

FILED

NO. 323749

NOV 14 2014

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON

Respondent,

Vs.

ANDRE JACOB NUNEZ

Appellant.

**APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
Judge Douglas Federspiel**

BRIEF OF APPELLANT

**Lindell Law Offices, PLLC
By: Eric W. Lindell
Attorney for Appellant**

Address:

**4409 California Ave. SW, Suite 100
Seattle, WA 98116
(206) 230-4922**

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I. NATURE OF THE CASE

The appellant, Andres Jacob Nunez, was charged by Amended Information with one count of Assault in the First Degree and one count of Attempted First Degree Robbery. A jury found Mr. Nunez Not Guilty of Attempted First Degree Robbery, but convicted him of Assault in the First Degree. The assault conviction included a non-firearm deadly weapon enhancement and a gang sentencing aggravator. Based upon the legal errors noted herein, Mr. Nunez appeals his convictions and sentence.

II. ASSIGNMENT OF ERROR

1. The Superior Court erred by admitting the defendant's custodial statement in violation of the defendant's constitutional right against self-incrimination.

2. The Superior Court erred by allowing the defendant's spouse to testify as a prosecution witness in violation of the spousal privilege.

3. The Superior Court erred by admitting evidence of recorded phone conversations without requiring that the recordings be properly authenticated.

4. The Superior Court erred by admitting gang evidence.

5. The Superior Court erred by admitting evidence in violation of the presumption of innocence and the defendant's First Amendment Right to Free Association.

6. The Superior Court erred by finding there was sufficient evidence to apply a gang sentencing aggravator.

7. The Superior Court erred by admitting improper character evidence in violation of ER 404(b).

8. The Superior Court erred in its instructions to the jury.

9. Error occurred in the Superior Court due to misconduct committed by the prosecutor.

10. Error occurred in the Superior Court because the defendant did not receive effective assistance of counsel.

III. STATEMENT OF THE ISSUES

1. Whether a custodial statement from the defendant should have been admitted even though the defendant was not informed of his constitutional rights prior to being interrogated.

2. Whether the Spousal Privilege should have prevented the defendant's spouse from testifying on behalf of the prosecutor.

3. Whether recordings of phone conversations between the defendant and his spouse should have been admitted when those recordings were not properly authenticated.

4. Whether the gang evidence should have been admitted when there was an insufficient nexus to connect that evidence to the crime charged, and when that evidence was admitted in violation of ER 404(b) and the defendant's Sixth Amendment right to confront his accuser.

5. Whether the prosecutor improperly presented evidence that infringed upon the presumption that the defendant is innocent and which violated the First Amendment right to free association.

6. Whether there was sufficient evidence to prove the gang sentencing aggravator.

7. Whether evidence of the defendant's "bad character" was admitted in violation of ER 404(b).

8. Whether the trial court erroneously instructed the jury.

9. Whether multiple acts of prosecutorial misconduct deprived Mr. Nunez of his constitutional right to a fair trial.

10. Whether Mr. Nunez received effective assistance of counsel.

IV. STATEMENT OF THE CASE

In 2012 Andres Nunez was employed at Washington Beef, a livestock slaughterhouse Yakima, Washington. RP 648. That summer the complaining witness, Ramiro Ruiz, and his older brother, Ricardo, began working at Washington Beef. RP 647. Ramiro was not and had never

been a gang member. RP 691. Although Ramiro was not gang involved, Ricardo had been a member of the Surenos street gang. RP 432, 652, 691.

On July 20, 2012, while the three men were at work, Ramiro and Ricardo fought with Mr. Nunez. RP 692, 696. The facts regarding how the fight started are in dispute. The fight ended when Ricardo knocked Mr. Nunez unconscious. RP 660, 723-24. Washington Beef performed an internal investigation and terminated Ramiro and Ricardo from their employment. RP 444, 664. Mr. Nunez was not disciplined. RP 444.

On August 27, 2012, five weeks after the fight at Washington Beef, Ramiro was stopped at a Park & Ride lot just outside of Yakima. RP 699-701. Ramiro claimed he was sitting in his car talking on his cell phone when Mr. Nunez suddenly appeared, climbed in the open rear window of Ramiro's car and stabbed him in the chest with a small knife. *Id.* Ramiro testified that, after Mr. Nunez stabbed him, he and Mr. Nunez got out of the car and Mr. Nunez demanded that Ramiro surrender his wallet, and that when Ramiro refused, Mr. Nunez chased Ramiro around the car several times. RP 704. Ramiro testified that Mr. Nunez's then fiancé, Jessenia, was parked in a nearby car and that she witnessed the altercation. RP 740.

The doctor treating Ramiro described his wound as superficial and testified that he would not classify Ramiro's wound as serious. RP 468, P

472. Ramiro left the hospital four hours after he arrived. RP 464. Ramiro had no other scrapes, cuts or injuries. RP 465.

Four months later, after learning he'd been identified as having assaulted Ramiro, Mr. Nunez turned himself in to the police. RP 445, 668.

The Trial: During his opening statement, the prosecutor described Mr. Nunez as "a sociopath." RP 438.

Mr. Nunez's trial counsel asserted during his opening that Ramiro Ruiz had attacked Mr. Nunez at the Park & Ride, forcing Mr. Nunez to defend himself. RP 444-45.

On the two occasions when Ramiro spoke with police following the Park & Ride altercation, he never claimed Mr. Nunez made any gang related statements. RP 772, RP 864-65. However, a year later when Ramiro testified he stated that, during the Park & Ride altercation, Nunez identified himself as member of the Nortenos gang. RP 702-03.

Evidence of phone calls: At trial the prosecutor presented testimony from an AT&T employee that phone number (509) 823-9881 was registered to Maria Nunez. RP 478. The prosecutor failed to present the jury with any testimony explaining who Maria Nunez was.¹ The AT&T employee testified that phone records showed that Maria Nunez's

¹ Outside the hearing of the jury the prosecutor represented that Maria Nunez was either the mother or grandmother of Andre Nunez. RP 76.

phone had been used to call **509-910-8301** shortly after the Park & Ride altercation. RP 565, 566. No witness testified who the (509) 910- 8301 number was registered to. RP 80, 82.

Department of Corrections (“DOC”) officers testified that persons they believed were Nortenos gang members occasionally called the 8301 number while they were being held in the Yakima jail. RP 558-560, 564. One of the DOC officers mentioned that the persons who called the 8301 number were listed in a “DOC security threat group”. RP 956-57. No evidence was introduced explaining the content of any of the calls.

The AT&T records also showed that the Maria Nunez’s phone dialed the **509-901-9428** number minutes after Mr. Ruiz was stabbed. RP 566. DOC officers testified that the 9428 number belonged to Mayda Casteon, the wife of Pablo Casteon, a purported senior member of the Nortenos gang. RP 946. The prosecutor had the DOC officer who supervised Mr. Casteon after his release from prison also testified about Casteon. RP 946-48. No witness testified Mr. Nunez had ever been seen with Mr. Casteon or any other Nortenos gang member. No witness testified they ever heard a conversation between Mr. Nunez and Mr. Casteon or any Nortenos gang member. The prosecutor argued in closing that, after Mr. Nunez stabbed Ruiz, Mr. Nunez called various Nortenos to brag that he had just assaulted Ruiz. RP 1150.

