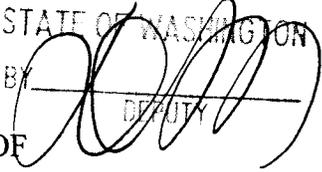


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
DEPUTY

No. 37259-II
IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent

v.

ABEL EDUARDO CONTRERAS
Appellant

REPLY BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 06-05904-4
The Honorable Beverly G. Grant, Presiding Judge

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A. REPLY ISSUES.

Issue No. 1.

Jennifer Klepach's taped statement to the police that was an undetermined conglomerate of half heard statements and information that she heard from other people at a party is not admissible under ER 801(d)(2).

Issue No. 2.

Gang affiliation testimony elicited by the State in violation of an agreed motion in limine unfairly prejudiced the defendant.

Issue No. 4.

The court erred in permitting the State to improperly bolster its witnesses' credibility.

B. STATEMENT OF THE CASE.

Appellant Abel Contreras adopts and incorporates the facts as put forth in his Opening Brief.

C. ARGUMENT

Issue No 1: Jennifer Klepach's Taped Statement To The Police That Was A Conglomerate Of Half Heard Statements And Information That She Heard From Other People At A Party Is Not Admissible Under ER 801(d)(2).

Ms. Klepach testified her memory was better at the time she testified before the jury because at the time she was interviewed by the police she had been out at a bar all night long celebrating her birthday. RP 1482. She also told the jury she had not believed anything the defendant had said about that night (RP 1486) and that she was not paying close attention (RP 1489, 1528), her children were a distraction because they

were running around the house (RP 1525) and other people were present. (RP 1525.) Furthermore, she testified the statements she made to the police were a conglomeration of things she may have heard from Appellant and others telling her what they thought he had said. RP 1525, 1528. She conceded there was a fair amount of confusion as to what Mr. Contreras may have said. RP 1525, 1527-1528.

Ms. Klepach was identified by the State as their most crucial witness, and had her thrown in jail over the holidays because she did not wish to testify. RP 1050. The State argued this evidence was not impeachment unless it was disavowed. RP 1498, 1504. Initially court agreed the testimony was only admissible as to her credibility (RP 1484, 1507) however, reversed its decision on the basis a witness must “disavow” the statement before it can be considered a prior inconsistent statement. RP 1514-15. The Pierce County Prosecuting attorneys argued that the jury should be able to use her prior unsworn inconsistent statements as substantive evidence because they were not “impeachment” but rather only conflicting statements. RP 1597. The Pierce County Prosecuting attorneys conceded the statements did not meet the requirements of ER 801(d)(1)(i), however, argued they should be considered as substantive evidence because she did not “disavow” the statement. RP 1598. The court ruled that because Ms. Klepach

acknowledged making those statements the jury would have to decide the credibility of those statements. RP 1603. Considering the uncertainty of the origin and accuracy of the statements Ms. Klepach gave to police officers, the fact that the trial court did not address or rule on whether the statements were statements of a party opponent or were admissible under ER 801(d)(2) is understandable and appropriate. Accordingly, the defense proposed limiting instructions were also appropriate and necessary. *State v. Sau*, 115 Wn. App. 29, 40-49, 60 P.3d 1234, 1239 - 1243 (Div. 2, 2003).

Issue No 2: Gang affiliation testimony elicited by the State in violation of an agreed motion in limine unfairly prejudiced the defendant and was the culmination of a trial based on fear mongering and innuendo.

The State's argument that the introduction of the forbidden gang association evidence was an isolated, harmless incident mischaracterizes the evidence and its prejudicial impact on Appellant Contreras' right to a fair trial. The improperly elicited gang evidence was culmination of a trial based on fear mongering and innuendo. As held by our State Supreme Court in *State v. Bryant*, 146 Wn.2d 90, 42 P.3d 1278 (2002) "Constitutional concerns relevant to this case focus on the integrity of the criminal justice system and fundamental fairness. "there is more at stake than just the liberty of the defendant. At stake is the honor of the government{,} public confidence in the fair administration of justice, and

the efficient administration of justice in a federal scheme of government.”

Citing *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972)

A prosecutor has a duty as an officer of the court to seek justice as opposed to merely obtaining a conviction. *State v. Huson*, 73 Wn.2d 660, 440 P.2d 192 (1968).

