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Dec 26, 2013, 2:05 pm
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THE SUPREME COURT OF
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SALVADOR S. NAVA,

Appellant.

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW
BY YAKIMA COUNTY

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 ORIGINAL

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii-iii

A. INTRODUCTION 1

B. ISSUES PRESENTED BY PETITION 2

 1. The court erred by allowing admission of the recorded statements 2

 2. The court erred when it allowed the admission of the gang evidence 2

 ANSWERS TO ISSUES PRESENTED BY PETITION

 1. The Court of Appeals was correct when it determined that the trial court properly admitted the recorded statements. The decision does not conflict with State v. Alvarado..... 2

 2. The Court of Appeals correctly upheld the trial courts admission of the gang evidence 2

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT 2

 1. Standards of Review 2

 2. Argument 3

RECORDED RECOLLECTION..... 3

GANG RELATED EVIDENCE..... 14

E. CONCLUSION 20

APPENDIX A

APPENDIX B

TABLE OF AUTHORITIES

PAGE

Cases

State v. Alvarado, 89 Wash. App. 543, 949 P.2d 831 (1998).....1, 3-5, 10

State v. Asaeli, 150 Wn.App. 543, 208 P.3d 1136 (2009)..... 14

State v. Boot, 89 Wn.App. 780, 950 P.2d 964 (1998) 15

State v. Campos-Cerna, 154 Wn.App. 702, 226 P.3d 185 footnote 8,
(Wash.App. Div.2 2010)..... 19

State v. Castellanos, 132 Wn.2d 94, 935 P.2d 1353 (1997) 3

State v. Derouin, 116 Wn.App. 38, 64 P.3d 35
(Wash.App.Div.1 2003)..... 5,6

State v. Floreck, 111 Wn.App. 135, 43 P.3d 1264 (2002)..... 10

State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993)..... 14

State v. Macon, 128 Wn.2d 784, 911 P.2d 1004 (1996)..... 5, 6

State v. Moreno, 294 P.3d 812 (Wash.App. Div 3 2013) 18

State v. Robinson, 104 Wn.App. 657, 17 P.3d 653 (2001)..... 5

State v. Rodriguez, 163 Wn.App. 215, 259 P.3d 1145
(Wash.App. Div.3 2011)..... 18

State v. White, 152 Wn.App. 173, 215 P.3d 251 (Wash.Div.1 2009)5-8

State v. Wynn, 178 Wash.287, 34 P.2d 900 (1934)..... 6

State v. Yarbrough, 151 Wn.App. 66, 210 P.3d 1029 (2009)..... 15

State v. Young, 160 Wn.2d 799, 161 P.3d 967 (2007) 3

TABLE OF AUTHORITIES (continued)

PAGE

Additional Cases

Impson v. State, 721 N.E.2d 127, 1282-3 (Ind.App. 2000) 9

State v. Marcy, 680 A.2d 76, 79-80 (Vt.1996) 8

Federal Cases

United States v. Porter, 986 F.2d 1014, 1017 (6th cir.1993),
cert.denied, 114 S.Ct. 347 (1993) 8, 9

Rules and Statutes

CrR 7.8 5

CrR 7.8(b)(2) 5

CrR. 7.8(2) 5

ER 404(b) 15

RAP 13.4 20

RAP 13.4(b) 2

Federal Rules of Evidence (FRE) Rule 803(5) 9

HRE Rule 802.1(4) 9

RCW 9.41.010 1

RCW 9.94A.510 1

RCW 9.94A.602 1

A. INTRODUCTION

Petitioner/Appellant Nava was found guilty by a jury on February 6, 2009 of six counts – Count I – First Degree Murder; Count Two First Assault; Count Three First Degree Assault; Count Four – First Degree Assault; Count Five – First Degree Assault; Count Six Second Degree Unlawful Possession of a Firearm. Each of the first five counts included a special verdict for use of a firearm during the commission of the crime pursuant to RCW 9.94A.510, RCW 9.94A.602 and RCW 9.41.010. He was sentenced under that cause number, 01-1-00902-3 on June 12 and 15, 2009.

Nava appealed his conviction the decision in that appeal was filed on October 22, 2013. Nava challenged the admission of the recorded statements of several of the primary witnesses, the admission of gang evidence and claimed that his trial counsel was ineffective.

The Court of Appeals Division III held that the trial court did not abuse its discretion in finding that there had been a proper foundation laid to allow for the admission of the recorded statements, that the admission of the gang evidence was proper and that Nava's counsel was not ineffective. The Court of Appeals also rejected allegations raised in Nava's Statement of Additional Grounds as well as his Personal Restraint Petition which was consolidated with the original appeal. Finally the Court of Appeals granted the State's cross appeal and reversed the trial courts exceptional sentence

downward, remanding for resentencing on that issue. This petition arises from consolidated matters 28222-8-III and 30001-3-III.

B. ISSUE PRESENTED BY PETITION

Mr. Nava has petitioned this court requesting review of the decision of the Court of Appeals. Petitioner alleges;

1. The court erred by allowing admission of the recorded statements.
2. The court erred when it allowed the admission of the gang evidence.

ANSWER TO ISSUES PRESENTED BY PETITION

1. The Court of Appeals was correct when it determined that the trial court properly admitted the recorded statements. The decision does not conflict with State v. Alvarado.
2. The Court of Appeals correctly upheld the trial courts admission of the gang evidence.

C. STATEMENT OF THE CASE

The Court of Appeals set forth the facts extensively in its decision. The State will rely on that statement which has been supplied as Appendix A to this reply.

D. ARGUMENT

1. Standards of Review.

RAP 13.4(b) Considerations Governing Acceptance of Review.;

This case does not **1)** Conflict with any decision by this court, the claim that the Court of Appeals ruling is incorrect is baseless. This allegation is based on a reading of the courts decision which is incorrect and does not

take into account the plain meaning of that ruling nor the facts of the case hot the standard set forth in Alvarado, *infra.*; **2)** This ruling does not conflict with any ruling by any other division of the Court of Appeals or for that matter any court. This issue has been ruled on previously as indicated by the cases cited by the Court of Appeals. **3)** The ruling of the Court of Appeals does not raise a significant question under either the State or Federal Constitution; the ruling merely reiterates the proof standard needed to support the introduction of evidence pursuant to court rule and case law.

As the Court of Appeals stated “Decisions involving evidentiary issues lie largely within the sound discretion of the trial court and ordinarily will not be reversed on appeal absent a showing of abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A trial court abuses its discretion if it improperly applies an evidence rule. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). Here, Mr. Nava's challenge focuses on the trial court's determination of a preliminary question concerning the admissibility of evidence.” (Slip opinion at 20-1)

2. Argument

RECORDED RECOLLECTION

This ruling does not conflict with State v. Alvarado 89 Wash.App. 543, 551, 949 P.2d 831 (1998) Alvarado has withstood the test of time. The Court in Nava clearly adopted and applied Alvarado:

We nonetheless find the reasoning of *Alvarado*, *Porter*, and like cases persuasive, even when it means that a trial court might admit a record that a witness has disavowed. (Slip opinion at 25)

The Court of Appeals opinion then addresses the fourth factor from

Alvarado that Nava now claims the courts below incorrectly applied;

Most important is that the language of ER 803(a)(5) providing the basis for the fourth element of the foundation-its requirement that the memorandum or record "reflect [the witness's former] knowledge correctly"-provides no textual basis for requiring that the witness personally vouch for the accuracy of the recorded statement. The well settled statement of the fourth element of the foundation-"that the record reflects the witness's prior knowledge accurately"--does not require personal vouching by the witness either. The Advisory Committee's Note accompanying Fed. R. Evid. 803(a)(5) when proposed in 1972 states, in part, that "[n]o attempt is made in the exception [for recorded recollections] to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate." 56 F.R.D. 183,307 (1973). ER 803(a)(5) was copied verbatim from Fed. R. Evid. 803(a)(5). *See* ER 803(a)(5) at 91 Wn.2d 1165 (1978); cmt. 803 at 91 Wn.2d 1168.

