

**FILED**  
Mar 15, 2012  
Court of Appeals  
Division III  
State of Washington

NO. 296776

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA VIENTO BOJORQUEZ,

Appellant.

---

BRIEF OF RESPONDENT

---

David B. Trefry WSBA #16050  
Special Deputy Prosecuting Attorney  
Attorney for Respondent

JAMES P. HAGARTY  
Yakima County Prosecuting Attorney  
128 N. 2d St. Rm. 329  
Yakima, WA 98901-2621

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES .....	ii-v
I. <u>ASSIGNMENTS OF ERROR</u> .....	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u> .....	1
1. Was evidence taken from appellant’s car wrongfully seized? .....	1
2. Did Appellant receive a fair trial?.....	1
3. Was appellant’s ability to prepare for trial hampered by untimely discovery? .....	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u> .....	1
1. Evidence seized from appellant’s car was legally seized .....	1
2. Appellant receive a fair trial .....	1
3. There were no violations of the rules of discovery which prejudiced appellant .....	1
II. <u>STATEMENT OF THE CASE</u> .....	1
III. <u>ARGUMENT</u> .....	1
<u>RESPONSE TO ALLEGATION “I”</u> <u>EVIDENCE SEIZED FROM APPELLANT’S CAR</u> .....	1
<u>ARREST OF BOJORQUEZ WAS FACTUALLY SUPPORTED</u> ..	15
<u>RESPONSE TO “I B” ISSUANCE OF SEARCH WARRANT</u> .....	17
<u>RESPONSE TO ALLEGATION “II” PREJUDICIAL EVIDENCE</u>	21
<u>GANG TESTIMONY</u> .....	26
<u>ALLEGED DISCOVERY VIOLATIONS</u> .....	32
IV. <u>CONCLUSION</u> .....	36

TABLE OF AUTHORITIES

PAGE

**Cases**

American Oil Co. v. Columbia Oil Co., 88 Wash.2d 835,  
567 P.2d 637 (1977) ..... 15

In re Det. of LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986)..... 13

Metropolitan Park Dist. v. Griffith, 106 Wn.2d 425,  
723 P.2d 1093 (1986) ..... 5

Robel v. Roundup Corp., 148 Wash.2d 35, 59 P.3d 611 (2002) ..... 18

Willener v. Sweeting, 107 Wn.2d 388, 730 P.2d 45 (1986)..... 5

State v. Atchley, 142 Wash.App. 147, 173 P.3d 323 (2007)..... 18

State v. Bray, 143 Wn.App. 148, 177 P.3d 154 (2008) ..... 5

State ex rel. Carrol v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)..... 22

State v. Cord, 103 Wash.2d 361, 693 P.2d 81 (1985)..... 18, 21

State v. Dorey, 145 Wn.App. 423, 186 P.3d 363 (2008) ..... 9

State v. Flint, 4 Wn.App. 545, 483 P.2d 170 (1971) ..... 25

State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007)..... 25

State v. Gaddy, 152 Wn.2d 64, 93 P.3d 872 (2004) ..... 16

State v. Glover, 116 Wash.2d 509, 806 P.2d 760 (1991) ..... 1, 2, 9

State v. Grewe, 117 Wash.2d 211, 813 P.2d 1238 (1991)..... 18

State v. Hager, 171 Wn.2d 151, 248 P.3d 512 (2011) ..... 24

State v. Halstien, 122 Wash.2d 109, 857 P.2d 270 (1993) ..... 18

TABLE OF AUTHORITIES (continued)

	PAGE
<u>State v. Handburgh</u> , 61 Wn.App. 763, 812 P.2d 131 (1991).....	5
<u>State v. Hentz</u> , 32 Wn.App. 186, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).....	5, 18
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	14, 18
<u>State v. Johnson</u> , 156 Wn.App. 82, 231 P.3d 225 (2010).....	11
<u>State v. Kennedy</u> , 107 Wash. 2d 1, 726 P.2d 445 (1986).....	2
<u>State v. Krenik</u> , 156 Wn.App. 314, 231 P.3d 252 (2010).....	33, 35, 36
<u>State v. Leach</u> , 113 Wn.2d 735, 782 P.2d 1035 (1989).....	10
<u>State v. Louthan</u> , 158 Wn.App. 732, 242 P.3d 954, 960 (2010).....	17
<u>State v. McCord</u> , 19 Wn.App. 250, 576 P.2d 892, review denied, 90 Wn.2d 1013 (1978).....	9, 10
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	13
<u>State v. Michielli</u> , 132 Wn.2d 239, 937 P.2d 587 (1997).....	35
<u>State v. Mitchell</u> , 145 Wn.App. 1, 186 P.3d 1071 (Wash.App. Div. 1 2008).....	8, 9
<u>State v. Nelson</u> , 131 Wn.App. 108, 125 P.3d 1008, 1014 (2006).....	26
<u>State v. Odom</u> , 8 Wn.App. 180, 504 P.2d 1186 (1973).....	32
<u>State v. Pressley</u> , 64 Wn.App. 591, 825 P.2d 749 (1992).....	9
<u>State v. Randall</u> , 73 Wn.App. 225, 868 P.2d 207 (1994).....	9
<u>State v. Robertson</u> , 88 Wash.App. 836, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998).....	20, 21

TABLE OF AUTHORITIES (continued)

	PAGE
<u>State v. Robinson</u> , 24 Wash.2d 909, 167 P.2d 986 (1946) .....	25
<u>State v. Saenz</u> , 156 Wn.App. 866, 234 P.3d 336 (2010) .....	30, 31, 32
<u>State v. Samsel</u> , 39 Wn.App. 564, 694 P.2d 670 (1985) .....	10
<u>State v. Santacruz</u> , 132 Wn.App. 615, 133 P.3d 484 (2006) .....	16
<u>State v. Scott</u> , 151 Wn.App. 520, 213 P.3d 71 (2009).....	29, 32
<u>State v. Shoemaker</u> , 85 Wn.2d 207, 533 P.2d 123 (1975).....	11
<u>State v. Smith</u> , 68 Wn.App. 201, 842 P.2d 494 (1992) .....	14
<u>State v. Sondergaard</u> , 86 Wn.App. 656, 938 P.2d 351 (1997).....	10
<u>State v. Stein</u> , 140 Wn.App. 43, 165 P.3d 16 (2007).....	25, 26
<u>State v. Thiery</u> , 60 Wn.App. 445, 803 P.2d 844 (1991) .....	9
<u>State v. Wade</u> , 138 Wn.2d 460, 979 P.2d 850, 852 (Wash. 1999) .....	5, 14
<u>State v. Walker</u> , 136 Wn.2d 678, 965 P.2d 1079 (1998).....	11
 <b>Federal Cases</b>	
<u>Brendlin v. California</u> , 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) .....	13
<u>Hoffa v. United States</u> , 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1996) .....	12
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) .....	11
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	6, 12

