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No. 95409-7

COA 33571-2-III, 33624-7-III

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LUIS GUADALUPE RODRIGUEZ-PEREZ,
WILLIAM ESCOBAR MARTINEZ, Petitioners.

ANSWER TO PETITIONS FOR REVIEW

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue is the court of appeals decision filed on December 7, 2017 in Division Three of the Court of Appeals.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly hold that the prosecutor did not improperly vouch for Martinez where the prosecutor's statements were merely argument based on reasonable inferences from the evidence presented at trial?
2. Did the Court of Appeals correctly hold that the trial court's exclusion of testimony about Rodriguez-Perez's gang affiliation was not an abuse of discretion where there was no showing of relevance?

D. STATEMENT OF THE CASE

The petitioners, Luis Guadalupe Rodriguez-Perez and William Martinez, were both charged with second degree murder for the death of Da'Marius Morgan and first degree assault for the assault on Isaiah Prince, who was shot in his leg. CP 16-17, Martinez CP 79-80.¹ Their cases were consolidated at trial. The charges stemmed from the following facts:

¹ There were two sets of clerk's papers designated by each appellant. To distinguish the two, "CP" will be used to refer to the clerk's papers designated by Rodriguez-Perez and "Martinez CP" will be used to refer to the clerk's papers designated by Martinez.

On March 22, 2014, the Seasons Performance Hall in Yakima held an event to promote local rap artists and singers. RP (3/9/15) 702-3. Bands came from all over town, with multiple artists performing. RP (3/9/15) 703-4; RP (3/13/15) 1323-4. During the music event, Da'Marius Morgan, an African-American male, was involved in a fistfight outside the event. RP (3/13/15) 1325; RP (3/16/15) 1651. At one point, Mr. Morgan punched another male in the head. RP (3/13/15) 1327; RP (3/19/15) 2102; RP (3/27/15) 2883. Shortly thereafter, gunshots went off and Mr. Morgan fell to the ground. RP (3/19/15) 2102-3. Mr. Morgan later died from a fatal gunshot wound to his chest. RP (3/19/15) 2136; RP (3/20/15) 2196, 2200. Isiah Prince was struck in the leg by a bullet. RP (3/23/15) 2376. Mr. Prince did not see who shot him and did not know if the defendants shot him. RP (3/23/15) 2367-8. Nor did he know who killed Mr. Morgan. RP (3/23/15) 2368.

Estevan Montero, a security officer, saw the shooting from inside the Seasons. RP (3/9/15) 710-1. He closed the door when a fight broke out outside. RP (3/9/15) 709-11. Though a window he saw three individuals by his truck, one of which shot a handgun towards an African-American male who then fell to the ground. RP (3/9/15) 712, 719, 727, 729. The three suspects then ran down an alley. RP (3/19/15) 729.

Martin Gonzalez was also working security for the Seasons. RP (3/12/15) 1231, 1261-2. He saw two large groups fighting in the street. RP (3/12/15) 1263. He looked out a window and saw someone get punched. RP (3/12/15) 1239-40, 1246. He saw more arguing and then saw someone fire three shots. *Id.*

Aaron Adams, a full-time student, was at the concert to see a friend who was performing in the last act. RP (3/12/15) 1322-4. While there, he saw a fight through the windows of the Seasons. RP (3/12/15) 1324. It started as an argument between two groups. RP (3/12/15) 1325. He then saw Mr. Morgan swing at a male and knock him down. RP (3/12/15) 1327. Two males then ran behind a truck, pulled out semiautomatic pistols, and fired simultaneously at Mr. Morgan who was by himself in the middle of the street. RP (3/12/15) 1328-9, 1366. Immediately after they fired, the shooters ran into an alley. RP (3/12/15) 1349.

