IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31205-4-III (consolidated with 31187-2-III)

STATE OF WASHINGTON, Respondent,

v.

JAIME LOPEZ, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Jaime Lopez was convicted of seven counts of first degree assault and one count of drive-by shooting although there was insufficient evidence to show that he knew who was present in the house at the time of the shooting. In light of the facts of this case, the specific intent instruction and the transferred intent instruction served to lessen the State's burden of proof on the elements of first degree assault and misled the jury as to the legal requirements to convict. The court's accomplice instruction further misstated the law and confused the jury by giving conflicting explanations as to whether mere presence at the scene could constitute sufficient participation and support in the criminal undertaking. The trial court impermissibly admitted statements by Lopez about his gang affiliation during a custodial interrogation that occurred after he invoked his right to remain silent. Lastly, the trial court permitted the State to introduce highly prejudicial profile evidence that sought to establish that because a gang's ideology would have established a motive to retaliate, Lopez, as a member of the gang, would have shared the gang's motive and acted accordingly. Because these errors deprived Lopez of a fair trial, the convictions should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Lopez joins in co-defendant Armando Lopez's Assignments of Error 1-13.

ASSIGNMENT OF ERROR 2: The trial court erred in giving instruction no. 9.

ASSIGNMENT OF ERROR 3: The trial court erred in admitting statements made after Lopez invoked his right to remain silent when the circumstances of the questioning do not fit within the exception for routine booking questions.

ASSIGNMENT OF ERROR 4: The trial court erred in admitting expert testimony about a gang's norms and ideology in order to show that Lopez acted in accordance with those norms and ideology.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When first degree assault requires specific intent to cause fear of injury and no evidence is introduced that the defendant intended to harm a specific person, are instructions that fail to instruct the jury on the

specific intent requirement constitutionally inadequate in relieving the State of its burden of proof as to an essential element?

ISSUE 2: When there is no specific evidence of intent to harm a specific person, does giving a transferred intent instruction when there is no injury to any person incorrectly state the law and relieve the State of its burden of proof as to an essential element of first degree assault?

ISSUE 3: When the instruction on accomplice liability informs the jury that accomplice liability can be established by all assistance including presence, is the instruction confusing and legally erroneous by informing the jury that mere presence at the scene of a crime is legally adequate to establish accomplice liability?

ISSUE 4: When a defendant invokes his right to remain silent following a *Miranda* advisement, does questioning the defendant about gang affiliation fall within the "booking statements" exception to custodial interrogation?

ISSUE 5: When an expert is allowed to testify about gang motives without any evidence that the defendant personally shared that motive, does the testimony constitute profile testimony and propensity evidence barred by ER 404(a) and ER 403?

IV. STATEMENT OF THE CASE

In the early morning of March 14, 2011, Maria Guadalupe Rincon Cega was awakened in her home in Outlook, Washington by the noise of gunshots. III RP 211, 213-15. The noise awakened all seven people in the house, including Cega's two small children, her husband Jose, her son Elias, her daughter Diane, and a family friend Daisy Cordoso. III RP 214-15, 261-62. Cega heard a car leave the property but did not see it. III RP 248. Nobody in the house was struck by the gunfire. III RP 249. From the scene, police recovered a 7.62 caliber rifle clip with live rounds and spent .40 caliber and .22 long rifle caliber casings. III RP 285-91, IV RP 314-33, VI RP 640-42.

On the morning of the shooting, two women were in the area delivering newspapers and heard gunshots. IV RP 354-55. They knew that a gang house was located in the general area that had been shot at several times before. IV RP 355-56. Shortly afterward, a vehicle coming from the direction of Cega's home turned in front of their car with its lights off. IV RP 356. The women called the police and identified the car as a charcoal colored Mitsubishi Gallant. IV RP 357. They followed the vehicle a couple of miles until the car flipped around and headed towards Yakima. IV RP 357-58.

