

68409-4

68409-4

NO. 68409-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY ARCHULETA JR. AND
VELIA ARCHULETA,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA A. MACK

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

TOMÁS A. GAHAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

APR 11 2011 1:32
N

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. PROCEDURAL FACTS	3
2. SUBSTANTIVE FACTS.....	4
3. GANG EVIDENCE AND CLOSING	8
4. JURY INSTRUCTIONS.....	18
C. <u>ARGUMENT</u>	19
1. THE TRIAL COURT PROPERLY ADMITTED THE GANG EVIDENCE AS MOTIVE AND RES GESTAE AFTER FINDING AN INSEPARABLE CONNECTION BETWEEN THE GANG AND THE CRIME.....	19
2. DETECTIVE O'NEILL'S TESTIMONY ASSISTED THE PROPERLY-INSTRUCTED TRIER OF FACT IN UNDERSTANDING THE CASE AND DID NOT EXPRESS AN OPINION REGARDING ARCHULETA JR.'S GUILT. IT DID NOT, THEREFORE, INVADE THE PROVINCE OF THE JURY.....	31
3. EVEN WITHOUT THE GANG EVIDENCE, THERE WAS SUFFICIENT EVIDENCE FOR A REASONABLE JUROR TO HAVE FOUND ARCHULETA JR. GUILTY AS AN ACCOMPLICE.....	36
4. VELIA'S MOTION WAS NOT PROPERLY PRESERVED AND, EVEN IF IT WAS, JOINDER OF THE DEFENDANTS DID NOT CREATE A MANIFEST INJUSTICE.....	40

a.	Facts Regarding Severance	40
b.	The Severance Motion Was Not Preserved	44
c.	Even If The Issue Was Preserved, No Manifest Prejudice Was Created By Keeping The Defendants Together For Trial.....	45
D.	<u>CONCLUSION</u>	48

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Dawson v. Delaware, 503 U.S. 159,
112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)..... 19

United States v. Mejia, 545 F.3d 179
(2d Cir. 2008)..... 33, 34, 36

Washington State:

State ex rel. Carroll v. Junker, 79 Wn.2d 12,
482 P.2d 775 (1971)..... 20

State v. A.M., 163 Wn. App. 414,
260 P.3d 229 (2011)..... 37

State v. Allery, 101 Wn.2d 591,
682 P.2d 312 (1984)..... 31

State v. Barry, 25 Wn. App. 751,
611 P.2d 1216 (1980)..... 46

State v. Black, 109 Wn.2d 336,
745 P.2d 12 (1987)..... 31

State v. Boot, 89 Wn. App. 780,
950 P.2d 964 (1998)..... 14, 20, 22, 24, 26, 28, 33

State v. Carlisle, 73 Wn. App. 678,
871 P.2d 174 (1994)..... 37

State v. Embry, __ P.3d __,
2012 WL 5331565 (October 30, 2012)..... 36

State v. Engel, 166 Wn.2d 572,
210 P.3d 1007 (2009)..... 37

<u>State v. Galisia</u> , 63 Wn. App. 833, 822 P.2d 303 (1992).....	37
<u>State v. Grisby</u> , 97 Wn.2d 493, 647 P.2d 6 (1982).....	46
<u>State v. Johnson</u> , 124 Wn.2d 57, 873 P.2d 514 (1994).....	19
<u>State v. Lane</u> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	20
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	20, 25
<u>State v. Phillips</u> , 108 Wn.2d 627, 741 P.2d 24 (1990).....	46
<u>State v. Rodriguez</u> , 163 Wn. App. 215, 259 P.3d 1145 (2011).....	46
<u>State v. Rotunno</u> , 95 Wn.2d 931, 631 P.2d 951 (1981).....	37
<u>State v. Schaffer</u> , 63 Wn. App. 761, 822 P.2d 292 (1991).....	47
<u>State v. Scott</u> . 151 Wn. App. 520, 213 P.3d 71 (2009).....	20, 22, 23, 26, 28, 30
<u>State v. Silva-Baltazar</u> , 125 Wn.2d 472, 886 P.2d 138 (1994).....	37
<u>State v. Sluder</u> , 11 Wn. App. 8, 521 P.2d 971 (1974).....	46
<u>State v. Steing</u> , 144 Wn.2d 236, 27 P.3d 184 (2001).....	33
<u>State v. Yarbrough</u> , 151 Wn. App. 66, 210 P.3d 1029 (2009).....	20, 23, 24, 26, 28, 33, 36

Statutes

Washington State:

RCW 9.94A.535..... 8

Rules and Regulations

Washington State:

CrR 4.4..... 40, 41, 42, 45, 46

ER 4049, 10, 12, 13, 20, 23-26, 28-31, 36

A. ISSUES

1. Before admitting evidence of a defendant's gang affiliation, a trial judge must find a connection between the evidence and the crime. Here, the court preliminarily denied a motion to add a gang aggravator to the information, finding that there was no nexus between the gang and the crime charged. After further consideration, however, the court found that the gang evidence was inseparable from the crime; it revealed the context of the crime, the relationship between the defendants, and their potential motive. Did the court act within its discretion in permitting the gang evidence at trial?

2. An expert is permitted to testify when the expert's testimony will assist the trier of fact in understanding the issues and is not unfairly prejudicial. An expert invades the province of the jury when the expert gives an opinion about an ultimate issue in the case. Here, the jury heard testimony from a gang expert, describing the defendants' roles in their gang and the meaning of "snitching" in a gang context. Both were issues found relevant by the trial court. Did the expert's testimony invade the province of the jury?

3. Evidence at trial is deemed sufficient when, viewed in a light most favorable to the State, a reasonable juror could have found the defendant guilty beyond a reasonable doubt. Here, the defendants entered

the victim's home together, after dark and unannounced. Both accused their victim of having called them "snitches," and Archuleta Jr.¹ looked angrily at her as his sister, Velia, began to beat the victim. Archuleta Jr. stood a few feet away, watching and accusing the victim throughout the beating until both defendants left together. Was there sufficient evidence that Archuleta Jr. committed Burglary in the First Degree as an accomplice without the gang evidence?

4. A motion to sever codefendants must be made during pretrial motions, and renewed on the same ground after the State's case-in-chief, otherwise the issue is waived on appeal. Here, Velia's attorney raised a motion to sever at pretrial, based on the admissibility of Archuleta Jr.'s statements, and raised another severance motion after the State's case, based on the gang evidence against Archuleta Jr. Where Velia failed to renew the severance motion on the same ground after the State rested, was the issue waived on appeal?

5. Even where a motion for severance is properly preserved at trial, an appellant upon review must show that joinder created a manifest prejudice. A court determining whether to sever considers the strength of the State's evidence on each count, the clarity of the defenses, jury

¹ Because the co-defendants share a last name with their father, Anthony Archuleta, Sr., this brief will differentiate between father and son with "Archuleta Sr." and "Archuleta Jr.," and will refer to Velia Archuleta by her first name. No disrespect is intended.

instructions, and the cross-admissibility of the evidence against each defendant. Joinder is manifestly prejudicial when the prejudice outweighs concerns about judicial economy. Here, the evidence, crime, victim, time and place, instructions, defenses, and intent were identical for each defendant. Gang evidence was admitted against both defendants as res gestae of the crime and the trial court found that the gang evidence could have been admitted against Velia, even had it not been admitted against Archuleta Jr. Under these circumstances, has Velia failed to show manifest prejudice arising out of joinder?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Both Velia Archuleta and Anthony Archuleta, Jr. were charged with Burglary in the First Degree for entering Vanessa Rodriguez's apartment and beating her.² 1CP 1.³ During pretrial hearings, the State moved to amend the information to add the "Gang Enhancement" aggravator, but, after hearing testimony and argument, the court denied

²On September 27, 2012, this Court consolidated this appeal with State v. Anthony Archuleta, Jr., No. 68536-8-I. All arguments here apply to both defendants, except severance, which applies only to Velia.