Police officers responded, and several individuals pointed them to an alley where the shooters were. RP (3/16/15) 1529. Washington State Patrol Sergeant Couchman responded and went to an alley east of the Seasons. RP (3/13/15) 1434-6. He saw a group of agitated individuals yelling and running towards a bush. RP (3/12/15) 1187; RP (3/13/15) 1438, 1440, 1448; RP (3/17/15) 1821. Two males from the group then started kicking two males that were hiding behind the bush. RP (3/10/15)

937-9; RP (3/12/15) 1187; RP (3/13/15) 1440, 1448; RP (3/18/15) 1882-3; RP (3/27/15) 2901. The two males who were hiding, Martinez and Rodriguez-Perez, were taken into custody. RP (3/12/15) 1187; RP (3/13/15) 1440, 1442; RP (3/18/15) 1824.

At a show-up, Mr. Montero and Mr. Adams identified Martinez as the shooter. RP (3/10/15) 888; RP (3/13/15) 1338, 1415; RP (3/24/15) 2542. Another concertgoer, Daniel Cerda, said of Martinez, "that guy is so close to him." RP (3/10/15) 974; RP (3/11/15) 981; RP (3/24/15) 2542. Mr. Adams said that Rodriguez-Perez could have been the shooter if he ditched his hat before the show-up. RP (3/12/15) 1343, 1416; RP (3/13/15) 1421. Mr. Gonzalez also went to two show-ups and said that no one in those two groups was the shooter. RP 1254-7, 1268-71.

Numerous Smith & Wesson .40 caliber shell casings and a bullet slug were found near Mr. Montero's truck. RP (3/10/15) 812-4, RP (3/17/15) 1845, 1858-9. A black jacket, white shirt, red cap, and cell phone were also found in the bushes where the two defendants were hiding. RP (3/12/15) 1153; RP (3/18/15) 1906-16, 1933.

Shortly after the incident, a man who was walking his dog found a small black semi-automatic .40 caliber handgun. RP (3/12/15) 1194-8; RP (3/25/15) 2074-5, RP (3/23/15) 2317-9. Rounds in the gun matched the shell casings found earlier. RP (3/23/15) 2380-1. A forensic exam

revealed that a bullet from the crime scene and the one from the victim's body were both fired from the gun. RP (3/25/15) 2629. The shell casings that were found were fired from the same gun as well. RP (3/25/15) 2632. A fingerprint lifted off the gun matched known prints of Rodriguez-Perez. RP (3/26/15) 2665, 2670. The gun was also consistent with the gun held by Rodriguez-Perez in a cell phone video that was turned over to police by Martinez. RP (3/25/15) 2595.

After the incident, the police obtained videos from numerous sources, including local surveillance videos, COBAN video from officers who arrived on the scene, and a cell phone video made by concertgoer William Telakish. RP (3/19/15) 2159; RP (3/23/15) 2297-2308. In one of the surveillance videos, a male is seen extending his arm towards a bush where the firearm was subsequently found. RP (3/25/15) 2452.

Both defendants were convicted of second degree murder and their convictions were affirmed by the Court of Appeals.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

- 1. The Court of Appeals correctly held that the prosecutor did not improperly vouch for Martinez because his statements were merely argument based on reasonable inferences from the evidence presented at trial.**

Rodriguez-Perez argued on appeal, and for the first time, that the prosecutor vouched for a witness's credibility during closing argument.

However, the record shows otherwise. The Court of Appeals correctly held that the prosecutor did not improperly vouch for Martinez.

Courts review allegations of prosecutorial misconduct during closing argument in light of the entire argument, the issues in the case, the evidence discussed during the argument, and the court's instructions. *State v. Sakellis*, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011). The State has wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility. *State v. Thompson*, 169 Wn. App. 436, 496, 290 P.3d 996 (2012). But a prosecutor commits misconduct by personally vouching for a witness's credibility. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The defendant has the burden of establishing that (1) the State acted improperly, and (2) the State's improper act prejudiced the defendant. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *Id.* at 760-1.

Here, Rodriguez-Perez objected only on the basis that the prosecutor was arguing inconsistent theories of prosecution. RP (3/31/15) 3305. He did not lodge any objection based on the rule against vouching. As such, he has waived any claim of improper vouching on appeal. In order to preserve errors for appeal, a timely and specific objection must be placed on the record so that the trial judge can rule on it, and if necessary,

cure any errors. An appellate court may decline to consider a claim of trial error if the grounds for the claim are different from the grounds on which the objection was made at trial. *See, e.g., State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004).