Of great importance is the following section of the Nava opinion:

In no other context is a fact finder expected to determine what a person knew or believed by relying exclusively on what that person *claims* he or she knew or believed. This is so even in applying other exceptions to the hearsay rule that depend on the reliability we ascribe to certain types of out-of-court statements. For example, we do not automatically accept a recanting witness's protestation that what appeared to others to be her excited utterance was actually a fabrication. In *Young*, a child victim made seemingly distraught statements after being sexually molested by her mother's boyfriend, only to claim later that she was lying. Our

Supreme Court held that "the trial court does not err by weighing the witness's credibility against the evidence indicating that the statements were spontaneous and reliable." 160 Wn.2d at 808 (quoting *State v. Briscoeray*, 95 Wn. App. 167, 173, 974 P.2d 912 (1999)). The same should be true here. As observed in *Derouin*, 116 Wn. App. at 46, "[O]ther evidence establishing the accuracy of [a recorded recollection] could be just as credible as, if not more so, than the declarant's testimony at trial that the statement was accurate when made." (Slip at 25-26)

The methodology set forth in Nava, which is based directly on the ruling in Alvarado, is analogous to the method commonly used to address recanted testimony in a CrR 7.8 setting. CrR 7.8(b)(2) allows the trial court to grant a party relief from a final judgment based on newly discovered evidence. A trial court's ruling on a CrR 7.8 motion for relief from judgment is also reviewed for abuse of discretion. State v. Robinson, 104 Wn.App. 657, 662, 17 P.3d 653 (2001). Recantation testimony may be considered "newly discovered evidence" to support a motion for relief from judgment. State v. Macon, 128 Wn.2d 784, 799-800, 911 P.2d 1004 (1996); CrR 7.8(b)(2). But this court has ruled that "[r]ecantation testimony is inherently questionable," and does not necessarily entitle the defendant to a new trial. Macon, 128 Wn.2d at 801. The testimony of Orozco is clearly of this nature.

The ruling in Alvarado, Derouin and White comport with the law set forth in State v. Macon, where this Court recognized that "[i]t is for the trial court to determine whether the original testimony of a recanting witness was

perjured and, if so, whether the jury's verdict was likely influenced by it." 128 Wn.2d 784, 801, 911 P.2d 1004 (1996). The court also clarified that whether there is independent evidence to support the recanting witness's original testimony is not a controlling factor in the trial court's determination. Macon, 128 Wn.2d at 804. Rather, the court observed, "[w]hen the trial court, after careful consideration, has rejected such testimony, or has determined that it is of doubtful or insignificant value, its action will not lightly be set aside by an appellate court." Macon, 128 Wn.2d at 804 (alteration in original) (quoting State v. Wynn, 178 Wash. 287, 289, 34 P.2d 900 (1934)). Thus, the court concluded, "the trial court does not abuse its discretion if it determines the recantation is unreliable and denies the defendant's motion for a new trial." Macon, 128 Wn.2d at 804 (emphasis omitted).

Nava follows the decision as set forth in State v. Derouin, 116 Wn.App. 38, 64 P.3d 35 (Wash.App. Div. 1 2003). Division III stated "Derouin was a domestic violence case and in deciding it, Division One of this court observed that broadly viewing evidence bearing on the accuracy of a statement "is especially relevant in cases of domestic violence since the victim may have a stronger motive to forget the past statement than to remember it." Derouin, 116 Wn. App. at 46; *accord* White, 152 Wn. App. at 184-85. Prosecutions for acts of gang-related violence may also depend upon

information provided by witnesses who, at trial, have a stronger motive to forget a past statement than to remember it.” (Slip opinion at 28). The opinion is also analogous to the ruling in State v. White, 152 Wn.App. 173, 183-6, 215 P.3d 251 (Wash.App. Div. 1 2009) where Division I stated:

In State v. Alvarado, this court held that the requirement that a recorded recollection accurately reflect the witness's knowledge may be satisfied without the witness's direct verification of accuracy at trial. 89 Wash.App. 543, 551, 949 P.2d 831 (1998).

Therefore, “[t]he court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.” *Id.* at 551-552, 949 P.2d 831.

White argues that the State failed to establish that the police statement accurately reflected Whitson's prior knowledge of the event or that it is accurate under the *Alvarado* test. White correctly notes that Whitson did not testify that the statement accurately reflected her prior knowledge. Moreover, White claims that the police statement fails under the *Alvarado* test, because Whitson explicitly testified that White was not at the park-and-ride on July 4, 2007, thus disavowing the accuracy of the statement. White also argues that there is no basis to support the trustworthiness of the statement, as recorded by Officer Coleman.

The State counters that in domestic violence cases, other indicia, even where the victim denies making the statement, may establish the trustworthiness and accuracy of a recorded statement. State v. Derouin, 116 Wash.App. 38, 45-6, 64 P.3d 35 (2003). In Derouin, the victim of domestic violence provided a written statement to police, but at the trial testified that she did not recall giving the statement to the police and could not recall anything about the incident. *Id.* at 41, 64 P.3d 35. We held the trial court erred in not admitting the statement as a prior recorded recollection, because the victim had never disavowed the accuracy of the prior statement, instead she denied any recollection of it. *Id.* at 46, 64 P.3d 35. At the time the victim made the statement, she signed it as recorded by the officer after being warned that she was doing so under penalty of perjury. *Id.* Moreover, although the statement had been written by a police officer, the accuracy of “the recording process was not so unreliable as to prevent the statement's admission. Any inaccuracies within the statement due to the recording process can be argued

at trial and should go to the weight, not the admissibility of the evidence." *Id.* Last, because other indicia of reliability weighed in favor of admitting the statement, the statement was erroneously excluded. *Id.* at 47, 64 P.3d 35.

The testimonial evidence relied upon in White is very similar to that set forth in Nava's trial (See Appendix):

Here, Officer Coleman testified that he wrote the statement as narrated by Whitson. He then read it back to Whitson, who had an opportunity to correct any errors. Subsequently, Whitson signed both pages, under penalty of perjury, and initialed each to show the beginning and end of the statement. Whitson testified that she spoke to a police officer on the day of the assault. When presented with a copy of her statement to police, Whitson identified the signatures on the statement as hers. But Whitson could not remember if the statement accurately reflected what she told the police, because she was "too intoxicated" on July 4. Officer Coleman testified that he did not observe any signs that Whitson was intoxicated on the day of the assault. While upset, she was "certainly functional." White emphasizes that Whitson testified that she did not see him on the day of the assault, thereby undermining the accuracy of the statement she gave the police. But, Whitson herself, even after reading the statement on the stand, did not disavow the accuracy of the statement.

Here, other evidence of reliability weighs in favor of admitting the statement, including the 911 tape, where Whitson identifies White as her attacker. White testified that it is her voice on the tape. The totality of the circumstances support the trial court's ruling that that the police statement is supported by sufficient indicia of reliability. We hold that the trial court did not abuse its discretion in admitting Whitson's statement. (Footnote omitted.) (White at 186)

Other courts have concluded that the foundational requirement that the statement reflect the witness's knowledge correctly can be established by means other than the testimony of the declarant witness vouching for the statement's accuracy. E.g., United States v. Porter, 986 F.2d 1014, 1017 (6th Cir.1993) (6th Cir.), *cert. denied*, 114 S.Ct. 347 (1993).; State v. Marcy, 680 A.2d 76, 79-80 (Vt.1996) (plurality opinion). Porter, 986 F.2d at 1017,

preceded Alvarado in Porter, the court construed Federal Rules of Evidence (FRE) Rule 803(5), which is identical to HRE Rule 802.1(4). The court concluded that:

[FRE] Rule 803(5) does not specify any particular method of establishing the knowledge of the declarant nor the accuracy of the statement. It is not a *sine qua non* of admissibility that the witness actually vouch for the accuracy of the written memorandum. Admissibility is, instead, to be determined on a case-by-case basis upon a consideration, as was done by the district court in this case, of factors indicating trustworthiness, or the lack thereof. *Id.* at 1017.