Deputy Jesus Rojas was in the area and heard the description of the vehicle. V RP 460-61. As he was driving on Yakima Valley Highway in the area of Zillah, he saw a vehicle matching the description stop at an intersection approaching Yakima Valley Highway. V RP 462. The vehicle turned away from him and Rojas turned around to pursue it. V RP 462-63. Rojas eventually caught up with the vehicle and stopped it with backup assistance. V RP 468-69. He removed four individuals from the car – Armando Lopez, the driver, Jose Jesus Mancilla, the front seat passenger, Nicholas James, and Jaime Lopez, both back seat passengers. V RP 470-72.

No guns or ammunition were located inside the vehicle. V RP 475-76. Believing that the vehicle occupants may have thrown evidence out of the car, police went back to the intersection where Rojas saw the vehicle and found a 7.62 caliber rifle, a .22 caliber rifle, and a .40 caliber handgun. V RP 540-41.

At the police station, officers took photographs of the defendants' blue clothing and tattoos. V RP 489-501. The police sought to show that the blue clothing and tattoos incorporating the number "13" established the defendants' affiliation with a Sureno gang. V RP 480.

Rojas arrested the four defendants and read them their *Miranda* rights. I RP 135-37. All four defendants invoked their right to remain silent. I RP 137. When they were booked into the jail, a corrections officer questioned them about gang affiliation. I RP 115. In response to that questioning, Lopez stated he was a Sureno. I RP 117-18.

The State charged Lopez with seven counts of first degree assault and one count of drive-by shooting, all carrying gang aggravators under RCW 9.94A.535(3)(aa) and firearm enhancements under RCW 9.94A.533(3). CP 1413-45. Pretrial, the defendants moved to exclude their statements about gang affiliation made when they were booked into jail. RP 152-53. The trial court found that the questioning by the corrections officer fell within the exception for routine questions in the booking process and concluding that because gang affiliation was not an element of the crimes charged, allowed the statements to be admitted. I RP 154, 157.

At trial, the State introduced the booking statements acknowledging gang membership. V RP 604. The State further introduced expert testimony about the characteristics of the Sureno gang, including the gang's motivation to commit violence against rival gangs. VII RP 836-VIII RP 880; VII RP 841. The State relied upon this evidence

of the characteristics of gang membership in its closing argument to argue that the defendants acted in accordance with those characteristics by shooting at Cega's house in Outlook. X RP 995, 1009.

In its instructions to the jury, the trial court defined the crime of first degree assault as follows:

> A person commits the crime of first degree assault when with intent to inflict great bodily harm he assaults another with a firearm. A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime. An assault is an intentional touching or striking or shooting of another person with unlawful force that is harmful or offensive. A touching or striking or shooting is offensive if the touching or striking or shooting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act with unlawful force done with intent to inflict bodily injury upon another but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted. An assault is also an act with unlawful force done with the intent to create in another apprehension and fear of bodily injury and which in fact creates in another reasonable apprehension and eminent [sic] fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

X RP 972. In addition, the trial court instructed the jury on the doctrine of transferred intent as follows:

> If a person assaults a particular individual or group of individuals with a firearm with the intent to inflict great bodily harm and by mistake, inadvertence or indifference the assault with the firearm took affect [sic] upon an

> unintended individual or individuals the law provides that the intent to inflict great bodily harm with a firearm is transferred to the unintended individual or individuals as well.

X RP 972-73. Finally, as to accomplice liability, the trial court gave the following instruction to the jury:

> 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 either one, solicits, commands, encourages or requests another person to commit a crime, or two, aids or agrees to aid another person in planning or committing the crime. The word aid means all assistance whether given by acts, words, 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 a 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. A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

X RP 971-72.

The jury convicted Lopez on all counts and found the enhancements and the aggravators had been proven. CP 2321-43. The trial court sentenced Lopez to consecutive sentences for counts 1-7 and imposed the enhancements consecutively, for a total sentence of 1929 months. CP 2402, 2408-09. Lopez appeals. CP 2403.