³ In this brief, 1CP will refer to the Clerk's Papers designated for Anthony Archuleta Jr.'s appeal and 2CP will refer to the Clerk's Papers designated for Velia Archuleta's appeal.

this motion. 7RP 97-99⁴. After a jury trial, both defendants were found guilty as charged of Burglary in the First Degree. 1CP 34; 2CP 87.

Archuleta Jr. was sentenced to 38 months, and Velia was sentenced to 15 months, the low ends of their respective standard ranges. 1CP 64, 66; 2CP 88, 90.

2. SUBSTANTIVE FACTS.

During the summer of 2010, Vanessa Rodriguez began dating Anthony Archuleta, Sr. Archuleta Sr., originally from Rancho San Pedro, California, was an active member of the Rancho San Pedro (RSP) gang, an outcrop of California's Sureño Third Street gangs. 4RP 23-36. When Rodriguez met Archuleta Sr., he was already the founder of his own RSP gang in Washington, named the PeeWees, after Archuleta Sr.'s gang moniker, "PeeWee." 4RP 23-36. Second-in-command of the RSP PeeWees was Anthony Archuleta Jr., Archuleta Sr.'s son; Archuleta Sr.'s daughter, Velia Archuleta, was a junior member of the same gang. 4RP 54-56. During Rodriguez's relationship with Archuleta Sr., she formed an affinity with her boyfriend's children. 10RP 103. Eventually, Rodriguez

⁴ The verbatim report of proceedings cited here consists of 14 volumes, which will be referred to in this brief as follows: 1RP (11/29/11); 2RP (11/30/11); 3RP (12/1/11); 4RP (12/15/11); 5RP (12/21/11) (mistakenly noted as 12/22/11 on the transcript cover sheet); 6RP (12/29/11); 7RP (1/3/12); 8RP (1/4/12); 9RP (1/5/12); 10RP (1/10/12); 11RP (1/11/12); 12RP (1/12/12); 13RP (1/17/12); and 14RP (1/23/12).

and Archuleta Sr. broke up; by August of 2011, they were no longer together. 10RP 38-41.

On August 4, 2011, Rodriguez, who was not a member of RSP, witnessed two RSP members known as Japo and Diego being arrested. 10RP 95. As they were being arrested, another RSP member, named Pancho, accused Rodriguez of “snitching” on Japo and Diego, angering Rodriguez, who scuffled with Pancho. 10RP 97.

Rodriguez testified that on the following night, at around 10 PM, Velia and Archuleta Jr. entered Rodriguez’s apartment unannounced. 10RP 103. Rodriguez was sitting alone in the living room, her 11-year-old son was in the bathtub, and her mother, who also lived in the apartment, was in a bedroom. 10RP 100-01. Rodriguez testified that Archuleta Jr. and Velia came toward her, with Archuleta Jr. saying, “you calling us a snitch... what the fuck...” 10RP 113. Archuleta Jr. repeated, “over and over,” “what the fuck, you know, you calling us a snitch.” 10RP 114. Rodriguez testified that Archuleta Jr. “looked mad” – she “had never seen him like that before.” 10RP 114.

As Archuleta Jr. accused her of calling them “snitches,” Velia began punching Rodriguez in the head, pulling her hair, and slamming her against the wall, repeating the accusation that Rodriguez had called them “snitches.” 10RP 114-15. Rodriguez testified that as Velia beat her, Velia

said, "why you calling us a snitch? We ain't a snitch." 10RP 15. As Velia was hitting Rodriguez and throwing her against the wall, Rodriguez tried to make sense of the accusations, explaining to the Archuletas that it was Pancho who had accused *her* of being a snitch. 10RP 154.

As Velia continued the assault, she defended her gang, telling Rodriguez that "RSP ain't no snitch." 10RP 115. Rodriguez testified that as Velia beat her, Archuleta Jr., stood behind the couch in the living room: "He was in a rage....He just looked like he was on attack mode." 10RP 118. Rodriguez testified that she was so "shocked" she did not even try to fight back; she had always seen the assailants as "family," like her own "kids." 10RP 116.

Finally, Rodriguez's mother, Cervantez, came from her bedroom and tried to stop the beating by prying Rodriguez's fingers out of her daughter's hair. 10RP 119. Cervantez testified that she heard both siblings ask Rodriguez repeatedly why she had accused them of snitching. 10RP 41. Both Rodriguez and Cervantez testified that the defendants eventually relented and ran off together down the stairs of the apartment complex. 10RP 120. As they left, Cervantez, believing that their father, Archuleta Sr., had put them up to the beating, told the Archuletas that their father was "a coward." 10RP 120. Velia responded by calling Cervantez a "bitch." 10RP 120.

Cervantez also testified that Archuleta Jr., whom she also knew as "Duke," always claimed to be a member of the RSP's. 10RP 40. She also believed that Velia was a member, and had overheard her talking to her father about the gang. 10RP 60.

After the beating, Rodriguez was left with bumps and bruises all over her face and head. 10RP 120. The jury saw photographs of the bruising. 10RP 121. About ten minutes after the Archuletas left her apartment, Rodriguez posted a message on her Facebook page, saying, "LMFAO people are funny these dayz talking shit and not even knowin' what the fuck they fighting 4... grow da fuck up children." 10RP 160. Rodriguez testified that "LMFAO" means, "laughing my fucking ass off." 10RP 160. She said that she wrote the post responding to the beating, but that she was not literally "laughing," it was just a "figure of speech." 10RP 160.

Rodriguez testified that she did not call the police immediately after the incident because she did not want to report on "family." 10RP 122. Her mother, however, afraid that the Archuletas might return, finally convinced Rodriguez to report the assault to the police on August 8, 2011. 10RP 123. That same day, Rodriguez also went to the hospital to receive treatment for her injuries sustained during the attack. 10RP 124.

The Emergency Room physician who treated Rodriguez testified that she suffered contusions and a possible concussion. 12RP 13.

During the Archuletas' case, they presented alibi evidence, showing surveillance video from a Federal Way Walmart that captured the defendants at the store on the night of the burglary. Velia's work supervisor testified that he had seen Velia at work sometime between 9:30 and 10:00 PM on that night. 12RP 71. The defendants' mother testified that she picked up both defendants from Velia's work at about 9:30 PM and drove them straight to Walmart, then to a drive-through restaurant, before going home for the night. 12RP 94-95.

3. GANG EVIDENCE AND CLOSING.

During pretrial hearings, the State sought to amend the charging language to include a gang aggravator, requiring the State to prove that the crime was committed "with the intent to directly or indirectly cause any benefit, aggrandizement, pain, profit, or other advantage to or for a criminal street gang... its reputation, influence, or membership..." RCW 9.94A.535(3)(aa); 1RP 1-8; 2CP 1. Before ruling on the motion to amend, the court heard from the State's gang expert, Auburn Police Detective O'Neill. 4RP 1-74.

The State sought to admit evidence that both defendants were members of the RSP's, arguing that this was admissible under Evidence

Rule (ER) 404(b) and as substantive evidence of the anticipated aggravator. 7RP 46-51. The State argued that the defendants' gang ties explained the motive for the attack: the Archuletas believed that Rodriguez had accused them of "snitching," and, for gang members, snitching is a serious offense, meriting punishment. 7RP 46-93, 37-38. The gang relationship between the two siblings also explained Archuleta Jr.'s role as the shot-caller and Velia's role as a lower-ranked gang member. 7RP 37-38.