A prosecutor must always remember that he or she does not conduct a vendetta when trying any case, but serves as an officer of the court and of the state with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided. We recognize that the conduct of a trial is demanding and that if prosecutors are to perform as trial lawyers, a zeal and enthusiasm for their cause is necessary. However, each trial must be conducted within the rules and each prosecutor must labor within the restraints of the law to the end that defendants receive fair trials and justice is done. If prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means. Court must not permit this to happen, for when it does the freedom of each citizen is subject to peril and chance.

State v. Torres, 16 Wn.App. 254, 263, 554 P.2d 1069.

This court, as have other reviewing courts, has acknowledged the highly prejudicial nature of gang evidence. See, e.g., *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136, 1155-56 (2009)(gang evidence); *State v. Ra*, 144 Wn. App. 688, 700-01, 175 P.3d 609 (2009)(gang evidence); *State v. Scott*, 151 Wn. App. 520, 213 P.3d 71 (2009) (gang evidence); *State v. Boot*, 89 Wn. App. 780, 788-89, 950 P.2d 964 (1998); *State v.*

Campbell, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995). See *United States v. Singleterry*; 646 F.2d 1014, 1018 (5th Cir. 1981) (a defendant's guilt may not be proven by showing he associates with unsavory characters, and admission of evidence of bad conduct of relatives or friends is error because it is a highly prejudicial attempt to taint defendant's character through "guilt by association"). See also, *United States v. Roark*, 924 F.2d 1426 (8th Cir. 1991)(association with Hell's Angels Motorcycle Club not cured by instruction to jury to disregard, appellate court reversed and remanded for a new trial.)

Rather than condone the misconduct, Appellant Contreras urges the Court to heed the admonition of Judge Frank:

This court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we had declared in effect 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If the prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through a form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will

gladly pay the small price of a ritualistic verbal spanking. The practice of this court -- recalling the bitter tear shed by the Walrus as he ate the oysters -- breeds a deplorably cynical attitude towards the judiciary.

Judge Jerome Frank, dissenting in *U.S. v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2nd Cir. 1946).

In this case, the State agreed that gang evidence would be excluded. RP 361. However, by violating the trial court's order based on the State's stipulation to exclude gang evidence, the jury was able to speculate on the nature of the evidence and how it fit in with the State's voir dire questioning regarding criminal activity on the east side, Det. Krause's "specialty" and the questions posed to lay witnesses regarding their fear of harm or retaliation. RP 12/20/06 58 (court references State attempts during voir dire.); RP 1278 specialty gang crimes); RP 1398 – T. Luhtala; RP 1178 – Mayhall; RP 12/20/07 p. 42 – Kowalski).

Moreover, the trial court's ruling that, while improper, defendant was not prejudiced, reflects the court's confusion concerning evidence she precluded the defense from admitting and her bias that the jury had already "connected the dots" (RP 1565) as to Appellant's bad character. This is precisely the problem in this case requiring new trial. *See United States v. Singleterry*; 646 F.2d 1014, 1018 (5th Cir. 1981) (a defendant's guilt may not be proven by showing he associates with unsavory

characters, and admission of evidence of bad conduct of relatives or friends is error because it is a highly prejudicial attempt to taint defendant's character through "guilt by association"). *See also, United States v. Roark*, 924 F.2d 1426 (8th Cir. 1991)(Association with Hell's Angels Motorcycle Club not cured by instruction to jury to disregard, appellate court reversed and remanded for a new trial.)

A criminal defendant is entitled to be tried for the crime charged. Evidence of prior criminal misconduct, wrongs or bad acts is not admissible to prove character as a basis for suggesting that conduct on the particular occasion of the crime charged was in conformity with conduct on other occasions because of its great prejudice and minimal probative value. ER 404(b); *State v. Laureano*, 101 Wn.2d 745, 682 P.2d 889, 901 (1984). The logic of this is clear. The fact that a defendant has committed a crime or other bad acts does not mean that his character is so wedded to crime that he is likely to have committed the crime presently charged.

In this case, gang testimony was not only irrelevant and thus inadmissible, but was so highly prejudicial that no curative instruction could have overcome the impression left upon the jury. The trial court abused its discretion in denying the Appellant Contreras' motion to dismiss and/or for a new trial.

Issue № 4: The Court Improperly Allowed The State To Bolster Witness Testimony

A prosecutor has a duty to the public to act impartially and in the interest of justice. *State v. Stover*, 67 Wn.App. 228, 232, 834 P.2d 671 (1992), *review denied*, 120 Wn.2d 1025 (1993). Both the federal and state constitutions guarantee a defendant the right to trial by an “impartial jury.” U.S. Constitution, Sixth Amendment; Wa. Const. Art 1, Sec. 22 (amend. 10). Thus, under the constitutions, a defendant is entitled to a fair trial. “Fair trial certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office, information from its records, and the expression of his own belief of guilt in the scales against the accused.” *State v. Case*, 49 Wn.2d 66, 71, 298P.2d 500 (1956)

A criminal defendant’s right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury’s verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)(“Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial.”)