Jessenia Nunez, Mr. Nunez's wife, was listed as a witness for the prosecution. RP 974. Both Mr. and Mrs. Nunez raised the issue of Spousal Privilege and advised the court that Mrs. Nunez should not be made to testify against her husband. RP 972, 974. The trial court allowed the prosecutor to call Mrs. Nunez to testify against her husband. RP 937-38. In addition, the trial court allowed the prosecutor to play three recorded phone conversations purported to be jail phone calls between Mr. Nunez and Mrs. Nunez before they were married. RP 1139-42.

Detective Chris Taylor testified as the prosecutor's expert on street gangs. RP 577-78. Detective Taylor testified that Mr. Nunez's name did not appear in the state database used to identify gang members and that, prior to Mr. Nunez being booked into jail for assaulting Mr. Ruiz, Detective Taylor didn't have any information indicating Mr. Nunez was a gang member. RP 618, 632. Mr. Nunez's trial counsel then elicited Detective Taylor's opinion that Mr. Nunez assaulted Mr. Ruiz in order to benefit the Nortenos gang and himself. RP 625.

In an effort to establish that Mr. Nunez had ties to the Nortenos gang, a jail officer testified that Mr. Nunez stated during an intake interview in the jail that he had an association with the Nortenos gang. RP 549.

During closing argument the prosecutor explained to jurors that the civil law doctrine of *Res Ipsa Loquitur* established that Nunez had intended to cause “great bodily harm” to Ramiro. RP 1137-38. The prosecutor also argued, among other things, that defense counsel presented the jury with “red herrings” and “argument falsifies.” RP 1185.

Because the trial court included the definition of “bodily injury” in the jury instruction defining “great bodily harm,” the prosecutor informed Mr. Nunez’s jury that all the law required him to prove to establish First Degree Assault was that Mr. Nunez intended to cause “bodily harm” to Mr. Ruiz. RP 1136-37, CP 240-281, Court’s Instructions to the Jury, Instruction No. 11, RP 1117-18 (record of court reading instruction No. 11 to the jury).

Contrary to his opening statement, Mr. Nunez’s trial counsel failed to call any witnesses or present any evidence demonstrating that Mr. Nunez had been defending himself during the Park & Ride altercation.

In Count I, Mr. Nunez was found guilty of Assault in the First Degree with both a non-firearm deadly weapon enhancement and a special gang aggravator. In Count II, Attempted Robbery in the First Degree, Mr. Nunez’s jury found him not guilty.

V. ARGUMENT

A. The trial court committed error by allowing evidence from a custodial interrogation taken in violation of Mr. Nunez's Constitutional right against self-incrimination.

The Fifth Amendment to the United States Constitution provides that, "[N]o person...shall be compelled in any criminal case to be a witness against himself." Similarly, Article I, Section 9 of our State Constitution provides that "no person shall be compelled in any criminal case to give evidence against himself...".

The United States Supreme Court has determined that the prohibition against self-incrimination contained in the Fifth (and Fourteenth) Amendment requires that any custodial interrogation be preceded by the now familiar *Miranda* warnings.²

An "interrogation" includes:

[N]ot only express questioning, but also . . .any words or actions on the part of the police . . .that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Rhode Island v. Innis, 446 U.S. 291, 301 (1980); see also, *State v. O'Neill*, 98 Wn. App. 978, 992, 967 P.2d 988 (1998). Routine questions asked by an officer responsible for booking a defendant into jail can constitute an interrogation triggering the requirement that the officer advise the

² *Miranda v. Arizona*, 384 U.S. 436, 471, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

defendant of his or her rights under *Miranda* prior to any questioning. *State v. Denny*, 152 Wn. App. 665 (2009); *State v. Sargent*, 111 Wn.2d 641 (1988).

In *Denny*, a jail booking officer, in order to determine if Denny should be housed in a jail medical unit, asked Denny whether or not she had used drugs in the previous 72 hours. *Denny*, at 668. The *Denny* court found the question constituted a custodial interrogation requiring *Miranda* warnings because Denny was in jail and was being booked on a drug charge and, therefore, the booking officer had reason to know an affirmative answer to questions about her recent drug use would produce an incriminating response. *Denny*, at 673-74.

The same argument applies to Officer Winmill, the classification officer who questioned Mr. Nunez in the Yakima jail. Officer Winmill, testified it was his job, among other things, to research, the defendant's "...current charges." RP 8, RP 526. Before he talked with Mr. Nunez, Winmill found out Mr. Nunez was being held in jail on a felony assault charge. RP 17. When Officer Winmill went to the jail to question Mr. Nunez about his gang affiliations, Officer Winmill discovered Mr. Nunez had already been through the booking process and jail staff had already evaluated Mr. Nunez and assigned him a location in the jail reserved for persons associated with the Nortenos gang. RP 15, RP 16.

At that point there was no need for Officer Winmill to question Mr. Nunez about gang affiliation for purposes of assigning him a safe jail location – it had been done.

Furthermore Officer Winmill knew that Mr. Nunez has being held on an assault charge and that he'd been assigned in a jail location based on the belief Mr. Nunez was associated with the Nortenos gang. Accordingly, Officer Winmill, like the booking officer in *Denny*, should reasonably have known that Mr. Nunez's assault might have been gang involved, and that questioning Mr. Nunez about his gang membership would likely produce an incriminating response. Because Officer Winmill failed to inform Mr. Nunez of his rights under *Miranda* before interrogating him, the statement Mr. Nunez gave Officer Winmill should have been suppressed.³

B. The trial court erred by allowing Mrs. Nunez to testify against her husband and by admitting recordings of communications between Mr. Nunez and his wife.

During Mr Nunez's trial, the prosecutor called Mrs. Nunez as a witness to testify against her husband. In addition, the prosecutor

³ In addition, the admission of Mr. Nunez's statements about gang association violated his Due Process rights under the 14th amendment because it was fundamentally unfair for Officer Winmill to lead Mr. Nunez to believe the purpose behind asking Mr. Nunez about gang association was to ensure Mr. Nunez remained in a safe location in the jail as opposed to the information being used against him in court.

introduced and played three recorded telephone conversations purported to be between Mr. Nunez and his wife while Mr. Nunez was in jail. The prosecutor relied heavily on those phone conversations to convict Mr. Nunez.⁴

1. Requiring Mrs. Nunez to testify against her husband and playing recorded conversations between the two violated Spousal Privilege.

When the prosecutor announced his intention to call Jessenia Nunez to testify against her husband, both Mr. Nunez and Mrs Nunez invoked spousal privilege. RP 972, 974.⁵

The sanctity of the spousal privileges are such that "the possibility that a criminal may not be convicted for the commission of a crime because of the [spousal] privilege is the price which the judicial system accepts in order to further the societal goal of preserving marital harmony." *In re: Grand Jury Matter*, 673 F.2d 688, 694 (3d Cir.1982).

Section RCW 5.60.060(1), the Spousal Privilege statute, contains two separate rules - the rule of spousal incompetence and the rule of

⁴ Admitting the recordings also violated ER 403 and 404(b). The recordings are heavily edited and confusing, making it difficult to determine with certainty what is being discussed. E.g. RP 932. Further, at least one of the calls improperly discusses sentencing information and leaves the distinct impression Mr. Nunez would not mind serving 5 years in prison (RP 933), while in another Mr. Nunez makes derogatory comments about his mother. RP 931.

