No. 31670-0-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ISIDRO LICON,
Defendant/Appellant

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT
Honorable Vic L. VanderSchoor, Judge

BRIEF OF APPELLANT

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3. The trial court erred in denying Mr. Licon's motion for a mistrial based upon Officer Fox's testimony regarding hearsay statements of Jaime Gutierrez.

4. Mr. Licon's inability to obtain the testimony of Jaime Gutierrez deprived him of a fair trial, including his right to compel witnesses and his right to present a defense.

5. The trial court erred in denying Mr. Licon's request for a material witness warrant for Mr. Gutierrez.

6. Cumulative error denied Mr. Licon of a fair trial.

7. The record does not support the finding that Mr. Licon has the ability to pay Legal Financial Obligations.

8. The trial court erred by imposing discretionary costs.

9. The trial court erred in imposing three community custody conditions unrelated to the charged crimes, and imposing two of these conditions in violation of the First Amendment right of association.

Issues Pertaining to Assignments of Error

1. Did the trial court err in admitting gang evidence?
2. Did the trial court err in allowing Officer Eric Fox to testify regarding hearsay statements of Jaime Gutierrez, and denying Mr. Licon's motion for a mistrial based upon the admission of this evidence?
3. Did Mr. Licon's inability to obtain the testimony of Jaime Gutierrez deprive him of a fair trial, including his right to compel witnesses and his right to present a defense?
4. Did the trial court err in denying Mr. Licon's request for a material witness warrant for Mr. Gutierrez?
5. Did cumulative error deny Mr. Licon of a fair trial?
6. Should the finding of ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous, where the finding is not supported in the record?
7. Did the trial court abuse its discretion in imposing discretionary costs where it did not take Mr. Licon's financial resources into account, nor consider the burden it would impose on him, as required by RCW 10.01.160?
8. Were the community custody conditions (1) prohibiting contact with known gang members, (2) prohibiting possession of gang

paraphernalia, and (3) requiring notifying the community corrections officers of vehicles owned or regularly driven by Mr. Licon valid "crime-related" prohibitions under RCW 9.94A.703(3)(f), and did the gang related community custody conditions violate Mr. Licon's First Amendment right of association?

B. STATEMENT OF THE CASE

On February 10, 2012, Isidro Licon went to an apartment where Sylvia Guerra lived with her fiancé, Jaime Gutierrez, and her daughter, Selena Cortez.[1] RP 103, 111-112, 137, 414, 416-417; RP (Jan. 7, 2013) 58. Guillermo Tapia drove Mr. Licon to the apartment. RP 380-383. Edgar Arroyos and Steven Morfin were also there. RP 109-110, 135-136, 414, 417; RP (Jan. 7, 2013) 61, 91. Mr. Licon was a member of the Florencia gang, but no longer wanted to be an active member. RP 414-415; RP (Jan. 7, 2013) 22. Guerra was a member of the Mexican Pride Surenos (MPS) gang, but she cut ties with the gang several years before. RP 105. Cortez was not a gang member. RP (Jan. 7, 2013) 26-27, 74.

[1] The Report of Proceedings consists of five volumes: two separately paginated volumes, one containing a pretrial hearing, and the other containing one day of trial proceedings and the sentencing hearing; and three consecutively paginated volumes containing the remainder of the trial proceedings. References to "RP" herein refer to the three consecutively paginated volumes. References to the other volumes include the date.

Mr. Licon recently learned that Guerra had kicked Gutierrez's brother out of her apartment. RP 407, 412-413. Mr. Licon questioned Gutierrez and Guerra regarding why she did this. RP 107, 112-114; 419-421. Mr. Licon and Guerra then got into an argument. RP 113-114, 153-154, 420-421; RP (Jan. 7, 2013) 63.

Cortez entered the room during the argument. RP 115, 421-422; RP (Jan. 7, 2013) 63-64. She grabbed a knife. RP 116, 154, 163-164, 423; RP (Jan. 7, 2013) 66. Mr. Licon body slammed Cortez into the couch, pinned her down, and attempted to remove the knife from her hand. RP 116, 130, 154, 424-429; RP (Jan. 7, 2013) 66-69, 105-106, 110-111.

According to Mr. Licon, Cortez attacked him with a knife without provocation, and he had to defend himself from the knife. RP 437, 453. According to Guerra and Cortez, Mr. Licon had a gun, and Mr. Licon hit Cortez in the face with the gun, and held the gun to Guerra's head. RP 111-114, 116-117, 130, 168; RP (Jan. 7, 2013) 64, 70, 114-115.

The State charged Mr. Licon with three counts: second degree assault of Ms. Guerra, second degree assault of Ms. Cortez, and unlawful possession of a firearm in the second degree. CP 207-208. The State alleged a firearm enhancement for each assault count. CP 207-208. The State also alleged two gang aggravators for each assault count:-that the

crimes were committed to advance gang standing and to benefit a criminal street gang. CP 207-208.

