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Court of Appeals
Division III
State of Washington

NO. 32374-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ANDRE JACOB NUNEZ, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

- A. Did the trial court properly admit statements made in response to a routine booking form at the jail?
- B. Did the trial court properly admit the testimony of Nunez's spouse and their recorded jail phone conversations made prior to their marriage?
- C. Did the trial court properly admit the jail phone calls that were not objected to on the basis of authenticity?
- D. Was gang-related evidence properly admitted?
 - 1. Was there a sufficient nexus for the evidence?
 - 2. Did the court engage in the required analysis under 404(b)?
 - 3. Was Exhibit 30, a computer-generated list of inmates, properly admitted?
 - 4. Did Nunez waive any challenge to Officer Taylor's opinion testimony by eliciting the testimony at trial?
 - 5. Was the evidence admitted consistent with Nunez's right to be presumed innocent and right of association?
- E. Viewing the evidence in the light most favorable to the State, could any rational trier of fact have found the presence of the gang aggravator beyond a reasonable doubt?
- F. Did Nunez fail to preserve any right to appeal the admission of his wife's testimony that she had seen him fight in front of her and did the trial court properly admit jail phone calls in which the defendant used curse words?

- G. Was the jury properly instructed on the definition of great bodily harm and did Nunez waive any right to appeal by not objecting to the instruction at trial?
- H. Did Nunez waive any right to assert prosecutorial misconduct by failing to object during the prosecutor's closing argument?
- I. Has Nunez failed to establish that he is entitled to a new trial based on the performance of his trial attorney?

II. STATEMENT OF THE CASE

The Appellant, Andre Jacob Nunez, was charged with first degree assault and first degree robbery, with aggravating factors alleged on both counts. CP 235-6. The charges stem from the following fact pattern:

Ricardo Ruiz and his younger brother, Ramiro Ruiz, worked at Washington Beef together. RP 647. Andre Nunez also worked there. RP 650. On July 20, 2012, Ramiro accidentally bumped into Nunez at work and then apologized to him. RP 692, 725. Nunez then called him a "scrap," a derogatory word for a Sureño gang member, even though Ramiro is not a gang member. RP 690, 692. Nunez had previously called Ramiro and Ricardo "scraps" and uttered the word, "Norte," which is used by Norteño gang members. RP 659. Nunez told Ricardo to tell Ramiro to "watch his back" and that he was going to "pull his card." RP 650, 692. Ricardo informed Nunez that Ramiro was his brother and that Ramiro was not into gangs. RP 651. Ricardo also told Nunez that he, himself, was a

Sureño and to go through him and not his brother. RP 651, 653, 724.¹

Nunez said he was a “Yakima banger for LR,” or “La Raza.” RP 654.

Ricardo relayed this to his brother a few minutes later in the break room. RP 654-5, 695, RP 717. When Ramiro went to leave, Nunez followed him and said, “Ramiro, hey come here. Let’s go to the restroom.” RP 656, 696. Ramiro asked him, “What’s your problem?” and said, “I don’t wanna do this.” RP 656, 657. Ramiro walked away but Nunez continued to follow him and then swung at him. RP 647, 696. Ramiro ducked a couple of times and then turned and started punching back. RP 656-7, 696, 722. Nunez picked up a chair and put it over his head. RP 696, 271.

At that point, Ricardo ran to the aid of his brother. RP 657. Nunez then showed his red belt (which Ricardo had seen him wear before) and made a reference to “LR” or La Raza. RP 659, 674-5. Ramiro tackled Nunez. RP 658. Nunez’s head hit the wall and he got knocked out for a little while. RP 660, 697. Nunez had previously bragged that he was a UFC fighter and had never been dropped by Sureños. RP 661, 667. When Nunez got up, he yelled gang slurs to Ricardo such as, “fucking scraps.” RP 697.

¹ Ricardo had left California to escape the gang lifestyle. He was a Sureño gang member there along with two older brothers. RP 651, 692.

A few months later, on August 27, 2012, Nunez and his girlfriend pulled behind Ramiro's car at a rest stop. RP 698-9. Ramiro was in the driver's seat of his car on the phone with his fiancé. Nunez got out of the car and threw a water bottle at the side of Ramiro's head through an open window. RP 700, 730. Nunez said, "well now you fucking scrap. What are you going to do now?" and other cuss words. RP 703. Nunez then jumped in the car through an open back window and stabbed Ramiro with a knife. RP 700-1. The knife was 6 ½ inches long with 3-inch blade. RP 735, 770-1.

Ramiro tried to block Nunez and push him away. RP 701. Nunez then opened the front passenger side door and attempted to stab Ramiro again. RP 701. Ramiro was able to jump out the door at one point. RP 701. Nunez got out and started calling him a "fucking scrap" and said, "It's all about Norte. What the fuck are you going to do you fucking scrap?" RP 702, 739. Nunez then chased Ramiro around the car and demanded his wallet. RP 704. Nunez tried to stab him about 5 or 6 times. RP 702-3. At one point, Nunez kicked his driver's side window as well. RP 706. Ramiro felt like Nunez was trying to kill him. RP 705. Ramiro told him to go away and was able to run and tell a truck driver to call 911. RP 706.

Mark Wilcox, a farmer, was exiting I-82 when he saw an individual throw a bottle at the back of another car. RP 486, 489. He slowed down and the individual jumped into a car driven by a female. RP 486. Ramiro flagged down Wilcox and yelled, "call 911. I've been stabbed." RP 487, 490. Wilcox called 911 for help. RP 509-10. Wilcox described Ramiro as being hysterical and breathing hard. RP 487, 510.

Ramiro was taken to the hospital. He had a stab wound on the right side of his chest. RP 456. The wound was about 2 inches in length and had penetrated through his skin, fatty tissue, and muscle fibers. RP 460, 467. He received 6 or 7 sutures to close the wound. RP 471, 710.

At trial, Nunez did not testify and he did not call any witnesses. He was convicted of first degree assault as well as a deadly weapon enhancement and gang aggravator. CP 282, 284-5. He was found not guilty of the robbery charge. CP 283. He was sentenced and this appeal followed.

III. ARGUMENT

A. The trial court properly admitted statements made in response to a routine booking form at the jail.

Before trial, the defense moved to suppress statements made to a corrections officer during a routine booking process. CP 16-26. Officer Winmill is a corrections officer in the Classification Division of the county jail. RP 7. He is tasked with doing research to house inmates safely after the initial pre-booking process. RP 7, 16, 550. His follow-up work is done about 3 days after the pre-booking is done. RP 16. To do that, he looks at such things as an inmate's history of incarcerations, disciplinary history, what the current charges are, gang involvements, gang affiliation, and tag names. RP 7. Sometimes an initial classification will change after his follow-up work is done. RP 548.

