64-65. As in *Asaeli*, nothing established that Mr. Flores-Martinez actually belonged to the "LVL gang," or that the local LVL group actually qualified as a criminal gang. *Asaeli*, at 577-578. Instead, the evidence of purported gang affiliation may have just described

“gang-like traditions” that Mr. Flores-Martinez and his friends practiced.

*Id.*

The evidence did not relate to any element of the charged crimes, and painted Mr. Flores-Martinez in a bad light. It should have been excluded under ER 402, ER 403, and ER 404(b). Furthermore, the court failed to conduct an adequate analysis on the record. *Asaeli, supra.* Finally, the court failed to give the jury a limiting instruction. Court’s Instructions to the Jury, Supp. CP.

The error requires reversal because it is prejudicial. *Asaeli, supra.* There is a reasonable probability that the court’s failure to exclude the evidence or to give a limiting instruction materially affected the outcome of the trial. *Id., at 579.* If the jury believed Mr. Flores-Martinez belonged to a real criminal gang, they may have imputed to him the actions of others involved in the incident. Accordingly, Mr. Flores-Martinez’s convictions must be reversed and the case remanded for a new trial, with instructions to exclude evidence of any alleged gang affiliation. *Id.*

### **CONCLUSION**

For the foregoing reasons, Mr. Flores-Martinez’s convictions must be reversed, and the case remanded for a new trial. Upon retrial, Mr.

Flores-Martinez's statements must be suppressed, along with the out-of-court identification and evidence of gang-affiliation.

Respectfully submitted on March 10, 2011.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Ulises Flores-Martinez  
1610 Windsor Ave. #2  
Centralia, WA 98531

and to:

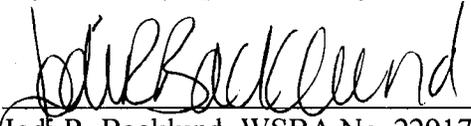
Lewis County Prosecuting Attorney  
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 10, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 10, 2011.

  
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