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Court of Appeals
Division III
State of Washington

31670-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISIDRO LICON,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Is it an abuse of discretion to admit evidence of gang affiliation where the evidence was admitted to prove the charged aggravating factors that the assaults were committed to maintain or advance membership and with the intent to aggrandize the gang's reputation or influence and to give the jury context necessary to their comprehension of events?
2. Did the court manifestly abuse its discretion in admitting Jaime Gutierrez's duplicative statement through Officer Fox as a prior inconsistent statement?
3. Was the Defendant deprived of a fair trial where he failed to examine a witness on the stand, released the witness, and

then could not find the witness to recall him to inquire whether the witness believed his own wife was a liar?

4. Did the court manifestly abuse its discretion in denying the Defendant's request for a material witness warrant where the motion for the warrant was made minutes before the close of testimony, where the Defendant failed to timely interview witnesses available to him, where the Defendant had an opportunity to examine the witness who had already been arrested on the State's material witness warrant, did not examine the witness, and then released the witness, and where the alleged testimony is not probable?

5. Was there cumulative error?

6. Will the court review unpreserved challenges to legal financial obligations following the decision in *State v. Duncan,* No. 29916-3-III, 2014 WL 1225910 (Wn. App. filed March 25, 2014)?

7. Did the court abuse its discretion in imposing reasonable and sufficiently narrow, crime-related community custody conditions?

IV. STATEMENT OF THE CASE

The Defendant Isidro Licon has been convicted by jury of two counts of assault in the second degree and one count of unlawful possession of a firearm in the second degree. CP 6, 27. The jury did not find the gang aggravators which were alleged in the information. CP 80-81, 207-08.

On February 10, 2012, police responded to Sylvia "Mousy" Guerra's home. RP[1] 22-23, 51-52; 2 RP 22. Ms. Guerra's face was bright red; she had a red mark on her forehead, red marks on her neck, and skin was missing from her lip. RP 52, 57-62, 97-98, 376. As she spoke with police, she was "crying hysterically," almost trembling, "abnormal" behavior for a woman police knew from past dealings to be "pretty tough." RP 52-53, 58, 59, 403.

Ms. Guerra's fiancé Jaime "Smurf" Gutierrez and Ms. Guerra's 18 year old daughter Selena "Little Mousy" Cortez were also present. RP 26-27, 53, 103, 131, 186; 2 RP 31, 85. Ms. Cortez was holding her head, which appeared to be red and sore with an inch-long bleeding cut beneath a head bandanna. RP 36-37, 63, 174, 370, 376. Her hand was cut and wrapped. RP 160-

[1] "RP" refers to the trial transcript prepared by John McLaughlin. "2 RP" refers to the transcript prepared by Cheryl Pelletier.

61, 174; 2 RP 69.

Ms. Guerra, aware that she would be labeled a "snitch," eventually told police that the Defendant Isidro "Traviezo" Licon, Edgar "Smokes" Arroyos, Guillermo "Habits" Tapia Torrez, and a fourth person later identified as Steven "Nutcase" Morfin had been to her home and had pistol whipped her and her daughter. RP 30-31, 33, 55-57, 64, 109-10, 170-71. She said, she thought her daughter was going to die that day. RP 403. The Defendant also grabbed Ms. Guerra, pulled her down and she heard a gun being racked behind her head. RP 30. Overcome, she told police that police had better find the men before she did. RP 134.

Ms. Guerra explained that the assault was related to their gang affiliations; the Defendant was in a gang known as the Florencia 13, and Ms. Guerra had previously been affiliated with an allied gang, MPS or Mexican Pride Sureños. RP 59, 104-05, 282; 2 RP 17, 21. Her daughter Ms. Cortez is associated with both gangs. RP 35-36; 2 RP 26-27, 31.

On the day of the assault, Mr. Arroyos and Mr. Morfin came to Ms. Guerra's home unexpectedly to speak with her fiancé. RP 109, 119; 2 RP 60-61. Mr. Morfin played with a gun (a .22 or .32)

while he sat on the couch, and Mr. Arroyos (also in possession of a gun) began to text. RP 110-11, 118-19, 400; 2 RP 13-14, 29. From the looks exchanged, Ms. Guerra understood that she should leave. RP 111. Before she could, the Defendant and Mr. Tapia drove up. RP 110. The Defendant rushed into her house with a pistol in his waist, pulling up his shirt to display it to Mr. Gutierrez. RP 108, 111-12, 145-46. He began to yell at Mr. Gutierrez for "kick[ing] out his brothers for this bitch." RP 113. It was apparent that the four men had planned this confrontation. RP 118-19.

