

NO. 37120-1- II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

vs.

GUADALUPE SOLIS-DIAZ

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR LEWIS COUNTY

The Honorable Nelson Hunt, Judge
Cause No. 07-1-00543-3

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities.....	iii
Assignments of Error.....	1 & 2
Issues Pertaining to Assignment of Error.....	2
Statement of the Case.....	3 through 25
Summary of Argument.....	25 and 26
Argument.....	26 through 38

I.

THE TRIAL COURT ERRED IN SUPPRESSING THE EVIDENCE OF MR. ROBERT APPLEWOOD'S TESTIMONY ON HEURISTIC REASONING, WHEN SUPPRESSION IS NOT AN ALLOWED REMEDY FOR DISCOVERY VIOLATIONS, THE WITNESS WAS PREVIOUSLY DISCLOSED TO THE PROSECUTION, AND SUPPRESSION OF THE EVIDENCE DEPRIVED THE DEFENDANT OF NEEDED INFORMATION TO CHALLENGE THE CRUX OF THE STATE'S CASE, THE VIDEO.....26

II.

THE TRIAL COURT ERRED IN ALLOWING ANY KIND OF EXAMINATION OF MR. THOMAS, CONCERNING HIS PLEA BARGAIN, GIVEN THAT MR. THOMAS COULD VERY WELL HAVE UNDERSTOOD THAT HIS PERFORMANCE IN MR. SOLIS-DIAZ'S TRIAL WOULD IMPACT HIS PLEA BARGAIN, THUS AFFECTING HIS CREDIBILITY.....28

III.

THE TRIAL COURT ERRED IN OVERRULING OBJECTIONS CONCERNING WHETHER CERTAIN PEOPLE WERE IN THE COURTROOM WHEN SUCH EVIDENCE WAS AN ATTEMPT TO CONVICT BY GUILT OF ASSOCIATION AND CHARACTER.....29 and 30

IV.

THE TRIAL COURT ERRED IN DENYING THE MOTION IN LIMINE TO SUPPRESS THE GANG MEMBERSHIP EVIDENCE, WHEN THERE WAS NO OFFER OF PROOF OF WHAT THAT EVIDENCE WOULD BE AND NO BALANCING OF THAT EVIDENCE UNDER ER 403 OR ER 404(B)...31 and 32

V.

THE DEFENDANT'S DUE PROCESS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED WHEN THE DEFENSE COUNSEL FAILED TO OBJECT TO NUMEROUS STATEMENTS CONTAINING RUMOR AND HEARSAY ABOUT THE DEFENDANT'S GANG INVOLVEMENT, SPECULATION ABOUT MOTIVE FOR THE SHOOTINGS, AND FAILURE TO PIN DOWN THE DEFENDANT'S ALIBI AND ALLOWING HIS PAST CRIMINAL RECORD INTO EVIDENCE WITH NO CHALLENGE.....34

Conclusion.....38 and 39

TABLE OF AUTHORITIES

TABLE OF CASES

<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	37
<u>Delaware v. Van Arsdall</u> , 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).....	29
<u>Harris By and Through Ramseyer v. Wood</u> , 64 F.3d 1432 (1995).....	35
<u>Sarausad v. State</u> , 109 Wn. App. 824, 39 P.3d 308 (2001).....	33
<u>State v. Acosta</u> , 123 Wn. App. 424, 98 P.3d 503 (2004).....	30
<u>State v. BJS</u> , 140 Wn. App. 91, 169 P.3d 34 (2007).....	36
<u>State v. Boot</u> , 89 Wn. App. 780, 950 P.2d 964 (1998).....	32
<u>State v. Campbell</u> , 78 Wn. App. 813, 901 P.2d 1050 (1995).....	33
<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995).....	36
<u>State v. Greathouse</u> , 113 Wn. App. 889, 56 P.3d 569 (2002).....	30
<u>State v. Howland</u> , 66 Wn. App. 586, 832 P.2d 1339 (1992).....	34
<u>State v. Hutchinson</u> , 135 Wn.2d 863, 959 P.2d 1061 (1998).....	26 and 27
<u>State v. Kilgore</u> , 107 Wn. App. 160, 26 P.3d 308 (2001).....	37

<u>State v. Lewis</u> , 19 Wn. App. 35, 573 P.2d 1347 (1978).....	26
<u>State v. Mason</u> , 160 Wn.2d 910, 162 P.3d 396 (2007).....	37
<u>State v. Portnoy</u> , 43 Wn. App. 455, 718 P.2d 805 (1986).....	29
<u>State v. Ra</u> , 142 Wn. App. 868, 175 P.3d 609 (2008).....	32
<u>State v. Rodriguez</u> , 121 Wn. App. 180, 87 P.3d 1201 (2004).....	36
<u>State v. Sherwood</u> , 71 Wn. App. 481, 860 P.2d 407 (1993).....	34
<u>State v. Shilling</u> , 77 Wn. App. 166, 889 P.2d 948 (1995).....	34
<u>State v. Soh</u> , 115 Wn. App. 290, 62 P.3d 900 (2003).....	28
<u>State v. Stamm</u> , 16 Wn. App. 603, 559 P.2d 1 (1976).....	26
<u>State v. Thacker</u> , 94 Wn.2d 276, 616 P.2d 655 (1980).....	26
<u>State v. Walton</u> , 76 Wn. App. 364, 884 P.2d 1348 (1994).....	36
<u>State v. Ward</u> , 125 Wn. App. 243, 104 P.3d 670 (2005).....	36
<u>State v. Yates</u> , 161 Wn.2d 714, 168 P.3d 359 (2007).....	31, 37

CONSTITUTION

United States Constitution 6 th Amendment.....	34
---	----

COURT RULES

ER 402.....	30, 32,
ER 403.....	31, 33, 37
ER 404(B).....	31, 32, 33, 37

A. ASSIGNMENTS OF ERROR

I.

1. The trial court erred in suppressing the evidence of Mr. Robert Applewood's testimony on heuristic reasoning, when suppression is not an allowed remedy for discovery violations, the witness was previously disclosed to the prosecution, and suppression of the evidence deprived the Defendant of needed information to challenge the crux of the State's case, the video.

2. The trial court erred in allowing any kind of examination of Mr. Thomas, concerning his plea bargain, given that Mr. Thomas could very well have understood that his performance in Mr. Solis-Diaz's trial would impact his plea bargain, thus affecting his credibility.

3. The trial court erred in overruling objections concerning whether certain people were in the courtroom when such evidence was an attempt to convict by guilt of association and character.

4. The trial court erred in denying the motion in limine to suppress the gang membership evidence, when there was no offer of proof of what that evidence would be and no balancing of that evidence under ER 403 or ER 404(b).