Prior to trial, Mr. Licon moved to exclude gang evidence, arguing that the charged crimes were not related to gang activity. CP 234-235; RP 12-22. Mr. Licon argued his fight with Guerra had to do with her kicking Gutierrez's brother out of her apartment. RP 13. He argued the only connection between the crimes and gang activity was the fact that he and Guerra were gang members. RP 13-14. The State argued Mr. Licon committed the assaults because of disrespect between himself and Guerra, as gang members. RP 14-15. The State argued "[w]e have gang experts that will indicate this type of behavior is consistent with gang activity. . . ." RP 15. The trial court ruled gang evidence admissible, stating:

> You both have your theories. This is a case - - [the prosecutor] indicate[s] his theory of the case. It's evidently backed up by statements made by one or more witnesses. As Judge Runge did in the State v. Scott case she said, as long as the evidence is developed as the State anticipates, the evidence would be admissible. Unfortunately what happened was the prosecution failed to provide the appropriate nexus during testimony which sometimes that happens. And if that happens, [Mr. Prosecutor], you will just have to be aware of it the Court of Appeals may very well reverse this. I will make my ruling similar to Judge Runge indicating in one instance it's an indication of motive or intent of the crime. It's also arguably res gestae to the explaining the interactions of the parties as indicated in Scott. It is 404(b) evidence. It certainly is relevant. In fact if the facts come out as the State has alleged and that

> relevance outweighs the prejudicial impact [sic]. So that's my ruling on that matter.

RP 17-18.

During trial, Mr. Licon made a continuing objection to the admission of gang evidence, and the trial court acknowledged his standing objection. RP 215, 230.

City of Pasco Police Officer Michelle Goenen testified, over a hearsay objection, that when she asked Guerra "why Mr. Licon would come over and do that[,]" Guerra "informed me that he was Florencia 13 and she was MPS, which is Mexican Pride Surenos." RP 59.

Guerra testified she remembers telling Officer Goenen that Mr. Licon committed the acts "because he got into an argument with my fiancée [sic] over kicking out his brother over a dumb incident which escalated." RP 107. The questioning continued:

> [The State:] Do you remember saying something about you being MPS and him being Florence?
> [Ms. Guerra:] They asked me if I was from a gang and if I was gang affiliated. I told them I was MPS and he was Florence but it wasn't a gang issue. I said it wasn't a gang issue but to me is wasn't.

RP 107.

Over defense objection, Guerra was permitted to testify that Mr. Licon was a member of the Florencia gang, and that she had second thoughts regarding cooperating with the prosecution, because she and her

family had received threats from members of Mr. Licon's gang. RP 104, 122-123.

Cortez testified that during an interview held prior to trial, she stated she felt that Mr. Licon came to the apartment on the day in question because he was obsessed with Guerra. RP (Jan. 7, 2013) 86-87. Cortez testified she believes that the argument concerned Mr. Licon's obsession with Guerra. RP (Jan. 7, 2013) 94.

Gutierrez was called as a witness by the State. RP 185-192. During the administration of the oath, Gutierrez stated "I remain silent." RP 185. When asked if he promised to tell the truth, he stated "I have nothing to say." RP 185. The State continued to question Gutierrez. RP 186. Gutierrez said he belonged to the Florencia gang, and that he was present at the scene on the day in question. RP 186-187. When asked "[d]o you recall an incident involving Ms. Guerra and Mr. Licon[,]" Gutierrez responded "I don't recall." RP 187. When asked "[d]o you recall the police showing up at the residence where you an[d] [Ms. Guerra] live[,]" Gutierrez responded, "I remain silent." RP 187. The State asked the trial court to order Gutierrez to answer the question. RP 187-188. Gutierrez's attorney told the trial court he advised Gutierrez that he has the right to remain silent. RP 188-189.

The trial court allowed the State to ask Gutierrez several more questions. RP 189-192. Gutierrez told the court he did not recall the police arriving at the apartment, or talking to Officer Eric Fox, on the day in question. RP 190-191.

City of Pasco Police Officer Eric Fox went to Guerra's apartment following the incident. RP (Jan. 7, 2013) 38. The officer testified that he spoke with Gutierrez. RP (Jan. 7, 2013) 38. When the State asked the officer what Gutierrez said to him about Mr. Licon, Mr. Licon objected on the basis of hearsay. RP (Jan. 7, 2013) 38-40, 42-43. Mr. Licon argued the testimony was inadmissible as a prior inconsistent statement under ER 613, because Gutierrez took the Fifth Amendment and did not testify, and therefore, he was not available to question regarding the statements. RP (Jan. 7, 2013) 39-40, 42-43. The trial court overruled the objection. RP (Jan. 7, 2013) 43.

Officer Fox then testified that Gutierrez "confirmed that Mr. Licon was there and that he did have a firearm ... ." RP (Jan. 7, 2013) 43. The State questioned the officer regarding what Gutierrez said about why the incident occurred:

> [The State:] Now can you give the complete statement as to what Mr. Gutierrez said why this offense occurred?
> [Officer Fox:] That he was in a relationship with an MPS or Mexican Pride Surenos gang member, which was [Ms.] Guerra.