Ms. Guerra had known the Defendant for several years. RP 103-04, 130. She stood up for herself. RP 114, 153-54. Her daughter came into the room as the Defendant was waving the gun at Ms. Guerra. RP 114; 2 RP 64. Ms. Cortez told the Defendant to stop yelling at Ms. Guerra, but he pushed the girl to the ground by her hair and punched her mother. RP 115, 145, 153-54; 2 RP 63-66, 94-95, 98-99. Ms. Cortez then armed herself with a knife in defense of herself and her mother, but the Defendant body slammed the girl to the couch, pinning her. RP 115, 154-55; 2 RP 66, 75-76, 103, 105, 424, 426-27. He stood on Ms. Cortez's hand. RP 130; 2 RP 67, 76, 109. When she did not release the knife, he

pistol whipped her. RP 116, 130; 2 RP 68, 110-12.

Ms. Guerra tried to intervene, but Mr. Morfin and Mr. Arroyos were on top of her. RP 116, 145, 148. When she got free, the Defendant yelled for Mr. Morfin to shoot her. RP 116. Mr. Morfin was unable to cock the gun so he struck her in the mouth with the weapon instead. RP 116-17, 130, 338, 400; 2 RP 67.

The Defendant managed to break the knife, he hit Ms. Cortez three times, and then he came for Ms. Guerra. RP 117, 169-70, 355, 429; 2 RP 68. He held her by the hair dragging her toward the door and holding his own gun to her head. RP 117, 146, 356; 2 RP 115. Ms. Guerra was so terrified, she wet her pants. RP 129. Ms. Cortez ran to the kitchen for another weapon, and all four men fled in Mr. Tapia's car leaving the house in "chaos." RP 117, 119, 149; 2 RP 115. A television and table were broken in the fight. RP 149-50.

Ms. Guerra testified that she had left the gang lifestyle about four years before when she started in anti-gang outreach. RP 105, 112-13; 2 RP 85-86. Although in the past, Ms. Guerra would have taken care of the problem, retaliated with "street justice," this time she called 911. RP 117, 120, 430. After four years in anti-gang

outreach, Ms. Guerra reflected on the risk of going to prison and missing out on the rest of her children's lives. RP 120. She had seen "this grown man pistol whip [her] 90 pound daughter with a gun," and knew what gang culture expected of her. RP 121. But she was not willing to go to prison just to satisfy those expectations. RP 121. She had already spent most of her daughter's childhood in jail. 2 RP 85.

When police arrived, Ms. Guerra was answering a call from Mr. Tapia; he was checking on whether she would be talking to police about his involvement. RP 123-24, 134-35. Officer Mendoza asked Ms. Guerra, how many times this was going to happen now that her child was involved. RP 121. Eventually, Ms. Guerra made a statement to police, although she felt she was breaking the code. RP 121, 401.

Ms. Cortez, on the other hand, was not willing to cooperate with police. RP 36, 54, 120, 150; 2 RP 36, 52, 80. She refused to have her picture taken. RP 54, 63-64, 120-21; 2 RP 80. She did not speak with anyone, law enforcement or defense, until shortly before she testified. 2 RP 73-74, 77-81.

Mr. Gutierrez was similarly reticent. RP 55, 57; 2 RP 46-47.

However, he gave police the names of the men who had been present and admitted that the Defendant Licon had a firearm. 2 RP 43. Mr. Gutierrez said he had been trying to keep out of trouble, but was upset with himself for not having protected his girlfriend. 2 RP 44-45. When he said he wanted to handle things himself, police advised that would just make matters worse. 2 RP 46.

The next day, Mr. Arroyos and Mr. Morfin were arrested; Mr. Morfin was holding an empty handgun holster. RP 43, 201-02, 314, 332-34. The two men had just come from Mr. Arroyos' residence. RP 44, 215, 319-20. Police searched that residence and, in the northeast bedroom, they discovered two pistols, men's clothing hanging in the closet, and Mr. Arroyo's photographs on the television. RP 47, 49, 202-03, 211-13, 322-24. One of the guns fit Mr. Morfin's holster perfectly. RP 335.