The court in Porter upheld the admission of portions of a prior written statement made by the defendant's girlfriend as past recollection recorded even though the girlfriend never testified that the statement was accurate. *Id.* The court concluded that the requirement of FRE Rule 803(5) that the statement correctly reflected the girlfriend's knowledge was satisfied by other indicia of the statement's trustworthiness. See also Impson v. State, 721 N.E.2d 1275, 1282-3 (Ind.App. 2000);

Finally, we note that Ind.Evidence Rule 803(5) provides an exception to the hearsay rule for a memorandum or record if (a) the memorandum or record relates to a matter about which a witness once had knowledge, (b) the witness has insufficient recollection at trial to enable the witness to testify fully and accurately, (c) the witness is shown to have made or adopted the memorandum or record, (d) the memorandum or record was adopted when the matter was fresh in the witness's memory, and (e) the memorandum or record is shown to reflect the witness's knowledge correctly. Here, the battery affidavit relates to the attack upon Lori by Impson. Lori's denial at trial of the specifics of the attack serves as the "insufficient

recollection" required by (b) above. See Miller, 13 Indiana Practice § 803.105, at 631 (1995) (citing 2 McCormick § 282, at 258 (4th ed.1992) for the proposition that "courts have found 'insufficient memory' when an apparently reluctant witness claims lack of memory to evade a question"). The signing of the affidavit on the same day as the attack arguably shows a timely adoption of the statement while the matter was fresh in Lori's memory. Finally, the affidavit's consistency with the statements made by Lori to the investigating officers and to Jerry is indicative that it reflects Lori's knowledge correctly. See U.S. v. Porter, 986 F.2d 1014, 1017 (6th Cir.1993), cert. denied, 510 U.S. 933, 114 S.Ct. 347, 126 L.Ed.2d 312 (court determined that prior statements detail and internal consistency established its accuracy).

In this case the trial court was aware of and used Alvarado when discussing the use of the recorded statements. (RP 127) Throughout the process of determining if the recorded statements would be used the parties discussed and used this case as their legal guidance. The trial court was also aware of State v. Floreck, 111 Wn. App. 135, 43 P.3d 1264 (2002) (RP 148) The Court of Appeals in its decision acknowledged that this

There were four individuals who were called whose statements had been recorded prior to trial. As stated in by the Court of Appeals;

The procedure followed by the trial court with Mr. Orozco and later witnesses was for the State to first call the witness; for the lawyers to examine and cross-examine the witness to the extent possible about the night of the shooting; and, when the witness's ability to testify to relevant matters was exhausted, to excuse the jury. Outside the presence of the jury, the State presented evidence bearing on the remaining elements of the required foundation, including playing the proffered tape-recorded statement. The trial court then heard argument from the lawyers; ruled on the admissibility of the recording; and, if it found the recording

admissible, allowed the State to play the recording for the jury after which the witness would be subject to further examination and cross-examination. (Slip Opinion at 11-12)

Mr. Peter Lopez was called his statement was not challenged. The next witness called was Mr. Orozco was the only person who made any statement which would or could be construed as a disavowal of the prior recording and even he did not specifically state that what he said on the recording was untrue. When he was asked if he was lying to the police in the recording he state:

A I **probably** was. I'm a liar.

Q Okay.

A I lie to my wife, I lie to everybody.

Q Why would you have lied to the police at that time?

A I wanted to go home, man, they scare me. I just wanted to go home.

Mr. Orozco stated a couple more times that he “probably” lied to the police before the court the matter was taken addressed by the parties outside the presence of the jury. This is not a disavowal of the prior statement. The trial court addressed the edicts of Alvarado and determined as did the Court of Appeals, that these recordings should be admitted.

Further, no matter what terminology is used by the Court of Appeals it is clear to the State that Orozco while calling himself a “liar” did not directly disavow or expressly repudiate the previous statement. His “probably” statement is obviously an attempt to not violate the oath that he swore when he made the statement and just as he agreed to testify while at the same time

clearly attempting to temper his testimony against a known gang member who had coldly and callously murdered a man in cold blood.

Next Ms. Maribelle Olivas was called and the same procedure was used in this instance. (Slip Opinion at 14-16) Once again this witness was equivocal regarding the veracity of the statement. As quoted by the Court of Appeals:

At that time I was in treatment, I was (inaudible) and I could not get in any trouble whatsoever at all and I did not want them to find out about this. Even though we did find out about it, so they knew and at that time I still was drinking and I was not supposed to be drinking so I didn't want them to find out anything about what I was doing on the weekends.

RP (Feb. 2, 2009) at 360. Asked again if she had any reason for believing the statement she gave was not accurate, she answered:

I don't think it was very accurate. I could tell by the recording that I was hung over and I could tell that I probably just told him what he wanted to hear just so I didn't have to continue talking to him.

Id.

...

Having heard the testimony and the arguments of the lawyers, the trial court again found the recording admissible, observing, as to accuracy, "[S]he says, I was hung over. Now, that affects whether or not she has she's telling us now that it may affect her ability to have all the events clearly laid out. Whether or not she told the police officer what he wanted to hear, that doesn't send me a clear signal that she's disavowing the statement." *Id.* at 363.

Thereafter, when the recording was played to the jury and the parties completed their questioning of Ms. Olivas, defense counsel asked if she did not just tell the officer what he wanted to hear. This time, Ms. Olivas answered:

Pretty much toward the beginning, you know, *I-really I was pretty honest about what we did, you know, going out and stuff*, but I think toward the end I think I just wanted to get out of there.

Id. at 384 (emphasis added). Outside the presence of the jury, the court observed that "[s]ometimes it's necessary to hear what people say a couple of times in order to get a real feeling for what they're really saying," and that her answer before the jury suggested that she was not disavowing accuracy, "she just wanted to get out of there. And she was going to cut to the chase on everything and just give an abbreviated version of it or some version that wasn't as thorough and complete. She just wanted to get out of there." *Id.* at 385.

The analysis in the trial court and the decision upholding that decision in the Court of Appeals clearly are supported by the decision in Alvarado.

The final witness at issue in this case was Marisa Perez. She stated outside the presence of the jury after hearing her own recorded statement. "Sounds like I was scared and I wanted to protect my husband." *Id.* at 451. As stated in the Nava decision "Yet when defense counsel then asked whether she was lying to the officer, she answered, "I might have said some stuff . that were misinterpreted or ... *I don 't fee l like I was lying. I don't remember what I said, how could it be if I was lying.*" *Id.* at 452 (emphasis added). (Slip opinion at 16-17)

Here once again there was never an actual disavowal of the veracity of the previously recorded statement the response was every equivocal. The trial court considered the testimony of Sgt. Salinas once then determined as set out by the Court of Appeals:

The court commented that it recognized that Ms. Perez, like other witnesses, had conflicted feelings "as to what happened, as to their loyalties [and] as to their own jeopardy" that would perhaps affect their recall as to certain events and may "shade their testimony a little bit," but it had not heard her disavow the accuracy of her statement made in May 2001. *Id.* at 460. It reiterated that the defense had the right to question the witnesses as to their motivations and argue to the jury how much credibility or weight should attach to their statements, but that they were nonetheless admissible.

This court must also take into consideration that the only statement that could even possibly be determined to have been "disavowed" by the proponent was the one made by Mr. Orozco and Nava fails to articulate or demonstrate any resulting harm. A nonconstitutional evidentiary error requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). The evidence supplied by the other three lay witnesses called by the State whose statements were also recorded support the State's case. There is no challenge before this court nor the Court of Appeals that there was insufficient evidence supplied to support the conviction.

GANG RELATED EVIDENCE.

The decision in this case does not "conflict" with the decision in State v. Asaeli, 150 Wn.App. 543, 208 P.3d 1136, (2009) or any other decision of any court of review in this state. Pertinent portions of Sgt. Salinas' testimony are contained in Appendix B. This testimony alone supplied a

sufficient basis to allow the limited gang evidence to be presented to the jury. As the Court of Appeals ruled “Here, the trial court found on the record that the gang evidence was relevant to issues of premeditation, motive, and intent, all of which are permitted purposes for offering evidence of other wrongs under ER 404(b). See State v. Yarbrough, 151 Wn. App. 66,210 P.3d 1029 (2009) (gang evidence admissible as to motive); State v. Boot, 89 Wn. App. 780, 788-90, 950 P.2d 964 (1998) (admissible as to motive, premeditation); Campbell, 78 Wn. App. at 821 (premeditation, motive, and intent).” (Slip at 33)

Nava argues that the State did not prove there is a Sureno gang or that Nava was a self admitted member or that there was evidence that this crime was related to gang involvement. This is refuted by Nava’s own trial counsel’s statements.

