

NO. 30411-6-III

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Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FABIAN ARREDONDO,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii-vi
I. <u>ASSIGNMENTS OF ERROR</u>	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u>	1
1. The court violated Appellant’s constitutional public trial right	1
2. The trial court abused its discretion when it allowed the introduction of evidence under ER 404(b).....	1
3. Appellant’s Sixth Amendment rights were violated when the court denied his motion to question a State’s witness about alleged mental health issues.....	1
4. The State presented insufficient evidence the acts committed by Appellant were to benefit a criminal street gang	1
5. The court did not properly inquire of the Appellant at the time of sentencing regarding his ability to pay his legal financial obligations.....	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u>	1
1. There was no violation of the right to a public trial.....	1
2. The trial court did not abuse its discretion when it allowed the admission of ER 404(b) testimony	1
3. The court did not err when it denied Appellant’s motion to question a State’s witness regarding alleged mental health issues	1
4. There was sufficient evidence to support the gang aggravator	1
5. This issue has been raised for the first time on appeal and therefore it is not properly before this court, see State v. Duncan slip opinion 29916-3-III published March 14, 2014 ..	1
II. <u>STATEMENT OF THE CASE</u>	1
III. <u>ARGUMENT</u>	2
<u>RESPONSE TO ALLEGATION ONE</u>	2

RESPONSE TO ALLEGATION TWO –
ADMISSION OF ER 404(b) EVIDENCE 16

RESPONSE TO ALLEGAGTION THREE – COURTS EXCLUSION
OF ALLEGED MENTAL HEALTH ISSUES..... 21

RESPONSE TO ALLEGATION FOUR-SPECIAL VERDICT 25

RESPONSE TO ALLEGATION FIVE – LEGAL FINANCIAL 34

IV. CONCLUSION 34

TABLE OF AUTHORITIES

PAGE

Cases

Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801,
828 P.2d 549 (1992) 2

In re Personal Restraint of Orange, 152 Wn.2d 795,
100 P.3d 291(2004) 14

State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997)..... 2

State v. Beskurt, 176 Wn.2d 441, 293 P.3d 1159, 1163 (2013) 13

State v. Bluehorse, 159 Wn.App. 410, 248 P.3d 537 (2011).....27, 29-30

State v. Bone-Club, 128 Wn.2d. 254, 906 P.2d 325 (1995) 10, 14

State v. Brightman, 155 Wn.2d. 506, 122 P.3d 150 (2005)..... 10, 14

State v. Brockob, 159 Wash.2d 311, 150 P.3d 59 (2006)..... 2

State v. Brooks, 45 Wn.App. 824, 727 P.2d 988 (1986) 32

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990).....32-33

State v. Campos-Cerna, 154 Wn.App. 702, 226 P.3d 185 footnote 8,
(Wash.App.Div 2 2010)..... 25

State ex rel. Carrol v. Junker, 79 Wash.2d 12, 482 P.2d 775 (1971)..... 33

State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957) 14

State v. Davis, 41 Wn.2d. 535, 250 P.2d 548 (1952)..... 10

State v. Dejarlais, 88 Wash.App. 297, 944 P.2d 1110 (1997),
aff'd, 136 Wash;2d 939, 969 P.2d 90 (1988)..... 32

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980)..... 32

TABLE OF AUTHORITIES (continued)

	PAGE
<u>State v. Devin</u> , 158 Wn.2d. 157, 142 P.3d 599 (2006).....	12
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	18
<u>State v. Duncan</u> , slip opinion 29916-3-III, published on March 25, 2014.....	1, 34
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006).....	14
<u>State v. Foxhoven</u> , 161 Wash.2d 168, 163 P.3d 786 (2007).....	18
<u>State v. Froehlich</u> , 96 Wn.2d 301, 635 P.2d 127 (1981).....	21-23
<u>State v. Gogolin</u> , 45 Wn.App. 640, 727 P.2d 683 (1986).....	18
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	32
<u>State v. Gresham</u> , 173 Wn.2d 405, 269 P.3d 207 (2012)	18
<u>State v. Grisby</u> , 97 Wn.2d 493, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211 (1983).....	20
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	2
<u>State v. Hill</u> , 83 Wn.2d 558, 520 P.2d 618 (1974).....	33
<u>State v. Kirkman</u> , 159 Wn.2d. 918, 155 P.3d 125 (2007).....	10
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995)	18, 20
<u>State v. Marsh</u> , 126 Wn.142, 217 P. 705 (1923).....	10, 14
<u>State v. Monday</u> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	20
<u>State v. Monschke</u> , 133 Wn.App. 313, 135 P.3d 966 (2006)	33
<u>State v. Moreno</u> , 294 P.3d 812 (Wash.App.Div. 3 2013).....	25

TABLE OF AUTHORITIES (continued)

	PAGE
<u>State v. Moreno</u> , 173 Wn.App. 479, 294 P.3d 812 (2013)	27, 30, 31
<u>State v. Robertson</u> , 88 Wash.App. 836, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998)	2
<u>State v. Rodriguez</u> , 163 Wn.App. 215, 259 P.3d 1145 (Wash.App.Div. 3 2011)	25
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	32
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1998)	11
<u>State v. Thompson</u> , 151 Wn.2d 793, 92 P.3d 228 (2004)	21
<u>State v. Trout</u> , 125 Wn.App. 313, 103 P.3d 1278 (Wash.App.Div. 3 2005)	11
<u>State v. Watt</u> , 160 Wn.2d 626, 160 P.3d 640 (2007)	21
<u>State v. Webb</u> , 162 Wn.App. 195, 252 P.3d 424 (2011)	33
<u>State v. WWJ Corp.</u> , 138 Wn.2d 595, 980 P.2d 1257 (1999)	10, 11
<u>State v. Yarbrough</u> , 151 Wn.App. 66, 210 P.3d 1029 (2009)	33
<u>State v. York</u> , 50 Wn.App. 446, 749 P.2d 683 (1987)	20
 Federal Cases	
<u>Estes v. Texas</u> , 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d. 543 (1965)	16
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	32

TABLE OF AUTHORITIES (continued)

	PAGE
<u>United States v. Al Smadi</u> , 15 F.3d 153, 155 (10 th Cir. 1994).....	16
<u>United States v. Mechanik</u> , 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986)	12
<u>United States v. Shyrock</u> , 342 F.3d 948, 974 (9 th Cir.2003).....	16
 Rules and Statutes	
CrR 6.12(c)	23
ER 404(b)	1, 16
RAP 2.5(a)	10, 14
RAP 2.5(a)(3)	9-11
RAP 10.3(b)	2
RCW 5.60.050(1)	23
RCW 9.94A.535(3)(aa).....	27
RCW (.94A.535(3)(s)	33

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. The court violated Appellant's constitutional public trial right.
2. The trial court abused its discretion when it allowed the introduction of evidence under ER 404(b).
3. Appellant's Sixth Amendment rights were violated when the court denied his motion to question a State's witness about alleged mental health issues.
4. The State presented insufficient evidence the acts committed by Appellant were to benefit a criminal street gang.
5. The court did not properly inquire of the Appellant at the time of sentencing regarding his ability to pay his legal financial obligations.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no violation of the right to a public trial.
2. The trial court did not abuse its discretion when it allowed the admission of ER 404(b) testimony.
3. The court did not err when it denied Appellant's motion to question a State's witness regarding alleged mental health issues.
4. There was sufficient evidence to support the gang aggravator.
5. This issue has been raised for the first time on appeal and therefore it is not properly before this court, see State v. Duncan slip opinion 29916-3-III published March 14, 2014.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer specific section of the verbatim report of proceeding in the body of this brief.