TABLE OF AUTHORITIES (continued)

	PAGE
<u>United States v. Wynne</u> , 993 F.2d 760 (10 <sup>th</sup> Cir. 1993) .....	12
 <b>Rules and Statutes</b>	
CrR 3.6 .....	2, 3
ER 403 .....	25
RAP 10.3(b) .....	1
RCW 10.31.100 .....	15
RCW 10.31.100(1) .....	15

## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

- 1) Was evidence taken from appellant's car wrongfully seized?
- 2) Did Appellant receive a fair trial?
- 3) Was appellant's ability to prepare for trial hampered by untimely discovery?

### B. ANSWERS TO ASSIGNMENTS OF ERROR.

- 1) Evidence seized from appellant's car was legally seized.
- 2) Appellant received a fair trial
- 3) There were no violations of the rules of discovery which prejudiced appellant.

## II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

## III. ARGUMENT.

### RESPONSE TO ALLEGATION "I" EVIDENCE SEIZED FROM APPELLANT'S CAR

A police officer may conduct an investigatory stop based on less than probable cause if the officer has a well-founded suspicion of criminal activity based on specific and articulable facts. State v. Glover, 116

Wash.2d 509, 514, 806 P.2d 760 (1991). The level of articulable suspicion necessary to support an investigative detention is "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wash.2d 1, 6, 726 P.2d 445 (1986). This court will decide the "reasonableness" of the officer's suspicion based on the totality of the circumstances, including the officer's training and experience, the location of the stop, and the conduct of the person detained. Glover, 116 Wash.2d at 514, 806 P.2d 760.

The ruling by the trial court came after extensive testimony from the officers who were called upon to respond to the call of shots fired. They responded to an area of Yakima that they knew well. Sgt. Salinas had been in charge of the specialized gang unit in the Yakima Police Department. He was in that unit for five years. (RP 05.07.10 pg 26) He stated that he had made "thousands" of contacts with individuals.

He testified at the CrR 3.6 hearing;

At the time that I was supervisor of the gang unit between 2004 and 2008 are the Norteno gangs where Northside buildings or NSB inaudible and which is number two-one they claim those are all Norteno groups. Also Sureno groups that were popular at the time were LVL for Lower Valley Locals, PBS or Playboy Surenos, SSF for Southside Familia, inaudible we had some smaller inaudible groups below the --- they were like inaudible group and they would eventually become in full fledged gang membership. (RP 05.07.10 pg 27)

He knew which sections of the city were Norteno and which were Sureno. As evidence by Sgt Salinas in some of the initial questioning during the CrR 3.6 hearing:

JOE SALINAS: This would be in the middle of north central Yakima very heavily populated by residential units, a lot of apartments and lots of single family and multi family dwellings and it's Sureno neighborhood, blue.

CLEMENTS: Okay and would they claim that as Surenos turf?

JOE SALINAS: Yes.... (12.17.10 RP 66)

This court must not lose sight of these statements throughout the analysis of this case. The fact is many sections of the City of Yakima now have a color code. This section was well known to the officers who were responding to the call of shots fires, it was "blue." This was an area that was claimed by the Surenos "the Surenos are the individuals that claim blue, heavily populate that area." (05.07.10 pg. 29)

The area was well known for criminal acts:

CLEMENTS: Okay and has that area been subject to violent crimes, drive by shootings, homicides, those types of crimes?

JOE SALINAS: Yes. (05.07.10 pg 29)

Sgt. Salinas testified at this hearing that there had been multiple callers as well as the report by his fellow officer that there had been shots fired. The information was that the shooter was a "male wearing a white jacket with dark jacket" they did not know the direction of travel of this person. This occurred near the 1500 block of McKinley. Sgt Salinas

testified that “We get shots fired calls regularly within Yakima and they could be any number of things whether they’d be fireworks, back firing car, or actual shots fired. Police --- we don’t get too alarmed because after twenty years in the department we get them regularly. Until we get multiple callers they you realize there’s differences of opinion like inaudible everybody recognizes there were shots fired and call 9-1-1. The multiple callers kind of sends a signal to me that there’s actually something going on there.”(RP 5.7.10 pg 32)

The officer arrived in the vicinity of the shooting and observed the appellants car coming “hurriedly” out of the alley. The car signal came on as the car was illuminated and started to turn towards the officer. At about the same time Sgt. Salinas received more information indicating a person had observed a male running in an alley. (EP 05.07.10 pgs 33-34)

One of the other things which were critical to the actions of the officer was that he observed the color of the shirt worn by the driver;

JOE SALINAS: The first thing that strikes me as odd in seeing this is the driver is wearing a red shirt which doesn’t reflect a lot however in District 4 you can be shot for just wearing a red shirt in that neighborhood. Nobody wears a red shirt in that neighborhood unless they’re asking for trouble in my experience. So, I’m already thinking because of the shirt in the area and the type of crime that we’re involved in here that they’re at this point somehow involved or again they can tell more about what’s happened.(RP 05.07.10 pgs 35-36)

State v. Wade, 138 Wn.2d 460, 979 P.2d 850, 852 (Wash. 1999);

A trial court's admission of evidence is reviewed for an abuse of discretion. State v. Lane, 125 Wash.2d 825, 831, 889 P.2d 929 (1995). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 482 P.2d 775 (1971). A trial court's judgment is presumed to be correct and should be sustained absent an affirmative showing of error. Smith v. Shannon, 100 Wash.2d 26, 35, 666 P.2d 351 (1993); Mattice v. Dunden, 193 Wash. 447, 450, 75 P.2d 1014 (1938).

The defendant bears the burden of proving abuse of discretion.