After the assault, the Defendant left for Phoenix, leaving his pregnant girlfriend behind. RP 65, 313, 432, 438, 441. He was arrested a few months later, when he returned to the Tri-Cities. RP 432, 438-40. In his recorded phone conversations from jail, the Defendant acknowledged that he had been "on the run" and would have been on the run for a long time if not for his girlfriend, but now

expected to serve a long prison sentence. RP 441-42.

Police observed that gang violence in Pasco significantly decreased after the Defendant's arrest. 2RP 7. Police explained that this was because the Defendant was a Florencia leader or "shot caller" who commands violence. RP 285-86; 2 RP 6-7. In the specific offense, the Defendant's leadership was suggested by Mr. Arroyos' texting the Defendant, by the Defendant's carrying a gun, and by his ordering Mr. Morfin to shoot Ms. Guerra. RP 16; 2 RP 8-9, 25, 30. When Ms. Guerra insulted the Defendant in front of other Florencia members, he had to retaliate to maintain his street credibility and reputation. 2 RP 9, 16. That Ms. Guerra was a female and affiliated with a different gang made the insult worse. 2 RP 9-10. "[T]he gang rule is any insult must not go unanswered." 2 RP 9. Gang members discipline their own (e.g. Mr. Gutierrez) through violence. 2 RP 10-11, 25. The actions of the four aggressors would serve to aggrandize Florencia's reputation and influence. 2 RP 11.

At trial, Ms. Guerra remained conflicted about cooperating with the prosecution. Right after the assault, someone had tried to break into her home. RP 404. When she had refused to cooperate

in the prosecution against Mr. Morfin, he had been released and then attacked her again, beating her over the head with a gun and bottle and sending her to the hospital. RP 126. Her daughter was "jumped" taking out the trash. RP 126. Ms. Guerra sent her daughter to Texas, and then she and Mr. Gutierrez left for North Dakota where eventually they were arrested on material witness warrants in the Defendant's case and held since November 25. RP 125-26; 2 RP 73. While incarcerated on the material witness warrant, she received threats from the Defendant's "family here," that "same gang family." RP 122-23. She struggled with her decision, discussing it with her pastor. RP 120-21. Worried about the safety of her children, she continued to have second thoughts, not knowing whether she would testify up until the very day that she took the stand. RP 122.

Mr. Gutierrez testified that he went by the gang moniker of "Smurf," that he belonged to Florencia, that Ms. Guerra was a member of a different gang, and that they had been together on February 10, 2012. RP 186. He acknowledged that his gang had a code against testifying, which is why he would not cooperate. RP 190. He said his presence as a witness was forced. RP 192. In

response to the remaining questions, Mr. Gutierrez claimed he could not recall. RP 187-92.

Ms. Cortez arrived from Texas shortly before trial when she met with the attorneys from both sides. 2 RP 73-74, 77-78. She testified that she believed that if she cooperated with police, the Defendant would have used his gun. 2 RP 122.

The Defendant testified at trial that the Florencia gang was just a group of people who drank beer in the alley and anybody was welcome to join. RP 445. He testified that it was no threat to his status that "a 100 pound girl and a kitchen knife chased away three members of the F-13 street gang." RP 449. He admitted that both he and another gang member assaulted the women. RP 453.

At the sentencing hearing, the court found the Defendant had the present and future ability to pay his legal financial obligations and ordered him to pay mandatory and discretionary fees. CP 8-9. The court also ordered the Defendant to have no contact with known gang members, to not possess gang paraphernalia including clothing, insignia, and medallions, and to notify the community corrections officer of the vehicles the Defendant owns ore regularly drives. CP 14, 35; 2 RP 168-69.

V. **ARGUMENT**

A. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF GANG MEMBERSHIP.

The Defendant argues that the court abused is discretion in admitting evidence of gang affiliation. Brief of Appellant at 13. A court abuses its discretion if its decision is manifestly unreasonable or without any tenable grounds or reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The State had charged the Defendant with gang aggravators under RCW 9.94A.535(3)(s) and (aa), alleging that Defendant committed the assaults against the women in order to maintains or advance his position in a gang and with the intent to aggrandize the gang's influence or reputation. CP 207-08. Because the evidence was necessary to prove the State's allegations, there was no abuse of discretion.

