COURT OF APPEALS
DIVISION THREE
OF THE STATE OF WASHINGTON

FILED

JUN 26 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

STATE OF WASHINGTON )
)
Respondent, )
) No. # 29657-1-III
v. )
) STATEMENT OF ADDITIONAL
RICARDO JUAREZ DELEON ) GROUNDS FOR REVIEW
(your name) )
)
Appellant. )

I, Ricardo J. DeLeon, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

See Attached Sheets

See Attached Sheets

Additional Ground 2

See Attached Sheets

See Attached Sheets

If there are additional grounds, a brief summary is attached to this statement.

Date: 6-24-12

Signature: Ricardo J. DeLeon

Form 23

## SUMMARY OF ARGUMENT

The doctrine of transferred intent is inapplicable under the facts and circumstances of this case. Instruction 16 impermissibly shifted the State's burden of proof to Mr. Deleon. Due process requires the state to prove each and every element of an offense beyond a reasonable doubt. Instruction 16 amounted to a mandatory presumption on intent for counts 2 and 3.

Cases involving gang-related evidence and gang aggravators are fraught with danger of unfair prejudice. When the evidence exceeds the bounds necessary to establish either an element of an offense, or an aggravating factor, a criminal defendant is denied a a fair trial. Bifurcation should be granted to avoid the predicament which occurred in Mr. Ricardo Deleon's trial.

The Sixth Amendment and Const. art. I, § 22 guarantee a person who is charged with a crime, the right to the effective assistance of counsel. In Mr. Deleon's case defense counsel's multiple errors denied him the effective assistance as well as a fair trial.

Juror misconduct requires a mistrial. The trial court's Judgment and Sentence contains a number of errors not supported by the record.

## STATEMENT OF THE CASE

For the purpose of this Statement of Additional Grounds, Appellant Ricardo J. Deleon incorporates the Statement of Facts in his Appellate Counsel's opening brief on Appeal as submitted to this Court.

## ARGUMENT

### I. Transferred Intent

Instruction 16, pertaining to transferred intent, is the only basis by which the State Prosecution was able to go forward with the offenses charged in Counts 2 and 3. The State and trial court relied on State V. Elmi, 166 Wn. 2d 209, 218, 207 P.2d 439 (2009), to support giving the transferred intent instruction. However, the Elmi Court, even though it accepted review on the issue of transferred intent, determined that it did not have to reach that issue. The Court ruled at 218: "Because RCW 9A.36.011 encompasses transferred intent...we do not need to reach the doctrine of transferred intent...and proceed, instead, under RCW 9A.36.011."

The particular quote from the decision is a prime example of circular reasoning with no underlying basis in fact. Justice Madsen's dissent in *Elmi* attacks that reasoning at 221:

> ...[T]here is nothing in RCW 9A.36.011 to suggest that the legislature intended to codify a concept broader then **the common law doctrine** that would allow multiple first degree assault convictions to stand **where there is proof that the person the defendant intended to assault was in fact assaulted and no unintended victim received actual injury.**

(Emphasis supplied.)

The facts and circumstances of Mr. Deleon's case directly match Justice Madsen's analysis of RCW 9A.36.011. As she stated at 222:

> ...[T]he doctrine of transferred intent, whether at common law or as codified, is not and never has been intended to apply in circumstances where no unintended victim is injured.

Justice Madsen relied upon *State v. Krup,* 36 Wn. App. 454, 458-59, 676 P. 2d 507 (1984) which quoted **WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 611 (1972).** The particular language is set forth at 223: "'There must be an *actual intention to cause apprehension,* unless there exists the morally worse intention to cause bodily harm'".

As to Mr. Lopez, there is no indication that the shooter even knew that he was present. He was coming out of the house at the time. It is true

that one bullet hit the house. It is true that Mr. Lopez was scared. Nevertheless, those truths do not equate to an assault.

Mr. Acevedo saw the gun and ducked down behind a parked car. The State did not present any evidence of where the bullets hit in relation to Mr. Acevedo.

As Justice Madsen pointed out in *Elmi*, at 228:

> In cases where no victims suffer actual injury but the defendant "creates a substantial risk of death or serious physical injury to another person [(s)]" the legislature has created the crimes of drive-by shooting or reckless endangerment.

Mr. Deleon contends that the State's use of transferred intent as defined in Instruction 16 amounts to a mandatory presumption in violation of the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3.

> It is reversible error to instruct the jury in a manner that relieves the State of its burden to prove beyond a reasonable doubt every essential element of a criminal offense. We analyze a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. We review an alleged error in jury instructions de novo.
> ...
>
> "A mandatory presumption is one that requires the jury "to find a presumed fact from a proven fact.'" To determine whether a jury instruction creates a mandatory presumption, we examine whether a reasonable juror would interpret the presumption as mandatory.

> Mandatory presumptions violate a defendant's right to due process if they relieve the State of its obligation to prove all of the elements of the crime charged beyond a reasonable doubt.
>
> Even if a jury instruction includes an unconstitutional mandatory presumption, it does not necessarily require reversal. Such an erroneous instruction is subject to harmless error analysis. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless beyond a reasonable doubt.

*State v. Atkins,* 156 Wn. App. 799, 236 P. 3d 897 (2010), quoting *State v. Hayward,* 152 Wn. App. 632, 642, 217 P. 3d 354 (2009) (quoting *State v. Deal,* 128 Wn. 2d 693, 699, 911 P. 2d 966 (1996)).

## II. GANG RELATED EVIDENCE

It is Mr. Deleon's position that gang-related evidence was improperly admitted and adversely impacted his right to a fair and constitutional trial. The gang-related evidence poisoned the minds of the jury and had little or nothing to do with the underlying offenses.