State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

The trial court entered extensive oral and written Findings of Fact and Conclusions of Law. (CP 70-77, RP 12.10.10 pgs 2-4) The findings and conclusions entered by the trial court have not been challenged in this appeal. State v. Handburgh, 61 Wn. App. 763, 766, 812 P.2d 131 (1991); “These findings were unassailed by either party on appeal and, consequently, they are verities on appeal. Metropolitan Park Dist. v. Griffith, 106 Wn.2d 425, 433, 723 P.2d 1093 (1986). Our review is, therefore, limited to determining if the trial court's findings support its conclusions of law. Willener v. Sweeting, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).”

See also State v. Bray, 143 Wn. App. 148, 177 P.3d 154 (2008);

Mr. Bray does not challenge any of the court's findings of fact as unsupported by the evidence, and those findings are therefore verities here on appeal. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Whether the warrantless Terry stop here passes constitutional muster is a question of law and our review is then de novo. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004); Martinez, 135 Wash.App. at 179, 143 P.3d 855.

Police may stop a citizen to investigate with less than probable cause to believe a crime has been committed. State v. Glover, 116 Wn.2d 509, 513, 806 P.2d 760 (1991). But the stop is permissible only if the officer "has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime." State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). We look at the totality of the circumstances known to the officer to decide whether the stop meets these criteria. Glover, 116 Wn.2d at 514, 806 P.2d 760. The level of articulable suspicion necessary to support an investigatory detention is "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). The reasonableness of a stop is a matter of probability not a matter of certainty. State v. Mercer, 45 Wn.App. 769, 774, 727 P.2d 676 (1986). Again, the police may stop a suspect and ask for identification and an explanation of his or her activities if they have a well-founded suspicion of criminal activity. State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982).

There are few factual situations which clearly set forth a valid basis for a "Terry" stop than those presently before the court. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Sgt. Salinas had an in-car camera that recorded much of what he subsequently testified too. This video was watched by the trial court

judge. (This is listed throughout the transcript as “COBAN” which is an in-car camera system produced by the COBAN company.) (RP 05.07.10 pgs 35-59, 61-66)

This is not the typical officer contact with a typical citizen in a typical neighborhood. This is an officer driving rapidly to the scene of a report by numerous individuals, including one of his fellow officers, who had been in charge of the “gang unit” for four years. When he entered the area he quickly noticed a car traveling at a speed that he considered unusual, in an alley near the place the shots fired had been reported. Before the stop he was told that a person had been observed running into an alley. He observed that the car contained a driver wearing a red shirt in a blue area, a gang neighborhood claiming the color blue. This car did not stop when it saw the officer but turned towards the officers car, a move which Sgt. Salinas testified was an act he had observed to occur by gang members attempting to get away, a maneuver which would cause the officer to have to complete a “u-turn” to pursue this vehicle.

The nuance and more detail can be understood by this court the reading the section where Sgt. Salinas testified on both direct, cross, redirect and recross from both defense attorneys and the Deputy Prosecutor.

Once again this real-time video was watched and listened to by the trial court judge.

Even if appellant had later turned out to merely be a witness State v. Mitchell, 145 Wn.App. 1, 186 P.3d 1071 (Wash.App. Div. 1 2008) addresses what an officer may do; it is clear the actions of the officers complied with this standard as well;

[T]he law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime. “[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen.” Florida v. Royer, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). See also *ALI, Model Code of Pre-Arrest Procedure* § 110.1(1) (1975) (“[L]aw enforcement officer may ... request any person to furnish information or otherwise cooperate in the investigation or prevention of crime”). That, in part, is because voluntary requests play a vital role in police investigatory work. See *e.g.*, Haynes v. Washington, 373 U.S. 503, 515, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963) (“[I]nterrogation of witnesses ... is undoubtedly an essential tool in effective law enforcement”); *U.S. Dept. of Justice, Eyewitness Evidence: A Guide for Law Enforcement* 14-15 (1999) (instructing law enforcement to gather information from witnesses near the scene)

In judging reasonableness, courts apply a balancing test that looks to “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”

This court must also take note that at the time of initial contact the Sgt. Salinas indicated that he did not know if the occupants of the

appellants car were “involved” they can “tell me more about what happened” regarding the reported crime. (RP 05.07.10 pgs 37, 40,

A police officer may detain a witness if there are exigent circumstances or special officer safety concerns. State v. Dorey, 145 Wn. App. 423, 186 P.3d 363 (2008) Other factors this court should consider include “the seriousness of the crime being investigated, a reason to believe the person detained had knowledge of material to aid in the investigation of such crime, and the need for prompt action.” State v. Mitchell, 145 Wn. App. at 8 (citing 4 *Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment* § 9.2(b) at 289-91 (4th ed. 2004)). In reviewing the circumstances, courts may consider such factors as the officer's training and experience, the location of the stop, and the conduct of the person detained. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992) citing State v. Glover, 116 Wn. 2d 509, 513, 806 P.2d 760 (1991). Another important factor compromising the totality of the circumstances that must be examined is the nature of the suspected crime; a violent felony crime provides an officer with more leeway to act than does a gross misdemeanor. State v. Randall, 73 Wn. App. 225, 229-30, 868 P.2d 207 (1994); State v. Thiery, 60 Wn. App 445, 803 P.2d 844 (1991) (“Officers may do far more if the suspect conduct endangers life or personal safety than if it does not”); State v. McCord, 19 Wn. App. 250,

576 P.2d 892, review denied, 90 Wn.2d 1013 (1978) (seriousness of suspected crime bears on the degree of suspicion needed to make a stop and the extent of the permissible intrusion after the stop).

Even if Mr. Bojorquez behavior might arguably be viewed as innocent the test for reasonableness of an investigative stop involves weighing the invasion of personal liberty against the public interest to be advanced. State v. Samsel, 39 Wn. App. 564, 570, 694 P.2d 670 (1985).

The initial search of appellant's car was a consent search. State v. Sondergaard, 86 Wn. App. 656, 660, 938 P.2d 351 (1997) "A search conducted pursuant to a valid consent is a well-recognized exception to the warrant requirement. Where the government seeks to rely upon consent to justify a warrantless search, it must prove that the consent was voluntary."