“MR. COTTERELL: Well, Your Honor, I think that it is possible. The gang aspect is intertwined, there’s no about -- in this case, but what happened is the facts of the case as it was brought out is this happened at a taco truck on May back of 2001 late at night. And it wasn’t a planned event where these two different groups would meet... This isn’t like somebody’s being staked out or stalked and hunted down for this revenge of this prior murder of the rival gang member... that’s why I was asking him about that because this is two groups of people that evidently don’t like each other, epithets are being tossed back and forth and then the evidence will come out that somebody -- this individual definitely got shot in the head twice.... Going into all the gang aspect is just going to create a huge mess in this case and it’s going to poison everybody and all the evidence because there’s no need to go into all the revenge aspect -- revenge of this thing, but the reality of it is, is that a person walked from a car, walked over there, shot the guy in the head and then took off.... If he goes back and starts to dig up all this gang stuff of

revenge and everything, this is going to create a story that's going to have a life of its own. It's going to -- we're going to lose focus as to what happened here and it can be done. It's not easy because this case is so involved with gangs but the reality of it is -- the gist of it is an individual -- and they say it was Salvador Nava, we say it wasn't.

It is of great importance that at trial there was not a single word in the record indicating Nava was challenging the existence of the Sureno's or the Norteno's or his involvement and membership in the Sureno's. There record does not contain any disavowal by the defendant that the Sureno's were not a gang. The common sense understanding of any sentient being living in the world today and especially in Yakima knows of the existence of this violent street gang. Even trial counsel admitted that there appeared to be ties:

MR. RAMM: That the defendant is a member of Sureno sect and the victim in this case is a member of the Norteno --

THE COURT: So this is an allegation of rival gangs?

MR. RAMM: Yes, and that there was an earlier shooting death involving a Victor Serrano (phonetic) and that that was the motive for this killing of Antone Masovero.

THE COURT: So in order to properly explain to the jury how this particular crime or series of crimes came to be, you're saying that you're going to have to introduce the subject of gang affiliation and gang activity?

MR. RAMM: Yes, in order to prove the element of premeditation in Count No. 1.

THE COURT: I think it's clearly something that has potential prejudicial impact to identify somebody as a gang member with gang affiliations because it tends to portray somebody as a bad person involved in bad activity before they even hear what he allegedly did, so you have to determine if the probative value of the gang material is greater than the prejudicial impact, would you agree with that?

MR. RAMM: Yes, Your Honor.

THE COURT: Alright, so we should make a record of that outside the presence of the jury. Mr. Cotterell, do you agree with that?

MR. COTTERELL: I do, Your Honor, and just on the record I am objecting to any reference to gangs in this case. **I know that it appears to be part and parcel of the motive in this case because of a prior gang killing two weeks prior to this incident and a revenge type thing. I think it can be brought out in this case without gangs because gangs -- any sign of a gang puts a pallor on the whole case because of the gang activity in this area. I know that people are very, you know, fed up with the gangs and all that and it could just, you know, taint this whole jury.** (Emphasis mine.) (RP Jan. 26, 2009 pages 6-7)

Det. Kellett and Sgt. Salinas flew to Texas to pick up Nava. Det.

Kellett testified without objection that Nave engaged him in a discussion with

Sgt. Salina, the gang expert as follows:

Q During that wait at the gate did you -- did Mr. Nava make any statements to you?

A Yes, he did.

Q Okay, and how did that -- how was that initiated?

A **He was mostly just asking about people in Yakima and Sergeant Salinas had engaged him in a conversation about people, mutual people that they knew from Yakima, acquaintances, members of the gang that were still back in Yakima, asking how they were and what they were doing and what Sergeant Salinas knew of them.**

Nava places great emphasis on what he alleges is the “fact” that State did not prove the existence of the Sureno’s as a gang similar to the allegation raised in State v. Asaeli, 150 Wn.App. 543, 208 P.3d 1136, (2009). Asaeli is distinguishable. The record in Asaeli makes it clear that this was either a new gang or one that was relatively obscure or unknown to the officers involved. The existence of “Kusman Blokk” as a gang **was challenged at the trial court level**. The testimony of Sgt. Salinas makes it very clear that there are

two umbrella gangs in the Yakima area, the Norteno's and the Sureno's.

Nava's own counsel argues that:

I think it can be brought out in this case without gangs because gangs -- any sign of a gang puts a pallor on the whole case because of the gang activity in this area. I know that people are very, you know, fed up with the gangs and all that and it could just, you know, taint this whole jury. (Emphasis mine.) ((RP Jan. 26, 2009 pages 6-7)

Slip opinion at 34:

During that hearing, Sergeant Salinas testified, without objection by the defense, that Victor Serrano's tag name was Smurf; that a "tag name" was a street moniker used by gangs; that Mr. Serrano was involved with the Sureno gang claiming the color blue; that Antone Masovero claimed the color red, the Norteno color; that it came to light in the Yakima police department's investigation of the Masovero homicide that Cesar Perez, Andres Orozco, Lance Nanamkin, and Salvador Nava were linked to the Sureno gangs while Antone Masovero and the other victims seated in the Martinez sedan were affiliates or members of the Norteno gang; that Lance Nanamkin had been quite upset about the death of Victor Serrano and that he had drawings and other items indicating his affiliation with the Sureno gang in his bedroom; that Antone Masovero had been present at the death of Mr. Serrano and may have handed the weapon to the shooter; and that "in the gang world, you will have an act occur involving rival gangs and then you will see a smattering of retaliation type acts occur, and this is what we believe occurred in this situation." RP (Jan. 26, 2009) at 11-14, 16.

Both Division III, State v. Rodriguez, 163 Wn.App. 215, 259 P.3d

1145 (Wash.App. Div. 3 2011); State v. Moreno, 294 P.3d 812 (Wash.App.

Div. 3 2013) and Division II of the court of appeals have published cases in

which there was explicit recognition of the existence of the Sureno and

Norteno gangs. See for example, State v. Campos-Cerna, 154 Wn.App. 702, 226 P.3d 185 footnote 8, (Wash.App. Div. 2 2010):

[8] The following facts were adduced at trial about the gangs and gang culture involved in this matter. In Vancouver, Washington, there are rival gangs called the Nortenos and Surenos. The Nortenos, or northerners, originated in northern California, the gang's primary color is red, and the gang is controlled by a prison gang called Nuestra Familia. The Surenos, or southerners, originated in southern California, its primary color is blue, and it is controlled by a prison gang called the Mexican Mafia.

There is also a gang called Mara Salvatrucha, or MS, with origins in El Salvador that formed in Los Angeles, in part to protect its members from the Sureno gang. Mara Salvatrucha appears to have added the number 13 when it aligned itself with the Mexican Mafia and now is known as MS-13. The Mexican Mafia brokered a deal between MS-13 and the Sureno gang, bringing them both under its "umbrella," its division of territory between member gangs, and its taxation of member gangs. RP at 556. Although once independent, MS-13 now seems to be intertwined with the Sureno gang.

Norteno and Sureno members are known to wear belts with gang colors and buckles with letters or numbers that designate their gang affiliation or geographic origin. Gang members that encounter an unknown person may "hit up" that person to ascertain these gang affiliations and geographic origins. RP at 573. It is common in the area of Vancouver around the Town Pump and Lord's Gym for Surenos and Nortenos to "hit up" one another, especially if the other person is in rival colors. Although the neighborhood surrounding the Town Pump is nominally Sureno territory, Nortenos frequent the establishment.

Underlying Norteno and Sureno philosophy is a belief that disrespect from a rival gang toward a member or the gang requires retribution that may be immediate or delayed. These gangs can be violent and a member's size does not dictate the threat he may pose; it is normal for some members to carry weapons, such as guns, knives, bats, and brass knuckles. Unlike other gangs, the Mexican Mafia prohibits Sureno members from doing drive by shootings-members must exit their vehicles before shooting at others.

In this case there was never any question, doubt or challenge that the actors in this tragedy were members of rival gangs. Nava's defense was he did not commit the crime. The challenge was that not to the existence of the gangs or the involvement in gangs of the actors but that the inclusion of the gang information would portray Nava in a bad light and prejudice his case. The reality of life is that these gangs do exist, that they kill each other for reasons that are not easily discernable to the general public. In order for the State to present a case such as this it is essential to demonstrate certain aspects of these gangs. The testimony was limited and specific. This is not a case where an officer in front of the jury is given free rein to describe each and every aspect of the gang culture. Nava made gangs an issue when he walked to the back window of a car in a public location in front of numerous witness and shot Mr. Masovero in the head twice while stating "This is for my homie, Smurf."

