

No. 30709-3-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

RAMIRO FARIAS-GALLEGOS,

Defendant/Appellant.

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Court of Appeals
Division III
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY
The Honorable Vic L. Vandershoor, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to sustain a conviction for assault in the first degree (and so was insufficient to sustain the sentencing enhancement of being armed or an accomplice being armed at the time of the assault).

2. It was misconduct for the prosecutor to allow jury voir dire and evidence on gangs without alerting the court or defense counsel that the State had withdrawn its gang evidence.

3. The trial court committed reversible error when it allowed improper hearsay that impeached the State's own witnesses.

4. It was impermissible variance and constructive amendment of the charging document to allow conviction with the use of any firearm when the Information charged that the crime was committed by the use of a .32 caliber handgun, and no such weapon was proven to be used.

5. The trial court committed reversible error by informing the jury that Mr. Farias-Gallegos was charged alternatively as an accomplice and then failing to give either an accomplice or a unanimity instruction.

6. Defense counsel provided ineffective assistance of counsel when he failed to seek suppression of the show-up identification.

7. Cumulative error should result in reversal of the conviction and sentencing enhancement.

8. The record does not support the express finding that Mr. Farias-Gallegos has the current or future ability to pay Legal Financial Obligations.

9. The sentencing court erred in imposing invalid conditions of community custody.

Issues Pertaining to Assignments of Error:

1. Is a defendant's due process rights under the federal and state constitutions violated when the State fails to prove all elements of the crimes of assault in the first degree and of being armed (or an accomplice being armed) with a weapon in the commission of the crime?

2. Is it a violation of due process for a prosecutor to stand silent while the defense addresses anticipated and highly prejudicial gang evidence when the State already has decided not to present such evidence?

3. Is it prosecutorial misconduct for a prosecutor to fail to alert the trial court and defense that the State is abandoning certain gang-related evidence, thus allowing the trial and jury to be tainted with gang evidence and discussions?

4. Is it reversible error for a trial court to permit hearsay testimony regarding eyewitness identification, especially when the hearsay impeaches the State's own witnesses and is an attempt to bolster a non-existent identification?

5. Is it impermissible variance and constructive amendment of a criminal Information when the State alleges that a crime was committed with a .32 caliber handgun but the evidence at trial shows that this cannot be proved beyond a reasonable doubt, and the court ultimately instructs that the jury must only find the use of any handgun, regardless of caliber?

6. Is it a violation of constitutional rights for a trial court to inform the jury when reading the Information that a defendant is being prosecuted in the alternative as an accomplice, but fail to give the jury instructions as to accomplices or unanimity, especially when the evidence is in dispute and insufficient to sustain a verdict of direct culpability?

7. Is it a violation of a defendant's constitutional rights for defense counsel to fail to seek suppression of a show-up identification when the witness who participated in the show-up identification had inconsistencies in his descriptions of his alleged assailant and was the only witness to identify the defendant at trial as being at the scene?

8. Does cumulative error require a new trial?

9. Should the finding that Mr. Farias-Gallegos has the current or future ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where it is not supported in the record?

10. Does a sentencing court lack statutory authority to impose certain conditions of community custody that are not crime-related?

B. STATEMENT OF THE CASE

On August 30, 2011, Ramiro Farias-Gallegos was arrested for assault in the first degree of Jose Angel Franco Munguia. CP 75. The State charged him via a Second Amended Information with first degree assault with a firearm, “to wit: a .32 semi-automatic handgun” and specially alleged that Mr. Farias-Gallegos “or an accomplice at the time of the commission of said crime” possessed a firearm, thus subjecting him to a sentencing enhancement. CP 67-68. The trial court read the Second Amended Information aloud to the jury. RP Jury Voir Dire at 3.

At trial, the State’s evidence showed that there was an altercation between two individuals and the driver of a car stopped at a stop sign (Mr. Munguia). Only two witnesses – Ms. Ochoa and her son Jose – saw anyone shoot a gun. RP Feb. 15, 2012 at 7, 31. Ms. Ochoa testified that the shooter wore a white shirt (while Jose could not remember any color). Id. at 8. It is undisputed that Mr. Farias-Gallegos had a gray shirt. Neither Ms. Ochoa or Jose Ochoa identified Mr. Farias-Gallegos as being at the scene.

In addition, there were various descriptions of the shirts worn by the individuals talking to the driver. For instance, Ms. Ochoa stated that

one (the alleged shooter) wore a white shirt and the other wore a green shirt. Id. at 8-9. Another witness, Elvida Moreno, testified that the men may have been wearing white shirts, and she saw no one with a gun. Id. at 16. One witness – Mrs. Ochoa’s 12-year-old son Jose – testified that there was one individual with a gun, and it was a silver gun. Id. at 31. There was a dispute about whether the individuals were tall or short. Id. at 22, 39. 12-year-old Jose Ochoa was unable to remember any shirt colors. Id. at 33. Over objection, Jose was impeached by the prosecutor (still without remembering) that he had previously told an officer that one was “young and skinny and wearing a white shirt” and one was wearing a green shirt. Id. at 34-35. No witness from the neighborhood identified Mr. Farias-Gallegos as being at the scene. The call to the police through dispatch described the individuals differently than Ms. Ochoa or Ms. Moreno had described them – i.e., that one had a blue shirt and baggy pants with one hand down his waist and the other was possibly wearing a blue or gray shirt. RP Feb. 16, 2012 at 47. Mr. Munguia (the victim) was the one who called police. Id. at 119, 125-126. In trial, he disputed his own description to dispatch in that he now claimed that one of the individuals had a gray shirt and the other had a white shirt. Id. at 117. He asserted that the individual wearing the gray shirt had shown him a black gun. Id. at 117. He was driving away when he heard gun shots, and did not see

any shooting. *Id.* at 125. Mr. Munguia (the victim) identified Mr. Farias-Gallegos as the one with the black gun pursuant to a suggestive show-up conducted at least over an hour after the shooting. *Id.* at 104, 111-112.