RP (Jan. 7, 2013) 45.

Following the officer's testimony, Mr. Licon moved for mistrial, arguing that Officer Fox's testimony was improper impeachment of Mr. Gutierrez under ER 613. RP (Jan. 7, 2013) 53-56. Mr. Licon argued that because Gutierrez pled the Fifth Amendment, he was unavailable for questioning regarding the statements he made to Officer Fox. RP (Jan. 7, 2013) 53-56. Mr. Licon also argued the admission of Gutierrez's statements to Officer Fox violated the confrontation clause. RP (Jan. 7, 2013) 55-56. The trial court denied the motion for a mistrial. RP (Jan. 7, 2013) 56.

City of Pasco Police Detective Justin Greenhalgh executed a search warrant at the purported residence of Arroyos. RP 199-200, 201-202. In the residence, he found a photo album containing photos of Arroyos showing his gang affiliation. RP 212-213, 215. Mr. Licon objected to the admission of these photos, arguing that gang evidence was inadmissible under ER 404(b) and prejudicial, because the State had not presented any testimony showing the incidents in question were gang related. RP 213-15, 217-221, 225-228. The trial court overruled the

objection, and allowed the State to admit three of the photos. RP 215, 221, 225, 228-231; State's Exhibits 11-13.

David Reardon, a crime analyst for the City of Pasco Police Department, testified as a gang expert for the State. RP 265-267. Mr. Reardon gave general testimony regarding gangs, including why gangs fight, gang activities, expectations of gang members, and the role of respect in a gang. RP 281-289. He testified that Mr. Licon, Morfin, Arroyos, and Guiterrez are members of the Florencia gang, and that Guerra is a member of the MPS gang. RP 293-296; RP (Jan. 7, 2013) 18. Mr. Reardon testified that Florencia and MPS were allies, not rival gangs. RP (Jan. 7, 2013) 17.

Over defense objection, arguing that the answer called for a legal conclusion, the trial court allowed Mr. Reardon to give his opinion regarding whether the incident between Mr. Licon and Guerra was gang related. RP 298-299. When asked how this case is consistent with gang activity, Mr. Reardon testified "[w]hat I saw from the police reports was that the victim insulted Mr. Licon and therefore Mr. Licon, in my opinion, had to retaliate because of his - - there were several other members in the room and if he would not retaliate, he would lose street credibility and his reputation." RP (Jan. 7, 2013) 9. Mr. Reardon testified Mr. Licon had to retaliate because Guerra was from a different gang, and also because she is

a female. RP (Jan. 7, 2013) 9-10, 16. He stated that being disrespected by a female gang member would result in a loss of status. RP (Jan. 7, 2013) 10.

Mr. Licon testified in his own defense. RP 404-466. He said Cortez attacked him with a knife without provocation, and he had to defend himself from the knife. RP 437, 453. He punched Cortez in the face after he attempted to get the knife out of her hand. RP 429, 453. The jury was instructed on self-defense. CP 101, 114-116; RP 487, 492-494.

Mr. Licon sought to call Gutierrez as a witness. RP 466-468. A subpoena for Gutierrez was served on his mother the previous day, but Gutierrez was not present to testify. CP 66; RP 466. Mr. Licon asked for a material witness warrant for Gutierrez. RP 466. He argued "[t]hat is the only way we can get that impeachment evidence through Mr. Tapia is if I get him here." RP 466. The court declined to issue a material witness warrant. RP 467.

Mr. Licon wanted to call Gutierrez as a witness to question him regarding statements Gutierrez made to Tapia, while they were together in jail booking. RP (April 16, 2013) 144. According to Tapia, Gutierrez told him "he was going to take the Fifth Amendment and that he was not going to lie for [Ms. Guerra] any longer." RP (April 16, 2013) 144.

In its rebuttal case, over defense objection, the State called a second gang expert, City of Pasco Police Detective Kirk Nebeker. RP 397, 468-477. The detective testified regarding the structure and rules of the Florencia gang, and that Mr. Licon was an active member. RP 469-471, 476.

The jury found Mr. Licon guilty as charged. CP 82, 84, 86; RP 545-546. The jury returned special verdicts on both of the second degree assault counts, finding that Mr. Licon was armed with a firearm at the time of the commission of each crime. CP 83, 85; RP 545-546. The jury did not find the existence of the two alleged gang aggravators for the assault counts. CP 80-81; RP 546-547.

At sentencing, the trial court imposed the following community custody conditions, among others:

> [X] No contact with known gang members.
> [X] No possession of gang paraphernalia including clothing, insignia, medallions, etc.
> [X] Notify the community corrections officer of any vehicles owned or regularly driven by the defendant.

CP 35; RP (April 16, 2013) 168-169.

The trial court also imposed discretionary costs of $443, consisting of a $193 sheriff service fee and a $250 jury demand fee, mandatory costs

of $800[2], and a $500 fine, for a total Legal Financial Obligation (LFO) of $1743. CP 30; RP (April 16, 2013) 168. In the Judgment and Sentence, the trial court made a boilerplate finding that Mr. Licon had the ability to pay the LFOs:

> **2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.
>
> The court finds:
>
> [X] That the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 29. The trial court did not inquire into Mr. Licon's financial resources, whether or not he is disabled, or the nature of the burden that payment of LFOs would impose. RP (April 16, 2013) 164-169.

