

FILED

MAR 18 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 28560-0-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

Juan Zepeda,

Appellant.

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

The Honorable F. James Gavin

APPELLANT'S OPENING BRIEF

KRISTINA M. NICHOLS
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A. SUMMARY OF ARGUMENT

Juan Zepeda was forced to sacrifice a speedy trial¹ so that defense counsel could better prepare for trial. 1RP² 26-27. Unfortunately, defense counsel was not prepared for this trial, as was demonstrated by counsel's deficient performance throughout these proceedings. As established below, there were countless significant, prejudicial errors that occurred throughout Mr. Zepeda's trial, most without challenge by defense counsel. Mr. Zepeda's conviction should be reversed and dismissed, or at a minimum, remanded for a new trial and appropriate sentencing.

B. ASSIGNMENTS OF ERROR

1. The court erred by admitting gang-related evidence and failing to give a limiting instruction.
2. The court erred by admitting and publishing Mr. Zepeda's taped interview with the detective and then failing to give a limiting instruction.
3. There was not sufficient evidence to support the intimidating a witness count as it was charged, and the court erred by submitting alternative means to the jury on this count without a unanimity instruction.
4. The court erred by running Mr. Zepeda's firearm enhancement consecutive to his unlawful possession of a firearm conviction.

¹ *State v. Williams*, 104 Wn. App. 516, 523, 17 P.3d 648 (2004) (citing *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) (court does not abuse its discretion by granting continuance, even over defendant's objection, to allow defense counsel more time to prepare for trial).

² "1RP" refers to the transcript of pretrial and trial dates from July through September 2009. "2RP" refers to the transcript for sentencing on October 9, 2009.

5. The court erred in calculating Mr. Zepeda's offender score.
6. Counsel was ineffective for failing to object, and the court erred by permitting the testimony and/or argument at IRP 272-74, 262-63, 276, 283, 287, 399-400, 676, as specifically set forth in Issue 6 below.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the court erred by admitting irrelevant, unfairly prejudicial gang propensity evidence and failing to give a limiting instruction to the jury.
 - (i) The required four-part inquiry for admissibility was never conducted.
 - (ii) There was not a preponderance of evidence establishing Mr. Zepeda's inappropriate gang affiliation.
 - (iii) The gang-related evidence was never tied to an element of the crimes or proof of motive.
 - (iv) "Expert testimony" was erroneously admitted.
 - (v) Mr. Zepeda suffered undue prejudice.
 - (vi) The jury should have received a limiting instruction.
 - (vii) Defense counsel was ineffective.
2. Whether the court erred by admitting the taped interview because it was impermissible extrinsic evidence of a prior inconsistent statement, it was irrelevant and highly prejudicial and no limiting instruction was given to the jury.
3. Whether the court erred by failing to give a unanimity instruction as to the alternative means of intimidating a witness, particularly where there was not sufficient evidence of each means submitted to the jury or charged in the information.
4. Whether the court erred by adding the 36-month firearm enhancement to the unlawful possession of a firearm count.

5. Whether the court erred in calculating Mr. Zepeda's offender score by not counting the second-degree assault and intimidating a witness counts as the same criminal conduct.

6. Whether defense counsel's failure to object to countless other errors throughout trial prejudiced Mr. Zepeda.

(i) Defense counsel failed to object to the improper witness bolstering testimony of the State's main witness. 1RP 272-74.

(ii) Defense counsel failed to object to hearsay testimony outside a witness's personal knowledge. 1RP 262-63.

(iii) Defense counsel failed to object to speculative, opinion testimony that lacked proper foundation to be admitted. 1RP 276.

(iv) Defense counsel failed to object to the admission of irrelevant, unduly prejudicial, unnecessarily cumulative pictures and surveillance tape. 1RP 283, 287.

(v) Defense counsel failed to object to a detective's unresponsive testimony against Mr. Zepeda's character. 1RP 399-400.

(vi) Defense counsel failed to object to the prosecutor's closing argument that Mr. Zepeda was essentially a liar. 1RP 676.

7. Whether the cumulative error doctrine requires a new trial.

D. STATEMENT OF THE CASE

On May 27, 2009, Juan Zepeda was in Grandview, Washington, making funeral arrangements with 15-20 family friends for Mrs. Flores, his daughter's great-grandmother and his "second-mom," who had just passed away. (1RP 404, 478, 580-83) Mrs. Flores had at least nine children, and some of these children, grandchildren and/or their paramours who were present that day belonged to a gang known as the North Side

Vatos, or NSVs. (1RP 239, 404, 407, 440, 484, 593) Mr. Zepeda, who was 27-years-old and was living in Spokane, used to be a member of this gang and he did stipulate to a serious violent offense as a juvenile (1RP 129-30, 179, 202-10, 402, 579-80), but he was no longer in this gang or known to authorities as a gang member. (1RP 233-34, 264, 484, 494-95, 523-24, 549-50, 553, 594, 597) Unfortunately, members of the NSVs' rival gang, the Brito Brothers/BGLs, lived at 505 E Crescent in Grandview, which is diagonally across the street from Mrs. Flores's house at West 5th Street. (1RP 238)

After spending the day at the funeral home, Mr. Zepeda and many members of Mrs. Flores' family returned to Mrs. Flores' home on 5th Street to discuss funeral arrangements. (1RP 277, 404, 412, 414, 421, 517, 541) Upon arriving, Mr. Zepeda was outside the home when a "kid" on a bike started throwing rocks at the family. (1RP 423-24, 469, 474, 488, 542, 585) Mr. Zepeda could be heard cursing and telling the "kid" that the family was there making funeral arrangements, to be respectful and that it was not the time to get into anything. (*Id.*) Nonetheless, the argument continued and Mr. Zepeda was shot in the leg by the "kid" or one of the Brito brothers. (1RP 267, 401, 408, 423, 470, 542-43, 585-86)

After Mr. Zepeda was shot, there was an additional round of gun fire of 15-20 shots between BGL gang members the Brito Brothers and

one or more of the NSV gang members (including the deceased Mrs. Flores' son Victor Flores). (1RP 243, 258-61, 264, 275, 401, 489, 504) During the gunfire, the Flores family helped Mr. Zepeda from the street where he had fallen and took cover. (1RP 262, 275-76, 424, 471, 479-81, 492, 556, 586, 589) All of the defense witnesses, most of whom were family members of Mrs. Flores, testified that Mr. Zepeda did not have a gun that day. (1RP 414, 459, 469, 483, 491-92, 521, 543) After the gunfire stopped, Mr. Zepeda was helped into a car. (*Id.*)