5. The Defendant's due process rights to effective assistance of counsel were violated when the Defense Counsel failed to object to numerous statements containing rumor and hearsay about the Defendant's gang

involvement, speculation about motive for the shootings, and failure to pin down the Defendant's alibi and allowing his past criminal record into evidence with no challenge.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the trial court lacked the authority to suppress evidence for discovery violations, even assuming that Defense Counsel failed to comply with discovery.
2. Whether the trial court improperly prohibited cross examination of Mr. Thomas about his pleas bargain, when Mr. Thomas could very well have believed that his performance in this trial was part of the deal, regardless of whether the Prosecutor intended that belief or not.
3. Whether the "evidence" of the alleged gang members presence in courtroom was relevant, when there was no attempt to make a showing that they were connected to the shooting or any purpose of their being in the courtroom and no attempt was made to show that the Defendant had anything to do with their being there.
4. Whether the "evidence" of the alleged gang members presence in courtroom violated ER 403, when the evidence went to character and there was no attempt made to show why those people were there.
5. Whether an objection should have been made to the introduction of gang evidence, when there was no weighing of the evidence under ER 404(b) or ER 402, the evidence involved hearsay and speculation.

C. STATEMENT OF THE CASE

The Appellant, hereinafter referred to as the Defendant was charged with six counts of Assault in the First Degree, while armed with a firearm, Drive By Shooting, and Unlawful Possession of a Firearm in the Second Degree. (CP-Pages 1 through 5). An Omnibus Order was entered on October 18, 2007. It required all discovery to be exchanged ten days before trial. (CP Pages 7 and 8).

Volume I

Prior to the start of the evidence, the Defendant objected or made a motion in limine to exclude evidence of the Defendant's alleged gang ties. The objection was overruled, the court finding that the gang relationship was part of the State's theory of the case. (RP Page 13). Opening Statements by both the prosecution and the defense took place. (RP Pages 14 through 19).

The first witness called, was Mr. Steve Spurgeon. (RP Page 20). He testified that he worked for the City of Centralia's engineering department. He produced a map of the portion of Centralia that the shooting occurred in. (RP Pages 21 and 22).

The next witness called was Ms. Moon Chang. (RP Page 23). She testified that she owns the Shell Station on Tower Street, in Centralia and had installed a security system in August. (RP Page 24).

The State than called Detective Carl Buster. (RP Page 27). He testified to his law enforcement experience and that he went to the Shell

Station on Tower Street, to look through videos, from the owners security system. He testified that he found the video that he was looking for and later downloaded it to a memory stick belonging to Officer Humphrey. Using that memory stick, Detective Buster copied the file into his computer and created a compact disk copy of the videos. (RP Pages 28 through 30). He further testified that the video was an accurate depiction of what he saw in the store (RP Page 31). The video was admitted as Exhibit Number 1. (RP Page 32).

Detective Buster also prepared photo montages. The first person he showed them to was a Ms. Shanna Fisco. That first photo montage was marked and admitted as Exhibit Number 8. (RP Pages 33 and 34). Detective Buster also identified Exhibit Number 7, as another photo montage that he had showed Ms. Fisco. That was also admitted. (RP Page 34). Exhibit Number 6 was shown and described as the same montage as Exhibit Number 8. That montage was shown to a Mr. Jesse Dow. It was also admitted. (RP Page 35). Next, Exhibit Numbers 4 and 5 were identified, by Detective Buster. Exhibit Number 4 was the photographic lineup instruction sheet that was shown to Ms. Fisco and Exhibit Number 5 was the photographic lineup instruction sheet that was shown to Mr. Dow. They were admitted. (RP Pages 36 and 37). Exhibit Number 3 was a photo montage that the witness showed to Mr. Dow. It was admitted. (RP Page 37). He showed her two photo montages. (RP Page 39). The video was then shown to the jury. (RP Page 41). After that, Mr. Jesse Dow was called. (RP Page

42).

He was asked to describe what happened. No objection to narrative was made by the defense counsel. (RP Page 42). He testified that he was at the Shell Station when another car pulled up. For some reason, he had to calm his friend down and told her to get back to the bar. At the bar, he observed the car driving up slowly, with the window half-way down with a gun pointed out of it. He further testified that approximately seven shots were fired. (RP Pages 42 and 43). He testified that he went with Ms. Fisco to the Shell Station to get some cigarettes. (RP Page 43). While at the Shell Station, he recognized the driver, by his street name of "Pollo." He testified that he did not know the passenger, at the time. He did identify him in court, as the Defendant. (RP Pages 45 and 46). He also identified him as the shooter. (RP Page 47).

Mr. Dow was asked why he was shot at. He testified that he assumed that it was retaliation for an earlier altercation. There was no objection. The deputy prosecutor asked him to elaborate and he named a gang called "LVL", although he said he did not know too much about them. He did discuss the physical altercation he got into with them. (RP Pages 47 and 48). He further speculated on what the fight was about. Mr. Dow was asked if the Defendant was affiliated with the gang. Mr. Dow answered that he did not know for sure. (RP Page 49). The witness was asked leading questions about whether the Defendant goes by the name "Indio." The witness testified as to what he

heard and even mentioned the word "hearsay." There was no objection. (RP Page 50).

Mr. Dow was asked whether a Josh Rhodes was in the courtroom. An objection, on relevance, was made, but it was overruled. He pointed out Mr. Rhodes in the courtroom. (RP Page 50). He was then asked about Aiden Sanchez. The same objection was made, again it was overruled. The witness answered that he did not know. He was then asked about whether a Richard Molina was in the courtroom. Again, an objection was made and, again, it was overruled. Mr. Dow answered that he was in the back of the courtroom. (RP Pages 50 and 51). He testified that he had no doubts that the Defendant was the shooter. (RP Pages 51 and 52). Mr. Dow was then allowed to testify what Ms. Fisco told him about a gun, without a hearsay objection. (RP Page 52).

Later he testified that he got behind a Honda CRX when the shooting started. He heard a bullet hit the CRX and hit the windows behind him. The bullets were close. He could not speculate on whether he would have been hit, had he been standing up. (RP Pages 55 and 56). He saw the window rolled down halfway and the gun came out and shots were fired. (RP Page 56).

The witness testified that it was dark, but there were street lights and lights from the bar. Then he was asked to view the video. (RP Page 57). He described what he saw on the video and was then asked about his gang

affiliations. He testified he had none. He also testified that he wears bandanas and sometimes wears blue, sometimes red. (RP Page 58). He once again identified the driver as "Pollo" but did not know of gang ties. He was not aware of him being at the Shell Station, until as he left the building. They did not say anything to him. (RP Pages 59 and 60). Mr. Dow was then asked questions about the gangs, to which he replied that he did not know. (RP Page 59). He was then asked about his criminal history. He admitted to having a Robbery Second from 2001 and a Theft from 2007. He also testified that the Prosecutor cut a deal with him to drop a Possession of Firearm charge against a friend of his. He was allowed to explain why that was important to him. The reason given was his fear of the LVL. No objection was made, on any grounds. (RP Pages 61 and 62). He was allowed to speculate on whether he would face retaliation without objection. He said it was going to happen but that he was not afraid. (RP Page 63).

He was then shown the montage. He testified that he saw it a couple of weeks afterwards, because he had taken off. In it, he identified "Pollo" and testified that he was shown the montage by Officer Ramirez. (RP Pages 64 through 66). He did not recall the montage very well. He did not recall picking a person out of that montage. (RP Pages 66 and 67).