After discussing his training and experience as a gang expert, Detective O'Neill testified about how gangs are designated by the Auburn Police Department, and how particular gang members are "validated" as gang members by the police. 4RP 2-21; 6RP 1-8. Detective O'Neill testified that both of the defendants were validated members of the RSP's. 6RP 8-13; 7RP 37. This validation was the result of several years of investigations, including reviewing police reports, Archuleta Jr.'s own admissions, RSP gang graffiti with the Archuletas' monikers, O'Neill's own personal observations, and photographs and statements on websites like Myspace. 6RP 8-13; 7RP 37-38. Detective O'Neill testified about prior incidents involving both of the defendants that were indicative of gang membership. 4RP 72-73; 6RP 11-12.

During these pretrial hearings, O'Neill testified that Archuleta Sr. was the leader of the RSP's. 4RP 21, 23, 54-55. Second-in-command, after Archuleta Sr., was Archuleta Jr. 4RP 54-55; 6RP 47. O'Neill testified that the deference granted by other RSP members to Archuleta Jr. was second only to that of his father. 4RP 55-56. He also testified that Velia Archuleta was a confirmed member of the RSP's with the moniker "Gata," carrying less influence than either her father or her brother. 4RP 64-66; 6RP 47; 7RP 34-35.

Detective O'Neill also testified that enhancing a gang's criminal reputation can sometimes be the gang's primary purpose. 4RP 27-28, 38. He detailed the damage that being dubbed a "snitch" can do to a gang's reputation, saying that snitching is one of the most "egregious" acts a gang member can commit, and that it can be "devastating" to the reputation of a gang. 4RP 35-38; 7RP 37-38.

After Detective O'Neill's testimony, the court ruled on the admissibility of the gang evidence, analyzing it both as ER 404(b)⁵ evidence against the Archuletas and as potential substantive evidence of the gang aggravator. The court first found that the RSP's were a gang, and

⁵ ER 404(b) reads as follows:

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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

that the State had proved that both Archuleta Jr. and Velia were members of RSP by a preponderance of the evidence. 7RP 93. She also found that Archuleta Sr. was the leader of the RSP's and that Archuleta Jr. was second-in-command. 7RP 94-95. In those same findings, the court stated that it did not find "a nexus between gang affiliation and this crime," and therefore barred the State from amending the information to add the gang aggravator. 7RP 96.

The court went on to say that this did not appear to be a situation, as Detective O'Neill presumed, of gang members retaliating against someone *for* snitching, because Rodriguez had told police that she had been accused of calling the Archuletas snitches; she herself was not accused of snitching during the assault. 7RP 97. Where the court found that Detective O'Neill's testimony was relevant, however, was to explain the role of a "shot-caller":

What does fit is his statement that if somebody in the gang is assigned something to do, the other person stands and watches unless they need assistance. That fits the description.

7RP 97. But the court ended by repeating that, in these "particular circumstances," she does not find the "required nexus between the crime and the gang." 7RP 99.

The State then revisited the issue, asking the court to analyze the admissibility of gang evidence under a “res gestae analysis” to explain the “behavior of the defendants.” 7RP 99. The State argued from the commentaries to 404(b) saying that:

Other misconduct is admissible if it’s so connected in time, place, circumstances or means employed that proof of such other misconduct is necessary for a complete description of the crime charged or constitutes proof of the history of the crime charged.

1RP 100-01. The court sought clarification from the State regarding this analysis, asking the prosecutor what, exactly, he intended to introduce via Detective O’Neill. The prosecutor responded that he intended to use O’Neill’s testimony to lay the “foundation of the RSP gang, that they are members of the gang, and how the gang members utilize [a shot-caller⁶] versus acts of people who make the assault.” 7RP 105. The State further argued that the defense in this case was “alibi,” and that the gang testimony also served to counter the defense. 7RP 105.

At this point, Velia’s defense attorney argued that this appeared to be the very matter the court had already ruled on when it stated that there was “no nexus” between the crime and the gang evidence, but the court countered: “As I understand the difference, it is to show why Mr. Archuleta would have stood by and watched, as these events are

⁶ The transcript here and in some other portions reads “Shock collar” while the context makes it clear that the transcript should read, “shot-caller.”

alleged.” 1RP 106. Then the court made a distinction between the State’s motion to amend the information to add the aggravator and its motion to admit gang testimony at trial for purposes of ER 404(b), clarifying her initial finding:

The nexus required for the aggravator is different than the nexus required for 404(b). The aggravator requires that the defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage to or for a criminal street gang as defined in the statute.

That’s a different issue than 404(b). And the State is allowed to argue its theory of the case.

So the issue for 404(b) is whether the prior acts can be shown to have occurred by a preponderance of the evidence...

I’m inclined to admit some evidence with a limiting instruction. But I need very specific information...

And I’m going back to the purpose for which the evidence is sought to be introduced, is the combination of res gestae and to rebut the defense.

7RP 110-11. After more back-and-forth between the parties, the court indicated that it would recess for the remainder of the day, review the transcript of O’Neill’s testimony, and complete her ruling the following morning. 1RP 111-12.

The following morning, the court ruled on the ER 404(b) issue. The trial judge began by stating that, during the pretrial offer of proof from Detective O’Neill, there was a “great deal of testimony about snitching and the importance of snitching and not snitching in gang

culture.” 8RP 3. She found that “snitching” is “significant to the reputation and honor of the gang whether or not somebody snitches on the gang” and, “conversely, whether or not somebody accuses a gang member of being a snitch.” 8RP 4-5. The court summarized O’Neill’s testimony regarding each of the defendants’ roles in the gang: “Mr. Archuleta Jr., is a shot caller... Velia Archuleta is not.” 8RP 5.

Then the court held that the defendants’ gang involvement was an “inseparable part of the case,” offering a theory as to why Archuleta Jr. “was standing by allegedly while Ms. Archuleta allegedly assaulted Ms. Rodriguez.” 8RP 5. The court cited State v. Boot for its analysis of the admissibility of gang evidence as res gestae. 89 Wn. App. 780, 950 P.2d 964 (1998):

Boot, ...[a] 1998 case, allowed evidence of other illegal activities within two or three days, in that case it was murder, on res gestae grounds. The Court said that it was admissible because the conduct was close in time to the murder because it demonstrated the interactions of the defendant and the others involved and because it demonstrated an escalating chain of events.

Clearly, the interactions of the defendants in this case with each other and with Ms. Rodriguez are important. And I believe this evidence is necessary to complete the – to tell the story of context of what happened here.

I do find by a preponderance that both defendants are members of a criminal street gang, therefore that these misconduct, that you will, occurred [sic]. We’re not referring to very specific bad acts here, but to gang membership.

The evidence is, as I understand it, being introduced for purposes of res gestae. It is relevant to prove this particular crime under these circumstances, in particular the intent of Mr. Archuleta. It is prejudicial. There is no question about that, however, under the circumstances of this case, it is not more prejudicial than probative, it is more probative than prejudicial. It is the only way to explain the conduct of Mr. Archuleta Jr.

This information will be very limited to establishing the gang membership and to testimony about delegation and limited testimony about how gangs operate.

8RP 5-6.

Rodriguez and Cervantez, testified at trial prior to Detective O'Neill's testimony. Both mother and daughter confirmed that they knew the Archuletas were members of the RSP gang. 10RP 88-89; 11RP 40, 60. This testimony raised no objection from either defense counsel.

Immediately before Detective O'Neill's testimony, the parties sought clarification on what testimony was permissible under the court's ruling. 11RP 92. The court stated that the fact that the Archuletas were RSP members, and the difference in their roles, as well as some background testimony regarding gangs was admissible as part of the res gestae of the case. 11RP 92-100. The court further clarified that Detective O'Neill was free to testify regarding "snitching" in a gang context; "snitching is part of this case" because Rodriguez said that, as she was being beaten, the Archuletas accused her of telling others that they were snitches. 11RP 102.