E. CONCLUSION

Nava's claims do not meet the requirements of RAP 13.4. The actions of the trial court and the Court of Appeals well reasoned decision should not be disturbed.

Respectfully submitted this 127th day of December 2013

s/ David B. Trefry

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APPENDIX A

Shortly after midnight one night in May 2001, Antone Masovero was shot and killed as he sat as a passenger in a sedan that Anthony Martinez had just pulled up to a taco truck in a supermarket parking lot. Although over a dozen people were in the vicinity of the taco truck at the time of the shooting, most scattered before police arrived.

Police Officer Mark Lewis was performing traffic patrol nearby when he heard gunshots and saw muzzle flashes coming from the direction of the lot. He radioed in a report and was driving toward the lot when Mr. Martinez drove the gold Nissan Altima sedan in which Mr. Masovero sat, fatally wounded, out of the lot, its lights off, traveling toward the officer in the wrong lane of traffic. As Mr. Martinez approached the officer, he turned to his left into what appeared to be a street but was instead a curbed back entrance to a fire station. A gate across the station entrance stopped him and Officer Lewis pulled in and blocked him from the rear. Officer Lewis and other responding officers detained Mr. Martinez, his front seat passenger, and two passengers who had been sitting in the back with Mr. Masovero. Mr. Masovero had been shot twice through the head and was slumped in the left rear passenger seat, his head and shoulders covered in blood. It was apparent to officers that he was dead.

Officers were immediately dispatched to identify any witnesses in the parking lot or nearby homes, but only Guadalupe Rojas and her husband

Angel Rojas, who had arranged with their children to meet in the parking lot following a nearby quinceanera,^[1] were able to provide helpful information. Mr. and Ms. Rojas traveled to the police station and provided statements to then-Detective (later Sergeant) Joe Salinas.^[2] Mr. Rojas described a man he had seen walk up to the sedan in which Mr. Masovero was sitting and fire the fatal shots; from his description, detectives prepared a photomontage that they presented to Mr. Rojas the next morning. Although he was not able to make a firm identification, Mr. Rojas did tap his finger on the picture of Salvador Nava, the fourth picture in the array, as "look[ing] like" the shooter. Report of Proceedings (RP) (Jan. 29, 2009) at 78.

The four surviving passengers from the Martinez sedan were also questioned by police within hours following the shooting, but none provided information that was helpful in establishing who committed the assault. Only two survivors in the sedan would later be called as trial witnesses by the State; both claimed that Mr. Masovero was shot within less than a minute after they arrived at the taco truck. Both denied that there had been any altercation between anyone in their car and persons in the lot before the shooting began.

¹ A quinceanera is a coming of age party celebrating a 15th birthday.

² By the time of trial, Joe Salinas was a police sergeant and was generally addressed as such in the trial record. At the time of the Masovero murder and his assignment to lead the investigation into the murder, he served as a detective, however, and in recounting facts from that time frame, we refer to him as Detective Salinas.

Both claimed to have ducked down and covered their heads as soon as shots were fired and did not see who did the shooting.

Police found a .25 caliber semiautomatic pistol approximately 10 to 15 feet from where Mr. Martinez's vehicle was detained by Officer Lewis. It turned out the vehicle was stopped very near the home of a cousin of Mr. Nava. The gun was found by a firearm examiner to be inoperable. The police also found unspent cartridges of .45 and .380 caliber ammunition in the lot but no spent shell casings. They found dented but unopened beer cans as they walked the streets adjacent to the parking lot.

Mr. Martinez's sedan was impounded and when later examined, revealed three bullet holes or impact marks in or near the rear driver's side door and the right rear headrest. Based on the examination of the car and the results of an autopsy, Sergeant Salinas concluded and later testified that two shots struck Mr. Masovero and as many as three additional shots were fired at the car.

Officers investigating the crime believed that Mr. Masovero's murder was related to the murder of Victor Serrano, which had occurred 10 days earlier. Mr. Serrano was associated with a Sureno gang active in Yakima and went by the tag name Smurf. That murder took place at or very near Antone Masovero's home and Sergeant Salinas, who worked on both homicides, recalled that Mr. Masovero allegedly handed the gun used to murder Mr. Serrano to the shooter.

The afternoon following the murder, then-Detective Salinas attended the autopsy of Mr. Masovero. There, he was able to see the clothing that Mr. Masovero was wearing at the time he was shot. It included a red belt with the number 14 on it. Sergeant Salinas would later testify that the Norteno gang claims an allegiance or an affiliation to the color red as well as the number 14, the fourteenth letter of the alphabet being "N." Two bullets were retrieved from Mr. Masovero's head during the autopsy. They proved to be hollow point bullets that would have been fired from a .38 special caliber or .357 magnum caliber revolver.

Three days after the shooting, officers executed a search warrant for the home of Cesar and Marisa Perez and invited Detective Salinas to assist. The basis for the search was drug related but officers anticipated that it might yield evidence connected with the Masovero murder. The Perezes were friends of Mr. Nava and, it turned out, had been present in the parking lot at the time of the shooting.

Only Ms. Perez and a baby were present at the Perez home when officers arrived to execute the warrant. During the search, officers found and seized weapons, a small amount of drugs, and an article about the Masovero murder that had been cut out of the newspaper. One of the officers commented that they should arrest Ms. Perez and take her to the station. Detective Salinas responded—later admitting that he was playing "the good cop"—that he

thought Ms. Perez wanted to talk. RP (Feb. 3, 2009) at 458. Ms. Perez, who had by that time heard that people had accused her husband of the Masovero murder, started crying and, according to Detective Salinas, "blurted out, what if I tell you who did the shooting." *Id.* They took her to the police station where she provided a tape-recorded statement.

Ms. Perez told officers that a number of her and her husband's friends were present in the parking lot the night of the shooting, having arranged to meet there following a quinceanera in Selah. She and her husband arrived in their car, accompanied by her husband's sister Sandra Perez and their friend Crystal. Chava (the name by which she knew Mr. Nava, a friend of her husband's) had arrived in a different car with a man she knew as Panic (later identified as Andres Orozco), Lance Nanamkin, and two women she did not know.

According to Ms. Perez, her group and Mr. Nava's group had been at the taco truck for about 20 minutes when the gold sedan in which Mr. Masovero was a passenger arrived, at which point an altercation immediately began between the driver of the sedan and Mr. Nava, Mr. Orozco, and Mr. Nanamkin. She told the officers that in the course of the argument and yelling, Mr. Nava retrieved a gun from the car in which he had been riding, walked back to the sedan, and shot the passenger in the driver's side of the back seat, who she believed had a gun. She said that Mr. Nanamkin also had a gun and

had tried to shoot but his gun jammed. She said that Mr. Orozco had thrown a full beer can at the sedan but that he overshot the sedan and the can landed in the street.

In answering the officers' questions, she implicitly accepted their characterization of the men in the gold sedan as Nortenos, a rival gang of the Surenos. She, too, referred to the men as Nortenos. She told the officers that as he was shooting, Mr. Nava yelled, "[T]hat was for my homie Smurf." *Id.* at 480. She was aware that someone named Smurf had been killed two weeks earlier. She said that in the several days after the shooting her husband had talked to Mr. Nava, who knew the police were looking for him and was scared that "the cops might—they'll find him and if the cops don't find him, the Nortenos will." *Id.* at 476.

In the course of her interview, Ms. Perez identified pictures of Mr. Nava, Mr. Nanamkin, and Mr. Orozco. Detective Salinas used the photos to prepare and post a notice that the three men were wanted for questioning in connection with the murder. Mr. Nanamkin was located shortly thereafter and officers obtained a search warrant for the Nanamkin home.

When officers served the warrant at Mr. Nanamkin's home, his mother was present and showed them her son's room. Officers found and seized paraphernalia marked "VSL," which Sergeant Salinas later testified stands for a local Sureno gang, Varrío Surenos Lokota. Police photographs of the room

captured Mr. Nanamkin's moniker "Sleepy, " which was displayed on the doorframe. Sergeant Salinas would later testify that "[w]hat stood out most" was a large photo of Victor Serrano—Smurf— "[p]osted prominently in his room on one of the walls." RP (Feb. 4, 2009) at 613-14.