As part of this process, he uses a "Classification Face to Face Interview Form." CP 28, RP 12, State's Exhibit 25. The inmate has a chance to read the form and signs it under penalty of perjury. RP 18. Miranda rights are not read before the form is filled out. RP 20. Inmates do have an option to refuse and are not forced to sign the form or answer any question. RP 21.

The interview form includes questions such as are you involved or have you been involved with a gang. RP 549. Norteño and Sureño gangs

are kept in separate parts of the jail for their safety because they get in fights. RP 12, 15. In this case, Officer Winmill knew that Nunez was booked in for second degree assault. RP 17. The court held that the statements to Winmill were admissible and that there was no prior invocation of his right to remain silent or right to counsel. RP 43.

Nunez argues on appeal that there was no need for Winmill to document gang affiliation because it had been done. (App's brief at 11). However, the brief pre-booking interview is done before any charges are filed. A more thorough classification process post-charging is not only reasonable but necessary to insure inmate safety. As Officer Winmill testified, sometimes an initial classification will change after his follow-up work is done. RP 548

Nunez also argues that Officer Winmill should reasonably have known that his questioning would produce an incriminating response and therefore, should have read Miranda. (App's brief at 11). However, this case falls into the routine booking question exception to Miranda.

In Pennsylvania v. Muniz, 496 U.S. 582, 600-601 (1990), the Supreme Court held that answers to questions by a suspect in custody are nonetheless admissible when the questions fall within a routine booking question exception to Miranda, which exempts from Miranda's coverage questions to secure the biographical data necessary to complete booking or

pretrial services and that appear reasonably related to the police's administrative concerns." 496 U.S. at 601-2; see also United States v. Horton, 873 F.2d 180, 181 n.2 (8th Cir. 1989) ("It is well established that Miranda does not apply to biographical data necessary to complete booking or pretrial services").

In United State v. Washington, 462 F.3d 1124, 1133 (9th Cir. 2006), the Ninth Circuit held that questions about a defendant's gang moniker fell under the booking question exception to Miranda recognized in Rhode Island v. Innis, 446 U.S. 291, 301 (1990), and Muniz. Generally speaking, it is routine (and necessary) for jail officials to ask defendants about their gang affiliation so they can be housed safely and staff can safely secure jails in many jurisdictions. See id. ("The record in the instant case shows that agents routinely obtain gang moniker and gang affiliation information...in order to secure prisoner safety").

In State v. Walton, 64 Wn. App. 410, 412, 824 P.2d 533 (1992), a booking officer and pretrial investigator asked the defendant his address and the defendant gave one. Id. The State admitted his statements in his drug possession trial where he denied residing at the address where drugs were found. Id. at 412-3. The court held as follows:

The record suggests the booking officer and the pretrial investigator did nothing more than try to determine Mr. Walton's address.

The questions asked were routine background questions necessary for identification and to assist a judge in setting reasonable bail. These are precisely the routine statements which are admissible, even though they ultimately prove to be incriminating. Moreover, since Mr. Walton testified he did not reside at the Mallon address, his statements were admissible for impeachment purposes. There is no error.

Id. at 414 (citations omitted).

Nunez relies on State v. Denney, 152 Wn. App. 665, 218 P.3d 633 (2009), for his argument.² However, the Denney case is distinguishable. Denney had been arrested for morphine possession, and both the booking and bail questionnaires asked her if she had used an illegal drug in the last few days. Id. at 638. The questions asked in Denney would necessarily invite an answer that would be a direct admission of guilt. Id.

Here, Officer Winmill only knew that Nunez was arrested for assault in the second degree. RP 17. Officer Winmill did not have any more specific information about Nunez that would have suggested this

² In footnote 3, Nunez makes a due process argument, claiming it is “fundamentally unfair” for Officer Winmill to lead Nunez to believe the purpose behind his questions is to make sure Nunez remains in as safe location. Nunez cites no authority for his argument. As such, this Court does not have to review his claim. Nonetheless, that was the purpose behind the questioning. Officer Winmill likely had no idea the information he gained would be used in court later. Nunez does not make a due process argument based on coercion. The State would note that the issue of routine booking questions being per se coercive was raised in State v. Deleon, 185 Wn. App. 171, 341 P.3d 315 (2014), review granted, 184 Wn.2d 1017 (2015), a case currently before the State Supreme Court.

was a gang-related assault. Even if the officer had read the probable cause narrative there was no reference to the crime being gang motivated. CP 2-4. Similarly, the information filed on October 23, 2012 merely charged second degree assault without a gang aggravator. The classification with Winmill took place on December 4, 2012. CP 28. The gang aggravator was not added until January 29, 2013. CP 12-13. Unlike a drug possession charge, the charge of assault in the second degree does not inform the officer of whether the case is gang-related or not. Thus, unlike in Denney, the questions asked here would not necessarily invite an answer that would be a direct admission of guilt.

Here, exhibit 25, a redacted gang classification form, was admitted through Officer Winmill. State's Exhibit 25. The classification form indicated that Nunez was affiliated with Norteños. Id. On cross-examination, Officer Winmill testified that Nunez was placed with Norteños and that Nunez admitted to being a gang member. RP 549-50.

Nonetheless, it was harmless error to admit evidence of Nunez's gang affiliation by way of the classification form. The test is whether the exclusion of the evidence would have resulted in a different answer to the special verdicts. See State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985). Ricardo and Ramiro Ruiz both testified extensively about Nunez's gang affiliation. Their testimony was based on their first-hand

knowledge and observations. They testified about his gang clothing, his claim of being “Norte” and “LR or La Raza” and him calling them “scraps.” The defendant also had numerous gang tattoos that showed his affiliation with Norteños. RP 599, 604-5, 636; State’s Exhibits 15-17. Given the overwhelming evidence of Nunez’s gang affiliation, even if the jury had not considered the classification form, the answer to the special verdict still would have been “yes.”

B. The trial court properly admitted the testimony of Nunez’s wife and recorded jail phone conversations made prior to their marriage.

Washington recognizes two distinct evidentiary privileges between a husband and wife: a testimonial privilege, which, if invoked, places a party’s husband or wife off-limits as a witness against his or her spouse with only a few exceptions, and a communication privilege, which more narrowly protects spousal confidences. There are exceptions to both privileges and both privileges can be waived. RCW 5.60.060(1), in pertinent part, provides as follows:

(1) A spouse...shall not be examined for or against...her spouse...without the consent of the spouse...; nor can either during marriage..., be without the consent of the other, examined as to any communication made by one to the other during the marriage...But this exception shall not apply to...a criminal action...against a spouse...if

the marriage...occurred subsequent to the filing of formal charges against the defendant...