Detective O'Neill finally took the stand before the jury and testified consistently with his pretrial testimony regarding the defendants' RSP membership and their roles therein. After identifying Archuleta Jr. as a "shot-caller" for the RSP's, Detective O'Neill defined a "shot-caller" as "someone who has the credibility within the organization to direct the actions of other members of the gang," and said that they sometimes do the "dirty work," but not very often. When asked if "shot-callers ever occasionally escort junior members of the gang to effectuate tasks as given to them by the gang," the detective responded, "yes." 11RP 137. Detective O'Neill said that complying with tasks ordered by a shot-caller can promote a junior gang member to a higher rank. 11RP 137.

Detective O'Neill defined snitching in this context as "someone talking to the police about gang activity." 11RP 124. "Snitching," Detective O'Neill said, is a "top offense" and goes "hand in hand" with a gang's reputation. 11RP 125. Snitching, he continued, is a "blow to the ...honor of a gang member...it endangers the gang's existence and it must be dealt with." 11RP 125.

After a sidebar, the court permitted the State to further explore snitching in the context of the case, and Detective O'Neill discussed the potential consequences faced by a gang member accused of snitching:

[S]nitching is considered to be... a threat to them from the standpoint of... maybe putting somebody at jeopardy of being arrested. Also, if someone else is perceived as being a snitch, they might feel some personal danger from other members of the gang, so it's both legally and physically a dangerous thing.

11RP 137.

During his closing argument, the prosecutor relied on Detective O'Neill's testimony to argue that Archuleta Jr. was acting as a shot-caller when he showed up at Rodriguez's house that night with his sister:

Now, you remember from testimony from Brian O'Neill that [a] shot-caller is somebody who really runs the streets, runs the lower ranking members in the gang, tells them what to do, how to do it, why to do it, etcetera, and that's Anthony Duke Archuleta, Jr.... Velia is... a lower ranking member of the RSP's...

Officer Brian O'Neill in his expert opinion, it is known that shot callers sometimes escort junior members of a gang on gang-related tasks. Again, in Officer O'Neill's expert opinion, he's seen this before, it is not uncommon for this to happen. Make sure that the job is carried out and ensures that nothing goes wrong. Nothing did go wrong in this case. Mission accomplished. They broke into this house and they beat up Vanessa Rodriguez. Co-defendants' acts are consistent with the expert testimony.

Now, let's look at his verbiage, his statements. Through Vanessa's testimony we heard Anthony say, where's Vanessa, why you calling us a snitch. Vanessa, Anthony was in a rage. I have never seen him – or I never saw him like this before, he was in attack mode. Again, corroborates what Vanessa says. Anthony looked really mad. Never saw him like that before. Said something about snitch. Said, why did you call us a snitch, like 10 times, snitch, snitch, snitch. They need to be suppressed.

We can't have anybody calling us a snitch, can't have anybody snitching on us, you've got to stop this behavior.

14RP 27-28.

4. JURY INSTRUCTIONS.

The jury received an instruction regarding a witness with "special training, education" or experience and were told that they were not "required to accept his or her opinion." CP 45.

Jury Instruction number eight provided the following definition of an accomplice:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) Solicits, commands, encourages, or requests another person to commit the crime;
- or
- (2) Aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence.

A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 47.

The jury also received an instruction, offered by both defendants, limiting the gang evidence:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of an allegation

that the defendant is a member of a criminal street gang, and that his or her actions were motivated by his or her membership in that gang. This evidence may be considered by you only for the purpose of considering the issue of intent or motive, if any, the defendant may have had to commit the crime charged. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 49; 13RP 68.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED THE GANG EVIDENCE AS MOTIVE AND RES GESTAE AFTER FINDING AN INSEPARABLE CONNECTION BETWEEN THE GANG AND THE CRIME.

The Archuleta siblings contend that because the trial court preliminarily stated that there was no nexus between the gang activity and the current crime, it impermissibly admitted Detective O'Neill's testimony at trial. Because the court later clarified that the Archuletas' gang membership was part of the res gestae of the crime, the court did ultimately find a nexus between the crime and their membership, rendering the gang evidence admissible.

Before gang evidence is admissible against a defendant, there must be a connection between the crime and the gang organization, making the evidence relevant in the first place. Dawson v. Delaware, 503 U.S. 159, 166, 168, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992); State v. Johnson, 124 Wn.2d 57, 67, 873 P.2d 514 (1994). Evidence that a defendant is a gang

member can be admissible under ER 404(b) to show motive, context, and as res gestae evidence to show the interactions of the parties involved. Boot, 89 Wn. App. at 789; State v. Yarbrough, 151 Wn. App. 66, at 83-84, 210 P.3d 1029 (2009). In order to admit such evidence, the trial court must first find by a preponderance of the evidence that the misconduct actually occurred. State v. Lough, 125 Wn.2d 847, 853, 864, 889 P.2d 487 (1995). Then, the court must identify the purpose for which the evidence is offered, determine its relevance, and weigh its probative value against its prejudicial effect. Lough, 125 Wn.2d at 853. This must be done on the record and is reviewed under an abuse of discretion standard; discretion is abused only when it is exercised on untenable grounds or for untenable reasons. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court may then admit the evidence subject to a limiting instruction to the jury explaining the proper use of the evidence. Lough, 125 Wn.2d at 864.

Velia's briefing relies heavily on State v. Scott. 151 Wn. App. 520, 213 P.3d 71 (2009). Scott, along with two of his friends, broke down the door of a bedroom and brutally assaulted the victim, the husband of a woman who owed Scott's friend money. Id. at 522-23. The State moved in limine to admit evidence that Scott and his two friends were members

of the same gang and that Scott committed the crimes because the victim's wife had disrespected the gang by not paying. Id. at 523. In its pretrial offer of proof to the trial judge, the State said that this provided both motive and intent for the assault, warranting gang expert testimony regarding issues of "respect" in gang culture, and why perceived disrespect is met with violence. Id. at 523-24.

The trial court found that the evidence was admissible first to show the motive behind the crime – to send a message to the wife to repay her debt. Id. at 527. Secondly, the evidence showed the connection between "Scott and his codefendants, as well as the relationship of [the victim] to the attackers." Id. Finally, the trial court ruled that the gang evidence was admissible to explain prior threats made to the wife and her initial refusal to identify the defendants. Id. at 528. The court held that "[a]s long as the evidence is developed as the State anticipates, the Court would allow such evidence." Id. at 524.

At trial, the victim testified that he did not know any of his attackers, nor did he identify any of them as having gang affiliations. Id. at 524. His wife testified about the assault and said Scott was a member of a gang. Id. The gang expert who testified for the State also testified that Scott was a gang member. Id. at 524-25. Contrary to the State's offer of proof, the expert was never asked by the State about local members of

Scott's gang, nor did he discuss any issues of respect and disrespect in gang culture or any connection between gang membership and the assault. Id. at 524-25.

The Court of Appeals stated that “[c]ourts have regularly admitted gang affiliation evidence to establish the motive for a crime or to show that defendants were acting concert,” but that there still needed to be a “connection” between the gang and crime. Id. at 527. The court found that the trial court’s ruling admitting the evidence was proper for all of the trial court’s stated reasons.⁷ Id. at 527. The court held that absent evidence about Scott’s gang affiliation as his motive behind the crime, “[t]he attack on [the victim] by three relative strangers was otherwise unexplainable.” Id.