V. ARGUMENT

A. By failing to instruct the jury on the specific intent required to convict for first degree assault, the trial court relieved the State of its burden to prove an essential element of the charge and sufficient evidence failed to support the first degree assault convictions.

Lopez joins in sections 1 and 2 of the argument of co-Defendant Armando Lopez, and submits further argument as follows.

Assault in the first degree requires a specific intent to produce a specific result, rather than a general intent to do an act that produces the result. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). The Washington Supreme Court has held that the specific intent need not, under all circumstances, match a specific victim; in some cases:

> [O]nce the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 to any unintended victim.

State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). However, the implication from the Court's analysis is that in cases where the mens rea does *not* transfer from a specific intended victim to an unintended victim, the specific intent must then match a specific victim.

State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995), supports this interpretation. In *Byrd*, the defendant's conviction for second degree assault was reversed when the instructions permitted the jury to convict based only on a finding that the defendant committed an intentional act that resulted in another's reasonable apprehension and fear of bodily injury, rather than an act done with the intent to create in another a reasonable apprehension and fear of bodily injury. 125 Wn.2d at 713. The *Byrd* Court adopted the analysis of LeFave and Scott, which stated:

> [O]ne cannot (in those jurisdictions which have extended the tort concept of assault to criminal assault) commit a criminal assault by negligently or even recklessly or illegally acting in such a way (as with a gun or a car) as to cause another person to become apprehensive of being struck. There must be an actual intention to cause apprehension, unless there exists the morally worse intention to cause bodily harm.

Id. at 713 (*quoting* Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 611 (1972)). Accordingly, the Supreme Court concluded that the instructions were erroneous because "the jury was not instructed that the Defendant must have intended to create in his or her victim apprehension of bodily harm." *Id.* at 715.

Similarly, in the present case, without evidence that Lopez sought to inflict injury or apprehension of harm on a specific person inside, there is insufficient evidence of the particular harm, if any, that the defendant

intended to inflict. Moreover, by eliminating the requirement that Lopez fired into the house with intent to cause a specific harm on a specific person, the instructions conflate the mens rea requirement of first degree assault with the lesser mens rea requirement of recklessness by permitting a finding of guilt based solely on the act of shooting the weapon, regardless of who – if anybody – happened to be inside.

It is also significant in the present case that the "to convict" instructions named the specific victims in support of each of the seven counts of assault. IX RP 990-93. Because specific intent is required for each count of assault charged, each count required proof of a specific intent to either assault the victim named, or a failed attempt to assault another specific person such that the intent transfers to the unintended victim. *See Wilson*, 125 Wn.2d at 218. Here, there was no evidence presented to the jury to establish who the intended victim was, and certainly no evidence that Lopez had any specific knowledge of who was in the house, let alone specific intent to assault each individual in the house.

Lastly, under this court's prior holding in *State v. Ferreira*, 69 Wn. App. 465, 850 P.2d 541 (1993), intent to harm a specific victim or victims in the home must be shown to support a conviction for first degree assault.

In *Ferreira*, the defendant was present in a car from which shots were fired into a home, striking a six-year-old child. Four other people were present in the home at the time. The convictions for first degree assault were reversed because the evidence, viewed most favorably to the State, was "insufficient to establish the shooters' intent to inflict great bodily harm on any of the occupants in the house." *Ferreira*, 69 Wn. App. at 469. Even though it was "likely apparent" that the house was occupied, the shooters did not actually see anyone inside the house and did not deliberately fire at "occupied areas" of the house. *Id.* Accordingly, in *Ferreira*, this court concluded that the evidence failed to support a finding that the shooters acted with intent to inflict great bodily harm. *Id.* at 70.

Thus, under *Ferreira*, when the State fails to present evidence that the defendants had specific knowledge that any individuals were inside the house and specifically targeted them, there is insufficient evidence of the specific intent required to sustain a first degree assault conviction.