The defense at trial repeatedly cited *State v. Scott,* 151 Wn.App. 520, 213 P.3d 71 (2009). In that case, the court held gang evidence to be prejudicial because the State argued a murder was gang-related but *presented no testimony of the existence of a gang. State v. Scott,* 151 Wn.App. at 528 ("the record is utterly silent on whether any of the other actors were also members of the

18th Street gang"). The Defendant objects to the admission of photographs of Mr. Arroyos demonstrating his gang affiliation. Brief of Appellant at 15. These were admitted specifically to meet the standard in *Scott.* The State presented this and other evidence to demonstrate that everyone present in the home at the time of the assault was affiliated or associated with a gang.

Evidence of gang members is properly admitted under ER 404(b) within the trial court's discretion when there is a nexus between the crime and the gang membership. *State v. Scott,* 151 Wn.App. at 526-27. Gang-related evidence is admissible to show motive, intent, and plan or preparation. *State v. Embry,* 171 Wn.App. 714, 732, 287 P.3d 648 (2012). Courts "regularly" admit gang affiliation to show that defendants act in concert and when there is a connection between the gang's purposes or values and the offense committed. *State v. Scott,* 151 Wn.App. at 527.

Courts are not reluctant to allow evidence of defendant's relationship to a gang when the evidence is relevant to the prosecution. *State v. Moran,* 119 Wn.App. 197, 81 P.3d 122 (2003); *State v. Cronin,* 142 Wn.2d 568, 14 P.3d 752 (2000); *State v. Campbell,* 78 Wn.App. 813, 901 P.2d 1050 (1995). If the evidence

is probative of the State's theory that the assaults were committed to maintain or aggrandize the defendant's or gang's position, it is admissible. Here the court found, "[I]t's clear to me without the jury knowing that the gangs were involved they wouldn't understand what is going on in the case." RP 221.

The Defendant denies a nexus between gang membership and the assaults. Brief of Appellant at 16. The gang expert testimony was necessary to explain the complex culture of a gang and its nexus here. Mr. Reardon and Detective Nebeker explained that the Defendant responded with extreme violence to perceived insults from the victims because this was the gang code, and a violent response to even small offenses serves to aggrandize both the Defendant and the gang in reputation and influence. RP 9, 10-11, 16, 25.

The Defendant argues that Ms. Guerra's perception about her own and others' behavior is the final word on nexus and relevance. Brief of Appellant at 16. It is not.

> [T]hese gang members that have been in a gang for 11 years and 18 years aren't going to be fully aware of how much their actions are shaped by their gang membership and their duties as a gang member. An example of this, how many 120 pound women are

> going to stand in the face of someone with a gun in their face? They do that because they are gang members and because of self-respect.

RP 221.

The Defendant and his group came to the home to "discipline" or "check" Mr. Gutierrez, because he was allowing his MPS girlfriend to throw out his "homies." RP 221-22. Gangs have "the same value systems and that is power and respect. And you don't accept disrespect." RP 222, 287-88. The goal in this interaction was to establish and enforce the power hierarchy. RP 222. Their primary tool is violence and intimidation. RP 269. The goal was met as is evidenced by Mr. Gutierrez's refusal to testify, even in support of his own wife. RP 223.

The gang testimony was necessary to give the jury the cultural context in making credibility determinations, i.e. to explain the witnesses' behavior, to explain why they resist testifying, why they omit facts, and to explain the pressure on Ms. Guerra. RP 223. They were unwilling to testify, because it went against their code. Ms. Cortez was also afraid to cooperate, because she was afraid she would be shot. She and her mother suffered more violence after the trial against Mr. Morfin. The violence was

reduced when the "shot caller" who was the Defendant was removed from the street. The witnesses provided ample evidence that, despite their perceptions, the offenses were related to gang membership. The evidence was clearly relevant. ER 401.

The Defendant argues that his acquittal on the aggravating factors demonstrates that the evidence should not have been admitted. Brief of Appellant at 16. There is no logical thread in this "if-then" argument. The standard is ER 404(b) and whether the record demonstrates a nexus, not whether the jury finds the element beyond a reasonable doubt.

Note also that while a jury conviction is proof of guilt, a jury acquittal is not proof that the evidence was insufficient. This is because of jury nullification, that phenomenon "when the defendant's guilt is clear beyond a reasonable doubt, but the jury, based on its own sense of justice or fairness, decides to acquit." *State v. Moore*, --Wn. App. --, 318 P.3d 296, 298 n.4 (2014). In this case, the prosecutor explained to the jury that the special interrogatories regarded "enhancements" (RP 516), and the jury may have decided that an exceptional sentence was not called for.

