

NO. 31275-5-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.

CESAR SAUL PRADO,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Attorney for Respondent

JAMES P. HAGARTY
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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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 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 1.
7. Error occurred in the Superior Court because the defendant did not receive effective assistance of counsel.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court properly denied the motion to dismiss there was sufficient evidence to support the conviction.
2. The gang evidence was properly admitted.
3. There was no prosecutorial misconduct.
4. The court properly gave the missing witness instruction.
5. The court properly gave the lesser included instruction.
6. Trial counsel was effective.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been sufficiently set forth in appellants brief to give this court a proper overview of the case. Therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional, separate, facts section. The State shall refer to the record as needed within the body of this response.

III. ARGUMENT.

RESPONSE TO ALLEGATION ‘A’ SUFFICIENCY.

Appellant challenges the sufficiency of the evidence to support his convictions for attempted second degree murder, attempted first degree murder and unlawful possession of a firearm.

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). 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); 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). See also jury instruction “4,” CP 83.

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). (CP 80) "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).

At the close of the State’s case Prado made what is commonly called a “half-time” motion. He moved for a “directed verdict” stating that the State had failed to demonstrate there was any intent shown, no evidence of who the shooter was except for the “discredited” testimony of Rivera and that there had been no showing of premeditation. RP 547 The court in ruling against this motion stated;

Well, looking at the evidence in a light most favorable to the state, I am going to deny the motion. The testimony of Mr. Rivera, the title or describing it as discredited is a conclusion, I think, that the defense would want to achieve. That is a decision that the jury would engage in.

The testimony from him was clear that he identified, targeted and had gone to Mr. Prado, informed him of that. Mr. Prado stated what he was going to do. He got out of the car. He put a bandana on with the intent of achieving a particular purpose.

He traveled some distance to get to the target. He fired 11 shots, two initially and then the remaining in quick succession. The gap between the two and the remaining would suggest that there was some passage of time when there was an ability to deliberate. Following that period of time the remaining bullets were fired, and two people were hit.

The photographic evidence showed a person in a black and white checked coat run past the cameras at the Conoco station. Mr. Rivera testified that was the jacket worn by Mr. Prado.

I think there is ample evidence for this case to go to the jury. The motion is denied. RP 548-9

Prado indicates in his brief that neither Ms. Deckard nor Mr. Parren identified Prado as the shooter and that the testimony of Rivera is “the most unreliable type of testimony possible” stating that Rivera had “altered” his testimony in order to avoid more severe punishment. (Apps brief at 7.) Citing to the dissent in a 2010 case which further cites to an article by an “investigative reporter” whose website also lists as a proud achievement the co-development of a course on “Bob Dylan.”¹ The jury was given the instruction regarding the testimony of a codefendant.

¹ RyanBlitstein.com http://ryanblitstein.com/?page_id=2

The direct and circumstantial evidence in this case was substantial. Officers at the scene found eleven shell casings and they knew when they observed the victim, a known Sureno gang member, that this was probably a gang related crime. RP 151-2, 155 Officers testified that at the very beginning of the investigation they began to look at Prado and Rivera as possible suspects because Rivera was known to own and drive a gray Kia. RP 305-7 The officers learned from Rivera's father that he had left home driving the gray Kia at approximately 9:00. RP 334 The officers knew that Prado and Rivera were both documented La Raza Norteno gang members. RP 170-4, 180-1

The officers were well acquainted with the victim Brain Parren and knew him to be a self-admitted Sureno gang member. RP 171, 305-7

The surveillance video clearly shows that the shooter was wearing clothes that did not match what Rivera was wearing in the video from inside the Conoco. This video also shows Rivera leaving the Conoco just moments before Parren walks out. SE 4 It is only seconds after Parren leaves that shots are fired. The first call that came into E 911 was at "2325" therefore the time of the shooting was approximately 11:30 PM, the crash of the Kia comes in at 12:22 PM on the 19th. RP 89

The jury heard the testimony of Mr. Rivera. They were then instructed as follows;

INSTRUCTION NO. 7

Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth. CP 86

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).”

Rivera admitted that he drove his car to the scene; he stated that he was the person seen in the security video, a video that was played to the jury and admitted at trial. RP 431, SE 4 He testified that when he entered the Conoco he recognized the victim and knew him to be a Norteno or what he called a “scrap.” RP 432-5 He testified that he and Prado had with them on that day a .45 caliber Springfield handgun that they had stolen. RP 422-23 430-1 He then re-entered his car and told Prado and Bentley, who had a cast on his foot and was using crutches, that he had seen Parren. RP 418,425, 428-9, 430-6 When Prado asked if he should “light him up” Rivera egged him on. RP 436 Rivera testified regarding the physical location of his car at time of the

shooting. RP 436-7 Rivera's description of the clothing worn by Prado, the shooter, matches the clothing that can be seen in the surveillance video. RP 437, SE 4(Once again Mr. Bailey was on crutches.) Rivera testified that he moved his car, Prado got out of the car with a bandana over his face. When Appellant left the car he cocked the gun, putting a round in the chamber and headed back towards the Conoco. RP 437-8 Soon thereafter Rivera heard shots he had earlier stated that he believed the gun held fourteen rounds, his response regarding the number of shots fired was "probably the whole clip." RP 439 Rivera then testified that Prado had stated that he had shot the "scrap" and he also shot "a girl" a fact that only the shooter would have known. RP 439-40 Rivera testified that they "glorified" Prado and "told him that's what's up, earned some stripes." RP 439-40

In latter sections of his brief Appellant challenges the use of gang testimony and the experts called by the State. The State will fully address those issue in that section, however it State needs this court to recognize that without the testimony of the gang officers which explained the history, verbiage and mental process found in gang culture, no "lay" person would have been able to comprehend what was testified to by Mr. Rivera, Mr. Parren or Mr. Prado. No lay juror would know what putting in work, getting some stripes, the use of bandana's

with a specific color, the designation of turf, color, numbers or most other aspects of the “normal” daily life and routine of a member of a gang as was testified to in this trial by Mr. Rivera, Mr. Parren and the Appellant.

The final portion of Mr. Rivera’s testimony describes the ill-fated attempt to flee which resulted in the wrecking of the car. Mr. Rivera testified that he and Prado fled the car and were later picked up by his step-father. RP 441-45

Appellant testified that he was a member of the La Raza street gang. RP 587-8 Mr. Prado places himself in the gray Kia from around 2:00-3:00 PM until about 9:00 PM when he states he was taken by Rivera to Isabel Torres home. RP 572-3, 589 Ms. Torres is a friend of Prado’s and the mother of a dead La Raza gang member’s child. RP 584-5, 593-4 Prado then testified that he was picked back up by Rivera around midnight and soon thereafter Rivera “was on the phone talking to somebody, and he accidentally ran over a curb.” RP 574. Once again the shooting that Rivera admitted to being at and where his car was identified at was committed at approximately 11:30 PM on the 18th. Apparently in the intervening thirty minutes Mr. Rivera was able to drive Mr. Bentley somewhere and then go pick up Appellant and once he picked up Appellant, an almost life long friend and fellow

gang member he said nothing about the fact that he had just been the driver of a car that was involved in the shooting of a rival gang member and “a girl.”

Prado testified that he had admitted in his initial interview that he was at the Conoco but denied that on direct testimony. On both direct and cross-examination he affirmed that he had told the officers that in the interview but it was done because “I wanted them to stop asking me questions” not because he was actually there. RP 574-5, 598-99

Spent ammunition as well as spent slugs found at the scene was .45 caliber .RP 107, 119-33, 138. The expert for the State testified that she received eleven shell casings that were examined. The expert was able to examine two spent slugs recovered at the scene. RP 263-8 She testified that one of the possible weapons that the slugs could have come from was a “Springfield XD” RP 266.

