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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 312755

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON

Respondent,

vs.

CESAR SAUL PRADO,

Appellant.

**APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
Judge David Eloffson**

BRIEF OF APPELLANT

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I. NATURE OF THE CASE

Following a jury trial, the appellant, 17-year old Cesar S. Prado, was convicted of Attempted First Degree Murder, Attempted Second Degree Murder, and Unlawful Possession of a Firearm in the First Degree. The convictions included firearms enhancements and gang sentencing aggravators. Mr. Prado was sentenced to 49 years in prison. Based upon the legal errors noted herein, Mr. Prado appeals his convictions and sentence.

II. ASSIGNMENT OF ERROR

1. The Superior Court erred by denying the defendant's motion to dismiss for insufficient evidence.
2. The Superior Court erred by admitting expert gang testimony without a sufficient nexus to the crime and in violation ER 404(b).
3. The Superior Court erred by admitting expert gang testimony in violation of ER 702 and in violation of the Confrontation Clause of the Sixth Amendment.
4. Error occurred in the Superior Court when the prosecutor committed misconduct.
5. The Superior Court erred in giving a Missing Witness Instruction.

6. The Superior Court erred by instructing the jury on the lesser-included charge of Attempted Second Degree Murder in Count I.

7. Error occurred in the Superior Court because the defendant did not receive effective assistance of counsel.

III. STATEMENT OF THE ISSUES

1. Whether the evidence produced at trial was sufficient to support either the attempted murder charges or the gang sentencing aggravator.

2. Whether the prosecutor failed to produce sufficient evidence to establish a nexus between the crimes charged and gang membership.

3. Whether the prosecutor's expert gang testimony violated ER 404(b).

4. Whether the prosecutor's evidence of "prior bad acts," unrelated to gang affiliation or the crimes charged, violated ER 404(b).

5. Whether the prosecutor's expert gang testimony violated ER 702.

6. Whether the prosecutor's expert gang testimony violated Mr. Prado's Sixth Amendment right to confront his accuser.

7. Whether the prosecutor's misconduct deprived Mr. Prado of a fair trial.

8. Whether the trial court erred by instructing jurors on the missing witness doctrine when the witness at issue was not particularly available to Mr. Prado.

9. Whether the trial court erred by providing jurors with a lesser included offense instruction when the defendant and counsel made a reasoned decision not to request a lesser.

10. Whether Mr. Prado received effective assistance of counsel.

IV. STATEMENT OF THE CASE

On October 18, 2010, at approximately 11:20 p.m., Angela Deckard and Brandon Parren were at a Conoco gas station in downtown Yakima. RP 7, p. 527. Mr. Parren was a member of a Yakima street gang. RP 5, p. 303. While at the gas pumps, Mr. Parren and Ms. Deckard were shot. RP 7, p. 531. A grey Kia was seen leaving the gas station. RP 5, p. 333. Yakima police responded to the Conoco station. RP 5, p. 303. Yakima officers were aware that Israel Rivera drove a grey Kia. RP 5, p. 305. Officers believed Mr. Rivera and Mr. Parren were members of opposing gangs.

Approximately three hours later, Yakima police received reports that a grey Kia had crashed into a barrier and that two people had been seen running from the car. RP 4, p.271-73. Police then went to Mr.

Rivera's house and learned he had been with Cesar Prado earlier in the evening. RP 5, p. 337. The police arrested both men. RP 5, 336, 339.

Later that morning police interrogated Mr. Prado. RP 8, p. 575. Mr. Prado was a 15-year-old boy at the time. CP 0001. After initially denying any knowledge of the shooting, Mr. Prado told police that Mr. Rivera had given him a ride to the Conoco. RP 8, p. 575, 599. Mr. Prado denied any involvement in the shooting. RP 8, 575. After the interrogation, Mr. Prado stated he had informed the police that he'd been at the Conoco because he just wanted their questioning to stop. RP 8, p. 575, 599.

Police likewise questioned Mr. Rivera. Mr. Rivera denied involvement in the shooting. RP 6, 452-53. Subsequently, in exchange for avoiding attempted murder charges, Mr. Rivera claimed that Mr. Prado had shot both Ms. Decker and Mr. Parren because Mr. Parren was a member of a rival gang. RP 6, p. 405, 435-36, 448, 450, 451.

Mr. Prado was originally charged in juvenile court. RP 6-3-11. Following a hearing, the juvenile court declined jurisdiction over Mr. Prado and his case was transferred to the superior court. RP 6-3-11, p. 141.

Mr. Prado went to trial, accused of two counts of Attempted Murder in the First Degree and one count of Unlawful Possession of a Firearm in the First Degree. CP 00011.

At trial Ms. Deckard and Mr. Parren testified. RP 7, 527; RP 8, p. 566. Ms. Deckard was able to provide only general information about her assailant. RP 5, p. 372. Mr. Parren was able to provide a general description of the assailant. RP 8 565-66. Mr. Parren testified that Mr. Prado did not match the assailant's description. RP 8, p. 566.

Evidence at trial established that after police arrested Mr. Prado they searched his house. RP 5, p. 342. Mr. Prado was not in possession of clothing items worn by the shooter. RP 5, p. 360-61. Mr. Rivera's stepfather testified, and although he saw Mr. Prado not long after the shooting, he never mentioned Mr. Prado wearing clothes like those the shooter had been wearing. RP 6, p. 471-78. No gun was found in Mr. Prado's possession, and no gun was found during the search of Prado's home. RP 5, p. 342. No forensic evidence connected Mr. Prado to the shooting. The primary evidence against Mr. Prado came from his co-defendant, Israel Rivera (RP 6-3-11, p. 20), and from investigating officers who testified as experts on gang activity.

Although Mr. Prado, through his counsel, informed the court that he did not want the jury to receive a lesser included offense instruction on the attempted first degree murder charges in Count I (RP 8, p. 542-43, 604, 622), the court instructed Mr. Prado's jury on the lesser offense of attempted murder in the second degree lesser. RP 8, p. 622. In Count I,

Mr. Prado was found not guilty of attempted first degree murder but was convicted of the lesser offense of attempted murder in the second degree. RP 9, p. 708. Mr. Prado was convicted as charged in Counts II and III. RP 9, p. 708-09. In both Count I and Count II the jury returned firearms enhancement. *Id.* The jury returned special gang aggravator verdicts in Counts I and III. *Id.*

Mr. Prado was sentenced to 590 months in prison. CP 000142-44.

V. ARGUMENT

A. **The Evidence Was Insufficient to Support Either Mr. Prado's Attempted Murder Convictions or the Gang Sentencing Aggravators.¹**

The prosecutor failed to provide sufficient evidence to prove Mr. Prado was guilty of the crimes charged in Counts I and II.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. McDaniel*, 155 Wn. App. 829, *rev. den.* 169 Wn.2d 1027 (2010).

Mr. Prado's conviction was supported almost exclusively by the most unreliable type of testimony possible – that of an individual who

¹ RP 8, p. 547. At the close of the prosecutor's case, defense counsel argued that the prosecutor's evidence was insufficient to convict Mr. Prado of attempted murder.

alters his story in an effort to avoid facing significant punishment. See, *State v. Ish*, 170, Wn.2d 189, 208 n. 18, (2010) (Sanders dissenting)²; also WPIC 6.05 (cautioning jurors on relying on testimony of an accomplice testifying for the prosecution).