The *Ferreira* court further held that multiple offenses can be supported when a person commits an act of violence "with intent to place more than one person in fear of serious bodily injury." 69 Wn. App. at 470. In the present case, there was no evidence presented as to who Lopez intended to assault, so there was no basis for concluding whether he

intended to assault one person or more than one person for purposes of determining whether multiple charges could be sustained.

All of these authorities, read together, lead to the conclusion that a first degree assault conviction requires proof of specific intent to either batter, attempt to batter, or place in fear a specific victim. Although this intent can be transferred to an unintended victim under *Elmi* and *Wilson*, in the absence of a specific intent to harm a particular person – whether that person be actually present at the scene or not – there is no specific intent to inflict harm or fear sufficient to support a first degree assault conviction. Furthermore, in the absence of proof of specific intent to harm multiple persons, multiple charges are not supported under *Ferreira*.

None of these legal principles were communicated to the jury in the court's instructions. Instead, the instructions permitted the jury to convict based on merely a general intent to inflict harm or fear on unspecified persons who happened to be present. This relieved the State of its burden of proof as to the specific intent element. Under the evidence presented in this case, the instructional error was not harmless beyond a reasonable doubt. Accordingly, the convictions for first degree assault must be reversed.

B. The trial court erred in instructing the jury on transferred intent when there was no evidence of any specific intended victim and when the instructional language lowers the State's burden from specific intent to general intent.

Lopez joins in section 3 of the argument of co-Defendant Armando Lopez, and submits further argument as follows.

The trial court's reliance on *State v. Elmi*, 166 Wn.2d 209, 207 P.3d 439 (2009) to support the giving of a transferred intent instruction in the present case is misplaced. In *Elmi*, it was undisputed that the defendant acted with the specific intent to harm his ex-wife, a specific victim, without knowing that the children were also present. *Id.* at 216. Accordingly, the *Elmi* court held that the specific intent to harm his ex-wife transferred to the children who were present and placed in fear of harm. *Id.* at 218-19.

Similarly, in *State v. Wilson*, 125 Wn.2d 212, 883 P.2d 320 (1994), the defendant fired several shots into a tavern attempting to hit a bartender and a patron with whom he had argued. Failing to strike his intended targets, he did succeed in striking two unintended victims. *Id.* at 213-14. The *Wilson* court held that "once the intent to inflict great bodily harm

against an intended victim is established, the statute allows the intent to transfer to unintended victims." *Id.* at 214.

Unlike *Elmi* and *Wilson*, in the present case there was no evidence of any specific victim that Lopez intended to assault that could transfer to an unintended victim. Accordingly, the transferred intent instruction was inappropriate under the facts of this case.

The Court of Appeals rejected the application of the transferred intent doctrine under similar factual circumstances in *State v. Abuan*, 161 Wn. App. 135, 257 P.3d 1 (2011). In *Abuan*, a gang-related drive-by shooting took place. *Id.* at 141-42. The State charged the defendant with two counts of second degree assault against two separate individuals present at the time. *Id.* at 145. In rejecting the application of the transferred intent doctrine to the facts of the case, the *Abuan* court observed that doing so would overextend the holding of *Elmi* by arguably allowing anybody in the neighborhood who heard the gunshots to be a victim of assault. *Id.* at 158. Similarly, affirming the instructions in the present case expands the doctrine of transferred intent from a doctrine in which a specific intent to harm or cause fear in a specific person can be transferred to a doctrine in which a general intent to harm or cause fear in unspecified persons can be elevated to a specific intent to harm unintended

persons. This lessens the State's burden to prove the element of specific intent.