(Emphasis added).

Nunez first claims that his wife's testimony violated the spousal privilege. (App's brief at 12). However, they were married in 2013 *after* formal charges were filed against Nunez in 2012. (RP 889, App's brief at footnote 4). Therefore, their marriage occurred subsequent to the filing of formal charges. By the plain language of the statute, this is an exception to both the testimonial and communication privileges. "Testimonial privileges are creatures of statute, and should therefore be strictly construed." State v. Wood, 52 Wn. App. 159, 163, 758 P.2d 530 (1988). As such, the spousal privilege does not apply and the court did not error in allowing Nunez's wife to testify.

Nunez also argues that the privilege applies to jail phone calls made before Nunez and his wife were married. (App's brief at 12). The same exception that applies to the testimonial privilege applies here to the confidential communications privilege. They were married on February 19, 2013, after formal charges were filed, so the privilege does not apply.

In addition, the jail phone calls were not made during the marriage. The phone calls were made on December 6, 2012, and January 18 and 19,

2013. RP 930, 1023, 1024, 1140. Conversations occurring prior to marriage are not subject to suppression on the basis of marital privilege; See State v. Howard, 52 Wn. App. 12, 756 P.2d 1324 (1988).

Furthermore, the marital communications privilege also only applies to *confidential* communications between spouses during marriage. State v. Webb, 64 Wn. App. 480, 824 P.2d 1257 (1992). These were not “confidential communications” when they spoke over a phone line that they both knew was recorded and subject to monitoring. See State v. Grove, 65 Wn.2d 525, 398 P.2d 170, (1965) (husband’s letter to wife was not a confidential communication because defendant knew it would be censored by guards).

C. The trial court properly admitted jail phone calls that were not objected to on the basis of authenticity.

For the first time on appeal, Nunez argues that the jail phone calls between Nunez and his wife, Jesennia, were not properly authenticated. The requirement of authentication is waived when the opponent fails to object on authentication grounds. Seattle v. Bryan, 53 Wn.2d 321, 324, 333 P.2d 680 (1958). Here, there was no objection as to authenticity when the phone calls were discussed by the parties and the court. The objections that defense raised during the trial related to relevance, prejudice, and spousal privilege, not authentication. RP 754, 788.

Appellant now argues on appeal that 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 the trial. But Nunez's wife did state at trial that it was her voice and her husband's voice on the phone calls that were played for her by the prosecutor. RP 995-6. The logical and reasonable inference is that the phone calls were the jail phone calls at issue in the case. The defense attorney could have demanded that she listen to each phone call in court on the record and say "yes, that is our voices." His failure to object to authentication was likely to save time because everyone in the courtroom knew that the phone calls being referenced were the jail phone calls at issue that had been admitted at trial.

Furthermore, the identity of a party during telephone communication may be established by either direct or circumstantial evidence. State v. Danielson, 37 Wn. App. 469, 472, 681 P.2d 260 (1984). Both are equally reliable. State v. Martinez, 105 Wn. App. 775, 786, 20 P.3d 1062 (2001). A telephone conversation under ER 901(b)(4) may be authenticated even when the witness cannot identify the caller or recipient's voice (so as to satisfy ER 901(b)(5)). In fact, telephone calls have frequently been authenticated when self-identification is combined with virtually *any* circumstantial evidence. Id. (emphasis added). The

threshold of proof is low. Authentication may also be accomplished by circumstantial evidence that points to a person's identity as the particular person called, if the conversation reveals knowledge of facts that only the particular person would be likely to know. State v. Deaver, 6 Wn. App. 216, 219, 491 P.2d 1363 (1971).

In the present case, the State elicited testimony from Yakima County Department of Corrections Officer Welch. He testified extensively as to the telephone recording system at the jail and the calls played for the court. He testified that each call is made with the defendant's self-selected PIN number. RP 554. Furthermore, the jail phone system has a voice recognition component. RP 554. Inmates have to enroll their voice into the phone system and must state their name and the phrase "United States" each time they make a phone call. RP 554. Here, all phone calls were burned from Nunez's phone account. PR 556. Officer Welch was shown 3 CDs, exhibits 26, 27, and 28. He testified that the CDs "contain recorded phone calls for Andre Nunez." RP 557.

All the calls begin with the defendant stating his name, "Andre Nunez." RP 1023, 1024. Furthermore, his wife testified that the voice on the calls is the voice of the defendant. RP 995-96. And the content of the calls also clearly establishes that the caller is Nunez. See State's Exhibits 26-8. As such, even absent an objection, pursuant to ER 901(b)(4), the

phone calls were sufficiently authenticated and the trial court properly admitted evidence of the phone calls at trial.

D. The gang evidence was properly admitted.

1. There was a sufficient nexus for the evidence.

Evidence of street gang affiliation is admissible in a criminal trial if there is a nexus between the crime and gang membership. See State v. Scott, 151 Wn. App. 520, 213 P.3d 71 (2009). Here, the nexus was established by the victim's testimony at trial and his brother's testimony. When Ramiro bumped into Nunez, Nunez then called him a "scrap." RP 690, 692. Nunez had previously called Ramiro and Ricardo "scraps" and used the word, "Norte." RP 659. Ricardo told Nunez that he was a Sureño and to go through him and not his brother. RP 651, 653, 724. Nunez bragged he was a La Raza gang member. RP 654. During the attack at Washington Beef, Nunez showed his red belt (which Ricardo had seen him wear before) and made a reference to "LR" or La Raza. RP 659, 674-5. Nunez had previously bragged that he had never been "dropped" by Sureños. RP 661, 667. Furthermore, when Nunez got up, he yelled gang jargon to Ricardo, including the insult, "fucking scraps." RP 697.

Then, on August 27, 2012, after hitting Ramiro with a water bottle, Nunez said, "well now you fucking scrap. What are you going to do now?" and other cuss words. RP 703. While they were both outside the

car, he called Ramiro a “fucking scrap” and said, “[i]t’s all about Norte. What the fuck are you going to do you fucking scrap?” RP 702, 704. Based on the uncontroverted testimony of both Ramiro and his brother, there was undoubtedly a nexus between the crime and gang membership.