The Defendant argues that the prejudice outweighed the

probative value. Brief of Appellant at 17. Because the aggravators were charged (and there was no Knapstad motion and order dismissing the allegations), the evidence was necessary. The probative value necessarily outweighed any prejudice, because these facts were alleged and had to be proven.

The State's evidence was not unduly repetitive or outrageous. RP 261 (court prohibiting Corporal Brooks' testimony as to the Defendant's gang behavior while incarcerated). It was academic. Mr. Reardon testified as the Pasco PD crime analyst, explaining legal standards and gang culture. RP 265, 267-89. He explained that gangs use photographs, like the ones of Mr. Arroyos, to display solidarity and commitment to the gang. RP 276-77. Members gain rank by "putting in work," e.g. by committing assaults. RP 283-84. An assault may occur in a group to intimidate and show strength. RP 284. When you put in enough work, you may become a "shot caller." RP 286. Talking to law enforcement is considered "snitching" and is punished with violence. RP 286.

Mr. Reardon's testimony also gave context to the Defendant's phone conversation in which he admitted that he had

been with the gang for 14 years and "put in a lot of work." RP 460.

There is no "unfair" prejudice in offering evidence to prove precisely what was alleged. ER 403(excluding relevant evidence only if its probative value is substantially outweighed by unfair prejudice). The court did not abuse its discretion in admitting evidence offered to prove the allegations.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING OFFICER FOX'S TESTIMONY.

The Defendant challenges the admission of Mr. Gutierrez's statement through Officer Fox. Brief of Appellant at 18. While the Defendant tries to frame this challenge in constitutional terms (Brief of Appellant at 21), the standard of review defers to the trial court. The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned absent a manifest abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). The court did not manifestly abuse its discretion.

The State offered Mr. Guiterrez's statement made to Officer Fox as a prior inconsistent statement. 2 RP 39. An out of court statement is not hearsay if it is inconsistent with the declarant's testimony. ER 801(d)(1).

The Defendant argues that Mr. Gutierrez's statement to police is not inconsistent with his testimony that he could not recall the events. Brief of Apellant at 20, *citing State v. Newbern*, 95 Wn. App. 277, 292-93, 975 P.2d 1041 (1999). But Mr. Gutierrez did not make a blanket statement that he could not recall. Rather he testified that he was a member of a gang which prohibited him from testifying. RP 186, 190; 2 RP 41. He testified that he was only on the stand, because he was being forced after being arrested on a material witness warrant several months before trial. RP 190. It was in that context that he claimed he could not recall anything related to the Defendant. RP 187-92.

"Inconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done." 5A WASH. PRAC. Sec. 613.5. The witness' testimony that he did not recall, coupled with his testimony that he would not testify against a fellow gang member demonstrates sufficient inconsistency to uphold the court's ruling as not a manifest abuse of its discretion.

The Defendant claims that the prosecutor did not follow the proper procedure of first asking Mr. Gutierrez about his earlier

statements. Brief of Appellant at 20. This is inaccurate. When the prosecutor attempted to ask Mr. Gutierrez about his prior statements to police, defense objected. RP 190-91; 2 RP 41. The trial judge held that the state had sufficiently made this attempt. 2 RP 43.

The Defendant argues that the admission of Mr. Guiterrez's statement through Officer Fox is not harmless error. Brief of Appellant at 21-22. Because the short statement Mr. Gutierrez made to police was merely duplicative of other testimony, this claim is not plausible.

The Defendant claims that through Officer Fox, the jury learned that the Defendant had a firearm. Brief of Appellant at 22. But this information was already in evidence through Ms. Guerra and Ms. Cortez. The only person to dispute this evidence was the Defendant himself. The Defendant also claimed that Florencia was only a group of friends who drink beer in the alley, that members could leave the gang at will, that no one told anyone what to do in a gang, that no one took offense at any insult, and that Ms. Cortez attacked him with a knife without provocation. He did not call police, but went on the run. His testimony was not credible. RP

512-. The admission of Mr. Gutierrez's statement was not prejudicial.

Along the same vein, the Defendant notes that a denial of a motion for mistrial may be error if there is a substantial likelihood that inadmissible evidence affected the jury's verdict. Brief of Appellant at 22. Because challenged testimony which is duplicative of unchallenged and admitted testimony cannot be said to have a substantial likelihood of affecting the jury's verdict, the challenge to the court's denial of the motion for mistrial fails.