⁵ The charged crime occurred on August 27, 2012. Charges were filed against Mr. Nunez on October 30, 2012. RP 889. Mr. Nunez married Jessenia Acevedo February 19, 2013. Mrs. Nunez was pregnant before the couple married. RP 808.

confidential communication between spouses. Although the two rules appear in the same statute, the rules are distinct in their effect and are clearly separated from one another within the statute by a semi-colon.⁶

Spousal Incompetence: The first privilege, the “rule of spousal incompetence,” once asserted, renders one spouse incompetent to testify for or against the other as to all matters. *Barbee v. Luong Firm PLLC*, 126 Wa. App. 148, 159 (2005) (citing to *State v. Tanner*, 54 Wn.2d 535, 537 (1959)). The rule avoids placing a husband or wife in the position of having to choose between supporting his or her marriage or risking the consequences of refusing to testify in a legal matter. *Fortun v. Mcree*, 19 Wn. App. 7, 9 (1978). The rationale behind the rule of spousal incompetence lies in recognition of the “natural repugnance” resulting from having one spouse testify against the other. See, *State v. Wood*, 52 Wn. App. 159, 163 (1988). If provided with a sufficient foundation a trial court does not have discretion to refuse to give effect to the privilege. See,

⁶ A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during a domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply ... to a criminal action or proceeding against a spouse or domestic partner if the marriage or domestic partnership occurred subsequent to the filing of formal charges against the defendant... RCW 5.60.060(1).

Barbee, 126 Wn. App. at 159 (citing to *State v. White*, 50 Wn. App. 858 (1988)).

The rationale behind the rule of spousal incompetence can only be given its intended effect in Mr. Nunez's case by recognizing that, after the privilege had been invoked, Mrs. Nunez was not competent to testify for or against her husband.⁷ In other words, the trial court erred by allowing Mrs. Nunez to testify against her husband.

The rule of spousal incompetence also prohibits the use of a substitute for the testimony of a spouse once the rule of spousal incompetence applies.⁸ Accordingly, it was also error for the trial court to allow the prosecutor to use three recorded phone conversations purportedly involving Mrs. Nunez discussing the case at issue with her husband.

⁷ Although RCW 5.60.060(1), contains an exception to spousal privilege if the parties marriage occurs after criminal charges have been filed against a spouse, from a plain reading of the statute it appears that exception only applies to the spousal communications, that privilege, not the rule of spousal incompetence. Further exception is designed to thwart a "sham marriage" designed to make a witness unavailable. Here, Mr. and Mrs. Nunez had known each other for years and Mrs. Nunez was pregnant. RP 808.

⁸ The rule of spousal incompetence bars both the testimony of a party's spouse as well as the use of a substitute for such testimony. *Lyen v. Lyen*, 98 Wash. 498 (1917).

C. The recorded jail phone calls were admitted without proper authentication:

Evidence Rule 901 imposes a requirement that an exhibit be properly authenticated as a condition precedent to admissibility of the exhibit. ER 901(a).

Authentication of a telephone call generally requires,

evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called...

ER 901(b)(6).

In Mr. Nunez's case, the prosecutor offered and played three recorded phone conversations purported to be between Mr. Nunez and his wife. The phone conversations were not properly authenticated. No witness familiar with the voices of either Mr. Nunez or Mrs. Nunez verified that the voices on the recordings were those of Mr. and Mrs. Nunez. Further, it does not appear that Officer Welch, the custodian of records for the jail phone recording system, ever confirmed that the number receiving the calls from the jail belonged to Mrs. Nunez. RP 551-558. That Mr. Nunez's name is spoken at the beginning of the calls is insufficient to authenticate the calls.⁹ Finally, although the prosecutor had

⁹ Mere testimony that one party to a phone conversation identifies himself by name is, without more, insufficient to authenticate a phone conversation. *State v. Deaver*, 6 Wn. App. 216 (1971); also see, *United States, v. Pool*, 660 F. 2d 547, 560 (5th Cir. 1981).

Mrs. Nunez confirm when she testified that he previously played recording of calls that involved her and Mr. Nunez, the prosecutor never asked Mrs. Nunez to verify that the recordings he played for Mrs. Nunez prior to her appearing in court were the same recordings he introduced and played for the jury during trial.¹⁰

The calls were not properly authenticated and therefore should have been excluded.

D. The Superior Court Erred by Admitting Gang Evidence.

1. Because the prosecutor failed to prove a sufficient nexus between the crime at issue and gang membership, admission of gang evidence in Mr. Nunez's trial was prejudicial error.

The admission of evidence of a defendant's gang affiliation is considered prejudicial due to its inflammatory nature. *State v. Asaeli*, 150 Wn. App. 543, 579, *rev. den.* 167 Wn.2d 1001 (2009). Evidence that the accused is affiliated with a gang is presumptively inadmissible. See, *State v. McCreven*, 170 Wn. App. 444, 458 (2012) *rev. den.* 176 Wn.2d 2015 (2013). Gang evidence is only deemed relevant when a sufficient nexus

¹⁰ *DPA*: Now I had you listen to five calls. Or actually five calls where there was a female voice. Was that your voice? On the calls? Do you remember listening to the calls? *Mrs. Nunez*: Yes I do. But you showed me two different -- like different calls. *DPA*: Okay. Do you remember listening to sections of calls and identifying voices? *Mrs. Nunez*: Right. *DPA*: Okay. Who were the only --who were the people involved on those calls. Were involved in those calls? *Mrs. Nunez*: Yes. *DPA*: Okay, and was the defendant involved in those calls? *DPA*: Correct. RP 995-96.

exists between the crime at issue and the defendant's gang membership. *State v. Scott*, 151 Wn. App. at 526. The admission of gang evidence without a sufficient nexus between the crime and the defendant's gang membership is prejudicial error. See, *State v. Scott*, 151 Wn. App. at 527 (citations omitted.). Nexus requires proof of a connection between gang membership and the motive of the accused for committing the crime at issue. *Id.*; See also, *State v. McCreven*, 170 Wn. App. 444, (2012). The prosecutor in Mr. Nunez's case failed to prove a sufficient connection between gang association by Mr. Nunez and the motive for the altercation between Mr. Nunez and Ruiz at the Park & Ride.

The undisputed evidence at trial established that Ramiro Ruiz was not a gang member at the time of the Park & Ride altercation and that he had never been involved in gangs. RP 691. Mr. Ruiz had no gang related tattoos (RP 690) and never wore any of the accouterments that demonstrate gang membership. RP 716. A month before the Park & Ride incident both Ramiro and his brother, Ricardo, explained to Mr. Nunez that Ramiro was not gang involved. RP 651, 654. Ramiro Ruiz was simply not a gang member.

When Ramiro explained what happened at the Park & Ride, during two separate but detailed interviews with police, he never mentioned anything indicating that Mr. Nunez was wearing any gang clothing, made

any gang related statements, or that he made any gang signs. See, RP 772, RP 864-65. Consistent with what Ramiro told police, Jessenia Nunez, who was present during the altercation at the Park & Ride, testified she didn't hear any gang language being used either. RP 1001.