Generally, warrantless searches are considered unreasonable unless a well-established exception to the warrant requirement applies. State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Consent is one exception to the warrant requirement. State v. Leach, 113 Wn.2d 735, 738, 782 P.2d 1035 (1989). "The State must meet three requirements in order to show that a warrantless but consensual search was valid: (1) the consent must be voluntary; (2) the person granting consent must have authority to

consent; and (3) the search must not exceed the scope of the consent."

Walker, 136 Wn.2d 678, 965 P.2d 1079 (1998).

The factors this court will consider in determining whether consent was voluntary are "(1) whether *Miranda*<sup>1</sup> warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right not to consent." State v. Shoemaker, 85 Wn.2d 207, 212, 533 P.2d 123 (1975). Voluntariness is a question of fact to be considered under the totality of the circumstances with no one particular factor being dispositive. *Id.*

In a recently decided case State v. Johnson, 156 Wn.App. 82, 89-92, 231 P.3d 225 (2010) the court forth this issue as follows:

We review a trial court's denial of a CrR 3.6 suppression motion "to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." State v. Cole, 122 Wash.App. 319, 322-23, 93 P.3d 209 (2004). Unchallenged findings of fact are verities on appeal. State v. Balch, 114 Wash.App. 55, 60, 55 P.3d 1199 (2002). We review de novo conclusions of law, "including mischaracterized 'findings.'" Cole, 122 Wash.App. at 323, 93 P.3d 209. We defer to the fact finder on witness credibility issues. State v. Thomas, 150 Wash.2d 821, 874-75, 83 P.3d 970 (2004).

Whether a law enforcement officer has seized a person is a mixed question of law and fact. State v.

---

<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Harrington, 167 Wash.2d 656, 662, 222 P.3d 92 (2009). The defendant bears the burden of proving that an unlawful seizure occurred. State v. Young, 135 Wash.2d 498, 501, 957 P.2d 681 (1998). To determine whether a seizure occurred, Washington courts use an objective standard to examine the police officer's actions. State v. O'Neill, 148 Wash.2d 564, 574, 62 P.3d 489 (2003). Not every encounter between a law enforcement officer and an individual amounts to a seizure. State v. Armenta, 134 Wash.2d 1, 10, 948 P.2d 1280 (1997) (quoting State v. Aranguren, 42 Wash.App. 452, 455, 711 P.2d 1096 (1985)).

...  
When an officer subjectively suspects the possibility of criminal activity but does not have suspicion justifying an investigative detention (Terry stop), officer contact does not constitute seizure. O'Neill, 148 Wash.2d at 574-75, 62 P.3d 489. Thus, it is not a seizure when a law enforcement officer parks behind a vehicle parked in a public place, asks an occupant to roll down a window, questions him, and requests identification. *See* O'Neill, 148 Wash.2d at 572, 577, 579-581, 62 P.3d 489.

Even if an officer has probable cause to make an arrest prior to contacting an individual does not mean the officer may not conduct a Terry stop. This principle was established long ago. An officer's possession of sufficient facts to support probable cause will not preclude a Terry stop. There is no requirement an officer make an arrest as soon as probable cause is present so that constitutional protections are triggered at the earliest possible moment. See Hoffa v. United States, 385 U.S. 293, 310, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); United States v. Wynne, 993 F.2d 760 (10th Cir. 1993). Even if this officer had a reasonable suspicion

that these three were had just committed a criminal act or where about to commit a crime does not mean this officer could not make contact

Once again the findings of fact and conclusions of law were not disputed. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) states “We review findings of fact on a motion to suppress under the substantial evidence standard. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. We review conclusions of law in an order pertaining to suppression of evidence de novo.” (Citations omitted.)

This court has before it all of the information which was considered by the trial court. The findings of fact and conclusions of law support the actions of the officer and are based on the information presented to the trial court. They are further supported by the oral ruling made by the trial court. (RP 12.10.10 2-4) The oral findings and conclusions contained are supported by the testimony and the facts and should not be disturbed by this court. "Even if inadequate, written findings may be supplemented by the trial court's oral decision or statements in the record." In re Det. of LaBelle, 107 Wn.2d 196, 219, 728 P.2d 138 (1986).

The standard of review in a matter such as this is set out in State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994), wherein the court states:

Generally, findings are viewed as verities, provided there is substantial evidence to support the findings. State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1983). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Halstien, at 129.

...

We hold that in reviewing findings of fact entered following a motion to suppress, we will review only those facts to which error has been assigned. Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. (Hill, at 647.)

Appellant also raises the issue of the length of the stop, however he can cite to no portion of the record which would establish this length. The best Bojorquez can come up with is a section of the record referring to a codefendant and then state “it seemed likely police detained Mr. Bojorquez for that same amount of time.” (Appellant’s brief at 19)

State v. Smith, 68 Wn. App. 201, 207-8, 842 P.2d 494 (1992)

“This court is not obligated to search the record and decide how the trial court would have evaluated that evidence, if it was present.” (Emphasis mine.) See also State v. Wade, 138 Wn.2d 460, 979 P.2d 850 (1999): An appellate court may decline to address a claimed error when faced with a material omission in the record. See, e.g., American Oil Co. v. Columbia

Oil Co., 88 Wash.2d 835, 842-43, 567 P.2d 637 (1977) (declining to consider alleged error where party made no effort to remedy critical gap in transcript of proceedings.

The trial court ruled specifically on this issue: “...the length of time that Mr. Moreno was detained, I don’t think has anything to do with what was ultimately discovered. I thought the length of time, given the seriousness of the charges, was appropriate and ultimately, it was the warrant application that resulted in the items being discovered. Not the length of which he was held or the fact that he had been arrested.” (RP 12.12.10 pg 3)

ARREST OF BARRON WAS FACTUALLY SUPPORTED.

RCW 10.31.100 states that a police officer may arrest a person for a felony without a warrant when the officer has probable cause to believe that that person has committed or is committing a felony. A police officer may also arrest a person without a warrant for a misdemeanor or gross misdemeanor offense when the offense is committed in the officer’s presence or falls under one of ten exceptions of RCW 10.31.100. RCW 10.31.100(1) provides, “[a]ny 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 or the unlawful taking of property...shall have the authority to arrest the person.”

As was set forth in State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004);

Probable cause exists when the arresting officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed. At the time of the arrest, the arresting officer need not have evidence to prove each element of the crime beyond a reasonable doubt. The officer is required only to have knowledge of facts sufficient to cause a reasonable person to believe that an offense has been committed.