The video shows that the clothing worn by Rivera did not match that of the shooter. The third person in the car had been wearing a cast on his leg and was using crutches because he had been stabbed in the foot. RP 425, 418, 429, 500-2

An independent witness testified in the early morning hours of October 19, 2010 he observed two young males taking items from the trunk and flee the scene. He testified that they were acting hastily and

that it was approximately three minutes between the time these two young men fled the car and the arrival police officers. RP 271-74

By approximately 3:00 AM Prado was arrested from inside his residence wearing street clothes, he was hiding behind a door. RP 183-4, 339

Parren testified as a defense witness. He testified that he knew Isreal Rivera but he didn't remember seeing him because "I had just woken up." RP 558 Parren testified that he was a Sureno gang member RP 559 Parren denied stating that the shooter was wearing a red bandana, his lawyer interjecting that it was only "a bandana" not a red one. This was later "clarified" to be the bandana was "dark." RP 561, 565 Parren stated in his testimony that he turned his head at the last moment to avoid being shot directly in the head. He would not even go so far as to state that he had seen a gun, he testified that he jerked his head way because he "saw someone point an object at me." RP 556 Parren testified that he was shot in the neck and leg and that he was wheelchair bound for an extended period of time because one bullet had shattered his femur. RP 564-5 He testified that he was a Sureno and testified that even if he knew the shooter he would not identify that person. He stated he would not he could not testify against the shooter because if he did "his career could be over." RP 561-2

The second victim, Angel a Deckard testified she had driven Parren to the Conoco to get gas and that Parren had gone into the store. She testified that as she was waiting for Parren a gray car drove by and the **three occupants** were “mugging me.” She testified that “mugging” meant that “giving her dirty looks, like they knew who I was and didn’t like me or something.” RP 530 Shortly after Parren exited he came up to her car and told her he put more money in for gas, then the next thing she remembered was the gunshots and that she had been shot. RP 531-3 She testified that she removed a gun from the car. RP 534. Ms. Deckard testified the last time she saw the car with the three occupants was as it drove down an alley. RP 536 She testified that they removed a .45 caliber slug from her. She testified that she was scared for her life and for Parren’s life at the time of the shooting. RP 536-7

The State also had admitted the video recordings of the interviews of Prado and Rivera as well as the jail classification form pertaining to Prado and a recording of portions of two inmate phone calls from Prado where he calls Rivera a “snitch” but never states that Rivera is lying. SE 5, 6, 9, 23.

The appellant was in a car that fled the scene; flight is a factor that can be weighed by the jury. State v. Price, 126 Wn. App. 617, 645,

109 P.3d 27 (2005), review denied 155 Wn.2d 1018, 124 P.3d 659

(2005):

Evidence of flight is generally admissible as tending to show guilt, but the inference of flight must be "substantial and real" not "speculative, conjectural, or fanciful." State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). The evidence must be sufficient so as to create a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. Bruton, 66 Wn.2d at 112-13.

The appellant's culpability is further supported by his actions when the car wrecked and he fled that location too.

Premeditation is the deliberate formation of and reflection on the intent to take a human life and involves the mental process of thinking beforehand, deliberating on, or weighing the contemplated act for a period of time, however short. State v. Allen, 159 Wn.2d 1, 7-8 147 P.3d 581 (2006). Premeditation must involve more than a moment in time. RCW 9A.32.020(1); Allen, 159 Wn.2d at 8. The State can prove premeditation by circumstantial evidence where the inferences argued are reasonable and the evidence supporting them is substantial. State v. Clark, 143 Wn.2d 731, 769, 24 P.3d 1006 (2001). Examples of circumstances supporting a finding of premeditation include motive, prior threats, multiple wounds

inflicted or multiple shots, striking the victim from behind, assault with multiple means or a weapon not readily available, and the planned presence of a weapon at the scene. See Allen, 159 Wn.2d at 8; Clark, 143 Wn.2d at 769; State v. Pirtle, 127 Wn.2d 628, 644-45, 904 P.2d 245 (1995); State v. Hoffman, 116 Wn.2d 51, 83, 804 P.2d 577 (1991).

The charges set out were set out as Appellant acting in his sole capacity or as an accomplice. CP 11-12. The jury was instructed as to accomplice liability CP 89, State v. McChristian, 158 Wn.App. 392, 400-01, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011):

Washington's complicity statute, RCW 9A.08.020, provides that a person is guilty of a crime if he is an accomplice of the person that committed the crime. A person is an accomplice under the statute if, with knowledge that it will promote or facilitate the commission of the crime, he aids another person in committing it. RCW 9A.08.020. General knowledge by an accomplice that a principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow. State v. Roberts, 142 Wash.2d 471, 513, 14 P.3d 713 (2000). Our Supreme Court has made clear, however, that an accomplice need not have knowledge of each element of the principal's crime to be convicted under RCW 9A.08.020; general knowledge of " the crime" is sufficient. Roberts, 142 Wash.2d at 513, 14 P.3d 713 (citing State v. Rice, 102 Wash.2d 120, 683 P.2d 199 (1984); State v. Davis, 101 Wash.2d 654, 682 P.2d 883 (1984)). "[A]n accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the

scope of the preplanned illegality." Davis, 101 Wash.2d at 658, 682 P.2d 883. In other words, "an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor level assault, and need not have known that the principal was going to use deadly force or that the principal was armed." In re Pers. Restraint of Sarausad, 109 Wash.App. 824, 836, 39 P.3d 308 (2001).

The evidence presented to the jury regarding this shooting provided sufficient evidence of Prado's intent to kill Mr. Parren and Ms. Deckard, "[i]ntent to attempt a crime may be inferred from all the facts and circumstances." State v. Bencivenga, 137 Wash.2d 703, 709, 974 P.2d 832 (1999). State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). Deference must be given to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence.

At the end of the trial the evidence was overwhelming. The claim by Prado that the only real testimony against him was that of Mr. Rivera is specious.

GANG AGGRAVATOR.

Prado states that the only testimony regarding the gang aggravator was that of the officers. This completely ignores the sworn testimony of Mr. Rivera. Mr. Rivera identified Prado in court and stated that hey had

been friends since Rivera was eleven and they hung out together almost every day. He testified that they were both members of La Raza. RP 409-11 The State has included a very lengthy section of Rivera's testimony in Appendix A. He testified to the following;

It is clear from the testimony of the officers and Mr. Rivera that the "job" that Appellant held was that of a thief and in this instance as a "soldier" "he put in work" to earn his "stripes." The testimony of Rivera was that he recognized Parren as a Sureno and that Prado also knew that Parren was a Sureno. There was discussion in the car about "smoking" the "scrap." RP 422-45 Once again Prado was charge as a principle or as an accomplice. Rivera testified that he knew Parren and recongnized him to be a Sureno by the tattoos on his face, specifically the X3 on his face representing the number "13" that the Sureno's claim. Rivera testified that he went back to his car and described Parren to Prado and when Prado asked Rivera if he "should light him up" Rivera to told him yes. RP 432-39

The claim that because Ms. Deckard was shot first not Mr. Perran therefore there her shooting "would accomplish nothing" is ludicrous. These are members of a criminal street gang, they have just seen a rival gang member and they have a gun and they agree that they need to shoot the "scrap." That "scrap" when he is shot it speaking to Ms. Deckard who

is the person driving the car with Mr. Parren in it. The goal was to kill someone and clearly a person who is driving a known rival gang member would be just as much a target and shooting her would entail getting all of the “glory” the shooter would get for shooting the “scrap.”