Meanwhile, neighbors Brad and Melodie Smith were up the street at their house and heard the gunfire. (1RP 271, 275, 320) They called the police and Mr. Smith went outside to take pictures of the scene down the street. (1RP 274-75, 309) They saw Mr. Zepeda get helped into a vehicle and then the vehicle drove up the street toward the Smiths' house. (1RP 275-76, 322-23) Mr. Zepeda was quite agitated (he had just been shot), and he was confused when he saw Mr. Smith taking pictures of him since he was a victim. (1RP 278, 589-90) As the car drove by Mr. Smith, Mr. Zepeda's passenger window rolled down and Mr. Zepeda reached his arm out and cursed at Mr. Smith to stop taking pictures, that he would kill him. (RP 280-81, 292, 301, 324-25, 426, 603) Mr. Smith testified that Mr. Zepeda had a gun in his hand when he reached out the window; Mr. Zepeda testified he only had a cell phone that he was using to call his

mother about his injuries. (1RP 292, 297, 300-02, 426, 532-33, 587, 590-91, 605) Mr. Zepeda testified that he was just upset and did not intend to threaten Mr. Smith. (1RP 589) All other witnesses for both parties confirmed that they never saw Mr. Zepeda with a gun. (1RP 326, 414, 459, 469, 483, 491-92, 521, 543)

On the way to the hospital, Officer Carl Ramirez pulled the vehicle over and identified the driver as Marcos Flores and the passengers as Victor Flores, Mr. Zepeda and Emilia Mendoza. (1RP 334-35) No one mentioned that Mr. Zepeda had been shot and, after the brief stop, Mr. Zepeda was taken the rest of the way to the hospital in another vehicle. (*Id.*, 1RP 427) They did pass by a couple closer hospitals in an effort to get further from the dangerous scene and ended up at Kennewick General Hospital. (1RP 347, 595) After his treatment there, Mr. Zepeda was read his *Miranda* rights by Officer Scott Ames and transported to the Grandview jail. (1RP 52, 54, 56, 350)

The following day, Detective Ricardo Abarca interviewed Mr. Zepeda at the jail. (1RP 60, 363-64) Mr. Zepeda told the detective he was shot in Kennewick and refused to admit being in Grandview. (1RP 62, 66, 79, 87, 363-66, 379, 387) Mr. Zepeda explained at trial that he was afraid of gang retaliation against himself or his family if he cooperated with police. (1RP 594-96) Of course, Mr. Zepeda was shot in Grandview,

which he admitted to the detective after the tape recording was stopped and which he acknowledged when testifying about the above events at trial. (1RP 396, 592, 611) Nonetheless, the approximately 30-minute taped interview of Mr. Zepeda lying to the detective was admitted and published to the jury with no limiting instruction. (1RP 62, 128, 363-95)

Mr. Zepeda was ultimately charged with and convicted by a jury of unlawful possession of a firearm, intimidating a witness and second-degree assault of Mr. Smith. (CP 9-16, 106-07) He was sentenced to a mid-standard-range sentence based on the offender score that the State presented to the court, and he received a firearm enhancement on the assault conviction that the court ran consecutive to his unlawful possession of a firearm conviction. (*Id.*; 2RP 8, 28-31, 41) This appeal timely followed. (CP 17) For greater clarity, other pertinent facts will be cited with their related issues raised below.

E. ARGUMENT

Issue 1: Whether the court erred by admitting irrelevant, unfairly prejudicial gang propensity evidence and failing to give a limiting instruction to the jury.

The court erred by admitting the gang related evidence, and defense counsel was ineffective for either making an untimely or inadequate objection and contributing to the prejudicial error. The gang-related evidence was irrelevant, unduly prejudicial, inadmissible

propensity evidence. Moreover, the court erred and counsel was ineffective for failing to offer a limiting instruction to the jury.

A court cannot admit “[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith.” ER 404(b). It may, however, admit such evidence for another purpose, “such as proof of motive, plan, or identity.” *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (citing ER 404(b)). “ER 404(b) is not designed ‘to deprive the State of relevant evidence necessary to establish an essential element of its case,’ but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.” *Id.* (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

The majority of the evidence presented here from both sides concerned gangs and gang affiliation. 1RP *passim*. But none of this evidence was relevant to establish any of the elements of the charged crimes. Therefore, the only fathomable way that this character, propensity evidence of prior bad acts was admissible is if it was admitted for some other purpose such as motive to commit the crimes charged.

Assuming that the improper ER 404(b) character evidence was offered for some other permissible purpose, the court did not conduct the necessary inquiry on the record for admitting the evidence in the first

place, the evidence did not show by a preponderance that Mr. Zepeda was in a gang, the “expert testimony” from law enforcement lacked proper foundation, the evidence was unduly prejudicial and the lack of limiting instruction essentially guaranteed an unjust verdict.

“Before admitting ER 404(b) evidence, a trial court ‘must (1) find by a preponderance of the evidence that the misconduct 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 against the prejudicial effect.’” *Foxhoven*, 161 Wn.2d at 175 (internal citations omitted); *State v. Asaeli*, 150 Wn. App. 543, 576, 208 P.3d 1136 (2009)). The preceding four-part “analysis must be conducted on the record.”³ *Foxhoven*, 161 Wn.2d at 175 (emphasis added). “If the evidence is admitted, a limiting instruction must be given to the jury.” *Id.* (emphasis added).

State v. Asaeli, supra, is directly on point with this matter. There, the Court reversed the defendant’s conviction after gang association evidence was admitted. *Asaeli*, 150 Wn. App. at 573-80. First, the Court found that there was not a preponderance of the evidence establishing that

³ “If the record shows that the trial court adopted one of the parties’ express arguments as to the purpose of the evidence and that party’s weighing of probative and prejudicial value, then the trial court’s failure to conduct its full analysis on the record is not reversible error.” *Asaeli*, 150 Wn. App. at 577 (citing *State v. Pirtle*, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995)).

the defendant actually associated with a gang. *Id.* at 577-78. The Court explained, “[a]lthough 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.” *Id.* The court was also not convinced that the defendant’s possible prior association with the alleged gang established any gang affiliation for the underlying incident. *Id.* Since a preponderance of the evidence did not establish the gang association, the Court found the evidence inadmissible before even addressing the remaining three criteria. *Id.*

The *Asaeli* Court did note, however, that even if the trial court had not abused its discretion by admitting the evidence, the gang association evidence was also inadmissible for lack of adequate foundation for “expert testimony” and, regardless, the evidence was unduly prejudicial.