No physical or forensic evidence linked Mr. Prado to the Conoco shootings. Although police arrested Mr. Prado and searched his house shortly after the shootings, they did not find either any guns or any clothing of the type worn by the assailant. RP 5, 342, 360-61. Ms. Deckard did not identify Mr. Prado as her assailant. RP 5, 372. Mr. Parren did not identify Mr. Prado as his assailant and instead declared that Mr. Prado did not match the general description of the man who shot him. RP 8, p. 566.

As noted above, the only witness who testified that Mr. Prado was responsible for the shootings was Israel Rivera. Mr. Rivera initially denied that either he or Mr. Prado was involved in the Conoco shootings. RP 6, 452. Mr. Rivera “did not want to spend the rest of his life in prison” if convicted as charged. RP 6, p. 448. After being offered the choice of

² Ryan Blitstein, *The Inside Dope on Snitching*, MILLER-MCCUNE, Oct. 23, 2009, available at <http://www.miller-mccune.com/legal-affairs/the-inside-dope-on-snitching-33387>. “Many defendants, desperate to give up information in exchange for reduced sentences provide cops with bogus leads. This results in the prosecution of innocents...Nearly half of wrongful capital convictions can be traced to false testimony from informants, according to one Northwestern University study.”

pleading guilty to a Rendering Criminal Assistance charge and receiving a sentence of only 20 months if he would testify for the prosecution, Mr. Rivera changed his story and implicated Mr. Prado. RP6, p. 451.

Based upon the evidence and lack of reliable evidence, no rationale trier of fact could be convinced beyond a reasonable doubt of Mr. Prado's guilt. Because the evidence against Mr. Prado was insufficient to support his convictions for attempted murder, those convictions should be reversed.

1. The evidence was insufficient to support the gang aggravator.

Testimony from police or other gang experts is insufficient, standing alone, to support the gang aggravating factor. *State v. Bluehorse*, 159 Wn. App. 410, 431 (2011). Without evidence from some source other than opinion testimony from police officers, the gang sentencing aggravator would apply automatically whenever a gang member or aspiring gang member was involved in a shooting. See, *Bluehorse*, at 431.

The gang aggravator required that the prosecutor present sufficient factual evidence to establish beyond a reasonable doubt that the primary activity of the La Raza, the gang associated with Mr. Prado, was the commission of crimes. See, CP 000111. Instead the prosecutor merely introduced, through opinion testimony provided by police officers,

conclusory statements that La Raza was involved in a variety of general crimes. E.g. RP 5, p. 352-53. (Detective listing some crimes he believes La Raza has been involved in. See, footnote 5, *infra*.)

In addition, in order to prove the gang aggravator the prosecutor must demonstrate beyond a reasonable doubt that the accused committed the crimes at issue with intent to benefit the gang, as opposed to acting for the sole intent of bestowing some benefit upon himself as an individual. See, CP 000110. The prosecutor failed to provide sufficient evidence to establish intent for purposes of the gang aggravator. For example, Mr. Parren was shot, but he was not wearing gang colors. Although Mr. Parren apparently had a tattoo that identified him as a gang member, Mr. Prado never actually saw Mr. Parren's gang tattoo. Furthermore, when the shooting occurred, the assailant didn't say anything that would allow his gang to claim credit for the shooting. Compare, *State v. Yarbrough*, 151, Wn. App. 66, 97 (2009) (assailant in gang shooting claiming gang membership when shooting occurred). Mr. Rivera, the only prosecution witness who provided details about how the shootings occurred, alleged that Ms. Deckard was shot before Mr. Parren. RP 6, p. 439. Ms. Deckard was not a gang member. RP 7, p. 50. If the intent in the shootings was to bestow some benefit on a gang, Mr. Parren, a gang member, would have been the primary target and shooting Ms. Deckard would accomplish

nothing for the gang. In other words, Mr. Parren would have been shot first.

Other than opinion testimony from police officers - an insufficient basis to sustain the aggravator - the prosecutor failed to present sufficient evidence to convince any rational trier of fact beyond a reasonable doubt that Mr. Prado was guilty of a gang sentencing aggravator.

B. The Superior Court Erred by Admitting Expert Gang Testimony Without a Sufficient Nexus to the Crime and in Violation of ER 404(b).³

The improper admission of expert testimony by the officers investigating the Conoco shootings resulted in substantial prejudice to Mr. Prado and deprived him of his right to a fair trial.

1. The erroneous admission of evidence of gang affiliation violates the First Amendment Right of Association.

Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association. *State v. Scott*, 151 Wn. App. 520,526 (2009) (citing to *Dawson v. Delaware*, 503 U.S. 159, 117 l. Ed. 2d 309, 112 S. Ct. 1093 (1992)). The admission of evidence of a defendant's gang affiliation is

³ Prior to the start of trial, Mr. Prado moved to exclude all gang evidence. CP 00032; RP 1, p. 24, 26. Prado's counsel also noted that, given the gang activity in the community, it would be difficult to seat an impartial jury. RP 1, p. 28. Further, after the trial court denied defense counsel's motion to exclude, the court overruled an objection made by defense counsel regarding the introduction of gang evidence. RP 3, p. 156.

considered prejudicial due to its inflammatory nature. *State v. Asaeli*, 150 Wn. App. 543, 579, *rev. den.* 167 Wn.2d 1001 (2009). Evidence that the accused is affiliated with a gang is presumptively inadmissible. See, *State v. McCreven*, 170 Wn. App. 444, 458 (2012) *rev. den.* 176 Wn.2d 2015 (2013). Gang evidence is only allowed when a sufficient nexus exists between the crime and gang membership. *State v. Scott*, 151 Wn. App. at 526.

2. Because the prosecutor failed to prove a sufficient nexus between the crime at issue and gang membership, admission of gang evidence in Mr. Prado's trial was prejudicial error.

The admission of gang evidence without a sufficient nexus between the crime and gang membership is prejudicial error. See, *State v. Scott*, 151 Wn. App. at 527 (citations omitted.).

In Mr. Prado's trial, in an effort to establish the required nexus, one of the officers who responded to the Conoco shootings, Yakima Detective Joe Salinas, presented expert testimony on gangs. Detective Salinas explained that Mr. Parren's gang, the East Side Sorenos, was, at the time of the shootings, not very significant. RP 3, p. 176.

Detective Salinas also testified there was a hierarchy in the La Raza gang, even specifying that the leader of the gang was known as the "shot caller." RP 3, p. 166. The shot caller was essentially responsible for

determining all of the criminal activities of La Raza members could participate in. RP 3, p. 166-168. However, Detective Salinas went on to explain that La Raza had lost its structure and had no leadership. RP 3, p. 178-179. As a result, according to Salinas, there were young people operating with a lot of "I'm in it for me, not so much the gang anymore." RP 3, p. 178-179. According to Salinas, the result of that lack of organization and leadership was "shootings going on where there is no direction, people acting out on their own." RP 3, p. 180.

Israel Rivera, like Mr. Prado, a member of La Raza, testified for the prosecution, explaining that prior to the shootings he had not only encountered Mr. Parren without conflict, but he and Mr. Parren had smoked marijuana together. RP 6, p. 432.