The next witness to provide helpful information was Maribelle Olivas. Ms. Olivas was one of the two women, unknown to Ms. Perez, with whom Mr. Nava was riding on the night of the shooting. Ms. Olivas owned the white Honda Accord that the group was traveling in that evening. After Mr. Masovero's murder, she heard rumors that because she owned the car in which Mr. Nava was riding threats were being made against her, not necessarily by the men in the gold sedan, but "just the guys that have the color red." RP (Feb. 2, 2009) at 344. She was on probation at the time for drug charges and expressed concern about her safety to her probation officer, who notified Detective Salinas.

Detective Salinas met with Ms. Olivas five days after the shooting. She initially denied knowing anything about the shooting, but then relented and agreed to provide a tape-recorded statement. She told the detective that the group in her car had arrived at the taco truck between a quarter and a half hour before the gold sedan belonging to Anthony Martinez arrived. She knew Mr. Martinez and recognized his car. Earlier in the evening, Ms. Olivas had let her friend Alicia Velasquez drive her car, but on arriving at the taco truck, Ms.

Olivas moved into the driver's seat, fearing that something bad was going to happen. She attributed her worry to the gang activity that had been going on, saying "everybody was out for revenge. It's basically that there was a war going on between them.... The blues and the reds." *Id.* at 336. She told the detective that she believed the men that were with her and Ms. Velasquez "belonged to the blue." *Id.*

Ms. Olivas said that as Mr. Martinez's car approached the taco truck the driver began "exchanging words back and forth" with the men standing by the truck. *Id.* at 337. With that, she put her car in reverse, pulled out from where she was parked, and prepared to leave. She saw the driver of Mr. Martinez's car step out and it appeared to her that he was reaching for a gun; she could see that Mr. Nava had a gun in his hand, which he pointed at the Martinez car. It appeared that Mr. Nanamkin had a gun as well. At that point, Ms. Velasquez joined Ms. Olivas in the Honda as did Mr. Orozco, and Ms. Olivas drove off. In departing, she heard shots that sounded as if they came from one gun. She assumed it was Mr. Nava's since he had been pointing a gun and prepared to shoot when she last looked at him.

According to Ms. Olivas, Ms. Velasquez, who considered Mr. Nava her boyfriend, "jumped off shortly after getting into the car. *Id.* at 340. Ms. Olivas continued on with Mr. Orozco, dropping him off at his home before proceeding to the home of one of her cousins.

Mr. Orozco was questioned by Detectives Michael Tovar and David Cortez approximately a month after the shooting. Mr. Orozco did not come in voluntarily but was picked up for questioning about the Serrano and Masovero murders.

When interviewed, Mr. Orozco told police he was with friends, including Mr. Nava, Crystal and Sleepy, the name by which he referred to Mr. Nanamkin, on the night Mr. Masovero was shot. He told the detectives that they left a quinceanera in Selah and went to the taco stand in the supermarket parking lot where he got out of the car and a man started "talking shit" to him. RP (Jan. 29, 2009) at 155. Mr. Orozco confronted the man, who he claimed ran away. Two other cars then came their way and, according to Mr. Orozco, the occupants of the cars started "throwing signs." *Id.* at 157. Mr. Orozco then saw Mr. Nava fire a revolver three or four times.

Mr. Orozco was not sure where Sleepy was during the altercation but he did not see anyone other than Mr. Nava with a weapon. He also did not hear anyone say anything. After the shots were fired, he got in the car with Ms. Olivas who was frightened and tearful, and the two took off. Ms. Olivas dropped him at his home.

Mr. Nanamkin was eventually charged and pleaded guilty to manslaughter. Efforts to locate Mr. Nava proved unsuccessful. A warrant for his arrest issued, however, and in July 2008 he was apprehended in El Paso,

Texas. When questioned by Detective Arturo Ruiz of the El Paso Police Department, Mr. Nava originally denied having lived in Washington but eventually admitted that he had been at the scene of the Masovero shooting in May 2001. He denied having a gun or being the shooter. He was returned to Yakima to stand trial on one count of first degree murder, four counts of first degree assault, and one count of second degree unlawful possession of a firearm. The murder and assault charges alleged that he was armed with a firearm.

Before trial, the State and the defense notified the court that several witnesses were expected to claim a lack of recollection and the State might offer tape-recorded statements they had given to detectives in 2001 as recorded recollections under ER 803(a)(5). Mr. Nava filed a motion in limine, asking the trial court to exclude the statements based principally on his inability to conduct meaningful cross-examination of witnesses claiming an insufficient recollection.

As anticipated, four witnesses who had provided tape-recorded statements shortly after the murder and were called as witnesses at trial proved to have an insufficient recollection to testify fully and accurately. The first was Mr. Orozco. The procedure followed by the trial court with Mr. Orozco and later witnesses was for the State to first call the witness; for the lawyers to examine and cross-examine the witness to the extent possible about the night

of the shooting; and, when the witness's ability to testify to relevant matters was exhausted, to excuse the jury. Outside the presence of the jury, the State presented evidence bearing on the remaining elements of the required foundation, including playing the proffered tape-recorded statement. The trial court then heard argument from the lawyers; ruled on the admissibility of the recording; and, if it found the recording admissible, allowed the State to play the recording for the jury after which the witness would be subject to further examination and cross-examination.

Mr. Orozco was the first witness whose tape-recorded statement was offered by the State as a recorded recollection. With the jury present, he testified when asked if at one time he had a memory of what took place the night of Mr. Masovero's murder, "Not really, I was drunk." RP (Jan. 29, 2009) at 85. He later expanded, saying, "I was drunk drunk. I can't remember nothing." *Id.* at 86. He explained that he had been drinking "[b]eer, tequila, whatever, doing drugs." *Id.* Asked if he had a memory of events on the day he provided a recorded statement to police, he testified, "They picked me up early in the morning. I was drunk, I don't know." *Id.* at 93. He testified that he "used to do a lot of crack and crank, cocaine, every day." *Id.*

Asked if he was lying to police in providing the recorded statement, Mr. Orozco testified:

A I probably was. I'm a liar.

Q Okay.

A I lie to my wife, I lie to everybody.

Q Why would you have lied to the police at that time?

A I wanted to go home, man, they scare me. I just wanted to go home. I just told them what they wanted to hear, whatever, you know. I just wanted to go home, that's it.

Id. at 93-94. Mr. Orozco reiterated a couple more times that he probably lied to police before the State asked the trial court if it could take up an issue outside the presence of the jury.

With the jury absent, the State called David Cortez, formerly a detective and by the time of trial a police officer, who had sat in on the tape-recorded interview of Mr. Orozco in June 2001. Asked if Mr. Orozco had been under the influence of any intoxicant or controlled substance at the time he gave the statement, the officer responded, "No, not that I recall, " and then testified that Mr. Orozco had not been difficult to interview, that the interview went smoothly, that "[t]here wasn't any time where Mr. Orozco didn't quite understand what he was being asked, didn't have any or give any indication that he was tired, that he was under the influence or that he couldn't remember something." *Id.* at 119-20. He testified that Mr. Orozco was able to describe events chronologically, spoke coherently and logically, did not change his story, and that information provided by Mr. Orozco in June 2001 was consistent with physical evidence recovered at the scene. He testified that Mr.

Orozco's recollection appeared to be fresh in his mind and that he never expressed any fear of retaliation or concerns for his safety.

With the jury still absent, Mr. Orozco was recalled and his 14-minute tape-recorded statement was played for the court. The lawyers were allowed to examine him further and Mr. Orozco admitted that it was his voice on the recording.

After hearing argument of counsel, the trial court ruled that it would admit the recorded recollection. It found all four elements of the required foundation had been established, explaining, with respect to former knowledge and accuracy, that it found that Mr. Orozco was presently "being evasive. He just doesn't want to cooperate in any regard with regard to this, " adding, "I'm going to find that this is his statement that was in fact made to the police on June 17th at a time when it was fresh in his memory and that we're going to let the jury decide what they want to do with it." *Id.* at 150.