“The key criteria for admission of expert testimony are a qualified witness and helpful testimony.” *Asaeli*, 150 Wn. App. at 578 (citing *State v. Cauthron*, 120 Wn.2d 879, 890, 846 P.2d 502 (1993), *overruled in part on other grounds by State v. Buckner*, 133 Wn.2d 63, 65-67 (1997); *see also* ER 702). ER 702 provides:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in

issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

Asaeli, 150 Wn. App. at 579 (citing ER 702). In *Asaeli*, the Court held that, since the gang association evidence was not established by a preponderance of the evidence, the “expert’s testimony” was neither relevant nor helpful the jury. *Id.* Furthermore, the “expert” was not sufficiently familiar with the Samoan culture and specific alleged gang, and the testimony was simply conclusory in nature regarding general gangs and gang activities. *Id.* Therefore, it was inadmissible pursuant to both ER 404(b) and ER 702. *Id.*

Finally, the *Asaeli* Court found that the gang related evidence was unfairly prejudicial and required a new trial. *Asaeli*, 150 Wn. App. at 579-80. “An [evidentiary] error is prejudicial if, ‘within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’” *Id.* (quoting *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)). The *Asaeli* Court found that the evidence was sufficient to support the crime, but the undue prejudice from the gang related evidence warranted a new trial. The Court explained,

“[T]he inflammatory nature of gang evidence generally, the weakness of the evidence linking Williams to Kushmen Blokk or showing that Kushmen Blokk is an established gang; Ringer's general testimony that repeatedly characterized gang members as violent, coupled with Ringer's lack of knowledge about Samoan gangs or culture, cause us to conclude that there was a reasonable

probability that, had the trial court not admitted the general or expert gang evidence, the result of the trial would have differed...”

Asaeli, 150 Wn. App. at 579-80.

Here, the court committed the same errors listed above in admitting the gang association evidence. Specifically, (i) the court did not conduct the necessary four-part inquiry to admit the ER 404(b) evidence; (ii) a preponderance of the evidence did not sufficiently link Mr. Zepeda to the alleged gang; (iii) the gang-related evidence was not relevant to any element or otherwise shown to be relevant for ER 404(b) purposes; (iv) the “expert gang” evidence was inadmissible; (v) Mr. Zepeda was unduly prejudiced by the highly inflammatory gang-related evidence; (vi) it was error to fail to give a limiting instruction and (vii) defense counsel was ineffective for failing to object and contributing to these errors.

(i) Required four-part inquiry was never conducted

First, the court never conducted the required four-part inquiry on the record to determine if the otherwise impermissible ER 404(b) propensity evidence was admissible for other purposes, such as to prove motive. *Foxhoven*, 161 Wn.2d at 175.

As a threshold matter, the gang association evidence was not relevant as to any element of the charged crimes. The State did discuss amending the charges just before trial to add the aggravating factor of gang-related activity, but it withdrew its untimely request for which no

notice was given and conceded that the “gang issue” was not involved in this trial. 1RP 148, 153, 166. In other words, the gang-related evidence had no independent relevance of its own. It did not make the existence of any fact relevant to the charges more or less probable. Thus, lacking any relevance as to the substantive issues, the pertinent question was whether the otherwise irrelevant propensity evidence could be admitted for some other purpose under ER 404(b).

To determine admissibility under ER 404(b), the court was required to conduct a specific 4-part inquiry, as set forth in *Foxhoven*, 161 Wn.2d at 175. Here, even when defense counsel finally questioned whether the gang evidence should ever have been admitted during this trial (1RP 560), the court neglected to conduct the appropriate inquiry. Furthermore, this error can only be excused where the court obviously adopted the argument on the requisite four factors that was offered by one of the parties. *Pirtle*, 127 Wn.2d at 650-51. But neither of the parties nor the court ever offered or made the appropriate four-part analysis to determine whether this ER 404(b) gang evidence was admissible. Thus, reversible error occurred.

(ii) There was not a preponderance of evidence establishing Mr. Zepeda’s inappropriate gang affiliation.

Second, Mr. Zepeda’s case is on all fours with *State v. Asaeli*, *supra*, in that a preponderance of the evidence never established that Mr.

Zepeda was a gang member or that he was sufficiently linked to a gang to introduce the plethora of inflammatory gang evidence. Instead, all of the evidence presented throughout trial from both the State's and defendant's witnesses showed that Mr. Zepeda was not in the gang and was no more associated with the gang than any other family member or friend of those Flores family members who were in fact known gang members. Many of the defense witnesses, including the defendant, acknowledged Mr. Zepeda's former gang affiliation, and one even opined that the defendant was being accused here for what he is (a former NSV, *see* 1RP 570-71). But this did not establish by a preponderance of the evidence that Mr. Zepeda was currently linked to the gang. Mr. Zepeda had left that juvenile lifestyle behind in Grandview and was living in Spokane and working in Airway Heights (1RP 579).

Officer Ames similarly testified that he did not know of Mr. Zepeda as a gang member. (1RP 233-34) Leticia Brio, who was affiliated with the rival gang and lived across the street from the deceased Mrs. Flores, only identified Mr. Zepeda because she saw the news and testified that actually she did not know Mr. Zepeda. (1RP 262-64) Detective Abarca, the "gang expert," did not personally recognize Mr. Zepeda and was simply aware that his family members or friends were gang affiliated. (1RP 355) And all of the defendants' witnesses testified that, while some

of the family members or friends were involved in a gang, Mr. Zepeda left that life behind several years prior (see e.g. 1RP 404, 407, 414, 423, 440, 459, 484, 523-24, 549-50, 553, 594, 597, 606, 615).

Like in *Asaeli*, Mr. Zepeda's possible gang affiliation several years prior, his wearing of a particular colored hat (1RP 606), or his family or friends' possible gang associations does not establish by a preponderance of the evidence that the defendant himself was a gang member or sufficiently linked to introduce all this highly inflammatory evidence to the jury. The court's failure to analyze this factor is reversible error in and of itself. Regardless, had the court engaged in the appropriate analysis following an offering of proof by the State, it would have been clear that there was not a preponderance of the evidence establishing Mr. Zepeda's alleged gang involvement so that the ER 404(b) evidence could have been admitted.

(iii) The gang-related evidence was never tied to an element of the crimes or proof of motive.

Third, there was absolutely no analysis on the third required factor as to whether the evidence was relevant to prove an element of the crime charged, which in itself is reversible error. Regardless, as established above, the gang evidence was not relevant to any element of the charged crimes, so had the inquiry been conducted, it would have failed the test. Next, the court should have analyzed whether the evidence was admissible

for some other purpose under ER 404(b), such as proving motive. Again, there was no analysis. This constituted reversible error.

(iv) “Expert testimony” was erroneously admitted.

Fourth, like in *Asaeli, supra*, it was erroneous to admit the supposed “expert gang testimony.” Officer Bailey testified about the reds verses the blues and other gang paraphernalia that was found at nearby homes in Grandview. (1RP 238-39) But there was no specific testimony about Mr. Zepeda’s own current gang involvement, and it was particularly unhelpful and prejudicial since Mr. Zepeda did not even live in Grandview, let alone in these houses where gang paraphernalia was discovered. Detective Fairchild testified about the opposing gangs who lived across the street from each other near Mr. Zepeda’s second mom’s house, but, again, there was no direct testimony regarding Mr. Zepeda’s own link to any gang. (1RP 243)

Brad Smith testified at length about ongoing gang prevention efforts in the community and the escalation of gang violence, presumably as some sort of an expert on the community, but there was no direct testimony about Mr. Zepeda’s gang involvement other than wearing a red hat and being in an area known for gang activity when trouble broke out. (1RP 272, 274, 276, 277) Regardless, Mr. Smith was not offering any evidence relevant to any charge; there was never a foundation established

for admitting Mr. Smith's lay opinion or expert testimony as to the community violence; and it was unduly prejudicial, misleading and confusing to the jury to admit such the highly inflammatory evidence about gang activity in the community.