Shortly thereafter, the cross examination began. The defense counsel tried to get into specifics about the crimes the witness committed. Objections were sustained. (RP Pages 67 and 68). Mr. Dow acknowledged that the

police asked him to remain and that he did not. (RP Page 68). He went out the back door with Ms. Fisco and Ms. Norskog. (RP Page 69). He denied telling Officer Ramirez that "Sneaky" had shot at him or that "Sneaky was Juan Mejia." (RP Page 71). He did not recall failing to pick anyone out of the second montage. (RP Page 72). Mr. Dow acknowledged that he did contact the people in the vehicle, prior to going in the store, after reviewing the video and saw them go to the trunk. (RP Page 73). Mr. Dow was questioned about whether he told the police, in a taped statement, that he saw them pull into the store, as he was coming out. (RP Page 77). He further testified that he only saw the arm of the shooter being put out the window. (RP Page 78). He said the shooter had a slender face and was skinny. He did not recall whether the shooter was wearing a bandana or not. Even so, according to Mr. Dow, he was sure that the Defendant was the shooter. (RP Pages 78 and 79).

On redirect examination, Mr. Dow was shown Exhibit Number 10, and asked to read the first three paragraphs. He was then asked if he remembered the incident. An objection to the question already being asked and answered was overruled. There was no voir dire of the witness as to whether his recollection was refreshed or if he was simply repeating the statement. After that, Mr. Dow could "remember" picking out Mr. Soli-Diaz in the montage. (RP Pages 79 and 81). He was then asked a series of questions concerning LVL, including his issues with them, fights with other

LVL members, intimidating people with guns, etc. There was no objection made by defense counsel, either of exceeding the scope or character of third parties. (RP Pages 81 through 83). He was asked to give Mr. Josh Rhodes street name, which was Spooker, and, even though that exceeded the scope of the cross-examination, no objection was made. (RP Page 83). After re-cross examination, the deputy prosecutor asked some more questions, about his friend going to be being by LVL members. (RP Page 87). No objection was made.

After that, there was more re-cross. (RP Page 88). Mr. Dow was questioned about initially identifying the shooter as Juan Mejia, known as "Sneaky." Mr. Dow denied ever saying that. (RP Pages 88 and 89).

The next witness to testify was Ms. Shenna Fisco. (RP Page 89). She testified that she was at the Tower Tavern on the evening of August 10, 2007. When she got there, she ordered a beer and then conversed with Mr. Dow and Ms. Norskog. (RP Page 92). She further testified that Mr. Dow asked her to take him to go get cigarettes. They went to the Shell station on Tower to purchase them. (RP Page 93). When they arrived at the Shell station, Mr. Dow spoke to people in a car that had pulled up after they had arrived. (RP Page 94). She saw that Mr. Dow appeared worried and that the people were getting something out of the trunk. She then left as fast as she could to get back to the Tower Tavern. (RP Page 95). She then identified the Defendant as the shooter and said she was confident of her identification. She later

testified that she did not immediately identify the Defendant when she spoke to the police because she was scared and confused. (RP Pages 95 and 97). She then testified that she ran into the bar, trying to grab her friend as she did so. She was at the door, when she heard the shots. (RP Pages 97 and 98). She was then shown Exhibit Number 8, and asked about her identification, when she spoke to Detective Buster. She testified that she thought two of the people might be the shooter. She then, again explained that she was confused and scared. (RP Pages 98 and 99). She identified the person in photo number two as the shooter but also signed her name by photo number 5. When asked about that she said she really did not identify the photos as she should have and was scared. She testified about how she did not want to be killed for saying something.

Volume II

The next day, Ms. Fisco's direct examination continued. She, again discussed how she grabbed at her friend to get her back into the bar. She heard the shots before she could make it all the way inside the bar and saw a white car with ". . . someone sitting at the window with a gun shooting." The bullets came close. (RP Page 3). The questioning then backed up back to the Shell station. She testified that she really could not tell what the people were doing at the back of the white car. She did not know them. (RP Page 4). Later, she was asked questions about the video while he had her watch it. (RP Page 6). During that discussion of the video, she was asked who was the

person wearing the white t-shirt getting out of the white car. She answered that she did not know. The Prosecutor immediately asked if that was Mr. Solis-Diaz and she answered yes. (RP Page 7). After that, she was asked several leading questions by the Prosecutor, with no objections. Ms. Fisco did testify that it was fairly dark. (RP Page 8). She testified that she would never forget the Defendant's eyes. (RP Page 9).

Shortly after that, her cross-examination occurred. (RP Page 9). She described her view of the white car as a handful of glances and agreed it was out of the corner of her eye. (RP Page 11). She got a good look but it was fast. She testified that the shooter's head was out of the car. (RP Pages 12 through 14). She denied telling Ms. Paula Howell, a private investigator, that she did not get a good look at the shooter. (RP Page 14). She admitted taking off the night of the shooting, even though the police wanted to talk to her. She did contact the police to get her I.D. back. (RP Pages 15 and 16). She also admitted that she did not know who the shooter was at the time. (RP Page 22). There was another montage shown to on a subsequent date. She again picked two people as the shooter. Now, she was claiming that she was certain about the shooter's identity. She had picked a total of four people as the shooter. (RP Pages 22 through 24). She admitted that she became sure of her identification, after she was advised that the Defendant was arrested as the shooter. (RP Page 25).

The witness was then cross-examined about her taped statement. (RP

Page 26). She admitted telling Detective Buster that she did not get a good look at the driver. (RP Page 28). During the taped statement she told Detective Buster that the person depicted in photo number 6 was the shooter but was not 100% sure. She also picked photo number two. (RP Pages 29 and 30). She denied, in her statement that she would decline to identify the shooter, out of fear. (RP Pages 34 and 35).

The questioning then went back to her taped statement and the fact the prosecutor gave her a copy of it to take with her to review. (RP Pages 38 and 39). She also testified that she ducked and screamed when the shooting started. (RP Page 40).

On redirect, she testified that she was told that she was going to be cross-examined about the photo-montages. She explained how she was confused and scared. She clarified that she never told Detective Buster that she was 100% sure, only that she was "pretty sure." (RP Pages 41 and 42). She testified that the other people she picked as the shooter looked similar to the Defendant. (RP Page 43). She did not see the car, when the shooting first started. ((RP Page 47). She did say she got a good look at the shooter's face. She also testified that she did not have an opportunity to review her statement, when she spoke to the defense private investigator. (RP Page 48). The Prosecutor asked the witness whether Ms. Howell, the private investigator cared whether she had access to the statement. An objection was made, given the lack of knowledge the witness would have had. The

objection was overruled. (RP Pages 49 and 50). She told Ms. Howell that she could identify the shooter and was 100% positive about his identify. (RP Page 50).