Further, a defendant who fails to object to the State's improper act at trial waives any error, unless the act was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

To begin with, there was no misconduct on the part of the prosecutor in this case. Improper vouching occurs if the prosecutor (1) places the prestige of the government behind the witness, or (2) indicates that evidence not presented at trial supports the witness's testimony. *State v. Robinson*, 189 Wn. App. 877, 892-93, 359 P.3d 874 (2015). However, there is a difference between the prosecutor's personal opinion, as an independent fact, and an opinion based upon or deduced from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). Misconduct occurs only when it is clear and unmistakable that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion. *Id.* at 54.

Rodriguez-Perez argued on appeal that the prosecutor was vouching because of these three sentences in closing argument:

“[Martinez] knew Luis had the pistol. He knew Luis intended to fire. Luis fired the pistol at Morgan, that fool.” Appellant’s Brief at 13. This argument was within the prosecutor’s wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility. The prosecutor did not make a personal comment about Martinez’s credibility or indicate that other information not presented to the jury supported his credibility. He did not say or imply that he personally believed Martinez or that Martinez must be telling the truth. As such, the prosecutor did not improperly vouch for Martinez.

In fact, the prosecutor prefaced his statements by telling the jury that these were reasonable conclusions that they should draw. RP (3/31/15) 3304. And just a few paragraphs before the alleged improper argument, the prosecutor told the jury to reject a statement by Martinez and reminded the jury that they were the sole judges of witness credibility:

He tells you that he didn’t know that Luis intended to fire, but you are the sole judges of the credibility of the witnesses. You should reject that statement by Martinez.

RP (3/31/15) 3304. In fact, when going through Martinez’s testimony during closing, the prosecutor reiterated four other times that the jurors were the sole judges of credibility. RP (3/31/15) 3297, 3299, 3301, 3303.

And the prosecutor pointed out numerous statements made by Martinez that the jury should reject. RP (3/31/15) 3297, 3299, 3301, 3303.

And after the defense objected on the basis of “inconsistent theories,” the court made this cautionary statement to the jury:

Again, the jury is reminded that the lawyer’s remarks, statements and argument are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statement or argument that is not supported by the evidence in this case.

RP (3/31/15) 3305. As such, assuming, *arguendo*, there was any misconduct, any prejudice was cured by the court’s warning to the jury.

As to the prosecutor’s theory of the case, the prosecutor stated in closing that Martinez “either did it as a principal or an accomplice, but he was in it and he knew it.” RP (3/31/15) 3309. He pointed out that, “There is evidence that [Martinez] was the shooter. The witnesses testified that he was the shooter.” RP (3/31/15) 3313. In the State’s rebuttal, the prosecutor again argued that the jury should accept as credible the testimony of witnesses who identified Martinez as the shooter. RP (3/31/15) 3382. The prosecutor argued:

There was testimony given by Mr. Martinez, and Mr. Martinez said I’m not the shooter. Mr. Rodriguez-Perez is the shooter. I’m not going to just ignore that testimony because

you will decide this case. I don't know what you're thinking. When I make these arguments to you about Mr. Martinez, I'm not telling you just disregard what all the witnesses said that I called to the witness stand. What I'm saying is this: Even if you accept what Mr. Martinez says that he is not the shooter and the shooter is Mr. Rodriguez-Perez, my position to you is that it doesn't make any difference. Mr. Martinez is still guilty as an accomplice.

...

So whether you accept the testimony of the identification witnesses...or whether you find some credibility in what Mr. Martinez says, it doesn't make any difference. They did it together as a team.

RP (3/31/15) 3382-3. It was clear from the prosecutor's closing and rebuttal that he was not vouching for any one version of events. He was leaving it to the jury to decide what to believe. He made that point very clear many times. He was just going through the evidence. In addition, the prosecutor mostly criticized Martinez's testimony in closing.