Similarly, Detective Abarca testified about the intimidation factor common among gangs, a "code of silence," members of the public routinely being threatened by gangs, that he interviewed Mr. Zepeda for the alleged "gang-related shooting," his familiarity with certain gang members or associates, the various criteria used to determine if someone is a gang member or an associate and other gang members who were arrested. 1RP 354-55, 399-401. But Detective Abarca was not actually familiar with Mr. Zepeda. 1RP 399-400. There was no link to the defendant.

The State offered this general gang evidence through these apparent "gang experts." But none of the testimony was directed at Mr. Zepeda's past actions or involvement. Like in *Asaeli, supra*, there was not a proper foundation for admitting the testimony as "expert" gang evidence. A sufficient foundation was never established to qualify these witnesses as experts, and, in any case, the evidence was merely conclusory and general in nature so it should not have been admitted.

(v) Mr. Zepeda suffered undue prejudice.

Fifth, the gang evidence was unduly prejudicial and should have been excluded. There was a very small portion of the testimony that actually pertained to the elements of Mr. Zepeda's charged crimes. The rest of the evidence created an atmosphere of fear for the jurors and a need to "protect the community" by ridding it of gang activity. Given the extensive gang related evidence, particularly where it was so general in nature and did not directly involve Mr. Zepeda, the prejudice of this evidence outweighed any possible value. The extent of the improperly admitted evidence was so great that the error in admitting this evidence cannot be considered harmless. A new trial is required.

(vi) The jury should have received a limiting instruction.

Sixth, even if this Court could conclude that it was not reversible error to admit the evidence, Mr. Zepeda would be entitled to a new trial for failure to present the jury with a limiting instruction. The law is plain and well settled. If character or other bad acts evidence is admitted for some permissible purpose (such as motive), "a limiting instruction must be given to the jury." *Foxhoven*, 161 Wn.2d at 175. *See also* WPIC 5.30. Here, at the very least, it was reversible error not to instruct the jury as to the limited purpose for considering gang related evidence.

(vii) Defense counsel was ineffective.

Finally, this Court should be aware that the theme throughout this trial and for this appeal is that defense counsel was wholly ineffective. In approximately 800 pages of trial transcript, there are only a few objections mounted by counsel, despite countless errors. While defense counsel properly objected to an amendment to the charges in the eleventh hour to add a gang enhancement, which the court sustained, defense counsel should have continued objecting to the gang-related evidence presented throughout trial on the grounds indicated above. And defense counsel should not have exacerbated the problem by introducing more irrelevant, prejudicial gang-related evidence.

To demonstrate ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). A defendant suffers prejudice if there is a reasonable probability that, but for counsel's performance, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The competency of counsel is based on the entire record, and there is a strong presumption that counsel's performance was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Here, the entire record is replete with errors by defense counsel, as will be addressed throughout this brief. As to the gang-related evidence, the evidence was not admissible, the necessary inquiry into the four factors was not completed, the “experts” were not properly qualified, and the necessary limiting instruction was not requested. Defense counsel’s performance was admittedly lacking in this trial. 1RP 560, 668.

Moreover, the deficient performance cannot be deemed trial tactics. It serves the defendant no benefit to fail to object to gang-related evidence and present a case that completely entwines the defendant with various gang affiliates when he himself is not linked to the gang for unlawful endeavors. It is difficult to imagine what tactic defense counsel’s actions, or inactions, might have served. Instead, defense counsel should have moved to exclude the gang-related evidence, or at the very least have the jury instructed on the limited scope for considering that evidence. Failure to do so constituted error that, as explained above, was unduly prejudicial to Mr. Zepeda. Justice demands a new trial in this case.

Issue 2: Whether the court erred by admitting the taped interview because it was impermissible extrinsic evidence of a prior inconsistent statement, it was irrelevant and highly prejudicial and no limiting instruction was given to the jury.

The court erred by admitting and publishing the taped interview of Mr. Zepeda by Detective Abarca. It was irrelevant as to any substantive issue in the case, and as character-impeaching evidence of a prior

inconsistent statement, it was improper extrinsic evidence under ER 608(b) and ER 613(b) that was unduly prejudicial. Furthermore, the court erred by failing to give a limiting instruction regarding the evidence. To the extent defense counsel once failed to object to the admission of this evidence or the instructional error, counsel was ineffective.

Relevant evidence is that “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.” ER 401. While relevant evidence is generally admissible, irrelevant evidence is inadmissible. ER 402. The admission or exclusion of evidence is reviewed for manifest abuse of discretion. *State v. Jones*, 95 Wn.2d 616, 628, 628 P.2d 472 (1981).

Evidence of pretrial misconduct may be admitted, even though not relevant as substantive evidence of the crime charged, in order to impeach a witness. *See* ER 608(b) and ER 613(b).⁴ In general, which rule applies depends on whether the misconduct, such as a prior false statement, is consistent or inconsistent with the witness’ testimony at trial. Specifically,

⁴ C.f., ER 404(b), which governs admissibility of prior misconduct that is offered as substantive evidence, such as to prove motive, intent, opportunity, plan, etc.. Whereas ER 608(b) or ER 613(b) govern in situations where the prior misconduct (e.g., an admittedly false prior statement that is inconsistent with trial testimony) is offered for impeachment purposes. ER 608(b); ER 613(b); *State v. Wilson*, 60 Wn. App. 887, 891-92, 808 P.2d 754, *review denied*, 117 Wn.2d 1010 (1991).

“If the conduct is a statement inconsistent with the witness' trial testimony, it may be proved by examination of the witness or extrinsic evidence. ER 613(b). If the conduct is not a statement inconsistent with the witness' trial testimony, but is nonetheless conduct probative of the witness' credibility, it may be proved by examination of the witness, but not by extrinsic evidence. ER 608(b).”

State v. Simonson, 82 Wn. App. 226, 234-35, 917 P.2d 599 (1996).⁵

If the witness admits the falseness of a prior statement, impeachment is complete and questioning ends. 1A WAPRAC § 43:3. But if the witness continues to deny the prior false and inconsistent statement, he may be further impeached by introducing extrinsic evidence of the prior inconsistent statement. *Id.*; ER 613(b). In other words, “ER 613(b) requires the witness have the opportunity either to admit the inconsistency and explain it (in which case the testimony of the prior statement is not admissible as evidence) or to deny it (in which case evidence of the prior inconsistent statement is admissible).” *State v. Spencer*, 111 Wn. App. 401, 408-09, 55 P.3d 209 (2002).