After Ms. Fisco was done testifying, Ms. Cassandra Norskog was called to testify. (RP Page 57). She testified that she went to the Tower Tavern. She went with Jessie Dow. She is a friend of his, but not romantically in any relationship with him. (RP Page 58). When they returned from the Shell Station, they quickly got out and yelled for everyone to "watch out!" There were several people there. (RP Pages 60 and 61). She testified that she saw the car that was following and watched them shoot. Bullets were ricocheting off the ground. She was about four to five feet from the door of the tavern. (RP Page 62). She did not get down, but ran into the bar. (RP Page 64). The bullets came close to her, less than a foot. She did not see a gun. (RP Pages 64 and 65). She testified that she did not see the shooter. (RP Page 66). She was shown the video from the Shell Station and identified the two cars involved, Ms. Fisco's and the white car the shots were fired from. (RP Page 67).

On cross examination, she testified that she left the bar and did not stay, as requested by the police. She left with the person she was on the phone with, which contradicts claims she left with Mr. Dow and Ms. Fisco. (RP Page 69). She said the white car's window was only down four or five inches. She did not see a hand or body outside the window. (RP Page 71).

She admitted that she told Detective Buster that the shooter's car was dark in color, but now described it as a white car. (RP Page 74 and 75). On re-direct, she was asked about the discrepancy about the cars. Her response was that everything happened quickly and the video reminded her. (RP Page 75 and 76). She did not see where the car was, when the shooting started. (RP Pages 76 and 77).

The next witness called was Mr. Douglas Hoheisel. (RP Page 79). He was asked to describe the shooting. (RP Pages 80 through 85). He was asked if got a good look at the shooter. He responded that it was dark. He also went down on a knee behind a couple of cars. (RP Pages 82 and 83). He did notice a white bandana and thought he noticed the shooter wearing a white t-shirt. (RP Pages 84). It happened quickly and he did not have an opportunity to observe a physical description. He did notice the shooter was younger, maybe mid-twenties. He was unable to recognize any of the individuals in the video. (RP Pages 84 and 85). On cross examination, he reiterated that the light was "Low, very low." ((RP Page 91). He further testified that the shooter was leaning out the window of the car two of three feet. He still could not give any specific details about his identity. (RP Page 92). The witness was asked a leading question about adrenalin rush, with no objection. (RP Page 95).

The next witness called was Jonathan Freeman. He was at the Tower Tavern. (RP Page 96). He had four or five beers, but was not intoxicated.

(RP Pages 97 and 98). He was standing at the door of the tavern and heard "popping" sounds. He dove inside the tavern. (RP Page 99). He saw a blur of white, when asked to describe the car. (RP Page 100). On cross-examination, he testified that the car was going too fast to even see if someone was leaning out of the car. (RP Page 102).

The next witness called was Mr. Seth Devlin. (RP Page 104). He testified that he was at the Tower Tavern and drove the Honda CRX. (RP Page 105). He only saw people diving to the ground, when he heard the shots being fired. He was in the tavern at the time. (RP Page 113).

The next witness called was Mr. Marcus Volk. (RP Page 114). He was at the Hub Tavern, which is next door to the Tower Tavern. He had half a dozen whiskeys, but claims to have not been intoxicated. (RP Page 115). On cross-examination, he admitted that he could not recognize anyone in the car. (RP Page 120).

The next witness called was Terry Lowther. (RP Page 120). He testified that he had a description of the car and looked for it at building, he patrols for his employment. He obtained the license plate number of 605 PDG. (RP Pages 121 through 124). He connected the owner of the car, Anna Urarov with Juan Velasquez. (RP Page 125).

After the recess, the Prosecutor brought up an issue with the Court concerning a deal, one of the State's witnesses received. (RP Page 126). The Defense Counsel wanted to examine the witness, Mr. Thomas, about an

agreement he made in a separate case and whether his testimony in this case was anyway connected. The Prosecutor had maintained it was not. The Court refused to allow inquiry into that, even as an offer of proof, saying he would have to presume the Prosecutor was not telling the truth. (RP Pages 126 through 129). After that, Mr. Lowther's examination and cross-examination were concluded. (RP Pages 129 through 133).

Mr. Sean Thomas testified next. (RP Page 133). He was at the Tower Tavern, on the sidewalk, when the shooting occurred. (RP Pages 134 and 135). He saw Mr. Dow come up and warn him about the impending situation. He and Mr. Dow took their shirts off so that they could ". . . prevail." Then the shooting occurred. (RP Page 136). He did not know the Defendant. (RP Page 144). He was asked a leading question about there being six or seven shots, without objection. (RP Page 139). He ". . . switched my tactic. . ." to quote him, and went out into the street and threw his hat at the car. (RP Page 140). He was then asked questions about his knowledge of the LVL gang. He testified that it was a Hispanic gang. He named a Mr. Josh Rhodes as a member. He was asked about Mr. Rhodes and Mr. Dow having fights. He was asked whether this was a retaliation act. He started to mention what Mr. Dow had told him, but was stopped by an objection. (RP Pages 141 through 145). He was asked whether he had ever been shot at by LVL members, which was objected to, but not before he answered that he had, once before. (RP Page 145).

On cross-examination, he stated that "Junior" was not the Defendant (RP Page 148). He was also asked a question about the fight with "Spooker" and Mr. Dow and the witness brought in the hearsay statement, that was previously excluded. (RP Page 150). He told Detective Buster that he thought the shooter was the one known as "Sneaky" who was identified to be Juan Mejia. (RP Page 151). He was not sure that it was Mr. Mejia. (RP Page 154). The witness admitted to pleading guilty to a robbery. (RP Pages 154 and 155).

Sgt. Fitzgerald testified next. (RP Page 155). He testified in part to viewing the security video. He had seen it ten to twelve times. He identified the shooter as the Defendant, Guadalupe Solis-Diaz and that his gang names were Junior and Indio. (RP Pages 157 and 158). He testified that the view at on the Shell Station's viewer was better with a smaller screen. (RP Page 159). He then spoke about his research into the LVL, also known as the Little Valley Loquitos. He spoke about an ad hoc organization that keeps intelligence on the gangs. He spoke about the Defendant's names, including what his probation officer knew. There was no objection to hearsay. (RP Pages 159 through 162). He was also questioned about other gang members, again with no hearsay objection. (RP Pages 162 and 163). He then spoke about Chicano or Mexican gangs. LVL was affiliated with a southern gang. They wore blue and write their graffiti in blue or black. (RP Page 163 and 164). He was asked about Mr. Dow's affiliation with any gangs and answered

that they did not know of any gangs Mr. Dow was involved in, but they had heard "rumors" that he was. The witness testified that Josh Rhodes used to belong to another gang but now belongs to LVL. (RP Pages 164 through 166).

The witness also testified about how wearing blue could be fatal, if you were not an LVL member. On people with Mexican descent could be LVL members. (RP Page 166). After that, the video was shown and it was pointed out that Mr. Dow had blue bandana on. The witness then speculated on whether an LVL member would react to a white person wearing a blue bandana. (RP Pages 166 and 167). At no time during this dissertation, did the Defense Counsel object for hearsay, character, or speculation. The evidence was never challenged. (RP Pages 155 through 167). He then spoke of the code of conduct gangs apply to their members. (RP Page 168). Again, no objection was made.