Rodriguez-Perez claims that the prosecutor assured Martinez was the shooter in his opening statement. However, the purpose of an opening statement is to outline the evidence the party intends to introduce at trial. *State v. Kroll*, 87 Wn.2d 829, 834, 558 P.2d 173 (1976). The opening statement is based upon the anticipated evidence and the reasonable inferences which can be drawn therefrom. *State v. Aiken*, 72 Wn.2d 306, 351, 434 P.2d 10 (1967). The State is not required to prove anything

mentioned in the opening statement. A reality of criminal trial practice is that testimony sometimes changes before and during the trial. Here, the prosecutor made, in good faith, statements as to what he anticipated the evidence to be at that time. Furthermore, changing one's theory does not amount to vouching for the credibility of a witness.

In sum, the defense did not meet its burden of showing misconduct so flagrant and ill-intentioned that an instruction could not have cured it. The prosecutor's statements were not a personal comment, but permissible argument based on the evidence. In addition, the prosecutor cautioned the jury numerous times as to their role in assessing credibility. And the court made a cautionary statement as well. As such, this Court of Appeals was correct in holding that there was no improper vouching in this case.

2. The Court of Appeals correctly held that the trial court's exclusion of testimony about Rodriguez-Perez's gang affiliation was not an abuse of discretion.

Martinez argued at trial that the court should admit evidence that his codefendant, Rodriguez-Perez, was a gang member. However, the trial court correctly found that the testimony was not relevant and that the prejudicial effect outweighed any probative value. RP (3/27/15) 2862.

Evidence of gang affiliation is a special subset of prior bad act evidence under 404(b). *See State v. Yarbrough*, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009). It can be admitted in a criminal trial if there is a

connection between the crime and gang membership that makes the gang evidence relevant. *State v. Scott*, 151 Wn. App. 520, 526-27, 213 P.3d 71 (2009), *review denied*, 168 Wn.2d 1004 (2010).

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

A trial court's ER 404(b) ruling is reviewed for an abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 429-30, 705 P.2d 1182 (1985); *State v. Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995). When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). In this case, there was no abuse of discretion.

a. The trial court correctly held that evidence of Rodriguez-Perez's gang affiliation was irrelevant based on the offer of proof that was made.

Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006), *overruled in part on other*

grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014).

Evidence is relevant when it is both material—the fact to be proved “is of consequence in the context of the other facts and the applicable substantive law”—and probative—the evidence has a “tendency to prove or disprove a fact.” *State v. Sargent*, 40 Wn. App. 340, 348 n.3, 698 P.2d 598 (1985) (quoting 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 82, at 168 (2d ed. 1982)).

During pre-trial hearings, Rodriguez-Perez made a motion in limine regarding gang-related evidence. CP 27, 29. The State had no objection. RP (2/24/15) 544. Rodriguez-Perez argued that there was no evidence that the shooting was gang-related and that any testimony that any rap performer or group was gang-affiliated should be excluded based on relevance. CP 27. Martinez reserved on the issue, stating that he might join in the motion made by Rodriguez-Perez, but wanted to see how the evidence unfolded. RP (2/24/15) 553, 565.

Trial began on March 2, 2015 with jury selection. In the middle of trial, on March 16, Martinez’s attorney made an offer of proof regarding the evidence that he wanted to admit. He focused heavily on a police report that summarized what a witness, Mr. Martin Gonzalez, told the police:

...Gonzalez stated that it began inside during the concert when several subjects began to exchange words for an unknown reason but thought it had something to do with gangs or rap. Gonzalez explained that there were several rap groups playing tonight, that one of the rap groups named DSB, Down Since Birth, is affiliated the FB's, Fun Boys, a Norteño gang in Yakima. Gonzalez stated two large groups that consisted of West Side Hustlers and FB's then went outside to rumble and began to square off. He talks about it from there. Then he goes on discussing it further and says in the third paragraph that a subject that was with the FB's brandished a pistol and shot about three times. Then he describes what that person looked like, a Hispanic male about 5' 7", medium build, wearing a zip-up jacket or hoody with a T-shirt that had white or light brown on it and a red and black snapback cap. He indicated he thought he could recognize that person if he saw him again.

