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No. 30763-8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SALVADOR GARCIA SANCHEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The State charged Salvador Garcia Sanchez with assault, riot, witness intimidation and felony harassment and sought an exceptional sentence on the basis that he committed the crimes with the intent to benefit a criminal street gang. As a result, the jury heard extensive evidence about serious unrelated criminal conduct committed by Mr. Garcia and other members of a gang to which he belonged. But the controlling statute did not authorize the court to submit this particular aggravating factor to the jury. In addition, Mr. Garcia's attorney did not ask the court to bifurcate the gang-related evidence introduced for the purpose of the exceptional sentence even though this evidence was highly prejudicial and would not have been admissible at a trial on the charged offenses alone. Because the court stated it would have bifurcated the gang evidence if asked, Mr. Garcia received ineffective assistance of counsel due to his lawyer's unreasonable failure to keep the gang evidence from prejudicing the jury.

Finally, the State did not prove witness intimidation beyond a reasonable doubt and the information and to-convict instructions are constitutionally deficient because they do not contain the essential element that Mr. Garcia uttered a "true threat."

B. ASSIGNMENTS OF ERROR

1. The court did not have statutory authority to submit the gang aggravator to the jury.

2. Defense counsel provided ineffective assistance of counsel by failing to move to bifurcate the gang aggravator evidence from the trial on the substantive offenses.

3. The State did not prove witness intimidation beyond a reasonable doubt, in violation of constitutional due process.

3. The information is constitutionally deficient because it does not contain the essential element that Mr. Garcia uttered a "true threat."

4. The to-convict instructions are constitutional deficient because they do not contain the "true threat" element.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A court's sentencing authority is provided wholly by statute. The Sentencing Reform Act (SRA) does not expressly provide the court with authority to submit evidence in support of the gang aggravator, RCW 9.94A.535(3)(aa), to a jury. Did the court err in submitting such evidence to the jury?

2. Where the State alleges an exceptional sentence aggravating factor, the trial court has discretion to bifurcate the proceedings so that

the jury does not hear prejudicial and otherwise irrelevant evidence in support of the aggravator in the trial on the substantive offense. Here, the trial court indicated its willingness to bifurcate the proceedings but defense counsel did not file a timely motion to bifurcate. Did counsel provide ineffective assistance of counsel where the jury heard highly prejudicial and otherwise irrelevant evidence of Mr. Garcia's and other gang members' prior criminal offenses due to counsel's failure to file a timely motion to bifurcate?

3. To prove the crime of witness intimidation, the State must prove beyond a reasonable doubt the defendant threatened a current or prospective witness with the intent to: influence the person's testimony, induce the person to absent himself from an official proceeding, induce the person not to report information relevant to a criminal investigation, or induce the person not to provide truthful or complete information. Did the State fail to prove the crime beyond a reasonable doubt where the State did not prove Mr. Garcia's specific intent in making the alleged threats?

4. To be constitutionally adequate, both the information and to-convict jury instruction must contain all essential elements of the crime. An essential element is a fact the State must prove to sustain the

conviction. To prove the crimes of harassment and witness intimidation, the State must prove the defendant uttered a "true threat." Are the information and to-convict instructions constitutionally deficient because they omit this allegation?

D. STATEMENT OF THE CASE

The charges arose from three incidents that occurred over a six-month period. CP 126-33. The State charged: (1) witness intimidation, RCW 9A.72.110; (2) felony harassment, RCW 9A.46.020(2)(b)(ii); (3) first degree assault, RCW 9A.36.011(1)(a)(c), with a deadly weapon enhancement allegation; (4) riot while armed, RCW 9A.84.010(2)(b), with a deadly weapon enhancement allegation; (5) first degree assault. RCW 9A.36.011(1)(a)(c), with a deadly weapon enhancement allegation; and (6) riot while armed, RCW 9A.84.010(2)(b), with a deadly weapon enhancement allegation.[1] CP 126-33.

The State alleged Mr. Garcia committed all of the crimes with the intent to benefit a criminal street gang, RCW 9.94A.535(3)(aa), and sought an exceptional sentence on that basis.[2] Id.

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[1] The State also charged Mr. Garcia with bail jumping but that conviction is not at issue in this appeal.

[2] The State also alleged Mr. Garcia committed the crimes in order to advance his status in the hierarchy of a gang, pursuant to RCW 9.94A.535(3)(s), but the court later dismissed that allegation due to insufficient evidence. CP 11/23/11RP 34.

Prior to trial, the court granted the defense motion to sever the witness intimidation and felony harassment charges from the other charges because those incidents were unrelated. 11/23/11RP 48-50. Thus, two separate jury trials followed.

1. Martinez incident.

On Halloween night 2010, Luis Martinez went to a party in Othello. 11/29/11RP 342. He left the party with Mr. Garcia, Jose Nieves and two other men. 11/29/11RP 342. Mr. Martinez drove them in his car to Soap Lake to meet some girls. 11/29/11RP 343.

As Mr. Martinez was driving everyone back to Othello, he took a wrong exit. 11/29/11RP 344. He drove down a street to turn around and noticed a police car behind him. 11/29/11RP 344. The police officer flashed his lights and Mr. Martinez began to pull over. 11/29/11RP 345. Mr. Martinez then heard gun shots out the window and saw Mr. Nieves holding a gun. 11/29/11RP 345. Mr. Martinez stepped on the gas and drove down a dead-end street, where he stopped the car. 11/29/11RP 345. Everyone got out of the car and ran into the sagebrush nearby, where they hid for several hours. 11/29/11RP 346.