All of the testimony in conjunction with the information supplied by the officers regarding how the gangs conduct their business was more than sufficient to support the gang aggravator. Appellant contends that there is insufficient evidence to support the jury's finding that he committed these crimes "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 11-2; *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). These findings were not challenged at the trial court level nor have they been challenged in this court. CP 151-2 If no error is assigned, the findings of fact are verities here on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

As this court is aware the aggravating factor at issue is relatively new few cases have addressed this issue. In cases addressing a similar gang-related aggravating factor, this court has held that expert testimony about generalized gang motivations was insufficient. State v. Bluehorse,

159 Wn.App. 410, 429, 248 P.3d 537 (2011). The court has required that there must be some evidence of the defendant's actual gang-related motivation behind the crime charged. *Id.* at 428. In contrast to Bluehorse the facts presented in this case, from both officers and Mr. Rivera and Mr. Parren as set out throughout this brief clearly and unequivocally indicate that there was no other motivation here but that of gang on gang retribution. This was not Bluehorse, this was not hand signs thrown weeks ago. This was one Sureno in territory that was on the border of the two areas of the city of Yakima “claimed” by these gangs. This was three known members who had discussed cutting this same victim up with a samurai sword in a previous encounter where the Norteno’s were looking for the addict mother of one of these Norteno’s. This was recognition of the facial tattoos of Mr. Parren that broadcast to the world his allegiance to his gang. A culture which he as a victim embraces to the point where he stated that even if he knew who shot him he would not tell. Bluehorse is clearly distinguishable. The Court of Appeals reversed Mr. Bluehorse's 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.

State v. Moreno, 173 Wn.App. 479, 495, 294 P.3d 812 (2013) addresses this issue. There is no dispute that Appellant is a gang member.

The issue then is whether Appellant intended "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." RCW 9.94A.535(3)(aa). RCW 9.94A.535(3)(aa) does not require gang membership. Moreno 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. 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 Prado intended to indirectly cause a benefit or advantage to the membership of a criminal street gang. The evidence showed that he was

a La Raza Norteno member and that Rivera had informed him that Parren was in the store and that he was an associate of a rival gang, the Sureno's. The testimony from Mr. Rivera alone clearly indicates that the "soldier" and other gang member "put in work" and one of the means of gaining stature in the gang it to shoot a rival gang member. This was also clearly set out by the various officers who testified regarding the gang live/culture and the demands of that life. As set forth above in great detail the evidence was extensive that Prado, a member of the Norteno's, who proudly wore the tattoos of his gang, he was carrying a gun that he and fellow gang member Mr. Rivera had stolen in a car prowl, an activity they also did to support themselves and their gang; Mr. Parren the victim was clearly a Sureno who had gang tattoos on his face indicating his allegiance; Mr. Rivera went directly from the store where he had seen Mr. Parren to the car in which the other two gang members were sitting and told them about Mr. Parren. Immediately thereafter Prado asked the others if he should go "smoke" the "scrap" Rivera agreed with this idea. Prado then purposefully pulled up a bandana, red in color, and took out the gun walked around to where the victims were and discharged at least eleven rounds of .45 Caliber ammunition, striking both Parren and Decker. This is a well lighted public store's parking lot in the center of the city of Yakima. He and his accomplices then fled the scene and thereafter

disposed of the gun which was never found. Substantial evidence supported the jury's finding.

RESPONSE TO ALLEGATION 'B' GANG TESTIMONY.

Evidence of gang affiliation may easily be perceived by juries as evidence showing a lawbreaking character, thereby tending to prove the person acted in conformity with that character at the time of a crime. For that reason, its admission is subject to the standards for admitting evidence of "other crimes, wrongs, or acts" provided by ER 404(b). *See State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136 (2009). Affiliation with a gang is also protected by the First Amendment right of association and is inadmissible to prove a defendant's beliefs and associations; there must be a nexus between the crime and the gang before evidence of the affiliation is admitted. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (citing *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992); *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995)). A trial court's decision to admit gang evidence under ER 404(b) is reviewed for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995); *Scott*, 151 Wn. App. at 527.

Before admitting evidence under ER 404(b), the trial court must 1) find by a preponderance of the evidence that the misconduct occurred, 2) state 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) balance the probative value of the evidence against the danger of unfair prejudice. State v. Kilgore, 147 Wn.2d 288, 292,53 P.3d 974 (2002). It may conduct a hearing to take testimony, but is not required to do so. *Id.* at 294-95.

Here, the trial court found on the record that the gang evidence was relevant to issues of premeditation, motive, and intent, all of which are permitted purposes for offering evidence of other wrongs under ER 404(b). *See* State v. Yarbrough, 151 Wn. App. 66,210 P.3d 1029 (2009) (gang evidence admissible as to motive); State v. Boot, 89 Wn. App. 780, 788-90, 950 P.2d 964 (1998) (admissible as to motive, premeditation); State v Campbell, 78 Wn. App. 8134, 821, 901 P.2d 1050 (1995) (premeditation, motive, and intent).

In challenging the sufficiency of evidence to support the findings required to admit the evidence, Appellant focuses on evidence presented at trial. (Apps brief at 14-15) Appellant focus's on trial information such as the information regarding Mr. Bentley's foot injury was relevant to prove that of the three people in the car, only Prado fit the image on the surveillance video and was able to walk up the victims, shoot them then run away, obviously Bentley could not do that is he was in a cast. What better person to confirm this than a State official who had been in contact

with Bentley throughout this time frame. That is not the proper focus of review, however, because in this case the admissibility of the evidence was decided before trial. At the request of the parties, the trial court heard evidence on this issue. RP 24-77 The trial court heard from the parties and made a series of rulings:

THE COURT: Well, based on the offer of proof that I've heard that there will be, in fact, testimony in the form of an admission that Mr. Prado was engaged in this behavior, this conduct, because of the gang issues or opposition, it's clear that gang evidence is prejudicial. I don't think there's any question about that. It sounds like there's ample evidence, though, that would establish that gang association was the reason for this alleged crime, that it is very relevant.

I find that the evidence would show that this is the motive that urged Mr. Prado to do what he did or allegedly did is relevant and probative to the state's case. The prejudicial value or damage, I think, is far outweighed by the probative evidence that's offered or suggested by the state.

So the motion to admit gang evidence is granted. The motion to exclude is denied. RP 29

...

THE COURT: I think these are relevant. The issue I just raised is created by Mr. Prado's responses on page two to questions four and five in particular. I'm sorry, four, five and six. He's not asking individually personally for protection, but it would be my understanding that placing --

The evidence that's offered is to establish that he is a Norteno or a member of a Norteno gang. If he were to be placed with Surenos, that would endanger not only him but it would endanger Department of Corrections staff in trying to resolve any issues that might exist there and protect any Sureno members that come in contact with Mr. Prado in an aggressive way, protect them from possible physical harm as well as any criminal consequences that could flow from that.

I think that it is appropriate. It fits within the booking process analysis and why it should be admissible. RP 35

...

THE COURT: It would seem that page one achieves the goals the state is seeking that I think are fair and relevant to this case.

The third page, we don't even know yet who filled in the paperwork, do we? Almost certainly it says at the bottom.

...

THE COURT: Okay. At this point, page one, the Classification Release Interview Form is admissible. RP 37

...

THE COURT: It seems there are two issues here. One is whether or not the type of testimony is admissible. Second, duplication of testimony.

I think it is relevant. I think a person who is known as a gang expert should be entitled to testify and explain to the jury how the gang works and what motivates them. The culture, that is relevant to this case, but not every officer --

Even though it may seem helpful to the state, I think it's still incumbent on the jury to listen to the testimony that's presented, and I don't think -- it's not appropriate to have the same testimony essentially coming as an expert from -- I've heard Officer Taylor testify. I haven't heard Officer Morfin. If they're all saying the same thing from an expert's perspective -- RP 40

...