Although a year and a half after the Park & Ride incident, Ramiro testified Mr. Nunez said, "It's all about Nortos," while Mr. Nunez, armed with a knife, chased him around a car demanding Ramiro turn over his wallet, jurors did not find Ramiro's story about the attempted robbery credible, so they acquitted Mr. Nunez of that charge. Further, Ramiro's testimony a year and a half later that Mr. Nunez called him "scrap" during the altercation, a term both Officer Taylor (RP 582) and Ramiro Ruiz (RP 692) testified is used exclusively to describe members of the Sorenos gang, is highly suspect since Ramiro was not a gang member and Mr. Nunez knew it.

Additionally, the prosecutor played several recorded phone calls from the jail. If the caller was, in fact, Mr. Nunez, he discussed numerous things about his case, but he never once mentioned anything about the altercation with Ruiz involving anything gang related.

Similarly, the speculative rationale that Mr. Nunez would have been motivated by "gang code" to get revenge for the workplace fight that occurred a month earlier makes no sense either. Had the Park & Ride

altercation involved Ramiro's brother, Ricardo, there would be a stronger argument that the incident was gang motivated. Ricardo Ruiz had informed Mr. Nunez that he was a Surenos gang member. RP 653, 665. Also, Ricardo Ruiz, not Ramiro, was the person who knocked Mr. Nunez out during the workplace fight. RP 660. If Mr. Nunez felt compelled to "settle the score" because he was a gang member, he would have targeted an actual member of an opposing gang, especially when that person was the one who got the best of him in a prior fight.¹¹

Without sufficient evidence that the altercation between Mr. Nunez and Ruiz occurred to benefit the Nortenos gang as opposed to settling some personal score, the required proof of nexus between the charged crime and gang affiliation fails. Accordingly, the gang evidence presented in Mr. Nunez's case was prejudicial error and Mr. Nunez's conviction must be reversed.

2. The gang evidence introduced in Mr. Prado's trial violated ER 404(b).

Even if the prosecutor had been able to establish the required nexus, the admission of gang evidence violated the standards set forth in

¹¹ As discussed below in section D. 3, and D. 5, the speculative evidence of gang motive the prosecutor attempted to establish by introducing phone records that persons purported to be Nortenos gang members called phone numbers that were also called by a phone registered to Maria Nunez was insufficient in that it lacked several things - notably, any definitive proof that Mr. Nunez called the numbers at issue and any proof that Nunez ever actually discussed the Park & Ride incident with an actual gang member.

ER 404(b)¹² and ER 403. See, *State v. McCreven*, 170 Wn. App at 457. (2012).

In gang affiliation cases, ER 404(b) specifically serves to prevent the prosecution from suggesting a defendant is guilty because he or she is a criminal type person who would likely commit crimes like the one charged. See, *State v. Mee*, 168 Wn. App. 144, 154, *rev. den.* 175 Wn.2d 1011 (2012). That inference is improper because it contradicts the fundamental American criminal law belief of innocence until proven guilty. See, *State v. Wade* 98 Wn. App. 328, 336 (1999). Accordingly, a trial court should resolve any doubts about the admissibility of bad character evidence, like evidence the accused is a gang member, in favor of exclusion. See, *State v. McCreven*, 170 Wn. App. at 458.

As a precedent to admitting gang evidence, ER 404(b) requires the trial court to (1) find by a preponderance 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 of any such evidence. *State v. Embry*, 171 Wn. App. 714, 732

¹² Evidence of other crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

(2012) (citation omitted). Generally, the trial court must conduct the ER 404(b) analysis on the record. *State v. Asaeli*, 150 Wn. App at 576, fn. 34; see also, *State v. McCreven*, 170 Wn. App. at 461.

Rather than performing any in depth analysis into the inflammatory and tangential nature of the gang evidence proffered by the prosecutor in Mr. Nunez's case, the trial court gave the evidence only the most cursory look before approving its admission. RP 62-69. The trial court indicated that the court "could see it being be admitted for intent on the alleged underlying crimes. But an insufficient nexus for the enhancement." RP 68. Compare, *State v. Embry*, 171 Wn. App. at 733-36 (example of trial court properly engaging in the required analysis as a condition precedent to admitting gang evidence).

As a result of the court failing to properly perform the required four-step weighing process prior to allowing for the admission of gang evidence, prosecution witnesses testified that the Nortenos gang, the gang the prosecutor claimed Nunez belonged to, was responsible for homicides, robberies, home invasions, sexual assaults and that there was no "limit in what type of violence they would perpetrate." RP 586. In addition, a DOC officer testified about having to supervise Pablo Casteon, a senior member of the Nortenos gang, after Casteon was released from prison. RP 945-948. There was no evidence introduced that Mr. Nunez took part in any

prior criminal activity attributed to the Nortenos gang or that he was a known gang member or that he had ever met or spoken with Mr. Casteon.

Without the court engaging in the proper pre-admissibility analysis, irrelevant, highly inflammatory evidence was admitted at trial and, by the thinnest of links, directed at Mr. Nunez. The improper admission of gang evidence resulted in substantial prejudice to Mr. Nunez in violation of ER 404(b).

3. The expert gang testimony admitted during trial violated Mr. Nunez's Sixth Amendment Right to Confront his Accuser.

The Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to confront and cross-examine witnesses. *State v. McDaniel*, 155 Wn. App. 829, rev. den. 169 Wn.2d 1027 (2010); U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington Constitution provides that, "[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face." Washington's Supreme Court has commented that Article I, Section 22 can provide an even greater protection with regard to a defendant's right of confrontation than does the Sixth Amendment. *State v. Shafer*, 156 Wn.2d 381, 391-92 (1998) (citation omitted).

Testimony regarding a defendant's involvement in gangs must comport with the right of confrontation principles set forth in *Crawford v.*

Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004) and its progeny (e.g. *United States v. Mejia*, 545 F. 3d 179 (2008)). See, *State v. McDaniel*, 155 Wn. App. 829, *rev. den.* 169 Wn.2d 1027 (2010).¹³ Accordingly, the prosecution can only present testimonial evidence of an absent witness if the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. *State v. McDaniel*, 155 Wn. App. at 846.¹⁴

In Mr. Nunez's trial, in an effort to prove the Nunez/Ruiz altercation was gang motivated, DOC Officer Perez, relying on a report prepared by another DOC officer, testified that at some point several persons in the Yakima jail who called the same phone number dialed by the Maria Nunez's phone after the Park & Ride altercation, were Nortenos gang members. RP 956-58. Officer Perez didn't have personal knowledge all of the men were gang members, but knew that someone had identified them in the report as gang members. RP 956. The report Officer Perez relied on was testimonial. The report had been prepared by DOC Officer Welch at the prosecutor's request, to assist in court proceedings. See, RP

¹³ In the *McDaniel* case the court reversed the defendant's murder conviction after noting that the practice of allowing an officer to base part of his expert gang testimony on inadmissible hearsay, rather than piecing together and analyzing relevant information for himself, violated the defendant's right to confront his accuser. *State v. McDaniel*, 155 Wn. App. at 849 (citing to *U.S. v. Mejia* at 198-99).

¹⁴ The rule permitting expert witnesses to consider inadmissible hearsay in forming their opinions does not mean an expert witness may simply transmit inadmissible hearsay to the jury under the guise of an expert opinion. See, *U.S. v. Mejia*, 545 F.3d at 197.