ER 404(b) requires a balancing of probative value versus undue prejudice. The probative value of the gang-related evidence in Mr. Deleon's case pertained, almost exclusively, to the gang aggravator. The trial court ruled that it was admissible for establishing motive. Motive is not an element of the charged offenses.

> 'ER 404(b) is not designed "to deprive the State of relevant evidence necessary to es-

> tablish an essential element of its case," but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.' *State v. Foxhoven*, 161 Wn. 2d 168, 175, 163 P. 3d 786 (2007) (quoting *State v. Lough*, 125 Wn. 2d 847, 859, 889 P. 2d 487 (1995)).

*State v. Yarbrough*, 151 Wn. App. 66, 82, 210 P. 3d 1029 (2009).

The State established that Mr. Deleon, at one time, had been a member of NSV-14. The State established Ricardo Deleon and Mr. Robeldo were also NSV-14 members.

The color red was apparent on various clothing items worn by the three individuals on the evening of May 9, 2009. According to Officer Ortiz, the clothing worn by the Deleon brothers and Mr. Robledo is indicative of gang membership. (10/18/10 RP 1903, ll. 7-23; RP 1948, l. 14 to RP 1949, l. 11; RP 1951, ll. 1-9; ll. 16-24; RP 1952, ll. 3-23).

"We have consistently held that the admissibility of photographs is discretionary." *State v. Rowe*, 77 Wn. 2d 955, 957, 468 P. 2d 1000 (1970).

Nevertheless, the introduction of the cellphone photos and the music song titles, along with testimony that they had gang implications, acted to unduly influence the jury's emotions.

Officer Ortiz created standardized booking forms for the Sunnyside jail in connection with gang membership. The forms ask specific questions that are incriminating in nature.

> Statements made in the course of a police investigation are non-testimonial if the pri-

> mary purpose of the questioning is to allow police to assist in an ongoing emergency...."Statements taken by officers in the course of investigations are almost always testimonial. So are statements that are the product of police-initiated contact." *State v. Tyler*, 138 Wn. App. 120, 127, 155 P. 3d 1002 (2007) (citation omitted).

*State v. McDaniel*, 155 Wn. App. 829, 847, 230 P. 3d 245 (2010).

The questions on the booking form constitute police-initiated contact. They also constitute requests for incriminating statements that are testimonial in nature.

The fact that Mr. Deleon had two co-defendants further impacts the adverse consequences of admitting the booking forms into evidence.

*State v. St. Pierre*, 111 Wn. 2d 105, 112, 759 P. 2d 383 (1988) is instructive as far as this issue is concerned:

> The Court [referring to the United States Supreme Court] has expressed particular concern about the use of codefendant statements in criminal trials where the statements are not made under oath and the witness is not subjected to cross examination. In *Douglas v. Alabama*, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965), the Court declared hearsay statements of an accomplice's confession to be inheretantly suspect. As the Court stated in *Lee v. Illinois*, 476 U.S. 530, 541, 90 L. Ed. 2d 514, 106 S. Ct. 2056 (1986), the
>
> > truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defend-

> ant without the benefit of cross-examination.
>
> Such statements are presumptively unreliable and cannot be admitted unless they bear "sufficient' indicia of reliability' to rebut the presumption..." *Lee*, at 543 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980)).

The booking forms were improperly admitted and adversely impacted Mr. Deleon's right to a fair and constitutional trial. The continued validity of *Ohio v. Roberts, supra,* is now questionable based upon *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

*Crawford*, in the context of a criminal defendant's own statement, was analyzed in *Personal Restraint of Theders*, 130 Wn. App. 422, 433, 123 P. 3d 489 (2005):

> The *Crawford* Court specifically retained the preexisting rule of *Tennessee v. Street* [471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)] that "[t]he [Confrontation] Clause...does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." There is no doubt that Washington decisions following *Crawford* recognize that "[w]hen out- of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no Confrontation Clause concerns arise." "[E]ven testimonial statements may be admitted if offered for purposes other than to prove the truth of the matter asserted." Similarly, the *Crawford* Court expressly excluded certain types of statements from its holding "that by their nature [are] not testimonial – for example,

> business records or statements in furtherance of a conspiracy."

*See: State v. Mason*, 127 Wn. App. 554, 566, n. 26, 110 P. 3d 245 (2005); *State v. Moses*, 129 Wn. App. 718, 119 P. 3d 906 (2005); *State v. Davis*, 154 Wn. 2d 291, 301, 111 P. 3d 844 (2005).

The booking forms are, for the most part, testimonial in nature. Even though they may be a business record maintained by a law enforcement agency, they should not be included under the business records exception. This is particularly true in a case involving co-defendants.

As the *St. Pierre* Court noted over 20 years ago:

> ...[I]n a recent opinion authored by Justice Scalia, the Court extended *Bruton [Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)] to exclude a codefendant's confession that corroborates the defendant's admissible confession. *Cruz v. New York*, 481 U.S. 186, 95 L. Ed. 2d 162, 109 S. Ct. 1714 (1987). ...
>
> ...[T]he defendant's own confession may be considered at trial to determine whether his codefendant's statements are supported by sufficient "indicia of reliability" to be directly admissible against him despite the lack of opportunity for cross examination... .
>
> ...
>
> To determine if the presumption of unreliability is overcome, we must examine the circumstances surrounding the statement and its maker as well as the content.

*State v. St. Pierre, supra*, 112-14.