One or two days later, Mr. Martinez went to the sheriff's office and told them what had happened. 11/28/11RP 143; 11/29/11RP 348.

Police took Mr. Nieves into custody for the shooting. 11/28/11RP 141-42. The police report and the certificate for determination of probable cause stated that Mr. Martinez had told police that Mr. Nieves was the shooter. 11/28/11RP 145-47.

Two months later, Mr. Martinez and a friend were driving around Royal City. 11/29/11RP 349. Mr. Martinez saw Mr. Garcia standing on the street near Garcia's house. 11/29/11RP 350. When Mr. Garcia saw them, he ran into the middle of the street to try to stop their car. 11/29/11RP 350. They slowed down and Mr. Garcia ran to the side of the car and tried to open the passenger door where Mr. Martinez was sitting. 11/29/11RP 350. He could not open the door because the handle was broken. 11/29/11RP 350. He then banged on the window and called Mr. Martinez "a snitch, a bitch" and said he was going to kill him and "kick [his] ass." 11/29/11RP 351. Mr. Martinez believed that if Mr. Garcia had been able to open the door, he would have fought with him and tried to kill him. 11/29/11RP 351-52. Mr. Martinez and his friend slowly drove away. 11/29/11RP 352. Mr. Garcia did not chase them. 11/29/11RP 352.

About a half hour later, Mr. Martinez again saw Mr. Garcia as he and his friend continued their drive through town. 11/29/11RP 352.

Mr. Garcia was walking by the road with a friend. 11/29/11RP 352. When Mr. Garcia saw them, he threw some rocks at their car. 11/29/11RP 352. He did not hit the car because he was too far away. 11/29/11RP 352.

Mr. Martinez did not know Mr. Garcia very well and had never had any disputes with him before. 11/29/11RP 353. He did not know why Mr. Garcia was mad at him but thought it might be because he had talked to police about the Halloween incident. 11/29/11RP 391-92. Mr. Garcia did not say anything about that incident when he banged on the window, however, and did not mention Nieves. 11/29/11RP 378.

The State presented evidence that both Mr. Garcia and Mr. Nieves were members of the South Side Locos gang. 11/28/11RP 217; 11/29/11RP 355. Mr. Garcia has tattoos associated with the gang; he has been seen wearing the color blue and bandanas which are associated with the gang; and he spent time with other suspected gang members. 11/28/11RP 202-05, 207-10, 301-03. Joe Harris, a Grant County Sheriff deputy, testified that if a gang member could keep a witness from testifying against another gang member, that would benefit the gang by bolstering the gang's reputation and keeping other potential witnesses from testifying. 11/28/11RP 312. Deputy Harris

did not personally investigate this case or the Halloween incident, however. 11/28/11RP 314, 317.

To prove the gang aggravator, the State was required to prove Mr. Garcia committed the crime to benefit a "criminal street gang," as defined by statute. RCW 9.94A.535(3)(aa); CP 105 (jury instruction). The statute defines a "criminal street gang" as a group of persons that has "as one of its primary activities the commission of criminal acts," and whose members "have engaged in a pattern of criminal street gang activity." RCW 9.94A.030(12); CP 105, 107 (jury instructions). To prove the existence of a "criminal street gang," the State offered extensive evidence of prior unrelated criminal offenses committed not only by Mr. Garcia but also by several other alleged gang members. The court admitted the evidence, over repeated defense objection. 11/28/11RP 159-61, 196-97, 214-22, 225-30, 245-46, 393-94.

Thus, the jury heard evidence that on three specific occasions, unrelated to the present charge, Mr. Garcia and other suspected gang members assaulted a rival gang member.[3] 11/28/11RP 162-63,183-84, 188-91, 199-01. Police officer Reynaldo Rodriguez testified he has had

[3] Two of those assaults are the subject of the charges tried in the second jury trial in this case.

multiple prior contacts with Mr. Garcia, who has been charged multiple times for assault. 11/28/11RP 178.

The jury also heard extensive evidence of unrelated criminal acts committed by several other suspected South Side Locos members, even though no evidence connected Mr. Garcia in any way to those incidents. For instance, Police officer Korey Judkins testified that in September 2010, four South Side Locos members assaulted a boy at Royal City High School; two of them were convicted for the assault. 11/28/11RP 212-16. In April 2010, Mr. Nieves and another South Side Locos member assaulted a rival gang member; Mr. Nieves was convicted for that assault. 11/28/11RP 217-22. Two other South Side Locos members were convicted of another assault that occurred in September 2010. 11/28/11RP 223-30. In August 2010, two South Side Locos members were seen spray painting windows and the side of a building; one of them was convicted of malicious mischief. 11/28/11RP 231-32, 245-46. In December 2010, someone wrote gang-related graffiti inside a laundromat at an apartment building; police never found out who wrote the graffiti. 11/28/11RP 247-52.

After hearing this irrelevant and prejudicial evidence, the jury found Mr. Garcia guilty of witness intimidation and felony harassment

as charged. CP 111-12. The jury also answered "yes" on the special verdict form as to the gang aggravator. CP 115-16.