2. The court engaged in the required analysis under 404(b).

At trial, the State called Officer Chris Taylor as a gang expert. He testified as to the characteristics of Sureño and Norteño gang members. RP 579. He testified about some of their symbols, colors, and terminology such as “scrap” being an insulting name that Norteños call Sureño gang members. He explained that the number 14 was adopted by Norteños. RP 581-2. He also testified about Norteños’ use of the phrase “Norte,” the Roman Numeral for 14 (XIV), the MOB tattoo, and the northern star. RP 582, 585, 588, 698. Officer Taylor discussed how certain tattoos, such as the number XIV, are earned. RP 599-600, 627-8. Nunez has a large XIV tattooed on his chest, a MOB tattoo, and a northern star tattoo. State’s Exhibits 15-17, RP 598-9. He also explained how gangs have an expectation of retaliation. RP 627.

Nunez claims that the court erred in admitting expert gang testimony under Evidence Rule 404(b). In applying ER 404(b), a trial court is required to engage in a three-step analysis: 1) determine the

purpose for which the evidence is offered, 2) determine the relevance of the evidence, and 3) balance on the record the probative value of the evidence against the prejudicial effect. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The trial court does not have to conduct a hearing to take testimony. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

An appellate court will review a trial court’s ER 404(b) ruling for abuse of discretion. Dennison, 115 Wn. 2d at 628. A trial court has broad discretion to weigh the probative value of evidence against its prejudicial effect. State v. Stein, 140 Wn. App. 43, 67, 165 P.3d 16 (2007). The requirement for on-the-record balancing “both facilitates appellate review and ensures that the judge gives thoughtful consideration to the issue.” State v. Pirtle, 127 Wash. 2d 628, 651, 904 P.2d 245 (1995), cert. denied, 135 L. Ed. 2d 1084, 116 S. Ct. 2568 (1996) (citing State v. Jackson, 102 Wash. 2d 689, 694, 689 P.2d 76 (1984)). If both of these objectives are met, this court will uphold the admission of evidence challenged under ER 404(b). See Pirtle, 127 Wash. 2d at 651.

Here, the 404(b) evidence in question included testimony by a gang expert, Officer Taylor as to the gang culture in general. RP 66. Nunez claims on appeal that the court did not engage in the proper pre-admissibility analysis because it did not do an “in depth analysis.” (App’s brief at 21-2). However, the court did an extensive weighing on the record. RP 66-9.

The court first went through the State’s proposed testimony under 404(b):

There were in general, and these are going to be referenced as “including, but not limited to” proposed evidence of the defendant working at, I believe it was Washington Beef, within a month and a half of the alleged assault. And discussions between Mr. Nunez and the alleged victim and his brother pertaining to competing gang affiliations. The alleged victim’s brother having come up from California. There was some discussion about, I think it was “punching a card” or “pulling a card”. Or something to that effect. Sorry I don’t have the precise language on the tip on my tongue. And then a fight ensued. I don’t think that Washington Beef’s internal investigation and decision on who should’ve been fired is binding on this Court for purposes of the evidence being proposed by the state and within 45 days we have an event that’s alleged to have occurred in a rest stop area. Whereby, there’s terminology about a “scrap” and “it’s all about Nortés”. And gang colors, or colors associated with gangs were donned by---or a testimony from

the alleged victim would be that gang colors associated with the Sureños---pardon me. The---one of the two gangs. The Nortos, I believe, were donned by the defendant in the parking lot.

RP 66-7.

After summarizing the facts of the case, the court stated:

These obviously are prejudicial facts. But, facts used at trial are by nature intended to be prejudicial. The question is whether they are unduly prejudicial and the balancing that the Court needs to do at this point is whether their relevance outweighs the prejudicial nature of the facts. And I believe that as proffered they are more relevant than prejudicial. And in fact, not unduly prejudicial.

RP 67. The court went on to find that the proffered testimony was admissible to show intent for the assault and robbery. RP 67. But the court reserved on whether the testimony would be admissible to prove the gang enhancement.

RP 68.

Clearly, the weighing in this case was done on the record as required. The sole issue is whether the court's decision was an abuse of discretion. See State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Here the gang evidence was critical and undeniably probative of motive and intent. Courts regularly admit gang affiliation evidence where it is relevant to the motive for a crime or to prove a defendant's intent, both of which are permitted purposes for offering evidence under ER 404(b). State v. Scott,

151 Wn. App. 520, 527, 213 P.3d 71 (2009); State v. Yarbrough, 151 Wn. App. 66, 210 P.3d 1029 (2009) (gang evidence admissible as motive); State v Campbell, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995) (motive and intent). As such, Nunez has failed to demonstrate that the trial court abused its discretion in admitting the gang related evidence.

3. Exhibit 30, a computer-generated list of inmates, was properly admitted.

The State presented evidence at trial that Nunez called a particular phone number shortly after the stabbing. Community Corrections Officer Jeremy Welch provided a list of all the jail inmates that called that same number from the jail. RP 560, Exhibit 30. The defense objected to the admission of Exhibit 30 and the trial court inquired of the basis:

JUDGE: “And the basis?”

DEFENSE ATTORNEY: Your Honor, without a tremendous amount of additional testimony this document is meaningless. However, it would allow jurors to make assumptions about what it might or might not say. I don’t think it can be interpreted simply by looking at it.

JUDGE: I think he’s laid the foundation for what it is. And given that I’ll overrule the objection and admit State’s Exhibit 30. Of course, you’d be free to cross exam on what it may or not mean and its ability to be interpreted on your cross.

RP 560. Officer Perez later testified that he looked up the inmates calling that number in a database maintained by DOC and that the inmates were documented Norteños or affiliates thereof. RP 957.

Nunez is now claiming, for the first time on appeal, that State's Exhibit 30 is testimonial and prepared to assist in court proceedings. (App's brief at 23). This was not the objection made at the time of trial. At trial, the defense argued that the exhibit was meaningless and couldn't be interpreted, essentially arguing that it was irrelevant. As such, this new claim that the report was testimonial was waived at the trial. An objection must be made in the trial courts to preserve the error for appeal. See State v. O'Cain, 169 Wn. App. 228, 235, 279 P.3d 926 (2012) (“[t]he right to confrontation must be asserted at or before trial or be lost”); see also Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311, 313-14, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (claim of error premised on the confrontation clause must be asserted at or before trial or be lost).

Nonetheless, for sake of argument, any error in the admission of the report is harmless error. Ricardo and Ramiro Ruiz's testimony, along with Officer Taylor's expert testimony, was more than enough to prove a gang motive as well as the gang aggravator. Exhibit 30 was not so prejudicial that the verdict would have been different had it been excluded.