Mr. Licon appealed. CP 3-21.

C. ARGUMENT

1. The trial court erred in admitting gang evidence.

Gang affiliation is protected by the First Amendment right of association. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009)

[2] $500 victim assessment, $200 criminal filing fee, and $100 DNA collection fee. CP 30; RP (April 16, 2013) 168.

(citing *Dawson v. Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992)). "Therefore, evidence of criminal street gang affiliation is not admissible in a criminal trial when it merely reflects a person's beliefs or associations." *Id*. (citing *Dawson*, 503 U.S. at 166-67). The evidence is only relevant if there is a connection between the crime and the organization. *Id*. (citing *Dawson*, 503 U.S. at 166). "Accordingly, to admit gang affiliation evidence there must be a nexus between the crime and gang membership." *Id*.

Gang evidence falls under ER 404(b). *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). It may be admissible to show motive, intent, or identity. *Id*. Before the trial court can admit gang evidence under ER 404(b), it must follow these steps:

> (1)[F]ind by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

Id. at 81-82 (citing *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

"'ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the State from suggesting that a defendant is guilty because he

or she is a criminal-type person who would be likely to commit the crime charged.'" *Id*. at 82 (internal quotation marks omitted) (quoting *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)).

"Evidence of gang affiliation is considered prejudicial." *Scott*, 151 Wn. App. at 526. Without evidence establishing a connection between gang affiliation and the crime, the only reasonable inference for the jury to draw from testimony of gang affiliation is that the defendant was a bad person. *Id*. at 529. "One reason that ER 404(b) exists is to combat that type of reasoning." *Id*. (citing *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

Trial court rulings under ER 404(b) are reviewed for an abuse of discretion. *State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007). An abuse of discretion occurs "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Here, the trial court erred in admitting the following gang evidence: testimony of Guerra regarding Mr. Licon's gang affiliation and threats she and her family had received; three photos of Arroyos showing his gang affiliation; the gang expert testimony of Mr. Reardon; and the gang expert testimony of Detective Nebeker. RP 104, 122-123, 215, 221,

225, 228-231, 265-298, 468-477; RP (Jan. 7, 2013) 6-34; State's Exhibits 11-13.

The trial court erred in admitting this gang evidence because there was not a nexus between the crimes and gang membership. *See Scott*, 151 Wn. App. at 526. Contrary to the trial court's ruling, the facts did not come out as the State had alleged. RP 18. Instead, the testimony at trial showed that the reason for the incident was not gang related. RP 107; RP (Jan. 7, 2013) 86-87, 94. Both Guerra and Cortez gave reasons other than gang membership as the motivation for the incident. RP 107; RP (Jan. 7, 2013) 86-87, 94. Although Officer Goenen testified that Guerra discussed gang affiliations in the context of the incident, Guerra clarified her statements, and testified "it wasn't a gang issue." RP 59, 107. Furthermore, the fact that the jury did not find the existence of the two alleged gang aggravators for the assault counts shows that the evidence presented at trial did not establish a nexus between the crimes and gang membership. CP 80-81; RP 546-547; *see also Scott*, 151 Wn. App. at 526.

Under these circumstances, where the alleged crime victims themselves deny that a crime is gang related and the jury does not find the existence of alleged gang aggravators, yet the State presents large volumes of gang evidence at trial, the only reasonable inference for the jury to draw

from the testimony is that Mr. Licon is a bad person. *See Scott*, 151 Wn. App. at 529.

Furthermore, the trial court did not follow the required steps before admitting the gang evidence. *See Yarbrough*, 151 Wn. App. at 81-82 (citing *Thang*, 145 Wn.2d at 642). Because the evidence presented at trial showed that the reason for the incident was not gang related, the gang evidence was not relevant. *See* ER 401 (defining relevance). Further, under the circumstances, the prejudicial effect of the evidence is far greater than any probative value.

Evidentiary errors are harmless unless they result in prejudice to the defendant. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). "'[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *Id*. (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Given the large volume of volume of gang evidence presented by the State, where there was no gang connection to the crimes established, the error in admitting the gang evidence was not harmless. Mr. Licon's convictions should be reversed.

2. The trial court erred in allowing Officer Eric Fox to testify regarding hearsay statements of Jaime Gutierrez, and in denying Mr. Licon's motion for a mistrial based upon the admission of this evidence.

Gutierrez was called as a witness by the State. RP 185-192. He asserted his Fifth Amendment right to remain silent. RP 185, 187-189. He told the jury he did not recall an incident involving Mr. Licon and Guerra. RP 187. Gutierrez stated "I remain silent" when asked "[d]o you recall the police showing up at the residence where you an[d] [Ms. Guerra] live[.]" RP 187. He also told the court he did not recall the police arriving at the apartment, or talking to Officer Fox, on the day in question. RP 190-191.