State v. Frasquillo, 161 Wn. App. 907, 255 P.3d 813 (2011), further supports Lopez's argument that a transferred intent instruction was erroneous. In *Frasquillo*, the court relied upon *Ferreira* for the principle that when a person fires into a home intending to assault more than one person inside, the shooter thereby intends to assault all likely occupants of the house. 161 Wn. App. at 918. Because there was sufficient evidence that the shooter in *Frasquillo* intended to assault more than one person in the house, the court concluded that the transferred intent doctrine did not apply. *Id.*

In the present case, the State's instructions sought to have it both ways. The State charged Lopez with multiple counts of assault against each of the individuals inside the home. Under *Ferreira*, multiple counts against unintended victims can be sustained if there is evidence that the defendant intended to assault multiple people, regardless of whether the intended victims are actually assaulted. But under *Frasquillo*, if there is sufficient evidence that the defendant intended to assault multiple persons, the transferred intent doctrine is not implicated. It was, accordingly,

erroneous and confusing to give the transferred intent instruction in this case.

The error in the present case was not harmless because it relieved the State of its burden of proof on the specific intent element, and because the State cannot prove that the same verdict would have resulted had the jury been correctly instructed that it had to find either a specific intent to harm a specific person that transferred to unintended persons, or a specific intent to harm multiple persons that applied to all the occupants of the house. Because the erroneous inclusion of the transferred intent instruction deprived Lopez of a fair trial, the first degree assault convictions should be reversed.

C. The trial court's instruction to the jury on accomplice liability was confusing and included erroneous language that mere presence was sufficient to give rise to accomplice liability.

Because the State presented evidence of three shooters and four defendants, it was critical to the State's case to show that all of the defendants acted either as a principal or an accomplice in the shooting. It is well established that mere presence at the scene, even coupled with

knowledge that the presence aids in the commission of the crime, is insufficient to establish accomplice liability. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). Furthermore, encouragement based upon mere presence at the scene without a showing of intent to encourage the criminal act is insufficient. *In re Welfare of Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979). Lastly, failure to act to prevent a crime does not, in itself, make one an accomplice to the crime. *State v. Jackson*, 137 Wn.2d 712, 722, 976 P.2d 1229 (1999).

In the present case, the trial court gave the WPIC instruction on accomplice liability, which contains a direct misstatement of the law: "The word aid means all assistance whether given by acts, words, encouragement, support or presence." Aid that is rendered by mere presence is *not* legally sufficient to support accomplice liability under *Rotunno*, and encouragement by mere presence is likewise insufficient under *Wilson*. And despite the instruction's broad directive that "all assistance" is sufficient to support accomplice liability, the instruction does not clarify that assistance in the form of failing to act to stop the commission of the crime is inadequate under *Jackson*.

The WPIC instruction goes on to state that "more than mere presence and knowledge of the criminal activity of another must be shown

to establish that a person present is an accomplice." Thus, the question is whether the inclusion of this contradictory language serves to adequately limit the broad language concerning "all assistance" such that the "all assistance" language is not legally erroneous. Plainly, it does not. At best, the limiting sentence addresses the *Rotunno* holding that mere presence alone cannot give rise to accomplice liability. But a jury attempting to apply the "all assistance" instruction is not precluded from finding that encouragement through mere presence is adequate to convict, so long as the jury characterizes the presence as "encouragement" rather than "presence." The jury is also in no way precluded from reasoning that failing to stop a crime that one knows is happening falls within the broad category of "all assistance" described. Thus, the instruction remains legally erroneous because it sets forth an overbroad definition of complicity that is contrary to existing authorities, which overbreadth is not cured by the inclusion of the limiting sentence precluding conviction based on mere presence coupled with knowledge.

Jury instructions, read as a whole, must properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case. *State v. Sells*, 166 Wn. App. 918, 927, 271 P.3d 952 (2012). Erroneous instructions are subject to harmless error analysis to determine whether the State has been relieved of its burden to prove all of

the required elements and it must appear beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 334, 58 P.3d 889 (2002).

