

No. 40896-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ULISES FLORES-MARTINEZ,

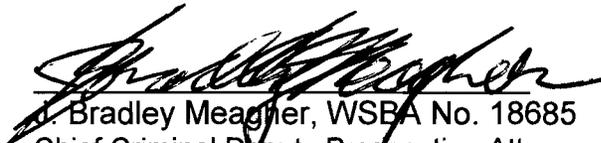
Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. STATEMENT OF THE CASE

On January 16, 2010, Ambar Perez, her two-year-old baby boy, and her boyfriend Kenton Bozeman drove to Safeway in Chehalis, Washington at about 8:30 p.m. RP (5/25-26/10) 33-35, 82. Mr. Bozeman and the baby remained in the car while Ms. Perez did some grocery shopping. *Id.* at 33-35, 83. Mr. Flores-Martinez and at least two other men approached the vehicle where Mr. Bozeman and the baby sat at about the same time that Ms. Perez exited the grocery store. *Id.* at 35-38. Both Ms. Perez and Mr. Bozeman told the men to “get away” from the vehicle because there was a child in the back seat and the men were making threatening gestures. *Id.* at 39-40, 85.

After telling the men to leave, Mr. Bozeman got out of the car and a fight ensued. *Id.* at 39-40, 87. The men who approached the car were calling Mr. Bozeman “mayate” – the Spanish word for “nigger” – and they were threatening to “get” him. *Id.* at 41. By the time Mr. Bozeman got out of the vehicle, the number of men around the car had grown to between seven and nine. *Id.* The men, including Mr. Flores-Martinez, were using “gang symbols” and taunting and threatening Mr. Bozeman. *Id.* at 41, 91. Ms. Perez recognized the hand-sign for the “LVL” gang being used by the men

around her car, including, she believed, Mr. Flores-Martinez. *Id.* at 42. Further, all of the men, Mr. Flores-Martinez included, were wearing blue, a color known to be associated with the LVL gang. *Id.* at 54. Mr. Flores-Martinez said, “We have a gun” and “I’ll kill you and your nigger baby.” *Id.* at 43. Further, Mr. Flores-Martinez and the other men addressed Ms. Perez and said things such as, “I’m going to kill you and your nigger baby. I’m gonna get you.” *Id.* at 48-49, 91. Mr. Flores-Martinez told Mr. Bozeman that he had a gun and another person struck Mr. Bozeman in the face. *Id.* at 89. Mr. Bozeman believes that he and his girlfriend, Ms. Perez, were targeted because they are an interracial couple. *Id.* at 94.

After the gang left, Mr. Bozeman followed their white Escalade in Ms. Perez’s car to the street on which they parked so that he could inform law enforcement personnel as to their location. *Id.* at 95, 97. Mr. Bozeman spoke briefly with the police upon returning to the Safeway. *Id.* at 95-96.

Before apprehending Mr. Flores-Martinez and the other gang members, the police entered the wrong home, based on information and a vehicle description from Mr. Bozeman, and at that incorrect location temporarily placed the occupants in

handcuffs but did not find anyone matching the description of the gang members involved in the conflict. *Id.* at 75-76, 140-141, 144. Upon locating the correct home and the correct white Escalade outside the home, the police entered the apartment and apprehended some of the members of the LVL gang involved in the confrontation. Law enforcement asked Ms. Perez and Mr. Bozeman to identify the men. *Id.* at 76-77, 96-97, 140, 157. Ms. Perez and Mr. Bozeman, at the request of law enforcement, identified Mr. Flores-Martinez and several of the other men at the apartment in front of which the white Escalade was parked. *Id.* at 59-60, 97. Although the men had changed clothing, Ms. Perez and Mr. Bozeman were able to positively identify them, including Mr. Flores-Martinez. *Id.* at 60, 97. Mr. Bozeman gave a taped statement the following day. *Id.* at 95-96.

Upon arrest, Mr. Flores-Martinez denied even being at Safeway at the time of the incident. *Id.* at 143.