While the trial court’s pretrial ruling was appropriate, the Court of Appeals found that the State never satisfied its pretrial offer of proof. Id. at 528. The actual, admitted evidence did not show that joint gang affiliation was “a reason for the three men to attack [the victim] together or to explain why they would care” that one of them was not paid by the victim’s wife. Id. The court also ruled that the State never provided the

⁷ The Scott court also found that the trial court correctly cited the gang evidence as relevant to show the relationship among the attackers, because the evidence “reinforced the motive and also was arguably *res gestae* to explain the interactions of the various parties.” Id. at 527-28 (citing Boot, 89 Wn. App. at 790). The gang evidence also helped to explain the late reporting because the victim’s wife “knew that Mr. Scott was a gang member and feared him and his associates.” Id. at 528.

connection between the expressed motive and the crime itself because, again contrary to the State's pretrial proffer, the gang expert was never asked about the importance of "respect" in gang culture or that violence was a "recognized response to disrespect," a condition required by the trial court when ruling on the admissibility of the evidence. Id.

Absent anything connecting the gang evidence to the crime, the Scott court held that "the only reasonable inference for the jury to draw from the testimony was that Mr. Scott was a bad person," which is precisely contrary to the intention of ER 404(b). Id. at 529. The absence of specific gang evidence presented at trial "left the trial court without an evidentiary basis to support the gang affiliation evidence that was presented." Id. at 530. The court found that the error was not harmless, and reversed the convictions. The Scott opinion, however, was explicit that, had the evidence introduced at trial conformed to the pretrial offer of proof, "there would *not have been any error.*" Id. at 528-29 (emphasis added).

In Yarbrough, a homicide case cited by Scott and the defendants here, a gang expert was permitted to testify regarding the hierarchal structure of a gang, the methods of advancement within the gang, the punishments for gang members unwilling to commit crimes in furtherance of the gang, and violence between rival gangs rooted in "disrespect."

151 Wn. App. at 79-80. The State argued that the gang evidence was admissible under ER 404(b) to prove the defendant's motive and his mental state. Id. at 80. The Yarbrough court agreed with the State, finding that the "gang-related evidence was ...highly probative of the State's theory of the case."⁸ Id. at 84. The court further found that the gang-related evidence helped explain the defendant's motive because he perceived his victim to be a member of a rival gang. Id.

In Boot, a homicide case cited by the trial court here in its pretrial rulings, the trial court admitted evidence of Boot's gang affiliation as evidence of motive under ER 404(b). 89 Wn. App. at 788. The reviewing court affirmed this basis, holding that the "testimony on gangs established that killing someone heightened a gang member's status," and the defendant was a known gang member: "The evidence shows the context in which the murder was committed." Id. at 789. The trial court further admitted gang evidence (and evidence of other bad acts committed by the defendant) under the res gestae exception to ER 404(b):

The res gestae exception admits evidence of other bad acts to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. Each act must be a piece necessarily admitted to ensure the jury has the complete picture.

⁸ The court also found the gang evidence relevant because the State had alleged the gang aggravator and Yarbrough had murdered his victim "to advance his position in the gang." Yarbrough, at 84.

Id. at 790 (internal citations omitted). The court found that, in light of its probative value, the evidence was not unduly prejudicial and that the trial court had “properly admitted it under the res gestae exception to ER 404(b).” Id.

In the case at hand, the trial court applied the appropriate ER 404(b) analysis to the facts as presented through the testimony of Detective O’Neill during pretrial motions. The court found by a preponderance of the evidence that RSP was a criminal gang and that both defendants were validated members, satisfying the first step in the ER 404(b) analysis. 7RP 93; Lough, 125 Wn.2d at 853, 864. After taking a recess to consider Detective O’Neill’s testimony and arguments from both sides, the court returned with a ruling regarding the relevance of the proposed gang evidence, completing the ER 404(b) analysis by stating the purpose for the testimony and balancing its probative value against its prejudicial effect:

The evidence is, as I understand it, being introduced for purposes of res gestae. It is relevant to prove this particular crime under these circumstances, in particular the intent of Mr. Archuleta. It is prejudicial. There is no question about that, however, under the circumstances of this case, it is not more prejudicial than probative, it is more probative than prejudicial. It is the only way to explain the conduct of Mr. Archuleta Jr.

This information will be very limited to establishing the gang membership and to testimony about delegation and limited testimony about how gangs operate.

8RP 6. The court also instructed the jury, requiring them to consider evidence of gang affiliation only for the “issue of intent or motive, if any...” CP 49; 13RP 68. This instruction was agreed upon by all parties, satisfying the last requirement for the admissibility of the gang evidence.

Like the offer of proof in Scott, and the actual evidence presented in Yarbrough and Boot at trial, the gang evidence here was admissible because it served to explain the actions, states of mind, and particular roles of the defendants. Detective O’Neill’s testimony gave context to the “snitching” accusations made by both defendants, and was proper res gestae evidence under ER 404(b).

Absent testimony that the Archuletas were RSP members, that Rodriguez was not, that Archuleta Jr. was a superior of Velia’s in RSP and that being accused of snitching as a gang member is an egregious offense within a gang, the jury would have been left entirely in the dark as to the true nature of the incident and the relationships involved. Knowing the potentially life-threatening consequences of being dubbed a “snitch” in gang culture elucidated a very real motive for the Archuletas to attack Rodriguez; they made it clear during the crime that they believed she had

accused them of being snitches, a serious offense in gang culture with potentially violent repercussions for the accused.⁹

Archuleta Jr. contends that there was no “justification to show why Velia and Junior might have worked together,” that there “was no evidence Velia and Junior had engaged in gang-related activities together in the past, or that their alleged displeasure with Rodriguez had any connection to the Rancho San Pedro gang.” Archuleta Jr.’s Brief at 13.

But Detective O’Neill testified to the siblings’ common membership in the gang, a gang started and headed by their father, and showed photographs of their monikers “tagged” together on the walls of the RSP’s Auburn territory. 11RP 117-23. The court viewed photographs of both defendants together, flashing gang signs and surrounded by other RSP members, and had prior police reports where both were involved in gang activity. 11RP 117-23. Cervantez testified that she had heard both discuss RSP business, and Rodriguez testified that while Velia was beating her she defended RSP and used the terms “we” and “us” to address the perceived offense: “What the fuck, why you calling us a

⁹ Velia argues that “snitching is generally recognized as a bad thing whether it is in the context of a gang or not,” so the “motive exception” to permitting the gang evidence is “inapplicable.” Velia’s Brief at 12-13. But Detective O’Neill testified that where a gang member in particular is perceived “as being a snitch, they might feel some personal danger from other members of the gang, so it’s both legally and physically a dangerous thing,” drawing a distinction between the general perception of snitching, and a real, physical danger that manifests itself when that perception is brought into gang culture. 10RP 137. The gang context to snitching, then, remains relevant to the issue of motive, and the court’s ruling was sound.

snitch. We ain't a snitch. RSP ain't no snitch.” 10RP 115. Thus, the evidence that the defendants acted in concert as members of the RSP when they entered Rodriguez's apartment and Velia beat Rodriguez was substantial, and the court properly exercised its discretion in admitting this evidence before the jury.

Unlike in Scott, where the gang expert never ended up testifying to the common gang affiliation of the defendants or the meaning of “respect” in the context of gang life, Detective O'Neill did testify about both Archuletas being RSP's and to the meaning of “snitching” in the same context, thus connecting the gang affiliation evidence to the crime and meeting the trial court's expectations following her pretrial rulings. As in Yarbrough and Boot, the gang testimony “reinforced the motive and also was arguably *res gestae* to explain the interactions of the various parties.” Yarbrough, at 527-28 (citing Boot, 89 Wn. App. at 790).

Both defendants' briefing focuses on the trial court's initial pretrial finding that there was no “required nexus between the crime and the gang.” 8RP 5. While this statement, if isolated from the remaining facts and findings, does not support the admissibility of gang evidence under either ER 404(b) or the Scott decision, the remainder of the record serves to clarify the court's ruling. In making its statement that there was “no nexus” between the crime and the gang, the court was making a narrow

distinction between the admissibility of gang evidence to further the gang aggravator, versus the admissibility of gang evidence under ER 404(b):

The nexus required for the aggravator is different than the nexus required for 404(b). The aggravator requires that the defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage to or for a criminal street gang as defined in the statute.