Taking into consideration all aspects of the booking forms, the testimony concerning the booking forms, and the purposes behind them, Mr. Deleon maintains that they constitute inadmissible hearsay evidence. He was denied his confrontation rights under both the Sixth Amendment and Const. art. I, § 22.

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

Washington has adopted the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) for determining whether or not a criminal defendant has received effective assistance of counsel. The two prongs of *Strickland* are deficient performance and prejudice.

> The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn. 2d 856, 862, 215 P. 3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance.

*State v. Grier*, 171 Wn. 2d 17, 33 (2011).

Even though the Court in *State v. Grier* determined that it was not ineffective assistance of counsel to request a lesser included offense instruction, it appears that this was based upon the fact Ms. Grier acquiesced in the decision to exclude that instruction following consultation with her attorney.

In Mr. Deleon's situation, it does not appear that any further discussion was conducted after the trial court denied the lesser included instruction on drive-by shooting.

Mr. Deleon contends that he has established that his attorney was deficient at trial in several respects: 1). Failure to request a lesser included offense instruction in an appropriate format; 2). Proposing a lesser included instruction which was obviously not a lesser included offense; 3). Failure to recognize the venue issue; 4). Failure to request a mistrial for juror misconduct; 5). Failure to timely join in a motion for a new trial; 6). Failure to properly challenge the exceptional sentence; and 7). Failure to recall Monica Mendoza for cross-examination.

**A. Lesser Included Offense(s)**

> When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record. *State v. McFarland*, 127 Wn. 2d 322, 335, 899 P. 2d 1251 (1995). ...
>
> Part tactic, part objective, the decision to request or forego lesser included offense instructions does not fall squarely within the defendant's sphere. Instead, **the relative responsibility of the defendant and ...counsel in this decision making process are not clearly delineated.** However, both American Bar Association (ABA) standards and Washington's RPCs provide useful guidance as to the allocation of decision making power in this arena.

*State v. Grier, supra.*, 29-30. (Emphasis supplied.)

The ABA standards and the RPCs both require that defense counsel fully consult with his/her client about lesser included offenses. It would appear that defense counsel may have had that type of consultation with Mr. Deleon insofar as drive-by shooting is concerned.

Nevertheless, case law is clear that drive-by shooting is not a lesser included offense of first degree assault. *See: State v. Rivera,* 85 Wn. App. 296, 932 P. 2d 701, *reviewed denied* 133 Wn. 2d 1002, 943 P.2d 662 (1997).

Mr. Deleon asserts that defense counsel was not engaging in any type of trial strategy or tactics insofar as lesser included offenses are concerned. Defense counsel apparently recognized that a drive-by shooting occurred. However, what defense counsel failed to recognize was the method by which he could get lesser included instructions before the jury. This is indisputably deficient performance.

> ...[A] criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach,* 153 Wn. 2d 126, 130, 101 P. 3d 80 (2004); *State v. Aho,* 137 Wn. 2d 737, 745-46, 975 P. 2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega,* 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)... .

*State v. Grier, supra.,* 33-34.

Defense counsel missed the fact that second degree assault, under RCW 9A.36.021(1)(e), would allow for a lesser included offense instruction based upon the felony of drive-by shooting.

RCW 9A.36.045(3) declares drive-by shooting a class B felony.

RCW 9A.36.045(1) defines the offense, in part, as follows:

> A person is guilty of drive-by shooting when he...recklessly discharges a firearm...in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is...from a motor vehicle... .

RCW 9A.36.021(1) states, in part:

> A person is guilty of assault in the second degree if he...under circumstances not amounting to assault in the first degree:
> ...(c) Assaults another with a deadly weapon; or
> ...
> ...(e) With intent to commit a felony, assaults another... .

There is no dispute that an assault occurred. There is no dispute that a drive-by shooting occurred. There is no dispute that a firearm was involved.

> Washington recognizes three forms of assault: (1) assault by actual battery; (2) assault by attempting to inflict bodily injury on another while having apparent present ability to inflict such injury; and (3) assault by placing the victim in reasonable apprehension of bodily harm. *State v. Byrd,* 125 Wn. 2d 707, 712-13, 887 P. 2d 396 (1995); *see also: State v. Wilson,* 125 Wn. 2d 212, 218, 883 P. 2d 320 (1994). Assault by battery does not require specific intent to inflict harm or cause apprehension; rather, **battery requires intent to do the physical act constituting assault.** *Daniels [State v. Dan-*

> *iels*, 87 Wn. App. 149, 940 P. 2d 690 (1997)] at 155. **The other two forms of assault**, however, **require specific intent** that the defendant intended to inflict harm or cause reasonable apprehension of bodily harm. *State v. Eastmond*, 129 Wn. 2d 497, 500, 919 P. 2d 577 (1996).

*State v. Hall*, 104 Wn. App. 56, 62, 14 P. 3d 884 (2000). (Emphasis supplied.)

Count 1 of the Second Amended Information charged Mr. Deleon with first degree assault involving Ignacio Cardenas. The assault of Mr. Cardenas constituted an actual battery. The shooting of Mr. Cardenas resulted from the physical act of pulling the trigger on a gun.

The two counts of first degree assault relating to Miguel Acevedo and Angelo Lopez fall within the other two definitions of assault. As such, the State was required to prove, beyond a reasonable doubt, a specific intent to inflict harm or to cause reasonable apprehension as to each individual.

There can be no dispute that Mr. Cardenas suffered great bodily harm. RCW 9A.36.011 defines first degree assault as follows:

> (1) A person is guilty of assault in the first degree if he...with intent to inflict great bodily harm:
> (a) Assaults another with a firearm **or any deadly weapon** or by any force or means likely to produce great bodily harm or death...; or
> ...
> (c) Assaults another and inflicts great bodily harm.