C. THE DEFENDANT'S FAILURE TO ASK MR. GUTIERREZ IF MS. GUERRA WAS LYING DID NOT DEPRIVE HIM OF A FAIR TRIAL.

The Defendant claims that he was deprived a fair trial, because he was unable to find Mr. Gutierrez to recall to the stand after the parties had dismissed the witness. Brief of Appellant at 23. The Defendant provides no authority to support this theory.

Mr. Gutierrez is the Defendant's fellow gang member. The defense did not interview Mr. Gutierrez in advance of trial, believing that he would refuse to testify. RP 394. Before Jaime Gutierrez testified, defense counsel Norma Rodriguez alleged that the

witness "has not been made available to us to speak with." RP 184. The prosecutor responded that Mr. Gutierrez had been sitting in jail, available to the defense for weeks. RP 185.

While the Defendant argues that a witness does not have an absolute right to remain silent (Brief of Appellant at 23), the defense wanted the witness to remain silent. The Defendant asked no questions of Mr. Gutierrez at trial, and objected to the prosecutor's questions. RP 185-92. After Mr. Gutierrez testified on January 3, 2013, the prosecutor asked that he remain under subpoena only until the end of the day. RP 192. The defense made no request that the witness remain. CP 53; RP 192. After that day, he was released. RP 394.

Mr. Tapia is the Defendant's friend and fellow gang member who assisted in the assault. He was a known witness and had been in jail available for any party to interview. RP 467. Defense also chose not to interview Mr. Tapia in advance of trial. RP 302-03, 348. Counsel only opted to interview Mr. Tapia when it became clear that Ms. Cortez had returned from Texas and would be testifying. RP 208, 302-03, 348, 467.

Ms. Cortez was "scared to death," "shaking like a leaf." RP

303-04. Defense tried to exclude her testimony and then delay her testimony. RP 209, 301-02. The prosecutor felt that the defense was "going to do everything in their power to prevent that witness from testifying." 2 RP 51.

When Mr. Tapia was called as a witness on January 8, 2013, he claimed that Ms. Guerra, who had accused him of complicity in the assault, was a liar. RP 385-87. But it was Mr. Tapia who had the multiple convictions for crimes of dishonesty. RP 387-89. Although he denied active gang membership, only the year before he had pleaded guilty to a crime of riot. RP 390-91. His explanation was that he was not guilty; the offense occurred when he was out of the country. RP 390-91. He said he pled guilty, only because he thought he was pleading guilty to the assault on Ms. Guerra and Ms. Cortez. RP 391.

Based on their interview with Mr. Tapia, the defense expected Mr. Gutierrez would call his own wife a liar. 2 RP 144. Mr. Gutierrez had gone on the run with his wife and sat with her in court. RP 509. The defense tried to admit testimony from Mr. Tapia regarding this alleged hearsay of Mr. Gutierrez. RP 384-85. When that failed, the defense wanted to recall the dismissed

witness. RP 393 ("I know he is released."). The prosecutor explained that the state did not know Mr. Gutierrez's whereabouts; he had left his last residence after someone broke his windows while he was in court. CP 52; RP 393.

Although it is not likely in the face of his loyalty to Ms. Guerra and the retaliation he was receiving that Mr. Gutierrez would have called his own wife a liar, no one had prevented the defense from calling Mr. Gutierrez. Mr. Gutierrez was not a cooperating witness for the state. He was arrested on a material witness warrant and largely refused to testify. CP 53. The Defendant cannot claim that he is prejudiced because he does not have access to a witness he himself excused.

D. THE COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION IN DENYING THE MATERIAL WITNESS WARRANT.

The Defendant challenges the court's refusal to issue a material witness warrant for Mr. Gutierrez after the defense had released him. The trial court's decision will only be reversed for a manifest abuse of discretion. *City of Bellevue v. Vigil*, 66 Wn. App. 891, 895, 833 P.2d 445 (1995).

At the close of evidence, after the Defendant had testified, the defense asked for a material witness warrant. RP 466. The court denied the request:

> I'm not inclined to grant a material witness warrant at this juncture of the case. I understand if it was probably more relevant I might do it. If he was one of your primary witnesses that hadn't come. I think we can see if we can't get this done. If he shows up before the State's finished, I will maybe let you bring him on.

RP 467. The defense did not renew its motion. RP 477.

Where the Defendant failed to timely interview witnesses available to him, where the Defendant had an opportunity to examine the witness who had already been arrested on the State's material witness warrant, did not examine the witness, and then released the witness, where the alleged testimony is weak and unlikely to exist, and where the motion for the warrant was made minutes before the close of testimony, the court's denial of the motion was tenable.