That's a different issue than 404(b). And the State is allowed to argue its theory of the case.

7RP 100-11.

When the trial judge stated that there was “no nexus” between the crime and the gang, she was referring specifically to the particulars of the gang aggravator, which she believed required that the crime be committed specifically for the advancement of the gang itself. Neither Detective O’Neill nor Rodriguez could testify to the precise advantage RSP derived from this beating, and so the court barred the State from adding the gang aggravator to its charging document.

But the judge’s later rulings made it clear that she did not ultimately hold that there was no connection between the defendants’ gang affiliation and the crime itself, only that there was not sufficient nexus to justify a gang aggravator, which required specific proof that the crime was intended to propel the reputation of the gang. After a break to read the transcript of Detective O’Neill’s testimony, the judge returned with her

ruling on the admissibility of gang evidence under ER 404(b), and stated explicitly that Archuleta's gang affiliation is an "inseparable part of the case":

As res gestae, I do believe that this information – limited information about gang involvement, ... are admissible as res gestae. They are an inseparable part of the case. It's the only way the State can argue its theory of the case as to why Mr. Archuleta was standing by allegedly while Ms. Archuleta allegedly assaulted Ms. Rodriguez.

...Clearly, the interactions of the defendants in this case with each other and with Ms. Rodriguez are important. And I believe this evidence is necessary to complete the – to tell the story of context of what happened here.

8RP 5-6.

Scott held that "[c]ourts have regularly admitted gang affiliation evidence to establish the motive for a crime or to show that defendants were acting concert," but still required a "connection" between the gang and crime. Scott, 151 Wn. App. at 527. The fact that the trial court explicitly found that the gang affiliation was "inseparable" from the facts themselves speaks directly to this "connection"; this inseparable relationship provides the requisite nexus between the crime and the gang. This is consistent with the gang evidence presented, both pretrial and at trial, revealing to the jury the context of the crime and the relationship of the defendants. The Archuletas cannot show that the court's exercise of

discretion in permitting the 404(b) gang affiliation evidence was untenable. This court should, therefore, affirm their convictions.

2. DETECTIVE O'NEILL'S TESTIMONY ASSISTED THE PROPERLY-INSTRUCTED TRIER OF FACT IN UNDERSTANDING THE CASE AND DID NOT EXPRESS AN OPINION REGARDING ARCHULETA JR.'S GUILT. IT DID NOT, THEREFORE, INVADE THE PROVINCE OF THE JURY.

Archuleta Jr. argues that Detective O'Neill invaded the province of the jury on the issue of accomplice liability by testifying that Archuleta Jr. was a "validated" gang member. Detective O'Neill's testimony was properly admitted after an ER 404(b) hearing and served to assist the trier of fact; he never testified, directly or indirectly, as to his opinion of the guilt or innocence of either defendant. Thus, the argument fails.

Expert testimony is admissible where it can serve to assist the trier of fact in understanding the issues. State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). Included in this equation is the question of whether the prejudicial nature of the testimony is so great as to render such testimony inadmissible." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). "No witness, lay or expert, may testify as to his opinion as to the guilt of a defendant, whether by direct statement or inference." Id. Here, the trial court determined that Detective O'Neill's limited testimony would be helpful for the jury to understand gang hierarchy generally, the

makeup of the RSP's specifically, the role of a shot-caller, and the issue of snitching and its repercussions.

Archuleta Jr. argues that the State improperly relied on Detective O'Neill's testimony to prove a "substantive element of a crime," namely that Archuleta Jr. was an accomplice, and cites to the prosecutor's closing argument where the prosecutor described how Archuleta Jr.'s role as a shot-caller for RSP was relevant to the current crime. Brief of Archuleta Jr. at 12-13. But the prosecutor here did not argue that, "we know that Archuleta Jr. was an accomplice to his sister's burglary on August 5, 2011 because Detective O'Neill said he was a shot caller for the RSP gang." Rather, the prosecutor used Detective O'Neill's testimony to apply the detective's description of a gang's shot-caller to the specific facts of the current crime.

The prosecutor reminded the jury that Rodriguez had testified that during the assault, Velia asked her, "why you calling us a snitch?" while "Anthony was in a rage...in attack mode," and also saying something about "being a snitch." 1RP 28. This, the prosecutor argued, was consistent with the description of a shot-caller in a gang given by Detective O'Neill: "[the] co-defendants' acts are consistent with the expert testimony." 14RP 28. After all, Archuleta Jr. was at the apartment, accompanying Velia and accusing Rodriguez of the same breach that

Velia accused her of, yet Velia committed the entire assault while Archuleta Jr. stood by and watched – his actions fit squarely with the shot-caller role described by the expert.

The State used the expert to assist the trier of fact in understanding the issues, without compelling a particular conclusion on an ultimate issue. It was the unique actions, reactions, and statements by Archuleta Jr., as elicited through Rodriguez on the stand, that permitted the State to apply Detective O’Neill’s testimony and conclude that his actions were consistent with a shot-caller on this occasion, sufficing for accomplice liability. Detective O’Neill’s testimony mirrored the permissible gang expert testimony in Boot and Yarbrough, providing context for the crimes without invading the province of the jury.

The jury’s province was further protected by the instruction regarding expert testimony, stating explicitly that they were not “required to accept his or her opinion.” CP 45. This Court should presume that jurors follow the court’s instructions. State v. Steing, 144 Wn.2d 236, 27 P.3d 184 (2001).

To advance the same argument, Archuleta Jr. cites extensively from United States v. Mejia, 545 F.3d 179, 190-91 (2d Cir. 2008), a federal case where the use of a police gang expert was scrutinized by the court as potentially usurping the jury’s role. But the discussion in Mejia

occurred in the context of deciding whether the officer's expert testimony was proper under the Federal Rules of Evidence and the Sixth Amendment confrontation clause, none of which are at issue here, rendering Mejia's rulings inapposite.

But even if the Mejia analysis were to apply here, the testimony so scrutinized by the Federal Court there and Detective O'Neill's testimony here is readily distinguishable. Mejia was a gang-shooting, homicide case where the expert for the government testified extensively about the defendant's gang, the MS-13. Id. at 186-87. He testified about the "enterprise structure and the derivation, background and migration of the MS-13 organization, its history and conflicts... its cliques, methods and activities, modes of communication and slang." Id. at 186. The expert went on to testify about specific details in the gang's operations, their methods of transportation and communication and their expanding drug and gun-running enterprises. Id. He went on to say that when MS-13 gang members needed guns, they "do what MS 13 does, which is, you know, shoot at rival gang members..." Id. at 187. The government used the expert to talk about other cases involving the same gang, and stated that MS-13 was responsible for "between 18 and 22, 23 murders" in the same state as the current charges. Id.

Given the broadness of the testimony beyond the immediate scope of the case, and the extent of the arguably irrelevant prior bad act testimony about the MS-13 as a whole, it is no wonder the Second Circuit found that when “officer experts” come to court and “simply disgorge their factual knowledge to the jury, the experts are no longer aiding the jury in its fact finding; they are instructing the jury on the existence of the facts needed to satisfy the elements of the charged offense.” *Id.* at 191.