The trial court allowed Officer Fox, over defense objection, to testify regarding statements Gutierrez made to him. RP (Jan. 7, 2013) 43, 45. Mr. Licon argued the testimony was inadmissible as a prior inconsistent statement under ER 613. RP (Jan. 7, 2013) 39-40, 42-43. Mr. Licon also argued Officer Fox's testimony regarding statements Gutierrez made to the officer violated the confrontation clause. RP (Jan. 7, 2013) 55-56.

a. The trial court erred in admitting Gutierrez's prior statements to Officer Fox, for impeachment purposes.

A trial court's decision to admit evidence is reviewed under an abuse of discretion standard. *Stenson*, 132 Wn.2d at 701. Under ER 613, governing prior statements of witnesses, "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." ER 613(b).

"[A] person may be impeached if his or her credibility is a fact of consequence to the action, but not otherwise." *State v. Allen S.*, 98 Wn. App. 452, 464, 989 P.2d 1222 (1999). "[A] person's credibility is *not* a fact of consequence when he or she fails to say anything pertinent to the case, regardless of whether he or she takes the witness stand." *Id.* (emphasis in original). This includes a person who refuses to testify, or claims not to remember pertinent facts of the case." *Id.*

"In general, a witness's prior statement is admissible for impeachment purposes if it is inconsistent with the witness's trial testimony." *State v. Newbern*, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999). Using a witness's prior statement for impeachment requires that the witness remember the prior event. *Id.*

Specifically:

> If the witness claims a total lack of memory and gives no substantive testimony on the factual issue at hand, a prior statement by the witness is inadmissible regardless of whether the lapse of memory is genuine because, as mentioned at the beginning of this section, there is simply no testimony to impeach.

Id. (citing 5A Karl B. Tegland, Washington Practice, *Evidence* § 256, at 310 (3d ed. 1989)). Moreover, "[i]f a witness does not testify at trial about the incident, whether from lack of memory or another reason, there is no testimony to impeach." *Id*. at 293 (citing Tegland, § 256, at 310).

The trial court abused its discretion when it admitted Gutierrez's prior statements to Officer Fox, for impeachment purposes. Gutierrez did not testify about the incidents in question. RP 187, 190-191. There was no testimony of Gutierrez to impeach. *See Newbern*, 95 Wn. App. at 292-293 (citing Tegland, § 256, at 310). Gutierrez could not be impeached, because he refused to testify, and did not remember pertinent facts of the case; therefore, his credibility was not a fact of consequence to the action. *See Allen S.*, 98 Wn. App. at 464. Further, Gutierrez was not given an opportunity to explain or deny the statements testified to by Officer Fox, and Mr. Licon could not interrogate Gutierrez regarding the statements. *See* ER 613(b). The trial court erred in allowing Officer Fox to testify regarding hearsay statements of Gutierrez.

b. Allowing Officer Fox to testify regarding hearsay statements of Gutierrez violated the confrontation clause.

The confrontation clauses of the state and federal constitutions guarantee the right of an accused to confront witnesses against him or her. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The State can present prior testimonial statements of an absent witness only if the defendant has had a prior opportunity for cross-examination. *Crawford v. Washington,* 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Impeaching a witness by referring to evidence that is never introduced violates the confrontation clause. *State v. Babich*, 68 Wn. App. 438, 445-46, 842 P.2d 1053 (1993). Gutierrez did not testify about the incidents in question. RP 187, 190-191. Therefore, impeaching Gutierrez with this evidence violated the confrontation clause. *See Babich*, 68 Wn. App. at 445-46.

c. Allowing Officer Fox to testify regarding hearsay statements of Gutierrez was not harmless error.

Evidentiary errors are harmless unless they result in prejudice to the defendant, materially affecting the outcome of the trial. *Bourgeois*, 133 Wn.2d at 403. Constitutional errors, including confrontation clause violations, are harmless "if the appellate court is assured beyond a

reasonable doubt that the jury verdict cannot be attributed to the error." *State v. Lui*, 315 P.3d 493, 511 (Wash. 2014).

Here, Officer Fox testified that Gutierrez told him Mr. Licon was present on the day in question, and had a firearm, a key fact in dispute at trial. RP (Jan. 7, 2013) 43. The officer also testified that Gutierrez told him gang membership was the reason the incident occurred, which was also a key fact in dispute at trial. RP (Jan. 7, 2013) 45. The erroneous admission of this testimony, addressing two key facts in dispute at trial, was not harmless.

d. The trial court erred in denying Mr. Licon's motion for a mistrial based upon the admission of this evidence.

Mr. Licon moved, unsuccessfully, for a mistrial based on the trial court allowing Officer Fox to testify to the statements Gutierrez made to him. RP (Jan. 7, 2013) 53-56.

