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**Dec 16, 2016**  
Court of Appeals  
Division III  
State of Washington

32867-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JUAN A. RODRIGUEZ, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

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APPELLANT'S BRIEF REPLY

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## A. INTRODUCTION

By commencing its argument with an analysis of the admission of testimony as to Mr. Rodriguez's alleged gang affiliation, the State appears to concede that the admission of that testimony was indeed error:

We apply a harmless error standard to constitutional errors such as this. *See, e.g., State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). "Under that standard, we will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict." *Id.*

*State v. DeLeon*, 185 Wn.2d 478, 487, 374 P.3d 95 (2016) (*quoted in Resp Br at 8*).

Thus the remaining issues in this case are whether there was sufficient untainted evidence of the defendant's gang affiliation to render relevant any of the testimony of the State's gang expert and, if not, whether the remaining evidence is sufficient to support the conclusion that, absent the due process violation and resulting admission of tainted evidence, this court can conclude, beyond a reasonable doubt, that the misconduct did not affect the verdict.

## B. ANALYSIS

The State bears the burden of showing that the constitutional error was harmless. *Id.* at 488 (citing *Monday*, 171 Wn.2d at 680). The State

argues that admitting the booking forms and supporting testimony was harmless error because other, untainted evidence of gang involvement was also presented at trial. Mr. Rodriguez responds that, in the absence of the booking evidence, the evidence of his purported gang affiliation is insufficient to render the expert testimony relevant.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. ER 404(b). Gang evidence falls within the scope of ER 404(b). *See State v. Boot*, 89 Wn. App. 780, 788–89, 950 P.2d 964, *review denied*, 135 Wn.2d 1015, 960 P.2d 939 (1998). It may be admissible for other purposes, such as proof of motive, intent, or identity, but before a trial court may admit such evidence, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

“[T]rial courts should be particularly cautious when weighing the probative value of gang-related evidence against its inherently prejudicial effect.” *State v. Mee*, 168 Wn. App. 144, 160–61, 275 P.3d 1192 (2012). If the evidence is insufficient to persuade the court that the defendant is a

gang member, then a gang expert's testimony about gang behaviors is not relevant. *Id.* at 159. Absent "evidence showing adherence by the defendant or the defendant's alleged gang to those behaviors . . . [such evidence] serves no purpose but to allow the State to "suggest[ ] that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *Id.* at 159 (quoting *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)).

In its pretrial ruling, in which it concluded the gang evidence would be admissible, the court particularly noted its reliance on the proffered testimony of Officer Hartley. (RP 38-39) The court stated that the gang evidence would be relevant "assuming that Officer Hartley can testify," but went on to acknowledge that her testimony might be inadmissible under the Fifth Amendment in light of a "recent but unpublished case." (RP 38) Based in the court's reasoning, gang evidence would not have been admissible if Officer Hartley's evidence had not been available. The court expressly ruled that prior instances of Mr. Rodriguez's association with suspected gang members, and pictures of other occupants of the car showing tattoos, was "prejudicial and without probative value" because Mr. Rodriguez did not appear in them. (RP 40) When the issue of expert testimony arose at trial, the court relied on, and affirmed the reasoning of, its prior ruling. (RP 980)

The trial court's ruling demonstrates that the gang-related evidence, including the expert testimony, was tainted by the admission of Officer Hartley's testimony and cannot be included in the evidence to be considered in determining whether the error was harmless.

The remaining evidence showed Mr. Rodriguez was a passenger in a car from which shots were fired, injuring the driver of another car; the injured driver rammed the car in which Mr. Rodriguez was a passenger; Mr. Rodriguez was eventually found pinned under the car near the gun that had been used in the shooting; and his DNA was found on the gun. Mr. Rodriguez was convicted of attempted first degree murder and first degree assault. (CP 240) In the absence of any evidence of motive or intent, the evidence is insufficient to enable this court to conclude, beyond a reasonable doubt, that the admission of highly prejudicial gang evidence did not affect the verdict. See *Monday*, 171 Wn.2d at 680.

### C. CONCLUSION

The conviction should be reversed.

Dated this 16th day of December, 2016.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32867-8-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
JUAN A. RODRIGUEZ,	)	
	)	
Appellant.	)	

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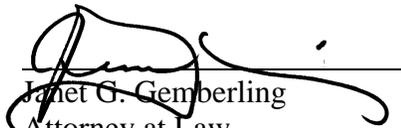
I certify under penalty of perjury under the laws of the State of Washington that on December 16, 2016, I served a copy of the Appellant's Reply Brief in this matter by email on the attorney for the Respondent, receipt confirmed, pursuant to the parties' agreement:

David Trefry  
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I certify under penalty of perjury under the laws of the State of Washington that on December 16, 2016, I mailed a copy of the Appellant's Reply Brief in this matter to:

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Signed at Spokane, Washington on December 16, 2016.

  
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