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Division III  
State of Washington  
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No. 36223-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

STAFONE NICHOLAS FUENTES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR SPOKANE COUNTY

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REPLY BRIEF OF APPELLANT

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THOMAS M. KUMMEROW  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
(206) 587-2711  
tom@washapp.org

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A. ARGUMENT

**1. Mr. Fuentes made a specific offer of proof sufficient to admit “other suspects” evidence, thus, he is entitled to reversal of his convictions for the trial court’s error in failing to admit this evidence.**

The State claims Mr. Fuentes’s failed to make a sufficient proffer for the admission of “other suspects” evidence. Brief of Respondent at 20-21. The State further claims Mr. Fuentes failed to offer any proof of “quarrels, threats, retaliation, or physical acts” engaged in by Mr. Budik or his associates or any other evidence. *Id.* The State conveniently ignores the record made by Mr. Fuentes both in his initial motion and his motion to reconsider.

“[T]he threshold analysis for ‘other suspect’ evidence involves a straightforward, but focused, relevance inquiry, reviewing the evidence's materiality and probative value for ‘whether the evidence has a logical connection to the crime.’” *State v. Ortuno-Perez*, 196 Wn.App. 771, 783, 385 P.3d 218 (2016), quoting *State v. Franklin*, 180 Wn.2d 371, 381-82, 325 P.3d 159 (2014). Because the premise underlying the introduction of “other suspect” evidence is to show that someone other than the defendant committed the charged crime, the standard for admission is whether the proffered evidence tends to indicate a reasonable doubt as to the defendant's guilt. *Ortuno-Perez*,

196 Wn.App. at 784. Properly conducted, this inquiry “focuse[s] upon whether the evidence offered tends to create a reasonable doubt as to the *defendant’s* guilt, not whether it establishes the guilt of the *third party* beyond a reasonable doubt.” *Franklin*, 180 Wn.2d at 381, *quoting Smithart v. State*, 988 P.2d 583, 588 & n. 21 (Alaska 1999) (emphasis in original).

In his motion to reconsider, Mr. Fuentes made a detailed offer of proof regarding the “other suspect” evidence:

1. On February 21, 2013, three days after the shooting, Titus Davis called Detective Cestnik from the hospital. Davis told Cestnik that he wanted to help find the person who had shot him and Lamont O’Neal. Davis said he was reluctant to talk to police because he had “issues” with certain officers and detectives in the past. Davis then told Cestnik “the word on the street is that it was an 8-Trey” who had shot him and O’Neal and that he had “just talked to an 8- Trey” about five minutes before he was shot.
2. Officer Van Tassel interviewed Lamont O’Neal at the hospital the day of the shooting. O’Neal stated that there had been no issues with anyone at the Knitting Factory before the shooting. When asked if he had any idea who did the shooting, O’Neal stated the only thing he could think of is that Davis was the main suspect in the murder of Adama Walton and that some people “were not very happy” with Davis because of that incident. O’Neal also stated that it was obvious the shooter was targeting Davis and not him.
3. A witness told police she saw a white Chrysler with "large shiny rims" in the parking lot of the Knitting

Factory just prior to shots being fired. After the shots, the white Chrysler was gone.

4. In the recorded interview with Detective Hill on February 25, 2013, Davis told Hill the following:

- He (Davis) was believed by some people to be responsible for shooting Kenneth Budick and Adama Walton. That statement was made in response to Det. Hill asking if Davis knew of anyone who might want to harm him;
- Minutes before being shot, Davis had smoked marijuana with a known 8-Trey gang member who was inside a car near where Davis and O'Neal were parked;
- That person, who Davis identified as Joseph Shorts, seemed impatient and made Davis somewhat nervous;
- Joseph Shorts was in a white Cadillac with another person Davis knows to be an 8-Trey gang member;
- Every time Davis had seen Kenneth Budick in the previous two years, he had been with the persons in the white Cadillac, i.e, 8-Trey gang members;
- On the night of the shooting, Davis received a text from "Sadie" asking if he was going to go to the Knitting Factory. When Davis was leaving his home to go to the Knitting Factory, he received another text from "Sadie" asking if he was already there. Davis thought that was odd because he had not told her whether he was going to the Knitting Factory. "Sadie" has a child that was fathered by Adama Walton.