4. Nunez waived any challenge to Officer Taylor’s opinion testimony by eliciting the testimony at trial.

When discussing proof of gang membership, Nunez’s trial attorney asked Officer Taylor if doing work for the gang was one indicia of gang membership. RP 624. Officer Taylor indicated that it was. RP 624. Defense counsel asked, “and that doesn’t apply to Andre, does it?” RP 624. Officer Taylor indicated “yes.” RP 625. When asked how so, Officer Taylor replied, “Based on the information I received in the report this was retaliatory crime that not only benefits the gang but Andre himself.” RP 625.

Nunez claims on appeal that improper opinion testimony was elicited from Officer Taylor by his defense attorney at trial during cross-examination. Essentially, the defense created this error at trial. This falls within the invited error doctrine, which prohibits a party from setting up error at trial and then complaining of it on appeal. See City of Seattle v. Patu, 147 Wn.2d 717, 58 P.3d 273 (2002).

5. The evidence was admitted consistent with Nunez’s right to be presumed innocent and right of association.

Defendant claims that the admission of gang evidence improperly infringed upon his presumption of innocence and his right of free association. He did not raise these issues at trial, and therefore, they are

waived and this court may decline to address them. See RAP 2.5(a). Furthermore, no cases support his position that the admission of gang evidence infringed upon his presumption of innocence. The gang evidence goes to motive, which is admissible “if relevant and necessary to prove an essential element of the crime charged.” State v. Mee, 168 Wn. App. 144, 156, 275 P.3d 1192 (2012). The gang evidence also goes to the aggravator, which requires that the State prove that

The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

RCW 9.94A.533(3)(aa).

Contrary to appellant’s claim, the evidence in this case was not admitted only to show Nunez “was guilty of a crime by mere virtue of the fact that he associated with gang members.” The evidence was admitted to show his motive and to prove the gang aggravator. Nunez cites no case that evidence of gang affiliation infringes on the presumption of innocence when it is relevant evidence. The cases he cites for his argument are distinguishable.

The issue of gang evidence and the First Amendment Right of Association was dealt with in State v. Campbell:

Campbell's argument that the gang testimony infringed on his First Amendment right to association is also without merit. The First Amendment does not erect an absolute bar to the admission of associational evidence. Dawson v. Delaware, 503 U.S. 159, 164-67, 117 L. Ed. 2d 309, 112 S. Ct. 1093 (1992). Association evidence is only inadmissible when it proves nothing more than a defendant's abstract beliefs. Dawson, 503 U.S. at 164-67. This evidence is admissible when relevant to an issue in a case. See Dawson, 503 U.S. at 164-67; United States v. Robinson, 978 F.2d 1554, 1565 (10th Cir. 1992), cert. denied, 113 S. Ct. 2938 (1993). As discussed above, evidence of Campbell's gang affiliation was relevant to show motive. Thus, its admission did not violate Campbell's First Amendment rights.

78 Wn. App. 813, 822-823, 901 P.2d 1050 (1995). Similarly, the admission of gang evidence in this case did not improperly infringe upon the defendant's presumption of innocence and right of free association.

E. Viewing the evidence in the light most favorable to the State, a rational trier of fact have found the presence of the gang aggravator beyond a reasonable doubt.

The gang aggravator is defined as follows:

The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or advantage to or for a criminal street gang as

defined in RCW 9.94A.030, its reputation, influence, or membership.

RCW 9.94A.533(3)(aa).

The standard of review is whether any rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 599, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. Id. Evidentiary inferences favoring the defendant are not considered in a sufficiency of the evidence analysis. State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

Circumstantial evidence may be used to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State

v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). The jury, alone, has had the opportunity to view the witnesses' demeanor and to judge their veracity.

Nunez suggests that the crime was motivated by a dispute that started weeks earlier and was therefore, not gang-related. However, the dispute that occurred at Washington Beef was itself gang-related. In both instances, Nunez used the derogatory term for Surenos, "scraps." In both instances, he claimed, "Norte." The uncontroverted evidence was that he started both incidents and that the reason he did so was that he believed the victim to be a rival gang member. When viewing the evidence in the light most favorable to the State, there was overwhelming evidence that this crime was gang motivated and done to directly or indirectly benefit the appellant's gang.

F. Nunez failed to preserve any right to appeal the admission of his wife's testimony that she had seen him fight in front of her and the trial court properly admitted jail phone calls in which the defendant used curse words.

Nunez argues that the trial court erred by admitting bad character evidence. First, he refers to part of his wife's testimony where she said that she had seen him fight other people. RP 982. The testimony went as follows:

PROSECUTOR: Had you ever seen the defendant fight anyone in front of you?
WITNESS: Yes. I have.
PROSECUTOR: How many times?
WITNESS: Um—
DEFENSE ATTORNEY: Objection.
Revelance. Prior bad acts.
JUDGE: Sustained

RP 983.

His attorney objected at trial to the question “How many times?” and the objection was sustained. Notably, his objection came after the witness’s answer that she had seen Nunez fight in front of her. As such, the objection was not sufficient in itself to save his right to have that error reviewed on appeal.

The case of State v. Delaney, 161 Wash. 614, 620, 297 P. 208

(1931) dealt with an identical situation:

The objection of counsel for Delaney at the close of the above-quoted testimony of Hudson, it is true, was made after the answer of Hudson was given, and was not followed by any motion or request to strike his answer. This objection, we may here assume, was not sufficient in itself to save Delaney’s right to have that error reviewed on this appeal.

Furthermore, Nunez did not make a motion to strike any of the testimony or seek a curative instruction from the trial judge. RP 983.

Nunez also claims error in the admission of jail phone calls in which he made negative comments about his mother. (App's brief at 29). The call in question involves him complaining about his mom not helping with bail and him referring to his mother as his "fucking mom." RP 931-32. He used the "f word" during the call. The call was made 2 days after he turned himself in to the jail. RP 785. The call is significant in that Nunez says, "You know, I know what I did and shit. But, you know, fucking, you know, I'm a man and shit. That it's my mistake and shit." RP 832. Nunez claims that the evidence is not admissible under 404(b).

However, the fact that he is complaining about his mom not helping with his bail is critical to putting the comments about his "mistake" into context: he is talking about his case -- why he is in jail. The statement comes in the midst of him complaining about getting no help from his mom.

If any more editing was done to the call, the statements about it being his "mistake" and him knowing what he did would not have any context. Even Nunez acknowledges that the calls were heavily edited. (App's brief at 12, n.4). The call contains admissions of wrongdoing ("I know what I did" and "it's my mistake"). As such, the call is highly relevant to proving that he committed the crime in this case. Further, the

curse words were not *significantly* prejudicial as Nunez claims. As such, there was no error in admitting the jail phone call.