Even though the testimony was unclear as to the description of the individuals at the car – and the description of the alleged shooter did *not* match that of Mr. Farias-Gallegos (as Ms. Ochoa – the only witness to the shooting who identified shirt colors – testified that the shooter wore a white shirt and the other individual wore a green shirt), the State elicited testimony from its officers that Mr. Farias-Gallegos’ appearance “fit” or “matched” the description that they had from witnesses of the “suspects.” See, e.g., RP Feb. 16, 2012 at 7, 8, 10, 24, 43, 69, 86. Defense counsel objected, saying this kind of testimony was hearsay. *Id.* at 7, 87. The objection was overruled, *id.* at 7, with the judge ultimately stating, “I will allow it. Your record is made, Mr. Rutt.” *Id.* at 88.

Also at trial, the State was unable to prove that the weapon was a .32 caliber handgun. Shell casings were found but could not be read. *Id.* at 21-22, 58. At least one officer reported the casings as .380 caliber. *Id.* at 57. The only officer who stated that the casings were .32 did so in his report but not at trial (relying instead on his report), and did so with regard to the unreadable casings. *Id.* at 21-22, 30-31, 58. The evidence showed

that a .380 caliber is larger than a .32 caliber. *Id.* at 60. Thus, a .380 caliber weapon could fire a .32 caliber bullet. *Id.* at 60. No officer saw Mr. Farias-Gallegos carrying a gun, and a gun was never found. *Id.* at 12, 35. Nor was a gun found in any location near where the police alleged the defendant was. *Id.* at 12, 13.

Before trial, the State named Dave Reardon of Pasco Police Department as a witness. CP 106. It is undisputed that the State provided the defense with Officer Reardon's information as a gang expert, and with his report that he would testify at trial that this was a gang-related activity. RP Feb. 16, 2012 at 66. At some point, the State abandoned this evidence, but did not inform the court or the defense of this. *Id.* at 65-66.

The subject of gangs first came up during jury voir dire when Juror No. 19 stated that he knew Officer Reardon because he had "worked with him dealing with gang issues." RP Jury Voir Dire at 10. As a result, and due to his expectation regarding State evidence, defense counsel asked the jurors about "the ... street gangs" about which "Juror Number 19 [had] addressed an opinion or at least made a statement earlier." *Id.* at 55. Defense counsel asked the panel, "The fact that my client may or may not have been a member of a gang at one time in his life, would that in any way ... cause you to be biased against him?" *Id.* This resulted in silence. *Id.* Juror No. 14 said he believed in "guilty by association" when a fellow

gang member commits a crime. Id. He stated, “If you had absolutely nothing to do with [a crime], but you’re a staunch member of that gang and he commits a crime, you’re guilty same as he is....” Id. at 56.¹ Others on the panel also struggled. Juror No. 16 said, “Well, I really don’t believe in guilt by association; but whether I like to admit or not, the term ‘gang member’ carries a certain connotation that leads to certain dispositions.” Id. at 59. In total, about five pages of voir dire transcript was used in this gang discussion. Id. at 55-59.

Then after a short recess, Juror No. 22 raised the issue on his own. At that time Juror No. 22 stated, “I have a very intimate knowledge of gangs in prison, especially Hispanic gangs. I have to be honest and say I might have a problem there. I’ve seen the prison gangs of all types and they’re pretty horrible.” Id. at 61. When asked if he could remain impartial, Juror No. 22 was concerned, and stated:

I think if it came up that he were associated with a street gang on the street, I have to be honest and say I have a hard time with that because I’ve had horrible experiences in prison. I’ve seen inmates very badly hurt, staff members very badly hurt. All because of these gangs.

Id. at 61.

¹ The juror did clarify that he understood that was not necessarily the law in our legal system. RP Jury Voir Dire at 56.

At no time during this discussion of gangs did the prosecutor reveal that the State was no longer presenting evidence regarding gangs.

During presentation of the State's evidence, a State witness testified that he went by a "gang house" to see if there was anything suspicious and that he saw who he thought was the defendant and that he was "appeared to be dressed like typical gang members in that area." RP Feb. 16, 2012 at 55.² Only at this point – and only at a recess – did the prosecutor tell the court and defense that the State no longer intended to present evidence regarding gangs. *Id.* at 66. Defense counsel stated that a curative instruction could not fix the damage done so far based on the State's failure to explain this earlier, since it was part of voir dire and was now a "can of worms." *Id.* at 67. He noted the prosecutor had "provided Mr. Reardon's information, numerous reports, his report itself that he was going to testify that this was a gang-type related activity..." *Id.* Three more times, the word "gang" surfaced through State witnesses – twice with regard to Officer Reardon's testimony regarding his background, and once from the alleged victim in this case, stating that Mr. Farias-Gallegos said that this was his "gang, his 'hood." *Id.* at 95, 116.

² The judge sustained an objection to the second "gang" reference. RP Feb. 16, 2012 at 56.

Midway through trial, the prosecutor stated the Mr. Munguia (the victim) could not be located and that a continuance may be required. *Id.* at 88. There already had been delays to which Mr. Farias-Gallegos had objected. CP 72. 163 days had passed between arraignment and the trial. It appeared that the prosecutor knew prior to trial that the alleged victim could not be located. RP Feb. 16, 2012 at 89. The prosecutor would have been aware that Mr. Farias-Gallegos refused additional continuances and that trial date already had been moved often.