The next witness whose recorded statement was offered as evidence by the State was Peter Lopez, the passenger sitting next to the right rear window of Mr. Martinez's sedan when Mr. Masovero was shot. The same procedure was followed. Mr. Lopez testified that he assumed his statement was accurate and that he valued honesty. The admission of his statement (in which he testified that he never saw the shooter) is not challenged.

The third recorded statement offered was that of Maribelle Olivas. Ms. Olivas testified that in 2001 she was abusing alcohol and drugs, and was in treatment. She claimed to be unable to remember whether she told officers the truth. Outside the presence of the jury, her recorded statement was played with Ms. Olivas on the stand.

When asked following the playing of her statement if there was any reason that the statement that had been played was not accurate and truthful, she answered:

At that time I was in treatment, I was (inaudible) and I could not get in any trouble whatsoever at all and I did not want them to find out about this. Even though we did find out about it, so they knew and at that time I still was drinking and I was not supposed to be drinking so I didn't want them to find out anything about what I was doing on the weekends.

RP (Feb. 2, 2009) at 360. Asked again if she had any reason for believing the statement she gave was not accurate, she answered:

I don't think it was very accurate. I could tell by the recording that I was hung over and I could tell that I probably just told him what he wanted to hear just so I didn't have to continue talking to him.

Id.

The trial court also heard testimony from Sergeant Salinas outside the presence of the jury, addressing facts bearing on the reliability of the procedure for taking Ms. Olivas's statement, his observations bearing on Ms. Olivas's truthfulness, and the consistency of her statement with other

evidence. Having heard the testimony and the arguments of the lawyers, the trial court again found the recording admissible, observing, as to accuracy, "[S]he says, I was hung over. Now, that affects whether or not she has— she's telling us now that it may affect her ability to have all the events clearly laid out. Whether or not she told the police officer what he wanted to hear, that doesn't send me a clear signal that she's disavowing the statement." *Id.* at 363.

Thereafter, when the recording was played to the jury and the parties completed their questioning of Ms. Olivas, defense counsel asked if she did not just tell the officer what he wanted to hear. This time, Ms. Olivas answered:

Pretty much toward the beginning, you know, *I—really I was pretty honest about what we did, you know, going out and stuff*, but I think toward the end I think I just wanted to get out of there.

Id. at 384 (emphasis added).

Outside the presence of the jury, the court observed that "[s]ometimes it's necessary to hear what people say a couple of times in order to get a real feeling for what they're really saying, " and that her answer before the jury suggested that she was not disavowing accuracy, "she just wanted to get out of there. And she was going to cut to the chase on everything and just give an abbreviated version of it or some version that wasn't as thorough and complete. She just wanted to get out of there." *Id.* at 385.

The last witness whose recorded statement was offered by the State was Marisa Perez. When asked with the jury present if the events of the night of the shooting were fresh in her memory in May 2001, she answered, "No, because when they caught me I was under pressure and I was really scared and I got the impression like if I was being arrested." RP (Feb. 3, 2009) at 427. When asked why she felt she was under pressure, she answered:

Because a different incident had happened and they were questioning—all these questions telling me my husband was going to jail and that they were going to take my baby away and I don't—just throwing a bunch of questions at me.

Id. She testified that her memory of the events "was never fresh." *Id.* at 428.

Outside the presence of the jury, her recorded statement was played. When asked by the prosecutor after listening to the recording whether it now sounded like the matter was fresh in her memory when she gave the statement, she answered, "Sounds like I was scared and I wanted to protect my husband." *Id.* at 451. Yet when defense counsel then asked whether she was lying to the officer, she answered, "I might have said some stuff that were misinterpreted or... / *don't feel like I was lying.* I don't remember what I said, how could it be if I was lying." *Id.* at 452 (emphasis added).

Sergeant Salinas testified outside the presence of the jury that he had not prompted Ms. Perez in answering his questions and that she provided details in her statement that were consistent with statements from other witnesses and

with physical evidence in the parking lot. He also testified that after she provided the recorded statement she called her husband Cesar, and he heard her tell Cesar to "come on in and tell them the truth because I already have, " after which Mr. Perez came in and provided a similar statement.³ *Id.* at 456.

Having heard the tape-recorded statement and the testimony of Ms. Perez and Sergeant Salinas, the trial court again found that the State had demonstrated the necessary foundation and admitted the recorded statement. The court commented that it recognized that Ms. Perez, like other witnesses, had conflicted feelings "as to what happened, as to their loyalties [and] as to their own jeopardy" that would perhaps affect their recall as to certain events and may "shade their testimony a little bit, " but it had not heard her disavow the accuracy of her statement made in May 2001. *Id.* at 460. It reiterated that the defense had the right to question the witnesses as to their motivations and argue to the jury how much credibility or weight should attach to their statements, but that they were nonetheless admissible.

The jury found Mr. Nava guilty on all counts. In sentencing Mr. Nava, the court imposed a total sentence of 520 months, which it originally believed could be arrived at by sentencing him within the standard range and running

³ Mr. Perez was in California at the time of trial. Although the State instituted proceedings in California to compel his appearance, there was difficulty in getting him on the intended flight to Spokane. The State ultimately decided to rest its case without calling him.

the assault and firearm counts concurrently, but consecutive to the murder count.

When the lawyers presented a proposed judgment and sentence the following week, however, they reported to the court that a total sentence of 520 months could be achieved only by imposing a sentence for the first count (first degree premeditated murder) of 220 months—less than the low end of the standard range for his offender score—and running that sentence concurrent with the remaining counts. That is what the court did, then, in order to preserve what it said it continued to believe was the appropriate total sentence. Its only finding was a marginal notation next to the 220-month base sentence for count one that "[t]he court finds that the multiple offense policy permits the court to go below the standard range under RCW 9.94A.535.^[4]" Clerk's Papers (CP) at 8.

APPENDIX B

THE COURT: Officer, would you come forward, please.

SERGEANT SALINAS: Sure.

THE COURT: Raise your right hand. Do you solemnly swear or affirm that testimony you'll give in this proceeding will be the truth, the whole truth and nothing but the truth?

SERGEANT SALINAS: Yes, sir.

THE COURT: Have a seat.

SERGEANT SALINAS: Thank you.

THE COURT: It's important that you speak up so everybody can hear you. First, tell us your name.

SERGEANT SALINAS: Joe Salinas.

THE COURT: What is your occupation?

SERGEANT SALINAS: I'm a police sergeant with the City of Yakima.

THE COURT: Mr. Ramm.

SERGEANT JOE SALINAS

Direct Examination

By Mr. Ramm:

Q Sergeant Salinas, back in May of 2001, what were your specific duties?

A I was a detective with the detective division of the Yakima Police Department.

Q And were you assigned a homicide investigation involving the death of Antone Masovero?

A Yes, I was.

Q Had you earlier been involved with the homicide investigation of Victor Serrano?

A Yes, I was.

Q And Mr. Serrano's tag name was Smurf?

A Yes, as I recall, Smurf.

Q Was he involved -- by your investigation was he involved with a specific gang?

A Right off the top of my head, I don't know, since it's so far ago, but I do know he was a Soreno claiming the color blue.

Q And in terms of Antone Masovero.

A Antone Masovero claimed the color red.

Q Which is which gang?

A Red is Norteno color.

Q And it could be among various gangs that are within the Soreno sect?

A And that's how it was -- of course, what they say back in the day.

There are several Soreno gangs under the Soreno umbrella, and that current -- currently what we have as well, but we didn't have a gang unit tracking them back at that time. Our gang unit started in 2004. Likewise, the Nortenos have several Norteno gangs under the Norteno umbrella. They have sub-groups

under that.

Q When you were investigating the homicide of Antone Masovero did it come to light that there was a recognition on the part of the persons with the group including Cesar (phonetic) Perez and Andres Orozco, Lance Nanamkin and the defendant Salvador Nava that they were approached in a vehicle or as they were at a taco stand by a group of individuals who were -- including Antone Masovero, that were Norteno or people that wore the color red?

A Yes, the victims in that case were seated in a vehicle and were all affiliates or members of the Norteno gang while the individuals you mentioned previous to that were linked to Soreno gangs.

Q And did you discover that through your investigation?

A Yes.

Q And was there an exchange of both hand signs and verbal statements between -- through your investigation did you discover that prior to the shooting that there was an exchange between these two groups?