570. The sole purpose of the report appeared to be to try and link Mr. Nunez to Nortenos gang members by virtue of the fact that they might have both called the same phone number.

The admission of testimony from unidentified, absent witnesses, used to prove that the crime charged against Mr. Nunez was gang motivated, violated Mr. Nunez's Constitutional right to confront his accuser and was admitted in error. Constitutional error is presumed to be prejudicial and the prosecutor bears the burden of proving the error harmless beyond a reasonable doubt. *McDaniel*, at 851-52; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824 (1967). The error was not harmless. In fact, the prosecutor later relied on Officer Perez's testimony to argue in closing that Mr. Nunez acted to benefit or aggrandize the Nortenos gang. E.g RP 1150. Based on the prejudicial Constitutional error, Mr. Nunez's conviction should be reversed.

4. Detective Taylor improperly invaded the province of Mr. Nunez's jury to decide the Gang Aggravator, by presenting his opinion Mr. Nunez was motivated to assault Mr. Ruiz in order to benefit his gang.

[T]here are some areas which are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.

State v. Montgomery, 163 Wn. App. 577, 591 (2008) (multiple citations omitted); also WASH. CONST., art I §§ 21, 22; U.S. CONST. amend VI; ER 608.

During Mr. Nunez's trial, Yakima Detective Taylor, while testifying as a gang expert, opined that the altercation at the Park & Ride was a retaliatory act committed by Mr. Nunez in part to benefit the gang. RP 625.¹⁵ Detective Taylor's opinion about Mr. Nunez's motive for the altercation with Mr. Ruiz's improperly invaded the province of the jury to decide the gang aggravator and constitutes prejudicial error.

E. The admission of evidence that Mr. Nunez might have associated with gang members improperly infringed upon the presumption that Mr. Nunez was innocent and violated Mr. Nunez's First Amendment Right of Free Association.

In the Nunez case the prosecutor argued that, because Mr. Nunez had apparently called telephone numbers used by or belonging to gang members, Mr. Nunez's altercation with Ruiz was gang motivated. That assumption violates both the presumption Mr. Nunez is innocent as well as his First Amendment Right to Free Association.

The law requires Mr. Nunez, like every accused, be presumed innocent unless and until jurors, during their deliberations, become convinced beyond a reasonable doubt that the prosecution has proven its

¹⁵ The appellant acknowledges Taylor's improper opinion testimony was elicited not by the prosecutor, but by Mr. Nunez's counsel during his examination of Taylor.

accusation. *State v. Flieger*, 91 Wn. App. 236, 240, 955 P.2d 872 (1998) (citation omitted); *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930 (1978) ([O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on circumstances not adduced as proof at trial).

In Mr. Nunez's trial, the prosecutor established that a phone registered to Maria Nunez called both a phone number registered to the wife of a Nortenos gang member and a phone number registered to an unknown party that members of the Nortenos gang frequently called while they were in jail. Even assuming, for purposes of this argument only and despite the evidence presented at trial, that Nunez made the calls on Maria Nunez's phone, that evidence proved nothing other than Mr. Nunez may have telephoned gang members or their relatives for a reason unknown.

Furthermore, the prosecutor elicited testimony from Mrs. Nunez that her husband had friends that were gang members. RP 981-82.

Evidence that only allows jurors to infer the accused is guilty because he associates with unsavory characters or persons accused or convicted of crimes unrelated to the crime charged violates the presumption of innocence by risking that jurors will convict the accused based on proof not adduced at trial, but on evidence indicating the accused is acquainted with known criminals. See, *State v. Rodriguez*, 146 Wn.2d

260 (2002) (presumption that defendant is innocent is tainted when associate of defendant's appears in shackles to testify at defendant's trial). *State v. Keenan*, 66 Ohio St. 3d 402, 409, 613 NE.2d 203 (1993) (prosecutor committed misconduct by presenting evidence and argument defendant was guilty based on his association with criminals); *Murphy v. State*, 1977 OK CR 200, 565 P.2d 694, 697 (1977) (prosecutorial misconduct to assert guilt by association, a thoroughly discredited doctrine that violates a fundamental principle of American Jurisprudence.)

Furthermore, like membership in a church, social club, or community organization, affiliation with a gang is protected by the First Amendment Right of Association. *State v. Scott*, 151 Wn. App. 520,526 (2009) (citing to *Dawson v. Delaware*, 503 U.S. 159, 117 l. Ed.2d 309, 112 S. Ct. 1093 (1992)). It was error to either infer or argue that Mr. Nunez was guilty of a crime by mere virtue of the fact that he associated with gang members.

The prosecutor's introduction of evidence infringing on the presumption of innocence and that violated Mr. Nunez's constitutional right to free association under the First Amendment constitutes prejudicial error. Accordingly, Mr. Nunez's conviction should be reversed.

F. The evidence was insufficient to support the gang aggravator.

Testimony from police or other gang experts is insufficient, standing alone, to support conviction for a gang aggravator. *State v. Bluehorse*, 159 Wn. App. 410, 431 (2011). Without evidence from some source other than opinion testimony from police officers, the gang sentencing aggravator would apply automatically whenever a gang member or aspiring gang member was involved in a shooting. See, *Bluehorse* at 431.

In order to prove the gang aggravator, the prosecutor must prove beyond a reasonable doubt that the accused committed the crimes at issue with intent to benefit the gang, as opposed to acting with the intent of continuing a dispute that started weeks earlier at the job Mr. Nunez and Ruiz shared. See, RP 1129; RCW 9.94A.535(2).

For the reasons previously identified above in section C. 1., there was simply insufficient evidence to meet the prosecutor's burden of proof to support imposition of the gang sentencing aggravator.

G. The trial court erred by admitting evidence of Mr. Nunez's "bad character," unrelated to either gang affiliation or the charges for which Mr. Nunez was being tried.

As a general rule, the accused must be tried for the offense charged and the introduction of evidence of unrelated wrongs or crimes is grossly

and highly prejudicial. See, *State v. Goebel*, 36 Wn.2d 367, 368 (1950); ER 404(b).¹⁶

In the Nunez trial, the prosecutor elicited testimony from Mr. Nunez's wife that she had seen Mr. Nunez fight other people. RP 982.¹⁷ The prosecutor also introduced recordings wherein Mr. Nunez referred to his mother in a derogatory manner. RP. 931-32.

That evidence was not admissible to show intent, or any of the other exceptions to ER 404(b)'s prohibition against propensity evidence. The net effect of the evidence was simply to prejudice jurors by showing that Mr. Nunez was a bad person with a propensity towards fighting and who referred to his mother in derogatory terms. The evidence was significantly prejudicial in light of the fact that Mr. Nunez's attorney informed jurors Mr. Nunez was defending himself from an assault

¹⁶ Evidence of other crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

¹⁷ The prosecutor, through Officer Perrault, also attempted to introduce evidence that Mrs. Nunez said she was not shocked to hear her husband had stabbed someone. RP 1011. When Officer Perrault attributed the statement to Mrs. Nunes, defense counsel objected. Id. The prosecutor offered to "move on." RP 1013. However, because Officer Perrault had inaccurately portrayed Mrs. Nunez's response, the trial court read Mrs. Nunez actual response into the record but never ruled on the objection. RP 1014. The prosecutor then asked Officer Perrault if Mrs. Nunez demeanor changed, or if she flinched, when informed that Mr. Ruiz had been stabbed. Officer Perrault answered she did not. RP 1015.

initiated by Mr. Ruiz. The evidence was improperly admitted in violation of ER 404(b).