When Sgt Salinas arrived he began gathering evidence to confirm or deny the defendant’s involvement in the reported shooting. Mr. Bojorquez was asked why they were in the area and he indicated that “they” were just smoking weed in the alley. (RP .05.07.10 pg 52,55,63 Possession of marijuana is a crime. If they had all been smoking marijuana in the alley then there was probable cause to arrest all three occupants. State v. Santacruz, 132 Wn.App. 615, 618-19, 133 P.3d 484 (2006);

A Terry stop " 'is reasonable if the State can point to "specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity." ' " This means the stop must be based on more than an officer's "inarticulate hunch." The lawful scope of a Terry stop may be enlarged or prolonged as needed to investigate unrelated suspicions that crop up during the stop. The officer may " 'maintain the status quo momentarily while obtaining more information.' " But, to detain a suspect beyond what the initial stop

demands, the officer must be able to articulate specific facts from which it could reasonably be suspected that the person was engaged in criminal activity.  
(Citations omitted, Footnote omitted.)

The arrest for this crime does not somehow preclude the officers from later, upon further investigation, charge appellant with additional crimes.

State v. Louthan, 158 Wn. App. 732, 242 P.3d 954, 960 (2010);

A lawful custodial arrest requires the officer to have probable cause to believe that a person committed a crime. Probable cause " boils down, in criminal situations, to a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed a crime." Probable cause is not knowledge of evidence sufficient to establish guilt beyond a reasonable doubt but, rather, is " reasonable grounds for suspicion coupled with evidence of circumstances to convince a cautious or disinterested person that the accused is guilty." We determine whether an arresting officer's belief was reasonable after considering all the facts within the officer's knowledge at the time of the arrest as well as the officer's special expertise and experience. (Citations omitted.)

#### RESPONSE TO "I B" ISSUANCE OF SEARCH WARRANT.

Appellant alleges the trial court relied upon "material misrepresentations to establish probable cause." The trial court found differently. And while appellant is correct that this court will review a claim of this nature de novo the findings and conclusion of the trial court are verities unless they are challenged.

State v. Atchley, 142 Wash. App. 147, 173 P.3d 323 (2007) “The trial court's findings of fact are reviewed under a clearly erroneous standard, and will be reversed only if not supported by substantial evidence. State v. Grewe, 117 Wash.2d 211, 218, 813 P.2d 1238 (1991). Substantial evidence exists only if there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wash.2d 641, 644, 870 P.2d 313 (1994) (citing State v. Halstien, 122 Wash.2d 109, 129, 857 P.2d 270 (1993)). Great deference is given to the trial court's factual findings. State v. Cord, 103 Wash.2d 361, 367, 693 P.2d 81 (1985). Conversely, this court reviews challenges to the trial court's conclusions of law de novo. Robel v. Roundup Corp., 148 Wash.2d 35, 43, 59 P.3d 611 (2002).”

The defendant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

Once again; State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994), wherein the court states:

Generally, findings are viewed as verities, provided there is substantial evidence to support the findings. State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1983). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Halstien, at 129.

...

We hold that in reviewing findings of fact entered following a motion to suppress, we will review only those facts to which error has been assigned. Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal.

Appellant states “[t]he trial court found these material misrepresentations” were used as a basis to issue the search warrant. The court **never** states there was any “material misrepresentation”, quite the contrary. After hearing literally days of testimony concluded the trial court addressed this issue directly in its ruling regarding the motion to quash:

No evidence was introduced which would allow a conclusion that Officer Taylor had either deliberately misrepresented facts or been reckless in his presentation of truthful or accurate facts. There were some minor inconsistencies revealed which include the statement that officers saw a subject running down the alley. Officer Taylor corrected the statement to reflect officers’ did not see anyone running down the alley. It should have stated a victim report (sic) seeing an individual running down the alley. There were also discrepancies with regard to the operational timeline observed but these discrepancies had no substantive impact. Officer Taylor’s choice in not taking written notes at the scene does not reflect any form of negligence. This event was fast moving and fluid and he responded accordingly. I found Officer Taylor’s testimony to be candid and forthright. Lastly, counsel seems to suggest that the sheer volume of misstatements constitutes recklessness. First, I don’t find there to be a significant number of misstatements and secondly, aggregating them does not make them more egregious. (CP 70-77)

The court continued this ruling orally;

Third, with regard to the warrant, that one --- and I'm supplementing orally what I had written because I have been keeping notes as we go along and --- but I wanted to get a decision out and I guess will readily admit this is not as well written as I would have liked. But, with regard to the warrant issue, I --- Mr. Clements, I believe, objected initially to having this matter heard and I didn't respond, perhaps appropriately, because I think it probably should have been heard. I think under the *Frank* standard, there was a duty to establish whether or not there were deliberate falsehoods or at least reckless misstatements of truth. That was never accomplished and I don't think even having allowing --- having allowed the hearing to go forward, there was frankly nothing that rose to that level. I thought Officer Taylor was very candid and credible in his testimony and I think I've otherwise adequately described in my decision, why the --- why they don't rise to the level of even having --- that we should have had a *Frank's* hearing and I guess in that sense, I allowed it to move forward and it otherwise took up Court time and I think it gave the defense an opportunity to certainly raise these issues with Officer Taylor, but I felt given the timelines that we're being worked with, it was a --- as I think I phrased it, a inaudible and emergent situation and he responded appropriately, although not perhaps precisely, he responded, given the demands on his time and you know, what he was required to do in a very credible fashion. So, the motions are denied.

In addition, even where a trial court's written findings are incomplete or inadequate or as here supplemented this court can look to the trial court's oral findings to aid in review. State v. Robertson, 88 Wash.App. 836, 843, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998).

State v. Cord, 103 Wn.2d 361, 366-67, 693 P.2d 81 (Wash. 1985)

sets forth a test which still applicable today and is particularly appropriate for this case;

In Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the Supreme Court held that where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the 's request.

If, at the hearing, the defendant establishes his allegations by a preponderance of the evidence, the material misrepresentation will be stricken from the affidavit. If the affidavit then fails to support a finding of probable cause, the warrant will be held void and the evidence excluded. The *Franks* test for material misrepresentations has also been extended to material omissions of fact.