The instruction in the present case cannot be said to be harmless. There was no evidence presented to show that any one of the four defendants provided specific assistance to commit the crime beyond mere presence in the car. The State did not show any act that Lopez committed to aid in the commission of the crime, nor did it establish beyond a reasonable doubt that he was one of the principal shooters. Accordingly, the lessened burden of proof afforded by the complicity instruction likely contributed to the jury's verdict and that verdict must be reversed.

D. Lopez's statement about his Sureno gang affiliation, made in response to law enforcement questioning after he had invoked his right to remain silent, does not fall within the "booking statements" exception and should have been excluded.

Lopez joins in section 4 of co-defendant Armando Lopez's argument, and submits further argument as follows.

In support of its admission of the gang affiliation statements, the trial court considered a number of authorities evaluating the application of

the "booking statements" exception to custodial interrogation. Arising from *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), the exception provides that only questions or practices that are reasonably likely to lead to an incriminating response constitute "interrogation" under *Miranda*. *Id.* at 301.

Under the *Innis* rule, courts have carved exceptions for routine booking questions necessary for basic identification purposes. *State v. Sargent*, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988) (citing *State v. Wheeler*, 108 Wn.2d 230, 239, 737 P.2d 1005 (1987)). However, "the limited exception to *Miranda* allowing background, biographical questions necessary to complete booking does not encompass all questions asked during the booking process." *Wheeler*, 108 Wn.2d at 238. Thus, the courts have recognized "the potential for abuse by law enforcement officers who might, under the guise of seeking 'objective' or 'neutral' information, deliberately elicit an incriminating statement from a suspect." *U.S. v. Booth*, 669 F.2d 1231, 1238 (9th Cir. 1981).

This recognition of the potential to effectively abrogate *Miranda* by characterizing plainly incriminating information as "neutral" is precisely the situation posed in the present case. Gang aggravators can support increased sentences and where the crime charged is alleged to be

motivated by gang membership, such as in a drive-by shooting, a positive response is reasonably likely to be incriminating.

A review of the case law cited by the trial court in rendering its decision illustrates the distinction between truly neutral questioning and booking questions that are reasonably expected to elicit an incriminating response. In *Sargent*, 111 Wn.2d at 650, a standard pre-sentence investigation in which the investigator asked the defendant "Did you do it?" constituted an interrogation. In *State v. Willis*, 64 Wn. App. 634, 636, 825 P.2d 357 (1992), a community corrections officer investigating the defendant's activities before he was taken into custody on property crimes asked the defendant how he supported himself, eliciting a confession to stealing a vehicle for which he was later charged. In *State v. Denney*, 152 Wn. App. 665, 667-68, 218 P.3d 633 (2009), a booking officer asked the defendant, who was charged with possessing morphine, a standard booking question about recent drug use, to which the defendant responded that she had taken a tab of morphine that day. In each of these cases, the statements were determined to violate *Miranda* and were suppressed.

By contrast, in *State v. Walton*, 64 Wn. App. 410, 412, 824 P.2d 533 (1992), questions by a booking officer and a pretrial investigator to ascertain the defendant's address did not constitute interrogation when a

later search uncovered evidence of criminal activity occurring at the residence, for which the defendant was charged. The *Walton* court observed, "The questions asked were routine background questions necessary for identification and to assist a judge in setting reasonable bail. These are precisely the routine questions that are admissible, even though they ultimately prove to be incriminating." *Id.* at 414.

Unlike the neutral request for an address at issue in *Walton*, questions about Lopez's gang affiliation were not necessary to establish his identity. To the contrary, they bear more similarities with the questions at issue in *Willis* and *Denney* in that they related to the potential for criminal activity that should reasonably be anticipated to be incriminating. That the State sought to characterize the question as neutral and routine simply illustrates that the *Wheeler* court's concerns about potential abuse were well-founded.

The error was not harmless. The only other evidence that the State introduced to establish Lopez's gang affiliation was photographs of his tattoos, combined with expert testimony about the significance of those tattoos in the gang culture. However, the State's expert admitted that a person who was no longer active in gangs could have tattoos; accordingly, the jury likely gave considerable weight to Lopez's admission. Because

the evidence was improperly admitted and likely weighed heavily in the jury's determination, the convictions should be reversed and the case remanded for a new trial.