The witness then spoke of the Defendant's gang history and then brought up hearsay by Josh Rhodes about his gang ties. (RP Pages 168 and 169). After a recess, the witness discussed the significance of white t-shirts. (RP Page 172). He was then asked how many times the Defendant was seen with a white t-shirt. There was no objection. (RP Pages 172 and 173). He was asked and answered a question about whether LVL people ever carry firearms. There was no objection. He was asked whether or not LVL members are instructed to change their appearance for court. An objection

was made on relevance, which was overruled. The witness testified that all gangs have their members change for court. (RP Pages 174 and 175).

On cross-examination, the witness was asked to go through the criteria to identify someone as a gang member (RP Pages 184 and 185). The witness was later asked, by Defense Counsel, about his moniker of Little Chongo. The Defense elicited information that the Defendant's mentor was Chongo and was then asked if the witness had ever seen the Defendant with his mentor. The answer was "Yes." The Defense Counsel also elicited hearsay statements of the Defendant's probation counselor. (RP Pages 189 and 191).

Volume III

On re-direct examination, the Detective Fitzgerald was asked about what information he had about the Defendant's gang involvement and when the witness started going into what he had heard, an objection was finally made and sustained. (RP Page 3). The witness was then asked about his gang identification and was allowed to speculate about whether he had ever had a street name, in the gang. There was no objection. (RP Pages 3 and 4). The witness was asked about where in the gang hierarchy Josh Rhodes was and allowed to testify that he was higher up, with no objection as to hearsay or no personal knowledge. (RP Page 6). Mr. Solis-Diaz is a "soldier" or "worker bee." His job would be to carry out the leader's instructions. (RP Pages 6 and 7). The witness was allowed to testify about the generalities of

gangs with no objection ever being made. (RP Pages 5 through 9).

After Detective Fitzgerald finished testifying, Sergeant David Ross, of the Centralia Police Department took the stand. (RP Page 14). He discussed the arrest of the Defendant. (RP Pages 14 through 19). During cross-examination, the witness testified that he was not 100% sure what the Defendant was wearing when he was arrested. (RP Page 21).

After Sgt. Ross was done testifying, Officer Mary Humphrey took the stand. (RP Page 25). She testified that she had viewed the video at the Shell Station. She did not know the names of the driver of the white car and the passenger but recognized them. She did identify the Defendant. (RP Page 26 through 28). She then discussed the Defendant's gang membership and activities. (RP page 28). She also testified that during search of the Defendant's house, she found nothing of evidentiary value. (RP Page 29). During her testimony, she was shown the video and reiterated that she recognized the Defendant. (RP Pages 29 and 30). Just at the beginning of cross examination, the witness was excused to retrieve some photos. (RP Page 31).

When Officer Humphrey re-took the stand, she was asked questions about a photo sheet of suspected LVL members. (RP Page 74). She had previous contact with him but could not remember specifics. (RP Page 75). On redirect examination, she referred to the information sheet as "Little Thugs on the Prairie." (RP Page 78). There was no objection.

Officer Rubin Ramirez was called to testify. (RP Page 32). He testified as to hearing the gunshots and going to the Tower Tavern. He also discussed his securing the scene. (RP Pages 32 and 33). He then went to look for the vehicle, but was unsuccessful. (RP Page 34). He further testified that he contacted Jesse Dow and showed him a photo montage. Mr. Dow was unable to pick out anyone as the shooter, on August 13, 2007. (RP Pages 40 and 41). Mr. Dow had given the name of Juan Mejia as the shooter. (RP Page 41). On cross-examination, Officer Ramirez testified that he was initially told there were three people in the car. (RP Page 64). He further testified that from the forensic evidence, i.e. shell casings, etc. the shots were fired of rapidly. (RP Page 66). The witness also testified that during his conversation with Mr. Dow, he identified the driver and Mr. Mejia as being at the Shell. (RP Pages 67 through 69). After Officer Ramirez was through testifying, Officer Humphrey re-took the stand. (RP Page 73).

Detective Buster re-took the stand after Officer Humphrey finished her testimony. (RP Page 79). He was asked questions about Mr. Thomas and Mr. Volk being under the influence. (RP Pages 82 and 83). An objection was made to playing the taped statement of the Defendant and the court initially did not make a ruling. (RP Pages 95 and 96).

Prior to that, Detective Buster stepped down, to allow Officer Valerie Peters to testify. The crux of her testimony, was that Juan Mejia was on EHM and was accounted for, in Thurston County, on the night of the

shooting. There were no tamper alerts. (RP Pages 97 through 103).

Detective Buster resumed the stand and discussed the Shell Station. He could tell right away that the passenger was not Juan Mejia. (RP Pages 107 and 108). The Detective testified about Mr. Mejia denying being the shooter, with no objection. (RP Pages 115). He also brought up hearsay of the Defendant's PO officer with no hearsay objection. (RP Page 117 through 119). He also testified how Mr. Dow identified the Defendant on the photo montage. (RP Pages 129 and 130).

Volume IV

Detective Buster resumed the stand and discussed his interview of the Defendant. (RP Page 2). He also discussed a still taken from the video, alleging that Mr. Solis-Diaz had a gun in his hand. (RP Page 9). According to Detective Buster, Mr. Solis-Diaz never denied being in the video or the shooter. (RP Pages 10 through 15). On cross-examination, the Detective Buster agreed that the Defendant denied that he shot at Mr. Dow. (RP Page 32). Shortly after that, the trial was recessed due to flooding. (RP Page 39).

Volume V

During the cross-examination, Detective Buster discussed the ruse they tried to use on the Defendant. A retired police sergeant, who was in plain clothes, would point out the Defendant and identify him as the shooter. Even still, the Defendant did not break down and confess. (RP Pages 4 through 7). The Defense Counsel then began to question about statements

made by Mr. Hoheisel to the Detective, but an objection based on hearsay was sustained. (RP Pages 11 and 12). Detective Buster also testified that Ms. Fisco identified photo number two in the photo montage and that person was Omar Barahas Diaz. He was never interviewed, because Detective Buster never considered him a suspect. (RP Pages 16 and 17). The person she picked out in photo number six was Bobby Medina. He, also was not interviewed. (RP Page 18). Ms. Fisco actually picked four people as the shooter. (RP Page 19). Detective Buster agreed that as soon as the Defendant was identified as the shooter, investigation stopped as far as other people were concerned. (RP Page 21).

The next person to testify, was Jennifer Helm. She was his probation officer. He was in on truancy matters before she was assigned to be his PO. There was no objection to bringing up his past truancy matters. (RP Pages 39 and 40). She brought up, without objection on relevance or ER 403, his being in Aggressive Replacement Training. (RP Page 42). She brought up hearsay of what one of the instructors told her about "LVL" being written inside his sunglasses, with no objection. (RP Page 43). She then discussed watching, at the police's request, the video. During that time, she was asked to state her knowledge about his gang affiliations, with no hearsay of personal knowledge objections. She identified Mr. Solis-Diaz as the passenger in the video. (RP Pages 43 through 46). The Defense Counsel also asked about the Defendant's legal troubles. (RP Pages 48 through 50). After Ms. Helm

testified, the State rested. (RP Page 57).