(Emphasis supplied.)

The State elected to proceed under RCW 9A.36.011(1)(a) instead of subparagraph (c). Thus, the statutory language of RCW9A.36.011(1)(a) would allow for a reasonable interpretation that second degree assault under RCW 9A.36.021(1)(c) is a lesser included offense.

The two statutes parallel each other insofar as the "deadly weapon" language is concerned. The first degree assault statute specifies a "firearm", as well as "any force or means likely to produce great bodily harm or death." The statute is worded in the disjunctive.

The State, in the Seconded Amended Information, specified that a "firearm" was the deadly weapon used as to each count. RCW 9A.04.110(6) defines "deadly weapon" as meaning "any...loaded or unloaded firearm... ."

Mr. Deleon concedes that the prosecuting attorney has the discretionary authority to select an appropriate charge. *See: State v. Meacham*, 154 Wn. App. 467, 671, 225 P. 3d 472 (2010).

If a prosecuting attorney knows that he/she has discretion to charge an offense as either a greater offense or a less included/lesser degree offense, then, it logically follows that a competent defense attorney should also be aware of that fact and request a lesser included/less degree instruction at trial.

> ...The assault statute since 1909 has always been divided into degrees and the operative language of first and second degree assault

> was not changed when the criminal code was revised in 1975. The legislature clearly provided in both first and second degree assault that the use of a firearm may be an alternate method of assault. Thus, the presence of a firearm does not elevate the crime of second degree assault to first degree assault as a firearm is not a necessary element for any degree of assault. Instead, the two degrees of assault are distinguished on the basis of *intent*. First degree assault may be accomplished by use of a firearm or other deadly weapon...force, or any means likely to produce death. Second degree assault may also be accomplished in a number of ways. However, the distinction is that assault in the first degree involves an "intent to kill" a human being or to commit a felony upon the person... of the one assaulted, by means likely to produce death. In second degree assault, the intent is to "injure"...another, with or without a weapon, or thing likely to produce bodily harm, or with intent to commit a felony.

*State v. Adlington-Kelly*, 95 Wn. 2d 917, 924, 631 P. 2d 954 (1981).

Even though the Legislature has amended both statutes since the *Adlington-Kelly* decision, the reasoning underlying that decision has equal or greater force as the offenses are now described. This is particularly true with regard to the requirement of specific intent as it pertains to Counts 2 and 3 of the Second Amended Information.

"...[A]lthough specific intent cannot be presumed, 'it can be inferred as a logical probability from all the facts and circumstances.'" *State v. Yarbrough, supra* 87, quoting *State v. Wilson*, 125 Wn. 2d 212, 217, 883 P. 2d 320 (1994).

"Specific intent is 'an intent to produce a specific result, as opposed to an intent to do a physical act' that produces the result." *State v. Esters*, 84 Wn. App. 180, 184, 927 P. 2d 1140 (1996), quoting *State v. Davis*, 64 Wn. App. 511, 515, 827 P. 2d 298 (1992), *rev'd on other grounds*, 121 Wn. 2d 1 (1993)... .

Based upon the forgoing excerpts relating to specific intent, it follows that the State was required to prove, beyond a reasonable doubt, that the intent under Counts 2 and 3 was not the physical act of shooting, but rather the intent to either inflict great bodily harm (but failing to do so), or an attempt to create apprehension in the minds of Mr. Acevedo and Mr. Lopez.

Even though both individuals described their reactions and fear of being shot, there is no indication that the shooter's specific intent was to generate that specific result.

When the individual committing an offense has no knowledge that another person is present there can be no specific intent to assault that person.

> ...[P]roof of a greater charge necessarily establishes proof of all lesser included offenses. Likewise, a defendant may be convicted of an offense that is an inferior degree to the one charged, RCW 10.61.003, provided that the statutes as here, proscribe but one offense.

*State v. Smith*, 122 Wn. App. 294, 299, 93 P. 3d 206 (2004).

First degree assault and second degree proscribe but one offense-assault. Assault can also be committed in the third degree and the fourth degree.

First degree assault, as charged by the State, required proof that a firearm was used. A firearm is a deadly weapon. Second degree assault includes an alternative of assault with a deadly weapon. It also includes an alternative of intent to commit a felony on another person. Drive-by shooting is a felony. Drive-by shooting involves the use of a firearm.

The foregoing analysis clearly indicates that lesser included offenses were available to defense counsel and would be beneficial to Mr. Deleon's defense.

Mr. Deleon recognizes that

> ...as a threshold determination apart from the *Workman* [*State v. Workman*, 90 Wn. 2d 443, 584 P. 2d 382 (1978)] test, the included offense must arise from the same act or transaction supporting the greater offense that is charged. *State v. Porter*, 150 Wn. 2d 732, 738-40, 82 P. 3d 234 (2004).

*State v. Huyen Bich Nguyen*, 165 Wn. 2d 428, 434-35, 195 P. 673 (2008).

There can be no dispute that the lesser included offenses arose from the same act upon which the State charged the greater offense.

"An error in instructions is harmless only if it 'in no way affected the final outcome of the case.'" *State v. Caldwell*, 94 Wn. 2d 614, 618, 618 P. 2d 508 (1980) quoting *State v. Wanrow*, 88 Wn. 2d 221, 237, 559

P. 2d 548 (1977); *State v. Golladay*, 78 Wn. 2d 121, 139, 470 P. 2d 191 (1970).

Instruction 16 obviously impacted the outcome of the jury's decision. Transferred intent was critical to the State's case as it related to Counts 2 and 3.