The denial of a motion for a mistrial is reviewed for an abuse of discretion. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). The denial will be overturned if there is a substantial likelihood that the inadmissible evidence affected the jury's verdict. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

There is substantial likelihood that the admission of Officer Fox's testimony regarding statements Gutierrez affected the jury's verdict. As

stated above, the officer testified to Gutierrez's statements regarding two key facts in dispute at trial. RP (Jan. 7, 2013) 43, 45. The trial court erred in denying Mr. Licon's motion for a mistrial based upon Officer Fox's testimony regarding statements Gutierrez made to him.

3. Mr. Licon's inability to obtain the testimony of Jaime Gutierrez deprived him of a fair trial.

Mr. Licon sought to call Gutierrez as a witness, to impeach the testimony of Guerra. RP 466-468; RP (April 16, 2013) 144. When Gutierrez did not appear at trial in response to Mr. Licon's subpoena, Mr. Licon asked for a material witness warrant for Gutierrez. CP 66; RP 466. The court declined to issue a material witness warrant. RP 467.

Mr. Licon's inability to obtain the testimony of Gutierrez deprived him of a fair trial. First, Mr. Licon's right to compel witnesses was violated. Second, Mr. Licon's right to present a defense was violated. For these reasons, Mr. Licon's convictions should be reversed.

The fact that Gutierrez took the Fifth Amendment when he was called as a witness by the State does not mean that Gutierrez would be able to invoke this privilege when called as a witness by Mr. Licon. RP 185-192. "A witness does not have the absolute right to remain silent when called to testify, as does a defendant in custody or on trial." *State v. Lougin*, 50 Wn.App. 376, 381, 749 P.2d 173 (1988). In general, a claim of

privilege may be raised only against specific questions, and not as a blanket foreclosure of testimony. *Eastham v. Arndt*, 28 Wn. App. 524, 532, 624 P.2d 1159 (1981); *see also State v. Delgado*, 105 Wn. App. 839, 845, 18 P.3d 1141 (2001) (acknowledging this general rule). Further, "a witness claiming the Fifth Amendment privilege against self-incrimination in an evidentiary hearing must assert the privilege on the stand in open court." *State v. Rainey*, No. 68846-4-I, 2014 WL 700164, at *4 (Wash. Ct. App. Feb. 24, 2014).

a. The inability of Mr. Licon to obtain Gutierrez's testimony violated Mr. Licon's right to compel witnesses.

A defendant has a right, under the Sixth Amendment, to compel witnesses. U.S. Const. amend. VI; *see also State v. Smith*, 101 Wn.2d 36, 41-42, 677 P.2d 100 (1984) (explaining this right). "The right is limited to those witnesses who are relevant and material to the defense." *State v. Allen*, 116 Wn. App. 454, 462, 66 P.3d 653 (2003) (internal quotation marks omitted) (quoting *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986)). It is the defendant's burden to show a witness is material. *Smith*, 101 Wn.2d at 41. This requires "establishing a colorable need for the person to be summoned." *Id.* at 41-42 (citing *Ashley v. Wainwright*, 639 F.2d 258 (5th Cir. 1981)).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence is generally admissible. ER 402.

Gutierrez's testimony would be relevant and material to the defense. His testimony would impeach one of the State's key witnesses, Guerra. RP 466; RP (April 16, 2013) 144. The State only presented testimony of two eyewitnesses who observed the incidents in question, Guerra and Cortez. RP 102-184; RP (Jan. 7, 2013) 57-123. Gutierrez's testimony would significantly undermine Guerra's testimony, and therefore, the State's case.

The substance of Gutierrez's proposed testimony was described to the trial court. RP 466; RP (April 16, 2013) 144; c*f. Allen*, 116 Wn. App. at 462 (defendants failed to demonstrate relevance and materiality of proposed defense witness testimony, where they failed to describe the substance of the proposed testimony). The inability of Mr. Licon to obtain Gutierrez's testimony violated Mr. Licon's right to compel witnesses, and deprived Mr. Licon of a fair trial.

b. The inability of Mr. Licon to obtain Gutierrez's testimony violated Mr. Licon's right to present a defense.

"A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

Both the United States and Washington Constitutions guarantee the right to present a defense. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). "At a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). "'The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.'" *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

"[T]he [defendant's] evidence must be of at least minimal relevance." *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

"[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Id*. "[T]he State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld." *Id*.

As stated above, Gutierrez's testimony would be relevant to the defense. His testimony would impeach one of the State's key witnesses, Guerra. RP 466; RP (April 16, 2013) 144. Guerra was one of only two witnesses the State presented who observed the incidents in question. RP 102-184; RP (Jan. 7, 2013) 57-123. Therefore, the testimony of Gutierrez, impeaching Guerra, might influence the determination of Mr. Licon's guilt. *See Ritchie*, 480 U.S. at 56. The inability of Mr. Licon to obtain Gutierrez's testimony violated Mr. Licon's right to present a defense, and deprived Mr. Licon of a fair trial.

4. <u>The trial court erred in denying Mr. Licon's request for a material witness warrant for Gutierrez</u>.