THE COURT: My thought behind this is that it has been my experience that gangs are understood and known to the general public but not necessarily how they work or operate. I think that will be important, an explanation, so the jurors can understand. If it's going to be duplicative, Mr. Heilman-Schott would make the appropriate motion and we would deal with it at that point.

Israel Rivera is a different commodity. He's not being offered as an expert, but he may touch on some of the same issues. I don't see that as being redundant.

With that, I guess the upshot is the gang expert testimony is allowed. It is not meant to be redundant. To the extent it is, Mr. Heilman-Schott, you would need to make your motion. Frankly, if you don't, I probably will say something not in the presence of the jury, if it's getting to be there. RP 41

These rulings without a doubt meet the test set for the admission of this type of evidence.

NEXUS

This was a random encounter not a random shooting. It would be an understatement to say that a lay person would understand or have knowledge of the workings of a criminal street gang. The testimony was extensive regarding the background, history and workings of a criminal street gang and specifically the Sureno and Norteno gangs in Yakima but without this testimony it would be an inconceivable leap for a lay juror to comprehend the language, actions and the motive a person would shoot two people whom they had randomly encountered in a convenience store.

The analysis set forth above and the rulings made by the court prior to trial clearly comport with State v. Scott, supra as cited by Appellant.

The claim that there was no nexus between the crimes charged and the introduction of the gang information is false. The entire theory by the State literally from the initial report to the police the victim Angela Deckard to closing arguments by the trial deputy was that this was a gang motivated, gang initiate, gang related crime. The State filed a lengthy motion in limine that for seven pages described the State's theory and reasoning for the use and admission of gang testimony. CP 19-26 This

was stated, known and proven from the initial hearing conducted on October 1, 2012. RP 1-77.

Prado in his brief says that the other encounter Rivera had with Mr. Parren was benign, that they smoked marijuana together. Prado overlooks the section of testimony by Mr. Rivera where he testified that he and Bentley went to the “dope hour...looking for Bentley’s mother who was a “tweaker” and there was a discussion of attacking him and chopping up Parren with a sword. RP 432-4. The information testified to by the various officers makes it clear that these two groups did not “socialize” as Prado would have this court believe. It is hard to imagine the shame that these two Norteno’s must have experienced having to go to a Sureno “dope house” looking for one of their mothers. The following are the questions and answers regarding an earlier encounter;

A. He came to the window and Patrick asked him where Rhonda was at. He said she wasn't there.

Q. Did you notice his tattoos at that time?

A. Yes.

Q. Did you attempt to beat him up or anything based on that?

A. No.

Q. Was there any conversation about attacking him?

A. Yes.

Q. And why was that?

A. Because he's a Sureno.

Q. Is that something that you do every time you see somebody that's a rival?

A. Pretty much.

A. Yes.

Q. Who?

A. Patrick.
Q. What did he want to do?
A. Chop him up.
Q. With what?
A. A Samurai sword.
Q. Did you guys have a Samurai sword?
A. Yes.
Q. Was he still in his cast?
A. Yes.
Q. Crutches?
A. Yes.
Q. Was he capable of getting out and doing that?
A. No.

This court need only read the section of the verbatim report where Office Salinas describes his previous and on going encounter with these gangs and the history of and make up of the gangs to realize that the claim by Prado that this testimony can be read to mean that these gangs were headless organizations where unknowns did what they did just for themselves to be a very incorrect understanding of these statements. RP156-81. Officer Salinas does not state that the La Raza are no longer an organized gang, he is saying the opposite. What he is saying is that the structure and leadership has changed to the point where this type of chance encounter will result in a shooting.

What you really can't stop is the chance encounters. We talked about Mr. Parren. You have it out on your face. You're telling the world who you are. You're wearing the clothing.

You go to the Walmart, there's no telling who you're going to see there. You could see a Norteno. You're riding your bike in the neighborhood. You may wind up in the wrong

neighborhood. Somebody's going to put you in check. Somebody is going to be there to let you know this is not your neighborhood. You don't belong here. We came across that quite a bit. RP 171

UNCHARGED BAD ACTS.

The testimony such as the fact that there was a warrant for Prado's arrest was unsolicited. The deputy prosecutor asked why Prado had run to his bedroom when the police knocked on the door at his house. Prado's response was "I had a warrant." The unsolicited statement was then followed by questions to clarify what that warrant was for. RP 597. There was no objection by trial counsel. Much of the other "bad act" testimony Prado claims the State solicited was from testimony of Mr. Rivera and that was necessary to establish the nature and extent of that relationship and to demonstrate that these two young people were in fact gang members who's primary occupation was "putting in work" for that gang which culminated with the shooting of Mr. Parren and Ms. Deckard.

Prado now complains that the stipulation he agreed to was prejudicial, he agreed to the language and the admission of this information. He can not now without further basis challenge its admission. State v. Young, 129 Wn.App. 468, 472, 119 P.3d 870 (2005);

The invited error doctrine prevents a defendant from appealing an action of the trial court that the defendant himself procured. ^[2] This prevents counsel from "setting up"

the trial court by seeking a specific action of the court and then seeking reversal on the basis of that same action. ^[3]

^[2] *State v. Henderson*, 114 Wash.2d 867, 870, 792 P.2d 514 (1990); *State v. Lewis*, 15 Wash.App. 172, 176-77, 548 P.2d 587 (1976) (holding that when a criminal defendant makes a tactical choice in pursuit of some real or hoped for advantage, he may not later urge his own action as a ground for reversing his conviction).

^[3] *State v. Meggyesy*, 90 Wash.App. 693, 707, 958 P.2d 319 (1998) (finding no invited error where the defendant did not invite the particular error he raised on appeal).

Once again there was not one single objection by Prado to this testimony. In fact there was not one single objection from the Appellant for the entirety of Rivera's initial direct testimony. RP 406-450 Prado fails to set forth a basis for this court to review these alleged unpreserved errors. *State v. Stevens*, 58 Wn. App. 478, 494, 794 P.2d 38 (1990);

A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986); *State v. Smith*, 15 Wn. App. 716, 722, 552 P.2d 1059 (1976). The important purpose served by this rule is to afford the trial court the opportunity to prevent or cure the error. *State v. Madison*, 53 Wn. App. 754, 762-63, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). By failing to object on proper grounds or moving to strike, Stevens did not give the trial court an opportunity to remedy the defect. Therefore, under *Guloy*, this issue is not properly before this court.

Stevens seeks to avoid operation of this rule by asserting a constitutional basis to the alleged error. As discussed previously, manifest constitutional error is reviewable for the first time on appeal. RAP 2.5(a)(3); *State v. Frey*, 43 Wn. App. 605, 609-10, 718 P.2d 846 (1986).

The majority of the information that Prado is claiming to be prior bad act information is information that was solicited regarding the membership in the La Raza Gang. The jury was instructed as follows with regard to that information;

Instruction 6

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony and exhibits related to gang membership and gang association. This evidence may be considered by you only for the purpose of establishing a motive as to why the crime alleged was committed. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation. CP 85

Prado states that this information had little, if any probative value. This is incorrect. This information regarding what these two friends was very probative and as with most evidence in a trial it was prejudicial. The court had previously ruled that this information was admissible. This is not testimony that these two young men who spent almost everyday with each other went out and did these acts. This was information that was presented to the jury to allow them to see the workings of this criminal street gang and thereby understand that the shooting that followed was to use the victim Mr. Parren's words, part of their career.