In jury instructions, the trial court did not instruct the jury as to the definition of accomplices (even though the court had read the Information aloud to them, which included reference to accomplices, RP Jury Voir Dire at 3). In addition, the trial court did not give a unanimity of the jury instruction as to facts. The trial court also instructed as to the use of a firearm generally, and did not require that the jury find that a .32 caliber semi-automatic gun was used. CP 39. The trial court also gave a lesser included instruction for fourth degree assault. CP 42.

Mr. Farias-Gallegos was found guilty of first degree assault and of the sentencing enhancement. CP 22-23. He was sentenced to 168 months in prison with a criminal history of zero. CP 8-20. The court also ordered a total amount of Legal Financial Obligations (“LFOs”) of \$3,405. CP 12 at ¶ 4.1. The court made no inquiry into Mr. Farias-Gallegos’ financial

resources and the nature of the burden that payment of LFOs would impose. RP Mar. 15, 2012 at 177-82. As part of the Judgment and Sentence, the court made the following pertinent findings:

¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

The court finds:

[X] That the defendant has the ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753 [sic].³

...

CP 11. The court ordered Mr. Farias-Gallegos to make monthly payments of \$100 on the LFOs, “commencing immediately.” CP 13.

The court also imposed terms of community custody, including the following conditions:

[X] No contact with known gang members.

[X] No possession of gang paraphernalia including clothing, insignia, medallions, etc.

CP 17.

This appeal followed. CP 2-3.

³ The Judgment and Sentence at ¶ 2.5 incorrectly cites to RCW 9.94A.753, which concerns restitution. The correct authority is RCW 9.94A.760.

C. ARGUMENT

1. The evidence was insufficient to sustain convictions for assault in the first degree and of being armed (or of an accomplice being armed) with a firearm at the time of the assault.

The State must prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). This Court reviews insufficient evidence claims for whether, when viewing evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

A person is guilty of assault in the first degree pursuant to RCW 9A.36.011(1)(A) if he or she assaults another with a firearm with the intent to commit great bodily harm – in this case, with a .32 caliber

handgun. CP 64-65. A person is subject to an enhanced penalty pursuant to RCW 9.94A.533(3)(a) if he or an accomplice was armed with a firearm *and* he is being sentenced to, *inter alia*, a conviction for first degree assault.

In this case, the evidence is insufficient to prove every element of the offense beyond a reasonable doubt, so the conviction must be reversed and dismissed with prejudice. See *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745 (1986) (remedy when evidence is insufficient is reversal and dismissal with prejudice).

Only two witnesses saw a shooter on the afternoon in question – Ms. Ochoa and her 12-year-old son Jose. Ms. Ochoa identified the individual with the gun as the only one of the two individuals wearing a white shirt. RP Feb. 15, 2012 at 8-9. Jose Ochoa testified that the gun was silver. *Id.* at 31. None of the witnesses in the neighborhood identified Mr. Farias-Gallegos as being at the scene. In fact, the only person who identified Mr. Farias-Gallegos as being at the scene was Mr. Munguia (the victim), and he testified that it was *the other individual* standing at his car who was wearing a white shirt – *not* Mr. Farias-Gallegos. RP Feb. 16, 2012 at 117. Mr. Munguia also testified that Mr. Farias-Gallegos held a *black* gun, not chrome. *Id.* at 119. Mr. Munguia only testified to *hearing* shots as he drove away. *Id.* at 116.

Thus, only Ms. Ochoa and her son Jose saw the alleged shooter, and their testimony was that he wore a white shirt and held a silver gun. Mr. Farias-Gallegos was wearing a dark grey shirt at the time of his arrest (and allegedly at the time of the incident) and the only evidence regarding him holding a gun was that he had a black gun. *Id.* at 119, 130. This direct evidence results in a finding that Mr. Farias-Gallegos was not the alleged shooter, making the evidence insufficient to sustain a conviction.

In addition, the evidence was insufficient to prove that the shooter possessed a .32 caliber handgun, as alleged in the indictment. As noted above, shell casings could not be read; were read as .380 caliber; and could have been shot from a .380 caliber even if the casings were .32. RP Feb. 16, 2012 at 21-22, 30-31, 58, 60. The police never saw Mr. Farias-Gallegos with a gun and a gun was never found. *Id.* at 12, 35. And there was no evidence that the gun allegedly held by Mr. Farias-Gallegos (according to Mr. Munguia's testimony) was operable, calling into question that aspect of the State's proof as well. See *State v. Padilla*, 95 Wn. App. 531, 534-35, 978 P.2d 1113, review denied, 139 Wn.2d 1003 (1999).⁴ This lack of evidence regarding the gun is a separate ground for finding that the evidence was insufficient to sustain the conviction.

⁴ This is not a case where the State attempted to charge the jury with instructions about assault via a threat (nor could it have done, as Mr. Munguia testified that he felt no fear when a firearm was allegedly waved at him). RP Feb. 16, 2012 at 116.

2. It was misconduct for the prosecutor to allow jury voir dire and evidence on gangs without alerting the trial court or defense counsel that the State was withdrawing its gang evidence.

“Defense lawyers are entitled to trust their adversaries.” *In re Gentry*, 137 Wn.2d 378, 426, 972 P.2d 1250 (1999) (Sanders, J., dissenting). “A prosecutor should not intentionally misrepresent matters of fact or law to the court.” *ABA Standards: Criminal Justice Prosecution Function and Defense Function*, Standard 3-2.8 (3d ed., 1993).⁵ “The State’s discretionary authority may not be exercised in a manner that constitutes a violation of due process rights.” *State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003).