III. ARGUMENT.

RESPONSE TO ALLEGATION ONE

Appellant did not objected in the trial court nor does he now assign error to any of the trial court's written or oral findings of fact nor has he challenged any of the conclusions of law. RP 103-105, CP 111-17. Therefore this court will consider the finding verities on appeal. State v. Brockob, 159 Wash.2d 311, 343, 150 P.3d 59 (2006) (citing State v. Hill, 123 Wash.2d 641, 647, 870 P.2d 313 (1994)). See also Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992), unchallenged findings of fact are verities on appeal. Further, this court may in addition, even where a trial court's written findings are incomplete or inadequate, look to the trial court's oral findings to aid review. State v. Robertson, 88 Wash.App. 836, 843, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998). This court reviews the trial court's conclusions of law de novo. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

The findings of fact and conclusions of law, which are set out in full below, in conjunction with the oral rulings, the testimony and the exhibits which were admitted at the remand hearing make it absolutely clear that there was no violation of the rights to a public trial under any section of the Washington State Constitution.

This allegation can be laid to rest based on the testimony of one officer at the reference hearing. Lt. Winters stated "...The public can for court (sic), the public entrance was open until 5." (RP Ref. pg. 14) That and that alone clearly dispels this issue. However the State continued the hearing and throughout that hearing it was made crystal clear that there had been no impingement on the right of the Appellant nor the public. This officer who was in charge of security was the officer who created the signs that were posted. Exhibit L filed with this court is unassailable; it clearly reads in very large black font "COURT HOUSE CLOSSES AT 4 PM. AUDITOR @ 3:30 COURT HEARINGS UNTIL 5 PM." The lieutenant further testified as follows;

Q And which signs would have been posted at the public entrance to the courthouse in October of 2011 when the Fabian Arredondo trial was in (inaudible).

A Both.

Q Alright, and do you recall what the security officer posted at the public entrance before 5:00 or until 5:00.

A I'm sorry, could you restate the question?

Q Sure. Was a security officer posted at the public entrance until 5 p.m.?

A Yes, we had DOS personnel there until 5 every day, every week day.

Q Would the public entrance have remained open until 5 p.m. if a session of trial ran until 5 p.m.?

A Yes.

Q If a session of trial went later than 4 p.m., would a member of the public who wanted to see the Fabian Arredondo trial have been admitted to the courthouse and directed to a courtroom by a security officer?

A Absolutely. (RP Ref. pg. 16-17)

During questioning defense counsel had a series of questions regarding the public's perception of the sign. Lt. Winters was questioned about whether the sign would stop people from entering even though it clearly stated that Court Hearings were open until "5 pm." His response mirrored that of Sgt. Clifford indicating that "...if somebody were to read that whole sign, they would see that the court goes until 5, unless it was after 5. In fact, many times -- usually after 5, people continue to try the door and to walk in and ask the DOS (Department of Security) officers there. We get that asked many times." (RP Ref. pg 18) The reference hearing is replete with testimony which beyond any doubt refutes the allegation that the some sort of "de facto" closure of the courthouse resulted in an actual closure of the courtroom. The court inquired about the signs on its own;

THE COURT: Lieutenant, I have a quick question for you. The location of these signs, both the one on the outside of the exterior door and then the one on the interior by the door, if somebody was reading, particularly the one, if somebody was reading the sign that's on the exterior door,

would they also be visible or be able to see the security officers?

A Yes.

THE COURT: So, if somebody had an inquiry or didn't understand -- the door's unlocked, they could enter and ask?

A That's correct.

The holding of the trial court, unchallenged before this court, is that not only was the courtroom not closed but also that no one was denied access to this courtroom. This court must note that part of the alleged error is based on the fact that Appellate counsel has addressed the times where the court allegedly went past 4:00 pm based on time stamps or indications of the time in the record which are inaccurate. The court states throughout the reference hearing that the various clocks used in the record are not the clocks that the trial court judge used to determine the times in the court. (VRP Ref. pg 2, 45-47, 95, 96-99. Judge McCarthy stated;

Let me start off this part of the analysis, I guess, with the JAVS issue. And as soon as this case came back before me and I saw the transcript and I -- it was immediately apparent to me what this whole issue rested upon a faulty base of the time stamp, if you would, on the JAVS recording. It has been my experience that the JAVS system for whatever reason doesn't have -- is not synced with real time. It's off by a significant amount of time. I mean, not an hour but a significant amount of time, and in this particular matter, if you just look at the Clerk's minutes and you look at the JAVS times that are on the transcript and obviously derived from the JAVS recording itself, there's a discrepancy there.

Now, the other discrepancy is with these clocks that are in the courtroom. The real time -- this clock right here says it's 2:11 p.m., and -- or 2:12 p.m., and it is in fact 2:07, so

that's a five or six -- five minute discrepancy right there. I did go up to Courtroom 2 over the noon hour and tried to see -- and did see what their -- the clock in that courtroom says, and again, it's off by four or five minutes. None of the -- you know, other judges have made this observation and I make the same myself is that there's no two clocks in this building that agree with each other as to what time it is. And so I always go when I'm timing things, I go off the computer or I go off my wristwatch, one or the other, but -- so the times that -- and one of the other issues is where is the Clerk getting the time as well for the Clerk's minutes and so is that coming off the clock on the wall, is it coming off the computer? I guess we're not quite sure as to where it's coming from, but it's, you know, it's a little bit troubling and part of the problem is that we're basing -- the big part of this issue is reflected in minutes, you know. Was it 4:01 or was it 4:02 or was it 4, you know
(RP Ref. 97-8)

On the one day that the trial actually went past 4:00 pm on the clock monitored by the court the court conducted a "Bone Club" analysis even though the courthouse was physically open to the public for trials until whatever time the court actually adjourned. The findings and conclusions are as follows;

FINDINGS OF FACT

- 1.** The court hereby incorporates by reference the testimony and exhibits introduced at the reference hearing, as well as the Court's oral comments made at the close of the June 27, 2013, hearing and made at the hearing on June 6, 2013.
- 2.** On October 3, 2011, a secure entrance became the only means for the public to enter and exit the Yakima County courthouse. All members of the public had access to the courthouse through this secure entrance, which is located on the east side of the courthouse facing North Second Street. Entering the courthouse, a member of the public proceeded to metal detectors where officers of the Yakima County Department of

Security screened members of the public for weapons before allowing them access to the courthouse interior.

3. On October 10, 2011, the court hearings concluded before 4 p.m. because the clock or time listed on the transcript for October 10, 2011 was in error because no two clocks in this courthouse have the same time. The time stamp on the JAVS recording system, which is reflected in the report of proceedings, is not synced to the actual time and is off by a significant amount. There is a discrepancy in the clerk's minutes in comparison to the JAVS times on the transcript. The courtroom clocks are also ahead by about six minutes. The court used the bench computer, which accurately reports the time, to keep track of the hour. The court session on October 10, 2011 was concluded at or before 4 p.m.