As Mr. Deleon has otherwise argued, the inclusion of Instruction 16 runs contrary to the common law, as well as to the requirement that there be specific intent to commit the offense of assault under two of the respective alternatives of the assault definition.

The inclusion of Instruction 16 resulted in a shift of the burden of proof from the State to the defense. The shifting of the burden of proof adversely impacted his constitutional rights.

The shifting of the burden of proof also relieved the State of its responsibility to prove each and every element of Counts 2 and 3 beyond a reasonable doubt. *See:* RCW 9A.04.100(1) and (2).

> The clear import of recent United States Supreme Court cases is that instructional errors which tend to shift the burden of proof to a criminal defendant are of constitutional magnitude because they may implicate a defendant's right of due process. *See: Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979); *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975); *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

*State v. McCullum*, 98 Wn. 2d 484, 488, 656 P. 2d 1064 (1983).

**B. Venue**

CrR 5.1(a) provides:

> All actions shall be commenced:
>
> (1) In the county where the offense was committed; or
> (2) In any county where an element of the offense was committed or occurred.

> Venue is not an element of a crime... Rather, venue is a constitutional right that is waived if not asserted in a timely fashion. *State v. McCorkell*, 63 Wn. App. 798, 822 P. 2d 795, *review denied*, 119 Wn. 2d 1004 (1992). Generally, the right must be asserted before jeopardy attaches, which is to say before the jury is sworn in a jury trial.

*State v. Pejsa*, 75 Wn. App. 139, 145, 876 P. 2d 963 (1994).

Defense counsel seems to have been unaware that there was a venue issue until testimony was received during the course of the trial. Once defense counsel became aware that venue was at issue an appropriate challenge was raised.

The trial court, relying upon *State v. Dent*, 123 Wn. 2d 467, 869 P. 2d 392 (1994), denied defense counsel's motion to dismiss Count 4. On the same basis the Court declined to give an instruction to the jury.

Mr. Deleon recognizes that a challenge to venue must be brought at the earliest opportunity or it is lost. In his case, the challenge was raised

as soon as it became apparent that the attempting to elude a pursuing police vehicle did not commence until after the car was in Benton County.

Alternatively, if defense counsel should have known that there was a question concerning venue, then his failure to raise the issue at an earlier time constitutes ineffective assistance of counsel. This failure denied Mr. Deleon his right to a trial by a jury in the county where the offense occurred. *See:* Const. art. I, § 22.

**C. Juror Misconduct**

> Washington...is committed to the proposition that the right to a trial by jury includes the right to an unbiased and unprejudiced jury, and that a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitutional trial.

*State v. Parnell*, 77 Wn. 2d 503, 507, 463 P. 2d 134 (1969).

Const. art. I, § 22 provides, in part:

> In criminal prosecutions the accused shall have the right...to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed... .

Mr. Deleon asserts that he was denied a fair and impartial jury as a result of a juror's use of Twitter. The full Twitter printout is attached as Appendix "B". The particular aspects of the Twitter which Mr. Deleon contends impacts the impartiality of the juror are:

1. "The list of usual suspects grows----the jury KNOWS the convict is innocent of knowing SELF."

2. "Metaphors as thick as a legal dictionary carried by an illiterate lawyer... ."
3. "...off to that horrible duty?-Yes, and hopefully today is the last of it."

All of the foregoing excerpts occurred on October 22, 2010. Prior to that the same juror had been twittering as follows:

1. "...oh I hate jury duty-I will NEVER do this again. I guarantee it."
2. "They force 14 ppl to sit in a small room for 3, 4, 5, 6 hours on end with no lunch or breaks. Why does stupid shit piss me off so much?"
3. "Two more hours of wasted time...this is pathetic beyond all comparison."

The above quotes all occurred on October 21, 2010.

On October 19th and 20th, 2010 the juror twittered the following:

1. "This is a professional waste of time. #Justice System".
2. "It's time to set the record straight that MJ was/is and always has been innocent. – I actually believe that now."
3. "I'm not against the police, I'm just afraid of them. –I'm not afraid of them, I'm just against the system they serve."

On October 18 the following tweets occurred:

1. "While it will get you shot in #Yakima for saying it, I will: If the Nortenos and Sorenos were smart...they'd unite."

2. "The largest known street gang in the world Police."

3. "I've never seen a circus so full of clowns. #court."

Earlier, during the trial, the juror tweeted:

1. "'I don't not recall'...as every liar on the stand says under oath."

2. "Liar, lawyer mirror for you...what's the difference?"

3. "Memories make bad eye witnesses."

Even though the juror's comments are ambiguous insofar as favoring one side or the other, they clearly provide an insight into the juror's mind. The juror is totally disgusted with the criminal justice system. The juror does not know who to believe. The juror just wants to get it over with.

> The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right of an accused in all criminal prosecutions to trial by an impartial jury. The Washington constitution provides a similar guaranty. Under the laws of Washington, the right to a jury trial includes the right to an unbiased and unprejudiced jury. "'The failure to accord an accused a fair hearing violates even the minimal standards of due process.'" "[M]ore important then speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. **Not only should there be a fair trial, but there should be no lingering doubt about it."**

*State v. Davis*, 141 Wn. 2d 798, 824-25, 10 P. 3d 977 (2000) quoting *State v. Parnell, supra* (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed. 2d 751 (1961)). (Emphasis supplied.)

The juror's Twitter certainly casts doubt on that particular juror's state-of-mind.