The law in Washington is clear, prosecutors are held to the highest professional standards. A prosecuting attorney is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). The State

Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956),

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealousness should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

As in Huson, we believe the prosecutor's conduct in this case was reprehensible and departs from the prosecutor's duty as an officer of the court to seek justice as opposed to merely obtaining a conviction.

State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713 (1981) (*quoting State v. Huson*, 73 Wn.2d at 663). If the prosecutor lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he or she ceases to properly represent the public interest. *State v. Reed*, 102 Wn.2d at 147.

Appellant Contreras repeatedly objected to bolstering testimony throughout the trial, arguing evidence of fear was not relevant and asking witnesses if they were being truthful was impermissible bolstering. RP

793 (Kowalski-vouching); 12/20/07 p. 34 (Kowalski “fear and hearsay testimony”), RP 1062 (Klepach- defense did not know would be asserting the 5th Amendment in front of jurors) RP 1458-61, 1463-64 (Klepach fear not relevant), RP 1483(vouching); RP 1178-1190 (Mayhall – defense objection to fear testimony; RP 1398 – Luhtala – objection to fear testimony). A prosecutor cannot bolster a witness' testimony by eliciting a statement from the witness to show the witness is fearful of testifying, without an attack on the witness' credibility. *State v. Bourgeois*, 133 Wn.2d 389, 400-01, 945 P.2d 1120 (1997). The evidence is impermissible on direct examination since it could lead the jury to view a witness' fear as substantive evidence of guilt (that the defendant has somehow threatened the witness.). *Id.* at 400.

The State's reliance is *Bourgeois*, is misplaced, or alternatively, is asking the court to condone obvious error. The *Bourgeois* court found that the conduct was error, and unlike the *Bourgeois* case, here the bolstering evidence was not harmless because the State's case was circumstantial and hinged on the jury's determination of the credibility of the State's eye witnesses, Kowalski, Mayhall and Atofau, all of whom had significant credibility issues. (Kowalski was incarcerated at Purdy (RP 726); Mayhall was in violation of his probation and has numerous crimes of dishonesty (RP 1178) and Atofau was incarcerated and has crimes of

dishonesty. RP 1309. Additionally, Luhtala admitted to heavy drug use during the pertinent time period. RP 1387, 1395.)

Moreover, repeatedly asking witnesses if they were telling the truth is another form of improper vouching. *State v. Green*, 119 Wn. App. 15, 24, 79 P.3d 460 (2003) citing, *Jessup*, 31 Wn. App. at 316, 641 P.2d 1185; *See also Roberts*, 618 F.2d at 536

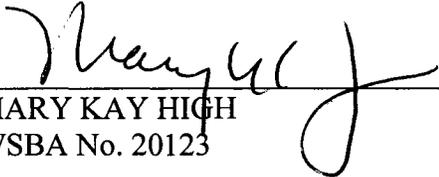
D. CONCLUSION

Contreras does not waive any arguments in his Opening Brief, but rather Contreras asks this Court to consider his reply arguments to a portion of the State's opening brief and respectfully requests this court to reverse his convictions.

DATED this 9th of February, 2010.

Respectfully submitted,

By

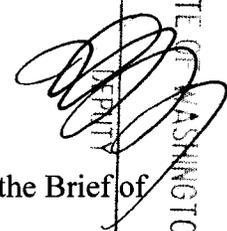


MARY KAY HIGH
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CERTIFICATE OF SERVICE

Mary Kay High hereby certifies under penalty of perjury under the laws of the State of Washington that on the 9th day of February, 2010, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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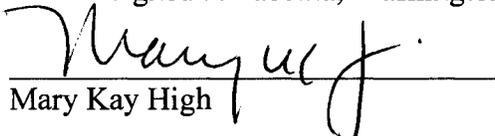
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And, I hand delivered a true and correct copy of the Brief of Appellant and the report of Proceedings to which this certificate is attached, to

Ms. Kathleen Proctor
Pierce County Dep. Pros. Atty.
946 County-City Building
Tacoma, WA 98402

And I delivered via email this brief to the Office of Public Defense.

Signed at Tacoma, Washington this 9th day of February, 2010.


Mary Kay High