There is no evidence anyone in La Raza ordered that a Soreno be shot. Further without a leader, without structure, there was no one in La Raza to reward or acknowledge the "achievement" of the shooting. In addition, shooting a member from a rival gang that had little significance would not benefit the "reputation, influence or membership" of La Raza. Finally, the fact that a La Raza member who claimed he was present and encouraged the shootings, (RP 6, p. 436) had smoked marijuana with Mr. Parren before the shootings only further calls into questions that the shooting occurred with intent to benefit the La Raza gang.

Without sufficient evidence, the assailant was acting for the gang as opposed to “freelancing” or settling some personal score, the required proof of nexus between this crime and gang membership fails. Accordingly, the gang evidence presented in Mr. Prado’s case should have been excluded.

3. The gang evidence introduced in Mr. Prado’s trial violated ER 404(b).

Even if the proponent establishes the required nexus, gang evidence is limited by the standards in ER 404(b)⁴ and ER 403. *State v. McCreven*, 170 Wn. App. 444, 457 (2012). In gang affiliation cases, ER 404(b) specifically serves to prevent the prosecution from suggesting a defendant is guilty because he or she is a criminal type person who would likely commit the crime charged. See, *State v. Mee*, 168 Wn. App. 144, 154, rev. den. 175 Wn.2d 1011 (2012). Any such inference contradicts the fundamental American criminal law belief of innocence until proven guilty. See, *State v. Wade* 98 Wn. App. 328, 336 (1999).

As a precedent to admitting gang evidence, ER 404(b) requires the trial court to (1) find by a preponderance that the misconduct occurred; (2)

⁴ Evidence of other crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

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 of any such evidence. *State v. Embry*, 171 Wn. App. 714, 732 (2012) (citation omitted). Generally, the trial court must conduct this ER 404(b) analysis on the record. *State v. Asaeli*, 150 Wn. App at 576, fn. 34; see also, *State v. McCreven*, 170 Wn. App. 444, 461 (2012).

Rather than perform any in depth analysis into the admissibility of the ER 404(b) gang evidence, the court in Mr. Prado's trial gave only the most cursory look at the evidence before approving its admission. The trial court essentially declared that the gang evidence showed motive and was relevant and probative to the State's case and it was therefore admissible unless cumulative. RP 1, p. 29. Compare, *State v. Embry*, 171 Wn. App. at 733-36 (example of trial court properly engaging in the required analysis as a condition precedent to admitting gang evidence).

Contrary to the clear limitations and the process ER 404(b) requires before gang evidence can be admitted, in Mr. Prado's case there appeared to be no limits on what would be admissible. For example, without performing the four step process noted above, prosecution witnesses testified that the La Raza chapter Mr. Prado belonged to was responsible for violent homicides, robberies, home invasions, daytime

burglaries, drug dealings, weapons dealings, witness tampering, and promoting prostitution.⁵ Furthermore, one officer testified that La Raza was responsible for painting what appeared to be swastika graffiti in Yakima. RP3, p. 177.

In addition to that general gang evidence, the prosecutor focused testimony on Patrick Bentley, a member of the La Raza chapter and a friend of Mr. Prado's. Mr. Bentley was not on trial with Mr. Prado and did not appear in court. Nonetheless, the prosecutor elicited testimony from Mr. Bentley's probation counselor that Bentley had been stabbed in the foot in July 2010 and that he had been incarcerated and while incarcerated received Aggression Therapy. RP 7, p. 501.

The admission of irrelevant and highly prejudicial testimony regarding the La Raza gang and irrelevant, inflammatory testimony about Mr. Bentley, without the court engaging in the proper weighing process, violated ER 404(b) and should not have been admitted.

⁵ Det. Taylor: "La Raza is involved in pretty much any type of criminal activity, violent homicides, homicides, drive by shootings, robberies. They've been known to be very active in home invasion or daytime burglaries, drug dealings, weapon dealings. We've had reports of promoting prostitution, running girls, witness tampering. Basically they run the gambit as long as it prospers them or the gang directly." RP 5, p. 352-53.

4. The trial court erred by admitting evidence of uncharged “bad acts,” unrelated to either gang affiliation or the charges for which Mr. Prado was being tried.

Although the prosecutor asked jurors to return a gang aggravator, the aggravator didn’t justify the prosecutor’s introduction of evidence that Mr. Prado had committed numerous, uncharged, prior bad acts, none of which had anything to do with either the Conoco shootings or gang membership. The prior bad acts evidence was highly prejudicial and should have been excluded.

At trial the prosecutor introduced prior bad act evidence that included, but was not limited to, allegations that Mr. Prado, a juvenile, had been accused of an uncharged burglary in King County⁶ (RP 8, p. 597), that there was a warrant out for Mr. Prado’s arrest for an incident unrelated to the shootings at issue,⁷ (RP 8, p. 597), that Mr. Prado was unemployed and his source of income came from stealing other people’s

⁶ Prior to trial, the Court excluded evidence of Mr. Prado’s juvenile convictions. RP 1, p.52. Nonetheless, at trial, in order to allow the prosecutor to prove Mr. Prado had previously been convicted of a “serious offense,” a necessary predicate to proving the VUFA charged in Count III, Mr. Prado’s jury was informed that he had previously been convicted of Residential Burglary and a Burglary in the Second Degree. RP 8 p. 546. Both offenses were juvenile convictions, occurring in 2007 and 2008. *Id.* After the testimonial portion of trial concluded, in likely recognition of the prejudice and error, the court simply instructed the jury that Mr. Prado had been convicted of a “serious offense.” RP 9 p.637-38. The jury was not asked to disregard evidence of the juvenile burglaries. Mr. Prado suffered substantial prejudice by this error.

⁷ See e.g. *State v. Thomas*, 4 Wn. App. 192 (1971) (error to admit evidence defendant had been arrested on a bench warrant. Error Thomas’s case rendered harmless by instruction to disregard).

property during car prowls, (RP 6, p. 425), that Mr. Prado smoked marijuana pretty much every day⁸, (RP 6, p. 409), that Mr. Prado was not attending school because he had been suspended, (RP 8, p. 593-94)⁹, that on occasions other than the Conoco shootings Mr. Prado possessed several hand guns taken in unidentified burglaries, (RP 6, p. 418), and, that the police had dealings with Mr. Prado a number of occasions prior to the Conoco shootings. RP 5, p.306. If that was not enough to taint Mr. Prado's jury, the prosecutor also introduced evidence that, the day of the shootings, Mr. Prado took an illegal prescription drug,¹⁰ (RP 6, p. 426), drank cough syrup to get high, (RP 6, p. 426-27), dealt drugs by selling marijuana to a girl, (RP 6, p. 424), possessed a gun stolen during a different burglary, (RP 6, p. 422), and, hours after the crime, took part in a hit and run. RP 6, p. 443-44.

⁸ See, *State v. Tigano*, 63 Wn. App. 336, rev. den. 118 Wn.2d 1021 (1992) (evidence of defendant's drug use on occasions other than time of crime, is generally inadmissible in that it is impermissibly prejudicial.).

⁹ The prosecutor alleged Mr. Prado's suspension was "gang related." In response, Mr. Prado declared he was suspended for marijuana, not gang activity.