The Defense began its case by calling Stephanie Lopez. (RP Page 57). The crux of her testimony was that the Defendant was with her, most of the evening and morning of the shooting. (RP Pages 58 through 65). On cross-examination, the Prosecutor asked her to confirm that this movie watching with the Defendant was on a Saturday night, which would have been after the shooting. (RP Page 67).

After Ms. Lopez testified, the attorneys discussed the expected testimony of the defense expert witness, Mr. Applegood. (RP Page 69). The Prosecutor objected to any testimony of "heuristic reasoning." During an offer of proof, Defense Counsel advised the court that heuristic reasoning was the process where persons fill in the blanks on a computer image from information in their mind they already have. The defense offered to put the witness on the stand and make a formal offer of proof. (RP Pages 69 and 70). The Court questioned why that had not been done before. The defense pointed out that his contact information had been provided to the State. (RP Page 71). The Court suppressed that portion of the testimony for failure to disclose it earlier and there being no report. (RP Pages 71 and 73).

After that, the Defendant's mother testified. She also testified about an alibi and the fact the Defendant was home. (RP Pages 74 through 79). On cross-examination, she agreed that she was intoxicated. He kept drilling her until she admitted her testimony dealt with the evening of the 11th of August,

not the tenth. (RP Pages 79 through 85).

After Ms. Dan testified, Mr. Robert Applegood took the stand. (RP Page 87). He testified about the low resolution of the video and its lack of details. He made clear that the resolution does not increase with a smaller screen. (RP Pages 88 through 108). When Mr. Applegood was done testifying, Detective Buster resumed the stand. He reiterated that the shooting occurred in the early morning hours of August 11, 2007. (RP Pages 114 and 115). After that, the evidentiary portion of the trial came to an end. (RP Page 115). The Court read the instructions to the jury. (RP Page 117) and (CP Pages 48 through 84). There were no limiting instructions on the prior bad act evidence of the Defendant. After closing arguments, the jury deliberated and convicted the Defendant of all counts. (RP Pages 170 through 173).

Sentencing

The Defendant was sentenced to 1,111 months in prison. (RP Pages 1 through 9).

D. SUMMARY OF ARGUMENT

The Defendant was denied a fair trial for several reasons. His expert was improperly limited in his testimony. There was extensive evidence of gang affiliation. Most of this evidence was in the form of “word on the street” and should not have been admitted. Neither should speculation about two possible motives. Evidence of prior bad acts, including Aggressive

Replacement Training, was introduced without any kind of limiting instruction. Additionally, the Defense Counsel committed numerous errors, to the extent that Mr. Solis Diaz was denied a fair trial.

E. ARGUMENT

I.

THE TRIAL COURT ERRED IN SUPPRESSING THE EVIDENCE OF MR. ROBERT APPLEWOOD'S TESTIMONY ON HEURISTIC REASONING, WHEN SUPPRESSION IS NOT AN ALLOWED REMEDY FOR DISCOVERY VIOLATIONS, THE WITNESS WAS PREVIOUSLY DISCLOSED TO THE PROSECUTION, AND SUPPRESSION OF THE EVIDENCE DEPRIVED THE DEFENDANT OF NEEDED INFORMATION TO CHALLENGE THE CRUX OF THE STATE'S CASE, THE VIDEO.

1. The trial court lacked the authority to suppress evidence for discovery violations, even assuming that Defense Counsel failed to comply with discovery. "Suppression of evidence is not one of the sanctions available for failure to comply with the discovery rules. CrR 4.7(h)(7); State v. Lewis, 19 Wn. App. 35, 47-48, 573 P.2d 1347 (1978); State v. Stamm, 16 Wn. App. 603, 610, 559 P.2d 1 (1976)." State v. Thacker, 94 Wn.2d 276, 616 P.2d 655 (1980). In Thacker, supra, the Court pointed out that there were deadlines in the omnibus order that stated that suppression would be considered if the order was violated, but still reversed. That rule was relaxed, slightly, in State

v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061 (1998). In that case, the Defendant was putting forth a diminished capacity defense. He was ordered to submit to a psychiatric examination with someone of the State's choosing. The Defendant refused, violating numerous court orders to do so. The Court looked at four factors in deciding whether the extraordinary remedy of suppression should be allowed. Those factors were: "... (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith." State v. Hutchinson, supra, at 880. In that case, Mr. Hutchinson was on trial for his life, the least he could hope for was life without parole, if he was convicted. There would be a serious impact on his defense of diminished capacity defense by precluding it. However, the State would not have access to rebut the evidence, if Mr. Hutchinson was allowed to proceed, in violation of the court orders. Finally, Mr. Hutchinson's failure to comply with the court orders was deliberate. Under those exceptional circumstances, exclusion was allowed.

Unlike Hutchinson, supra, the showing cannot be made that this was one of those extraordinary situations where suppression was allowed. The court had the remedy of recessing the trial to allow the State to look into the evidence, the impact of the suppressed evidence severely harmed the defense, given that the video became the crux of the case. Every eye witness to the shooting had questionable identification. The video is the evidence that allowed the State to pull its case together. Without the court even allowing an offer of proof of the evidence of heuristic reasoning, based on the failure

to disclose, a major tool the defense had to challenge the video was taken from it. A recess of the trial while no doubt inconvenient, was possible, thus minimizing any unfair impact on the State, particularly when the State had notice of the witness and could have interviewed him. Finally, there is nothing in this record to even remotely suggest that the Defendant deliberately caused this. It is arguable whether the Defense Counsel failed to comply with discovery, at all. The witness had been disclosed, just not all the details of the testimony. Consequently, the trial court erred in suppressing this evidence.

II.

THE TRIAL COURT ERRED IN ALLOWING ANY KIND OF EXAMINATION OF MR. THOMAS, CONCERNING HIS PLEA BARGAIN, GIVEN THAT MR. THOMAS COULD VERY WELL HAVE UNDERSTOOD THAT HIS PERFORMANCE IN MR. SOLIS-DIAZ'S TRIAL WOULD IMPACT HIS PLEA BARGAIN, THUS AFFECTING HIS CREDIBILITY.

2. The trial court improperly prohibited cross examination of Mr. Thomas about his pleas bargain, when Mr. Thomas could very well have believed that his performance in this trial was part of the deal, regardless of whether the Prosecutor intended that belief or not. The State had the obligation to disclose any plea deals with a witness. State v. Soh, 115 Wn. App. 290, 62 P.3d 900 (2003). In that case, the Court found that the State committed prosecutorial misconduct by not disclosing the full extent of an offer of immunity. However, the Defense Counsel testified that she had never communicated that offer to her client. Because the witness was

unaware of the deal, it could not have influenced his testimony and therefore was irrelevant. In State v. Portnoy, 43 Wn. App. 455, 718 P.2d 805 (1986), the Court of Appeals, Division II, citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), made clear that the defense is allowed to cross-examine a witness about any offers in exchange for testifying. The error is one of constitutional magnitude. In this case, the Court found it to be harmless, beyond a reasonable doubt, because Mr. Portnoy admitted he instructed the witness to keep the firearm trained on one of the people present.