2. Coria incidents.

Ricardo Coria testified he is not in a gang although he used to be when he lived in California 20 years earlier. 1/26/12RP 799-800. Two police officers testified, however, that Mr. Coria is still an active member of a "Nortenos" gang. 1/26/12RP 629-30; 1/27/12RP 879. The Nortenos are rivals of the South Side Locos. 1/27/12RP 957.

On January 14, 2011, Mr. Coria and his son Mario went to the house of Mr. Coria's nephew in Royal City. 1/26/11RP 787. At some point, Mr. Coria walked out to his car in the driveway to recharge his cell phone battery. 1/26/12RP 788. He then saw a group of five or six young men walking across the street toward the house; Mr. Garcia was in the group. 1/26/12RP 789-91. Four of the men were members of the South Side Locos; they were wearing blue bandanas and had the number 13 on their shirts, which are symbols of that gang. 1/25/12RP 549-51. Also, Mr. Garcia has gang-related tattoos. 1/25/RP 568-71. Mr. Coria was wearing a red belt buckle with the number 14 on it, which are symbols of the Nortenos gang. 1/26/12RP 820-21.

Mr. Coria stood in front of the young men. 1/26/12RP 790. Mr. Garcia walked up to him and said something about "south side" and some men in the group displayed gang signs. 1/26/12RP 791, 799, 818-19. Mr. Coria told them to leave. 1/26/12RP 792. When he looked back to tell his son to go back in the house, he felt something hard, like metal, hit him in the head. 1/26/12RP 793. He fell to his knees and Mr. Garcia hit him four to five times in the head with the metal object. 1/26/12RP 793. Mario came out of the house and pushed Mr. Garcia off of Mr. Coria and at that point a fight broke out. 1/26/12RP 794-95. Soon, however, someone said the police were coming and the "south side" group ran away. 1/26/12RP 795.

Later, police found a set of silver brass knuckles on the ground nearby. 1/25/12RP 564. Mr. Coria was not seriously injured and did not request medical assistance. 1/26/12RP 634.

On May 14, 2011, Mr. Coria was sitting in his car in the parking lot of the post office in Royal City, talking on his cell phone. 1/26/12RP 801. He noticed a group of four young men standing about 100 yards away staring at him and "throwing" gang signs; Mr. Garcia was in the group. 1/26/12RP 802-04. The young men called out to Mr. Coria but he ignored them and continued to talk on the phone.

1/26/12RP 803. Then he heard a knock on the window. 1/26/12RP 804. The young men were next to the car, calling him names and saying, if you are a "northerner," come out and fight. 1/26/12RP 804. Mr. Coria rolled down the window and told them to leave him alone. 1/26/12RP 804. Mr. Garcia reached through the window and hit him in the head a few times with his fist. 1/26/12RP 805. Mr. Garcia's associate hit Mr. Coria in the shoulder. 1/26/12RP 806-07. Mr. Coria was hit about eight times total. 1/26/12RP 807. Soon, the police arrived and the young men ran away. 1/26/12RP 807. Mr. Coria had bumps on his head but was not seriously hurt. 1/27/12RP 912.

Deputy Harris testified the two incidents were gang-related because the actors were gang members, uttered gang slurs, wore gang attire, and were members of rival gangs with a history between them. 1/27/12RP 935.

As at the first trial, the State again offered evidence of the prior unrelated criminal acts of several other suspected South Side Locos members and the defense again objected. 1/25/12 RP 581-98. Outside the presence of the jury, the court ruled the evidence was relevant and admissible to show the South Side Locos qualified as a "criminal street gang" under the statute. 1/25/12RP 597. But the court noted at length

the prejudicial nature of such evidence and its potential to unfairly bias the jury. 1/25/12RP 597-99. The court cogently observed that, pursuant to the statute,

> once a criminal defendant is believed to be a member of a gang, every crime ever committed by any member of the gang is admissible into evidence. That is so contrary to the notion of fair [sic] trial and so contrary to the principles of Evidence Rule 404 that we don't allow prior bad acts to come into evidence, that it's actually chilling to a trial judge to say, all you have to do to make this allegation is show that the defendant is a member of the gang, and then all of this other stuff comes into evidence.

1/25/12RP 597-98. Such a procedure is "fundamentally unfair" because it is "contrary to the notion that people should have criminal charges resolved based on the evidence that relates to those criminal charges. Not based on what [a gang associate] did on some day half year before." 1/25/12RP 598-99.

The court stated it was "nonsense" to believe a limiting instruction would cure the unfair prejudice caused by such evidence. 1/25/12RP 598. Thus, the court concluded, "if ever there was a motion to bifurcate the trial, so as not to permit any of this stuff to come in in the case in chief, I would grant it. I would be compelled to grant it." 1/25/12RP 598; see also 1/30/12RP 1035-36 (judge again observes he would have given "great[] consideration" to a motion to bifurcate had

one been timely made, given the ineffectiveness of a limiting instruction); 4/03/12RP 55 (judge observes that, had counsel argued before trial that the aggravator should be tried after the guilt phase, "because of the nature of this particular aggravator, what the State is required to prove, that would be a pretty persuasive argument").

The next day, in response to the court's comments, defense counsel filed a motion to bifurcate the gang aggravator from the substantive offenses. 1/26/12RP 605; CP 141-43. But, because the jury had already heard a considerable amount of evidence offered in support of the aggravator, the court denied the motion as untimely. 1/26/12RP 610-11.

Thus, the jury heard, over defense objection, the evidence about the prior unrelated criminal acts and convictions of other suspected South Side Locos that was presented at the first trial. 1/26/12RP 615-27; 1/27/12RP 978-92.