A prosecutor plays a unique role in the criminal justice system that requires him to act impartially and seek a just verdict based upon matters in the record. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629 (1934). “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” RPC 3.8, cmt. 1. “This responsibility carries with it specific obligations to see that the defendant is accorded

⁵ Washington courts consistently have looked to this manual for guidance with regard to prosecutorial conduct. See e.g., *State v. Zhao*, 157 Wn.2d 188, 205, 137 P.3d 835 (2006) (citing to the manual when noting that, by discouraging witness interviews, prosecutor improperly interferes with defendant’s right to investigate facts); see also, e.g., *State v. Grier*, 171 Wn.2d 17, 30-31, 246 P.3d 1260 (2011); *State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003); *State v. Pettitt*, 93 Wn.2d 288, 295, 609 P.2d 1364 (1980); *State v. Sweet*, 90 Wn.2d 282, 290, 581 P.2d 579 (1978); *In re Jagana*, 170 Wn. App. 32, 41, 282 P.3d 1153 (2012); *State v. Erickson*, 22 Wn. App. 38, 46, 587 P.2d 613 (1978); *State v. Finnegan*, 6 Wn. App. 612, 617, 495 P.2d 674 (1972).

procedural justice...” Id. “Justice must satisfy the appearance of justice.”
Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11 (1954).

“The defense’s reliance on ... a misleading misrepresentation can result in important changes in trial strategy.” *United States v. Bagley*, 473 U.S. 667, 683, 105 S.Ct. 3375 (1985) (stated in the context of incomplete information after a *Brady* request creating constitutional due process violations). Thus it is incumbent on the State not to mislead the defense in order to ensure that the defendant have a procedurally fair trial. As noted in *Swartz v. State*, 506 N.W.2d 792, 796 (Iowa App. 1993):

A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.... That the district attorney’s silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

In this case, the State committed misconduct because it informed Mr. Farias-Gallegos to be prepared to confront gang evidence, and then withdrew the evidence without telling the court or the defense, and then allowed defense counsel to raise the issue on his own during jury voir dire without alerting him to the withdrawal of the evidence. All this conduct resulted in impermissibly tainting the jury pool with the implication that Mr. Farias-Gallegos is or was a gang member. See RP Jury Voir Dire at

55-61; RP Feb. 16, 2012 at 66 (when the prosecutor finally informed the court and the defense that it no longer was going to use gang evidence).

Certainly it is well established that evidence of gang affiliation is inflammatory and prejudicial. *State v. Asaeli*, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009). It arouses emotional responses, and that is why a court must “scrupulously avoid” accepting evidence that an accused person is involved in an offense that is gang motivated. See *State v. Johnson*, 124 Wn.2d 57, 66-68, 873 P.2d 514 (1994).

Moreover, the comments by those in the jury pool during voir dire shows that these potential prejudices related to gang affiliation were actually in existence in this case and thus created actual prejudice for Mr. Farias-Gallegos. See e.g., RP Jury Voir Dire at 55-59, 61 (includes comments that gang members should be “guilty by association,” that the phrase “gang member” carries “certain connotations,” that gangs are “pretty horrible,” and that people can get “badly hurt” because of gangs).

Instead of stopping this line of inquiry – or speaking up at the first instance of gang information (when one potential juror volunteered that he knew Officer Reardon because of his work with gangs, RP Jury Voir Dire at 10), the prosecutor said nothing. The prosecutor continued to say nothing when his own witness testified that he went by a “gang house” and that an individual he thought was Mr. Farias-Gallegos was dressed

like a “gang member,” placing the burden on the defense to object. RP Feb. 16, 2012 at 55. Only at recess did the prosecutor volunteer to the court and the defense that it no longer was presenting Officer Reardon’s testimony regarding gang affiliation. Now there was the worst of both worlds – the topic had been introduced during jury voir dire and initial testimony without any explanation or distinction as to whether Mr. Farias-Gallegos was or was not a gang member, and without cross examination of the topic. It was as if the State chose not to present this evidence because the defense had done it for them already, through voir dire. The situation was exacerbated when Officer Reardon himself testified as to his expertise in gangs (something that was raised during jury voir dire, and that would remind jurors of the voir dire discussion). RP Feb. 16, 2012 at 95. All the above is prejudicial, and an unfair violation of Mr. Farias-Gallegos’ procedural due process rights.

The State’s actions become particularly egregious in light of the fact that gang evidence itself challenges the constitutional right to the freedom of association. See *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (“The State can take no action which will unnecessarily ‘chill’ or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right”). It is axiomatic that a defendant may not be tried on his associations alone.

Instead, he must only be tried and convicted on his actions. The State took an end run around this rule by proffering evidence and then allowing the defense to attempt to address the matter in voir dire without coming forth with the truth of the matter: that it would not be presenting that evidence after all. This is misconduct and reversible error.

And all this took place when evidence was scant at best. Mr. Farias-Gallegos maintains that the evidence was insufficient to sustain a conviction and this appeal should result in dismissal. But at a minimum, the evidence was tenuous and the tainting of the jury with nonexistent gang evidence without informing the defense of the withdrawal of the evidence should result in reversal of the conviction.

If the State took these actions in an attempt to force a mistrial, this too is misconduct requiring reversal. See *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083 (1982) (prosecutor cannot goad defendant into asking for mistrial). Here, there could be no further continuances – speedy trial already was stretched thin. Yet the prosecutor revealed midtrial that a main witness – Mr. Munguia, the victim – could not be located and that a continuance may be required. RP Feb. 16, 2012 at 88-89. Put in that context, it appears that the State may have held back information regarding gang affiliation evidence on purpose, in order to force the defense into requesting a mistrial. This should not be accepted.