4. On October 11, 2011, the judge anticipated that court may have to conclude after 4 p.m.. Consequently, the judge conducted a Bone Club analysis. There was a compelling need or interest in concluding jury selection that day, even if it meant going past 4 PM., so as not to delay another homicide trial that was scheduled to start the next day. The design of this courthouse does not allow for two large jury pools at the same time. The space created for the accommodation for the next jury pool would preserve the speedy trial rights of the defendant whose jury selection was set to commence on October 12.. The court made a public announcement about this and there was no objection. The method selected was the least restrictive for public access because the court went past 4 pm. for only a few minutes. The competing interests were weighed by the court. If the public right to trial was curtailed at all, it was just for minutes only and for an innocuous part of the trial. This part of the trial was the conclusion of jury selection process where the selected jurors, after the peremptory challenges had been made, were sworn in while the remaining jurors were given instructions with regards to calling in for jury duty that evening .. The court finds that the amount of time between the jury being sworn and the adjournment was only for a few minutes. On the 11th of October, the court was recessed at 4:10 not at 4:17, which is the incorrect time, from the JAVS recording noted in the report of proceedings. The Court's concern about going past 4 PM related to the policy, then in force, that the court would be responsible for any overtime costs incurred by the Department of Security.

5. In October 10, 2011 and October 11, 2011, the public entrance of the Yakima County Courthouse was not closed or locked at 4:00 p.m. because a courtroom was still in session in which case security officers kept the public entrance open until all courts were no longer in session for that day. Yakima County's policy was that the public entrance remained open as

long as any courtroom was in session. The courts and security officers followed this policy.

6. To implement this policy, late in the afternoon every day, security officers checked to determine which courtrooms remained in session. Security officers used various means to check. They visually checked courtrooms. They asked courtroom clerks if courtrooms were still in session. From their office or where they were situated, the security officers were stationed near the public entrance to see if anyone would come in after normal court hearings were over.

7. On October 11, 2011, the public entrance of the Yakima County Courthouse was open at all times when the Fabian Arredondo trial was in session. At no time was the public entrance of the Yakima County Courthouse closed while the Fabian Arredondo trial was in session. Security officers ensured that the public entrance to the Yakima County Courthouse remained open and that all members of the public had access to the courtroom while the Fabian Arredondo trial was in session. Even though other county offices may have been closed, security officers admitted any member of the public who came to the public entrance if he or she wanted to attend the Fabian Arredondo trial and directed him or her to the courtroom. No member of the public who desired to attend the Fabian Arredondo trial was prevented from attending any session.

8. A sign was posted at the public entrance to the Yakima County Courthouse during October 2011 when the Fabian Arredondo trial was in session. Those signs, admitted as exhibits, advised that the courthouse closed at 4:00 p.m. but court closed at 5:00 p.m. As stated in finding of fact 5, however, the public entrance of the courthouse always remained open if a courtroom was still in session despite the sign.

9. No member of the public was deterred by the sign described in finding of fact 8 from entering the Yakima County Courthouse and attending any session of the Fabian Arredondo trial. In the security officers' experience, members of the public always tried the door despite the sign before walking away from the public entrance. No member of the public was barred from entering the courthouse or attending any session of the Fabian Arredondo trial by the sign. For the twenty one months since the policy has been implemented, there was accommodation made to anyone who came to the door of the courthouse and was allowed in.

10. The defendant brought an individual named Crystal Mendoza, who testified that she was present, presumably during the first day of jury selection. She testified that she was asked by someone who may have worked for the court "to step outside." She did not know if the person was a male or female. She believed it may have been a judge or the bailiff but

she was not sure. During cross-examination, she testified that it was not this particular judge who asked her to step outside. This particular judge was the same judge who presided over the entire trial. The bailiffs during the jury selection process both testified that they would only ask someone to step outside if they were disruptive or at the direction of the court. They testified that there was no disruption during this phase of the trial nor was a directive by the court to excuse someone. They also testified that during this phase of the trial, a large number of potential jurors (about 100) were brought in and the bailiffs would have made accommodations (extra chairs) for the defendant's family or other members of the public who wanted to come in and be in the courtroom. The bailiffs testified that there was more than enough room for over 100 jurors in that particular courtroom. Both bailiffs testified that they did not ask anyone to step outside or leave the courtroom during those two days of jury selection. They both testified that they would not and did not exclude anyone from the open courtroom. Ms. Mendoza's recollection was vague because she could not remember when, who or what she was told or the circumstances in which this supposedly occur. The court finds that the bailiffs, or anyone else, did not exclude Ms. Mendoza from the courtroom.

Based on these findings of fact, the court enters the following:

CONCLUSIONS OF LAW

- 1.** The court has jurisdiction over the parties and the subject matter herein.
- 2.** Fabian Arredondo's right to a public trial under article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution was not violated.
- 3.** The public's right to open administration of justice under Article I, section 10 of the Washington State Constitution was not violated. The public's right to an open trial under the First Amendment to the United States Constitution was not violated.

It is clear that the recent decisions that have held that any claimed courtroom closure may be raised on appeal, even if there was no objection below, are based on a case superseded by RAP 2.5(a)(3) and are incorrect and harmful. This Court should not continue this course and it should

apply RAP 2.5(a)(3) to public trial claims as it has with most other claims of this nature raised for the first time on appeal.

Generally an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is truly constitutional, and manifest. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). “Failure to object deprives the trial court of [its] opportunity to prevent or cure the error.” State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The defendant must show both a constitutional error and actual prejudice to his rights. Id. at 926-27. To demonstrate actual prejudice, there must be a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” Id. at 935.

Many of the recent cases that have concluded that public trial claims are exempt from the rule rely upon a pre-rule case, State v. Marsh, 126 Wn. 142, 217 P. 705 (1923). See State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (citing Marsh only); State v. Brightman, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005) (citing Bone-Club only). While courts did allow some constitutional claims to be raised for the first time on appeal in criminal cases at the time of the decision in Marsh the Rules of Appellate Procedure replaced that common law practice with RAP 2.5(a). State v. WWJ Corp., 138 Wn.2d 595, 601, 980 P.2d 1257 (1999).

The adoption of RAP 2.5(a)(3) by the courts of review in this state limited the ability of a defendant to obtain review of a claim of constitutional error. Under the rule simply identifying a constitutional issue was no longer sufficient to obtain review of an issue not litigated below. State v. Scott, 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988). Review is not warranted if either; the record from the trial court is insufficient to determine the merits of the constitutional claim, or if the defendant does not establish practical and identifiable consequences in the trial. WWJ, 138 Wn.2d at 602-03.

State v. Trout, 125 Wn.App. 313, 103 P.3d 1278 (Wash.App. Div. 3 2005);

The general rule is that we will not review issues raised for the first time on appeal. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). There is an exception--a narrow exception--for certain constitutional questions, however. State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). But the error must meet the criteria of a "manifest error affecting a constitutional right." McFarland, 127 Wn.2d at 333 (quoting RAP 2.5(a)(3)). This exception is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal. Indeed, criminal law has become so largely constitutionalized that any error can easily be phrased in constitutional terms. Judge Marshall Forrest thoughtfully outlined the problem:

RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.

Stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). In this instance, this “rule” is incorrect because it contradicts the spirit and letter of the Rules of Appellate Procedure adopted by this Court. It is harmful in several areas including: the trial court is denied the opportunity to correct any error; if the claim of error is valid and could have been corrected, the public is unnecessarily denied the opportunity to view the original court proceedings; if the claim of error is valid and could have been corrected, a retrial may be required that should have been unnecessary. The costs of reversal are substantial: it forces jurors, witnesses, courts, the prosecution, and the defendants to repeat a trial that has already been conducted all the while the passage of time may render retrial difficult, even impossible; it compromises the prompt administration of justice. United States v. Mechanik, 475 U.S. 66, 72, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986). It may in theory entitle the defendant only to retrial, but in practice it may bestow complete freedom from prosecution. Id. The societal costs of reversal are a necessary consequence when an error has deprived a defendant of a fair determination of guilt or innocence but the balance of interest tips the other way when an error has had no effect on the outcome of the trial. Id.

As stated by Chief Justice Madsen in her concurring opinion in State v. Beskurt 176 Wn.2d, 441, 444 293 P.3d 1159, 1163 (2013);

I recognize that the court has previously concluded that the failure to object to closure does not preclude appellate review of a claim that the defendant's right to a public trial was violated. However, in doing so, the court followed case law that has been superseded by a court rule. We should make the necessary correction and recognize that just as in the case of other important constitutional rights, review of claimed error involving the right to a public trial should proceed in accord with the Rules of Appellate Procedure. When constitutional error is claimed and no objection was made at trial, RAP 2.5(a)(3) controls and permits review only when the claimed error is manifest error affecting a constitutional right. Under this standard, review is inappropriate in this case.

Appellant did not object or raise before the trial court the fact that some of the proceedings had gone past the 4:00 PM time as was discussed. The most probable reason is that he knew that even though the court stated that the courthouse closed the policy and practice as demonstrated in the remand hearing was for the security entrance, the sole means of entering the building, remained open and there were signs to that effect in place at the time of this trial. There is nothing in the initial record nor in the record made on remand that would indicate that one single citizen was denied entry by this claimed "de facto" closure. The State is at a loss to understand where these challenges will end. Is the next allegation going to be based on the State's alleged failure to plow the roads on a snowy day

thereby “de facto” closing the courtrooms or where a county has no public transit and thereby the citizen with no means of personal transport has no means to reach the courthouse? There is no end to this slippery slope. Appellant did not object to the alleged closure or to the procedures on the day of the alleged closure. The record does not establish that members of the public believed that the courtroom was closed. Absent any record on the subject, under RAP 2.5(a), Arredondo has failed to show that constitutional error occurred, or that the error was manifest, that is, that it had any practical effect on the trial.

When a courtroom closure is claimed, the appellate courts of this State have reversed only upon a showing that the trial court actually issued an order closing the courtroom, or where it was clear that people were in fact excluded from the proceedings. State v. Marsh, 126 Wash. 142, 142-43, 217 P. 705 (1923); State v. Collins, 50 Wn.2d 740, 745-46, 314 P.2d 660 (1957); Bone-Club, 128 Wn.2d at 256-57; In re Personal Restraint of Orange, 152 Wn.2d 795, 801-03, 100 P.3d 291 (2004); State v. Brightman, 155 Wn.2d at 511; State v. Easterling, 157 Wn.2d 167, 171-73, 137 P.3d 825 (2006). The evidence here is that the court did not order a court closure. The court never ordered – orally or in writing, directly or indirectly – that the courtroom be closed. In fact the courtroom was clearly open what is alleged here is that due to the wording on a sign on

the exterior of the courthouse that there may possibly have been someone who did not enter the building. Officer Siebol specifically addressed whether there had ever been anyone who had wanted entry after the building was closed he testified that he had allowed individuals into the building to attend court hearings and that he had never in that same period denied access to any person entry to see or attend court matters. (RP Ref. pgs 69-70)

This Court should reject any appeal which is based on speculation that someone may have or could have or possibly did not enter the building on the days alleged. Yakima County had a policy in place even before the hours were changed and a trial was going to go past the 5:00 PM hour. The testimony of Mr. Delia clearly sets forth the previous policy as well as the policy and practice after the changes to the entrances of the courthouse. (RP Ref. pgs. 40-43) With regard to allegation or supposition that someone may have been excluded this was succinctly addressed by Sgt. Clifford during questioning on cross-examination;

Q If you were a member of the public and you saw a sign like this at the entrance to the courthouse would that discourage you from coming in?

A I don't know.

Q Well, you don't know how people came in, did they knock on the door, knock on the glass?

A They open the door.

Q They open the door.

A Most people don't read the signs anyway.

Q Okay.

A And they just open up the door and walk in. (RP Reference hearing 10-11)

The Ninth Circuit has held that "[t]he denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom." United States v. Shryock, 342 F.3d 948, 974 (9th Cir. 2003) (quoting United States v. Al Smadi, 15 F.3d 153, 155 (10th Cir. 1994) (citations omitted)) That court quoted Justice Harlan's concurrence in Estes v. Texas, 381 U.S. 532, 588-89, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965):

Obviously, the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats.... A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. Shryock, 342 F.3d at 974.

RESPONSE TO ALLEGATION TWO – ADMISSION OF ER 404(b) EVIDENCE.

In this case the State moved for the admission of evidence that Appellant was involved in another drive-by shooting. In this day in age it still is necessary for the State to educate the lay people who comprise the jury venire that there are people who live in the same towns and cities who will for no other reason than the color of the clothing that another person is wearing shoot that person dead. This was a case of circumstantial evidence and the testimony of Mr. Simon who had previously been housed

in the same cell as Appellant. The State had the “confession” of the defendant to Mr. Simon but there was no direct evidence that placed the defendant behind the steering wheel of the car from which the deadly shots were fired.

The testimony offered came from Department of Corrections workers as well as one officer. DOC Officer Michael Hisey testified he and two police officers contacted Arredondo at an address in Zillah over The report of possible drug trafficking at that residence. RP 478-80. When these officers went to the defendant’s home there was a silver Mercedes-Benz was parked there and Arredondo had possession of the keys to that car. RP 481. Officers searched defendant’s car and found a .38 shell casing. RP 482, 486. Officer Dunn testified that he responded to a report of a drive-by shooting on February 9, 2009 in an area know for gang activity. RP 467. The victim in this drive-by shooting said the suspect vehicle “appeared to be like a Mercedes-Benz.” RP 468. The officer found a .38 shell casing in the area. RP 468-69. There was a forensic examination conducted on those casings and it revealed that the casing found at the scene of the drive-by shooting and the casing found in the car were fired from the same weapon. RP 523-24. Further on direct examination Mr. Simon testified “he said he had a Mercedes...[w]ithin his level of friends, he told me eh called the shots...he called the shots.” RP

582 Appellant admitted that the keys for the Mercedes were located in his room. RP 800.

Under ER 404(b), evidence of a defendant's prior wrongdoing is not admissible to show he acted in conformity therewith, but the court may admit it for other defined purposes. As was the case here a limiting instruction should accompany such evidence. State v. Gresham, 173 Wn.2d 405,420,269 P.3d 207 (2012). This court shall review the actions of the trial court in admitting this type of evidence as an abuse of discretion, State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (quoting State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995)), Gresham, at 419, quoting State v. Foxhoven, 161 Wash.2d 168, 174, 163 P.3d 786 (2007).

