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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

STATE OF WASHINGTON,

Respondent,

vs.

Ulises Flores-Martinez,

Appellant.

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

The Honorable Judge James Lawler

Appellant's Reply Brief

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ARGUMENT

I. THE COURT OF APPEALS SHOULD REVIEW MR. FLORES-MARTINEZ'S SUPPRESSION ARGUMENT BECAUSE IT INVOLVES A MANIFEST ERROR AFFECTING HIS CONSTITUTIONAL RIGHTS.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). Furthermore, appellate courts have discretion to review *any* error for the first time on appeal. *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). Respondent erroneously implies that an illegal search and seizure may never be challenged for the first time on review. Brief of Respondent, pp. 4-7.

This is incorrect. First, RAP 2.5(a)(3) explicitly allows for review of certain constitutional issues. Respondent relies primarily on authority that predates the Rules of Appellate Procedure, which were adopted in 1976 and which "'completely replaced all prior rules governing appellate procedure.'" *City of Seattle v. Holifield*, 170 Wash.2d 230, 245, 240 P.3d 1162 (2010) (quoting Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L.Rev. 1541 (1986)). *See* Brief of Respondent, pp. 4-5 (citing *State v. Silvers*, 70 Wash.2d 430, 423 P.2d 539 (1967); *State v. Gunkel*, 188 Wash. 528, 63 P.2d 376 (1936)).

Second, Respondent provides no principled basis to distinguish the issues here from the one reviewed at the Court's discretion in *Russell, supra.* Brief of Respondent, p. 5. Indeed, there is arguably a greater need for appellate review of constitutional errors than for the non-constitutional error considered in *Russell.*

Third, the record does not support any suggestion that Mr. Flores-Martinez affirmatively waived the issue. *See* Brief of Respondent, p. 6. Courts indulge every reasonable presumption against waiver of fundamental rights. *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Waiver of a constitutional right is ineffective unless it is "an intentional relinquishment or abandonment of a known right or privilege." *Zerbst, at* 464. Nothing in the record suggests that Mr. Flores-Martinez affirmatively waived his right to challenge the illegal searches and seizures at issue here.[1]

Fourth, Respondent's argument—that waiver results from an accused person's failure to seek suppression in the trial court—has been

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[1] This is in contrast to the waiver case cited by Respondent. *See* Brief of Respondent, p. 6 (citing *State v. Donohoe,* 39 Wash.App. 778, 695 P.2d 150 (1985)). In *Donohoe,* the appellant affirmatively waived suppression issues under the state constitution because he relied solely on the Fourth Amendment in his argument to the trial court and in his briefing to the Court of Appeals, raising Article I, Section 7 for the first time at oral argument. *See Donohoe, at* 782 ("Defendant must accept the consequences of this affirmative choice.")

foreclosed by the Supreme Court's recent decision in *State v. Robinson*, 171 Wash.2d 292, ___ P.3d ___ (2011).[2] As the *Robinson* Court noted, RAP 2.5(a)(3) permits review of manifest errors affecting a constitutional right, RAP 1.2 "mitigates the stringency" of the general prohibition on issues raised for the first time on review, and any waiver of a constitutional right must be knowing, intelligent, and voluntary. *Robinson*, Slip Op. pp. 5-6.

Fifth, the error is manifest because it had "practical and identifiable consequences" at trial.[3] *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). The conviction was based (at least in part) on Mr. Flores-Martinez's statements and on the out-of-court identification, both of which resulted from the illegal searches and seizures. RP (5/25/10) 26-27, 60, 142-143. The admission of this evidence had "practical and identifiable" consequences at trial. *Id.* Respondent's contention that "the record is nearly silent as to the circumstances surrounding the searches and seizures" is incorrect. Brief of Respondent,

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[2] The case cited by Respondent—*State v. Cross*, 156 Wash. App. 568, 234 P.3d 288 (2010)—relied heavily on Division II's *Millan* decision, which the *Robinson* Court overruled. *See Cross, at* 577-579 (citing *State v. Millan*, 151 Wash.App. 492, 212 P.3d 603 (2009), *overruled by Robinson, supra*).

[3] Respondent concedes that any error was constitutional in nature. Brief of Respondent, p. 7.

p. 8. The record is replete with information regarding the illegal searches and seizures.[4] RP (5/25/10) 25-26, 60, 76-77, 97, 139-144, 146, 208. If additional information is necessary to a fair resolution of the issue, the case can be remanded for a suppression hearing. *Robinson, at* ___.