As for the January incident, the jury found Mr. Garcia not guilty of first degree assault as charged but guilty of the lesser degree crime of second degree assault. CP 174-75. The jury also found him guilty as charged of riot while armed. CP 178. The jury found he was armed with a deadly weapon and answered "yes" on the gang aggravator

special verdict form. CP 182-85. As for the May incident, the jury found Mr. Garcia guilty of fourth degree assault and simple riot.[4] CP 180-81.

3. Sentencing.

Defense counsel argued the court did not have statutory authority to impose an exceptional sentence because the aggravator at issue, RCW 9.94A.535(3)(aa), is not specifically listed in RCW 9.94A.537(4), which provides the procedure for submitting aggravating factors to a jury. 4/03/12RP 49-51. The court overruled the objection, concluding it had statutory authority to submit the aggravator to a jury. 4/03/12RP 53. But the court concluded that, given the nature of Mr. Garcia's conduct, an exceptional sentence would be excessive. 4/03/12RP 75. Therefore, the court imposed a standard-range sentence.[5] 4/03/12RP 75; CP 254-55.

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[4] After the State had rested its case, the court there was not sufficient evidence that a weapon was used during the May incident and therefore the jury could be instructed only on the lesser crimes of fourth degree assault and riot. 1/27/12RP 1009-15.

[5] The court ruled that the witness intimidation and felony harassment charges, as well as the riot and assault charges for the January 2011 incident, encompassed the "same criminal conduct" for sentencing purposes. CP 252.

E. ARGUMENT

1. THE COURT ACTED WITHOUT STATUTORY AUTHORITY IN PERMITTING THE JURY TO HEAR THE EVIDENCE OFFERED IN SUPPORT OF THE AGGRAVATING FACTOR

a. The statute did not provide a procedure for submitting the aggravating factor to the jury at the trial on the substantive offenses.

It is axiomatic that a court's sentencing authority is derived wholly from statute. State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). A court does not have inherent authority to impose an exceptional sentence. Id. ("no such inherent authority exists" for court to create own procedures to impose sentence above standard range). It would "usurp the power of the legislature" for the court to create a procedure to impose an exceptional sentence that is not authorized by statute. State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005), overruled in part on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

"The sentencing court is bound to impose a standard range sentence unless the statutory requirements for an aggravated or mitigated sentence are established." State v. Davis, 163 Wn.2d 606, 614, 184 P.3d 639 (2008). The SRA is "a detailed sentencing matrix"

whose procedural requirements trial courts must follow. Id. The statute reflects a policy judgment by the Legislature to limit judicial discretion. Id. Given those policy judgments, and the statute's detailed nature, our supreme court consistently defers to the Legislature to decide on a procedure for imposing an exceptional sentence. Id.

Trial courts may not deviate from the legislatively prescribed exceptional sentence procedures. Davis, 163 Wn.2d at 608. Where the statute does not provide a procedure for submitting an aggravating factor to the jury, the court may not imply such a procedure. Id. at 613; Hughes, 154 Wn.2d at 150. Cases providing that courts have inherent authority to imply a procedural mechanism for enforcing a defendant's jury trial right apply only in situations where the statute is silent or ambiguous with respect to the relevant procedure. Davis, 163 Wn.2d at 613 (and cases cited).

Whether the trial court had statutory authority to follow a given procedure is a question of law this Court reviews *de novo*. Pillatos, 159 Wn.2d at 469.

Here, the statute did not provide a procedure for submitting the aggravating factor to the jury during the trial on the substantive offenses. RCW 9.94A.535(3) requires that "[f]acts supporting

aggravated sentences, other than the fact of a prior conviction, *shall* be determined pursuant to the provisions of RCW 9.94A.537." (emphasis added). The word "shall" in the statute imposes a mandatory requirement unless a contrary legislative intent is apparent. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

But RCW 9.94A.537 does not provide a procedure for allowing the jury to determine the facts alleged in support of the aggravating factor in the trial on the substantive offenses. RCW 9.94A.537(4) provides: "Evidence regarding any facts supporting aggravating circumstances under *RCW 9.94A.535(3)(a) through (y)* shall be presented to the jury during the trial of the alleged crime . . . ." (emphasis added). RCW 9.94A.535(3)(aa) is not one of the listed factors. Therefore, the statute does not explicitly provide a procedure for submitting the factor to the jury during the guilt phase of the trial.

Moreover, the court was not authorized to imply such a procedure because the statute is not silent or ambiguous. See Davis, 163 Wn.2d at 613. To the contrary, the statute provides explicit and detailed procedure for submitting aggravating factors to juries. The statute lists a number of aggravating factors that may be submitted to

the jury during the guilt phase of the trial but RCW 9.94A.535(3)(aa) is not included in the list. See RCW 9.94A.537(4).

Therefore, the court did not have authority to allow the jury to hear the facts offered in support of the aggravating factor during the trial of the alleged crime. Davis, 163 Wn.2d at 613; Hughes, 154 Wn.2d at 150.

b. The error in permitting the jury to hear the highly prejudicial evidence offered in support of the aggravating factor requires reversal of the convictions.

ii. First trial.