> The appellant must make a strong, affirmative showing of misconduct in order to overcome the policy favoring stable verdicts and the secret and frank discussion of the evidence by the jury. [Citation omitted.] If juror misconduct can be demonstrated with objective proof without probing the jury's mental processes, and if the trial court has any doubt about whether the misconduct affected the verdict, it is obliged to grant a new trial.

*Chiappetta v. Bahr*, 111 Wn. App. 536, 540-41, 46 P. 3d 797 (2002).

The issue of possible juror misconduct was raised. Defense counsel dropped the ball. Juror misconduct is a basis for a mistrial. *See: State v. Applegate*, 147 Wn. App. 166, 175-76, 194 P. 3d 1000 (2008).

> A party who asserts juror misconduct bears the burden of showing that it occurred. To bear that burden is to raise a presumption of prejudice, which the other party can overcome by showing that the misconduct was harmless beyond a reasonable doubt. (*i.e.*, that the misconduct did not affect the verdict).

*State v. Kell*, 101 Wn. App. 619, 621, 5 P. 3d 47 (2000).

The *Kell* case involved a juror who was using a cellphone during deliberations. The trial court's inquiry as to the use of the cellphone indi-

cated that any outside contacts were innocuous. The jurors all agreed that the use of the cellphone had not affected the jury's verdict.

The juror's Twitter was brought to the attention of counsel and the trial court. It was made part of the record. However, no further inquiry was made by either the Court or counsel. The lack of such an inquiry adversely impacted Ricardo Deleon's constitutional right to a fair trial.

## IV. Enhanced Exceptional Sentence

### A. Gang Aggravator

> RCW 9.94A.535 (3) provides, in part:
> Aggravating Circumstances-Considered by a Jury-Imposed by the Court....
> (aa) The defendant committed the offense with the intent to directly or indirectly cause any benfit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW-9.94A.030, its reputation, influence, or membership.

Officer Ortiz's testimony and the admission of the photographs and the song titles of Mr. Deleon's Co-defendant's cellphone, unduly prejudiced Ricardo DeLeon's right to a fair and constitutional trial. Moreover, a serious question exits as to whether or not the testimony, in and of itself, exceeded what has been authorized by Washington Courts. See, State V.

Bluehorse, 159 Wn. App. 410, 248 P.3d 537 (2011), (Limiting testimony concerning gang-related aggravating factors); **CONVICTION, CONFRONTATION, AND CRAWFORD;** Crawford V. Washington, 541 U.S. 35, ___S. Ct. ___ (2004): Gang-Expert Testimony as Testimonial Hearsay, 35 Seattle University Law Review 857 (2011).

Mr. Deleon contends that the State introduced gang-evidence in an attempt to support the foregoing aggravating factors. None of the gang-related evidence indicated whatsoever that the shooting incident was for the gang's "benefit, aggrandizedmet, gain, profit, or other advantage." There was a complete absence of testimony as to any of those factors.

RCW 9.94A.030(12) defines the term "criminal street Gang" as meaning:

> ...Any ongoing organization, association, or group of three or more persons, whether formal or informal having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street-gang activity....

The State established that there are criminal street gangs in Sunnyside. They include the BGL's LVL's and NSV's. BGL's and LVL's are rival blue gangs. Norteno's are also LVL rivals.

RCW 9.94A.030(14) defines a "criminal street gang-related offense " as meaning:

> Any felony...Offense...That is committed for the benefit of, at the direction of, or in association with any criminal

> street gang, or is committed with the intent to promote, further, or assist in any criminal conduct by the gang, or is committed for one or more of the following reasons: ...(e) To directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage for the gang, its reputation, influence, or membership....

Mr. Deleon incorporates into this section of his Statement Of Additional Grounds his prior argument concerning the gang-related evidence.

If the trial court had bifurcated the trial to allow the gang aggravating factor to be considered at a separate hearing following its verdict on the underlying offense, then the issue would not be on appeal.

"A trial court's decision on bifurcation is generally reviewed for an abuse of discretion". State V. Roswell, 165 Wn. 2d 186, 192, 196 P.3d 705 (2008).

A trial court abuses its discretion

> ...where the decision or order...is...a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or excercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll V. Junker, 79 Wn. 2d 12, 26, 484 P. 2d 775 (1971).

The trial court abused its discretion by not giving due consideration to the cases of State V. Yarbrough, 151 Wn. App. 66, 210 P.3d 1029 (2009), and State V. Monschke, 133 Wn. App. 313, 135 P.3d 996 (2006).

The issue concerning the aggravating factor of "gang membership" was not bifurcated by defense counsel.

> Gang evidence falls within the scope of ER 404 (b) See, State V. Boot, 89 Wn. App. 780, 788-89, 950 P.2d 964 (1998). It may be admissible for other purposes, such as proof of motive, intent, or re gestae, but before a trial court may admit such evidence, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State V. VY Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).
> State V. Ryna RA, 144 Wn. App. 688, 701, 175 P.3d 609 (2008).

Defense counsel, in the joinder with co-counsel's motion for a new trial, cited State V. Bluehorse,supra, This case was decided after Mr. Delone's trial, but prior to sentencing. The trial court did not consider the case when it ruled that the joinder motion was not timely.

Mr. Deleon contends that Bluehorse is directly applicable to the facts and circumstances of this case.

"Gang membership alone is not a factor that justifies an exceptional sentence." State V. Bluehorse,Supra 428.

The State merely proved gang membership during the course of the trial. It attempted to parlay that evidence into the aggravating factor. The attempt was made through Officer Ortiz's testimony. His testimony consisted of generalizations, impermissible inferences and questionable opinions.