¹⁰ *State v. LeFever*, 102 Wn.2d 777 (1984) (citation omitted), *overruled in part on other grounds relating to offers of proof*, 113 Wn.2d 520 (1989) (effect of evidence of defendant's drugs use upon a jury of laymen [would be] catastrophic. . . It cannot be doubted that the public generally is influenced with the seriousness of the narcotic problem. . .and has been taught to loathe those who have anything to do with illegal narcotics; *State v. Renneberg*, 83 Wn.2d 735, 737 (1974) ("evidence of drug addiction is necessarily prejudicial in the minds of the average juror").

None of the prior bad act evidence was admissible to show intent,¹¹ identity or any of the other exceptions to ER 404(b)'s prohibition against propensity evidence. Nor was the evidence a necessary part of establishing that the shootings, if they had been committed by Mr. Prado, were gang motivated. The evidence that Mr. Prado stole, possessed guns and took and sold drugs had no probative value in relation to the shootings. Instead, the evidence merely showed Mr. Prado to be an alleged thief, drug dealer, and criminal who was unemployed and who had been suspended from school. The net effect of the evidence was simply to show jurors that Mr. Prado had a propensity towards criminal behavior.

The uncharged prior bad act evidence, both gang and personal, introduced against Mr. Prado at trial had little, if any, probative value. The evidence was extremely prejudicial and inflammatory. As noted in section V. A. above, the evidence the prosecutor introduced against Mr. Prado at trial was not particularly strong. Because the improperly admitted ER 404(b) evidence, within a reasonable probability, materially

¹¹ E.g. When the mere doing of an act demonstrates criminal intent, evidence of other misconduct offered to prove intent is immaterial. Lansverk, *The admission of evidence of other misconduct in Washington to prove intent or absence of mistake or accident Comment*, 61 Wash. L. Rev. 1213, 1222 (1986); *State v. Saltarelli*, 98 Wn.2d 358, 365-366, (1982) (same).

affected the outcome of Mr. Prado's trial, reversal is required. See *State v. Halstien*, 122 Wn.2d 109, 127 (1993).

C. The Admission of Expert Gang Testimony in Violation of ER 702 Deprived Mr. Prado of his Constitutional Right to a Fair Trial.

The investigating officers in Mr. Prado's case were allowed to present expert testimony even though the subject matter of their testimony did not require specialized knowledge and even though their expert testimony did not assist the jury in understanding the evidence. Therefore, that officers' expert testimony was improper under ER 702.

Evidence Rule 702¹² imposes a special gatekeeping obligation on the trial court to ensure expert testimony is not admitted unless the subject matter of the testimony is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. ER 702; *State v. Willis*, 113 Wn. App. 389, 393(2002); see, *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 116 (1999). In other words, if the trial court determines that laymen would be able to understand the evidence without specialized knowledge concerning the subject, the expert testimony is prohibited. See e.g. *State v. Rafay*, 168 Wn. App.734, 782-90 (2012) *rev.*

¹² If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact 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. ER 702.

den. 176 Wn.2d 1023 (2013) (expert testimony regarding reliability of defendant's confession barred after court determined that jurors could assess the credibility of defendant's confession without need of expert's testimony).

One of the seminal cases addressing the fairly recent phenomena of using investigating officers to also testify at trial as expert witnesses on gang related issues is *United States v. Mejia*, 545 F. 3d 179 (2nd Cir. 2008). See, *State v. McDaniel*, 155 Wn. App. 829, *rev. den.* 169 Wn.2d 1027 (2010) (quoting extensively from *Mejia* as a basis reverse the defendant's conviction due to the improper admission of gang expert testimony). Review of the *Mejia* opinion is particularly helpful for two reasons: first, it recounts the evolution of the use of law enforcement officers as expert witnesses in gang cases, see *Mejia* 545 F.3d at 189-90; and second, because the facts and issues in *Mejia* are similar to those in Mr. Prado's case.

As *Mejia* outlines, the practice of allowing a law enforcement officer to testify as a gang expert originated with officers testifying as would a sociologist or anthropologist, explaining the meaning of terminology and symbols gang members used during recorded conversations. *Id.* The practice then expanded in RICO prosecutions where expert testimony was necessary to explain an organization's

membership requirements and rules as they pertained to proving a “criminal enterprise.” *Id.* The admission of expert testimony in those instances was based on the common sense rationale that an untrained layperson would not be able to understand the underlying factual evidence in the case without first understanding the meanings of specific terms and without some organizational context. However, before expert testimony was admissible, a foundation was required that established that expert testimony was necessary and helpful to demonstrate how an item of evidence, introduced through a fact witness, was used to carry out a particular criminal activity. *Id.*; See e.g. *U.S. v. Robinson*, 978 F.2d 1554, 1563-64 (10th Cir. 1992).

In the *Mejia* case, the government had charged several members of the MS-13 gang with a broad range of criminal activity, including conspiracy and RICO violations, stemming in part from drive by shootings directed towards members of an opposing gang. In order to prove a criminal enterprise at trial, the prosecution introduced expert opinion testimony from law enforcement officers who had investigated the gang’s criminal activity. The officers in *Mejia* provided expert testimony about their knowledge of gangs and presented evidence about the meaning of different gang symbols. However, as the *Mejia* court explained, the officer/experts then went beyond presenting specialized knowledge that

would assist jurors and additionally presented, under the guise of expert testimony, what was essentially an easily understood summary of alleged fact.

To illustrate what constitutes improper opinion testimony from a gang officer expert, the *Mejia* court presented a portion of testimony where an officer testified that the MS-13 gang had committed between 18 and 22 or 23 murders on Long Island between 2000 and the trial; that officers had recovered between 15 and 25 firearms as well as ammunition from MS-13 members, and that MS-13 members had been arrested for dealing narcotics. See, *Mejia* at 194-195.

In explaining why that testimony was improper, the *Mejia* court stated:

[a]ny law enforcement agency will develop expertise on the criminal organizations it investigates, but the primary value of that expertise is in facilitating the agency's gathering of evidence...[W]hen those officer experts come to court and simply disgorge their factual knowledge to the jury, the experts are no longer aiding the jury in its factfinding, they are instructing the jury on the existence of facts needed to satisfy the elements of the charged offense.

Mejia, 545 F.3d at 191.

In Mr. Prado's trial, Yakima Detective Taylor, in response to a prosecutor's inquiry about the criminal activity of La Raza, testified that:

La Raza is involved in pretty much any type of criminal activity, violent homicides, homicides, drive by shootings,

robberies. They've been known to be very active in home invasion or daytime burglaries, drug dealings, weapon dealings. We've had reports of promoting prostitution, running girls, witness tampering. Basically they run the gambit as long as it prospers them or the gang directly. RP 5, p. 352-53.

Detective Taylor's testimony mirrors the testimony the *Mejia* court found improper. As in *Mejia*, Detective Taylor's testimony went beyond sociological interpretation of terms or symbols jurors need to understand gang issues. See, *State v. McDaniel*, 155 Wn. App. at 847 (quoting, *Mejia*, 545 F.3d at 195). Testimony like Detective Taylor's general allegations of homicides, unspecified robberies, and other crimes allegedly committed by La Raza, did not require "specialized knowledge" of an expert and could have been understood by jurors had the appropriate *factual* evidence been introduced via traditional means such as lay witness testimony, criminal history, and appropriate court records. See *Mejia*, 545 F. 3d at 195. Furthermore, while testimony from an expert might have been needed to "assist jurors" in establishing a relationship between the fact of past criminal acts and La Raza, Taylor's expert testimony was not needed to "assist" jurors in establishing the facts themselves.