A As I recall, the statements will probably reflect that as the trial will progress, but that's typically what we see in a gang style confrontation.

Q Okay. And through your investigation did you also learn that, particularly Lance Nanamkin, was quite upset about the death of --

A Victor Serrano.

Q -- Victor Serrano? In fact, you had conducted -- you spoke to his mother and went into his room at her house, do you recall that?

A Correct.

Q And he had --

MR. COTTERELL: Your Honor, I'd object. The prosecutor's testifying or that the witness is testifying.

A We went -- I'm sorry.

MR. RAMM: I'm trying to orient him to where --

THE COURT: Some amount of leading is okay to (inaudible) at the testimony but the objection just asks us to be for a heads up.

Q Can you tell us about that?

A I recall going to a residence. I don't recall the exact address but it was at the corner of, I believe -- gosh, it's been so long, Union and Chestnut, but it is on East Chestnut. We went there originally to talk to Mr. Nanamkin who was not home. We made contact with the mother who allowed us to look in his room. He had some drawings and some other items in there that indicated his affiliation with the Soreno gang and his mother indicated to me that he was very distraught over the death of his friend, Victor Serrano and that's basically the information we got from her. She was unable to help with locating him and he was later ultimately located and charged in this crime.

Q And he entered a guilty plea to a manslaughter charge?

A Correct.

Q Are you familiar with whether or not Antone Masovero was at the location of the homicide of Victor Serrano?

A Initially, that case was investigated by Detective Mike Tovar who then left before that case came to fruition and I was then assigned that case as well since the two cases appeared to be related.

Q What was Antone Masovero present at the scene of the death of Mr. Serrano?

A At this point I can't tell you.

Q Okay.

A If the reports will reflect that then I would probably be able to recall a little bit better. You know, as I sit here, Antone was at the -- at that previous homicide. That occurred at the -- actually originated at Naches and Spruce, not a few blocks from our new police department. He was present and I believe now that I remember actually may have handed the firearm that was used to the shooter in that case.

Q Was that -- the scene of that shooting, that earlier shooting, were there a large number of individuals involved in that?

A There were several individuals involved, both witnesses and suspects and victims.

Q And would that fact lead to the probability of other altercations?

A Yes, especially in the gang world, you will have an act occur involving rival gangs and then you will see a smattering of retaliation type acts occur, and this is what we believe occurred in this situation.

Q I have no further questions.

THE COURT: Cross examination, Mr. Cotterell.

MR. COTTERELL: Yes, thank you, Your Honor.

Cross Examination

By Mr. Cotterell:

Q Good morning, Sergeant Salinas.

A Good morning.

Q Were you the named detective on this matter?

A On this case, I was.

Q Okay. And you interviewed several witnesses, is that correct?

A There were quite a few, yes.

Q And there was even some independent witnesses, weren't there?

A As I recall, yes, there were.

Q And from what you gathered from these witnesses didn't some of them say that apparently an individual went over from another car to the victim's car, is that right?

A There may be a witness statement to that effect.

Q And that that person might have had something underneath of their shirt when they walked over, is that right?

A Again, there may be a witness statement to that effect. I haven't reviewed the witness statements yet.

Q Okay. And indications were from the witnesses that shots were fired and then that person ran away from the scene, is that correct?

A That was initially what the reports to police were, I believe.

Q Okay. So basically the person that allegedly did this came from another car and then had to walk over maybe made some statements to that other car, is that right?

A I don't know if there was -- according to the statements, we had several different versions of events but all leading to ultimately what happened was an individual in the car that was deceased, but we also had witnesses saying that it was involving two groups of individuals, one group in the car and a group that was nearby.

Q So the indications were that one person went from that other group and walked over to the other group and --

A I think there was some contact, as I recall.

Q -- and then shot -- somebody shot the person in the back left passenger seat -- or the back seat, right -- is that right?

A Yes, the victim was seated behind the driver in the back seat.

Q Okay. And -- that 's all I have, Your Honor.

THE COURT: Mr. Ramm.

MR. RAMM: Nothing further, Your Honor.

THE COURT: Just for clarification, you said that a gang unit was formed in 2004.

A Correct.

THE COURT: So when these events that we're talking about in this

case occurred in -- allegedly in May of 2001.

A Correct, prior to the gang unit.

THE COURT: Prior to the gang unit being formed, how did the department deal with the concept of gang and membership and that kind of information?

A Well, unfortunately, the police department was in what I would call a state of denial about the amount and level of activity or violence that the gangs were performing in Yakima. It actually took the arrival of the new chief, Sam Grenado, coming to town in the year 2003 to recognize the level of our gang problem and he's instrumental in assembling the gang unit in 2004, which was tasked primarily with identifying and tracking as many of these guys as we could in our city limits. We didn't have that before. There were some efforts earlier previous to the gang unit with regard to tracking and trying to keep track of tag names and addresses and they used to keep binders with Polaroid photos and just handwritten notes.

THE COURT: But you as an officer in 2001, you were aware of the street level activity?

A Your street level officers knew who the gang members were and most of their tag names and, you know, there was just no organized effort to let all the officers know who they were.

THE COURT: What is a tag name?

A A tag name is a moniker, a street moniker. You have -- for instance,

we all grew up with people going to school and you call them Moose. You know, the big guy's Moose or, you know, a little guy with glasses, you call him Squints, you know, a guy with ears -- they do the same thing in the gang world but they'll give themselves more ominous names. For instance, one of the individuals involved in this case is called Panic. We have dealt with other individuals who take on names in Spanish like Matone (phonetic) which is killer in Spanish. They take on more ominous street names because it gives them more of a -- people are more frightened by their names.

THE COURT: What is the significance of graffiti? I think Mr. Ramm -- did you mention graffiti?

MR. RAMM: I don't believe I did.

A There are two different styles of --

THE COURT: (Inaudible -- talking over each other) signs that you --

MR. RAMM: Hand signs.

THE COURT: What's the significance of hand signs?

A The hand signs are identifier as well. In fact, they can throw up hand signs and they'll make letters with their hands. For instance, we have an LVL hand sign that's -- you put the hand in a particular level you have an L, a V, and another L here and they can throw up a hand sign and identify immediately who they are. They'll also shout out what group they're with. For instance, they may shout out during the shooting, they'll say this Barrio Soreno Trese (phonetic), which is VSL 13, that would be their gang, and

they'll shout it out while they're doing this, and they want the victims on the other end and anybody within ear shot to know who's conducting this crime.

THE COURT: Is this information that you knew back in May of 2001?

A I can say, I wasn't probably as well versed as I am now.

THE COURT: But you had some --

A Well, I had some knowledge of the gangs back then but no where near what I have now.

THE COURT: Just -- so for clarification that -- how long have you been a police officer?

A Coming up on 19 years.

THE COURT: Anything else?

MR. RAMM: No, Your Honor.

THE COURT: Anything else, Mr. Cotterell?

MR. COTTERELL: Nothing further, Your Honor.

THE COURT: You may step down. This witness may be excused for today?

MR. RAMM: Yes, thank you.

MR. COTTERELL: Yes.

SERGEANT SALINAS: Thank you.

THE COURT: Alright. It's almost noon, so maybe we'll break.

When we come back this afternoon, we'll deal with Kellett and I would like --

MR. RAMM: At 1:30, Your Honor?

THE COURT: Yeah. What I would like to do is take Detective Kellett and get his testimony done and then argue on the 3.5 hearing and the gang issue. Mr. Cotterell, I want to be sensitive to your desire to thoughtfully limit the issue of the gangs. You said you don't want that to come in. The issue is whether or not it has any probative value to this case. It has obvious prejudicial impact. When you brand somebody a gang member you're labeling them as an outlaw, somebody who lives in a criminal lifestyle in a criminal world and that has the tremendous potential to be prejudicial, but it also in the a case of this type may have great probative value to explain why people got together on a certain date and why somebody got shot, so -- anyway, I'd like to hear from you on that.

RP January 26, 2009, 10-18.

Certificate of Service

I, David B. Trefry, hereby certify that on this date I emailed a copy of this motion, by agreement of the parties to Eric Nielsen at Sloanej@nwattorney.net

Dated at Spokane, WA this 27th day of December, 2013.

s/ David B. Trefry

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Please find attached the State response to Petition for Discretionary Review.

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Yakima County