The Bluehorse Court ruled at 429:

> ...[O]ur Supreme Court has disapproved of reliance on... generalizations from law enforcement, even when such generalization relate to search warrants and not to the defendant's guilt during trial...

The generalizations which the Court referred to are contained in the following quote from *Bluehorse, supra:*

> ...Bair's generalized characterization of gang motivation behind drive-by shootings to find the gang aggravator..." when...there's a shooting like this, [gang members are] walking the walk, their're doing the deeds. They're maintaining their status in the gang. They are active in maintaining that status by...doing what some gang members do, which is retaliate and shoot at and hit sometimes other people with firearms."

Officer Ortiz's testimony concerning "putting in work" and "disrespect" essentially parallels the testimony that was condemned in *Bluehorse.*

..."[G]eneralized statements alone...fail to satisfy the State's burden at trial to prove the gang aggravator beyond a reasonable doubt... ." *State v. Bluehorse, supra* 430.

As the *Bluehorse* Court concluded at 431:

> The evidence supports an inference that *Bluehorse* was involved in this drive-by shooting, but without evidence relating to *Bluehorse's* motivation, the gang sentencing aggravator would be intolerably broadened by allowing it to attach automatically whenever an aspiring or full gang member is involved in a drive-by shooting based on the detective's generalized gang testimony; thus relieving the State of its burden to prove beyond a reasonable doubt that the specific defendant charged with the drive-by shooting sought to obtain, maintain, or advance his gang membership under RCW9.94A.535 (3)(s) and RCW 9.94A.537(3).

Even though the particular aggravator in *Bluehorse* is not the same as the aggravator in Mr. Deleon's case, he argues that the reasoning is equally applicable.

**C. Gang Clothing and Tattoos**

Mr. Deleon asserts that the following conditions of his Judgment and Sentence are overly broad:

> Wear no clothing associated with or signifying membership in a criminal street gang.
>
> Do not obtain any new tattoos, brands, burns, piercings or any voluntary scarring related to gang membership or association.

The first condition prohibits him from wearing the color red or blue. Blue jeans and other denim products are worn every day by millions of Americans. The color red is found in many styles of flannel shirts and pajamas.

Tattoos, piercings, etc. are a matter of personal choice. The fact that artistic designs by tattoo artists and jewelry makers may be associated with a gang should not preclude an individual's freedom of choice as to his or her own body.

It is Mr. Deleon's position that the conditions, as set forth above, invade his First Amendment rights and should be stricken from the Judgment and Sentence.

"Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right

of association. *State v. Scott*, 151 Wn. App. 520, 526, 213 P. 3d 71 (2009).

The prohibition concerning clothing, tattoos or other markings impacts his First Amendment right to freedom of speech and freedom of expression.

Recently, in *State v. Bahl*, 164 Wn. 2d 739, 753, 193 P. 3d 678 (2008) the Court ruled as follows:

> In addition, when a statute or other legal standard, such as a condition of community placement, concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms. ... For this reason courts have held that a stricter standard of definiteness applies if material protected by the First Amendment falls within the prohibition. As the Eleventh Circuit observed, "Vagueness concerns are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded of criminal statues because their consequences are more severe." *United States v. Williams*, 444 F. 3d 1286, 1306 (11th Cir. 2006), *rev'd on other grounds*, ____ U.S. ___, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).
>
> While many courts apply to sentencing conditions the same vagueness doctrine that applies with respect to statutes and ordinances, there is one distinction. In the case of statutes and ordinances, the challenger bears a heavy burden of establishing that the law is unconstitutional. This burden exists because of the presumption of constitutionality afforded legislative enactments. A sentencing condition is not a law enacted by the legislature, however, and does not have the same

> presumption of validity. Instead, imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. *State v. Riley*, 121 Wn. 2d 22, 37, 846 P. 2d 1365 (1993). **Imposition of an unconstitutional condition would, of course, be manifestly unreasonable.**

(Emphasis supplied.)

The gang-related conditions imposed on Mr. Deleon are unconstitutional. They invade his First Amendment rights. The State did not justify the conditions to the trial court.

## CONCLUSION

Mr. Deleon's constitutional right to due process was violated by Instruction 16. As worded, the Instruction constitutes a mandatory presumption that relieved the State of its burden of proof on Counts 2 and 3.

The trial court's failure to bifurcate the trial and the gang aggravating factor constitutes an abuse of discretion. The gang-related evidence had nothing to do with any element of the charged offenses. Mr. Deleon was denied a fair trial.

Defense counsel's performance was deficient in each of the particulars previously set forth. This deficient performance was prejudicial to the outcome of the trial. Mr. Deleon was denied the constitutional rights under the Sixth Amendment and Const. art. I, § 22.

Juror misconduct by means of Twitter declarations of the offending juror consititutes a mistrial.

The foregoing errors whether viewed individually, or in combination, require that Ricardo Deleon's conviction be reversed. He is entitled to a new new trial. See, State V. Lopez, 95 Wn. App. 842, 857, 980 P.2d 224 (1999).

Alternatively, error committed by the trial court at sentencing, combined with lack of sufficient proof as to enhancements and improper conditions requires resentencing.

DATED this 24th day of June, 2012.

Respectfully Submitted,

Ricardo Juarez Deleon #346529

Ricardo Juarez Deleon # 346529,
Appellant pro se,
WASHINGTON STATE PENITENTIARY
1313 N. 13th Avenue/Delta unit
WALLA WALLA, WA 99362

# APPENDIX "A"

ORIGINAL

INSTRUCTION NO. 16

If a person acts with intent to assault another, but assaults a third person, the actor is deemed to have acted with intent to assault the third person. The unintended victims do not need to be physically injured and the defendant need not know of their presence.