3. The trial court committed reversible error when it allowed improper hearsay.

“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). In addition to excluding statements, the rule against hearsay excludes general testimony about a statement if the content of the statement can be inferred from the testimony. See *State v. Johnson*, 61 Wn. App. 539, 546-47, 811 P.2d 687 (1991). “[An] officer’s state of mind in reacting to information he learned from [a] dispatcher is not in issue and does not make ‘determination of the action more probable or less probable than it would be without the evidence.’” *State v. Aaron*, 57 Wn. App. 277, 280, 787 P.2d 949 (1990) (rejecting State’s contention that such evidence was relevant to establish why the officer acted as he did); see also *State v. Johnson*, 61 Wn. App. at 547 (1991) (reaffirming that “if it is necessary at trial for the officer to relate historical facts about the case, it would be sufficient for him to report he acted upon ‘information received’”). These cases iterate the principle that to be admissible under the “state of mind” exception to the hearsay rule, statements must pertain to the *declarant’s* state of mind. *State v. Marintorres*, 93 Wn. App. 442, 449, 969 P.2d 501 (1999).

In this case, and over objection, the State repeatedly elicited testimony that Mr. Farias-Gallegos “fit” or “matched” the description given to officers from witnesses. See, e.g., RP Feb. 16, 2012 at 7, 8, 10, 24, 43, 69, 86. It is unclear whose testimony the officers reference in each of these instances – the State does not identify which witness’ description the “suspects” “fit” or “matched.” Nor could it – in fact, not one eye witness had yet testified that Mr. Farias-Gallegos had been at the scene, or that either of the two individuals in question wore a gray shirt, and there was a dispute as to something as simple as height. Instead the testimony was that the individuals standing by the car wore white shirts, or that one wore a white shirt and one wore a green shirt. RP Feb. 15, 2012, at 8-9, 16. The only unifying description was an overbroad one – i.e., that the individuals were young. Thus, by inference, this police testimony regarding suspects “fitting” or “matching” the description referred either to witnesses who did not testify or to witnesses who testified but did not testify as the State would have liked. Indeed, one such example exists in the record – additional impermissible hearsay – when the officer testified that 12-year-old Jose Ochoa had described their shirts to him and that he had said that he had seen the individuals before (thus implying that his description of them at trial was incomplete or inaccurate, as Jose testified

that he did not recall anything about the individuals other than that they were short and young). RP Feb. 16, 2012 at 54-55.

The only witness who identified Mr. Farias-Gallegos as being at the scene was Mr. Munguia (the victim), and he did not testify regarding what he described to officers regarding his alleged assailants' appearance. Moreover, it was Mr. Munguia who called dispatch, and dispatch reported that the individuals in question wore a blue shirt with baggy pants and a blue-grayish shirt. RP Feb. 16, 2012 at 46-47, 127. Yet on the stand, Mr. Munguia denied that there was an individual with a blue shirt with baggy blue pants, *id.* at 127 – even though that was his initial description, bringing his credibility (and entire testimony) into question.

In essence, by allowing the officers to testify regarding whether Mr. Farias-Gallegos “fit” or “matched” the description given to them by generic witnesses, the court was impermissibly allowing – simultaneously – the impeachment of the State’s own witnesses and the bolstering of Mr. Munguia’s in-court testimony (while impeaching his report to dispatch). There was no good use of these questions that, by their nature, contained hearsay, see *Johnson*, *supra*, and it was error.

And the error was not harmless. It violated Mr. Farias-Gallegos’ right to confront witnesses, so it is error of constitutional magnitude. See *State v. Jasper*, 158 Wn. App. 518, 526, 245 P.3d 228 (2010).

A constitutional error is harmless if “the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error.” The Court looks to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011). “If there is no reasonable probability that the outcome of the trial would have been different had the error not occurred, the error is harmless” under that standard. *Id.* (quotation omitted).

In this case, the questions (and the officers’ affirmative testimony in response) conveyed disclosures by unidentified witnesses that did not comport with any of the evidence before the jury. This improper evidence was not minor compared to the evidence as a whole, as there was no witness other than Mr. Munguia who identified Mr. Farias-Gallegos at the scene and no witness whose description of the individuals matched Mr. Farias-Gallegos, and there is no evidence that he had the opportunity to confront these alleged witnesses (thus creating error of constitutional magnitude). And (as described above) Mr. Munguia’s testimony was inherently unreliable. Not only did he identify Mr. Farias-Gallegos in a show-up (not line-up), he did so after having described the individual as wearing a blue shirt and baggy blue pants to dispatch (a description that did not fit Mr. Farias-Gallegos). RP Feb. 16, 2012 at 46-47. He also

thought that police brought Mr. Farias-Gallegos for the show-up from a house (he was brought from a car), and he did not see anyone in a green shirt (which was the testimony of others). *Id.* at 127, 129, 133-34. He was primarily concerned about his car and did not notice much – if anything – about the people that came towards him after the shots. *Id.* at 126-27. He went to the show-up “to identify a person,” wanted to do so, and wanted to make someone accountable (showing his bias). *Id.* at 121, 127. Already we have asserted that the evidence was insufficient to convict. The evidence was underwhelming, not overwhelming, and the admissibility of this hearsay cannot be harmless error. We ask for reversal.

4. It was impermissible variance and constructive amendment of the charging document to allow conviction with the use of any firearm when the Information charged the use of a .32 caliber handgun and no such weapon was proven to be used.

The state and federal constitutions require that an individual be informed of the charges he or she must face at trial. Wash. CONST art. 1, § 22 (“the accused shall have the right ... to demand the nature and cause of the accusation against him”); U.S. Const., Sixth Amendment. The Washington Supreme Court has stated that “[i]t is fundamental that under our state constitution an accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged.” *State v. Schaffer*, 120 Wn.2d 616, 621, 845 P.2d 281 (1992).