The offer of proof made by the State satisfied the court which needs to determine on the record that (a) the prior misconduct occurred by a preponderance of the evidence, (b) a lawful purpose exists to admit the evidence, (c) the evidence is relevant to prove the offense charged, and (d) its probative value outweighs its prejudicial effect. Gresham, 173 Wn.2d at 421. (RP 23-27) Courts of review have ruled that the absence of a record may be harmless if the record as a whole is sufficient to permit appellate review. State v. Gogolin, 45 Wn. App. 640, 645, 727 P.2d 683 (1986). The court ruled as follows:

THE COURT: Well, it's as -- I think under 404(b) it has probative value. I think the probative value in identifying that is Mr. Arredondo's animosity towards people who are of the Sureno persuasion, if you would, and it goes to show identity, and motive as well. So, under the circumstances, I believe that the probative value outweighs the prejudicial effect. I'll allow testimony regarding the earlier incident.
RP 26-7

Here the State was able to place Appellant at the party from which the victim fled, that at the party there had been an altercation between some of the Sureno's and the Norteno's who were present. It was able to show that there were guns at the party and that at a time earlier the Appellant had been loaned the car that was identified as having been involved in the shooting. Appellant's defense was "alibi and general denial." Therefore the State had to prove that this man, the appellant, had been steeped in the gang culture to the point that he was willing to drive a car and from that vehicle shoot another person. The court gave a limiting instruction orally to the jury.

This is the Court instruction to the jury regarding the ER 404(b) testimony;

Q All right. Thank you. Now, Detective Dunn, I'm going to ask you to turn your attention to an incident that occurred on February 9th of 2009. Uh, sometime February 9, 2009, uh --

THE COURT: Let me interrupt, Mr. Chen. Ladies and gentlemen of the jury, I need to give you a limiting instruction at this time. There's going to be testimony that's offered, I believe starting now, regarding an

incident that allegedly occurred on February the 9th of 2009.

That -- the testimony regarding that particular incident can be considered by you in only one way. Okay? You can only consider it in regard to the issue of whether -- the issues of identity and motive and intent of the Defendant. Okay?

So you cannot consider it as to whether Mr. Arredondo may or may not be a bad person or may or may not have acted in a similar fashion on February the 9th of 2009 to what he's alleged to have done on December the 5th of 2009. You can only consider the testimony regarding the incident of February 9, 2009, only on the issues of motive, intent, and identity.

Continue, Mr. Chen.

RP 466

Instruction 20 at CP 63 once again informs the jury of the extent to which this information could be considered by them during deliberations. As stated in State v. York, 50 Wn. App. 446, 451, 749 P.2d 683 (1987) “The jury is presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211 (1983).” See also State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995)).

Further, the totality of the evidence presented to the jury was ultimately overwhelming. Under the constitutional harmless error standard, we will not vacate the jury's finding if it appears beyond a reasonable doubt that the alleged error did not affect the verdict. State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). Regardless, any

error, even assuming error, would be harmless. There was ample other, indeed overwhelming, evidence in this record to support these convictions.

State v. Watt, 160 Wn.2d 626, 635-36, 160 P.3d 640 (2007). See also

State v. Thompson, 151 Wn.2d 793, 808, 92 P.3d 228 (2004);

Thompson's conviction was based, at least in part, on evidence found within the trailer--evidence we here conclude is inadmissible. This constitutional error may be considered harmless if we are convinced beyond a reasonable doubt that any reasonable trier of fact would have reached the same result despite the error. State v. Brown, 140 Wash.2d 456, 468-69, 998 P.2d 321 (2000). To make this determination, we utilize the "overwhelming untainted evidence" test. State v. Smith, 148 Wash.2d 122, 139, 59 P.3d 74 (2002). Under this test, we consider the untainted evidence admitted at trial to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Id.*

RESPONSE TO ALLEGATION THREE - COURTS EXCLUSION OF ALLEGED MENTAL HEALTH ISSUES.

Appellant cites State v. Froehlich, 96 Wn.2d 301, 635 P.2d 127 (1981) for the proposition that information pertaining to mental health issues is a legitimate area of inquiry and that the court ruling excluding this type of examination was err. The flaw with this theory is contained in Froehlich where the court addresses the facts of that case. Those facts are clearly distinguishable from this case. The court in Froehlich states;

The trial court was correct in noting that the issue of credibility was also inherent in Bliss' testimony. A witness' credibility is always at issue, but it was particularly so in this highly unusual setting. The mental defects of the witness were clearly demonstrated to the trial court and

jury by the extreme state of nervousness. A review of the record made by the trial court in expressing its concerns makes it equally obvious to this court on appeal. Where, as here, the mental disability of a witness is clearly apparent and his competency is a central issue in the case, the jury need not be left in ignorance about that condition or its consequences.

Froehlich 306-7

A review of the record here demonstrates that there was no “highly unusual setting” the “mental defects” in this case were not clearly demonstrated and in fact the witness in the initial hearing denied that there was an issue and from the record there did not appear to be any deficit. The summation of the Froehlich court is dispositive regarding this issue, once again as the Froehlich court stated “**Where, as here, the mental disability of a witness is clearly apparent and his competency is a central issue in the case, the jury need not be left in ignorance about that condition or its consequences.** *Id* at 307 The was no mental disability with this witness and he was clearly competent.

This was a discretionary ruling by the trial court. To quote Froehlich at 304:

Competency is a matter to be determined by the trial court within the framework of RCW 5.60.050 and CrR 6.12(c). State v. Moorison, 43 Wn.2d 23, 34, 259 P.2d 1105 (1953); McCutcheon v. Brownfield, 2 Wn. App. 348, 355, 467 P.2d 868 (1970). That conclusion will not be disturbed on appeal except for abuse of discretion. There being nothing in the record to establish that Bliss was of unsound mind, we hold the trial court did not abuse its discretion by ruling he was

competent to testify, leaving the question of credibility to the jury. CrR 6.12(c); RCW 5.60.050(1).

As was the case in Froehlich the court and counsel had occasion to query Simon outside the purview of the jury. RP 558-69. The initial inquiry by the State and the Court of Mr. Simon is as follows:

Q Mr. Simon, do you suffer from any condition or, uh --

A Mental health disorder or something like that?

Q Do you suffer from any condition or mental health disorder that may impact your ability to recall or remember events?

A No, sir.

Q All right.

THE COURT: Do you suffer from any type of mental health condition or disorder that would prevent you from accurately describing events?

MR. SIMON: No, sir. Actually, when I went to my mental health evaluation, psychiatric evaluation, they told me that my ability to recall and describe events was probably more than the next person sees because it's traumatizing events that happened in my life.