5. Video surveillance of the inside of the Knitting Factory shows Davis speaking to Joseph Shorts as both were leaving the club. The same video also shows Antonio Thomas leaving the club at about the same time. Thomas is a known 8-Trey gang member.

6. Initial reports of the shooting listed a blue 1998 Ford Expedition as a suspect vehicle. That vehicle was registered to an address on East Olympic in Spokane.

7. Officers responded to the East Olympic address and observed the blue Expedition parked across the street. While watching that address, officers observed a white Cadillac enter the area and pull up almost in front of the address. No one got out of the car. It appeared that the Cadillac was engaged in “counter-surveillance.” Several houses on that block of East Olympic are associated with 8-Trey gang members.

8. Police seized the blue Expedition believing it may have been involved in the shooting.

9. When interviewed by the police, Joseph Shorts admitted to being at the Knitting Factory at the time of the shooting with Antonio Thomas and leaving in Thomas’ car, a white Cadillac, but claimed that neither he nor Thomas were involved in the shooting.

CP 230-32.

This detailed offer of proof provided the necessary link between the “other suspects” and the shooting of Mr. O’Neal and Mr. Davis. Mr. Davis’s statement provides a logical connection between the “other suspect” evidence and the shootings. The evidence shows that one or more members of the 8-Trey Crips gang were present at the scene when Mr. Davis and Mr. O’Neal were shot and those 8-Trey gang members were connected to both Mr. Budick, one of the victims of a shooting allegedly committed by Mr. Davis, and Mr. Jones, who had possession of the firearm used to commit the crime. Thus, the proffered evidence shows that persons present at the scene had motive

to commit the crime and were connected to a person in possession of physical evidence related to the crime.

Further, the offer of proof created a reasonable doubt regarding Mr. Fuentes's guilt as required by *Franklin*. 180 Wn.2d at 381. In light of this detailed offer of proof, the trial court erred in excluding it. This Court should reverse Mr. Fuentes's convictions and remand for a new trial.

**2. Since Mr. Fuentes's role as Ms. White's pimp was a prior act admitted to show he acted in conformity with this character trait, the trial court erred in admitting it in the absence of any ER 404(b) analysis.**

The State claims the trial court did not err in admitting Ms. White's testimony that Mr. Fuentes had been her pimp since it was relevant evidence regarding the relationship between the two. Brief of Respondent at 24-29. The State relies, as it did in the trial court, in the decisions such as *State v. Magers*, 164 Wn.2d 174, 189 P.3d (2008), and *State v. Grant*, 83 Wn.App. 98, 920 P.2d 609 (1996). The State candidly admits the evidence in those cases was admitted under ER 404(b), but somehow here, the same type of evidence is admissible as merely relevant evidence. Brief of Respondent at 29.

The evidence that Mr. Fuentes was a pimp is classic “prior act” evidence. There is a categorical bar to the admission of “prior act” evidence unless it is admissible under ER 404(b). *See State v. Gunderson*, 181 Wn.2d 916, 921, 337 P.3d 1090 (2014) (“Evidence of a defendant's prior bad acts is not admissible to show the defendant has a propensity to commit crimes but may be admissible for some other proper purpose.”). Merely claiming it was relevant is merely the first step in analyzing admissibility. The trial court was still required to address admissibility under ER 404(b) as this is the only basis for admission of Mr. Fuentes’s prior acts involving Ms. White.