The summaries of alleged activities of La Raza, presented under the guise of expert testimony, were improper under ER 702 and should have been excluded.

1. The officers testifying in Mr. Prado's case lacked the appropriate qualifications and basis to present expert gang testimony.

Even where an expert's reliability is largely dependent on his or her experience, the expert must still provide an explanation for how that experience leads to the conclusions reached, why the experience provides a sufficient basis for the expert opinion, and how the experience was reliably applied to the facts of the case. See e.g. FED R. EVID. 702, Advisory Committee Note; see also, *State v. Pittman*, 88 Wn. App. 188, 198 (1997); e.g. *State v. Rafay*, 168 Wn. App.734, 782-90 (2012) *rev. den.* 176 Wn.2d 1023 (2013). The officer/experts in Mr. Prado's trial did not provide an adequate foundation for their testimony. Instead the officers repeated the conclusory refrain of "training and experience" as a sufficient basis to justify their filling a variety of gaps in the prosecutors case. In actuality, the primary basis for the expert opinions of the three prosecution officer/experts was mere *ipse dixit*.¹³

Detective Morfin: Detective Morfin presented expert testimony on a variety of gang related matters. Detective Morfin's expert qualifications consisted of attending the same law enforcement academy required by all

¹³ *Ipse Dixit* - "He himself said it. A bare assertion resting on the authority of an individual." Black's Law Dictionary, 5th Ed. West Publishing, p.49 (1979).

Washington officers and working as a gang officer where he declared he had both custodial and social contacts with “hundreds” of gang members. RP 5, 302-03. Detective Morfin did not explain how a gang unit officer differed from any other kind of officer. Detective Morfin’s specialized gang training apparently consisted of an annual meeting of an unspecified type involving “[a] bunch of deputies getting together sharing information and intelligence.” RP 5, p. 302. How that qualified Detective Morfin as an expert in the specific practices of Yakima’s La Raza gang, and how it qualified him to present an opinion on such matters as whether Mr. Prado’s conduct during a police interrogation was typical of a gang member was left unanswered. RP 5, p. 302.

Detective Taylor: Detective Taylor repeated the general “training and experience” mantra. However, he testified that he was a gang unit officer and had 120 hours of specialized gang training and received monthly briefings on gang matters throughout the State. RP 5, 327-28. He failed to explain what his specialized training included, who provided it, when it was provided and, significantly, how it provided him with specialized knowledge regarding the issues he testified to in Mr. Prado’s trial.

Without more, Detective Taylor used his expert opinion to fill in several material gaps in the prosecution’s case against Mr. Prado. For

example, resolve the prosecutor's problem of Mr. Parren's inability to identify Mr. Prado as his assailant, Detective Taylor explained that Mr. Parren's "role is to basically say, 'I don't know who did it. I didn't see anything. That was per se Soreno rules.'" RP 5, p. 357.

Similarly, Detective Taylor resolved the prosecutor's problem of the lack of the police finding even one item of physical evidence linking Mr. Prado to the crime by simply testifying that it was very common for gang members to dispose of evidence after they commit a crime. RP 5, p. 361.

As to the motive for the shootings, Detective Taylor likened the shooting of a senior gang member, like Mr. Parren, to "taking out a big deer, a deer hunter out there that gets a big deer." RP 5, p. 330.

Finally, because Detective Taylor had apparently been informed that Isabel Torres was on the defense witness list and would provide an alibi for Mr. Prado, Taylor informed Mr. Prado's jury that, without any indication of the basis for his knowledge, the role of females in a gang was to falsely provide gang members with alibis. RP 5, p. 359.

Detective Salinas: Detective Salinas identified himself as a patrol officer. RP 3, p. 164. He acknowledged he had not worked in the gang unit since 2009, and he based his testimony on the knowledge of La Raza practices in terms of how La Raza operated several years before the

Conoco shootings. See, RP 3, p. 157-58, 163. In describing his specialized gang training, Detective Salinas declared he “got a trip to Atlantic City to learn about gangs and [Yakima] formed a gang unit in 2004.” RP 3, p. 150. How long the Atlantic City trip lasted, what he learned on the trip, and how it qualified him to speak on the issues in Mr. Prado’s case went unaddressed. In presenting his additional qualifications to testify as an expert on gangs, Detective Salina broadly described his training as “constant, ongoing training. There’s always something new.” RP 3, p. 150-51. When asked how many active gangs there were in Yakima Detective Salinas explained “there was a website people go to, it shows all the gangs.” RP 3, p. 163.

With no further explanation as to his qualifications or the basis for his information and opinions, Detective Salinas declared that he, along with the gang members who inhabit the area, had designated the area where Mr. Parren was shot to be a Norteno area. RP 3, p. 156-57. He, like Detective Taylor, also attacked Mr. Parren’s credibility, inferring Mr. Parren would testify untruthfully if he said he didn’t know who shot him because that’s what gang culture expected. RP 3, 172-175. Ultimately, Detective Salinas resolved the question for Mr. Prado’s jury of whether the gang aggravator ought to apply when he declared “this was a gang on

gang, red on blue shooting. That's a gang motivated crime." RP 3, p. 158.

The officer experts did not provide sufficient detail about their experience and how those experiences qualified them to present their opinions on the issues referenced above. Furthermore, the officer experts lack of specificity infringed upon Mr. Prado's right to cross-examine the officers. Attempts by Mr. Prado's attorney to get the officers to be more specific as to the bases for their opinions would have necessarily led to the re-transmission of hearsay and otherwise inadmissible "bad act" evidence, thereby placing defense counsel in an untenable position-let unreliable testimony stand unchallenged or open the door to inadmissible hearsay.

Because the officers failed to provide a sufficient basis for their opinions, the expert testimony from those officers should have been excluded.

2. While testifying as expert gang witnesses, investigating officers improperly invaded the province of Mr. Prado's jury by presenting their opinions about the veracity of witnesses.

[T]here are some areas which are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.

State v. Montgomery, 163 Wn. App. 577, 591 (2008) (multiple citations omitted.); also WASH. CONST., art I §§ 21, 22; U.S. CONST. amend VII; ER 608. An expert invades the exclusive province of the jury by testifying as to their perception of another witness's truthfulness. *State v. Alexander*, 64 Wn. App. 147, 154 (1992).

During Mr. Prado's trial, Yakima detectives, testifying as experts, improperly presented their opinion on the veracity of defense witnesses and the guilt of Mr. Prado as to the gang aggravator.

At Mr. Prado's trial, Detectives Taylor, (RP 5, p. 357), and Morfin, (RP 3, p. 172-75), testified that Mr. Parren, a victim in the Conoco shootings, would not testify that he had been shot by Mr. Prado because of gang code. That testimony improperly inferred that Mr. Parren could actually identify Mr. Prado as his assailant but instead would testify falsely that he could not. That testimony constitutes an improper infringement into the jury's role to determine witness truthfulness.

Similarly, as noted above, Detective Taylor testified that, for gangs, a girl's role was to provide an alibi for a gang member. RP 5, p. 359. Detective Taylor's testimony undoubtedly was directed at Isabel Torres, who had been identified by the defense as an alibi witness for Mr. Prado. Detective Taylor's testimony improperly inferred that Ms. Torres would be testifying falsely if she were to testify that Mr. Prado was with

her instead of at the scene of the shooting. Detective Taylor's testimony improperly infringed upon the jury's role in determining witness veracity.