RP (3/16/15) 1559. Martinez's attorney argued that the evidence should be admitted:

So I think it's potentially a significant issue of identification that Gonzalez is telling him that the person that he saw brandish the pistol was affiliated with the FB's and that Sergeant Gonzalez² says he knew Luis Rodriguez-Perez to be a Fun Boys gang member and had dealt with him on two occasions when he was in the company of other FB gang members.

² It is clear from the context that Martinez's attorney meant to say Sergeant Cortez, whose testimony they were discussing.

RP (3/16/15) 1560.

Essentially, Martinez wanted to elicit information that Rodriguez-Perez was a member of the Fun Boys gang because Mr. Gonzalez said the person brandishing the pistol was “affiliated with” the Fun Boys.

Rodriguez-Perez objected, noting that the court heard Mr. Gonzalez’s testimony and that there was no information that this was a gang-related shooting. RP (3/16/15) 1566. The trial judge reserved ruling on the issue and stated, “there is no ruling at this point on gang evidence.” RP (3/16/15) 1573. Martinez indicated he was comfortable with the court reserving on the issue. RP (3/16/15) 1575. The court also told Martinez’s attorney that he could recall Sgt. Cortez. RP (3/16/15) 1580.

Later during the trial, after the State had rested, the court asked for an offer of proof regarding the gang-related evidence. RP (3/27/15) 2855. Martinez’s attorney reiterated that according to Sgt. Cortez’s report, Mr. Gonzalez, the college student working security at the Seasons, stated “it began inside during the concert when several subjects began to exchange words *for an unknown reason but thought it had something to do with gangs or rap.*” RP (3/27/15) 2857 (emphasis added). Mr. Gonzalez stated that two large groups went outside to rumble and square off. RP (3/27/15) 2857. A subject with West Side Hustlers (WSH) threw a punch at a Fun Boys (FB) rapper. RP (3/27/15) 2858. Someone with the Fun Boys then

started shooting. RP (3/27/15) 2858. Gonzalez did not know if he was shooting anyone in particular or just into the crowd. RP (3/27/15) 2858. Martinez's attorney claimed that Rodriguez had a gang-related tattoo and was a member of the Fun Boys, while Martinez was not part of a gang. RP (3/27/15) 2858-9.

The trial court ruled that there must be a connection between the crime and gang affiliation before the evidence becomes relevant. RP (3/27/15) 2862. The court stated:

In this particular circumstance, this court from the offer of proof, Mr. Krom, simply can't conclude that there's any evidence that the acts of the defendants in this case were in any fashion made to advance gang values or the purposes of the gang itself. The court is not convinced that there is a nexus. The evidence so far indicates that the shooting arose out of a conflict between two groups, which started out as yelling and rose to the level of a fistfight. There is simply not enough evidence in this case to establish that the shooting was to advance a particular gang purpose or value.

Id. The court later stated,

The relevance in this case, when I look at it in total, clearly it is Mr. Martinez's attempt to exculpate himself from involvement in this case by saying he did it. He did it because he was a gang member, and this gang wanted to assault this other gang. That's really what it boils down to, *relevance*. Under those circumstances, the

court finds that, number one, there's not a reasonable nexus between the crime and the advancement of gang values and activities.

Id. at 2862 (emphasis added).

Based on the limited offer of proof made by Martinez, it is clear why the trial court excluded the evidence. It was not relevant. Martinez wanted to elicit testimony that Rodriguez-Perez was a gang member to suggest that he was the shooter. Although Mr. Gonzalez said that the shooter was affiliated with the Fun Boys, at two show ups he said that neither defendant was the shooter. Mr. Gonzalez had no idea why these groups were fighting. According to the offer of proof, Mr. Gonzalez stated that words were exchanged for “unknown reasons” and that he did not know if the shooter was shooting anyone in particular or just shooting into the crowd. The offer of proof provided by Martinez was simply insufficient to admit evidence of gang affiliations. While the attorney characterized the fighting as “gang-related,” there was no evidence to that effect.