In the first trial, the jury heard evidence that Mr. Garcia and Mr. Nieves were members of a street gang. 11/28/11RP 202-05, 207-10, 217; 11/29/11RP 355. The jury also heard that, on three occasions unrelated to the present charge, Mr. Garcia had assaulted someone else. 11/28/11RP 162-63,183-84, 188-91, 199-01. Third, the jury heard extensive evidence of unrelated criminal acts committed by several other suspected gang members, even though no evidence connected Mr. Garcia in any way to those incidents. 11/28/11RP 212-32, 245-52. Finally, the jury heard a sheriff deputy testify that, in general, a gang member can gain respect within the gang and increase the gang's status in the community by committing criminal acts, and that a gang member

can provide a benefit to the gang by preventing a potential witness from testifying. 11/28/11RP 297-98, 301-03, 312. The deputy did not investigate the facts of this case, however. 11/28/11RP 314, 317.

None of this evidence was admissible absent the gang aggravator. Only relevant evidence is admissible at trial.[6] ER 402. ER 404(b)[7] specifically prohibits admission of a person's prior crimes, wrongs, or acts to demonstrate the person's character or general propensities, although such evidence may be admissible for other purposes, such as to show motive, opportunity, or intent. By its terms, ER 404(b) is not limited to the prior misconduct of a party. 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 404.13, at 508 (5th ed. 2007).

Gang evidence falls within the scope of ER 404(b). State v. Yarbrough, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). Evidence of

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[6] "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.

[7] ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

street gang affiliation is admissible in a criminal trial only if there is a nexus between the crime and gang membership. State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71, review denied, 168 Wn.2d 1004, 226 P.3d 780 (2009). If gang evidence is not relevant to the issues at trial, its admission violates the First Amendment right to free association. State v. Johnson, 124 Wn.2d 57, 67, 873 P.2d 514 (1994) (citing Dawson v. Delaware, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)).

Evidence of Mr. Garcia's gang membership was not admissible in the first trial because the State did not establish a nexus between the crime and gang membership. The State offered the evidence to show Mr. Garcia's motive but the evidence did not establish motive. Evidence of gang membership, alone, is not sufficient to establish motive for a crime. State v. McCreven, __ Wn. App. __, 2012 WL 3871356, at *4 (Sep. 5, 2012). Similarly, a law enforcement officer's testimony about the general motivations of gang members is not sufficient to establish a nexus between gang membership and the commission of a crime. State v. Bluehorse, 159 Wn. App. 410, 429-30, 248 P.3d 537 (2011).

Aside from evidence that Mr. Garcia and Mr. Nieves belonged to a gang, and the testimony of the sheriff deputy about the general motives of gang members, the State offered no evidence to establish a nexus between gang affiliation and the crime. The alleged victim, Mr. Martinez, did not belong to a rival gang. There was no evidence that any participant wore gang colors or clothing, flashed gang signs, or uttered gang-related statements. There was no evidence that gang members were acting in concert or defending gang territory.

Evidence of gang affiliation is highly prejudicial. Scott, 151 Wn. App. at 526. When there is no connection between a defendant's gang affiliation and the charged offense, admission of gang evidence is reversible error. McCreven, 2012 WL 3871356, at *5; Scott, 151 Wn. App. at 527; State v. Asaeli, 150 Wn. App. 543, 579-80, 208 P.3d 1136 (2009); State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (2008). The erroneous admission of the gang affiliation evidence in the first trial alone requires reversal of the witness intimidation and felony harassment convictions.

In addition to the gang affiliation evidence, the jury also heard damaging evidence of Mr. Garcia's, and other gang members', prior

unrelated criminal offenses. Without the improper gang aggravator, that evidence was plainly irrelevant and inadmissible.

The erroneous admission of a person's prior criminal offenses requires reversal if, within reasonable probabilities, the outcome of the trial was materially affected. State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). The outcome of the first trial was materially affected by the evidence of Mr. Garcia's and his associates' prior criminal offenses. The untainted evidence of guilt was minimal. As will be argued in section 3, the State presented no evidence to establish Mr. Garcia's specific intent for banging on Mr. Martinez's window or threatening to kill him. Without the prior misconduct evidence, which blatantly portrayed Mr. Garcia as a criminal, the outcome of the trial would probably have been different.

ii. Second trial.

In the second trial, the jury heard the same evidence of several prior unrelated criminal offenses committed by third parties suspected of being in the same gang as Mr. Garcia. 1/26/12RP 615-27; 1/27/12 RP 978-92. Without the improper gang aggravator, that evidence was plainly irrelevant and would not have been admissible. The evidence portrayed the gang as a group of non-law-abiding citizens and

encouraged the jury to find Mr. Garcia guilty by association. See McCreven, 2012 WL 3871356 at *5 (improper admission of evidence of defendant's membership in Bandidos motorcycle gang was reversible error because the gang is generally known to be comprised of individuals who pride themselves on not following the law). Therefore, within reasonable probabilities, the evidence of the prior criminal offenses materially affected the outcome of the trial and the convictions must be reversed. Gresham, 173 Wn.2d at 433.

2. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY NOT FILING A TIMELY MOTION TO BIFURCATE THE IRRELEVANT AND DAMAGING GANG AGGRAVATOR EVIDENCE FROM THE TRIAL ON THE SUBSTANTIVE OFFENSES

To establish ineffective assistance of counsel, the defendant must show his counsel's representation was deficient and he was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI. Counsel's performance is deficient if it falls below an objective standard of performance. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010). Prejudice results where there is a reasonable probability that but for counsel's deficient performance, the outcome would have

differed. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Trial courts have broad discretion to control the order and manner of trial proceedings. State v. Monschke, 133 Wn. App. 313, 334-35, 135 P.3d 966 (2006). A court should grant a motion to bifurcate the trial if a unitary trial would prejudice the defendant and there is no substantial overlap in evidence relevant to the proposed separate proceedings. Id. at 335.