Appellant disputes the trial court's finding that the affiant's omissions were neither intentional nor made with reckless disregard for the truth. Initially, we note the great deference that is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity. We find nothing in the record, here, to call the trial court's findings into question. (Citations omitted.)

The allegation that there was an unlawful use of evidence seized during an “illegal Terry stop” has been addressed above.

#### RESPONSE TO ALLEGATION “II” PREJUDICIAL EVIDENCE.

Bojorquez has not and can not prove the actions of the trial judge in allowing in certain evidence was an abuse of the courts

discretionary power. The action of the court is discussed in State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) and the long line of cases that have followed Junker:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. (Citations omitted.)

The two areas which Bojorquez's claims were error were the admission of a sawed off shotgun which was found in the trunk of his car and, the admission of information related to gangs.

The shotgun was testified to by Officer Ileana Salinas without objection. Her testimony clearly set forth that in the trunk of the car, owned and operated by the appellant she and other officers found, after service of a valid warrant, was a sawed off shotgun with two shells in the chamber.

There was direct testimony about the sawed off shotgun, no of that testimony was objected to by Bojorquez. (RP 12.20.10 .10g 31-32)

The parties argued whether this weapon should be allowed. The States theory was that this was res gestae. The court denied the objection stating “I think it’s relevant” (RP 12.17.10 pg 56) the judge then went on in his ruling and state, “Well, I’m going to allow it. But at the same token the Defense is entitled to cross examine the witnesses that lay the foundation or the --- provide the testimony and it --- it --- the more I understand that it is not anything that would cast either of these defendants in a bad light. Either than I mean the weapon by itself it’s not illegal, is that correct?”

Both counsel objected, there is no specific objection just “It had nothing to do with this case.”...”If anything it’s uncharged bad act” and “The other gun is being used for no other reason than prejudice.” (RP 12.17.10 pgs 55-6)

There never was a single objection to the testimony by the officers that this gun was found in the trunk or the admission of the pictures, just of the actual weapon. The State is at a loss as to how the admission of the actual object that was testified about by three officers somehow magically, because it is physically produced, prejudices the appellant to an extent that the other hundreds of pages of testimony to include DNA evidence, testimony regarding the other gun being the weapon which fired the projectile which was found lodged in a building at the scene, the fact that

the appellant was found at the scene driving a car that contained those weapons, the fact that one of the shooters was partially identified by the victim, a hat and glove were found at the scene which matched those worn by the shooter, the victim identifies the codefendant in a photo montage and positively identifies Bojorquez's codefendant in trial as the person who shot at him and last but not least the fact that individuals who at the minimum were putting forth the image that they belonged to a gang which was a rival to the gang which claimed the very territory where the shooting occurred were caught at the scene, that all of that was overcome by the admission of the physical object, a gun, which had been previously testified to and shown to the jury by at least one if not more photographs, which were published to that jury.

Appellant cites State v. Hager, 171 Wn.2d 151, 248 P.3d 512 (2011)(The actual cite in appellant's brief is 171 Wash.2d 162, this must be just a typographical error.) regarding the effect this shotgun "may have been profound." This is patently untrue. Once again there is no possibility with the overwhelming amount of additional information presented to the jury that the admission of a weapon, which was not illegal to possess and was not referred to as illegal, could have or did prejudice the jury.

Hager involves the admission of a statement qualifying the nature of a statement made by a person accused of child rape, not the admission of a gun found in the trunk of a car owned and operated by the defendant in the case. The additional problem with citation to this portion of Hager is it is contained in the dissent authored by the Justice Sanders, thus is not precedential.

Robinson, *infra*, does state; "[I]t is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors." State v. Robinson, 24 Wash.2d 909, 917, 167 P.2d 986 (1946). As this court is well aware "Relevant evidence that is not overly prejudicial is not inadmissible just because it connects a defendant to an uncharged crime, and the courts have so held. State v. Flint, 4 Wn. App. 545, 546-47, 483 P.2d 170 (1971).

Evidence is relevant and admissible if it tends to prove or disprove a material fact. The standard of review has been described as the so-called abuse of discretion standard. State v. Foxhoven, 161 Wn.2d 168, 176, 163 P.3d 786 (2007). But the undertaking appears to be closer to a *de novo* standard of review. *Id.* The court will, nonetheless, exclude the evidence if its probative value is outweighed by the danger of unfair prejudice. ER 403; State v. Stein, 140 Wn. App. 43, 67, 165 P.3d 16

(2007). That is a question vested in the discretion of the trial judge. Stein, 140 Wn. App. at 67.

State v. Nelson, 131 Wn.App. 108, 125 P.3d 1008,1014, (2006):

But an erroneous evidentiary ruling is not grounds to reverse unless, within reasonable probabilities, it changed the outcome of the trial. State v. Christopher, 114 Wash. App. 858, 863, 60 P.3d 677, review denied, 149 Wash. 2d 1034, 75 P.3d 968 (2003); State v. Tharp, 96 Wash. 2d 591, 599, 637 P.2d 961 (1981).

Mr. Nelson asserts the error was prejudicial but does not explain how. And we do not find the prejudice was so obvious that the record speaks for itself. The evidence that he assaulted his wife in the manner alleged by the State was overwhelming. The error was therefore harmless. State v. Davis, 154 Wash. 2d 291, 305, 111 P.3d 844 (citing State v. Guloy, 104 Wash. 2d 412, 426, 705 P.2d 1182 (1985)), cert. granted, --- U.S. ---, 126 S.Ct. 547 (2005).

#### GANG TESTIMONY

This case is replete with testimony regarding gangs. While the appellant correctly cites to current case law with regard to the admission of this type of evidence the fact of the matter is this was a crime committed by three young men dressed in a color which alone, by itself, if worn in the section of Yakima where this crime was committed can get a person killed. Add to that that fact that at least one person in the car was in fact an identified gang member along with other information such as the fact that the brother of this appellant was a gang member and the entire theory of the State's case was this was an act committed to further gang

affiliation the evidence was not only admissible it was essential for the jury to understand the reason, the intent, of the actors in this crime.

Appellant claims that the only connection he had to gangs was that he wore the wrong color shirt on the wrong side of town. This was an accomplice liability case. The jury needed to know why, even if Bojorquez was not “affiliated with a gang,” these three young men would go to this area and try to shoot a person for apparently no reason.