RESPONSE TO ALLEGATION 'C' ER 702

Admissibility of expert testimony under ER 702 is within the trial court's discretion. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003), *citing* State v. Kalakosky, 121 Wn.2d 525, 541, 852 P.2d 1064 (1993). State v. Simon, 64 Wn. App. 948, 963, 831 P.2d 139 (1991):

Expert testimony is admissible under ER 702 if the witness qualified as an expert and if the expert testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue . . ." ER 702. The decision to admit expert testimony will be reversed only for an abuse of discretion. "If the reasons for admitting or excluding the opinion evidence are 'fairly debatable', the trial court's exercise of discretion will not be reversed on appeal." (Citations omitted.)

The trial court considered this question and ruled that the gang information would be helpful to the jury. While the public is now exposed on a regular basis to the actions of gangs the inner workings of those gangs and the mentality of those in gangs can not be said to be common knowledge. The ordinary juror would not know that the reason for this shooting was that a person who "claimed" a specific number and color and geographically area happened to be in an area that was perhaps under the control of another group that "claimed" another number and color and geographical region. It would be safe to say that the mere "claiming" of a color and a number in a way that you as a member of the group claiming that color or number are required to assault or kill a person "claiming" another color or number if that other person is found to

disrespect that color or number or have the bad luck to have crossed into territory “claimed” by the other group. The very thought that a person can die for wearing the “wrong” color in a specific section of a town is something that no “lay” juror would likely know of or fully understand.

The entire theory of the State was that the criminal acts committed by Prado were based on this other-worldly conscription of colors, numbers and streets.

United States v. Mejia, 545 F.3d 179 (2nd Cir) 2008 is distinguishable. In that case the charges laid were for racketeering and conspiracy.

Here the State’s theory was that this apparent random act of attempting to murder “in cold blood” in a well lit public area could only be explained by getting deeply into the life and mental process of these two men. That entailed explaining Rivera, Parren and Prado’s “business” their trade. Here the officers did not opine as to the guilt or innocence of Prado. The testimony did however establish that he existed in a section of the society that is foreign to a lay person. This testimony was not as to or regarding the guilt of Prado, merely what and why he was motivated to take such drastic action with regard to a total stranger.

In State v. Simon, 64 Wn. App. 948, 964, 831 P.2d 139 (1991) the court addressed a relationship as foreign to most as the gang relationship

addressed herein the court stated, “Detective Benson's testimony regarding the pimp/ prostitute relationship was helpful to the jury because the average juror would not likely know of the mores of the pimp/prostitute world....the testimony did not constitute an opinion as to Simon's guilt. Detective Benson did not testify that Simon did or did not threaten Bartall; rather, Detective Benson testified in general terms about the nature of the pimp/prostitute relationship.” (Citation omitted.) The officers here stated their years of experience, relationship with the street gangs, number of contacts in general and in some instances with the victim, witnesses and the defendant and addressed an unfathomable area of this subculture. Once again they did not “opine” as to the guilt or innocence of Prado.

LACK OF QUALIFICATION BY OFFICERS/EXPERTS.

In re Detention of A.S., 138 Wn.2d 898, 982 P.2d 1156 (1999)”Moreover, the long-standing rule in Washington is, “Qualifications of expert witnesses are to be determined by the trial court within its sound discretion, and rulings on such matters will not be disturbed unless there is a manifest abuse of discretion.” Oliver v. Pacific Nw. Bell Tel. Co., 106 Wn.2d 675, 683, 724 P.2d 1003 (1986).”

State v. Simon, supra:

In the instant case, Detective Benson testified that he had been involved in investigating street prostitution for over 6 years, that he had investigated over 400 prostitution related

crimes, and that he had investigated over 50 promoting prostitution cases. Detective Benson also testified about his contact and conversations with prostitutes regarding the pimp/prostitute relationship. Although Detective Benson had no formal course work in this area, a witness need not possess the academic credentials of an expert; "[p]ractical experience in a given area can qualify a witness as an expert." (Citations omitted.)

Once again there was not one single instance where Prado objected to the basis or qualification of the officers who testified regarding gang life and culture therefore this error has not been preserved for review by this court nor had Prado enumerated a basis by which this court would be allowed to consider this alleged error for the first time on appeal.

Each officer was asked to address his background, training and knowledge. Prado dismisses this as "repeat[ing] the conclusory refrain of training and experience. The State knows of no other method to demonstrate, in a trial, the particularized knowledge, training, and experience which can and is readily used and recognized in establishing a witnesses "expertise" in a particular area other than asking that witness their background, training and knowledge.

Officer Morfin stated that he had the generalized officer training, three years as a "Gang Enforcement Officer" specialized gang training and hundreds of contact with gang members. Clearly this meets the standard set forth in Simon, supra. 302-3

Likewise Officer Taylor; assigned to the gang unit for the last five years, Washington State basic academy, member northwest gang investigators association, attended approximately 120 extra hours of specialized gang-related training as well as monthly gang intelligence briefings throughout the state as well as working with “DOC” to determine who offenders are they gang affiliation and their tattoos. RP 328-9 Officer Salinas testified extensively about his extensive background training and knowledge regarding gangs. Prado complains that this officer explained the basis for Parren not identifying Prado even if he could. The problem with this alleged error is that is exactly what Parren stated when questioned by the State.

Prado claims that this alleged lack of specific background and training infringed on his ability to cross examine these witnesses. If Prado had concerns he could easily asked that the jury be excused, and then done an offer of proof regarding the alleged lack of background training and knowledge. That would have alleviated Prado’s unfounded claim that he could not make further inquiry without introducing additional “bad act” evidence. (Apps brief at 28) A standard offer of proof outside the presence of the jury could have alleviated this alleged harm. Prado’s trial attorney did not take such an action because there was no basis to challenge this area of “expertise” with regard to these three officers.

INVADED JURIES PROVINCE.

The trial court had ruled on the admissibility of gang evidence however generally, to preserve an issue for appeal, a party must object to inadmissible evidence when it is offered during trial even when the trial court has already excluded it through a pretrial order. State v. Weber, 159 Wn.2d 252, 272, 149 P.3d 646 (2006) (citing State v. Sullivan, 69 Wn. App. 167, 172, 847 P.2d 953 (1993)), *cert. denied*, 127 S.Ct. 2986 (2007). This gives the trial court the opportunity to determine whether the evidence is covered by the pretrial motion and, if so, whether the court can cure any potential prejudice through an instruction. *See Weber*, 159 Wn.2d at 272 There is no indication during this or any other gang testimony that Prado objected to specific testimony.

Prado claims that the officers testimony invaded the province of the jury. With regard to the statements made by the officers regarding the testimony of Parren, Mr. Parren himself testified that even if he knew the identity of the shooter he would not reveal that to officers. The officers as well as the witnesses themselves testified as to what was termed the “snitch code” whereby members of a criminal street gang would not testify against or for that matter cooperate with police in determining who the perpetrator of the crime was. This “code” was clearly and fully supported by the witness, Parren’s testimony. Parren called as a defense

witness. Testified that he would not identify Prado even if he could. If he did “My career would be over...as a gang member.” RP 562 Even if the statements made by the officer had been error they were negated by the witness in question agreeing with and adopting the alleged improper statement. The information supplied by the officers did not “infer” that Mr. Parren knew who the shooter was. They just clarified that in the culture of gangs a person could be injured or killed if they testified.

The actions of the witnesses in this instance are akin to those analyzed in State v. Berube, 286 P.3d 402 (2012) where as here there was discussion regarding the alleged “snitch code.” The court in Berube found the actions of the deputy prosecutor were valid because the references were not used in a racial manner but in a way that pointed out that there were reluctant witnesses and why they might be reluctant.