Although an aggravating factor must be treated like an element for purposes of the Sixth Amendment, it is not an element needed to convict the defendant of a charged crime. State v. Roswell, 165 Wn.2d 186, 194, 196 P.3d 705 (2008). Therefore, an aggravating factor need not be proved to the jury at the trial on the underlying offense. Id. at 192-94.

Here, defense counsel was deficient for not filing a timely motion to bifurcate the aggravating factor from the trial on the underlying offense. As discussed previously in section 1(b), most of the evidence offered in support of the aggravator was not relevant to prove the elements of the substantive offenses and was unfairly

prejudicial to the jury's determination of guilt. Therefore, bifurcation was warranted. Monschke, 133 Wn. App. at 35.

Counsel had no strategic reason not to request bifurcation. Indeed, counsel's untimely motion demonstrates counsel believed there were sound reasons for moving to bifurcate the proceedings. See CP 1/26/12RP 605; CP 141-43.

The court's comments indicate the court would have granted a timely motion to bifurcate. The court denied counsel's motion because it was untimely, not because it was unwarranted. 1/26/12RP 610-11. The court stated repeatedly and at length that it believed admission of the gang aggravator evidence at the trial on the substantive offenses was profoundly unfair. 1/25/12RP 597-99; 1/30/12RP 1035-36; 4/03/12RP 55. Indeed, the court stated, "if ever there was a motion to bifurcate the trial, so as not to permit any of this stuff to come in in the case in chief, I would grant it. I would be compelled to grant it." 1/25/12RP 598. At sentencing, the court reiterated that, had counsel filed a timely motion to bifurcate, "because of the nature of this particular aggravator, . . . that would be a pretty persuasive argument." 4/03/12RP 55.

Finally, for the reasons given in section 1(b), there is a reasonable probability that, had the jury not heard the evidence offered in support of the aggravating factor that was irrelevant to the underlying charges, the outcome of the proceedings would be different. Therefore, counsel provided ineffective assistance of counsel by not filing a timely motion to bifurcate and the convictions must be reversed. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 230-32.

3. THE STATE DID NOT PROVE THE ELEMENTS OF WITNESS INTIMIDATION BEYOND A REASONABLE DOUBT

It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

To prove the crime of witness intimidation, the State was required to prove beyond a reasonable doubt:

> That on or about December 20, 2010, the defendant, or an accomplice, by use of a threat against a current or prospective witness attempted to:
> (a) influence the testimony of that person; or
> (b) induce that person to absent himself from an official proceeding; or
> (c) induce that person not to report the information relevant to a criminal investigation; or
> (d) induce that person not to give truthful or complete information.

CP 97 (instruction number 6); RCW 9A.72.110(1).

Sections (a) through (d) are alternative means of committing the crime. State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). To survive a sufficiency challenge, the evidence must be sufficient to prove at least one of the alternatives beyond a reasonable doubt. See id. at 429-30.

The evidence in this case is not sufficient to prove any of the alternatives because the State did not provide any evidence to show Mr. Garcia's specific intent in making the alleged threat. A jury may infer intent from a defendant's words and actions only if the "defendant's conduct plainly indicates the requisite intent as a matter of logical

probability." State v. Savaria, 82 Wn. App. 832, 841, 919 P.2d 1263 (1996), overruled on other grounds by State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003) (internal quotation marks and citation omitted). The evidence of intent must be more than guess, speculation or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

To prove witness intimidation, the State must prove more than that the defendant threatened a current or prospective witness; the State must prove the defendant's *specific intent* in making the threat. Brown, 162 Wn.2d at 430; Savaria, 82 Wn. App. at 841; State v. Jensen, 57 Wn. App. 501, 510, 789 P.2d 772 (1990). In Brown, for instance, the defendant told the witness she would "pay" if she spoke to police. 162 Wn.2d at 426. That evidence was not sufficient to prove the defendant uttered the threat with the specific intent to influence her testimony. Id.

Similarly, in Savaria, the defendant threatened to kill a prospective witness and the next day, when she appeared at the courthouse to testify, he exhibited his middle finger and glared at her. 82 Wn. App. at 835. Although the evidence was sufficient to show the defendant was unhappy about the witness's presence at the courthouse,

it was not sufficient to show he had a specific intent to influence her testimony. Id. at 841.

Finally, in Jensen, the defendant threatened a potential witness in an attempt to induce her to "drop the charge or make it a lesser charge." 57 Wn. App. at 510. That evidence was not sufficient to prove the defendant uttered the threat with the specific intent to induce the witness to absent herself from the proceedings. Id.

In contrast, in cases where courts have upheld a conviction for intimidating a witness, the evidence established the defendant's specific intent in uttering the threat. In State v. Scherck, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973), the defendant asked the witness to "refuse to appear as a witness at trial" and, when the witness said he could not refuse, the defendant observed that the witness "had a nice house in a nice neighborhood and that '[i]t would be a shame if anything happened to it.'" That evidence was sufficient to show the defendant had the specific intent to induce the witness not to appear in court. Id.