The testimony of the officers clearly added the lay persons on the jury to understand a mindset that is completely foreign to those very individuals. It is incomprehensible to the average citizen juror that a person or a group would “claim” a color and a number and would be willing to kill another person for use of that claimed color or number. That same lay juror may not know that there are sections of his town where the mere wearing of a color can get you killed or that young men are willing to commit heinous crimes in order to further their place in that gang.

There is no means for this jury to understand this without the testimony of these officers and “gang experts.”

This issue was discussed at length by the parties. (RP 12.14.10 pgs 74-84) The trial court Judge does a excellent job of setting forth the case

law and the requirements which need to be met before allowing this type of testimony. The standard for admission;

JUDGE: I --- I think the *State versus Scott* case that I think Mr. True cited and I --- I don't --- we've talked about it before in other matters. Number one, the primary argument that is offered is to why gang evidence isn't or shouldn't be allowed is because it doesn't address an element --- Scott case says courts have regularly admitted gang affiliation evidence to establish motive for a crime to show that defendants were acting in concert. That to me is obviously it says that it is relevant evidence going to motive. In the Scott case it failed because there was insufficient evidence to show that or expert evidence to show what they were doing or why they were doing what they were doing. And I guess the same issue would obtain here that if the State puts on the evidence and doesn't provide the expert testimony showing why somebody does it then it would fail and be prejudicial in this case. But the fact is, is that there is --- yeah, I think that it's a matter of law that it is certainly you have a right to be in a gang but it is by law at least in *State versus Scott* prejudicial and I --- I acknowledge that. I think the prejudice that is visited on the defendants is overcome by the probative value which shows why they were together, why they were in that current location, why they were doing what they were doing, what the motives were that took them to that place at that time and allowed them to do what they did, allegedly do what they did. I --- I think the Scott case is very instructive and I think it --- to keep it out wouldn't make any sense frankly. I know there's a complaint that it's always about gangs, that's an element in this, that's an issue, it goes to the motive and I don't know how you get around that.

Clearly the trial court was referring to and following the edicts of State v. Scott, 151 Wn.App. 520, 526-27, 213 P.3d 71 (2009) a case from this very court;

Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association. Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). Therefore, evidence of criminal street gang affiliation is not admissible in a criminal trial when it merely reflects a person's beliefs or associations. *Id.* at 166-167, 112 S.Ct. 1093. There must be a connection between the crime and the organization Before the evidence becomes relevant. *Id.* at 166, 168, 112 S.Ct. 1093.

Washington courts likewise have recognized the need for this connection Before admitting evidence of gang membership. State v. Johnson, 124 Wash.2d 57, 67, 873 P.2d 514 (1994). Accordingly, to admit gang affiliation evidence there must be a nexus between the crime and gang membership. State v. Campbell, 78 Wash.App. 813, 822, 901 P.2d 1050, review denied, 128 Wash.2d 1004, 907 P.2d 296 (1995). Evidence of gang affiliation is considered prejudicial. State v. Asaeli, 150 Wash.App. 543, 208 P.3d 1136, 1155-1156 (2009). Admission of such evidence is measured under the standards of ER 404(b). State v. Boot, 89 Wash.App. 780, 788-790, 950 P.2d 964, review denied, 135 Wash.2d 1015, 960 P.2d 939 (1998); State v. Yarbrough, \_\_ Wash.App. \_\_, 210 P.3d 1029 (2009). Evidence of other bad acts can be admitted under ER 404(b) when a trial court identifies a significant reason for admitting the evidence and determines that the relevance of the evidence outweighs any prejudicial impact. State v. Lane, 125 Wash.2d 825, 831, 889 P.2d 929 (1995). The balancing of these interests must be conducted on the record.<sup>[5]</sup> *Id.* at 832, 889 P.2d 929. The decision to admit or deny admission of ER 404(b) evidence is reviewed for abuse of discretion. *Id.* at 831, 889 P.2d 929. Discretion is abused when it is

exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

Courts have regularly admitted gang affiliation evidence to establish the motive for a crime or to show that defendants were acting in concert. Yarbrough, supra; Boot, supra; Campbell, supra. In each instance, there was a connection between the gang's purposes or values and the offense committed. In contrast, when there was no connection between a defendant's gang affiliation and the charged offense, admission of the gang evidence was found to be prejudicial error. Asaeli, supra; State v. Ra, 144 Wash.App. 688, 701-702, 175 P.3d 609, review denied, 164 Wash.2d 1016, 195 P.3d 88 (2008). (Footnote omitted.)

This court ruled on this very issue, in State v. Saenz, 156 Wn.App.

866, 872-73, 234 P.3d 336 (2010) this court stated as follows;

Mr. Saenz asserts that the trial court erred by admitting evidence of gang affiliation and witness intimidation. Washington courts have repeatedly held that gang affiliation evidence is admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See State v. Yarbrough, 151 Wash.App. 66, 210 P.3d 1029 (2009); State v. Boot, 89 Wash.App. 780, 950 P.2d 964 (1998); State v. Campbell, 78 Wash.App. 813, 901 P.2d 1050 (1995).

The decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. State v. Stenson, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997). The trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. State v. Stein, 140 Wash.App. 43, 65, 165 P.3d 16 (2007).

Relevant evidence is " evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence." ER 401. Relevant evidence is admissible; irrelevant evidence is not admissible. ER 402.

Relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. ER 403. Evidence of prior bad acts is not admissible to show that the person acted in conformity on a particular occasion, but is admissible for other purposes such as " motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). Before a court admits 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.

Yarbrough, 151 Wash.App. at 81-82, 210 P.3d 1029.

As was the case in Saenz, the State in this matter was not trying to use and it can be seen from review of the transcript, did not use this gang information to show that Bojorquez acted in conformity with the actions set forth by the various officers who testified regarding gangs and gang actions.

The State consistently states to the court and carries through in examination, that the use of this gang information is essential to demonstrate to the jury why these young men would go to this area and act they way they did.

There was testimony from a many of the State's witnesses, much of it in response to questions posed by defense counsel. It is very

consistent throughout that this testimony is not used to paint Bojorquez as some crazed gang member out to fulfill his destiny as a gang member. The testimony is mainly about territories, numbers, clothing, cars and a what is done to keep and maintain status in a gang. All consistent with the order of the court and the mandate of State v. Saenz and State v. Scott.