In applying this to the case at bar, there was no question that there was some plea bargain offered to Mr. Thomas. The Court shielded Mr. Thomas from being examined on the plea bargain, because the Deputy Prosecuting Attorney told the Court that the plea bargain dealt with another case. The problem with that, is simply the fact the Court accepted the claim at face value. Cross examination is the key method used to expose the truth. Even if the Deputy is completely truthful, and this writer is not suggesting he is being dishonest, there was always the possibility that the witness *thought* his plea bargain, was due in part to his performance in this case. We will never know, because the Trial Court closed down that inquiry. Accordingly, the Trial Court violated the Defendant's due process rights and the matter ought to be reversed.

III.

THE TRIAL COURT ERRED IN OVERRULING OBJECTIONS CONCERNING WHETHER CERTAIN PEOPLE WERE IN THE COURTROOM WHEN SUCH EVIDENCE WAS AN ATTEMPT TO

CONVICT BY GUILT OF ASSOCIATION AND CHARACTER.

3. The "evidence" of the alleged gang members presence in courtroom was relevant, when there was no attempt to make a showing that they were connected to the shooting or any purpose of their being in the courtroom and no attempt was made to show that the Defendant had anything to do with their being there. Under ER 402, evidence that is not relevant, is not admissible. In State v. Acosta, 123 Wn. App. 424, 98 P.3d 503 (2004), the Court of Appeals upheld the trial court ruling to exclude evidence, by the defense, that Mr. Acosta was sexually abused. He was using a diminished capacity defense, but his expert did not utilize the prior sexual abuse as a reason to reach his conclusion. Therefore, the evidence was irrelevant. See also State v. Greathouse, 113 Wn. App. 889, 56 P.3d 569 (2002).

In applying this to the case at bar, There was absolutely no showing that the Defendant had anything to do with the persons being present. There was nothing more developed other than they were present. They just as easily could have been there to see if the Defendant was going to finger anybody about the shooting, trying to find out what was known about the LVL, as opposed it making it more probable than not that the Defendant was the shooter. For those reasons, the evidence was not relevant and it should not have been admitted. Even if there was some minimal relevance, issues of unfair prejudice to the Defendant need to be addressed.

4. The "evidence" of the alleged gang members presence in courtroom

violated ER 403 when the evidence went to character and there was no attempt made to show why those people were there. ER 403 prohibits the introduction of evidence where the probative value is substantially outweighed by the unfair prejudice. See also State v. Yates, 161 Wn.2d 714, 168 P.3d 359 (2007). In that case, the court upheld the admission of evidence of an expert witness on crime scene investigations, autopsy photos, and in life photos of the Spokane victims. The probative value of establishing a common scheme or plan and proving an aggravating circumstance outweighed any potential of unfair prejudice.

In applying this to the case at bar, there was never any attempt to ascertain why the individuals were in the courtroom. It was simply part of a scheme, by the State, to convict with guilt by association. There is nothing to show that the Defendant had anything to do with the alleged gang. The trial court erred in denying the motion in limine to suppress the gang membership evidence, when there was no offer of proof of what that evidence would be and no balancing of that evidence under ER 403 or ER 404(b). For all we know, they may have simply wanted to find out what law enforcement knew about them, rather than showing solidarity with the Defendant or that he was the shooter. Even if the evidence was relevant, the relevance would have been minimal and vastly outweighed by the unfair prejudice.

IV.

THE TRIAL COURT ERRED IN DENYING THE MOTION IN

LIMINE TO SUPPRESS THE GANG MEMBERSHIP EVIDENCE, WHEN THERE WAS NO OFFER OF PROOF OF WHAT THAT EVIDENCE WOULD BE AND NO BALANCING OF THAT EVIDENCE UNDER ER 403 OR ER 404(B).

5. An objection should have been made to the introduction of gang evidence, when there was no weighing of the evidence under ER 404(b) or ER 402, the evidence involved hearsay and speculation. Before evidence of gang affiliation should be admitted, there should have been a balancing of the evidence under ER 403 and ER 404(b). See State v. Ra, 142 Wn. App. 868, 175 P.3d 609 (2008). In that case, the State had hoped to have admitted evidence of gang ties. After a colloquy, the evidence was reluctantly suppressed. Despite that, the Prosecutor deliberately brought the evidence up, anyway. The Court of Appeals found that the deliberate nature of the State's actions allowed the error to be raised. Given that evidence violated ER 403 and ER 404(b), the conviction was reversed. The Court stated that ". . . Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conforming with it. ER 404(b)." State v. Ra, supra, at 880 and 881. That is not to say that such evidence is never allowed. In State v. Boot, 89 Wn. App. 780, 950 P.2d 964 (1998), the court allowed such evidence. In that case, there was considerable evidence of the Defendant's involvement with in a gang, escalating crimes, being called a "baby" by other gang members, and premeditation in Ms.

Reese's murder. This went to his motive. See also State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050 (1995). In Campbell, supra, the trial court "... excluded evidence of Campbell's December 1988 robbery conviction; of police investigations connecting Campbell to a stabbing incident and to a shooting incident; expert opinion that the Mansfield Gangster Crips are particularly adept at selling drugs and deal drugs in cities other than Los Angeles; and expert opinion about the meaning of dark clothing and that gang members ordinarily carry and use guns." State v. Campbell, supra, at 1054. In all of these cases, regardless of whether the evidence was admitted or denied, the courts did a balancing of the probative value and the unfair prejudice as well as looking at the limited purposes under 404(b) that allows the evidence to be admitted. In Sarausad v. State, 109 Wn. App. 824, 39 P.3d 308 (2001), the trial court allowed gang evidence in, but that was after there was actual evidence of what transpired in the vehicles and why, from co-defendant's that testified. There was a lot more than mere speculation.

Unlike the cited cases, there was no balancing of the pro-offered evidence under ER 403 or ER 404(b), in this case. There was no limitation what evidence could be presented and what evidence would be suppressed. There was no discussion of any limiting instructions on the evidence. Unlike the evidence in the cases cited, where the evidence was allowed, the vast majority of the evidence in this case was hearsay, rumor and speculation. There were not one but two possible motives put forward for the shooting,

one being revenge for an altercation with Mr. Dow and the second being the temerity of Mr. Dow wearing a blue bandana. This evidence was extremely and unfairly prejudicial and it outweighed any probative value. For those reasons, the trial court erred in denying the motion in limine.

V.

THE DEFENDANT'S DUE PROCESS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED WHEN THE DEFENSE COUNSEL FAILED TO OBJECT TO NUMEROUS STATEMENTS CONTAINING RUMOR AND HEARSAY ABOUT THE DEFENDANT'S GANG INVOLVEMENT, SPECULATION ABOUT MOTIVE FOR THE SHOOTINGS, AND FAILURE TO PIN DOWN THE DEFENDANT'S ALIBI AND ALLOWING HIS PAST CRIMINAL RECORD INTO EVIDENCE WITH NO CHALLENGE.