Similarly, in State v. James, 88 Wn. App. 812, 814, 946 P.2d 1205 (1997), the defendant picked up a shotgun and told the witnesses that if they reported him to police, he would kill one of them. That

evidence was sufficient to prove the defendant's specific intent to induce the witnesses not to report a crime. Id. at 817.

Here, the evidence is not sufficient to sustain the conviction for intimidating a witness because the State did not prove Mr. Garcia's specific intent in uttering the alleged threat. The evidence showed only that, almost two months after Mr. Martinez reported the Halloween shooting incident to police, Mr. Garcia approached him in a car, banged on the window, called him a "snitch," and said he would kill him. 11/29/12RP 349-51. About half an hour later, Mr. Garcia threw rocks at Mr. Martinez's car. 11/29/12RP 352.

That evidence is insufficient to show Mr. Garcia had a specific intent in banging on the window and uttering the alleged threat. It does not demonstrate he was attempting to influence Mr. Martinez's testimony, induce him to absent himself from an official proceeding, induce him to withhold information relevant to the police investigation, or induce him not to give truthful information. CP 97; RCW 9A.72.110(1). At most, the evidence shows Mr. Garcia was angry at Mr. Martinez for reporting Mr. Nieves to police. That is insufficient to prove the crime of witness intimidation beyond a reasonable doubt. Brown, 162 Wn.2d at 430; Savaria, 82 Wn. App. at 841; Jensen, 57

Wn. App. at 510. The conviction must be reversed and the charge dismissed.

4. THE INFORMATION CHARGING WITNESS INTIMIDATION, AND THE "TO-CONVICT" INSTRUCTIONS FOR WITNESS INTIMIDATION AND FELONY HARASSMENT, ARE CONSTITUTIONALLY DEFICIENT BECAUSE THEY DO NOT CONTAIN THE ESSENTIAL ELEMENT THAT MR. GARCIA UTTERED A "TRUE THREAT"[8]

a. The information charging witness intimidation is constitutionally deficient.

It is a fundamental principle of criminal procedure, embodied in the state[9] and federal[10] constitutions, that the accused in a criminal case must be formally apprised of the nature and cause of the accusation before the State may prosecute and convict him of a crime. The judicially-approved means of ensuring constitutionally adequate notice is to require a charging document set forth the essential elements of the

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[8] A similar issue is currently pending in the Washington Supreme Court in State v. Allen, No. 86119-6. Oral argument was held March 1, 2012.

[9] Article I, section 22 of the Washington Constitution guarantees that "In criminal prosecutions, the accused shall have the right to appear and . . . to demand the nature and cause of the accusation against him (and) to have a copy thereof."

[10] The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of accusation." In addition, the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law."

alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). This "essential elements rule" has long been settled law in Washington and is constitutionally mandated. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008); State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995).

All essential elements of the crime—both statutory and non-statutory—must be included in the information so as to apprise the accused of the charge and allow him to prepare a defense, and so that he may plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989).

For post-verdict challenges, the information will be construed liberally and deemed sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. But if the information does not contain all the essential elements, "the most liberal possible reading cannot cure it." State v. Hopper, 118 Wn.2d 151, 157, 822 P.2d 775 (1992).

A charging document is constitutionally adequate only if all essential elements are included on the face of the document, regardless

of whether the accused received actual notice of the charge. Quismundo, 164 Wn.2d at 504; Vangerpen, 125 Wn.2d at 790.

Here, the information charging witness intimidation is constitutionally deficient because it does not contain the essential element of "true threat." The elements of a crime are defined as "[t]he constituent parts of a crime—[usually] consisting of the actus reus, mens rea, and causation—that the prosecution must prove to sustain a conviction." State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (internal citations and quotation marks omitted).

In order to sustain a conviction for the crime of witness intimidation, the State must prove beyond a reasonable doubt the defendant uttered a "true threat." State v. King, 135 Wn. App. 662, 669, 145 P.3d 1224 (2006). A "true threat" is "a statement made in a context in which a reasonable person would foresee that the statement would be interpreted by a person to whom it is directed as a serious expression of an intent to inflict bodily harm or death." Id. The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but are not "true threats" in the sense that they are merely jokes, idle talk, or hyperbole. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

Thus, the State's burden to prove a "true threat" requires the State to prove a reasonable person in the defendant's position would foresee that a listener would interpret the threat as serious. Id. at 288 n.6. In Schaler, the Supreme Court held the State's constitutional burden to make this showing encompasses the burden to prove the defendant had a particular *mens rea* as to the result of the hearer's fear: simple negligence. Id. at 287. In State v. Allen, 161 Wn. App. 727, 755, 255 P.3d 784 (2011), review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011), the Court held the allegation that the defendant "knowingly threatened" the speaker was sufficient to establish the "know or foresee" *mens rea* element as to the result.

Here, the information is deficient because it does not contain the essential *mens rea* element of the crime. The witness intimidation charge alleged that:

> On or about the 20th day of December 2010, in the County of Grant, State of Washington, the above-named Defendant did, direct a threat to a former witness because of the witness's testimony in any official proceeding and/or by use of a threat directed to a current witness or a person the Defendant had reason to believe was about to be called as a witness in any official proceeding or to a person whom the Defendant had reason to believe may have information relevant to a criminal investigation, did attempt to: influence the testimony of that person and/or induce that person to elude legal process summoning that person to testify

> and/or induce that person to absent himself or herself from such proceeding and/or induce that person not to report information relevant to a criminal investigation and/or induce that person not to prosecute the crime and/or induce that person not to give truthful or complete information relevant to a criminal investigation . . . .