Prado alleges that Officer Morfin improperly stated that he believed that Rivera was telling the truth. The problem with this allegation is that the question was asked by Prado’s own attorney while cross-examining Officer Morfin. The State objected to the question and the reply to the objection was that “it goes to the experience of the officer...” RP 522 Prado can not ask the question creating this alleged error and then attempt to use it as a basis for reversal on appeal.

RESPONSE TO ALLEGATION ‘D’ CONFRONTATION

This allegation is that the general testimony of the officers who relied on their years of experience and contact with hundreds of individuals was somehow using the testimony of out of court absent witnesses. Not to be repetitive but there is not one instance in the record of Prado objecting to this testimony nor is there a word in this appeal indicating how this court should be allowed or required to address this issue for the first time on appeal. The common phraseology of these officers clearly did not and was not intended to be a subversive method of introducing testimony from the alleged absent witnesses. This was merely the recitation of these experienced officers years on the street and the information they had gathered in through that experience. Prado speculates that instances obviously where only obtainable from “informants or custodial interrogations” without a single indication as to how he came to this conclusion. It could be as stated by the officers they get a great deal of the information they had regarding gangs from the social contacts with gang members. As one officer stated the gang members have lives too. These statements were not a violation of Crawford v Washington, 541 U.S. 36, 124 S.Ct. 1354, (2004). It was the simple testimony without any hidden agenda of several officers who for years worked on a daily basis with gang members and who attended

training regarding gangs and who were members of associations of officers who were also gang investigators.

There was no violation of the confrontation clause. Even if there was the evidence in this case is overwhelming. As set forth in great detail above the evidence of Prado's involvement in this crime is extensive and the baseless allegation that the testimony of Rivera is unreliable is completely refuted by that same record. Prado himself places himself in the car, with Rivera and Bentley at the scene and in the wreck after the shooting. He flees the location and is found hiding in the own home. The clothes that he was wearing match, according to Rivera's statement, match those seen in the surveillance video.

RESPONSE TO ALLEGATION 'E' MISCONDUCT.

This claim is baseless. The fact is that Prado and his attorney were sitting in an open courtroom mere feet from the prosecuting attorney and an officer having a conversation. There is absolutely no proof that the deputy prosecutor did anything but sit in his chair and from that position without the aid of anything he and the officer overheard a conversation between Prado and his attorney. "The attorney-client privilege only applies to communications that are intended by the party to be confidential; therefore, if the communication is intended to be disclosed to

others, it is not protected by the privilege. Seattle N.W. Sec. Corp. v. SDG Holding Co., 61 Wn. App. 725, 812 P.2d 488 (1991).”

Communications are not privileged unless they are confidential, and the presence of a third person defeats the confidentiality of such communications. State v. Wilder, 12 Wn. App. 296, 529 P.2d 1109 (1974). It is absurd to believe that any person who is sitting in an open courtroom feet from another person, let alone an opposing party, can claim that a conversation was privileged or that the other party did something to intentionally intercept that communication. The record is devoid of any information that would indicate that the deputy prosecutor and the officer did anything but sit in their assigned chairs. As pointed out by the court “usually people just retire to the back of the courtroom...” In this instance Prado and his attorney chose to sit in a location that was so physically adjacent to the other party that they by their actions exposed the conversation thereby removing any and all confidentiality.

This is clearly distinguishable from the cases cited by Prado going back to State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (Wash. 1963) Each and every case cited and each and every case the State reviewed demonstrated that what had occurred either through overt act or inadvertent error was that the State actor took some sort of action, whether through listening to a microphone in Cory to State v. Perrow, 156 Wn.App.

322, 231 P.3d 853 (Wash.App. Div. 3 2010) where the documents were seized even after the defendant indicated they were privileged or in State v. Fuentes, 172 Wn.App. 755, 760, 295 P.3d 252 (Wash.App. Div. 1 2013) Where “By great misfortune, the recordings provided by the jail to the detective included calls between Pena Fuentes and his attorney, Richard Hansen.” Here once again the record literally devoid of any acts on the part of the State. The State places on the record the only indication of what occurred when the deputy prosecutor states that “If they're saying it in open court where it can be heard, we're sitting here doing the work. I wasn't trying to listen.”

Prado’s attorney does not indicate that he did anything in and attempt to insure that his communication was not open to the public, which is what the deputy prosecutor and the officer were. This was once again an instance where Prado did something in a conscience manner and now is attempting to bootstrap that into an error.

The definition of “eavesdrop” found in the Merriam-Webster online dictionary is of note, “to listen secretly to what is said in private.” The two representative of the State were seated at a table in an open courtroom, in the same location that they had occupied throughout the trial, the defendant and his attorney were also seated in the same location at a table that they had occupied throughout the trial.

There is no indication at all in the record that Prado and his attorney did anything to insure that this conversation was “private” and clearly the two representatives of the state in no manner or means acted in secret. The court ruled that “You don't have anyplace to go with your client, Mr. Heilman-Schott. Mr. Clements is sitting here and does hear something. I'm not going to attribute anything bad to either the state for hearing...” RP 581

There was not misconduct on the part of the State.

MISCONDUCT IN CLOSING.

As jury instruction states;

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions. CP 80.

The facts are that Prado and Rivera were both members of a criminal street gang. The testimony of Rivera is that a person such a Mr. Parren is considered a “scrap” a term of disrespect. Rivera’s testimony make it clear that one of the goals for a “soldier” like he and Mr. Prado was to assault members of other gangs if they saw them. There was never an objection to the statement made by the officer at the time they testified therefore the use of those same terms in a closing argument is not

misconduct.. The terms were not inflammatory especially in light of all of the testimony proffered at this trial. The statements made by the prosecutor are certainly not misconduct as defined in State v. Belgarde, 110 Wn.2d 504, (1988) This was a recitation of previously admitted evidence, that once again as in the trial it self were not objected to. This was the closing argument in a case were the defendant was an identified and self admitted member of a criminal street gang. His accomplice Mr. Rivera had testified that with his and Mr. Bentley's urging and on the statement of Prado wondering if he should "smoke" Mr. Parren he attempted to do just that. Firing at least eleven rounds in the well lit public area of a convenience store in the center of the city of Yakima. The sole reason ascertained for the shooting was that Prado would "earn some stripes" and gain "respect" in this gang. The statements were in no manner or means inflammatory or misconduct.

RESPONSE TO ALLEGATION 'F' MISSING WITNESS.

State v. Jackson, 150 Wn.App. 877, 882-3, 209 P.3d 553

(Wash.App. Div. 2 2009)

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. State v. Carver, 122 Wash.App. 300, 306, 93 P.3d 947 (2004) (citing State v. Dhaliwal, 150 Wash.2d 559, 578, 79 P.3d 432 (2003)). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. Carver, 122

Wash.App. at 306, 93 P.3d 947 (quoting Dhaliwal, 150 Wash.2d at 578, 79 P.3d 432). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Carver, 122 Wash.App. at 306, 93 P.3d 947 (citing Dhaliwal, 150 Wash.2d at 578, 79 P.3d 432). If defense counsel fails to object to the prosecutor's statements, then reversal is required only if the misconduct was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. State v. Belgarde, 110 Wash.2d 504, 508, 755 P.2d 174 (1988). Footnote omitted.)

Prado stated from the outset that his defense was one of alibi or general denial. When he took the stand he stated under oath that he had been at the home of Mr. Torres. Ms. Torres was listed as a witness for Mr. Prado. He had previously request that due to her absence at the time of trial that a warrant be issued for her arrest. The conversation that resulted in the claim of misconduct for eavesdropping was one wherein Prado and his attorney discussed the fact that Prado did not want to have the writ executed, a necessary step in insuring that if contacted by law enforcement of if law enforcement was dispatched to Ms. Torres home that she could be arrested on the material witness warrant. This decision alone clearly indicates that Ms. Torres was “particularly available” to Prado. It was up to him to initiate the process to have her arrested so that she could be compelled to testify and if Prado was truthful, support his story. The State had chosen not to call this witness. The State had rested its case.