Regardless, even if questioning about the prior misconduct is permissible, “the court should apply the overriding protection of ER 403

⁵ See also *State v. Gregory*, 158 Wn.2d 759, 798-99, 147 P.3d 1201 (2006) (although extrinsic evidence is not admissible, it was permissible to impeach the witness by cross examining her regarding a prior lie to defense counsel about drug use related to that case); *Wilson*, 60 Wn. App. at 889-94 (quoting *State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980)) (“Any fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue”); *United States v. Reid*, 634 F.2d 469, 473 (9th Cir.1980), cert. denied, 454 U.S. 829 (1981) (defendant placed his credibility at issue when he took the witness stand; cross-examination of defendant concerning his own false statements in a letter was “entirely proper to impeach appellant’s general credibility.”)

(excluding evidence if its probative value is outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury).” *Wilson*, 60 Wn. App. at 893.

Additionally, it is well settled that “impeaching and contradictory statements are ‘admitted only to destroy the credit of the witnesses, to annul and not to substitute their testimony.’” *State v. Johnson*, 40 Wn. App. 371, 379, 699 P.2d 221 (1985). As such, where impeachment evidence is admitted “an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary.” *Id.* (citing *State v. Pitts*, 62 Wn.2d 294, 297, 382 P.2d 508 (1963)). In *State v. Johnson*, the court held that the witness’ prior inconsistent statements to police, which were oral and unsigned, could be admitted for impeachment purposes, but the jury had to be instructed that it could not consider the evidence for substantive purposes. *Id.* at 378. *See also* WPIC 5.30.

Here, defense counsel was ineffective⁶ for not objecting to the admission and publishing to the jury of the taped interview of Mr. Zepeda with Detective Abarca. The taped interview in and of itself was not relevant to any fact of consequence. Mr. Zepeda did not confess to any crime on that tape. He did not even admit being in Grandview until after

⁶ See rules above for establishing ineffectiveness of counsel.

the tape ended. 1RP 363-95. As such, the tape did not make it more or less probable that Mr. Zepeda was in Grandview at the time the alleged crimes occurred, let alone did that tape address any element of any of the crimes with which Mr. Zepeda was charged. The taped interview was completely irrelevant to any fact of consequence and should have been excluded under ER 402.

Instead, the tape was admitted presumably for the sole purpose of impeaching Mr. Zepeda. First, if that is the case, the prior misstatements should only have been introduced *after* Mr. Zepeda actually took the stand and became a witness. *Reid*, 634 F.2d at 473 (defendant placed his credibility at issue after he took the witness stand) (emphasis added). *See also State v. Horton*, 116 Wn. App. 909, 914-15, 68 P.3d 1145 (2003) (internal citation omitted) (“The foundation requirement was designed to give the witness a fair chance to explain any circumstances, such as duress or influence, that might excuse the inconsistency.”)

Regardless, ER 608(b) categorically precludes impeachment of witnesses’ character by extrinsic evidence, and ER 613(b) precludes impeachment regarding prior inconsistent statements with extrinsic evidence where the witness admitted that the prior inconsistent statement was indeed false, such as occurred here. Where Mr. Zepeda took the stand

as a witness, the State was permitted to inquire into the prior false statements on cross examination for impeachment purposes. But it was entirely unacceptable to admit the irrelevant taped interview as extrinsic evidence and publish it to the jury before Mr. Zepeda had a chance to take the stand, and it was further improper to admit the extrinsic evidence of the prior inconsistent statement after Mr. Zepeda acknowledged he had made the prior false statements while testifying. ER 608(b); ER 613(b).

In any event, the tape was inadmissible pursuant to ER 403 due to its highly prejudicial nature. In addition to the evidentiary errors indicated above, the interview should have been excluded because its probative value did not outweigh the unfair prejudice to the defendant. In a trial based on the defendant's credibility, it was unfairly prejudicial to publish this extrinsic interview evidence of the defendant lying where there was no substantive relevance to the tape and it was simply an extrinsic attack on Mr. Zepeda's character. Despite the jury being presented with testimony from 20 different witnesses, this case really came down to deciding whether it believed Mr. Smith or Mr. Zepeda regarding the alleged gun being pointed out the vehicle window by the defendant. Since credibility was key and there was no cumulative evidence of Mr. Smith's testimony that he saw Mr. Zepeda with a gun, the evidence of Mr. Zepeda previously lying to police was particularly prejudicial.

Finally, the court erred by failing to give a limiting instruction that the tape could not be considered by the jury for any substantive purpose. The prejudice in admitting the taped interview is exacerbated by the lack of limiting instruction. *See* WPIC 5.30.

Defense counsel was ineffective for failing to raise any of these evidentiary or instructional challenges. Given the above law, counsel's performance clearly fell below an objective standard of reasonableness. Had defense counsel raised any of these evidentiary or instructional objections, there is a reasonable probability that the results would have been different. The trial court implied that, even if the taped interview satisfied *Miranda*, that did not necessarily mean that all other hurdles to admissibility had been satisfied. *See* 1RP 128, 572. The court appeared to expect some sort of evidentiary challenge, yet defense counsel never offered one. *Id.*

Given that this case rested entirely on Mr. Zepeda's credibility, it was extremely prejudicial to publish a 30-minute tape of Mr. Zepeda's false statements, which he admitted throughout trial were false. This case was about a victim seeing what he expected to see given the gunfire he was hearing in the neighborhood, and a defendant trying to correct that witness's impression with his own testimony. Yet the jury had already chalked Mr. Zepeda up to being a liar before he even took the stand.

Moreover, this was no slight error that the jury could have overlooked. The prosecutor made Mr. Zepeda's prior false statements his focus during opening and closing argument (1RP 212, 676), and the prosecutor badgered Mr. Zepeda regarding the prior false statements (with no objection from defense counsel) even though the defendant admitted their falsity (1RP 611).

Mr. Zepeda was significantly prejudiced and the error cannot be deemed harmless. There is a reasonable probability that, but for defense counsel's inadequate representation, the outcome would have been different. Mr. Zepeda is entitled at the very least to a new trial.

Issue 3: Whether the court erred by failing to give a unanimity instruction as to the alternative means of intimidating a witness, particularly where there was not sufficient evidence of each means submitted to the jury or charged in the information.

Mr. Zepeda was denied his constitutional right to a unanimous jury verdict beyond a reasonable doubt as to the count of intimidating a witness. The jury was not instructed based on the means charged in the information, and it was not given a unanimity instruction on the alternative means offered by the State at trial. Mr. Zepeda's conviction of intimidating a witness should be reversed and dismissed for insufficient evidence on the means charged or, at a minimum, reversed and remanded for a new trial with proper instructions to guarantee a unanimous verdict.

“A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:

“(a) Influence the testimony of that person;

“(b) Induce that person to elude legal process summoning him or her to testify;

“(c) Induce that person to absent himself or herself from such proceedings; or

“(d) Induce that person not to report the information relevant to a criminal investigation... or not to give truthful or complete information relevant to a criminal investigation...”

RCW 9A.72.110(1).