Defense counsel made a motion in limine to preclude introduction of information related to gang membership. *Id.* at 7-8; CP 80. In the hearing, defense counsel presented his argument to the court and the court determined that evidence relating to

potential gang membership had probative value based on the State's offer of proof. RP (5/25-26/10) 12-13. Throughout the trial, defense counsel objected over eighteen times, including several objections outside the presence of the jury. *Id* at. 39, 44, 49, 50, 55, 57, 58, 105, 129, 136, 153, 154, 155, 157, 158, 180, 207, 208, 245. Through these multiple objections, defense counsel held the State to its burden and to the rules of evidence; he demonstrated that he was capable and willing to raise issues and objections as part of his trial strategy.

Mr. Flores-Martinez was found guilty on both counts. CP 55-56.

ARGUMENT

I. THE STATE DID NOT VIOLATE MR. FLORES-MARTINEZ'S CONSTITUTIONAL RIGHTS TO BE FREE FROM UNREASONABLE SEARCHES OR SEIZURES NOR DID THE STATE VIOLATE HIS RIGHT TO PRIVACY.

A. Standard Of Review And Scope Of Appeal

“Error predicated upon evidence allegedly obtained by an illegal search and seizure cannot be raised for the first time on appeal.” *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967).

If the defendant fails to object to the admissibility of evidence, that failure is considered “a waiver of any legal objection...” *Id.*, See *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995) (failure to move to suppress evidence contended to be illegally gathered constitutes a waiver of any error associated with the admission of the evidence.)

Further, “While the constitutional rights of the individual are to be preserved, those rights are dependent, for their recognition, upon a timely assertion.” *State v. Gunkel*, 188 Wash. 528, 534-535, 63 P.2d 376 (1936).

Finally, RAP 2.5(a) uses the term “may”¹ to indicate that the denial of review of an issue raised for the first time on appeal is discretionary. *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). However, *Russell* does not concern the waiver of a constitutional right, but rather a failure to request a jury instruction. *Id.* Case law does not support the assertion that a waived right may be reviewed after a failure to raise it at the trial court Mr. Flores-Martinez contends. Brief of Appellant at 6.

¹ RAP 2.5(a) reads, in relevant part: “The appellate court *may* refuse to review any claim of error which was not raised in the trial court.” (Emphasis added.)

An appellant may raise for the first time on appeal a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). But, although this court can choose to consider for the first time on appeal ‘manifest error affecting a constitutional right,’ RAP 2.5(a)(3), a defendant can waive such rights by his action or inaction in the trial court. *State v. Donohoe*, 39 Wn. App. 778, 782, 695 P.2d 150 (1985). Further, because “a defendant can receive complete constitutional protection against the use of illegally obtained evidence through superior court suppression hearing procedures, and because the rights afforded by these constitutional provisions are not ‘trial rights’ or part of the ‘truth-finding function’ they can be waived.” *State v. Cross*, 156 Wn. App. 568, 577, 234 P.3d 288 (2010) (quoting *Donohoe* at 782 n.5). Finally, “while there is no question that search and seizure issues are constitutional in nature, even when there is a high probability that a motion to suppress might have succeeded, the absence of a motion to suppress fails to produce an error eligible for review by this court.” *Cross*, 156 Wn. App. at 577. Without a motion to suppress on the record, there is no error to review. *Id.*

“The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the

opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). The exception is a “manifest error affecting a constitutional right.” *Id.*

This exception, articulated in RAP 2.5(a)(3), does not encompass all constitutionally related issues. And, “permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

To bring up an issue for the first time on appeal under this exception, the appellant must demonstrate that the error 1) is of constitutional magnitude and 2) is manifest. *Id.* The analysis requires the appellant to show that the error is a constitutional error. *Id.* In this case, Mr. Flores-Martinez argues that his rights under the Washington State Constitution, Article I, § 7, and under the United States Constitution Amendment IV were violated in an unlawful search and seizure, both issues of constitutional magnitude. Brief of Appellant 7-8.

To be “manifest” there must be a showing of actual prejudice. *O’Hara*, 167 Wn.2d at 99. The appellant must show “that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* (internal citations omitted). Most importantly, when “determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim.” *Id.* “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *Id.* quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To make the proper analysis, “the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.” *Id.* at 99-100.

