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Division III  
State of Washington

#335712

No. 33624-7-III  
Consolidated with No. 33571-2-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**LUIS GUADALUPE-PEREZ,**

**WILLIAM MARTINEZ,**

Appellants.

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Yakima County Superior Court Cause No. 14-1-00421-0

The Honorable Judge Richard Bartheld

**Appellant's Reply Brief**

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## ARGUMENT

**I. MR. MARTINEZ HAD A CONSTITUTIONAL RIGHT TO INFORM THE JURY THAT THE SHOOTING WAS PART OF A GANG-RELATED “RUMBLE” IN WHICH HE HAD NO INTEREST.**

Morgan was killed in a gang-related brawl RP (3/16/15) 1559; RP (3/27/15) 2857. Mr. Martinez was not associated with either of the gangs involved. RP (3/16/15) 1562. Rodriguez-Perez, on the other hand, was a member of the gang that rivaled Morgan’s. RP (3/9/15) 758-759; RP (3/11/15) 1005; RP (3/27/15) 2858. Rodriguez-Perez even had a tattoo indicating that he held a position of authority within the gang. RP (3/25/15) 2574-2575; RP (3/27/15) 2859.

But the trial court did not permit Mr. Martinez to elicit any of that evidence. RP (2/27/15) 2859-2862. As a result, the jury did not know that the fight was gang-related. The jury also never learned that Mr. Martinez had no reason to be involved in the fight, but that Rodriguez-Perez did.

**A. The court violated Mr. Martinez’s right to present a defense by prohibiting him from introducing evidence that he had no interest in the fight that led to the shooting.**

Morgan was shot during a fight that began when members of two different gangs rushed out from a gang-affiliated rap concert to “rumble” and “square off”. RP (3/16/15) 1559.

Still, the state claims that the gang evidence was not relevant to Mr. Martinez's case, relying exclusively on the argument that there was no nexus between the gang activity and the shooting. Brief of Respondent, pp. 51-57 (citing *State v. Yarbrough*, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009)).

But the *Yarbrough* court holds that gang-related evidence is not barred by ER 404(b) whenever it is relevant to prove motive or mental state. *Id.*

Evidence that someone present at a shooting could have had a gang rivalry with the deceased is relevant to establish that person's motive. See *State v. Ortuno-Perez*, 196 Wn. App. 771, 791, 385 P.3d 218 (2016).

The trial court in *Ortuno-Perez* abused its discretion and violated the accused's right to present a defense by excluding evidence that someone other than the accused who was near the victim at the time of a murder was a member of a rival gang. *Id.* That is so even though there was no evidence that the shooting, itself, was related to any gang activity. *Id.*

Here, on the other hand, Morgan was shot outside of a gang-related rap concert when two gangs began to "rumble." RP (3/27/15) 2857. Rodriguez-Perez was a member of the gang that was "squar[ing] off" against Morgan. RP (3/16/15) 1559; RP (3/27/15) 2858. Morgan was

shot immediately after he punched a member of Rodriguez-Perez's gang.  
RP (3/9/15) 713; RP (3/12/15) 1240.

Mr. Martinez was not a member of either gang. RP (3/16/15)  
1562.

The state does not even attempt to explain how this gang evidence  
could possibly lack a nexus to a shooting that took place during a  
“rumble” between the two gangs. Respondent's argument is unpersuasive.

The court violated Mr. Martinez's constitutional right to present a  
defense by prohibiting him from presenting evidence of the gang-related  
nature of the shooting. *Ortuno-Perez*, 196 Wn. App. 771; *State v. Jones*,  
168 Wn.2d 713, 724, 230 P.3d 576 (2010). Mr. Martinez's convictions  
must be reversed. *Id.*

B. The court erred by prioritizing judicial economy over Mr.  
Martinez's constitutional right to present a defense.

The state does not address this issue in its brief. Nor does the state  
argue that the gang evidence would have been inadmissible at a severed  
trial in which Mr. Martinez was tried alone. *See* Brief of Respondent.