Prado asserted that not only was Torres an alibi witness but that she “would be our main witness.” RP 470 When Prado moved for the material witness warrant he once again asserted that he was the party who had access to her but she was not cooperating. RP 490-1

The explanation of why Ms. Torres was obviously inadequate to explain her absence if Prado needed to have the material witness warrant issued. If she had a valid reason for not appearing he could have and should have argued that position and then moved as the court indicated it would for some sort of brief delay to get her to trial. As it was the reason given were that she had “car problems, school problems, other problems, work problems, she lives in another area, she had transportation problems, she had child care problems, there was (sic) other issues involved. RP 469 490-1, 581-2 Prado exerted his control over this witness by requesting that the material witness warrant issue then later deciding that the would not have the writ issued thereby negating the means granted by the court to force this witness to appear. This was a purely purposeful action on the part of Prado demonstrating his almost exclusive control over the appearance of Ms. Torres. The warrant was not in the hands of the State, the State had not requested the warrant assuming that the defendant was going to call Ms. Torres and when the warrant order was signed obviously the State believed that it would be executed and because Prado knew

where she lived she would be arrested and brought to trial. State v. Lopez, 29 Wn. App. 836, 841, 631 P.2d 420. (1981) ”The trial court must give a missing witness instruction where the witness is peculiarly available to one party and it can be reasonably inferred that because of the witness' relationship to that party he would have been called but for the fact that his testimony was damaging.”

Prado’s story changed each time he was questioned. It is obvious that the ongoing inability to get Torres to come to court with the various reasons was not a reasonable explanation as required by State v. Montgomery, 163 Wn.2d 577, 599, 183 P.3d 267 (2008) Further, in State v. McGhee, 57 Wn. App. 457, 464, 788 P.2d 603 (1990) the court stated “When both the defendant and the State have connections with the witness, the trial court is entitled to consider defendant's failure to compel the witness's testimony in determining whether the "missing witness" instruction should be given.”

The trial court properly assessed the positions of the parties, the actions of Ms. Torres and appellant. The court made its discretionary ruling base on sound facts, supported by the law. This court should not disturb that action. Clearly the statements in closing did not arise to misconduct and even if for the sake of argument they did, Prado can not

demonstrate to this court that he was prejudiced. There is absolutely no chance that the statements in closing affect the jury's verdict.

RESPONSE TO ALLEGATION 'G' LESSER INCLUDED.

The State requested the lesser included instruction. RP 617-8.

Defense counsel agreed that the lesser included met the standards of "Workman."

MR. HEILMAN-SCHOTT: Your Honor, I would like to argue against it, but second degree murder is a lesser included offense of first degree murder. You take the factors in this case and work them through the Workman test. The legal issues, all the elements of one are contained in the other. If you commit the first you're necessarily committing the second.

The actual version in this case about whether it could be first or second, unfortunately, your Honor, I don't have a lot to argue with here. That's one of the reasons I originally was proposing a lesser included instruction on both counts. RP 621

The court agreed that the use of the lesser included was supported by the facts and granted the States request finding that the standard was met;

THE COURT: In looking at it, I think the standard is whether or not the evidence would raise an inference that only the lesser included was committed. I think there is an inference that only the lesser would be included, which would provide or satisfy the factual prong. That was in part what I discussed earlier having looked at the transcript.

Based on the testimony of Mr. Rivera, there is clearly an inference that only attempted second degree murder was committed, that there was no premeditation. Mr. Prado,

according to Mr. Rivera, said I'm going to light him up, did not say them. There is a reference only to the male. So certainly one could suggest or infer, I suspect, that there was some chance to deliberate the evidence would show that the deliberation that I referenced earlier was only applied to Mr. Parren. I think it's appropriate to give the instruction.

State v. Gilmer, 96 Wn. App. 875, 981 P.2d 902 (1999);

Either the defense or the prosecution may request a lesser included offense instruction. A two-part test is applied to determine whether a lesser included offense is warranted. Berlin, 133 Wn.2d at 545-46 (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). "First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed." Workman, 90 Wn.2d at 447-48 (citations omitted). The first prong of the test is referred to as the "legal prong" and the second prong of the test is referred to as the "factual prong." Berlin, 133 Wn.2d at 546. To satisfy the factual prong of the lesser included offense test, the evidence must permit a jury to rationally find a defendant guilty of the lesser included offense and to acquit him or her of the greater offense. State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

RESPONSE TO ALLEGATION 'H' INEFFECTIVE ASSISTANCE

It is apparent from the pleadings that counsel for Prado was relying on the assertions of his client that he was actually at Ms. Torres home at the time of these shootings. There was obviously an enormous problem that arose when Prado determined that he did not wish to have Ms. Torres arrested and brought to testify. It is obvious that as a trial strategy if your defense is that the defendant has an alibi for the date and time of the

charged crime, you will not need to work to exclude testimony that you might move to exclude if your defense was that your client was at the scene but there was some reason or justification for his actions. But when you are a significant way through the trial as here and your client says do not bring in the alibi witness as a trial attorney your whole defense strategy might have been completely different. Appellant indicated that he was relying on and general denial and an alibi defense. This was acknowledged in the Omnibus Order. CP 8-9 "Alibi witness to be supplied by Friday, 8/24/12" followed by the signatures of the Defendant, the Judge and the two attorneys. Much of this allegation is based on alleged failures on the part of counsel to exclude what is claimed to be improper testimony. This testimony was properly admitted. The court in its preliminary rulings agreed that there was gang related information that was essential to the proof of this case and that it was more probative than prejudicial to allow the admission of the gang related information.

To establish a claim for ineffective assistance of counsel, the defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 1. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1,8, 162 P.3d 1122 (2007). Deficient performance is that which falls "below an objective standard of

reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322,334-35, 899 P.2d 1251 (1995). Prejudice exists if the defendant can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." Nichols, 161 Wn.2d at 8.

In evaluating claims for ineffectiveness, courts are highly deferential to counsel's decisions and there is a strong presumption that counsel performed adequately. Strickland, 466 U.S. at 689-91. It is well settled that a defense attorney's failure to request an instruction limiting the jury's use of damaging evidence can be explained as a tactical choice, to avoid reemphasizing that evidence. State v. Humphries, 170 Wn. App. 777, 797-98,285 P.3d 917 (2012), review granted, 177 Wn.2d 1007 (2013); State v. Yarbrough, 151 Wn. App. 66, 90-91, 210 P.3d 1029 (2009); State v. Price, 126 Wn. App. 617, 649,109 P.3d 27 (2005); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

The tactic used by counsel should not be second guessed by this court.

State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982):

Defendant next claims he was deprived of a fair trial because his trial counsel was ineffective. The test in Washington is whether "[a]fter considering the 'entire record', can it be said that the accused was afforded an 'effective representation' and a 'fair' and 'impartial'

trial". State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). This court has refused to find ineffective assistance of counsel when the actions of counsel complained of go to the theory of the case or to trial tactics. State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980); see also State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. Both defense counsel and the defendant felt that to take a polygraph examination and stipulate its admission was the proper course of action. When the results of the polygraph test proved to be against the defendant, counsel simply tried to make the best of a bad situation and to use the defendant's failure of the polygraph examination to his advantage. Likewise, after he failed in his pretrial motion to exclude the prior conviction, counsel seized the offensive and raised the subject himself in an effort to downplay the importance that might be attached to it. Neither course of action can be said as a matter of law to constitute error.