In contrast, Detective O’Neill’s testimony here was limited to the fact that both defendants were members of RSP (something already testified to, without objection, by Rodriguez and Cervantez), their specific roles in RSP, the job of a “shot-caller” and the meaning of snitching in a gang context. He did not testify about any specific prior incidents or crimes involving RSP’s, nor did he make generalizations about their involvement in criminal enterprises or the negative impact of the gang on the community. 11RP 117-52. Detective O’Neill’s testimony stayed well within the confines of the court’s ruling, and assisted the trier of fact, who had already heard testimony regarding the “snitching” accusations and that Velia cited her RSP membership during the assault. Detective O’Neill’s limited testimony on specific, relevant issues was not comparable with the expansive testimony presented by the government in Mejia on the scourge of MS-13 as a whole.

That Washington cases have failed to apply Mejia in their analysis of gang expert testimony is also telling. In a recent case, State v. Embry, __ P.3d __, 2012 WL 5331565 (October 30, 2012), the Court of Appeals applied Yarbrough, finding that the test for the admissibility of gang affiliation evidence remains rooted in ER 404(b), and follows the same analysis performed by the trial court here: first, that it be found factual by a preponderance of the evidence; second, that the court identify its purpose as an exception to the evidence rule; third, that the evidence was relevant and connected to the crime charged, and finally, that it was more prejudicial than probative.

The expert in Embry, like Detective O'Neill in the case at hand, properly testified regarding the context of the crime and the relationship of the parties only after the court conducted the appropriate ER 404(b) analysis, without invading the province of the jury.

3. EVEN WITHOUT THE GANG EVIDENCE, THERE WAS SUFFICIENT EVIDENCE FOR A REASONABLE JUROR TO HAVE FOUND ARCHULETA JR. GUILTY AS AN ACCOMPLICE.

Archuleta Jr. claims that, had the court barred the gang evidence in the State's case-in-chief, there would not have been sufficient remaining evidence to convict him. But even if the court had barred the admission of evidence regarding his role in the RSP's, a reasonable juror could still

have convicted Archuleta Jr. as an accomplice to Burglary in the First Degree.

Every element of a crime must be proven beyond a reasonable doubt. State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). When an appellant challenges the sufficiency of the evidence, the reviewing court views the evidence in the light most favorable to the State, drawing all reasonable inferences from the evidence in the State's favor and interpreting them "most strongly against the defendant." State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Mere presence at the commission of a crime, even when the defendant has knowledge of the crime, is not sufficient to show accomplice liability. State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). But a defendant need not participate in each element of the crime, nor share the same mental state that is required of the principal. State v. Galisia, 63 Wn. App. 833, 840, 822 P.2d 303 (1992). An accomplice bears the same criminal responsibility as a principal. State v. Silva-Baltazar, 125 Wn.2d 472, 480, 886 P.2d 138 (1994). Evidence showing that a defendant is associated with the venture and participated in it as something he desires to succeed supports accomplice liability. State v. Carlisle, 73 Wn. App. 678, 680, 871 P.2d 174 (1994).

In the case at hand, the jury was instructed that, in order to convict the defendants of Burglary in the First Degree, they would have to find the following elements beyond a reasonable doubt:

1. That...the defendants unlawfully entered or remained in a building;
2. That the entering or remaining was with intent to commit a crime against a person or property therein;
3. That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged assaulted a person; and
4. That any of these acts occurred in the State of Washington.

CP 51. The jury was further instructed that an accomplice is someone who, with knowledge of promoting or facilitating a crime, either “solicits, commands, encourages, or requests another person to commit the crime; or aids or agrees to aid another person in planning or committing the crime.” CP 47.

Because the gang affiliation evidence was indeed helpful to the trier of fact in understanding Archuleta Jr.’s role in the case and the assault as a whole, Archuleta Jr. is correct in arguing that barring the admission of this evidence would significantly decrease the State’s substantive evidence of accomplice liability. After all, in such contrived isolation, the jury would be left with no context for Velia’s seemingly cryptic phrase of “RSP ain’t no snitch,” virtually no information regarding a potential motive for the crime, nor any explanation for Archuleta Jr.’s presence

there – this is, after all, why the trial court ultimately found the gang evidence inseparable from the crime itself.

But even bereft of the testimony that informed the jury of the context behind the assault, the jury still would have heard testimony that both defendants entered together, uninvited, into Rodriguez’s living room after dark, and that Archuleta Jr. spoke first, looking “angry” and asking Rodriguez why she had accused them both of snitching.¹⁰ The jury would have heard how both defendants spoke as a team, saying “we” and “us” in their accusations, and that Archuleta Jr. continued addressing Rodriguez while his sister beat her. They also would have heard that Archuleta Jr. stood, looking “mad” during the entire beating, and that both defendants left together after Velia was done.

In the light most favorable to the State, and with all inferences in the State’s favor, a reasonable juror could have found that Archuleta Jr. intended for his sister to beat Rodriguez, that he accompanied her, entered illegally with her, encouraged her by continuing to interrogate the victim as his sister beat her, stood behind the couch ready to assist, and then left together with his codefendant. This evidence, coupled with a favorable inference for the State, is enough to reach the sufficiency burden.

¹⁰ Even without evidence of Archuleta’s particular role in RSP, because Rodriguez testified that Velia actually claimed her RSP membership while attacking Rodriguez, it is extremely unlikely that any court would have prevented all gang evidence at trial. This is further discussed in the section regarding severance.

4. VELIA'S MOTION WAS NOT PROPERLY PRESERVED AND, EVEN IF IT WAS, JOINDER OF THE DEFENDANTS DID NOT CREATE A MANIFEST INJUSTICE.

Velia contends that the trial court should have granted her motion to sever because the "massive and complex quantity of gang evidence introduce [sic] to prove [Archuleta Jr.] was an accomplice to the alleged burglary made it impossible for the jury to properly disregard it during deliberation on Velia's guilt or innocence." Velia's Brief at 16. The severance motion was not properly preserved for appeal and should therefore not be considered here. Even if the court finds that the issue was preserved, the gang evidence would have been cross admissible for both defendants, so the court acted well within its discretion.

- a. Facts Regarding Severance.

Criminal Rule (CrR) 4.4 provides the authority for severance among defendants:

- (1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

- (2) If a defendant's pretrial motion for severance was overruled he may renew the motion *on the same ground* before or at the close of all the evidence. *Severance is waived by failure to renew the motion.*

CrR 4.4(a)(1), (2) (emphasis added).

During pretrial motions, Velia's defense attorney moved to sever her case from Archuleta Jr.'s pursuant to CrR 4.4(c)(1), which reads:

A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:

- (i) the prosecuting attorney elects not to offer the statement in the case in chief;
- or
- (ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

CrR 4.4(c)(1); 2CP 42. Velia's attorney, both during pretrial and in his Trial Memorandum, argued that Archuleta Jr. had made a statement to police that referenced Velia arguing with the victim about one week before Archuleta Jr.'s arrest. 2CP 41; 1RP 110-11. Because the statement was otherwise admissible and was made by Velia's co-defendant, Velia sought severance under the rule. Velia's attorney also indicated that he anticipated raising severance based on gang evidence, but could not address the motion fully because the court had not yet ruled on its admissibility. The court asked Velia's attorney if the severance motion

was based primarily on the statements by the co-defendant, and he responded as follows:

It is, Your Honor. That was the basis. It was also anticipated [sic] the possibility that if certain evidence came in against Mr. Archuleta and not against Ms. Archuleta with respect to gang involvement, there is a concern that there may be some undue prejudice as a result of that.

Not knowing exactly what that might be, I cannot address it fully. But that is the other basis.

But primarily I was concerned about [Archuleta, Jr.'s] statement initially. And then depending upon what happens with the gang evidence, that would be other basis.

2RP 110-11.