In addition, one of the issues Mr. Prado's jury was asked to decide for purposes of applying the gang aggravator was whether Mr. Parren's shooting was a gang motivated crime. Detective Salinas answered that question for the jury when he testified, "If your committing gang-type crime, which I would say this is a gang-type crime. This is a gang on gang, red on blue shooting. That's a gang motivated crime." RP 3, p. 158. Detective Salina's opinion about whether or not Mr. Parren's shooting was a gang crime improperly invaded the province of the jury.

Finally, although it is improper for an expert witness to present his or her opinion on the believability of another witness, Detective Morfin testified that he believed that Mr. Rivera, the witness who implicated Mr. Prado in the Conoco shootings, was being both truthful and forthright. RP 5, p. 322, 323.¹⁴ Detective Morfin's testimony constitutes improper vouching for the credibility of another witness.

¹⁴ Inexplicably, it was Mr. Prado's counsel who asked Detective Morfin his opinion on whether Mr. Rivera was truthful and forthright, while it was the prosecutor who objected to the question on the basis that it called for a direct comment on credibility. The objection was overruled.

Detectives Taylor and Salinas improperly invaded the province of Mr. Prado's jury by testifying about the veracity of defense witnesses and whether Mr. Prado was guilty of the gang aggravator.

D. The Admission of Expert Gang Testimony During Trial Violated Mr. Prado's Sixth Amendment Right to Confront his Accuser.

The Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to confront and cross-examine witnesses. *State v. McDaniel*, 155 Wn. App. 829, rev. den. 169 Wn.2d 1027 (2010); U.S. Const. Amend. VI. Similarly, Article I, section 22 of the Washington Constitution provides that, "[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face." Washington's Supreme Court has commented that Article I, Section 22 can provide an even higher protection with regard to a defendant's right of confrontation than does the Sixth Amendment. *State v. Shafer*, 156 Wn.2d 381, 391-92 (1998) (citation omitted). In accord with the right of confrontation, the prosecution can only present testimonial evidence of an absent witness if the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. *State v. McDaniel*, 155 Wn. App. at 846. The prosecution may only present non-testimonial statements from an absent witness if the statements comply with evidentiary rules. *Id.* (citing to *Davis v. Washington*, 547 U.S. 813, 821,

126 S. Ct. 2266 (2006).¹⁵

“Expert testimony regarding the commission of specific crimes or the defendant’s involvement in gangs must comport with the right of confrontation principles set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) and its progeny (e.g. *United States v. Mejia*, 545 F. 3d 179 (2008)).” *State v. McDaniel*, 155 Wn. App. 829, rev. den. 169 Wn.2d 1027 (2010). An officer/expert’s testimony violates *Crawford* when the expert communicates out-of-court statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion. *U.S. v. Mejia*, at 198 (citation omitted). Similarly, statements taken by officers in the course of investigations are almost always testimonial and in violation of *Crawford*, as are statements that are the product of police-initiated contact. *State v. McDaniel*, 155 Wn. App. at 847 (citation omitted).¹⁶

The officer/experts in Mr. Prado’s trial repeatedly relied on out of court statements from absent witnesses in violation of Mr. Prado’s

¹⁵ The rule permitting expert witnesses to consider inadmissible hearsay in forming their opinions does not mean an expert witness may simply transmit inadmissible hearsay to the jury under the guise of an expert opinion. See, *U.S. v. Mejia*, 545 F.3d at 197.

¹⁶ In the *McDaniel* case the court reversed the defendant’s murder conviction after noting that the practice of allowing an officer to base part of his expert gang testimony on inadmissible hearsay, rather than piecing together and analyzing relevant information for himself, violated the defendant’s right to confront his accuser. *State v. McDaniel*, 155 Wn. App. at 849 (citing to *U.S. v. Mejia* at 198-99).

confrontation clause rights and the rules against hearsay. For example, when Detective Taylor provided his general pronouncement on the activities of La Raza, he noted, “[w]e’ve had reports of promoting prostitution, running girls, witness tampering...”¹⁷. That same type of expert testimony was found to violate the confrontation clause in the *Mejia* case. See, *U.S. v. Mejia*, 545 F. 3d at 194-95. Furthermore, the testimony of the officer/experts in Mr. Prado’s trial was rife with other references to unidentified third parties being the source of information testified to by the officers.¹⁸ In other instances, the officers provided expert testimony on matters that could have only come from informants or custodial interrogations from absent witnesses.¹⁹

The admission of testimony from absent witnesses, presented under the guise of expert testimony, constituted inadmissible hearsay and violated Mr. Prado’s constitutional right to confront his accuser. As a

¹⁷ See footnote 5, *supra*.

¹⁸ E.g. Det. Taylor: “our contacts on the street” advised that Mr. Rivera had been labeled a snitch for testifying against Mr. Prado. RP 5 p. 356-57 (simultaneously violating the confrontation clause and providing an improper inference that Prado must have committed the crimes Rivera was testifying about or Rivera could not be a snitch.); Det. Salinas: “A snitch” provided information that La Raza was painting what appeared to be swastika’s in northeast Yakima. RP 3, p. 177.

¹⁹ E.g. Det. Salinas: You gain the highest level of respect within a gang like La Raza by spilling blood for the gang. RP 3, p. 170. Det. Taylor: Soreno rules don’t allow members to testify. RP 5, p. 357.

result, Mr. Prado suffered substantial prejudice at trial.²⁰ The State bears the burden of proving that a confrontation clause violation was harmless beyond a reasonable doubt by showing it didn't affect the outcome of the case. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824 (1967). The State cannot meet that burden in Mr. Prado's case.

E. Prosecutorial Misconduct Deprived Mr. Prado of his Constitutional Right to a Fair Trial.

Both the State and Federal Constitutions declare that a person shall not be deprived of life, liberty, or property without due process of law. U.S. Const. Amends 5, 14; Wash. Const. Art. 1, §3.²¹ An individual's liberty interest and his right to a fair and unbiased trial is important and a fundamental part of due process. *United States v. Salerno*, 481 U.S. 739, 750, 95 L.Ed.2d 697, 107 S.Ct. 2095 (1987). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *In re Personal Restraint Of Glasmann* 175 Wn.2d. 696 (2012).

²⁰ Similar testimony was proffered at Mr. Prado's decline hearing. RP 6-3-11, p. 72 (Mr. Rivera did not testify at decline so detective testified that the fact assertion in the prosecutors decline brief accurately portrays what Mr. Rivera said. RP 6-3-11, p. 84 (detective testified that Mr. Prado was known in gang as the one you went to if you wanted an item stolen). But see, *In Re Hegney*, 138 Wn. App. 511, 533-34 (2007) (court found right to confront accuser did not apply to juvenile decline hearings.)

²¹ ...nor shall any state deprive any person of life, liberty, or property, without due process of law... U.S. Const, Amend. 14. "No person shall be deprived of life, liberty, or property, without due process of law." Art. I, §3, Wash. Const.

1. The prosecutor committed misconduct when he and the detective on the case eavesdropped on confidential conversations occurring between Mr. Prado and his attorney.