Respondent's failure to address this issue may be treated as a  
concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913  
(2009).

**II. PROSECUTORIAL MISCONDUCT DEPRIVED MR. MARTINEZ OF A FAIR TRIAL.**

- A. The prosecutor committed misconduct in his closing PowerPoint presentation altering admitted exhibits to add captions supporting the state's theory of the case and containing inflammatory text.

The prosecutor committed misconduct in closing argument by displaying exhibits that had been altered to add captions claiming that ambiguous exhibits actually supported the state's theory of the case. *In re Glasmann*, 175 Wn.2d 696, 706, 286 P.3d 673 (2012). One exhibit was also altered add inflammatory language and display Mr. Martinez in a negative light.

Those slides took admitted exhibits and added alterations to make them appear as though they unequivocally supported the state's theory of Mr. Martinez's guilt. This strategy "deliberately altered [admitted exhibits] in order to influence the jury's deliberations," which had been explicitly prohibited by the Supreme Court. *See Glasmann*, 175 Wn.2d at 706.

Still, Respondent claims that the alterations to the exhibits were not meant to influence the jury's assessment of Mr. Martinez's guilt. Brief of Respondent, p. 25. But the state cannot point to any other possible purpose for adding the captions. Certainly the prosecutor's oral argument was sufficient to avoid any confusion regarding what was being portrayed.

Additionally, at least four slides showed Mr. Martinez engaged in innocuous activity like sitting on a couch and walking in the street but proclaimed that he was actually going to get a gun, fleeing from the police, or having “GOOD TIMES” while his friend brandished a gun. Ex. SE-A 43, 48, 65, 67.

Those slides took basically neutral evidence and altered it to make Mr. Martinez appear more likely to be guilty. The state’s argument to the contrary is misplaced.

The state also attempts to excuse the prosecutor’s strategy by pointing out that each of the captions added to the photographs were “based on the testimony.” Brief of Respondent, pp. 24-42 (going through each slide at length and pointing to the portion of the testimony to which it refers). But Respondent cannot point to any authority supporting its position that a prosecutor may alter exhibits in order to comport with the state’s theory of the case so long as those alterations are based on inferences from the other evidence in the case.

Indeed, the alterations to exhibits at issue in *Glasmann* and *Walker* were based on inferences from the testimony or quoted from the testimony itself. Those alterations, nonetheless, constituted flagrant and ill-intentioned misconduct because they “present[ed] altered versions of admitted evidence to support the State’s theory of the case.” *State v.*

*Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015), *cert. denied*, 135 S.Ct. 2844, 192 L.Ed.2d 876 (2015).

The prosecutor committed misconduct by showing the jury the admitted exhibits that had been altered to add captions supporting the state's theory of the case. *Glasmann*, 175 Wn.2d at 704; *Walker*, 182 Wn.2d at 478. The prosecutor also committed misconduct by appealing to passion and prejudice and presenting Mr. Martinez in a negative light. *Id.*

Mr. Martinez's convictions must be reversed. *Id.*

B. The prosecutor committed misconduct by displaying slides conveying his personal opinion regarding Mr. Martinez's credibility and guilt.

Because the state does not address the authority most directly applicable to this case – the Supreme Court's recent decisions in *Glasmann* and *Walker*<sup>1</sup> – Mr. Martinez relies on the argument set forth in his Opening Brief.

### **CONCLUSION**

For the reasons set forth above and in Mr. Martinez's Opening Brief, Mr. Martinez's convictions must be reversed.

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<sup>1</sup> See Brief of Respondent, pp. 15-25 (omitting any analysis of *Glasmann*, 175 Wn.2d 696 and *Walker*, 182 Wn.2d 463).

Respectfully submitted on February 24, 2017,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on February 24, 2017.



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

**ELLNER LAW OFFICE**

**February 24, 2017 - 12:51 PM**

**Transmittal Letter**

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