H. By erroneously instructing the jury on the definition of Great Bodily Harm, the trial court committed reversible error:

By erroneously instructing Mr. Nunez's jury in a manner that relieved the prosecutor of its burden to prove each element of the charged crime beyond a reasonable doubt, the trial court committed reversible error. See, *State v. Peters*, 163 Wn. App. 836, 847 (2011); *State v. Kylo*, 116 Wn.2d 856 (2009).¹⁸

Mr. Nunez was charged with Assault in the First Degree when, "with intent to inflict great bodily harm," he assaulted Ramiro Ruiz with a deadly weapon, a knife. CP 12, Amended Information, 2-13-2012; RCW 9A.36.011. As charged, Assault in the First Degree required proof Mr. Nunez had the specific intent to inflict "great bodily harm." RCW 9A.36.011.

Great bodily harm is defined as,

[B]odily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

11 *Washington Practice: Washington Pattern Jury Instructions: Criminal*

¹⁸ Mr. Nunez may challenge a legally erroneous jury instruction for the first time on appeal. RAP 2.5(a)(3); *State v. Levy*, 156 Wn.2d 709, 721 (2006).

(“WPIC”) 2.04 (3d.Ed. Supp. 2010); RCW 9A.04.110(4)(c);

When the court in Nunez instructed the jury on the definition of “great bodily harm,” the court added the definition of “bodily injury” to the instruction.¹⁹ “Bodily injury” is a much less egregious level of injury than “great bodily harm” and requires only proof of, “physical pain or injury, illness or an impairment of physical condition.” WPIC 2.03; RCW 9A.04.110(4)(a).

The Comment to WPIC 2.03, the instruction defining “bodily injury” explicitly warns that the definition of “bodily injury” should not be used when defining “great bodily harm” because “great bodily harm” has a distinct statutory definition. *Id.* Despite the plain warning, the trial court not only used both definitions, it incorporated the definition of “bodily injury” into the same instruction jurors used to define “great bodily harm.”

Jury instructions must instruct the jury that the State has the burden to prove each element of the crime beyond a reasonable doubt and it is reversible error to instruct the jury in a manner that relieves the State of their burden of proof. *State v. Peters*, 163 Wn. App at 847 (citing to *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State*

¹⁹ See, CP 240-281, Court’s Instructions to the Jury, Instruction No. 11; or see, RP 1117-18 (trial court reading Instruction No. 11 to the jury).

v. *Kyllo*, 116 Wn.2d 856 (2009). In *Kyllo*, the Supreme Court reversed, reasoning that the instructions as given in that case could have caused the jury to confuse “great bodily harm” with “substantial bodily harm” resulting in a lowering of the State’s burden of proof. *Kyllo*, 116 Wn.2d at 864.

Similarly, the instructions given to the Nunez jury impermissibly lowered the prosecutor’s burden of proof and it’s likely the jury incorrectly believed that all that was necessary to convict Mr. Nunez was proof he intended to inflict the less egregious “bodily injury” on Ruiz. In fact, during his closing the prosecutor made just that argument. Rather than read the jury the definition of “great bodily harm,” the prosecutor referred to that portion of Instruction No. 11 that defined “bodily injury,” arguing the jury could convict Nunez on less than proof that Mr. Nunez acted with the intent to inflict “great bodily harm.”

Ladies and gentlemen, here’s how simple the law is. If you intend to really hurt someone. If you intend to cause bodily harm and you assault them with a deadly weapon then you have committed the crime of Assault in the 1st Degree in Washington State. It’s that simple.

RP 1136-37.

The prosecutor has the burden on appeal of establishing beyond a reasonable doubt that the verdict in Mr. Nunez’s case would have been the same absent the error. *Peters*, at 850 (citing to *Delaware v. Van Arsdall*,

475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Based on the circumstances under which the erroneous instruction was given and the prosecutor's use of the erroneous instruction, the prosecutor cannot meet that burden and Mr. Nunez's conviction must be reversed.

H. Prosecutorial Misconduct Deprived Mr. Nunez of his Constitutional Right to a Fair Trial.

Both the State and Federal Constitutions declare that a person shall not be deprived of life, liberty, or property without due process of law. U.S. Const. Amends 5, 14; Wash. Const. Art. 1, §3.²⁰ An individual's liberty interest and his right to a fair and unbiased trial is important and a fundamental part of due process. *United States v. Salerno*, 481 U.S. 739, 750, 95 L.Ed.2d 697, 107 S.Ct. 2095 (1987). Prosecutorial misconduct can deprive a defendant of a fair trial. *In re Personal Restraint Of Glasmann* 175 Wn.2d. 696 (2012). Only a fair trial is a constitutional trial. *State v. Case*, 49 Wn.2d 66 (1956).

1. The prosecutor's use of the civil standard of proof during closing in order to prove "intent to inflict great bodily harm," an element of the crime, was misconduct:

The prosecutor's use of the civil tort concept of *res ipsa loquitur* during closing argument effectively relieved the State of its burden of proving intent to cause "great bodily harm," an element of Assault in the

First Degree, and impermissibly shifted the burden of proof to the defense thereby violating the appellant's right to due process and a fair trial. RP 1137-38, 1150-51.²⁰

Res ipsa loquitur, a doctrine occasionally used in civil litigation, means, "the thing speaks for itself." *Curtis v Lein*, 169 Wn.2d 884 (2010), quoting W. Page Keeton, Et Al., *Prosser and Keeton on the Law of Torts*, § 39 at 243 (5th ed. 1984).

[T]he doctrine of *res ipsa loquitur* provides an inference of negligence from an occurrence itself which establishes a prima facie case sufficient to present a question for the jury...

[T]he doctrine of *res ipsa loquitur* casts upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence.

Metro Mortgage & Sec. Co., Inc. v. Washington Water Power, 37 Wn. App. 241, 243, (1984).

The doctrine recognizes that the nature of an act may allow that the occurrence of the act itself circumstantially establishes liability on the part of the defendant without further direct proof. *Jackson v. Criminal Justice*

²⁰ ...nor shall any state deprive any person of life, liberty, or property, without due process of law... U.S. Const, Amend. 14. "No person shall be deprived of life, liberty, or property, without due process of law." Art. I, §3, Wash. Const.

²¹ Defense counsel objected to the improper argument on both occasions when the prosecutor directed the Nunez jury to *res ipsa loquitur* but the trial court overruled each objection. RP 1137-38, RP 1150-51.

Training Commission, 43 Wn. App. 827, 829 (1989). Where *res ipsa loquitur* applies the plaintiff is spared from having to establish specific acts of negligence and the burden shifts to the defendant to provide an explanation. *Curtis*, 169 Wn.2d at 894. Even in the civil context, courts ordinarily apply the doctrine “sparingly in peculiar and exceptional cases, and only where the facts and demands of justice make its application essential.” *Curtis*, 169 Wn.2d at 894. (quoting *Tinder v. Nordstrom*, 84 Wn. App. 787, 792 (1997)).