In general, any communication intended to be confidential between a client and his attorney is protected by the attorney-client privilege. *Main v. Moulton*, 474 U.S. 159, 106 S. Ct. 477 (1985). An invasion by the prosecutor into attorney-client privacy is a violation of the defendant's Due Process and Sixth Amendment right to effective assistance of counsel. *Id.* See also, *State v. Granacki*, 90 Wn. App. 598, 602 (1998) (citing to *State v. Cory*, 62 Wn.2d 361 (1962)). The prosecutor is under an affirmative duty not to circumvent or dilute the attorney-client privilege. *Moulton*, 474 U.S. at 171. The prosecutor in Mr. Prado's case did not honor the Mr. Prado's right to confidentially consult with his attorney.

During trial, Mr. Prado was being held in jail. His attorney did not have an office in the courthouse and during trial, so Mr. Prado and his attorney were left with the choice of communicating in the courtroom or not communicating at all. RP 8, p. 580, 581.²² At some point when Mr. Prado was consulting with his attorney in the courtroom, the prosecutor and detective, who were seated nearby, listened to Mr. Prado and his attorney discussing whether to have Ms. Torres served with a material

²² Judge: You don't have anyplace else to go with your client, Mr. Heilman-Schott.

witness warrant to try and compel her attendance in court. RP 8, p. 579. Instead of moving further away or informing defense counsel that his private conversations could be heard, the prosecutor remained and listened. *Id.*²³

The conversation Mr. Prado engaged in with his counsel while in court was confidential and privileged. See, *People v. Urbano*, 128 Cal. App. 4th 396 (2005) (the court concluded that conversation between attorney and client while at counsel table, overheard by a detective sitting with prosecutor nearby, was confidential while later comments and gyrations defendant made while sitting in jury box that could be seen and heard by anyone sitting in courtroom were not); also, *People v. Shrier*, 190 Cal. App. 4th 400 (2010) (agents who overheard hushed conversation between attorney and client in conference room where both were examining discovery constituted an improper invasion of attorney-client privilege. However, dismissal not the appropriate remedy because invasion did not occur within “the hallowed confines of the courtroom”); *In re Sealed Case*, 737 F.2d 94, 102 (D.C Cir. 1984) (the court found

²³ Compare, *State v. Pena Fuentes*, 172 Wn. App. 755, 760 (2013) where, after detective investigating a possible witness tampering explained he had listened to recording of attorney-client phone calls, prosecutor instructed detective not to listen to any further calls, not to inform anyone of the substance of the calls, and to cease investigation into the witness tampering case, and then advised defense counsel of what had occurred, with the lack of action taken by the prosecutor in Mr. Prado’s case.

conversations occurring between attorney-client while they were sitting next to each other on a commercial air flight were confidential and privileged).

It was misconduct for the prosecutor and detective to eavesdrop on the in-court conversations occurring between 17-year old Cesar Prado and his attorney. Accordingly, Mr. Prado's conviction should be reversed.

2. The prosecutor committed misconduct during his closing argument.

It is improper for a prosecutor to use an argument calculated to inflame the passions and prejudices of the jury in order to secure a conviction. *State v. Belgarde*, 110 Wn.2d 504, 507-08 (1988); American Bar Association ("ABA") Standards for Criminal Justice, Std. 3-5.8(c) (2d ed. 1980); *State v. Clafin*, 38 Wn. App. 847, 849-50 (1984), *review denied*, 103 Wn.2d. 1014 (1985).

The prosecutor's argument that the Conoco shootings were about Mr. Prado getting his "scrap killer tag" (RP 9, p. 673), a reference to Detective Taylor's trial testimony wherein he inferred gang members thought of shooting Mr. Parren like a hunter thinks of bagging a large deer, was inflammatory and improper. See e.g. *State v. Rivers*, 96 Wn. App. 672 (1999).

Furthermore, it was misconduct for the prosecutor to argue that, based on the fact that Mr. Prado was receiving phone updates from family members about police progress following the shooting of Mr. Parren and Ms. Deckard, “it’s not the first rodeo probably with them.” RP 9, p. 684. The prosecutor’s argument improperly infers that Mr. Prado had been involved in shootings on prior occasions. Argument and reference to evidence outside the record constitutes misconduct. *State v. Fisher*, 165 Wn.2d. 727 (2009).

Determining whether prosecutorial misconduct resulted in prejudice to the accused requires that the misconduct be analyzed “in the context of the record and all the circumstances of the trial.” *In re PRP of Glasmann*, 175 Wn.2d. 696 (2012). The evidence against Mr. Prado at trial was far from overwhelming. The prosecutor’s improper argument, along with his improper invasion into the attorney-client privilege, substantially prejudiced Mr. Prado. Because there is a substantial likelihood that the prosecutor’s misconduct affected the jury verdict, Mr. Prado should receive a new trial. *Id.*

F. The Trial Court Erred by Granting the Prosecutor’s Request for a Missing Witness Instruction.

Because Isabel Torres was not “particularly available” to the defendant, and because the defense provided both a satisfactory

explanation for her absence and requested a continuance to secure her presence, the trial court erred in giving the jury a Missing Witness Instruction when Ms. Torres did not testify.

Prior to trial and during opening statements, defense counsel identified Ms. Torres as an alibi witness, asserting that Mr. Prado was not present when Mr. Parren and Ms. Deckard were shot because Mr. Prado was instead at Ms. Torres' home. RP 8, p. 623. On the sixth day of trial, during an exchange with the court regarding scheduling, defense counsel explained Ms. Torres would testify but that counsel didn't anticipate she would take long. RP 6, p. 470. The next day, defense counsel explained to the court that Ms. Torres had moved across the mountains to Auburn, Washington, and that, although counsel had talked to her by phone several times and she had been subpoenaed, it now appeared that she would not be appearing in court as scheduled. RP 7, p. 490-491. Ms. Torres had explained she had "car problems, school problems, other problems and employment problems and that she wasn't coming." RP 7, 491. Defense counsel asked for a material witness warrant and for short continuance of trial to secure Ms. Torres' attendance. RP 7, p. 491. The trial judge responded that Ms. Torres had to appear to testify by the next day. RP 7, p. 491-92. The court proceeded with trial. After defense counsel proceeded without Ms. Torres, the court instructed the jury on "the

missing witness instruction.” RP 9, p. 645-46. The trial court erred in giving a missing witness instruction in this case.

The missing witness doctrine and accompanying jury instruction can be applied to the defense, but “... the limitations on the missing witness doctrine are particularly important when, as here, the doctrine is applied against a criminal defendant.” *State v. Montgomery* 163 Wn.2d 577, 598 (2008) (citation omitted). Even if a witness has information beneficial to one party, application of the missing witness doctrine is improper unless the missing witness is particularly under the control of the defendant, rather than being equally available to both parties, and the witness’s absence is not satisfactorily explained. *State v. Montgomery*, 163 Wn.2d at 598-99; see also, *State v. Davis*, 73 Wn.2d 271, 276 (1968). It is error for a judge to give a missing witness instruction without proof of each factor. *Montgomery*, at 599.

Ms. Torres was not “particularly available” to Mr. Prado.

For a witness to be “available” to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging... [O]ne of the factors which determines this question is the relationship which the potential witness bears to the parties, the logical inference being that a person will be likely to call as a witness one

bound . . . [to] him by ties of interest or affection unless he has reason to believe that the testimony given would be unfavorable...