In this case, the record is nearly silent as to the circumstances surrounding the searches and seizures and their legality or otherwise. Although Mr. Flores-Martinez argues that the police officers did not have a warrant to either arrest him or to search the home in which he was allegedly found, the record is completely silent as to whether or not a warrant issued prior to the searches. See RP (5/25-26/2010). In fact, the record indicates that Mr. Flores-Martinez was arrested outside of the apartment. *Id.* at

25. From the record, it would be impossible to determine whether or not the error, if any, was identifiable or prejudicial and thus manifest.

Due to the difficulty in determining what a trial court would have ruled in an instance in which no motion was actually presented, the appellate court may review manifest constitutional errors raised for the first time on appeal “when an adequate record exists.” *State v. Contreras*, 92 Wn. App. 307, 312-313, 966 P.2d 915 (1998). In this case, there is no adequate record and no manifest error can be reviewed. Mr. Flores-Martinez must show that his motion to suppress based on the allegedly illegal search and seizure “would have been granted based on the record.” *Id.* at 313-314. Mr. Flores-Martinez cannot make such a showing.

Sergeant Carrell did enter the apartment, but there is no indication as to the circumstances under which she entered. *Id.* at 157. Testimony at trial indicated that there were fourteen or more individuals “taken out” of the apartment, but again, no indication as to the circumstances surrounding their removal. *Id.* at 163. The closest thing to an unlawful entry that appears in the record comes in the form of a statement by another suspect in the underlying

crime who testified that the police “came in kicking the door down, you know, just harassing me, cuffed me.” *Id.* at 208. Mr. Flores-Martinez cannot meet his burden to show that the error, if an error, of entering the dwelling in or near which he was found and apprehended was manifest, and therefore cannot take advantage of RAP 2.5(a)(3).²

Mr. Flores-Martinez also argues that he was unlawfully seized. However, the record is again silent as to the legality of the seizure. See RP (5/25-26/2010). Although the record indicates that Mr. Flores-Martinez was seized, the circumstances around the seizure were not developed on the record. *Id.* at 26, 163. As noted above in *O’Hara*, Mr. Flores-Martinez must be able to show prejudice from the record, and that is a burden he cannot meet in this case because there was no intentional development of these issues on the record and there was insufficient incidental development of any of the issues to glean sufficient information from the record as a whole.

² RAP 2.5(a) reads: The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court:... (3) manifest error affecting a constitutional right.

It simply cannot, *from the record*, be determined whether or not the searches and seizures indicated in Mr. Flores-Martinez's brief were manifest error, or even error at all. Without admitting that any error even occurred it is worth noting once again that "even when there is a high probability that a motion to suppress might have succeeded, the absence of a motion to suppress fails to produce an error eligible for review by this court." *Cross*, 156 Wn. App. at 577.

**B. Mr. Flores-Martinez Lacks Standing To Appeal
 The Police Entry Into A Dwelling Owned And
 Occupied By A Third Party In Which Mr. Flores-
 Martinez Was Not Found Or Which With Mr.
 Flores-Martinez Was Not Otherwise Connected.**

Suppression can only be sought by those individuals "whose rights were violated by the search itself." *Alderman v. U.S.*, 394 U.S. 165, 171-172, 89 S.Ct. 961 (1969). To be defined as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure" and be the "one against whom the search was directed." *Id.* at 173.

To challenge a search or seizure as unlawful, the challenger must show 1) that he had constitutional protection himself, "which includes the burden of showing that a privacy or possessory interest was invaded," and 2) the invasion of the right was

perpetrated by the government, and 3) that “he has standing to contest the invasion.” *State v. Picard*, 90 Wn. App. 890, 896, 954 P.2d 336 (1998).

Mr. Flores-Martinez lacks standing to challenge any alleged unlawful search or seizure of third persons or their homes. See Brief of Appellant at 10-13. Mr. Flores-Martinez does not offer any evidence from the record that he had any constitutionally protected rights in the home or liberty interest of any third party and further, from the record, cannot so claim. See RP (5/25-26/2010) and Brief of Appellant. There is no indication that Mr. Flores-Martinez was a victim of the search of the first home or the arrests pursuant thereto. See RP (5/25-26/2010) at 162-163.