The evidence that was presented at trial was overwhelming. State v. Flores, 164 Wn.2d 1, 186 P.3d 1038, 1046-47 (2008):

In evaluating whether the error is harmless, this court applies the "overwhelming untainted evidence" test. State v. Davis, 154 Wash.2d 291, 305, 111 P.3d 844 (2005) (quoting State v. Smith, 148 Wash.2d 122, 139, 59 P.3d 74 (2002)), *aff'd on other grounds by* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Under that test, when the properly admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.* 2 Evidence that is merely cumulative of overwhelming untainted evidence is harmless. State v. Nist, 77 Wash.2d 227, 236, 461 P.2d 322 (1969); see also Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L.REV.

277, 319 (1995) ("Regardless of the announced standard of review for harmless error, Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative.").

IV. CONCLUSION

For the reasons set forth above this court should deny allegations of Mr. Prado. The actions of the trial court should be upheld, the decision of the jury in this matter should not be disturbed and this appeal should be dismissed.

Respectfully submitted this 14th day of January 2014,

By: s/ David B. Trefry
DAVID B. TREFRY
Special Deputy Prosecuting Attorney
Yakima County
WSBA# 16050
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
Fax: 1-509-534-3505
E-mail: TrefryLaw@wegowireless.com

APPENDIX A

Q. What do you have to do leading up to that point to getting put on?
A. Put in work.
Q. Can you tell us what putting in work means?
A. Shootings.
Q. What else?
A. Burglaries to get guns.
Q. What else?
A. That's basically the main ones.
Q. Do you remember what date you got put on? RP 412
A. Valentine's Day 2007.
Q. Is that a date you remember because it's significant within La Raza or gang culture?
A. I remember it was Valentine's Day.
Q. Do you remember how Cesar -- did Cesar become involved with La Raza?
A. Yes.
Q. At what point in time did he become involved?
A. 2009.
Q. What time in 2009? Do you recall?
A. September 16th.
Q. How do you know that date?
A. Because I got a call from a couple friends. That's Mexican Independence Day.
Q. How was he put on?
A. Same way I was.
Q. Fourteen seconds?
A. Yes.
Q. Before you're put on, do you have a tag name or a gang name or is that earned at the time you're put on?
A. Either way, vice versa.
Q. Did you have a tag name or a gang name associated with you?
A. Yes.
Q. What are those?
A. Little Sin. RP 413

Q. And is La Raza a clique of Norteno?
A. Yes.
Q. What's your status in La Raza?
A. Soldier.

Q. What does that mean to be a soldier?
A. To put in work, earn stripes.
Q. You said put in work and earn stripes. What are stripes?
A. Higher status in the gang.
Q. And what type of crimes give La Raza gang members higher status?
A. Shootings.
Q. Is that the highest status?
A. Yeah.
Q. Does it matter whether you kill somebody or not?
A. Not really.
Q. It's just the willingness to shoot somebody?
A. Yes.
Q. Do you get a higher status if you actually kill somebody?
A. Yes.
Q. Who are your typical targets?
A. Sorenos.
Q. Any other gangs?
A. No.

RP 415-16

...

A. The 13th letter in the alphabet is the M.
Q. What status is Cesar in the gang?
A. Same as me. 416
Q. Soldier?
A. Yeah.
Q. What do soldiers do? What other ranks are there in La Raza besides soldier?
A. I don't know. Once you put in work, then you're respected. You don't have to do nothing really.
Q. So the younger guys typically go out and put in work?
A. Yes.
Q. Do the older guys direct work?
A. Yes.
Q. The guys that carry guns are the guys that put in work?
A. Yes.
Q. Did you or Cesar carry guns?
A. Yes.
Q. How often would you see Cesar with a firearm?
A. A lot.
Q. What type of guns did Cesar have.
A. .38's, .40, .45.
Q. How did he get those guns?

RP 417

A. Burglaries.

RP 418

Q. On October 18th, 2010, did you associate or hang out with Cesar?

A. Yes.

Q. And on that day, did Cesar have a gun?

A. Yes.

Q. What kind of gun?

A. Springfield .45 XD.

Q. What kind of gun is that? Is it a cowboy gun or a semiautomatic?

A. Compact.

Q. Compact?

A. Yeah.

Q. When you say compact, how does it fire?

A. A bullet at a time, as fast as you pull the trigger.

Q. Does it have a cylinder or a revolver?

A. No, it's not a revolver.

Q. What kind of gun is it?

A. It's a semiautomatic.

Q. Where did that gun come from?

A. From a burglary.

Q. And did you participate in that?

A. Yes.

Q. Did Cesar?

A. Yes.

Q. Where was that burglary at?

RP 422

A. In the west valley area.

Q. How many rounds -- where did you exactly find it?

A. Inside a Ford Excursion.

Q. Who found it?

A. Cesar.

Q. Did you guys fire that gun?

A. Yes.

Q. On an occasion before October 18th, 2010? 423

...

Q. Let's start from the morning of the 18th of October 2010.

Do you recall how that morning started out for you?

A. Same as every morning, wake up, take a shower, get in my car, go pick up Cesar.

Q. Did you wake up at your house?

A. Yes.

Q. Is that typically where you stayed?

A. Yes.
Q. Did you have a bedroom there?
A. Yes.
Q. About what time do you recall on the 18th did you go meet up with Cesar?
A. Sometime before noon.
Q. And how did you do that? RP 423
A. Drove over there.
Q. And what were you driving?
A. My Kia.
Q. What was the plan for that day?
A. Just to chill, smoke, cruise around, a couple car prowls.
Q. Was car prowling something you guys would do on a typical day?
A. Yes.
Q. What types of things were you looking for in vehicles?
A. GPS's, guns.
Q. After you picked up Cesar, did you go meet with anyone else?
A. Yes.
Q. Who?
A. I think some female.
Q. Where did you see her at?
A. We picked her up.
Q. And do you recall where you picked her up?
A. Yeah. I think she was doing her nails on 16th Avenue and Tieton.
Q. Was she a friend of yours or Cesar's?
A. Both of ours.
Q. What was the purpose of picking her up?
A. To sell a sack of weed and smoke out.
Q. Were you selling or Cesar or both of you?
A. Both of us. RP 424
Q. Is that how you guys made money?
A. Kind of.
Q. What other things did you do to make money?
A. Car prowls.
Q. Did either one of you have a job?
A. No. R RP 425

A. Yes.
Q. What was the plan from there?
A. After we dropped off Cecilio?
Q. Right.

A. Go do some car prowling.

Q. Where did you go do that?

A. Glead.

Q. Why Glead?

A. Because people tend to leave stuff in their car.

Q. Is that because it's a rural area?

A. Yes.

Q. What time approximately did you go out to Glead?

A. Around 9:00, 10:00.

Q. At that point did Cesar have the Springfield XD with him?

A. Yes.

Q. Did you, in fact, prowl any cars out in that area?

A. I don't remember.

RP 430

DECLARATION OF SERVICE

I, David B. Trefry, state that on January 14, 2014 I emailed, by agreement of the parties, a copy of the Respondent's Brief to: Mr. Eric Lindell at ericlindell@icloud.com (It should be noted that this is not the email address listed by WSBA for Mr. Lindell, however it is the email address at which he requested email service.) and by first class mail to

Cesar Saul Prado
c/o Green Hill School
375 S.W. 11th
Willow Unit
Chehalis WA 98532

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

DATED this 14th day of January, 2014 at Spokane, Washington.

s/ David B. Trefry
DAVID B. TREFRY, WSBA #16050
Senior Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane WA 99220
Telephone: (509) 534-3505
Fax: (509) 534-3505
David.Trefry@co.yakima.wa.us