State v. Davis, 73 Wn.2d 271, 277 (1968) (citations omitted).

Here, Ms. Torres was not particularly available to Mr. Prado. Ms. Torres was not related to Mr. Prado. Ms. Torres was not in a personal relationship with Mr. Prado. Ms. Torres did not work with Mr. Prado. See e.g. *State v. Davis*, 73 Wn.2d at 277 (investigating officer working with prosecutor was found to be “particularly available” to the prosecution.). No one described Ms. Torres as anything more than a friend of Mr. Prado’s.²⁴ RP 8, 583-84. See e.g., *State v. Dixon*, 150 Wn. App. 46 (2009) (evidence that the defendant’s friend was a passenger in the car where drugs were found was insufficient to establish that defendant had control over the passenger, and it was therefore error to give missing witness instruction). Furthermore, several weeks prior to Mr. Prado’s trial, Ms. Torres, unaware trial had been continued, appeared pursuant to a subpoena to testify in Mr. Prado’s case. RP 8, p. 624. On that date she met and spoke with the prosecutor, not Mr. Prado’s counsel, and the

²⁴ Although Ms. Torres appeared in some group photographs that included Mr. Prado, there was no evidence indicating that her presence in the photo had any connection at all to Mr. Prado. Instead Ms. Torres presence in the photo was likely connected to the presence of friends of her boyfriend, the father of Ms. Torres’ child, appearing in the same photo as Mr. Prado. RP 8, p. 584.

meeting with the prosecutor occurred without Ms. Torres even notifying Mr. Prado's counsel. RP 8, p. 624. The prosecution listed Ms. Torres as a trial witness. CP 00014.

Ms. Torres was not "particularly available" to Mr. Prado. The trial court committed error in giving the missing witness instruction.

In addition, because Mr. Prado's counsel provided a satisfactory explanation as to why Ms. Torres could not appear and additionally requested a short continuance to secure Ms. Torres's presence, the trial court was in error in providing a missing witness instruction. Instead of evaluating Ms. Torres' explanations and how they affected her ability to appear in court, the trial judge reasoned that because Mr. Prado faced serious charges, Ms. Torres's reasons for not appearing were not satisfactory. RP 8, p. 631-32. The trial court's balancing process was improper. If the granting of a missing witness instruction is decided by weighing the reason the witness is unable to appear against the seriousness of the charge at issue, the instruction would issue every time a witness failed to show so long as a defendant was charged with major offense.

Ms. Torres had a satisfactory explanation for not appearing and therefore, it was error for the trial court to issue a missing witness instruction.

G. The Trial Court Erred by Providing Jurors with a Lesser Included Offense Instruction when the Defendant and His Counsel Made a Reasoned Decision Not to Request the Lesser.

Mr. Prado's counsel originally submitted a lesser-included offense instruction of Attempted Murder in the Second Degree for Count I. RP 6, 485. After consultation with Mr. Prado and much deliberation, defense counsel and Mr. Prado withdrew their request that the jury be instructed on the lesser-included offense. RP 8, p. 542-43, 604, 622. The trial court gave the instruction anyhow. RP 8, 621-22.

The decision to withdraw the request for the lesser appears to reflect the tactical recognition that evidence of premeditation in Count I was weak and an "all or nothing" approach on that count. RP 8, 542-43. Ultimately, the jury agreed with that reasoning and acquitted Mr. Prado of Attempted First-Degree Murder in Count I. However, the jury convicted him of the lesser.

Even where risk [of conviction on the primary charge] is enormous and the chance of acquittal minimal, it is the defendant's prerogative to take this gamble... [A]ssuming that defense counsel has consulted with the client in pursuing an all or nothing approach, a court should not second-guess that course of action...

State v. Grier, 171 Wn.2d 17, 39 (2011), *adhered to in part on remand*, 168 Wn. App. 635 (2012).

It was error for the trial court to instruct the jury on the lesser included offense of Attempted Murder in the Second Degree in Count I despite the clear statements by counsel and client that they did not wish such an instruction be given. As a result of the error, Mr. Prado suffered significant and measurable prejudice. Mr. Prado was acquitted of the primary charge. Had he not been convicted of the lesser offense, Mr. Prado's standard sentence range would have been shortened by approximately 22 years. CP 000143. His conviction must be reversed.

H. Mr. Prado did not Receive Effective Assistance of Counsel.

The Sixth Amendment to the U.S. Constitution and Article 1, Section 22 of the Washington State Constitution mandate that a defendant is entitled to effective counsel and the right applies whether counsel is appointed or retained. *State v. James*, 48 Wn. App. 353, 362 (1987) (citation omitted). The test utilized for ineffective assistance is whether (1) the defense counsel's performance fell below an objective standard of reasonableness, and (2) whether this deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 366 (1985). The *Strickland* court defined prejudice as the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. at 694.

Mr. Prado’s trial counsel was ineffective for failing to object pursuant to ER 403 and 404(b) to the volumes of “prior bad acts” evidence admitted at trial against Mr. Prado individually.²⁵ None of that propensity evidence related to the crimes charged or the gang aggravator. Had Mr. Prado’s counsel objected to the admission of evidence of such things as Mr. Prado’s habitual drug use, repeated uncharged thefts, burglaries and the like, his objections would likely have been sustained and none of that prejudicial and inflammatory evidence would have been presented to Prado’s jury. See, *State v. Saunders*, 91 Wn. App. 575, 578 (1998).

Mr. Prado’s trial counsel was ineffective for agreeing to the introduction of Mr. Prado’s juvenile burglary convictions after the trial court had ruled that those convictions were inadmissible.²⁶

Mr. Prado’s trial counsel was ineffective for failing to object to the improper and inflammatory argument made by the prosecutor in his closing argument.

Mr. Prado’s trial counsel was ineffective for failing to request that the prosecution provide an offer of proof pertaining to the qualifications,

²⁵ See, § V.B.4.

²⁶ See, footnote 6, *supra*.

basis, and content of the expert gang testimony of Yakima officers prior to their testifying in Mr. Prado's trial. An offer of proof or some additional discovery would have likely prevented much of the improper gang testimony from being presented to Mr. Prado's jury. Alternatively, defense counsel should have requested that the court require the investigating officer/experts to split their appearance at trial into two segments; one addressing their role as case investigators and one addressing their role as purported experts. Allowing the investigating officers to present factual testimony to the jury while simultaneously presenting expert opinion likely confused the jury into treating the officers' opinions as factual evidence.

The evidence against Mr. Prado at trial consisted primarily of the testimony of a young co-defendant who changed his story after receiving an offer of a substantially reduced plea on condition he testify against Mr. Prado. The improper propensity evidence and improper gang expert testimony presented in Mr. Prado's trial played a vital role in securing his conviction. The failure of Mr. Prado's counsel to interpose objections and to take reasonable steps to exclude that evidence undermines the confidence in outcome of Mr. Prado's trial. See, *Strickland v. Washington*, 466 U.S. at 694. In short, without the improper propensity evidence and without the improper gang related testimony, there is a

reasonable probability that Mr. Prado would have had a different result at trial.

Mr. Prado did not receive effective assistance of counsel and is therefore entitled to a new trial.

VI. CONCLUSION

For the reasons stated above, Cesar Prado respectfully requests the court grant him the relief requested herein.

DATED this 10th day of July, 2013.



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