The prosecutor’s reliance on the doctrine of *res ipsa loquitur* in Mr. Nunez’s case as proof Mr. Nunez acted with the specific intent to inflict “great bodily harm” on Ruiz misstates the law and constitutes misconduct. In a criminal case the prosecution bears the burden of proving intent beyond a reasonable doubt and the accused bears no burden. *In Re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970). By asserting otherwise, as the prosecutor did by informing jurors that the doctrine of *res ipsa loquitur* allowed them to presume Mr. Nunez intended to cause “great bodily harm” by mere virtue of the fact that Ruiz suffered a stab injury, lowered the prosecutor’s burden of proving the intent element to less than proof beyond a reasonable doubt, relieved the prosecutor of having to prove the absence of self-defense beyond a reasonable doubt, and shifted the burden to the defendant to produce evidence to rebut the

inference that he'd acted with the required intent. See, *State v. Gregory*, 158 Wn.2d 759, 859-60 (arguments that shift the burden of proof to the defense constitute misconduct); also, *State v. Fleming*, 83 Wn. App. 209, 213 (1996), *review denied* 131 Wn.2d 1018 (1997) (argument deemed improper if it “insidiously shifts the burden of proof” and therefore misstates the law).

On both occasions when the prosecutor resorted to the improper argument, defense counsel objected. Although the prosecutor attempted to backpedal on one occasion, correctly referring to his proper burden, the trial court improperly overruled defense counsel's objections. By overruling defense counsel's objections, the trial court left jurors with the clear, but incorrect, impression that the prosecutor had established one of the core elements of the Assault in the First Degree simply because Ruiz suffered a wound at Mr. Nunez's hand. The error and resulting prejudice requires that Nunez's conviction be reversed.

2. The Prosecutor Committed Misconduct by Calling the Accused “A Sociopath” in Opening Statement:

During his opening statement the prosecutor described Mr. Nunez as “the sociopath.” RP 438. A defense objection was sustained and a

curative instruction given. *Id.* The prosecutor's comment constitutes clear misconduct.²²

3. The Prosecutor committed Misconduct by improperly disparaging Mr. Nunez's trial counsel during closing argument:

A prosecutor's closing argument has a special persuasive force with a jury. See, Commentary, ABA *Standards for Criminal Justice*, Commentary, Std. 3-5.8. The prosecutor carries the prestige of representing the sovereignty and, as such, his improper suggestions and insinuations are apt to carry more weight against the accused than they should. *Berger v United States*, 295 US 78, 88, 55 C. Ct 629, 633 (1935). A prosecutor commits misconduct by making disparaging comments impugning defense counsel's integrity. *State v. Lindsay*, 180 Wn.2d 423, 432 (2014) (citation omitted).

During closing argument in the Nunez trial, the prosecutor improperly impugned the integrity of defense counsel. The prosecutor improperly inferred Nunez's defense counsel was deceiving the jury by presenting arguments that were "little rabbit trails" (RP 1183), "red

²² The prosecutor has a duty to act impartially and in the interests of justice and may not make heated partisan comments that appeal to the passions of the jury. *State v. Music*, 79 Wn.2d 699, 717 (1971)(prosecutors conduct referring to defendant as a "mad dog" and his friends as "four punks," was reprehensible.); *State v. Rivers*, 96 Wn. App. 672, 981 P.2d 16 (1999) (reversible error for prosecutor to refer to defendant as a "hyena," "jackal" and a predator); also, *State v. Belgarde*, 110 Wn.2d 504, 508 (1988) (misconduct for prosecutor to compare defendant to Kadafi).

herrings” and “argument falsifies.” RP 1185.²³ That argument was improper. See, e.g. *State v. Campos*, 2013 UT App. 213, 309 P.3d 1160, 1174-75 (2013) (prosecutor’s comparison of defense counsel’s theories to “red herrings” was inappropriate and crossed the line to an impermissible attack on defense counsel’s character); *U.S. v. Milk*, 447 F.3d 593, 601-02 (8th Cir. 2006) (prosecutor’s claim defense trying to mislead jury with “red herring” evidence was improper.)

In addition, the prosecutor went on to compare defense counsel to a fictional movie villain best known for carrying off one of the greatest deceptions in the history of movies, stating that:

And then the most interesting one is, here’s another red herring. Yeah, he can move his right arm. And ladies and gentlemen, yeah, it didn’t get chopped off. The way defense counsel is saying this stuff its like this guy, uh, what is it from? The Usual Suspects. Kiaser Sosay.²⁴

RP 1187.

²³ Ladies and gentlemen, in argumentation there’s this things. They’re called red herrings. They’re argument falsifies. What it is, you change the subject slightly. Something that’s still is along the line and you champion those and then say or infer that you have somehow made an argument to whatever the main point is. ...So, one red herring; not a serious wound. And I’m gonna get back to that later. Not a serious wound. RP 1185.

²⁴ Kaiser Soze was the name of a fictional villain appearing in the Academy Award winning 1995 movie, *The Usual Suspects*. Soze, a legendary crime lord, reputedly killed his wife and two children to prove a point to competitors and also engaged in crimes including murder, robbery arson, fraud, and acts of terrorism. The Soze character was a master deceiver and manipulator. See www.complex.co/pop-culture/2013/02/best-villians-movie-history/the-usual-suspect.

Likening defense counsel to a notorious fictional villain famous for deceit and asserting that defense counsel presented the jury with red herrings and false argument constitutes improper prosecutorial misconduct. See, *State v. Lindsay*, 180 Wn.2d 423 (2014); *State v. Gonzales*, 111 Wn. App. 276 (2002). The prosecutor's misconduct deprived Mr. Nunez of a fair trial.

4. The Prosecutor Committed Misconduct During Closing Argument by Making Statements Unsupported by the Record and by Improperly Characterizing the crime in an Inflammatory Manner.

It is misconduct for a prosecutor to use an argument unsupported by the record or which is calculated to inflame the passions and prejudices of the jury in order to secure a conviction. *State v. Claflin*, 38 Wn. App. 847, 849-50 (1984), *review denied* 103 Wn.2d 1014 (1985); *State v. Belgarde*, 110 Wn.2d 504, 507-08 (1988); American Bar Association ("ABA") Standards for Criminal Justice, Std. 3-5.8(c) (2d ed. 1980). A trial in which irrelevant and inflammatory matters are introduced against the accused is not a fair trial. See, *State v. Miles*, 73 Wn.2d 67, 70 (1968).

In his closing argument, the prosecutor, without any supporting evidence, informed jurors that after delivering a "kill shot" Mr. Nunez wanted to say to Mr. Ruiz as Ruiz died, 'It's all about the Norte's.' RP

1137; see also RP 1189 (prosecutor again asserting Nunez wanted a “kill shot”).

Although it paints a dramatic and inflammatory image, there was no evidence to support that argument.

Undeterred, the prosecutor continued, arguing, “Thank God it was not a serious wound. Thank God this is not a murder trial. Right?” RP 1,188. And that, “It was the result that we were worried about that’s called murder.” RP 1189.