During this hearing Mr. Simon stated the following in response to questioning from Appellant's counsel;

A If that's what you want to call it, sir, but my memory is fine. I could tell you what you wore the day we had the interview. I could tell you how many words you said if I really had to count, but you really didn't say that much. The other guy with the white hair did all the talking.

Q Okay. Okay. So you're saying you don't have any conditions that affect your ability to remember events?

A I'm not saying that whatsoever. It's however they put it in clinical terms, I'm sure that another doctor could say, okay, hey, it may seem like that to you, but in this type of situation or this other way, it would affect him. But right now as I sit here in this court chair after recollecting over the things I've heard in the few days I was in the cell with Mr. Arredondo, I have no problems remembering. RP 561-2

The Court then ruled;

THE COURT: Well, first off, I don't see how short term memory is implicated here because this isn't something that occurred earlier this morning or last night or something like that. This is something weeks and months ago. Short-term memory, I don't think, is implicated. The rest of it has nothing to do with Mr. Simon's ability to accurately recall and to describe the events or alleged events that he is going to be called upon to describe in his testimony.

And it's a classic situation of probative value, as it were, versus prejudicial effect. His mental -- I hesitate to say disorders, but his personality issues or thereabouts that we've just discussed here outside the presence of the jury -- depression, concentration, anxiety and being hypervigilant and posttraumatic stress disorder potentially don't implicate his ability to, I don't believe, implicate his ability to recall the events that he's going to be called upon to testify about.

So the probative value of inquiry into those is negligible. The prejudicial effect, on the other hand, is enormous. You could label him as a mental case, if you would, and so that the jury would disbelieve anything he had to say because he has some type of a psychiatric disorder.

I'd note that nicotine dependence is enough (sic) psychiatric disorder, so, you know, would you ask somebody, is it true that you're addicted to nicotine and how does that affect that person's ability to be -- uhm, to recall and accurately relate events from the witness stand.

So I will bar any inquiry into Mr. Simon's mental state now or in the past. Additionally, the short-term memory issue, I don't think, is implicated, as well, so there'll be no inquiry into his issues relating to the substance abuse. RP 566-68

The trial court properly evaluated the proposed inquiry by Appellant and correctly determined that the probative value was far outweighed by the prejudicial effect. This court should not disturb that ruling.

RESPONSE TO ALLEGATION FOUR – SPECIAL VERDICT

Appellant has not challenged any of the evidence or testimony that was admitted regarding his membership in the Norteno street gang nor the expert testimony presented by the State's witnesses especially Det. Brownell and the lay testimony of Mr. Simon.

Both this Division in State v. Rodriguez, 163 Wn.App. 215, 259 P.3d 1145 (Wash.App. Div. 3 2011) and State v. Moreno, 294 P.3d 812 (Wash.App. Div. 3 2013) and Division II have published cases in which there was explicit recognition of the existence of the Sureno and Norteno gangs. See for example, State v. Campos-Cerna, 154 Wn.App. 702, 226 P.3d 185 footnote 8, (Wash.App. Div. 2 2010):

The following facts were adduced at trial about the gangs and gang culture involved in this matter. In Vancouver, Washington, there are rival gangs called the Nortenos and Surenos. The Nortenos, or northerners, originated in northern California, the gang's primary color is red, and the gang is controlled by a prison gang called Nuestra Familia. The Surenos, or southerners, originated in southern California, its primary color is blue, and it is controlled by a prison gang called the Mexican Mafia. There is also a gang called Mara Salvatrucha, or MS, with origins in El Salvador that formed in Los Angeles, in part to protect its members from the Sureno gang. Mara Salvatrucha appears to have added the number 13 when it aligned itself with the Mexican Mafia and now is known as MS-13. The Mexican Mafia brokered a deal between MS-13 and the Sureno gang, bringing them both under its "umbrella," its division of territory between member gangs, and its taxation of member gangs. RP at 556.

Although once independent, MS-13 now seems to be intertwined with the Sureno gang. Norteno and Sureno members are known to wear belts with gang colors and buckles with letters or numbers that designate their gang affiliation or geographic origin. Gang members that encounter an unknown person may "hit up" that person to ascertain these gang affiliations and geographic origins. RP at 573. It is common in the area of Vancouver around the Town Pump and Lord's Gym for Surenos and Nortenos to "hit up" one another, especially if the other person is in rival colors. Although the neighborhood surrounding the Town Pump is nominally Sureno territory, Nortenos frequent the establishment. Underlying Norteno and Sureno philosophy is a belief that disrespect from a rival gang toward a member or the gang requires retribution that may be immediate or delayed. These gangs can be violent and a member's size does not dictate the threat he may pose; it is normal for some members to carry weapons, such as guns, knives, bats, and brass knuckles. Unlike other gangs, the Mexican Mafia prohibits Sureno members from doing drive by shootings-members must exit their vehicles before shooting at others.

In this case there was never any question, doubt or challenge that the actors in this tragedy were members of rival gangs. The defendant admitted that he was a member of the Norteno's and that he had become a member because of his family, "I became to be involved in Norteño gang due to my family members. They had been -- and they -- my family members evolve around gangs, and I grew up in it." RP 751

Even the sitting Judge acknowledged the gang intimidation in this case:

THE COURT: Okay. And the only other thing, I wanted to put on the record a little bit more regarding the two gentleman who were told to leave the courtroom. Because of their attire, I believe that their presence would be disruptive, that it would be intimidating.

And it's already clear to me, and I think everybody else in this room, that there's been a strong undercurrent of intimidation in this case. Many of the witnesses are -- are visibly afraid to be here and to be testifying, and under the circumstances it's my belief that the -- that allowing those two gentleman to remain dressed as they were would only add to the intimidating factor that's already quite palpable in this case. RP 405-6

Appellant contends that there is insufficient evidence to support the jury's finding that he committed the homicide "with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang its reputation, influence, or membership." CP at 2, 70, 85-88, *see* RCW 9.94A.535(3)(aa). This Court will review findings that support an exceptional sentence for substantial evidence. State v. Moreno, 173 Wn.App. 479, 495, 294 P.3d 812 (2013). In cases addressing a similar gang-related aggravating factor, this court has held that expert testimony about generalized gang motivations was insufficient. See, State v. Bluehorse, 159 Wn.App. 410, 429, 248 P.3d 537 (2011). This court had ruled that there must be some evidence of the defendant's actual gang-related motivation behind the crime charged. Id. at 428. Here there was specific testimony from numerous individuals including the Appellant that he was a confirmed member of the Norteno's

street gang, that he was at a house party where other members of that gang were in attendance, that at some point in the evening the victim and his friends arrived at that same party and that some of those individuals were members of a rival street gang the Sureno's. The testimony was that at this party there was an altercation between members of these two rival gangs. That at the party there were members of Appellant's Norteno gang who were armed with guns. The defendant testified that he was in the gang because of his family history in this gang that he grew up in that culture. RP 792-3

Detective Brownell testified to the specific problems with gangs in his town, Toppenish, Washington and that he was assigned as a "street crimes detective" and that he was tasked to "go out and be proactive monitoring gangs, learning the gang life, gang cultures." RP 682. He testified as to the segregation of his city into areas that were controlled by the two primary gangs, the Norteno's and the Sureno's. He testified as to what gang was related to areas in this case that the defendant was a confirmed member of the Norteno's street gang. RP 680-86, 702 Det. Brownell testified regarding the characteristics of these street gangs and their society and structure.