G. The jury was properly instructed on the definition of great bodily harm and Nunez waived any right to appeal by not objecting to the instruction at trial.

Nunez argues that the trial court committed reversible error by erroneously instructing the jury on the definition of great bodily harm (WPIC 2.04) and bodily injury (WPIC 2.03). The two pattern instructions were combined into one instruction, number 11, as follows:

Great bodily harm means bodily 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. Bodily injury means physical pain or injury, illness, or an impairment of physical condition.

CP 253.

First of all, any objection was waived at trial when defense counsel did not object. See RAP 2.5(a) (The appellate court may refuse to review any claim of error which was not raised in the trial court). As explained in State v. Scott, 110 Wn.2d 682, 685-6, 757 P.2d 492 (1988):

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. The rule reflects a policy of encouraging the efficient use of judicial

resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial. With respect to claimed errors in jury instructions in criminal cases, this general rule has a specific applicability. CrR 6.15(c) requires that timely and well stated objections be made to instructions given or refused "in order that the trial court may have the opportunity to correct any error." Citing this rule or the principles it embodies, this court on many occasions has refused to review asserted instructional errors to which no meaningful exceptions were taken at trial. (Citations omitted).

Secondly, the instruction is not "a manifest error affecting a constitutional right." In fact, it was not an error at all. In WPIC 2.03, the definition of bodily injury and "note on use" are as follows:

WPIC 2.03 Bodily Injury—Physical Injury—Bodily Harm—Definition
[Bodily injury] [physical injury] [bodily harm] means physical pain or injury, illness, or an impairment of physical condition.

Note on Use

Use this definition when an instruction refers to bodily injury, physical injury, or bodily harm. Use the appropriate bracketed term or terms depending on the elements of the particular crime or defense. For directions on using bracketed phrases, see the Introduction to WPIC 4.20. Do not use this instruction to define "substantial bodily harm," "great bodily harm," or "great personal injury." These

other terms have distinct statutory definitions. See WPIC 2.03.01 (for substantial bodily harm), WPIC 2.04 (for great bodily harm), and WPIC 2.04.01 (for great personal injury).

(emphasis added). Because WPIC 2.04 (for great bodily harm) includes the phrase “bodily injury,” there is no error in defining a term within that instruction. In fact, the comment to WPIC 2.03 says to use it if another instruction refers to bodily injury. Here, WPIC 2.04 refers to it. In addition, the instruction defining assault, CP 252, refers to “bodily injury.”

Nunez misquotes the comment to WPIC 2.03. (App’s brief at 31). The comment doesn’t say to not use 2.03 *when* defining great bodily harm. The comments warn not to use 2.03 “*to* define...great bodily harm.” (emphasis added). There is a significant difference. Under the misquoted comment, one would think you cannot use 2.03 with 2.04. However, it is clear that 2.03 may be used in conjunction with 2.04. It just cannot be used *in and of itself* to define great bodily harm because that would clearly result in an incorrect definition.

There is nothing wrong with defining a term within the definition of “great bodily harm” and the definition of “assault.” The instructions given in this case in no way lowered the State’s burden. The jury was instructed that “a person commits the crime of First Degree Assault when, with intent to inflict great bodily harm, he assaults another with any

deadly weapon.” CP 250 (emphasis added). Instruction number 13 included the elements that the State has to prove. CP 255. Included is the element “[t]hat the defendant acted with intent to inflict great bodily harm.” CP 255 (emphasis added). In sum, there was no error. Nunez points to no case that says you cannot instruct a jury with both WPIC 2.03 and WPIC 2.04.

H. Nunez waived any right to assert prosecutorial misconduct by failing to object during the prosecutor’s closing argument.

In order to establish that he is entitled to a new trial due to prosecutorial misconduct, Nunez must show that the prosecutor’s conduct was improper and prejudiced his right to a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996)). But a defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it caused enduring and resulting prejudice that a curative instruction could not have remedied. Boehning, 127 Wn. App. at 518 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert.

denied, 514 U.S. 1129 (1995)). A prosecutor’s closing argument is reviewed in the context of the total argument, the issues in the case, the evidence, and the jury instructions. Id. at 519. “A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.” Id.

Nunez mistakenly claims that the deputy prosecutor likened the defense attorney to Kaiser Soze, a fictional character who was a criminal mastermind. First of all, there was no objection at trial. Secondly, a review of the complete record shows that it is clear from the context that the prosecutor never compared the defense attorney to Kaiser Soze. The point the prosecutor was making was that the defense was describing the *victim* as being some sort of a criminal mastermind like Kaiser Soze.

This is clear from reading the defense closing and the entirety of the State’s rebuttal argument. The prosecutor, in rebuttal, addresses the notion of a “great conspiracy” between Ramiro and Ricardo Ruiz. RP 1186. He goes through everything the victim would have had to do to set up and prove a false charge against Nunez. In doing so, the prosecutor talks about the shoeprint would be a “great coincidence” if this were a conspiracy. RP 1187. The prosecutor stated, “So great, Ramiro being sort of---I guess this **criminal mastermind** decided, “oh well we’ll utilize that,” referring to the shoe print. RP 1187 (emphasis added). And the

prosecutor went on to argue that the conspiracy would have had to involve Ramiro's girlfriend and how Ramiro would have had to call her and tell her what to say. RP 1187. The prosecutor then argued that the way the defense was describing Ramiro, Ramiro was a criminal mastermind like Kaiser Soze:

The way defense counsel is saying all this stuff it's like this guy uh, what is from? The usual suspects. Kaiser Soze. Like he walked out of there. Met up with Ricardo and Ricardo says, "Hey how did everything go?" "Oh perfectly according to plan." And give a you know, high five and then go play catch with a football.

RP 1187. It is clear, when you have the entire context of the statement, the prosecutor was not comparing Kaiser Soze to the defense counsel at all. He was saying that the way the defense attorney was describing the *victim* he would have to be a criminal mastermind like Kaiser Soze. This claim of prosecutorial misconduct is entirely without merit.

Nunez also challenges parts of the closing argument where the prosecutor uses the terms red herring, rabbit trails, and argument fallacies. However, the defense never objected at trial, and therefore, has waived this issue on appeal. Where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting

prejudice that could not have been neutralized by an admonition to the jury.” State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). In fact, the absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted).

During closing arguments in this case, the defense asserted, among other things, that there was no serious wound because the victim could move his right hand when he met with the detective. The State’s characterization of this argument as “red herring” was a fair response to the defense argument, suggesting only that insufficient evidence supported the defense position. The State’s comment that the argument was a “red herring” is consistent with the law of this case as set forth in the to-convict instruction. It was not “flagrant and ill-intentioned.”