E. WHERE THERE IS NO ERROR, THERE IS NO CUMULATIVE ERROR.

The Defendant argues that if the alleged errors do not demand reversal individually, then cumulative error demands it.

The State denies any error.

F. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING LEGAL FINANCIAL OBLIGATIONS.

The Defendant challenges the court's imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay.

The Court of Appeals recently addressed this challenge in *State v. Duncan*, -- P.3d --, No. 29916-3-III, 2014 WL 1225910 (Wn. App. filed Mar. 25, 2014), noting that the challenge is "recurrent" in appeals. *State v. Duncan*, 2014 WL 1225910 at *2. The court held that it would decline to address for the first time on appeal a claim that the record did not support the trial court's findings regarding ability to pay discretionary LFO's. The opinion explains that an offender may decline to challenge the finding at the trial level, because the State's burden of proof is so low. *Id.* But also an offender has good strategic reasons to waive the issue at the time of sentencing when there are "more important issues at stake." *Id.* at *1, 3. At the moment the judge is considering the incarceration penalty for the offense, the offender should be trying to portray himself in the best light. Therefore, it is "unhelpful" to portray

oneself as perpetually unemployed and irretrievably indigent. *Id.* at *3. And, in any case, the matter can be readdressed later by a petition for remission at the more pertinent time, i.e. the time of collection. *Id.*

The record provides sufficient evidence for the court's finding and sentence. The Defendant was a 26 year old, fit man. CP 5. The record indicates that the Defendant is not burdened by language or competency barriers.

In addition to mandatory costs, the court imposed only $443 in discretionary costs. CP 8. The court found that the Defendant was an adult who was not disabled and had the ability to work and pay his fines at a rate of $100/mo. CP 8, 10. Considering the small amount of fines imposed and the reasonable payment schedule, the court had sufficient evidence of the Defendant's ability to pay the ordered costs.

The Defendant asks to strike finding 2.5, which is on page four of each J&S (CP 7), arguing that this would be consistent with the holding in *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011). Brief of Appellant at 33. Because, unlike *Bertrand*, there is evidence on the record demonstrating the Defendant's ability to

pay, there is no cause to strike the supported finding. The Defendant's request to strike the court's factual finding must be denied. The finding is supported in the record; and the trial court deserves discretion on factual matters.

The Defendant not only asks to strike the factual finding, but also to strike the imposition of costs. Brief of Appellant at 33. This remedy is not supported in law.

In *State v. Bertrand*, 165 Wn. App. at 404, the sentencing court made a finding that the defendant Bertrand had the present or future ability to pay. The court of appeals found no evidence in the record to support the finding and, therefore, held that the finding was clearly erroneous. *State v. Bertrand*, 165 Wn. App. at 404. However, the court also noted that the question was not ripe under *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116, 837 P.2d 646 (1991). *State v. Bertrand*, 165 Wn. App. at 405. The court held that until such a future determination could be made, the Department of Corrections could not begin to collect on the LFO's. *State v. Bertrand*, 165 Wn. App. at 405.

Note that even if the finding were without basis in the record (which is not the case here), the Defendant's request to strike not

just the finding but also the imposition of fines is not the holding in *Bertrand*. Rather the *Bertrand* court struck the finding, but affirmed the imposition of LFO's, noting that the proper time to address the question is "when the government seeks to collect the obligation." *State v. Bertrand*, 165 Wn. App. at 405, *citing State v. Baldwin*, 63 Wn. App. at 310.

This record is sufficient to sustain the finding that the Defendant has the present and future ability to pay costs of $443. The court did not abuse its discretion in imposing the legal financial obligations.

G. THE COURT DID NOT ABUSE ITS DISCRETION IN ORDERING REASONABLE, CRIME-RELATED COMMUNITY CUSTODY CONDITIONS.

The Defendant challenges the following sentencing conditions:

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

CP 35.

The Defendant's challenge to community custody conditions

is made for the first time on appeal. Brief of Appellant at 35. The court should refuse to review an unpreserved error unless the Appellant can demonstrate manifest error affection a constitutional right. RAP 2.5(a).