The trial court erred in failing to issue a material witness warrant for Gutierrez. CrR 4.10 governs the issuance of a material witness warrant:

On motion of the prosecuting attorney or the defendant, the

> court may issue a warrant, subject to reasonable bail, for the arrest of a material witness. The warrant shall issue only on a showing, by affidavit or on the record in open court, that the testimony of the witness is material and that
> (1) The witness has refused to submit to a deposition ordered by the court pursuant to rule 4.6; or
> (2) The witness has refused to obey a lawfully issued subpoena; or
> (3) It may become impracticable to secure the presence of the witness by subpoena.

CrR 4.10(a).

A material witness warrant is issued only when the defendant can show that the testimony of a witness is in fact material and could affect the outcome of the trial. CrR 4.10(a); *State v. Hartley*, 51 Wn. App. 442, 446, 754 P.2d 131 (1988); *City of Bellevue v. Vigil*, 66 Wn. App. 891, 895-96, 833 P.2d 445 (1992). A trial court's decision to grant or deny a motion for a material witness warrant is reviewed for abuse of discretion. *Vigil*, 66 Wn. App. at 895.

The trial court abused its discretion in denying Mr. Licon's request for a material witness warrant for Gutierrez. Gutierrez refused to obey a lawfully issued subpoena. *See* CrR 4.10(a)(2). A subpoena for Mr. Gutierrez was served on his mother the previous day, but Gutierrez was not present to testify. CP 66; RP 466. Therefore, other available means of securing Gutierrez's presence at trial had proved futile. *Cf. Vigil*, 66 Wn. App. at 896 (a material witness warrant would be inappropriate "absent

some type of showing that other available means of securing witness' presence at trial had proved futile[.]").

Further, as stated above, Gutierrez's testimony was material; he would impeach one of the State's key witnesses, Guerra. RP 466; RP (April 16, 2013) 144. Given that the State only presented testimony of two eyewitnesses to the incidents in question, one of these being Guerra, Gutierrez's testimony could affect the outcome of the trial. RP 102-184; RP (Jan. 7, 2013) 57-123; *see Hartley*, 51 Wn. App. at 446. Mr. Licon's convictions should be reversed.

5. Cumulative error deprived Mr. Licon of a fair trial.

"The accumulation of errors may deny the defendant a fair trial and therefore warrant reversal even where each error standing alone would not." *State v. Davis*, 175 Wn.2d 287, 345, 290 P.3d 43 (2012). Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

Here, cumulative error in the form of prejudicial and inadmissible testimony, both the gang evidence and the out-of-court statements of Gutierrez, and Mr. Licon's inability to obtain the testimony of Gutierrez, deprived Mr. Licon of a fair trial. This court should reverse and remand for a new trial on the basis of cumulative error.

6. The unsupported finding of ability to pay Legal Financial Obligations, and the discretionary costs imposed without compliance with RCW 10.01.160, should be stricken from the Judgment and Sentence.

Although Mr. Licon did not make these arguments below, illegal or erroneous sentences may be challenged for the first time on appeal. *See State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *see also State v. Bertrand*, 165 Wn. App. 393, 398, 403-05, 267 P.3d 511 (2011) (considering the defendant's challenge to the trial court's imposition of LFOs for the first time on appeal); *State v. Bower*, 64 Wn. App. 808, 810, 827 P.2d 308 (1992) (also considering the challenge for the first time on appeal); *cf. State v. Blazina*, 174 Wn. App. 906, 911-12, 301 P.3d 492 (2013), *review granted* (Wash. Oct. 2, 2013) (declining to consider the challenge for the first time on appeal); *State v. Calvin*, 316 P.3d 496, 508 (Wash. Ct. App. 2013) (declining to consider the challenge for the first time on appeal); *State v. Quintanilla*, 313 P.3d 493, 497 (Wash. Ct. App. 2013) (acknowledging *State v. Blazina*, but also discussing the merits of the LFO issue raised by the defendant).

a. The finding of ability to pay must be stricken.

There is insufficient evidence to support the trial court's finding that Mr. Licon has the present and future ability to pay legal financial

obligations, and the finding must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 9.94A.760(2); RCW 10.01.160(3). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant . . . ." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). "In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

In *Curry*, our Supreme Court concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not

make a specific finding of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, the *Curry* court recognized that both RCW 10.01.160 and the federal constitution require consideration of the ability to pay. *Id*. at 915-16.

Here, there is insufficient evidence to support the trial court's finding that Mr. Licon has the present and future ability to pay legal financial obligations. CP 29. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "'as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.'" *Bertrand*, 165 Wn. App. at 404 n.13 (quoting *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden' imposed by LFOs under the clearly erroneous standard."

Bertrand, 165 Wn. App. at 404 (quoting *Baldwin*, 63 Wn. App. at 312) (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. at 405; *see also Calvin*, 302 P.3d at 522.