II. MR. FLORES-MARTINEZ’S COUNSEL ACTED EFFECTIVELY AND PURSUED A LEGITIMATE TRIAL STRATEGY AND MR. FLORES-MARTINEZ WAS NOT PREJUDICED; THUS HE WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER ANY CONSTITUTIONAL PROVISION.

A. Mr. Flores-Martinez Counsel Implemented A Reasonable Trial Strategy Or Tactic And His Performance Was Not Deficient.

To prevail on an ineffective assistance of counsel claim, Mr. Flores-Martinez must show that (1) his attorney’s performance was deficient and (2) the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The strong presumption is that the attorney's conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *McFarland*, 127 Wn.2d at 335. In order to properly raise the claim, "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation *based on the record* established in the proceedings below"³ and not on the brief or other matters not on the record. *McFarland*, 127 Wn.2d at 335.

Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether, given all the facts and circumstances, the assistance given was reasonable. *Id.* at 688. Finally, "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Due to the strong presumption of effective assistance, Mr. Flores-Martinez shoulders the burden to "show in the record the absence of

³ Emphasis added

legitimate strategic or tactical reasons supporting the challenged conduct by counsel” including a failure to request a motion to suppress. *McFarland*, 127 Wn.2d at 336.

If counsel’s performance is found to be deficient, than the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694. When the claim of ineffective assistance is based on a failure to make a motion to suppress evidence and “the record reveals a substantial basis for denying a motion to suppress...Absent an affirmative showing that the motion probably would have been granted, there is no showing of actual prejudice.” *Contreras*, 92. Wn. App. at 391.

Mr. Flores-Martinez cannot show that his counsel was ineffective for failing to file a motion to suppress evidence from a search unless he can show that the State somehow violated his constitutional rights and that such violation could have formed the basis for a successful motion to suppress. *State v. Hathaway*, No.

40181-9 Wn. App. Div. II, (2011). The Court “will not presume a CrR 3.6 hearing is required in every case in which there is a question as to the validity of a search and seizure, so that a failure to move for a suppression hearing in such case is per se deficient representation,”⁴ and the burden is on the defendant to show, from the record, that the choice not to seek suppression was not a legitimate strategy or tactic. *McFarland*, 127 Wn.2d at 336.

The record does not support Mr. Flores-Martinez’s assertion that defense counsel lacked a legitimate strategy or tactical reason for choosing not to attack the validity of the search of the apartment or Mr. Flores-Martinez’s arrest or counsel’s choice not to seek suppression of the evidence obtained therefrom. Brief of Appellant at 16. The record is ambiguous as to whether or not the search of the apartment even led to Mr. Flores-Martinez’s arrest, as he was

⁴ CrR 3.6 reads:

(a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

arrested “outside of apartment C-1.”⁵ RP (5/25-26/2010) at 25. There is also indication in the record that probable cause existed to arrest Mr. Flores-Martinez even absent an arrest warrant⁶. The victims identified the vehicle in which Mr. Flores-Martinez had left. The victims identified one of Mr. Flores-Martinez’s associates, the other suspects, and the location of the older model white Escalade near where Mr. Flores-Martinez was apprehended. *Id.* at 37, 55, 97, 141. The police, at the time of the arrest, believed that they were arresting Mr. Flores-Martinez for attempted kidnapping.⁷ *Id.* at 143.

Considering the record, Mr. Flores-Martinez’s counsel’s strategy may not have included a motion to suppress because he recognized that any motion to suppress would have been unsuccessful. Defense counsel was aware that the police arrested Mr. Flores-Martinez, spoke with him, and searched the apartment in which he may have been found, and counsel carefully questioned

⁵ An officer who did not enter the apartment and who had no direct contact with Mr. Flores-Martinez testified that Mr. Flores was one of the “14 plus” individuals found in the apartment and required to lineup. RP (5/25-26/2010) at 162-163.