“The right to a unanimous jury verdict includes the right to jury unanimity on the means by which the defendant committed the crime.” *State v. Boiko*, 131 Wn. App. 595, 598, 128 P.3d 143, *review denied*, 158 Wn.2d 1026 (2006) (citing *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980)). Each of the subsections (a) through (d) above is an alternative means of committing the crime intimidating a witness. *Id.* at 599; *State v. Brown*, 162 Wn.2d 422, 428-29, 173 P.3d 245 (2007); *State v. Chino*, 117 Wn. App. 531, 539, 72 P.3d 256 (2003). The State is generally required to elect between the alternative means before submitting them to the jury. See e.g. *Boiko*, 131 Wn. App. at 599. When multiple means are offered by the State as a way to convict, a jury unanimity instruction must be given or there must be substantial evidence supporting each alternative means

presented to the jury. *Id.* (citing *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994)). “Consequently, when reviewing an alternative means case, courts must determine whether any rational trier of fact could find each [alternative means] beyond a reasonable doubt.” *Id.*

When reviewing for sufficiency of the evidence, evidence is viewed in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *Brown*, 162 Wn.2d at 428 (emphasis added) (citing *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). In *Brown*, the State had charged the defendant with intimidating a witness by attempting to influence that person’s testimony pursuant to RCW 9A.72.110(1) subsection (a). *Id.* at 429-30. But “the only evidence presented, even when viewed most favorably to the State as required, show[ed] that [the defendant] threatened [the victim] in an attempt to prevent her from providing any information to the police [pursuant to subsection (d)].” *Id.* at 430. The Supreme Court explained:

“[Defendant’s] conviction must be reversed because the evidence [does] not support a conviction for intimidating a current or prospective witness through an attempt to influence her testimony by use of a threat- the only one of the four alternative statutory means of committing the crime that the information can be read to charge.”

Brown, 162 Wn.2d at 430. See also *State v. Wiley*, 57 Wn. App. 533, 536-37, 789 P.2d 106 (1990) (under former statute, which did not include subsection (d) above, defendant could not be convicted of intimidating a witness where neither a criminal investigation nor official proceeding had yet begun).

Finally, juries are only to be instructed on the offense charged in the information. *Chino*, 117 Wn. App. at 539 (“the crime upon which the jury is instructed is limited to the offense charged in the information,” which the Court may review for the first time on appeal due to the constitutional issue at stake) (citing *State v. Foster*, 91 Wn.2d 466, 471, 589 P.2d 789 (1979)). “This court reviews de novo whether a jury instruction accurately states the law without misleading the jury.” *Id.* at 538 (internal citations omitted). “Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.” *Id.*

Here, Mr. Zepeda was charged only with intimidating a witness under RCW 9A.72.110(1)(a), which pertains to threats for the purpose of influencing the testimony of a witness, not a prospective witness who may be influenced not to report a crime (compare subsection (d) of same statute). CP 106, 95. The criminal statute listed in the charging document

referred only to subsection (a) (*id.*), as did Mr. Zepeda's ultimate felony judgment and sentence (CP 9). Moreover, the language in the charging document did not adequately charge a crime under any of the other subsections, such as subsection (d), which pertains to threats against prospective witnesses where investigations have not yet ensued. The charging information did mention that the victim was a person the defendant had reason to believe may have information relevant to a criminal investigation (seemingly implicating part of subsection (d)), but nowhere in the charging language was the allegation that Mr. Zepeda threatened that person in "an attempt" to "induce that person not to report the information." RCW 9A.72.110(1)(d).

In other words, the only crime charged in the information was intimidating a witness in an attempt "to influence the testimony" of the alleged victim (see RCW 9A.72.110(1)(a)). CP 106. But there was not sufficient evidence of this charged crime; there was never any evidence that Mr. Zepeda's actions were an attempt to influence Mr. Smith's testimony. The only evidence relating to intimidating a witness pertained to Mr. Zepeda's actions before any criminal investigation had even begun, which does not sustain a conviction under subsection (a) of the statute. *Brown*, 162 Wn.2d at 430; *Wiley*, 57 Wn. App. at 536-37. Accordingly, Mr. Zepeda's conviction for intimidating a witness should actually be

reversed and dismissed for insufficient evidence to support the crime as charged and for improperly instructing the jury on means of intimidating a witness that were never sufficiently charged.

Regardless, Mr. Zepeda's constitutional right to a unanimous jury verdict was violated; the court was required to give a unanimity instruction since the State offered multiple means to the jury as a way of convicting Mr. Zepeda. Specifically, the jury was instructed that it could convict Mr. Zepeda if it found he threatened Mr. Smith in an attempt to influence his testimony or if he threatened Mr. Smith in an attempt to induce him not to report information relevant to a criminal investigation or to induce Mr. Smith not to give truthful or complete information relevant to a criminal investigation. CP 38, 39 (Instructions 11 and 12). The jury could convict under either alternative means in RCW 9A.72.110(1)(a) or (d). Therefore, a unanimity instruction should have been given.

Since the required unanimity instruction was not given, sufficient evidence would have to support each alternative means beyond a reasonable doubt. But, again, there was not sufficient evidence that Mr. Zepeda threatened Mr. Smith in an attempt to influence his testimony. Like in *Brown and Wiley, supra*, at most in this case was evidence of an attempt to induce Mr. Smith not to report what he had seen down the street to police. But since this fails to establish the alternative means related to

subsection (a) for influencing testimony, particularly where no official proceeding had yet begun,⁷ the constitutional error cannot be deemed harmless. Mr. Zepeda's conviction for intimidating a witness should be reversed and dismissed for insufficient evidence of the crime charged or, at a minimum, reversed and remanded for a new trial to guarantee a unanimous jury verdict.

Issue 4: Whether the court erred by adding the 36-month firearm enhancement to the unlawful possession of a firearm count.

The court erred by adding the 36-month firearm enhancement to Mr. Zepeda's count of unlawful possession of a firearm; RCW 9.94A.533(3)(f) specifically precludes this result.

A defendant generally cannot challenge a standard range sentence for the first time on appeal. *State v. Ammons*, 105 Wn.2d 175, 183, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986). He can, however, challenge the procedure under which the sentence was imposed; moreover, illegal or erroneous sentences may be challenged at any time. *Id.*; *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (internal citations omitted). *See also In re Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002) (a defendant cannot agree to punishment in excess of what the Legislature has established). And where defense counsel's performance fell below an

⁷ *Cf. In re Harris*, 94 Wn.2d 430, 435, 617 P.2d 739 (1980); *Wiley*, 57 Wn. App. 533; *State v. Pella*, 25 Wn. App. 795, 612 P.2d 8 (1980).

objective measure of reasonableness, resulting in prejudice to the defendant that could have otherwise been avoided, this Court should not deem a sentencing error waived. *McFarland*, 127 Wn.2d at 334-35.

Here, defense counsel was ineffective by deferring to the prosecutor's and Court's interpretation of the law with no independent research or analysis of his own. 2RP 30. Had counsel performed adequately and conducted any independent research, he could have alerted the trial court to the following law, including the exception to the firearm enhancement where it concerns unlawful possession of a firearm.