Martinez claims that the trial court prioritized judicial economy over his right to introduce evidence. Petition at 13. However, as indicated by the Court of Appeals, “Our review of the record shows no support for Martinez’s contention that the trial court considered judicial economy as a

reason for excluding gang evidence.” *State v. Rodriguez-Perez*, 1 Wn. App. 2d 448, 468, 406 P.3d 658, 669 (2017). The record shows that the trial court considered two things: 1) the relevance of the evidence, and 2) the prejudicial effect of the evidence. It was clear from the record that the trial court relied mostly on the relevance prong, stating, “That’s really what it boils down to, *relevance*.” RP (3/27/15) 2858 (emphasis added).

b. The trial court did not abuse its discretion in finding that any probative value of testimony about Rodriguez-Perez’s gang affiliation was outweighed by its prejudicial effect.

In addition to relevance, under ER 404(b), there must be a showing that the probative value of the evidence outweighs its prejudicial effect. Because a trial court has considerable discretion in determining whether the probative value of evidence is outweighed by its potential prejudice, this Court will find reversible error “only in the exceptional circumstance of a manifest abuse of discretion.” *Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610 (1994).

In this case, after conducting a balancing test on the record, the court found that it was unduly prejudicial. The trial court stated:

The court also thinks that it’s reasonable to conclude that that reported evidence by the defendant would simply be offered as a self-serving statement attempting to exculpate himself in the act and inculpate a gang member. In that regard, the prejudicial effect

of any gang evidence would far outweigh any relevance in this particular case.

RP (3/27/15) 2861-2.

In his petition for review, Martinez claims that “No state interest is compelling enough to prevent evidence that is of high probative value to the defense.” Petition at 10. However, this wasn’t “highly probative” evidence. It was irrelevant evidence, as demonstrated by the minimal offer of proof that was made, and counsel equivocating about admitting the evidence. As such, the trial court did not abuse its discretion by excluding the evidence.

Martinez also argues that the Court of Appeals held that the right to present evidence “carries significantly less weight in a joint trial.” Petition at 1. However, this misstates the court’s holding. The court noted that “...a defendant’s right to present evidence is not absolute. It may, ‘in appropriate cases, bow to accommodate other legitimate interests in the criminal process.’” 1 Wn. App. 2d at 470 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L.Ed. 297 (1973)). As indicated in *State v. Giles*,

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant a meaningful opportunity to present a defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). This

right, however, is not absolute. It may, “in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process,” *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), including the exclusion of evidence considered irrelevant or otherwise inadmissible. *State v. Strizheus*, 163 Wn. App. 820, 830, 262 P.3d 100 (2011); *accord Jones*, 168 Wn.2d at 720 (“Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence.”); *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010) (“[T]he scope of that right does not extend to the introduction of otherwise inadmissible evidence.”).

196 Wn. App. 745, 756-57, 385 P.3d 204, 211 (2016). In this case, the right to present a defense must bow to the other legitimate interests, including the exclusion of evidence considered irrelevant.

F. CONCLUSION

In sum, the Court of Appeals correctly held that the prosecutor did not vouch for the credibility of Martinez in closing argument. He made arguments based on the testimony that came out at trial. Furthermore, the Court of Appeals correctly held that the trial court did not abuse its discretion in excluding testimony about Rodriguez-Perez’s gang affiliation.

This case does not meet any of the criteria in RAP 13.4(b). First of all, the decision is not in conflict with a decision of the Supreme Court or

another decision of the Court of Appeals. Second, a significant question of law under the Constitution of the State of Washington or of the United States is not involved. Lastly, the petition does not involve an issue of substantial public interest that should be determined by the Supreme Court. As such, his petition for review should be denied.

Respectfully submitted this 9th day of March, 2018,

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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on March 9, 2018, by agreement of the parties, I emailed a copy of STATE'S ANSWER TO PETITION FOR REVIEW to Lisa E. Tabbut at ltabbutlaw@gmail.com and Skylar T. Brett at skylarbrettlawoffice@gmail.com.

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

DATED this 9th day of March, 2018 at Yakima, Washington.

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