Furthermore, Nunez’s misconduct claim fails because he has not met the high burden set forth in Russell as to the resulting prejudice. Nunez makes no argument as to why an objection and instruction would not have cured any prejudice in this case and the record supports none. And, in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury, Nunez has not shown that the prosecutor’s remarks were “so flagrant and

ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” See Russell, 125 Wn.2d at 86.

Nunez relies on a Utah case, State v. Campos, 2013 UT App 213, 309 P.3d 1160 (2013), for his argument that the use of the phrase “red herring” was prosecutorial misconduct. The Utah court, however, held that referring to a theory as a red herring would not be inappropriate so long as the reference could be classified as a comment on the strength of the evidence and the inferences and deductions arising therefrom. 2013 UT App 213. The court indicated that there was a difference in arguing that the defense theory was a distraction from the ultimate issue and arguing that the defense counsel was intentionally trying to mislead the jury. Id.

Here, the prosecutor’s remarks focused on the merits of the defense theory instead of attacking the integrity of defense counsel. “[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” Russell, 125 Wn.2d at 87 (citing United States v. Hiatt, 581 F.2d 1199, 1204 (5th Cir. 1978)). It is not misconduct for a prosecutor to argue merely that the evidence does not support the defense theory. Id. The court also instructed the jury that the attorneys’ remarks were not evidence and that they must disregard any remark,

statement, or argument that was not supported by the law or the evidence. CP 242. In these circumstances, and in light of the jury's acquittal on one of the counts, there is no substantial likelihood the remarks affected the verdict.

Nunez also argues that the prosecutor's use of the phrase "res ipsa loquitur" during closing argument constituted misconduct. "Res Ipsa Loquiter" is Latin for "the thing speaks for itself." However, while the prosecutor used the phrase "res ipsa loquiter," it was not used in a way to change or lessen the State's burden of proof. This is clear from the context:

Ramiro Ruiz told you, and what reasonable would not feel that same way, that he thought that he was gonna---well he said, "I thought he was trying to kill me." Well, that's a no brainer. He just stabbed you in the chest. He's trying to stab you in this general area, ladies and gentlemen. What else is intending to do? There's a Latin phrase that's used in law and it's called res ipsa loquitur.

RP 1137. The defense objected and the prosecutor replied as follows:

Your---it---this has nothing to do. **My burden is to prove every element beyond a reasonable doubt.** But res ipsa loquitur in Latin means the thing speaks for itself. This speaks for itself. If you're gonna stab somebody in the chest you're looking to cause great bodily harm. You're intending to cause great bodily harm. I submit to you by

his actions, Ramiro was right. He was trying to kill him.

RP 1138 (emphasis added).

The prosecutor made clear what his burden was as to the elements of the case: proof beyond a reasonable doubt. The prosecutor was not describing the law by using the Latin phrase. He was using the phrase to explain that if someone stabs somebody in the chest, you may infer what their specific intent was. This is an appropriate argument. As indicated in State v. Bea:

It would have been appropriate and expected for the State to argue the jury's right to infer intent. "Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances." State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

162 Wn. App. 570, 254 P.3d 948 (2011).

Here, when discussing circumstantial evidence, the prosecutor stated:

Evidence that has been presented to you may be either direct or circumstantial. See, you win. You got to be on the jury. You get to figure out what the---you get to hear what the answer is. The term direct evidence refers to evidence who has directly perceived something at issue in this case. Then circumstantial evidence from which based on your common sense and

experience. Res ipsa loquitur. You may reasonably infer something that is at issue in this case.

RP 1150. A defense objection was overruled. The judge noted that the burden of proof is different from the concept of circumstantial evidence.

RP 1151. The prosecutor continued to reiterate that his burden in the case was proof beyond a reasonable doubt:

Ladies and gentlemen, let me make it clear for the record. I'm not saying---no. **Every element needs to be proved beyond a reasonable doubt.** It's---the thing speaks for itself. Alright? He was stabbed. It's pretty circumstantial evidence of the intent of the stabber. And I gave you the Lone Ranger. And ladies and gentlemen, I will submit you that the tracks lead to the defendant. The miner's pointing at the defendant. And even Black Bart, himself, the defendant is pointing at the defendant. All evidence points to the defendant. Overwhelmingly.

RP 1151 (emphasis added).

On appeal, Nunez explains in great detail what the term res ipsa loquitur means in the context of civil tort law. It is highly unlikely that any jurors had any familiarity with the Latin concept at all, let alone what the doctrine means in the context of civil tort liability. From the record in this case, it is clear that all the prosecutor was trying to do was explain that you can make reasonable inferences from the evidence and that the State

can rely on circumstantial evidence to prove intent, both completely permissible arguments. After both objections, the prosecutor reiterated what the burden of proof was in this case, proof beyond a reasonable doubt. As such, Nunez has not shown prosecutorial misconduct or any prejudice requiring reversal of his convictions.

On appeal, Nunez also makes a brief argument about the prosecutor's opening statement where the prosecutor describes the facts of the case. The relevant portion is as follows:

And the defendant is chasing him around the car.

....

Jessenia (defendant's wife) is watching and smiling. She was watching it all. The window had been rolled down. Watching it all and she was smiling. Run around. Staying safe. Staying on the other side from the guy---the sociopath who just stabbed him and then tried to stab him some more.

RP 437-8. An objection was made and sustained. The judge gave a curative instruction immediately to the jury and told them, "you'll disregard that last comment." RP 438. Nunez did not move for a mistrial or object to the court's remedy.

Courts generally presume jurors follow instructions to disregard improper evidence. State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994). The defense bears the burden of showing that the comment was so

prejudicial that the curative instruction was ineffective. Here, Nunez has not met that burden. He has in no way argued why the court's instruction was not enough. The comment was made early on in the trial, prior to any evidence being presented. Any error was cured with the immediate instruction to the jury.

Nunez also claims that the prosecutor made references to a "kill shot" in closing argument that was unsupported by the record.³ The argument that Nunez wanted a "kill shot" is completely supported by the evidence. Nunez stabbed the victim and repeatedly tried to stab him again. RP 700-1, 703, 705. The victim said that he thought Nunez was trying to kill him. RP 705. Also, there was no objection to the argument. As such, any error is deemed waived unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). The argument that Nunez wanted a "kill shot" is not prejudicial but rather, a reasonable inference from the evidence. "A prosecutor has wide latitude in closing argument to draw

³ Nunez also claims in a footnote that it was improper for the prosecutor to argue that Nunez "coached a witness." App's brief at fn. 6. Based on the jail phone call to Jessenia where he tries to get her to say it was a case of self-defense, it was entirely reasonable to conclude that Nunez was not only trying to coach her, but trying to get her to testify falsely in his case. This argument was entirely proper based on the facts of the call.

reasonable inferences from the evidence and to express such inferences to the jury.” Boehning, 127 Wn. App. at 519.