For all these reasons, the issue is properly before the court under RAP 2.5(a)(3). Furthermore, if the error is not manifest, the Court of Appeals should still review the issue on its merits, under RAP 1.2 and *Russell, supra.*

Respondent does not address the merits of Mr. Flores-Martinez's arguments (other than to assert that Mr. Flores-Martinez lacks standing to challenge the search of the first house). Brief of Respondent, pp. 4-12. Accordingly, Mr. Flores-Martinez rests on the argument set forth in the Opening Brief.

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

Mr. Flores-Martinez stands on the argument set forth in the Opening Brief.

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[4] Significantly, Respondent did not seek permission to present additional evidence on review pursuant to RAP 9.11.

III. THE EVIDENCE OF "GANG" AFFILIATION SHOULD HAVE BEEN EXCLUDED.

Evidence of gang affiliation creates a significant risk of unfair prejudice. Accordingly, before such evidence is admitted at trial, the prosecution must establish (1) that the group actually exists, (2) that the accused person actually belongs to it, and (3) that the group actually qualifies as a criminal gang. *State v. Asaeli*, 150 Wash.App. 543, 577, 208 P.3d 1136 (2009). A group may boast of being a gang, use gang signs, use gang names, and claim affiliation with a true criminal gang without itself qualifying as a criminal gang. *Asaeli, at* 577-579. A local group of youth may claim membership in a national gang (such as the Crips or the Bloods) or a regional gang (such as the LVL); however, this does not mean the local group is itself a criminal gang. *Id; but see State v. Gatlin*, 158 Wash.App. 126, 132, 241 P.3d 443 (2010).

A group qualifies as a gang if there is proof that it has "as one of its primary activities the commission of criminal acts," and that the "members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity." RCW 9.94A.030; *see also* RCW 28A.600.455.

In this case, there was no proof that the Lewis County LVL "gang" qualified as a criminal street gang. Nothing in the record established that

the group had as one of its primary activities the commission of criminal acts; nor did the evidence establish that local LVL members engaged in a pattern of criminal street gang activity, individually or collectively. RCW 9.94A.030. *See* RP (5/25/10) *and* RP (5/26/10) *generally*. Respondent is unable to point to anything in the record proving the existence of an actual criminal gang; instead, Respondent cites to evidence that the group members referred to themselves as a gang, wore specific colors, and used gang hand signals.[5] Brief of Respondent, p. 21. Such indicia are merely "gang-like traditions;" they do not prove the existence of a gang. *Asaeli, at* 578.

Respondent does not attempt to argue harmless error. This failure to argue the issue can be taken as a concession. *See In re Pullman,* 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009). In light of the failure to provide a limiting instruction, the erroneous admission of gang-affiliation evidence prejudiced Mr. Flores-Martinez. *Asaeli, at* 579. The convictions must be reversed and the case remanded for a new trial, with instructions to exclude evidence of any alleged gang affiliation. *Id.*

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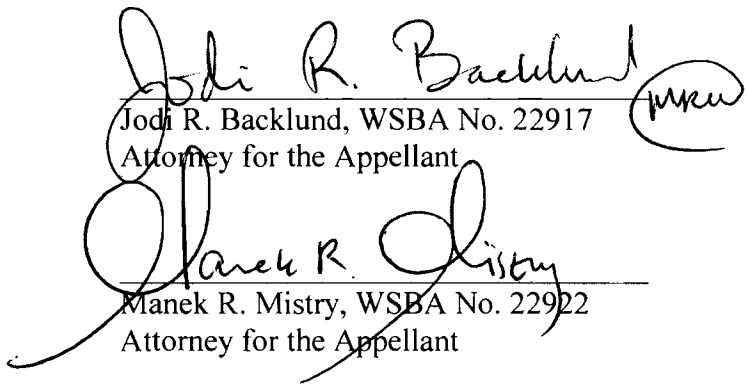
[5] Respondent also points to testimony that a witness had seen LVL graffiti on buildings. Brief of Respondent, p. 22. However, the record does not show who authored the graffiti; it certainly does not establish authorship by the group involved in this case. Furthermore, absent proof that crime was a primary purpose of the group, it did not qualify as a gang under RCW 9.94A.030.

CONCLUSION

Mr. Flores-Martinez's convictions must be reversed, and the case remanded for a new trial.

Respectfully submitted on June 21, 2011.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

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

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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 June 21, 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 June 21, 2011.

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