Where a defendant is convicted of certain felonies while in knowing possession of a firearm, his sentence may be enhanced. RCW 9.94A.533(3)(b) (enhanced 36 months for a class B felony such as second-degree assault, as here). "If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement." *Id.* However, "[t]he firearm enhancements in this section shall apply to all felony crimes except the following:... unlawful possession of a firearm in the first and second degree." RCW 9.94A.533(f) (emphasis added).

In other words, firearm enhancements cannot be applied to an unlawful possession of a firearm conviction. 13A Washington Practice

§109. In *State v. Berrier*, the Court agreed that the firearm enhancement could not be added to either the defendant's conviction for second-degree unlawful possession of a firearm (which was specifically precluded by the statute) nor defendant's conviction for unlawful possession of a short-barreled shotgun (due to equal protection reasons since the former was specifically precluded by the statute). *State v. Berrier*, 110 Wn. App. 639, 647-51, 41 P.3d 1198 (2002). The Court explained, "[t]he purpose of exempting certain crimes from the firearm sentence enhancements in former RCW 9.94A.310(3)(f) (2000) [now codified as RCW 9.94A.533(3)] appears to be that the possession or use of a firearm is a necessary element of the underlying crime itself." *Id.* at 650.

It would seem that the statute is plain on its face and specifically precludes application of the enhancement to the unlawful possession of a firearm conviction in this case. The parties proceeded under the mistaken assumption that RCW 9.94A.533(3) required the firearm enhancement to run consecutively to sentences on all counts, regardless of the type of underlying offense. But RCW 9.94A.533(3)(f) specifically precludes firearm enhancements being tacked onto the unlawful possession of a firearm under this section. This analysis is consistent with the plain language of the statute, the Washington Practice and case precedent. *State*

v. *Carter*, 138 Wn. App. 350, 356, 157 P.3d 420 (2007) (plain language in a statute does not require statutory construction.)

Assuming *arguendo* that this Court finds the statute ambiguous, the rule of leniency requires any ambiguities to be resolved in Mr. Zepeda's favor given the lack of contrary Legislative direction. *Carter*, 138 Wn. App. at 356 ("Under the rule of lenity, when a criminal statute is ambiguous and the legislative intent is insufficient to clarify it, the ambiguity must be resolved in favor of the accused.")

Here, there is no specific Legislative direction as to this particular issue. But it is worth noting that the Legislature has separately created harsher penalties for crimes involving guns, such as unlawful possession of a firearm, theft of a firearm, possession of a stolen firearm and drive-by shootings. To the extent other offenses involve a firearm but possession of a firearm is not a necessary element to convict, the Legislature has directed that those crimes also receive harsher penalties when they do involve a gun. *See* Notes following RCW 9.94A.510 regarding the Hard Time for Armed Crime Act (justifying firearm enhancements because armed criminals pose an increasing and major threat and because the former law did not distinguish between felonies committed with or without a gun). In other words, Legislative intent suggests that the firearm enhancements were meant to enhance penalties for those crimes that could

be committed with or without a gun, such as second-degree assault, but not enhance the sentence for unlawful possession of a firearm (which already has a relatively harsher penalty since possessing a firearm is already an element of the offense).

In sum, while the 36-month firearm enhancement could run consecutive to the assault to which it attached, RCW 9.94A.533(3)(f) precluded running it consecutive to the sentence for unlawful possession of a firearm. If this Court determines that Mr. Zepeda's conviction should be affirmed, it is still necessary to remand for resentencing.

Issue 5: Whether the court erred in calculating Mr. Zepeda's offender score by not counting the second-degree assault and intimidating a witness counts as the same criminal conduct.

Mr. Zepeda's offender score was miscalculated. He should have had one less point on each of the counts because the second-degree assault and intimidating a witness counts constituted the same criminal conduct.

Defense counsel was ineffective⁸ for failing to argue that the second-degree assault and intimidating a witness counts constituted the same criminal conduct for sentencing purposes. Counsel's failure to make this argument cannot be considered tactical. Mr. Zepeda would have been entitled to a lesser standard range sentence, and he would not have been exposed to any adverse consequences.

⁸ The test for effectiveness of counsel has been set forth above in previous sections.

When calculating an offender score, both current offenses and prior convictions can add points for sentencing purposes. RCW 9.94A.589(1). But those prior or current convictions that involve the “same criminal conduct” are calculated as one crime for sentencing purposes. RCW 9.94A.589(1)(a). Two or more crimes constitute the same criminal conduct when they have the “same criminal intent, are committed at the same time and place, and involve the same victim.” *Id.*; *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006).

Here, trial counsel erred by failing to argue that the intimidating a witness and second-degree assault of Brad Smith constituted the same criminal conduct for purposes of calculating Mr. Zepeda’s offender score. There can be no doubt that the two offenses occurred at the same time and place with the same victim. Both offenses allegedly occurred when Mr. Zepeda reached his arm out the window with a gun pointed at Mr. Smith and told him in choice language to stop taking pictures. Since both offenses arose from conduct occurring at the same time and place with the same victim, the only remaining question for these purposes is whether both offenses involved the same criminal intent.

In reviewing criminal intent, courts consider objectively how intimately related the crimes are, whether the criminal objective changed substantially between the crimes, and whether one crime furthered the

other. *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). A single intent exists if there is no substantial change in the nature of the criminal objective. *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990).

Here, Mr. Zepeda's criminal intent did not change between the second-degree assault and intimidating a witness offenses. Assuming for these purposes only that this Court finds sufficient evidence, the evidence establishes two offenses constituting the same criminal objective. If Mr. Zepeda did point a gun out the car window at Mr. Smith and tell him to stop taking pictures and that he would kill him, the intent for both second-degree assault and intimidating a witness was the same. Viewed objectively, the crimes were substantially and intimately related – both were allegedly conducted in an attempt to instill fear in Mr. Smith so that he would stop taking Mr. Zepeda's picture. There was not a substantial change in the nature of the criminal objective between offenses. As such, the criminal intent was the same.

Since the criminal intent, time and place of the offenses, and the victim were all the same, the second-degree assault and intimidating a witness offenses both constituted the same criminal conduct for purposes of calculating the defendant's offender score. Given this, defense counsel was ineffective for failing to raise the challenge, and Mr. Zepeda's offender score should be recalculated with one less point on each count.

Issue 6: Whether defense counsel's failure to object to countless other errors throughout trial prejudiced Mr. Zepeda.

As previously argued, this record is replete with defense counsel's ineffectiveness, and further examples of that ineffective representation are summarized herein.

Again, to demonstrate ineffective assistance, Mr. Zepeda must show (1) deficient performance and (2) resulting prejudice. *McFarland*, 127 Wn.2d at 335. In general, performance is deficient when it falls below an objective standard of reasonableness, but not when it is undertaken for legitimate reasons of trial strategy or tactics (i.e., for the defendant's ultimate benefit). *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Prejudice requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Here, defense counsel was ineffective for failing to present the court with appropriate jury instructions (1RP 343) and failing to object to the numerous evidentiary and sentencing errors set forth above. In addition, counsel was ineffective when he failed to make countless objections during the course of trial. A mere sampling of some of the more prejudicial errors is now summarized as follows.