The court considered the arguments of all parties and then analyzed the information before it in the context of State v. Scott and thereafter made a sound, fair and appropriate ruling with regard to the admission of this “gang” evidence.

#### ALLEGED DISCOVERY VIOLATIONS.

State v. Odom, 8 Wn. App. 180, 187-88, 504 P.2d 1186 (1973).  
P.3d 687;

A defendant charged with a crime is constitutionally entitled to a fair trial, but not necessarily to a perfect trial. Bruton v. United States, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968).

This case was a long drawn out matter. By the time it came to a conclusion there had been approximately fifty days where the case was addressed on the record, and the attorneys had changed in for one defendant.

The defendants claimed over and over that they were not getting what they should have with regard to discovery. The argument on this

subject just prior to the final ruling by the court covers pages. The bottom line is that the court was fully apprised of all of the alleged violations. One in particular was the alleged failure on the part of the State to supply information regarding forensic gun evidence. However when all of the statements were before the court it would appear that the attorneys had received the report that described the results of the tests. It was merely the full copy including the notes of the Forensic Scientist that were supplied at a later date. (RP 12.14.10 54, 57, 65) The attorney for Bojorquez never indicates that he even attempted to make contact with the Forensic scientist prior to the last report being supplied.

Bojorquez's attorney finally states that "I don't remember it coming in." and then addresses the fact that the 18<sup>th</sup> of November is not the beginning of the month. The fact remains that as presented by the State there was approximately one month between the time appellant's attorney is complaining about not getting a report and the time the report with the actual results came into his office. All that was needed was for counsel to read that report and call the Forensic Scientist to discuss the tests.

State v. Krenik, 156 Wn.App. 314, 320, 231 P.3d 252 (2010);

The trial court's power to dismiss under CrR 4.7 or CrR 8.3 is discretionary, and the decision is reviewable only for manifest abuse of discretion. Dismissal is an extraordinary remedy, one that the trial court should use only as a last resort.. Dismissal under CrR 8.3 or CrR 4.7 is "generally available only when the defendant has been

prejudiced by the prosecutor's actions." To justify dismissal, the defendant must show actual prejudice; the mere possibility of prejudice is insufficient. (Citations omitted.)

The trial court looked at the totality of the alleged errors and determined while there were in its estimation violations one of the first considerations was that they should not be lumped together and ruled on as an aggregate;

JUDGE: No, what I did is I went through each of them individually. I didn't aggregate them and --- and I think that was clearly part of the Defense argument is to aggregate the alleged discovery violations and say if you add them all together this is what you end up with. I looked at them individually and each of them has an individual resolution. I don't consider the statement from Mr. Bojorquez or the tape recording of a phone call the same as the --- the ballistics' report. Each has --- each has a separate issue to deal with and a separate resolution. I don't see that dismissal is the appropriate resolution.

Appellant sets forth one item, the ballistics test, and claims that based on the allegations that he was not supplied the full report the entire testimony should have been stricken or now that the entire case should be thrown out. However, as indicated above trial counsel when confronted could not state that he had not received the report but that "he could not remember" getting the report. The inability of a trial attorney to remember an test result supplied by the State does not rise to the level set forth above, requiring a dismissal of the trial or the denial by the court to allow the admission of that evidence.

In Krenik the state admitted in the middle of the actual trial, during the testimony of a primary witness, that there was surveillance video of the scene of the charged crime. This would appear to be far in excess of any of the alleged violations found in this case. In Krenik at 321, the court used the following analysis;

Where previously undisclosed discovery is revealed during the State's case-in-chief, a continuance can be an appropriate remedy. Brush, 32 Wn.App. at 456. In *Brush*, the defendant moved for a mistrial because the prosecutor failed to provide defense counsel with the statement of a witness until the first day of trial. Brush, 32 Wn.App. at 455-56. "Because the available remedy was the granting of a continuance and since defense counsel did not move for such a continuance, the prosecutor's noncompliance with the discovery rule was not prejudicial error." Brush, 32 Wn.App. at 456.

There is nothing in this record which would allow any court to dismiss the entire case based on the allegations of discovery errors. There is nothing here that would rise to that set out in State v. Michielli, 132 Wn.2d 239, 937 P.2d 587 (1997). While appellant claimed there was mismanagement he has not present this court with an actual record which would support that claim. He also can not demonstrate any prejudice. The fact is the one major report that caused much of the dispute was in actuality just a more in-depth version of a report which had already been sent. The fact is all that counsel would have needed to do is speak with this expert prior to his testimony. The failure on the part of appellant to

properly interview or question a State's witness is not a discovery violation on the part of the State.

Appellant states the court did not protect the rights of appellant by ordering a continuance so that Mr. Bojorquez could hire an expert, this is not the duty of the court and appellant can not point to any portion of the record where he asked the court for this remedy, therefore "Because the available remedy was the granting of a continuance and since defense counsel did not move for such a continuance, the prosecutor's noncompliance with the discovery rule was not prejudicial error. Krenik, supra.

The well reasoned ruling by the trial court should not be disturbed by this court.

#### IV. CONCLUSION

Based on the forgoing facts and law Bojorquez's appeal should be denied. This appeal should be dismissed.

Dated this 15<sup>th</sup> day of March, 2012

By: s/DAVID B. TREFRY  
Special Deputy Prosecuting Attorney  
Yakima County  
WSBA# 16050  
P.O. Box 4846  
Spokane, WA 99220  
Telephone: 1-509-534-3505  
Fax: 1-509-534-3505  
E-mail: [TrefryLaw@wegowireless.com](mailto:TrefryLaw@wegowireless.com)

DECLARATION OF SERVICE

I, David B. Trefry state that on March 15 2012, emailed as copy, by agreement of the parties, of the Respondent's Brief , to Tanesha L. Canzater at [Canz2@aol.com](mailto:Canz2@aol.com) and to Joshua Viento Bojorquez, DOC# 346390, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

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

DATED this    day of March, 2012 at Spokane, Washington.

By: s/ DAVID B. TREFRY  
Special Deputy Prosecuting Attorney  
Yakima County  
WSBA# 16050  
P.O. Box 4846  
Spokane, WA 99220  
Telephone: 1-509-534-3505  
Fax: 1-509-534-3505  
E-mail: [TrefryLaw@wegowireless.com](mailto:TrefryLaw@wegowireless.com)