This constitutional right to notice is violated where the State amends the Information after resting its case in chief when the amendment is not to a lesser degree of the same offense or to a lesser included offense. *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); accord, *State v. Markle*, 118 Wn.2d 424, 436-37, 823 P.2d 1101 (1992). In such a case, prejudice is presumed. *Pelkey*, at 491; *Markle*, at 436-37.

“An instruction may not be more far-reaching than the charge in the information.” *State v. Brown*, 45 Wn. App. 571, 576-77, 726 P.2d 60 (1986) (reversible error when charging document named alleged specific co-conspirators but “to convict” instruction required only that the jury find defendant conspired with “one or more persons”); see also *State v. Valladares*, 99 Wn.2d 663, 671, 664 P.2d 508 (1983) (defendant must be convicted of conspiring with co-conspirators named in Information). This is so because “an accused cannot be tried for an offense not charged...” *Brown*, 45 Wn. App. at 576; *Valladares*, 99 Wn.2d at 671 (Information must be sufficient to support State’s theory); see also *State v. Jain*, 151 Wn. App. 117, 123-24, 210 P.3d 1061 (2009) (reversal required when charging document alleged money laundering for transactions related to two named properties and “to-convict” instruction allowed conviction for transactions related to any properties).

The above-cited cases directly control here.⁶ In this case, the “to convict” instructions given by the court allowed the jury to convict Mr. Farias-Gallegos of crimes not charged in the Information – i.e., of the use of any firearm, instead of the using of a .32 caliber weapon. Thus, the “to convict” instruction was more far reaching than the charge and violated Mr. Farias-Gallegos’ constitutional right to notice. The error is analogous to the giving of an instruction which permits conviction of an uncharged alternative means. See e.g., *State v. Severns*, 13 Wn. 542, 548, 125 P.2d 659 (1942); *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

This instructional error is also tantamount to a constructive amendment of the Information after the State has rested. Under *Pelkey*, such amendments are per se prejudicial. *Pelkey*, 109 Wn.2d at 491. Therefore, the “to convict” language here (where it allowed conviction based on any firearm rather than a .32 caliber handgun) is likewise per se reversible error.

Even if the error is not per se prejudicial, reversal is required under the standard for erroneous instructions. A defective instruction given on behalf of the party in whose favor the verdict was returned is presumed

⁶ Defense counsel did not register an objection to the instruction. This failure to lodge an objection does not bar appellate review, however, because the issue raised relates to a manifest error affecting a constitutional right. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); *State v. Garcia*, 65 Wn. App. 681, 686 n.3, 829 P.2d (1992); RAP 2.5(a)(3).

prejudicial unless it affirmatively appears that the error was harmless. *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). An instructional error is harmless only where it is trivial, or formal, or merely academic, was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. *Brown*, 45 Wn. App. at 576. Here, there is no harmless error. In fact, the evidence showed that the State could not prove beyond a reasonable doubt that a .32 caliber handgun actually was the weapon used to inflict the alleged assault. No gun was ever found. RP Feb. 16, 2012 at 12, 35. No gun was found in any location near where the police alleged Mr. Farias-Gallegos was. *Id.* at 12, 13. Shell casings were found but could not be read. *Id.* at 21-22, 58. At least one officer reported the casings as .380 caliber. *Id.* at 57. The evidence showed that a .380 caliber is larger than a .32 caliber. *Id.* at 60. Thus, a .380 caliber weapon could fire a .32 caliber bullet. *Id.* at 60. Under this set of facts, the State failed to prove this element of the Information as charged, and to allow Mr. Farias-Gallegos to be convicted of the use of a generic firearm violates his constitutional rights. The conviction must be reversed.

5. The trial court erred by informing the jury that Mr. Farias-Gallegos was charged alternatively as an accomplice and then failing to give either an accomplice or a unanimity instruction.

Under the federal and state constitutions, a criminal defendant has a right to a unanimous jury verdict. *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990). A defendant may be convicted only when a unanimous jury concludes the criminal act charged has been committed. *State v. Crane*, 116 Wn.2d 315, 324-25, 804 P.2d 10 (1991), cert denied, 111 S. Ct. 2867 (1991). The right to a unanimous jury is a fundamental constitutional right which may be raised for the first time on appeal. *State v. Holland*, 77 Wn. App. 420, 891 P.2d 49, review denied, 127 Wn.2d 1008 (1995). “Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless.” *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). The adequacy of jury instructions is reviewed de novo as a question of law. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). An instruction is insufficient if it is misleading. *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

In this case, the trial court read aloud to the jury the Information, which alleged that Mr. Farias-Gallegos “or an accomplice” committed the alleged assault with the use of a firearm. But there never was presented the definition of “accomplice,” nor was there ever a recantation by the State or the Court of the charged conduct, leaving to the jury to determine

the validity of the original charge.⁷ The omission of an element in a jury instruction is not harmless error when the evidence is disputed. See e.g., *Neder v. United States*, 527 U.S. 1, 18, 119 S. Ct. 1827 (1999); see also *State v. Teaford*, 31 Wn. App. 496, 500, 644 P.2d 136 (1982) (accomplice liability instruction must be given when alleged). Without a definition to the word “accomplice,” the jury was impermissibly allowed to speculate. This was error. Accomplice liability is a legal phrase requiring an instruction so the jury understands its legal meaning in the context of the trial – or requires removal from the case, if there is a judgment of acquittal. Failure to address the issue was misleading and created the potential for jury confusion.

Additional confusion would have come from the inclusion of an instruction on fourth degree assault. This implied that Mr. Farias-Gallegos could be guilty as an accomplice because it would assault without a firearm. Given the fact that the evidence was insufficient to sustain the verdict in the first place, this instruction necessarily added confusion for the jury and is grounds to reverse the conviction for retrial.