E. The trial court erred in permitting improper profile evidence of gang ideology that served only to establish propensity to commit the crime charged, contrary to ER 404(a) and ER 403.

Lopez joins in section 5 of co-defendant Armando Lopez's argument, and submits further argument as follows.

Lacking direct evidence of the defendants' involvement in the shooting at the Cega's house, the State sought to buttress a case based on the defendants' proximity to the scene of a crime with evidence of a propensity to act in accordance with certain gang characteristics. To support the inference that Lopez acted as a normal Sureno gang member would act, the State presented expert testimony of Jose Ortiz over the objections of defense counsel. I RP 27-28. Although Ortiz did not identify Lopez as an active gang member or provide any evidence that Lopez shared in the Sureno gang ideology, he was nevertheless permitted to testify generally that Sureno gang members were enemies of Norteno gang members and that acts of violence between the two were common.

Ortiz's testimony failed to establish that Lopez personally had any motive to engage in a drive-by shooting of a Norteno house unless the jury accepted that because Surenos generally disliked Nortenos, Lopez probably did as well; and further, that because Lopez probably disliked Nortenos, that he probably acted consistent with that characteristic on this occasion by shooting at a Norteno house. Such inferences are plainly prohibited under ER 404(a) and should be excluded under ER 403 even when they have some probative value because of the enormous potential for prejudice.

Testimony that serves only to identify a person as a member of a group that is likely to commit the charged crime is inadmissible. *State v. Braham*, 67 Wn. App. 930, 936, 841 P.2d 785 (1992); *see also State v. Petrich*, 101 Wn.2d 566, 576, 683 P.2d 173 (1984) (evidence that defendant was member of a group that was statistically more likely to commit the charged crime should not have been admitted); *State v. Maule*, 35 Wn. App. 287, 293, 667 P.2d 96 (1983) (expert testimony that defendant is a member of a group having a higher incidence of a certain crime invites the jury to conclude that the defendant is more likely to have committed the crime); *State v. Steward*, 34 Wn. App. 221, 224, 660 P.2d 278 (1983) (expert testimony that child injuries were often inflicted by

live-in boyfriends was highly prejudicial and its admission was reversible error).

In addition to being inadmissible under ER 702, as argued by co-defendant Armando Lopez, Ortiz's testimony should have been excluded under ER 404(a) and ER 403. The admission of the evidence was not harmless. The State's evidence consisted of a showing that four Sureno gang members were apprehended in proximity to a shooting at a Norteno house. Barring the expert testimony introduced to show that the defendants were the likely perpetrators because of their profile as Sureno gang members, it is extremely unlikely that the jury would have made the connection between presence in the area and being involved in the shooting. Accordingly, the convictions should be reversed.

VI. CONCLUSION

As a result of the instructional and evidentiary errors in this case, Lopez was deprived of his right to a fair trial. The instructions permitted the jury to convict based on a lessened standard of intent and involvement, and the evidence encouraged the jury to infer that Lopez was likely guilty solely because he was a Sureno gang member and the house that was shot at was affiliated with Nortenos. These errors infected the trial process and produced a result that cannot be relied upon as fair in light of the law and

evidence. For these reasons, the court should reverse Lopez's convictions and remand the case for a new, untainted trial.

RESPECTFULLY SUBMITTED this 12th day of August, 2013.

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Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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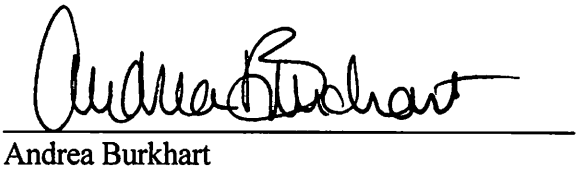
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 12th day of August, 2013 in Walla Walla, Washington.



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