⁶ “A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

“(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property...” RCW 10.31.100

⁷ RCW 9A.40.030 defines kidnapping in the second degree as a class B felony. RCW 9A.28.020 defines the attempt to commit a class B felony a class C felony.

officers and witnesses on those points. RP (5/25-26/2010) at 25, 75-77, 144-145, 163. Defense counsel – on the record – demonstrated his awareness of the issues of search and seizure, but chose not to file a motion. *Id.* The burden to show a lack of a legitimate strategy in choosing not to file suppression motion falls on Mr. Flores-Martinez⁸, and that is a showing he cannot make.

III. THE TRIAL JUDGE PROPERLY ADMITTED EVIDENCE RELATED TO MR. FLORES-MARTINEZ’S AFFILIATION WITH THE “LVL” GANG.

A. The Trial Judge Did Not Abuse His Discretion By Ruling To Allow Evidence Of Mr. Flores-Martinez Gang Affiliations To Be Admitted During The Trial After Hearing An Offer Of Proof And Witness Testimony On The Matter And Determining That The Evidence Was Probative And Relevant.

When appealed, the trial court’s “decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion,” which is defined as a decision “based on manifestly unreasonable or untenable grounds.” *State v. Saenz*, 156 Wn. App. 866, 873, 234 P.3d 336 (2010).⁹ Unless the trial court abuses its discretion, the reviewing court will not disturb the trial court’s ruling. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

⁸ *McFarland*, 127 Wn.2d at 336

⁹ The Supreme granted review of this case on 1 December 2010. 170 Wn.2d 1013, 245 P.3d 775 (Table).

ER 404(b)¹⁰ does not allow evidence of other crimes, wrongs, or acts to be admitted for the purpose of showing bad character and conformity therewith, but does allow such evidence for the purpose of proving motive, opportunity, intent, knowledge, or identity, among others purposes. *State v. Yarbrough*, 151 Wn. App. 66, 82, 210 P.3d 1029 (2009); ER 404(b).

However, before a trial court may admit such evidence, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *Id.* at 81-82.

¹⁰ ER 404:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. 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.

To find that misconduct occurred, the trial court need only hear an offer of proof and “the trial court needs only to hear testimony when it cannot fairly decide, based upon the proponent's offer of proof.” *State v. Kilgore*, 107 Wn. App. 160, 190, 26 P.3d 308 (2001). The purpose of the offer of proof is to allow the court to assess the admissibility of the evidence and the offer of proof may replace the holding of “a mini-trial before ruling on the ER 404(b) issue.” *Id.* at 188.

In the *Kilgore* case, the “prosecutor detailed the incidents that amounted to the prior bad acts” and the court, from that recitation, was able to find by a preponderance of the evidence that the act had occurred. *Id.* at 188-189.

Prior to trial, Mr. Flores-Martinez filed a motion in limine to preclude introduction of evidence of his gang affiliation. RP (5/25-26/2010) at 7-8. The State made an offer of proof, stating that the gang, including Mr. Flores-Martinez, intentionally targeted the victims because the victims are an interracial couple who had a child in common; that the victims were aware that Mr. Flores-

Martinez was in the gang “LVL” and that the gang was capable of working in concert to carry out their threats; that the suspects were aware that the “LVL” did not approve of interracial relationships; and that Mr. Flores-Martinez’s gang affiliation heightened the victims’ reasonable fear that Mr. Flores-Martinez’s threat would be carried out. *Id.* at 8-10. The State further offered evidence that members of the group who attacked the victims would identify themselves at trial as members of the LVL, and at least two gang members did so at trial. *Id.* at 9, 203, 216. Finally, the State made an offer of proof that testimony would be forthcoming showing that Mr. Flores-Martinez and other members of the gang were wearing the gang colors, were flashing gang signs, and that they were working as a group. *Id.* at 11-12.

The court ruled to allow the testimony and determined that there was, in balance, “certainly probative value” to the evidence given the circumstances of the crime. *Id.* at 12. The court listed reasons for allowing the evidence, including the offers of proof, and decided to leave the issue in the hands of the jury to make the determination of the weight to be given to the affiliation. *Id.* at 12-13.