Contrary to the prosecutor’s exhortations, the physician who treated Ramiro Ruiz for his injury testified that Ruiz’s wound was “superficial” and that he would not classify Ruiz’s injury as serious. RP 468, 472. Other than the superficial wound, Ruiz’s doctor did not note that Ruiz suffered any other injury. RP 465. Ruiz spent four hours, including the wait, at the hospital. RP 463-64. Argument by the prosecutor that, “but for the grace of God” Ruiz’s life was spared, was completely unsupported by the evidence and was improperly inflammatory. E.g. *Smith v. State*, 658 S.W. 2d 685, 688 (Tex Ct. App. 1983) (improper for prosecutor to argue, “but for the grace of God this could have been a murder case or a rape case...”); *Levingston v. State*, 651 SW 2d 319 (Tex. Ct. App. 1983) (improper for prosecutor in closing to argue, “...but for the grace of God he is not being tried for two murders).

In addition, the prosecutor's argument that after the Park & Ride altercation, while Mr. Ruiz was "begging someone to call 911" Mr. Nunez telephoned Nortenos to brag that he had just assaulted Ruiz, had no basis in fact. RP 1150. To the contrary, the evidence at trial showed Mr. Nunez was "upset" after the altercation with Ruiz. RP 1003. In fact, the only testimony introduced at trial was that Mr. Nunez was not talking to anyone on the phone when he entered the car after the altercation with Ruiz. RP 1005-06. Furthermore, the phone call evidence the prosecutor relied on established, at most, that Mr. Nunez was guilty of associating with bad people, an argument that is, in and of itself, misconduct.²⁵ There was simply no evidence proffered by any witness at trial that Mr. Nunez spoke with or bragged to any Nortenos gang members, or anyone else, about what happened to Ruiz.

By making arguments that were both improperly inflammatory and contrary to the evidence admitted at trial, the prosecutor committed misconduct.

²⁵ Arguing "guilt by association" is misconduct. *State v. Keenan*, 66 Ohio St. 3d 402, 409, 613 NE.2d 203 (1993); *Murphy v. State*, 1977 OK CR 200, 565 P.2d 694, 697 (1977).

5. Misconduct by the prosecutor resulted in substantial prejudice to Mr. Nunez and his conviction should be reversed.

The prosecutor's several acts of misconduct were flagrant and ill-intentioned, and created a "substantial likelihood that the misconduct affected the jury verdict" such that a curative instruction would not cure the resulting prejudice.²⁶ See, *State v. Belgarde*, 110 Wn.2d. at 508; *State v. Stith*, 71 Wn. App. 14 (1993) (in some instances a curative instruction is insufficient to cure prejudice resulting from the prosecutor's improper argument); *State v. Miles*, 73 Wn.2d 67, 70 (1968).

Impugning the integrity of defense counsel, improperly shifting the burden to the defendant, presenting arguments designed to improperly inflame the passions of jurors, referring to the accused in derogatory terms, and arguing facts not in evidence, are all forms of misconduct that our courts have found improper for years. E.g. *State v. Fisher*, 165 Wn.2d. 727 (2009) (argument and reference to evidence outside the record

²⁶ In addition to the several instances of misconduct described, the trial prosecutor was clearly overzealous. For example, after the prosecutor violated a prior court ruling by arguing in closing that Nunez had "coached a witness." Defense counsel objected and after the objection was sustained, the prosecutor informed the jury, "Well, you can take whatever inference you want from that." RP 1141. In addition, the trial court previously ruled that it was improper for one of the officers to testify that Mr. Nunez answered a phone call from the officer because there was no evidence it had been Nunez, and because the party answering told the officer, "I don't want to talk to you," after the officer identified himself. RP 837-39. In closing the prosecutor inferred the defendant had answered and hung up as evidence Mr. Nunez was conscious of guilt. RP 1144. See also, footnote 17, *supra*.

constitutes misconduct.); see also, *State v. Fleming*, 83 Wn. App. 209, 214, (1996) *rev. den.* 131 Wn.2d 1018 (1997). Before the prosecutor made his misconduct arguments he had access to both rules and case law that prohibit the very type of misconduct arguments he presented during trial. Likewise he heard the testimony and knew what evidence was not presented at trial. The prosecutor's arguments were therefore flagrant and ill-intentioned. See, *State v. Charlton*, 90 Wn.2d 657, 662, 665 (1978).

Furthermore, the evidence against Mr. Nunez at trial depended primarily on the testimony of Ramiro Ruiz and was far from overwhelming. Jurors did not find Mr. Ruiz's version of events highly convincing because Ruiz testified very clearly that Mr. Nunez attempted to rob him at knifepoint and yet the jury found Nunez not guilty of that charge.

The prosecutor's improper arguments substantially prejudiced Mr. Nunez. Further, there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict. Therefore, Mr. Nunez should receive a new trial.

I. Mr. Nunez did not receive effective assistance of counsel.

The Sixth Amendment to the U.S. Constitution and Article 1, Section 22 of the Washington State Constitution mandate that a defendant is entitled to effective counsel and the right applies whether counsel is

appointed or retained. *State v. James*, 48 Wn. App. 353, 362 (1987) (citation omitted). The test utilized for ineffective assistance is whether (1) the defense counsel's performance fell below an objective standard of reasonableness, and (2) whether this deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 366 (1985). The *Strickland* court defined prejudice as the “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. at 694.

Mr. Nunez’s trial counsel was ineffective for failing to object pursuant to ER 403 and 404(b) to the of “prior bad acts” evidence admitted at trial against Mr. Nunez individually. None of that propensity evidence related to the either the crimes charged or the gang aggravator.

Mr. Nunez’s trial counsel was ineffective for eliciting an improper opinion during cross examination from prosecution witness Taylor that his opinion was that Mr. Nunez assaulted Mr. Ruiz at the Park & Ride to benefit his gang.

Mr. Nunez’s trial counsel was ineffective for failing to object to all of the improper and inflammatory misconduct arguments made by the prosecutor in his closing argument.

The failure of Mr. Nunez's counsel to interpose objections and to take reasonable steps to exclude otherwise inadmissible evidence undermines the confidence in outcome of Mr. Nunez's trial. See, *Strickland v. Washington*, 466 U.S. at 694. In short, without the improper propensity evidence and without the improper gang related and guilt by association evidence, without the prosecutorial misconduct, there is a reasonable probability that Mr. Nunez would have had a different result at trial. Mr. Nunez did not receive effective assistance of counsel and is therefore entitled to a new trial.

VI. CONCLUSION

For the reasons stated above, Andre Nunez respectfully requests the court grant him the relief requested herein.

DATED this 7th day of November, 2014.


ERIC W. LINDELL, WSBA# 18972
Attorney for Appellant

PROOF OF SERVICE

I certify that on the 10th day of November 2014, I caused to be delivered, via U.S. Mail, a copy of the Appellant's Motion For Extension of Time to File Appellant's Brief, in the above-referenced matter, upon the following persons and/or parties:

| | |
|--|--|
| Rene S. Townsley, Clerk of the Court Court of Appeals, Division III 500 N. Cedar St. Spokane, WA. 99201 | Andre Jacob Nunez, 373913 Airway Heights Corrections Center PO Box 2049 Airway Heights, WA. 99001 |
| Yakima County Prosecuting Attorney Appellate Unit 128 North 2 nd Street, Room 329 Yakima, Washington 98901 | |

Dated this 10th day of November 2014.


ERIC W. LINDELL, WSBA#18972