⁷ Defense counsel proposed an accomplice instruction, CP 55, though he did not object to the lack of the instruction being given. However, a challenge to instructional error may be raised for the first time on appeal. See *State v. Malvern*, 110 Wn. App. 811, 813, 43 P.3d 533 (2002).

6. Defense counsel provided ineffective assistance of counsel when he failed to seek suppression of the show-up identification.

To support a claim of ineffective assistance of counsel,⁸ Mr. Farias-Gallegos must show that (1) defense counsel's representation fell below an objective standard of reasonableness, and (2) defense counsel's deficient performance actually prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (applying the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984)). This showing of deficient representation must be based on the record developed in the trial court. *Id.* at 335. The appellate court strongly presumes counsel's representation was effective. *Id.* Consequently, Mr. Farias-Gallegos must show the absence of legitimate strategic or tactical reasons supporting his counsel's failure to move to suppress the show-up identification. *Id.* at 336. If he fails to satisfy either prong of the test, the appellate court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

In this case, there can be no justification for choosing not to seek suppression of this show-up identification. Moreover, actual prejudice results because a suppression motion would have been granted.

⁸ Mr. Farias-Gallegos did not raise this issue at the trial level. However, this issue is one of constitutional magnitude and therefore may be brought for the first time on appeal. *State v. Soonalole*, 99 Wn. App. 207, 215, 992 P.2d 541 (2000).

When an identification procedure is both suggestive and likely to give rise to a substantial risk of misidentification, it cannot be admitted. *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977); *Manson v. Brathwaite*, 432 U.S. 98, 144, 97 S.Ct. 2243 (1977). This is a two-step inquiry: first, a court must determine whether the identification procedure is suggestive. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). A suggestive identification procedure is one that unduly calls attention to one individual over others. *Id.* If that test is satisfied, the court moves to the question of whether the suggestiveness created a substantial likelihood of misidentification. *Id.* There are five factors traditionally considered in this second inquiry: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness' level of attention, (3) the accuracy of the witness's prior description, (4) the level of certainty at confrontation, and (5) the time between the offense and confrontation. *State v. Barker*, 103 Wn. App. 893, 905, 14 P.3d 863 (2000); *Neil v. Biggers*, 409 U.S. 188, 199–200, 193 S.Ct. 357 (1972).

Although show-up are not per se impermissibly suggestive, see *State v. Guzman-Cuellar*, 47 Wn. App. 326, 335, 734 P.2d 966 (1987), an identification without other suspects present is impermissibly suggestive as a matter of law. See *State v. Maupin*, 63 Wn. App. 887, 896, 822 P.2d 355 (1992) (in the context of a photograph identification, the display of a

single individual to a witness is impermissibly suggestive as a matter of law); see also *State v. Rogers*, 44 Wn. App. 510, 516, 722 P.2d 1349 (1986) (“the practice of showing suspects singly to persons for the purpose of identification has been widely condemned”).

Here, the witness (Mr. Munguia, the alleged victim of the crime) had provided a description to dispatch of his alleged assailant that did not match Mr. Farias-Gallegos – i.e., that the suspect was wearing a blue shirt with baggy pants (and not the dark gray shirt and blue jeans worn by Mr. Farias-Gallegos). RP Feb. 16, 2012 at 47, 119, 125-26. Mr. Munguia also demonstrated at trial his lack of attention to detail in that he did not know information about the witnesses surrounding him and believed that Mr. Farias-Gallegos was taken from a house for the show-up (when in fact Mr. Farias-Gallegos was taken from a patrol car). *Id.* at 121, 126-127, 129, 133-134. Moreover, Mr. Munguia testified that there was no one present at the scene wearing a blue shirt and baggy pants despite the fact that he was the one to call dispatch and this was the description that dispatch received. *Id.* at 47, 117, 125-126. And the record reflects that Mr. Munguia was biased at the time of the show-up because he was told he was going to identify the suspect, and he wanted to do so and wanted to make someone accountable. *Id.* at 121, 127.

Applying the five-part test to these circumstances shows that a motion to suppress would have been granted. As described above, Mr. Munguia's level of attention was inadequate; his prior description described someone wholly different from Mr. Munguia; while he had an opportunity to view the suspect, it was a brief encounter that occurred during what he alleged to be an argument and a near-accident, creating distractions; it was over an hour before any identification could be made; and any level of certainty at the time of the show-up must be countered by the fact that Mr. Munguia was told he was to identify the suspect and he wanted to do so as he wanted to make someone accountable. *Id.* at 121, 127. At best, the record shows that Mr. Munguia is a person without any memory or discernment. More likely it means he was lying at trial about the in-court and show-up identification (especially since he denied seeing someone with a blue shirt and baggy pants in spite of the fact that this was the description he gave to dispatch). Either way, the record shows that the show-up was impermissibly suggestive and influenced the outcome of Mr. Munguia's identification of Mr. Farias-Gallegos as his assailant. Under these circumstances, a motion to suppress identification would have been granted, and it was prejudicial ineffective assistance of counsel for the motion not to be filed (especially since Mr. Munguia was the only witness to identify Mr. Farias-Gallegos as being at the scene).

7. Cumulative error requires reversal.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when the trial court's cumulative errors were fundamentally unfair. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994), clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849 (1994). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *Lord*, 123 Wn.2d at 332.

Here, we have submitted several errors – some of constitutional magnitude and all affecting the outcome of this jury trial, where we have argued that the evidence at the outset is insufficient. As such, if this Court were to rule that the above errors, on their own, do not mandate reversal, then the errors, taken together, do.