Here, the record does not show that the trial court took into account Mr. Licon's financial resources and the nature of the burden of imposing LFOs on him. RP (April 16, 2013) 164-169. The record contains no evidence to support the trial court's finding that Mr. Licon has the present or future ability to pay LFOs. To the contrary, the trial court found him indigent for purposes of pursuing this appeal (on file; SCOMIS sub #159, filed 5/5/13). The finding that Mr. Licon has the present or future ability to pay LFOs is not supported in the record. The finding is clearly erroneous and must be stricken from the Judgment and Sentence. *See Bertrand*, 165 Wn. App. at 404-05 (ordering the trial court to strike an unsupported finding of ability to pay).

b. <u>The imposition of discretionary costs of $443 must also be stricken</u>. Because the record does not reveal that the trial court took Mr. Licon's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary costs must be stricken from the Judgment and Sentence.

A court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. *Baldwin*, 63 Wn. App. at 312. The decision to impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. *Id*. This is a judgment which requires discretion and should be reviewed for an abuse of discretion. *Id.*

The trial court may order a defendant to pay discretionary costs pursuant to RCW 10.01.160. However:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Here, the court ordered Mr. Licon to pay discretionary costs of $443, consisting of a $193 sheriff service fee and $250 jury demand fee. CP 30; RP (April 16, 2013) 168. However, the record reveals no balancing by the court through inquiry into Mr. Licon's financial resources and the nature of the burden that payment of LFOs would impose on him. RP (April 16, 2013) 164-169. Further, there was no evidence of Mr. Licon's present or future employment, nor an inquiry into his resources or employability. And, contrary to what was stated in its

finding of ability to pay, the trial court did not inquire as to whether or not Mr. Licon was disabled. CP 29; RP (April 16, 2013) 164-169.

The trial court's imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) is an abuse of discretion. *See Baldwin*, 63 Wn. App. at 312 (stating this standard of review). The imposition of the discretionary costs of $443 should be stricken from the Judgment and Sentence.

7. The trial court erred in imposing three community custody conditions unrelated to the charged crimes, and imposing two of these conditions in violation the First Amendment right of association.

The trial court imposed the following community custody conditions, among others:

> [X] No contact with known gang members.
> [X] No possession of gang paraphernalia including clothing, insignia, medallions, etc.
> [X] Notify the community corrections officer of any vehicles owned or regularly driven by the defendant.

CP 35; RP (April 16, 2013) 168-169.

Although Mr. Licon did not object to the imposition of these conditions, sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008 (stating that "'[i]n the context of sentencing, established case law holds that illegal or

erroneous sentences may be challenged for the first time on appeal.'") (*quoting Ford*, 137 Wn.2d at 477); *see also State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003 (allowing the defendant to challenge community custody conditions for the first time on appeal).

"As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(f). Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008 (*citing State v. Autrey*, 136 Wn. App. 460, 466-67, 150 P.3d 580 (2006). A "[c]rime-related prohibition" is defined, in relevant part, as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10); *see also State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

The community custody conditions prohibiting Mr. Licon from having contact with known gang members, and prohibiting him from possessing gang paraphernalia are not related to the crimes of conviction. As argued above, the crimes charged here were not gang-related. RP 107; RP (Jan. 7, 2013) 86-87, 94. In addition, these two gang-related community custody conditions violate Mr. Licon's right of association under the First Amendment, which protects his right to be affiliated with a

gang. *See Dawson*, 503 U.S. at 163 (gang affiliation is protected by the right of association recognized by the First Amendment).

The community custody condition requiring Mr. Licon to notify his community corrections officer of any vehicles he owns or regularly drives is not related to his crimes of conviction. There is no evidence in the record that Mr. Licon used a vehicle in the commission of the crimes of conviction. Mr. Licon did not commit the second degree assaults with a vehicle, or unlawfully possess a firearm in connection with a vehicle. Furthermore, Mr. Licon was driven to the scene by Tapia. RP 380-383. There is no evidence in the record that the car Tapia was driving was owned by Mr. Licon or regularly driven by Mr. Licon.

The three challenged community custody conditions are not "[c]rime-related prohibition[s]." RCW 9.94A.030(10); *see also O'Cain*, 144 Wn. App. at 775. The first two community custody conditions also violate Mr. Licon's right of association under the First Amendment. *See Dawson*, 503 U.S. at 163. Accordingly, this court should remand this case with an order that the trial court strike these three community custody conditions. *See O'Cain*, 144 Wn. App. at 775 (stating the remedy for an erroneous community custody condition was to strike it on remand).

D. CONCLUSION

The trial court erred in admitting gang evidence. The trial court also erred in allowing Officer Fox to testify regarding hearsay statements of Gutierrez. Furthermore, Mr. Licon's inability to obtain the testimony of Gutierrez as a defense witness deprived him of a fair trial. Cumulative error deprived Mr. Licon of a fair trial. This court should reverse Mr. Licon's convictions and order a new trial.

This court should also order the trial court to strike the finding of ability to pay Legal Financial Obligations, and the imposition of discretionary costs from the Judgment and Sentence.

Finally, this court should order the trial court to strike the following community custody conditions: (1) no contact with known gang members; (2) no possession of gang paraphernalia including clothing, insignia, medallions, etc.; and (3) notify the community corrections officer of any vehicles owned or regularly driven by the defendant.

Respectfully submitted on March 11, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on March 11, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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