The only constitutional challenge the Defendant raises is a claim that the condition prohibiting contact with known gang members violates his constitutional right of association. Brief of Appellant at 36. [Contrary to the Defendant's claim, possessing paraphernalia is not a freedom of association issue and, therefore, raises no constitutional concern.] The Defendant's appeal related to two other conditions, asserting no constitutional issue at all, must be denied outright under RAP 2.5(a).

In making the freedom of association challenge, the Defendant relies on *Dawson v. Delaware*, 503 U.W. 159, 163, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). *Dawson v. Delaware* does not regard sentencing conditions. The issue in that case was whether the defendant's association with the Aryan Brotherhood had any relevance to the issues being decided in the proceeding. *Because it was irrelevant*, its admission violated his First and Fourteenth Amendment rights.

The law allows reasonable crime-related sentencing conditions such as a prohibition against contact with criminal organizations.

> Crime-related prohibitions which limit fundamental rights are permissible provided the restrictions are reasonably necessary and narrowly drawn. *Riley,* 121 Wash.2d at 38, 846 P.2d 1365 (citing *United States v. Consuelo–Gonzalez,* 521 F.2d 259, 265 (9th Cir.Cal.1975)); *Malone v. United States,* 502 F.2d 554, 556 (9th Cir.1974). A reviewing court looks to whether the order prohibits "a real and substantial amount of protected conduct in contrast to the statute's legitimate sweep." *State v. Riles,* 135 Wash.2d 326, 346–347, 957 P.2d 655 (1998). A convicted defendant's freedom of association may be restricted only to the extent it is reasonably necessary to accomplish the essential needs of the state and public order. *Id.* at 347, 957 P.2d 655 (quoting *Riley,* 121 Wash.2d at 37–38, 846 P.2d 1365).

State v. Warren, 134 Wn. App. 44, 70-71, 138 P.3d 1081 (2006).

The court's imposition of a condition prohibiting contact with known gang members is not manifest error. It is not error at all.

As part of any term of community custody, the court may order an offender to comply with any crime-related prohibitions RCW 9.94A.703(3)(f). Sentencing conditions, including crime related prohibitions, are reviewed for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). The existence

of a relationship between the crime and the condition "will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge." *State v. Parramore,* 53 Wn. App. 527, 530, 768 P.2d 530 (1989); *State v. Riley,* 121 Wn.2d at 28. No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Llamas–Villa,* 67 Wn. App. 448, 456, 836 P.2d 239 (1992).

The Defendant claims the gang conditions are not crime-related. The evidence at trial was that the Defendant was an admitted gang member who committed assaults against gang members and in the company of other gang members for a gang purpose. Conditions prohibiting gang contact and possession of gang paraphernalia (used to promote and display the gang's power and to intimidate) are clearly crime-related.

The Defendant claims there is no evidence that he used any vehicle in the commission of his crime. Brief of Appellant at 37. This is incorrect. The Defendant used Mr. Tapia's vehicle to approach the victims and then flee the crime. Mr. Tapia is also a gang member and, therefore, the condition requiring the Defendant

to notify his CCO of the vehicles he uses assists the DOC in monitoring his compliance with the condition to have no contact with gang members. The court had tenable reasons for imposing this condition as well. There was no abuse of discretion.

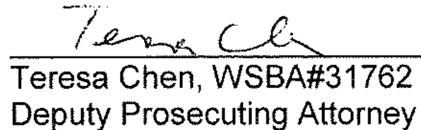
VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: June 17, 2014

Respectfully submitted:

SHAWN P. SANT
Prosecuting Attorney



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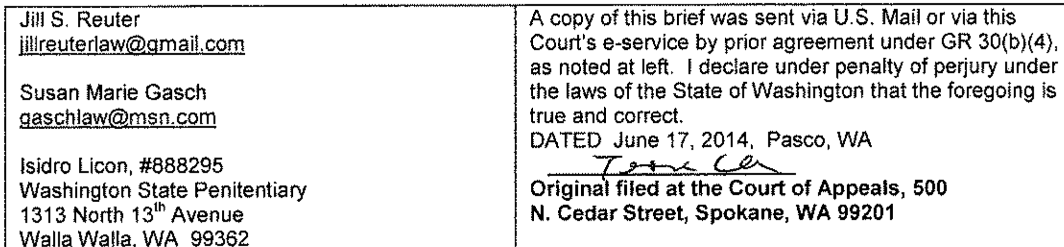

Jill S. Reuter jillreuterlaw@gmail.com Susan Marie Gasch gaschlaw@msn.com Isidro Licon, #888295 Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 17, 2014, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**