Nunez also alleges that the prosecutor committed misconduct when he said, “Thank God it was not a serious wound. Thank God this is not a murder trial.” RP 1189. He claims that these comments were unsupported by the evidence. However, the doctor told Ramiro that if the knife would have been a little bit bigger, he would have died that day. RP 731. The doctor testified that if the knife had penetrated the heart or a major blood vessel or artery, that the wound could be fatal. RP 459-60.

Nunez claims that the doctor said that the wound was superficial. That misstates the record. When pressed by defense on cross-examination, Dr. Tanwani replied, “I cannot say it was superficial or deep in the muscles. Unless I see the CAT scan.” RP 458. Nonetheless, the prosecutor’s comment was not “this is a serious wound.” The comment was “Thank God it was *not* a serious wound.” RP 1189 (emphasis added). The comment was supported by the record.

Even if it was improper, since no objection was made at trial, the defendant has to show that no instruction would have cured the prejudice. He cannot do so in this case. In Levingston v. State, 651 S.W.2d 319 (Tex. App. Dallas 1983), a case cited by Appellant, the court found that an objection and curative instruction cured any harm from a similar

argument. Furthermore, the fact no objection was made suggests that the comment was not overly inflammatory. The State has to prove “great bodily injury.” The prosecutor’s comment that this was not a serious wound could actually have been used by the defense to argue there was no great bodily injury. Not objecting could have been a strategic decision on the part of trial counsel.

During closing argument, the prosecutor discussed the phone records that showed Nunez called known Norteño gang members shortly after the stabbing. The prosecutor then argued the following:

While Ramiro Ruiz is begging someone to call 911 cause he’s been stabbed the defendant is calling these numbers. Wonder what he was calling to say. He’s a bragger. We already know that. Cause he done good. He made himself and he made his gang look good.

RP 1150. No objection was made to the argument during trial.

Nunez claims, for the first time on appeal, that this argument was not a reasonable inference from the evidence. Given all the gang names that Nunez was yelling during and after the stabbing, it would be unreasonable for him *not* to tell his gang associates about what he did. The fact that he called a prominent Norteño gang member shortly after the stabbing goes directly to motive and the gang aggravator. And it would be

logical to infer that he was, at the least, telling fellow Norteños about what happened. Stabbing a rival gang member earns you respect in the gang, but only if the other gang members know what you did. The prosecutor’s suggestion that Nunez was bragging about what he did was entirely reasonable given the evidence. Furthermore, the jury was instructed to “disregard any...argument that is not supported by the evidence...” CP 242. Nunez has not demonstrated that the prosecutor’s argument, which was not objected to at trial, constitutes prosecutorial misconduct.

I. Nunez has failed to establish that he is entitled to a new trial based on the performance of his trial attorney.

The defense must show deficient performance of the part of his trial attorney and that but for the deficient performance, the outcome of the trial would have been different. The analysis begins with a “strong presumption that counsel’s performance was reasonable.” State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. Id. at 863. To rebut the presumption of reasonable performance, a defendant bears the burden of proving that “there is no conceivable legitimate tactic explaining counsel’s performance.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland v. Washington, 406 U.S. 688, 689 (1984). That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel’s initial calculus; hindsight has no place in an ineffective assistance analysis. See Strickland, 466 U.S. at 689; cf. State v. Hoffman, 116 Wn.2d 51, 112, 804 P.2d 577 (1991) (“The defendants cannot have it both ways; having decided to follow one course at trial, they cannot on appeal now change their course and complain that their gamble did not pay off.”).

To satisfy the prejudice prong of the Strickland test, the defendant must establish that “there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.” Kyllo, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. In assessing prejudice, “a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law” and must “exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification’ and the like.” Strickland, 466 U.S. at 694-95.

Nunez first claims that his attorney failed to object to prior bad acts. (App’s brief at 44). He does not indicate which prior bad acts counsel failed to object to. Id. His argument consists of two sentences and states that his attorney “Failed to object...to the “prior bad acts” evidence admitted at trial against Mr. Nunez individually.” A party waives an assignment of error when he fails to support it with argument or authority. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986)). See also State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (court need not consider arguments not developed in the briefs and for which a party has not cited authority); RAP 10.3(a)(6) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant parts of the record). Here, there is nothing that states which prior bad acts were not objected to that resulted in deficient performance. As such, the State is unable to respond to this claim.

Nunez also claims that his attorney was ineffective when he elicited improper opinion testimony from Officer Taylor. The defense attorney’s questioning was regarding what are indicia of gang membership and what is enough to be considered a “gang member.” RP 624-625. If you read the entire cross-examination, the attorney was clearly trying to

get the officer to say that Nunez had not done any work for the gang, one indicia of gang membership. This would have been a reasonable strategy on the part of the attorney because he wanted to get the officer to say that his client's actions could be purely retaliatory for a prior incident. He was not successful, however. As indicated previously, the fact that his strategy ultimately proved unsuccessful is immaterial to ineffective assistance analysis. See Strickland, 466 U.S. at 689. It was a reasonable strategy and Nunez has not shown the absence of any conceivable legitimate tactic explaining his attorney's performance.

Defendant also alleges that his attorney was ineffective in failing to object at times during the prosecutor's closing argument. His argument in this regard is one sentence long. App's brief at 44. The decision of when or whether to object is a classic example of trial strategy. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Defense counsel did object 4 times during the prosecutor's closing. RP 1127-1151. As to the times when he chose not to object, there was no deficient performance. The arguments made by the prosecutor were supported by the evidence. Any objection, request, or motion would have been denied. That is most likely why defense counsel did not object. It may also have been a tactical decision intended to avoid drawing further notice to the prosecutor's

statements. Furthermore, Nunez has not established prejudice. Thus, he fails to establish ineffective assistance of counsel on this basis.

IV. CONCLUSION

For all the above reasons, the State asks that Appellant's conviction be affirmed.

Respectfully submitted this 4th day of December, 2015,



TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on December 4, 2015, by agreement of the parties, I mailed a copy of BRIEF OF RESPONDENT via US Mail to Mr. Eric W. Lindell at Lindell Law Offices, PLLC, 4409 California Ave. SW, Suite 100, Seattle, WA 98116.

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

DATED this 4th day of December, 2015 at Yakima, Washington.

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