...And as you work up the gang life-style, the more credit you have as far as crimes you've committed, how much you've hustled, you know, regardless, fill in the blanks,

you earn a certain level of prestige and respect amongst the gang members and even rival gang members. RP 684

This court need only read the testimony of Mr. Simon to determine that this allegation is baseless; the testimony of Mr. Simon is dispositive. His testimony throughout was that the defendant had confessed his involvement in this crime. An example of the specific nature of the testimony of Mr. Simon testified which on its own would satisfy the requirements of this aggravator is as follows;

...actually his whole, I guess, personality and attitude kind of just went along with the whole tough guy role because there was a point where he was editing the story as far as it happened to where the victims came up and they were from a rival gang, and he said that they were supposed to be testifying against him, too. Actually, he brought up the fact that he would walk totally on this crime if the two -- he used the term bitches weren't to testify and the three victims.

He said they'd have nothing then. He said that he wasn't really concerned about the victims that much just for the simple fact that he could speak to somebody and have somebody say something to him and say, hey, you gotta keep it real, you don't testify against each other because we're in a code of whatever. And he said the two girls were his main concern. RP 583

The facts in the case most cited in gang information cases, Bluehorse was nowhere near as extensive and specific as the testimony in this case. Here the State's expert testified as to what the standard was and Mr. Simon testified to the specific facts, from conversations with the defendant himself, that supported the allegation that this member of a gang, a shot

caller, a person up in the ranks who had been tied to gangs through his family as he was growing up, went out and got a “strap” and used it to “blast” some “scraps.” In Bluehorse the court reversed the gang aggravating factor because the exchange of gang signs several months prior was the only evidence of gang-related motivation aside from generalized expert testimony. Id. at 430. Here we have everyone, the defendant included, placing him at a party of Norteno’s that was interrupted by the arrival of rival Sureno’s. A fist fight occurred, guns were present and the next thing is that the car that the Appellant had borrowed is identified as racing after and along side the victim’s car and shot were fired. That car is found abandon and wiped down. The identification of the car and what the Appellant did to and with that car came from two witnesses, Mr. Simon (RP 582-96) and Ms. Carmen Romero. RP 133-148

Moreno is the only published case that addresses the aggravating factor at issue here. In Moreno, this court concluded that there was sufficient evidence to support the aggravating factor when Mr. Moreno committed what appeared to be a random act of violence against a nongang member. Moreno, 173 Wn.App. at 495. As was done in this trial, in Moreno an expert testified that the Nortenos and Surenos were rivals, there was usually a specific reason for encroaching on rival territory, and

gang members often commit random crimes as a way to maintain or improve their status within the gang. Id. at 497. Evidence also showed that Mr. Moreno had ties to the Nortenos gang, he and his cohorts were in Surenos territory, and somebody in Mr. Moreno's car yelled out a gang-related phrase moments before the shooting. Id. at 496-97. That evidence in connection with the expert testimony was sufficient to support the inference that Mr. Moreno intended to advance his position in his gang by shooting at the pedestrian. Id. at 497.

Here, like in Moreno, there is sufficient evidence for the jury to infer that Appellant intended to indirectly cause a benefit or advantage to the membership of a criminal street gang. The evidence showed Arredondo was a self admitted Norteno that he was a shot caller and higher up in the ranks of the gang and that minutes before the shooting there had been a physical fight between members of his gang and the rival Sureno street gang. (RP 751-56, 767-90, 795-97); people at the party whom Appellant knew were “flashing” their guns (RP 750) and by his own confession to Mr. Simon, Arredondo stated that he was driving an Accord, that he had gotten a “strap” and got a “scrap” the very derogatory term used to describe members of other gangs. Substantial evidence supported the jury's finding. RP 579-80.

Appellant challenges the sufficiency of the evidence supporting the sentencing aggravators. In reviewing a challenge to the sufficiency of the evidence, this court will view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd*, 136 Wash.2d 939, 969 P.2d 90 (1998).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850

(1990). "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

Once again the decision to allow this to go to the jury was a discretionary ruling on the part of the court. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). The court will review a jury's verdict on an aggravating factor for substantial evidence just as we do when evaluating the sufficiency of the evidence supporting the elements of a crime. State v. Webb, 162 Wn.App. 195, 205-06, 252 P.3d 424 (2011).

Other cases that have addressed the sufficiency of the evidence to support the aggravating circumstance provided by RCW 9.94A.535(3)(s) require a nexus between the crime charged and a defendant's actual gang-related motivation. See State v. Yarbrough, 151 Wn.App. 66, 96-97, 210 P.3d 1029 (2009) (sustaining the gang aggravator where the evidence established that the defendant made a gang reference before shooting, perceived the victim as a member of a rival gang, and a recent gang altercation had occurred prior to the shooting); State v. Monschke, 133 Wn.App. 313, 135 P.3d 966 (2006) (testimony established that the

defendant wanted to advance in a white supremacist group and had advocated the assault so that another member of the group could earn recognition for it).

The State presented evidence that overwhelmingly proved the aggravator as alleged.

RESPONSE TO ALLEGATION FIVE – LEGAL FINANCIAL

Appellant did not raise this issue in the trial court. This issue was recently address by this court in State v. Duncan, slip opinion 29916-3-III, Published on March 25, 2014. In that opinion this Court indicated;

The Supreme Court may clarify this issue in Blazina and Paige-Colter, but for now we do not understand the reasoning and holdings of Moen, Ford, and later cases as requiring that we entertain challenges to LFOs and supporting findings that were never raised in the trial court.

In the unusual case of an irretrievably indigent defendant whose lawyer fails to address his or her inability to pay LFOs at sentencing and who is actually prejudiced, a claim of ineffective assistance of counsel is an available course for redress. We decline to address the issue for the first time on appeal.

This court should once again decline to address this issue for the first time on appeal.

IV. CONCLUSION

For the reasons set forth above this court should deny allegations and affirm the actions of the trial court.

Respectfully submitted this 11th day of April 2014,

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APPENDIX A

THE COURT: ...The next issue is the issue of whether the courtroom was closed at -- or let me address it first. First off is the 4:00 issue and then I'll talk about the other issue as to what may or may not have happened in regard to the front doors of the courthouse. And I'm going to ask as, I guess as an exhibit of the Court, I've made -- I made a copy of the Clerk's minutes, which include the jury case information sheet, the jury sheet, which shows when people were excused on the 11th and also shows the date -- or excuse me, the Clerk's minutes as far as when recess -- when the recess -- when the Court recessed for the day. So I'll have that marked and admitted as an exhibit of the Court.

Let me start off this part of the analysis, I guess, with the JAVS issue. And as soon as this case came back before me and I saw the transcript and I -- it was immediately apparent to me what this whole issue rested upon a faulty base of the time stamp, if you would, on the JAVS recording. It has been my experience that the JAVS system for whatever reason doesn't have -- is not synced with real time. It's off by a significant amount of time. I mean, not an hour but a significant amount of time, and in this particular matter, if you just look at the Clerk's minutes and you look at the JAVS times that are on the transcript and obviously derived from the JAVS recording itself, there's a discrepancy there.