CP 127. Thus, the information alleged only that Mr. Garcia "direct[ed] a threat" to a witness. Id. It did not allege that he "knowingly threatened" the witness, or that a reasonable person in his position would foresee that a listener would interpret the threat as serious. Therefore, the information omitted the essential "true threat" *mens rea* element. Schaler, 169 Wn.2d at 287; Allen, 161 Wn. App. at 755.

If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). The remedy is reversal of the conviction and dismissal of the charge without prejudice to the State's ability to re-file the charge. Quismundo, 164 Wn.2d at 504-06; Vangerpen, 125 Wn.2d at 792-93.

b. The to-convict instructions for the felony harassment and witness intimidation charges are constitutionally deficient.

As explained, the State bears the burden to prove every element of a charged offense to the jury beyond a reasonable doubt. Apprendi,

530 U.S. at 477; Winship, 397 U.S. at 364; U.S. Const. amend. XIV; Const. art. I, § 3.

In order to ensure the constitutional right to a jury determination of every element of the charge, the "to-convict" instruction must set forth all the elements of the crime. State v. Smith, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819-20, 259 P.2d 845 (1953). The to-convict instruction serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. Emmanuel, 42 Wn.2d at 819-20. The instruction, which purports to list all the elements of the crime, "must in fact do so." Smith, 131 Wn.2d at 263; Emmanuel, 42 Wn.2d at 819-20. "[J]urors are not required to supply an omitted element by referring to other jury instructions." Smith, 131 Wn.2d at 262-63.

A to-convict instruction that omits an element of the crime is constitutionally defective. Id. This Court reviews the adequacy of a challenged to-convict jury instruction *de novo*. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

Here, the to-convict instruction for the witness intimidation charge omitted the essential element of "true threat." The instruction stated:

> To convict the defendant of intimidating a witness as charged in count 1, the State must prove each of the following elements beyond a reasonable doubt:
>
> 1. That on or about December 20, 2010, the defendant or an accomplice, by use of a threat against a current or prospective witness attempted to:
>
> (a) influence the testimony of that person; or
>
> (b) induce that person to absent himself from an official proceeding; or
>
> (c) induce that person not to report the information relevant to a criminal investigation; or
>
> (d) induce that person not to give truthful or complete information relevant to a criminal investigation; and
>
> 2. That this act occurred in the State of Washington.

CP 97.

Similarly, the to-convict instruction for the felony harassment charge omitted the essential "true threat" element. That instruction stated:

> To convict the defendant of harassment as charged in Count 2, the State must prove each of the following elements of the crime beyond a reasonable doubt:
>
> 1. That on or about December 20, 2010, the defendant, or an accomplice, knowingly threatened to kill Luis Enrique Flores or any other person immediately or in the future;
>
> 2. That the words or conduct of the defendant placed Luis Enrique Flores in reasonable fear that the threat to kill would be carried out;
>
> 3. That the defendant acted without lawful authority; and
>
> 4. That the threat was made in the State of Washington.

CP 100.

Neither instruction informed the jury that the State must prove beyond a reasonable doubt that Mr. Garcia "knowingly threatened" the witness, or that a reasonable person in Mr. Garcia's position would foresee that a listener would interpret the threat as serious. Therefore, the instructions are constitutionally deficient. Smith, 131 Wn.2d at 263; Emmanuel, 42 Wn.2d at 819-20.

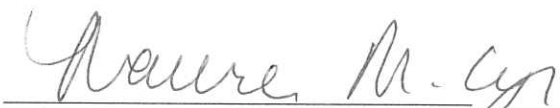
An instructional error is presumed prejudicial unless it affirmatively appears to be harmless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). "An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." State v. Brown, 147 Wn.2d 330339, 58 P.3d 889 (2002). Although "not every omission of information from a 'to convict' jury instruction relieves the State of its burden of proof[,] . . . the total omission of essential elements can do so." State v. Sibert, 168 Wn.2d 306, 312, 230 P.3d 142 (2010). This Court may not look to other jury instructions to supply an element missing from the "to convict" instruction. Id. at 311; Emmanuel, 42 Wn.2d at 262-63.

Because the to-convict instructions entirely omitted an essential element of the crimes, reversal is required.

F. CONCLUSION

The court did not have authority to permit the jury to hear the evidence offered in support of the aggravating factor and because that evidence was prejudicial and otherwise inadmissible, the convictions must be reversed. Defense counsel provided ineffective assistance of counsel by not filing a timely motion to bifurcate the aggravator from the trial on the substantive offenses, which also requires reversal of the convictions. The witness intimidation conviction must be reversed and the charge dismissed because the State did not prove the elements of the crime beyond a reasonable doubt. Finally, the information for the witness intimidation charge, and the to-convict instructions for the felony harassment and witness intimidation charges, omitted an essential element, requiring reversal of those convictions.

Respectfully submitted this 27th day of September, 2012.



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Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 30763-8-III
	)	
SALVADOR SANCHEZ,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] D. ANGUS LEE, DPA GRANT COUNTY PROSECUTOR'S OFFICE PO BOX 37 EPHRATA, WA 98823-0037	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] SALVADOR SANCHEZ 357421 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF SEPTEMBER, 2012.

X_____

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