The defendant was entitled, under the Sixth Amendment of the United States Constitution, to have effective assistance of counsel. See State v. Shilling, 77 Wn. App. 166, 889 P.2d 948 (1995), review denied 127 Wn.2d 1006, 898 P.2d 308. See also State v. Sherwood, 71 Wn. App. 481, 860 P.2d 407 (1993). The Court described the two part test which was; whether defense counsel's performance was deficient and whether the defendant was prejudiced. In that case, the lawyer interviewed one of the prospective defense witnesses and did not call him. In State v. Howland, 66 Wn. App. 586, 832 P.2d 1339 (1992), the court looked at entire record to determine

ineffective assistance of counsel. Although, admittedly, defendants bear a heavy burden in prevailing on an ineffective assistance of counsel claim, it is not an impossible burden.

In Harris By and Through Ramseyer v. Wood, 64 F.3d 1432 (1995), the Ninth Circuit found ineffective assistance of counsel. That case involved a Pierce County Aggravated Murder charge, where Mr. Harris had been sentenced to death. The court found in that case that the trial attorney was deficient in allowing his client to give a detailed statement to police without any promise for a reduction or even a promise of immunity. Mr. Anderson, the trial counsel, consulted with Mr. Harris for less than two hours. He only interviewed three witnesses out of thirty-two and did not request the assistance of an investigator to help interview witnesses. He made no attempt to reach any of the proposed defense witnesses.

He made no attempt to look into the defendant's mental situation, which included the capacity to commit the crime and stand trial. Mr. Anderson failed to object to evidence concerning Mr. Harris's prior convictions and a list of those he intended to kill. He made no attempt to rehabilitate the defendant's credibility when he called him to the stand. Finally, the attorney tore down whatever credibility his client had, during closing argument. Under these circumstances, the court found that Mr. Harris did not have effective assistance of counsel and reversed the conviction.

Failure to object to evidence, or failing to raise appropriate motions

may result in the courts finding that there was ineffective assistance of counsel. See State v. Graham, 78 Wn. App. 44, 896 P.2d 704 (1995). In that case the court did deny claims that there was ineffective assistance of counsel, for failing to object, because there was an insufficient showing as to the merit of the legal claims and because the evidence against the defendant was "airtight".

In State v. Walton, 76 Wn. App. 364, 884 P.2d 1348 (1994), the second prong of the test was satisfied by showing A reasonable probability that ineffective assistance of counsel prejudiced the defendant. See also, State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004). In that case, the defense counsel proposed defective instructions on self defense, so that a jury would have to find that the Defendant was threatened with grievous bodily harm, before he could be acquitted on a self defense theory. See also State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2005), where the Court of Appeals, Division I, found ineffective assistance of counsel for failing to propose a lessor included instruction. In State v. BJS, 140 Wn. App. 91, 169 P.3d 34 (2007), the court found ineffective assistance of counsel for failing to correctly advise a client of his options in a juvenile case. In deciding whether an attorney's performance is deficient, an examination of the errors allowed need to be made.

As discussed above, the allowing of the gang evidence, in the form that it was admitted was error. Further inquiry needs to be made as to the

scope and the manner the evidence was admitted. Hearsay is not admissible, except as provided in the rules of evidence, or statute. Because this is a criminal case, constitutional prohibitions to out of court statements exist as well. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007). Additionally, courts should not allow admission of speculative evidence. State v. Kilgore, 107 Wn. App. 160, 26 P.3d 308 (2001). As also discussed above, evidence of other bad acts are generally not admissible. ERE 403 and ER 404(b). That includes past criminal records. If they are to be admitted, a court should consider a limiting instruction. See State v. Yates, supra.

In applying this to the case at bar, the Defense Counsel failed to object to numerous hearsay statements from numerous witnesses, concerning what people have “heard” about the Defendant’s gang involvement and about the conflict between Mr. Rhodes and Mr. Dow. There were no objections made about allowing witnesses to speculate about the motive for the shooting. Two motives were given, neither supported by any evidence. The evidence of Mr. Diaz doing a “worker bee’s” job was pure speculation, yet it was not objected to. There was no objection to Mr. Solis-Diaz being in Aggressive Replacement Training or his minor in possession, which clearly goes to his character and his prior acts. There was no attempt to rehabilitate the defense witnesses when the Deputy Prosecutor clearly got them to state that the night

they were testifying about was the night after the shooting. As a result of this, the State's tactics were vindicated by putting the LVL gang on trial and having the Defendant taking the fall. The risk for prejudice was extreme; this was a serious incident and all communities have an interest in stamping out gangs. When this hearsay and speculation is admitted, without challenge, it will be very difficult for a jury to look past that and decide the issues on the actual evidence. This is particularly in light of the fact that no limiting instructions were given or, apparently, proposed.

He also failed to call his private investigator as a witness, even though it appeared from the record that some of the witnesses statements could have been impeached. Assuming *arguendo*, that Defense Counsel did violate discovery rules and the court had the right to suppress the evidence, this error on the part of the Defense negatively impacted the defense of Mr. Solis-Diaz. For all of these reasons, the Defense Counsel's performance was deficient and the mistakes made effected the outcome of the trial. By this argument, it is not this writer's intent to label Counsel as a deficient lawyer; he is an excellent attorney, but it is clear that the record in this case supports that the Defendant did not receive an effective representation in this matter. Consequently, Mr. Solis-Diaz did not receive a fair trial.

F. CONCLUSION

Therefore, for the reasons given in this brief, the Court denied the Defendant a fair trial by suppressing the expert evidence of Mr. Applegood,

allowing gang evidence in based on speculation and word on the street, with no limiting instructions, and not allowing inquiry into a plea deal with Mr. Thomas. Additionally, the Defendant did not have effective assistance of counsel. Accordingly, the convictions should be reversed and the matter remanded for a new trial.

DATED This 21 Day of July, 2008.

RESPECTFULLY SUBMITTED,



George A. Steele #13749
Attorney for Defendant

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DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE APPEALS COURT OF THE STATE
OF WASHINGTON DIVISION II

STATE OF WASHINGTON)	No. 37120-1 II
Plaintiff)	CERTIFICATE OF SERVICE
vs.)	BY KATHLEEN R. SPEER
GUADALUPE SOLIS-DIAZ)	
Respondent)	

I, Kathleen R Speer, certify that at all times mentioned herein I was of legal age when and on July 22,2008, I served a copy of the **Brief of Appellant** of Guadalupe Solis-Diaz by presenting a copy in person to:

Deputy Prosecuting Attorney, Lori Smith
Prosecuting Attorney's Office
345 W. Main Street
Chehalis, WA. 98532

I certify under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 22nd day of July, 2008 at Shelton, Washington.



Kathleen R. Speer

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE APPEALS COURT OF THE STATE
OF WASHINGTON DIVISION II

STATE OF WASHINGTON,
Plaintiff,

GUADALUPE SOLIS-DIAZ,
Deceased

NO. 37120-1-II
AFFIDAVIT OF MAILING

I, Olene Steele, being first duly sworn, on oath, certify that at all times mentioned herein I was of legal age, and on July 22, 2008, I mailed a copy of the Brief Of Appellant by First Class Mail, with the proper postage affixed thereto to the following:

Guadalupe Solis-Diaz
C/O Green Hill School
375 SW 11th Street
Chehalis, WA.98532

I certify under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 22nd day of July 2008 at Shelton, Washington.


Olene Cheryl Steele

ORIGINAL

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