(i) Defense counsel failed to object when the prosecutor questioned Mr. Smith about his irrelevant prior career as a fire chief, participation in

gang prevention committees and other good deeds in the community to try to rid the area of gangs. (1RP 272-74) In *State v. Smith*, the Court held that it was reversible error to admit irrelevant witness background evidence, such as officer's awards and commendations, that effectively bolstered the witness' credibility because it violated ER 401, ER 608, ER 702 and constituted prosecutorial misconduct. *State v. Smith*, 67 Wn. App. 838, 842-45, 841 P.2d 76 (1992). Here, the extensive questioning about Mr. Smith's good Samaritan background was improper and counsel was ineffective for failing to object to the bolstering of the single most important witness against Mr. Zepeda (the only witness who believed he saw Mr. Zepeda with a gun).

(ii) Defense counsel failed to object or move to strike Leticia Brito's identification of Mr. Zepeda based on what she saw on television as opposed to her own personal observations. 1RP 262-63. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." ER 602. Furthermore, hearsay is generally inadmissible. ER 802. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

Here, it was entirely improper for Leticia Brito to identify Mr. Zepeda based on what she had seen on the news rather than her own independent knowledge. Ms. Brito's statements should not have been admitted for the truth of the matter, and they did not fit within any other known exception for allowing such hearsay. A timely objection and curative instruction would likely have been sustained; defense counsel was ineffective for failing to make the objection.

(iii) Defense counsel failed to object to Mr. Smith's inadmissible testimony that 713 W. 5th Street was known for a lot of "Reds" gang activity. (1RP 276) First, as established above, the gang-related evidence should not have been admitted in the first place. In any event, there was no foundation laid for this particular testimony by Mr. Smith. Specifically, there was no foundation as to how or why Mr. Smith believed there to be gang activity at that particular address, which violated the ER 602 requirement that witnesses only testify from personal knowledge. Also, no foundation was laid to qualify Mr. Smith to express such an opinion under either ER 701 (opinion testimony of lay witnesses) or ER 702 (opinion testimony of experts). Counsel's failure to object was ineffective, and the evidence did prejudice Mr. Zepeda by once again clouding the charged issues with irrelevant, inflammatory gang evidence.

(iv) Defense counsel failed to object to the pictures and surveillance system being admitted as irrelevant and unnecessarily cumulative of other trial testimony (1RP 283, 287). This evidence was inadmissible as set forth above regarding irrelevant gang-related evidence. Furthermore, it was inadmissible under ER 402 and ER 403 as a needless presentation of irrelevant evidence that was cumulative to the Smiths' and other witness' testimony. The witnesses had already testified that there was a large gathering of people, that Mr. Zepeda was present and that he was helped from the street where he had fallen into the car that drove by the Smiths' house. Neither the photographs nor the surveillance system captured the key question in this case: whether Mr. Zepeda had a gun or pointed it at Mr. Smith. The evidence was thus not probative of any relevant fact and, as background evidence, it was unnecessarily cumulative of the other witness' testimony.

(v) During defense counsel's cross examination of Detective Abarca, the witness stated that he did not know of Mr. Zepeda being in a gang because the defendant "had been in jail." (1RP 399-400) This testimony about Mr. Zepeda being in jail was unresponsive, irrelevant and unduly prejudicial. It was inadmissible pursuant to ER 401; i.e., it did not make the existence of any fact of consequence more or less probable. And it violated ER 403 as unfairly prejudicial in that it was "likely to provoke

an emotional response rather than a rational decision....” *State v. Johnson*, 90 Wn. App. 54, 62, 950 P.2d 981 (1998). In other words, this irrelevant, unresponsive testimony was likely to provoke an emotional response from the jury that placed unfair weight on Mr. Zepeda’s prior criminal history. As such, defense counsel should have moved to strike this unresponsive testimony. 14A WAPRAC § 34:15 (“An unresponsive answer is subject to objection and a motion to strike by examining counsel.”) Counsel was ineffective for failing to make the proper objection and move to strike.

(vi) Defense counsel failed to object to the prosecutor’s closing argument that the defendant’s trial testimony was the same as his lies in his taped interview with the detective (1RP 676). “In general, a prosecutor errs by expressing a ‘personal opinion about the credibility of a witness and the guilt or innocence of the accused... Just as it ‘is improper for a prosecutor personally to vouch for the credibility of a witness,’ it is improper for a prosecutor to personally vouch against the credibility of a witness.” *Horton*, 116 Wn. App. at 921 (internal quotations omitted). Here, the prosecutor essentially referred to the defendant as a liar during closing argument. Even though Mr. Zepeda acknowledged that he had made the prior false statement (such that extrinsic evidence and further questioning regarding the prior false statement was inadmissible, *see above*), the prosecutor nonetheless vouched against Mr. Zepeda’s

credibility during closing argument. The prosecutor said that Mr. Zepeda's trial testimony was the same as his statements on the videotape (1RP 676), and, of course, both parties agreed that Mr. Zepeda was lying on the tape. Thus, the prosecutor's statement was functionally equivalent to expressing an opinion that the defendant was generally a liar. This was improper, was grounds for an objection, and prejudiced Mr. Zepeda as to the most crucial determination the jury had to make in this case: credibility of the defendant.

Issue 8: Whether the cumulative error doctrine requires a new trial.

If there was ever a case where the cumulative error doctrine demanded reversal, this is it. Mr. Zepeda maintains that each error argued above does independently warrant reversal. But if this Court finds that the errors above are not prejudicial enough to warrant reversal on their own, the cumulative effect of those errors certainly requires reversal.

The cumulative error doctrine applies "when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). "[T]he final measure of error in a criminal case is not whether a defendant was afforded a perfect trial, but whether he was afforded a fair trial." *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968); *State v. Coe*, 101 Wn.2d 772, 788-89, 684

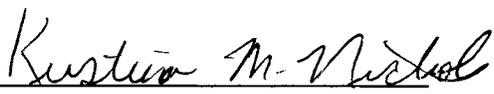
P.2d 668 (1984).

The sheer volume of errors in this case shows that Mr. Zepeda did not receive his constitutionally entitled right to a fair trial. There was a pattern of significant errors and ineffectiveness of defense counsel throughout this trial. The only possible remedy can be to reverse Mr. Zepeda's convictions.

F. CONCLUSION

Based on any one of the numerous errors argued above, or their cumulative effect, Mr. Zepeda's convictions should be reversed. If this Court agrees that sufficient evidence did not support Mr. Zepeda's intimidating a witness count, that conviction should be reversed and dismissed. At a minimum, this matter should be reversed and remanded for a new trial followed by proper sentencing.

Respectfully submitted this 18 day of March, 2010.


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