Now, the other discrepancy is with these clocks that are in the

courtroom. The real time -- this clock right here says it's 2:11 p.m., and -- or 2:12 p.m., and it is in fact 2:07, so that's a five or six -- five minute discrepancy right there. I did go up to Courtroom 2 over the noon hour and tried to see -- and did see what their -- the clock in that courtroom says, and again, it's off by four or five minutes. None of the -- you know, other judges have made this observation and I make the same myself is that there's no two clocks in this building that agree with each other as to what time it is. And so I always go when I'm timing things, I go off the computer or I go off my wristwatch, one or the other, but -- so the times that -- and one of the other issues is where is the Clerk getting the time as well for the Clerk's minutes and so is that coming off the clock on the wall, is it coming off the computer? I guess we're not quite sure as to where it's coming from, but it's, you know, it's a little bit troubling and part of the problem is that we're basing -- the big part of this issue is reflected in minutes, you know. Was it 4:01 or was it 4:02 or was it 4, you know.

So, first off, talking about on the 10th, it's clear from reading the transcript that I was acutely aware of the issue or the potential problem of going past 4:00. Now, again, it's apparent from the testimony I've heard that there was some -- it's undisputed as to what exactly was going on as far as whether the doors were locked or unlocked, but in any event 4:00 at least. And it was kind of a little bit of involving practice or protocol

during those early weeks of the new security system, but in any event that there was concern -- and my recollection is there was concern about incurring overtime costs as well, as least on my part, the part of the Court that we went past 4:00 and Mr. Delia talked about the overtime issue that was in effect at that particular time, that the Court would be responsible for the overtime incurred by the -- by the security officers. So, I am personally convinced that on the 10th of October that we concluded all court business at or before 4:00. I don't think we went past 4:00.

The other -- on the 11th, we clearly did go past 4:00 and the Court, myself, made a finding and it may not be the fanciest *Bone-Club* finding that's ever been uttered by a judge, but I think it's sufficient *Bone-Club* finding -- findings, if you would, to warrant the necessity of going past 4:00 and the potential of conducting some portion of the trial, however innocuous portion of the trial in an open courtroom in a closed courthouse. So the *Bone-Club* factors are the proponent of closure (inaudible) must make a showing of the compelling interest. Anyone present when the closure motion is made must be given an opportunity to object. The proposed method for securing open access must be the least restrictive. The Court must weigh the competing interest of the proponent of closure and the public and the order must be no broader in its application or duration than necessary to serve its purpose. In this particular case, there was a compelling need to conclude jury selection on the 11th in order to

not delay the commencement of another murder trial which was scheduled to commence the next day.

The geography, if you would, of this particular building is that you cannot have two large jury pools at the same time because there's no room for them. You can only have one large jury pool at a time and in this particular instance another large jury pool was going to be arriving on the 12th for the next murder trial in line and in order to accommodate those people and those numbers, the jury panel for this -- for the Arredondo case had to be finished. The jury selected in the space created, if you would, for the accommodation of the next jury panel arriving the next day.

So, there was a compelling need there in order not to violate the next guy's speedy trial rights in order to require that the jury selection process be finished by the -- on that day, on the 11th. There was obviously in a public announcement by myself, there was no objection made by anybody, we -- the method for securing open access must be the least restrictive and the least restrictive was we just went a few minutes past 4:00, assuming that there was some restriction to public access after 4:00. The competing interests were weighed, the Court was the proponent to the closure of the public's access, you know, if it was denied it was denied for minutes only in an innocuous part of the trial. This is the conclusion of the jury selection process, the jurors who had been selected after the exercise of preemptory challenges were called up and put in the

jury room. They were sworn and the balance of the jury was -- the jury panel was excused and given directions as to what they were supposed to do as far as calling in the next day or that evening for further service. And the order must be no broader in its application and duration than necessary to serve its purpose, and you know, it was -- if we curtailed the public's right or if we curtailed the right to a public trial, it was done for just minutes and in fact in the Court's -- the Clerk's minutes it shows that the jury was sworn at 4:10 and then supposedly the court adjourned at 4:17, although if you look at the transcript, the period of time between the jury being sworn and the case actually recessing wouldn't have been that long. It was just a matter of myself giving an instruction to the jury, the first preliminary instruction and then having them go down to the jury room with the bailiff. So I suspect that on the 11th that the actual court -- that the court actually recessed probably closer to 4:10 than to 4:17, but in any event -- and I would point out it was nowhere near the number -- the time that's reflected on the JAVS transcript.

Alright, so -- and let me get to the issue of the doors. There was conflicting testimony about what the protocol was on -- at this particular time, the October 10th and 11th of 2011. The one officer said that his recollection is that the doors were locked but the officers remained available to open them and to let people in in order to accommodate their attendance at court proceedings or to answer their questions about other

things such as their ability to access the, you know, the auditor's office or the clerk's office or the treasurer or assessor, whatever. So one officer said they locked -- everybody else said that there were unlocked and that the officers were there to answer -- were present. It doesn't make any sense to me to have them locked and the officer standing there for an hour. Why would they just stand there for an hour? It doesn't make any sense unless the doors were unlocked.

And again, it's a matter of confusion and I will candidly admit that I was somewhat confused as well perhaps but my other focus I think is reflected in the transcript, or perhaps not reflected in the transcript, is the issue that came in at the overtime but in any event I do believe based upon, you know, I guess the testimony, overwhelming testimony of the officers that the protocol was that the doors would remain unlocked and that people could enter the courthouse and that they would direct them, you know, otherwise if they wanted to attend court they were allowed to do so. If they wanted to go to the auditor's office, they would be told that the auditor's office is closed, that the clerk's office is closed or whatever agency that they wanted to go visit was not available to them because as a practical matter at 4:00 everything is closed except for the courts themselves. It's a rare occasion, too. Officer Seibol testified that in the 21 months since the new regimen has been -- was introduced, the new security system, it's happened a dozen times that people have come in and

wanted to attend some court proceeding and, you know, he's always accommodated them in his experience. So, I do believe that the doors were unlocked and available.

I don't -- you know, the sign is not, you know, a -- the best example of signage, I guess, that we -- that I've seen but on the other hand, I don't think it generates confusion. If it does generate confusion the officers are there to eliminate the confusion to answer the questions.

So -- if there's anything else I wanted to discuss. In any event then, I don't believe that the public or anybody, any particular person in particular or that the public in general was somehow denied access to the very few minutes of Mr. Arredondo's case on the 11th of October that occurred after 4:00, and so I guess with that finding, we'll conclude.
(RP Ref. pgs 97-101)

DECLARATION OF SERVICE

I, David B. Trefry state that on April 11, 2014, I emailed a copy, by agreement of the parties, of the Respondent's Brief, to Mr. David Gasch at gaschlaw@msn.com and by United State mail to Fabian Arredondo DOC #319232, 1313 N 13th Ave, Walla Walla WA 99362

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11th day of April, 2014 at Spokane, Washington.

s/ David B. Trefry

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