Regarding whether the Ms. White’s testimony was admissible under ER 404(b), the State initially argues that since Mr. Fuentes objected only on prejudice grounds, he waived the issue because he failed to make a specific ER 404(b) objection. Brief of Respondent at 30. The State is in error as an objection on the basis of prejudice *is* sufficient to preserve the issue for appeal. *See State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) (“An objection based on ‘prejudice,’ is adequate to preserve an appeal, based on ER 404(b), because it suggests the defendant was prejudiced by the admission of evidence of prior bad acts.”).

The trial court ruled Ms. White's testimony regarding Mr. Fuentes as her pimp was admissible as "motive" evidence. RP 784. Motive is one of the factors the court may consider under ER 404(b). (Evidence of prior acts "may, however, be admissible for other purposes, such as proof of motive"). But, the trial court failed to identify what element of the offense the evidence was relevant to prove. Courts must guard against using motive as a magic password "whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names." *State v. Saltarelli*, 98 Wn.2d 358, 364, 655 P.2d 697 (1982).

Further, by admitting under "motive," it merely begs the question, motive for what? Ms. White was a fact witness who testified about her observations following the shooting of Mr. Davis and Mr. O'Neal. *State v. Fuller*, 169 Wn.App. 797, 829, 282 P.3d 126 (2012) ("Although the State may introduce evidence of motive even if motive is not an essential element of the crime charged, the State may not show motive by introducing evidence that the defendant committed or attempted to commit an unrelated crime in the past.").

The trial court failed to properly address the admissibility of the evidence of Mr. Fuentes's prior act. Thus, the trial court erred in

admitting the evidence and Mr. Fuentes is entitled to reversal of his convictions.

**3. Contrary to the State's argument, this Court's decision in *State v. Wallin* establishes the prosecutor violated Mr. Fuentes's rights to confront witnesses and participate in his defense.**

The State argues it did nothing wrong in cross-examining Mr. Fuentes because it was merely impeaching him with his prior inconsistent statements. Brief of Respondent at 44. But the record establishes the prosecutor specifically asked if Mr. Fuentes was tailoring his testimony:

*Q Okay. Now, you, also, had opportunities numerous times to watch Mr. Gaither and Mr. Jones and Ms. White testify, correct?*

*A Yes.*

*Q And you've had numerous opportunities to tailor your testimony today; have you not?*

MR. WALL: Objection, Your Honor.

THE COURT: I'm going to sustain it to the form of the question.

RP 1254 (emphasis added). This record clearly establishes the prosecutor was not merely asking a generic tailoring argument but asking specifically if Mr. Fuentes was tailoring his testimony.

The State's attempt at distinguishing the decision in *State v. Wallin*, 166 Wn.App. 364, 269 P.3d 1072 (2012), is unavailing. The prosecutor here went beyond the misconduct in *Wallin* by not merely asking generic questions suggesting tailoring, he asked specifically whether Mr. Fuentes was tailoring his testimony. Further, there is nothing in Mr. Fuentes's testimony which opened the door to this questioning. As in *Wallin*, Mr. Fuentes never stated he was basing his answer on testimony he heard. This questioning violated Mr. Fuentes's right to confrontation and right to be present at trial. *See Wallin*, 166 Wn.App. at 377 ("Why then should he be subject to the State's suggestion - unfounded on this record - that he tailored his testimony?"). Mr. Fuentes's convictions should be reversed.

**B. CONCLUSION**

For the reasons stated in the previously filed Brief of Appellant as well as this reply brief, Mr. Fuentes asks this Court to reverse his convictions and remand for a new trial.

DATED this 23<sup>rd</sup> day of October 2019.

Respectfully submitted,

*s/Thomas M. Kummerow*

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THOMAS M. KUMMEROW (WSBA 21518)

Washington Appellate Project – 91052

1511 Third Avenue, Suite 610

Seattle, WA. 98101

(206) 587-2711

tom@washapp.org

Attorneys for Appellant

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	)	
RESPONDENT,	)	
	)	
v.	)	NO. 36223-0-III
	)	
STAFONE FUENTES,	)	
	)	
APPELLANT.	)	

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