During the course of trial, lay testimony was given, based on experience and familiarity with the LVL and its members, as to the colors they wore and the gang signs they used. *Id.* at 50-54¹¹, 42. There was also testimony that members of the gang, including Mr. Flores-Martinez, identified themselves with the LVL and were wearing the gang colors and used gang signs. *Id.* at 48-49, 54-55, 64, 89-90, 92.

The court identified the purpose for the testimony as going toward the victims' reasonable fear and Mr. Flores-Martinez motive. *Id.* at 12. Although the court did not specifically address relevancy as such, it did find that "In balance there, I think there is certainly probative value here given this crime. I believe it is directly related based on the offer of proof..." *Id.*

B. The LVL Is A Well-Known Street-Gang And Such Facts Were Presented To The Court Which Either Did Or Could Have Found That The LVL Exists By A Preponderance Of The Evidence.

Mr. Flores-Martinez argues, correctly, that the court must be able to find, by a preponderance of the evidence, that a gang exists prior to associating a defendant therewith. See *State v. Asaeli*, 150 Wn. App. 543, 577-578, 208 P.3d 1136 (2009). Evidence going to

¹¹ The objection to the witness' testimony was heard outside the presence of the jury.

the existence of a gang cannot be merely conclusory testimonial statements given without basis for belief or knowledge or without some definition of “gang.” *Id.* The evidence is insufficient if the actions associated with the accused may be merely “gang-like traditions that the defendants merely absorbed into their culture.” *Id.* at 578.

In the case at hand, testimony was given by a lay witness who had personal contact with members of the LVL, had seen LVL graffiti on buildings in the local community, and who had seen the LVL’s gang signs being used. RP (5/25-26/2010) at 42. One witness claimed to be a former member of the LVL gang. *Id.* at 203. And yet another admitted to being a current member of the LVL gang and to using LVL hand signals during the altercation at Safeway. *Id.* at 214, 216. Other testimony indicated that Mr. Flores-Martinez and other gang members were associating themselves with the LVL during the altercation, including, “Oh, we’re LVL, we’re bad ass. We’re gonna shoot you up.” *Id.* at 48-49.

As to the definition of “gang”, the State asserts that the LVL meets the definition of a “criminal street gang” as defined in RCW 9.94A.030(12):

(12) "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity. This definition does not apply to employees engaged in concerted activities for their mutual aid and protection, or to the activities of labor and bona fide nonprofit organizations or their members or agents.

Testimony at trial indicated that the LVL has a symbol or sign, causes malicious mischief which is a criminal act¹² and committed the criminal act for which Mr. Flores-Martinez was convicted. Finally, there is no indication that Mr. Flores-Martinez or his associated gang members are employees engaged in activities for their mutual aid and protection, nor that they are associated with a bona fide nonprofit organization or labor. RP (5/25-26/2010) at 42.

CONCLUSION

The record does not indicate that Mr. Flores-Martinez suffered any violation of his constitutional rights either when he was seized or during the course of any search. Mr. Flores-Martinez does not meet his burden of showing, from the record, that his defense counsel was ineffective or that his counsel failed to pursue a valid strategy during trial. Finally, Mr. Flores-Martinez cannot

¹² See RCW 9A.48.070-090

show that the trial judge abused his discretion when he allowed evidence of Mr. Flores-Martinez's gang affiliations to be introduced at trial.

Because Mr. Flores-Martinez fails in each instance to meet his burden on appeal, the State requests that the court uphold the decision reached by the trial court.

RESPECTFULLY submitted this 31 day of May, 2011.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:


J. BRADLEY MEAGHER, WSBA 18685
Attorney for Plaintiff

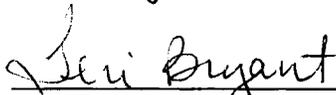
**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,)	NO. 40896-1-II
Respondent,)	
vs.)	DECLARATION OF
)	MAILING
ULISES FLORES-MARTINEZ.,)	
Appellant.)	
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Ms. Teri Bryant, paralegal for J. Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On May 31, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Backlund & Mistry
Attorney's at Law
PO Box 6490
Olympia, WA 98507

DATED this 31 day of May, 2011, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office