8. The express finding that Mr. Farias-Gallegos has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW

9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. *Relevant statutory authority.* RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.”⁹ RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

b. *There is no evidence to support the trial court's express finding that Mr. Farias-Gallegos has the present and future ability to pay legal financial obligations.* Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916. *Curry*

⁹ It appears that imposition of legal financial obligations is also contemplated by the Juvenile Justice Act. See RCW 13.40.192.

recognized, however, that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915-16.

Here, there is nothing in the record to suggest the court considered Mr. Farias-Gallegos' "present and future ability to pay legal financial obligations." Yet the court made an express finding that Mr. Farias-Gallegos had the ability to pay those LFOs. Whether a finding is express or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' "

Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn.

App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Mr. Farias-Gallegos' financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's express finding that Mr. Farias-Gallegos has the present or future ability to pay LFOs. The finding is therefore clearly erroneous and must be stricken from the Judgment and Sentence. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported finding. Bertrand is clear: where there is no inquiry and no evidence to support the trial court's express or implied finding regarding ability and means to pay, the finding must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

This remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. *State v. Lohr*, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); *State v. Schelin*, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual finding

without support in the record back to a trial court for purposes of “fixing” it with the taking of new evidence. *Cf. State v. Souza* (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, recon. denied, rev. denied, 116 Wn.2d 1026 (1991); *Lohr* (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

Mr. Farias-Gallegos is not challenging *imposition* of the LFOs; rather, the trial court made the express finding that he has the ability to pay them and, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. The reversal of the trial court's finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Farias-Gallegos until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that “ ‘[t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial*

scrutiny of his obligation and *his present ability to pay at the relevant time.*” *Bertrand*, 165 Wn. App. at 405, citing *Baldwin*, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

9. The trial court exceeded its authority when it imposed non-crime related prohibitions on Mr. Farias-Gallegos.

Mr. Farias Gallegos challenges the following two conditions imposed by the court:

- [X] No contact with known gang members.
- [XI] No possession of gang paraphernalia including clothing, insignia, medallions, etc.

CP 17. Because there was no evidence that the crime was gang-related, the court abused its discretion in imposing these prohibitions as conditions of community custody and they should be stricken.

Sentencing conditions are reviewed for abuse of discretion. *State v. Crockett*, 118 Wn. App. 853, 856, 78 P.3d 658 (2003); see *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). A crime-related prohibition will be reversed if it is manifestly unreasonable. *Riley*, 121 Wn.2d at 37 (quoting *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)).

The Legislature has authorized the imposition of prohibitions and affirmative conduct upon a defendant, provided they are related to the

circumstances of the crime. *Crockett*, 118 Wn. App. at 857; *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). RCW 9.94A.505, the general sentencing statute of the Sentencing Reform Act, provides that “[A]s a part of any sentence, the Court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. RCW 9.94A.505(8). RCW 9.94A.703(3)(c) and (f) authorize a court to order participation in crime-related treatment or counseling services and compliance with any crime-related prohibition. A “crime-related prohibition” is an order of a court prohibiting conduct that *directly relates to the circumstances of the crime* for which the offender has been convicted. RCW 9.94A.030(10) (emphasis added). A “circumstance” is defined as “[a]n accompanying or accessory fact.” *State v. Williams*, 157 Wn. App. 689, 692, 239 P.3d 600 (2010).

a. *No. contact with known gang members*. There is nothing in the record to indicate there was anything gang-related about the circumstances of Mr. Farias-Gallegos’ crime of assault. The condition must relate to the circumstances of the crime. See *State v. Parramore*, 53 Wn. App. 527, 768 P.2d 530 (1989) (community supervision condition requiring defendant convicted of selling marijuana to submit to urinalysis was directly related to his drug conviction despite absence of evidence on whether defendant smoked marijuana); *State v. Llamas-Villa*, 67 Wn. App.

448, 456, 836 P.2d 239 (1992) (condition prohibiting association with individuals who use, possess, or deal with controlled substances was conduct intrinsic to the crime for which Llamas was convicted and therefore was directly related to the circumstances of the crime of possession of cocaine with intent to deliver); *State v. Hearn*, 131 Wn. App. 601, 128 P.3d 139 (2006) (condition that Hearn refrain from associating with known offenders was directly related to circumstances of the crime of drug possession).

Herein, assault is not per se a gang-related crime. The State did not present evidence nor could it argue in closing that the assault was gang-related. There was no evidence that the assault occurred because of gang involvement by Mr. Farias-Gallegos. Since the challenged prohibition does not relate to the circumstances of the crime, the restriction here is manifestly unreasonable.

Furthermore, limitations upon fundamental rights must be imposed sensitively, in order to be permissible. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir.1975). A defendant's freedom of association may be restricted only if reasonably necessary to accomplish the essential needs of the state and public order. *Malone v. United States*, 502 F.2d 554, 556 (9th Cir.1974), cert. denied, 419 U.S. 1124, 95 S.Ct.

809 (1975). This constraint is an unconstitutional restriction of Mr. Farias-Gallegos' freedom of association.

b. *Indicative of gang lifestyle.* Here, there is nothing in the record to indicate there was anything gang-related about the circumstances of the crime of assault. Although no causal link needs to be established between the condition imposed and the crime committed, the condition must relate to the circumstances of the crime. *Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). The type of clothing, insignia or medallions Mr. Farias-Gallegos might wear—here, there was only evidence of a grey shirt—was and is not related to the underlying conviction of assault. This condition is not reasonably related to the circumstances of the crime, and the provision should be stricken.

The trial court's imposition of the two restrictions was exercised on untenable grounds. The offending conditions of community custody are not directly related to the circumstances of the crime and are not otherwise authorized by statute. The court lacked authority to impose such conditions. See *State v. Bird*, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980) (court may only suspend sentence if authorized by Legislature); *In re Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The offending conditions must be stricken.