Archuleta Jr.'s attorney did not seek severance, and the prosecutor stipulated that he would not be seeking to admit Archuleta Jr.'s statement about Velia into evidence in the State's case-in-chief, in accord with CrR 4.4. 2RP 111. Given this stipulation, the judge denied Velia's severance motion, but invited her attorney to raise it again should he think it appropriate, presumably after her ruling regarding the admissibility of gang evidence: "At this time, the motion to sever is denied. But if you think you need to renew it, Mr. Minor, you are free to do so." 2RP 111. Despite the court later ruling that the gang evidence, in a narrow capacity, was admissible, Velia's defense counsel never took the court up on its offer to raise the severance motion on those grounds during pretrial.

9RP 27-28.

Velia did raise severance again after the State rested. Velia's attorney acknowledged that, while during his pretrial severance motion his primary concern was "that there may be information admissible against one [defendant] that would not necessarily apply to the other," his concern now was that, "[i]n this situation" the "allegations that Archuleta Jr. ... was a shot caller in the Rancho San Pedro gang" could be "unduly prejudicial to Ms. Archuleta," should the jury believe that the purpose behind the crime was to "further[r] her position in the gang." 12RP 26. The State countered that the gang evidence would be cross-admissible in any case because both defendants were charged with committing precisely the same crimes, against the same victim, in the same place, and posited the same defense. 12RP 27. Archuleta Jr.'s attorney agreed with the State, and added the following:

...the State's theory of my client being a shot caller is to implicate my client, not Ms. Archuleta, who is charged as the primary actor and/or sole actor as far as Ms. Rodriguez's testimony is concerned

12RP 28-29.

The court denied the motion and agreed that the evidence would be admissible against both defendants:

I agree that the evidence... about Mr. Archuleta Jr. being a shot caller would be evidence in [Velia's] trial even if severed. The evidence is cross-admissible. The defenses

are not mutually exclusive, so I'm going to deny the motion to sever at this point.

12RP 29.

The jury was instructed that each defendant was charged with a separate crime and that they must decide each case separately, without letting their "verdict as to one defendant," control their verdict as to the other. CP 43.

b. The Severance Motion Was Not Preserved.

Velia argues for reversal, claiming that joinder with Archuleta Jr. created manifest prejudice by permitting the jury to hear evidence of gang affiliation. But by failing to renew her objection on the same grounds after the State rested, Velia waived the issue.

In her brief, Velia states that "prior to trial, she moved to sever her trial from Junior's, in part on the prospect that gang evidence would be admitted against Junior to explain his alleged role in the offense." Brief of Appellant at 14. But a close reading of the transcript reveals that her attorney's pretrial severance motion was based only on the potentially prejudicial statements by her codefendant, and the motion to sever based on the gang evidence was not yet before the court; the court, after all, had not yet ruled on the admissibility of the gang evidence. Because of this, the judge invited Velia's attorney to raise a motion to sever *after* her

ruling, should he still deem it necessary. 2RP 111. Once the court established the scope of admissible gang testimony during its pretrial rulings, Velia's counsel objected to its admission, but did not raise severance despite the earlier invitation from the court. 9RP 28.

The second severance motion did not renew Velia's initial motion "on the same ground" as required by CrR 4.4 (1), but instead raised the motion on a separate basis, namely the admissibility of gang testimony against her codefendant. Detective O'Neill's testimony about the defendants' gang affiliation at trial was no surprise and was in fact the subject of several days of pretrial litigation – this, then, did not create some sudden infusion of new evidence warranting a new motion in the "interests of justice" under CrR 4.4. Velia relied only on the codefendant's statements for her grounds for a severance motion in pretrial and only speculated at the possibility of another severance motion following the court's ruling on the admissibility of gang evidence. By failing to raise the specific motion in his pretrial motions when the issue was ripe, Velia's lawyer waived it on appeal.

- c. Even If The Issue Was Preserved, No Manifest Prejudice Was Created By Keeping The Defendants Together For Trial.

The trial court may, in its discretion, grant separate trials only where doing so would "promote a fair determination of guilt or

innocence” under CrR 4.4(c)(2). A defendant must meet the following two factors: “1) there is a conflict of interest between the two defendants; and 2) a defendant can point to specific prejudice.” State v. Sluder, 11 Wn. App. 8, 12, 521 P.2d 971 (1974); State v. Barry, 25 Wn. App. 751, 756, 611 P.2d 1216 (1980). Because separate trials are disfavored in Washington, a defendant at trial must point to specific prejudice before the trial court grants separate trials. Barry, 25 Wn. App. at 756. A defendant must show that a joint trial will be so manifestly prejudicial to outweigh concerns for judicial economy. State v. Phillips, 108 Wn.2d 627, 640, 741 P.2d 24 (1990). A denial of a motion to sever is reviewed under the abuse of discretion standard and a defendant on appeal must show manifest prejudice resulting from a joint trial that outweighs judicial economy concerns. Id. at 640; State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982).

When a court determines whether to sever to avoid prejudice, it considers the strength of the State’s evidence on each count, the clarity of defenses, jury instructions, and cross-admissibility of the evidence from one defendant to the other. State v. Rodriguez, 163 Wn. App. 215, 259 P.3d 1145 (2011). In Rodriguez, the defendant drove a getaway vehicle while his co-defendant shot and killed the victim. Id. at 220. The reviewing court found that the trial judge properly denied the defendant’s

severance motion because the jury was properly instructed to decide each count separately and the State's evidence against both defendants was strong and cross-admissible. Id. at 228.

Here, the jury was instructed that each defendant was charged with a separate crime and that they must decide each case separately, without letting their "verdict as to one defendant" "control their verdict" as to the other. CP 43. The various relevant factors all weighed in favor of joinder: the victim, the place, the time, the crime, the mens rea, the defenses, were all the same for both defendants.

While Velia argues that the particular gang evidence prejudiced her because it meant that the jury heard that she was a gang member, her gang affiliation would have come into evidence *even if* Archuleta Jr.'s had not. After all, it was Velia who invoked the gang as she committed the beating, saying "RSP ain't snitches." Regardless of the admissibility of gang evidence against Archuleta Jr., Rodriguez would have been permitted to testify regarding Velia's statements and what they meant to her because the statements were so inextricably "connected in time, place, circumstances" that proof of "such other misconduct is necessary for a complete description of the crime charged, or constitutes proof of the history of the crime charged." State v. Schaffer, 63 Wn. App. 761, 768, 822 P.2d 292 (1991). It is only by explaining what "RSP" refers to and

what “snitching” in a gang context means, that the motive and meaning behind Velia’s particular actions are made manifest.

The trial judge recognized this when she denied the half-time motion to sever, finding that the gang evidence was “cross-admissible” – it would have been heard by the jury whether or not severance had occurred. There cannot, therefore, be a reasonable argument that joinder was manifestly prejudicial where the evidence would have been heard with or without joinder.

Any potential prejudice was outweighed by the interests of judicial economy. Thus, the trial court properly denied Velia’s motion to sever and the conviction should be affirmed.

D. CONCLUSION

For the foregoing reasons, the defendants’ convictions should be affirmed.

DATED this 4 day of December, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
TOMÁS A. GAHAN, WSBA #32779
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

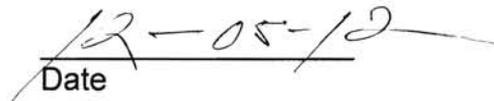
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at 1908 E Madison Street, Seattle, WA 98122, containing a copy of the Respondent's Brief, in STATE V. VELIA ARCHULETA, Cause No. 68409-4, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington



Date

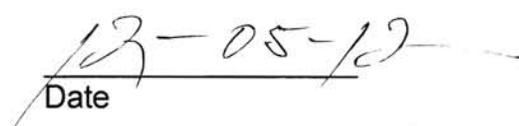
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Suzanne Lee Elliott, the attorney for the appellant, at 1300 Hoge Building, 705 Second Avenue, Seattle, WA 98104, containing a copy of the Respondent's Brief, in STATE V. ANTHONY ARCHULETA, JR., Cause No. 68409-4, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington



Date