# APPENDIX "B"

2

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EX OFFICIO CLERK
SUPERIOR COURT
YAKIMA, WASHINGTON

# SUPERIOR COURT OF WASHINGTON
# IN AND FOR YAKIMA COUNTY

| | |
|---|---|
| **STATE OF WASHINGTON**<br><br>Plaintiff / Petitioner (s)<br>**VS.**<br><br>**RICARDO DELEON**<br>**ANTHONY DELEON**<br>**OCTAVIO ROBLEDO**<br><br>Defendant / Respondent (s) | **NO. 09-1-00976-2**<br>**09-1-00977-1**<br>**09-1-00978-9**<br><br>JUROR INFORMATION<br>RE: TWITTER ACCOUNT |

(SEE ATTACHED)

Twitter.com/Icpchad

RT @DeniseLescano: @icpchad looking forward to seeing them...jury cant reach a verdict?? - We just stared deliberation on Friday

Does anyone know where I can find (online) 'The Runaway Jury' to stream for free right now?
12:20 AM Oct 23rd via TweetDeck

Everything is fine here http://youtu.be/QzcmSxvgVJE the system is friendly, & we should be so grateful we get to pay for it.
11:35 PM Oct 22nd via TweetDeck

RT @SpiritRaintree: @icpchad You, good sir, are a wordsmith. I dig that. You are a powerful non-conformist. Respect & Gratitude.
8:52 PM Oct 22nd via TweetDeck

.The list of usual suspects grows----the jury KNOWS the convict is innocent of knowing SELF.
8:48 PM Oct 22nd via TweetDeck

Metaphors as thick as a legal dictionary carried by an illiterate lawyer ... here, can you #follow this?
8:47 PM Oct 22nd via TweetDeck

RT @CourtneyRich: @icpchad you fighting the good fight my friend? Good for you! - There are 2 others as well. ;-) Score 3 : 9 ;-)
5:36 PM Oct 22nd via TweetDeck

RT @jenn_row: @icpchad to you as well.....off to that horrible duty? - Yes, and hopefully today is the last of it.
8:26 AM Oct 22nd via TweetDeck

RT @CarePathways: @icpchad jury duty how did it go? - SSSSSTTTTIIIILLLLLL GGGGGGOOOOOIIIIIINNNNNGGGGGG. It's insanely ridiculous
11:48 PM Oct 21st via TweetDeck

RT @jenn_row: @icpchad oh I hate jury duty - I will NEVER do this again, I guarantee it.
1:10 PM Oct 21st via TweetDeck

They force 14 ppl to sit in a small room for 3,4,5,6 hours on end with no lunch or breaks. Why does stupid shit piss me off so much?
12:38 PM Oct 21st via txt

Two more hours of wasted time ... this is pathetic beyond all comparison.
10:49 AM Oct 21st via txt

RT @DeniseLescano: @icpchad omg YOUR STILL ON JURY DUTY??!! What the heck is it a murder trial? How long you gonna be? - 1 more day.
7:26 PM Oct 20th via TweetDeck

This is a professional waste of time. #JusticeSystem
9:51 AM Oct 20th via txt

RT @tajjackson3: It's time to set the record straight that MJ was/is and always has been innocent. - I actually believe that now.
10:00 PM Oct 19th via TweetDeck

We The People - A Day in the Mind - Chad Lilly http://on.fb.me/9RqetR #FB post via @marlenlife
9:53 PM Oct 19th via TweetDeck

RT @slavis_show: I'm not against the police, I'm just afraid of them. - I'm not afraid of them, I'm just against the system they serve.
1:23 PM Oct 19th via TweetDeck

The Golden Ratio - Chad Lilly on Coast to Coast AM http://youtu.be/ZSZONOTSDs8
12:06 AM Oct 19th via TweetDeck

While it will get you shot in #Yakima for saying it, I will: If the Nortenos and Surenos were smart ... they'd unite.
10:24 PM Oct 18th via TweetDeck

If 'NO' was on their ballot ... then I'd register to vote.
9:00 PM Oct 18th via TweetDeck

In a legal dictionary: 'Human Being' is defined as: Monster. (and this why you need another to [re]present your fiction to the court.
8:24 PM Oct 18th via TweetDeck

The largest known street gang in the world: Police
8:17 PM Oct 18th via TweetDeck

@SayMichalSexy - It's been a long, strange day (Jury Duty) ... I'm happy to be home----swimming in the stream with you.
8:01 PM Oct 18th via TweetDeck in reply to SayMichalSexy

I've never seen a circus so full of clowns. #court
2:10 PM Oct 18th via txt

Only a few more days left of this Jury Duty ... going to get this over with ... see ya laterz.
8:34 AM Oct 18th via TweetDeck

Whetto" http://youtu.be/5J8sbTCOttE
11:33 PM Oct 14th via TweetDeck

."I don't not recall" ... as every liar on the stand says under oath.
9:15 PM Oct 14th via TweetDeck

Liar, lawyer mirror for you ... what's the difference?" -Tool
3:01 PM Oct 13th via txt

.. the wheels on the bus of BS go 'round and 'round ... 'round and 'round. #Law
1:10 PM Oct 13th via txt

Memories make bad eye witnesses.
11:04 AM Oct 13th via txt

NO. 29657-1-III

Consolidated with 29679-2-III & 29691-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

| | |
|---|---|
| RICARDO J. DELEON,<br>Appellant,<br>Defendant,<br><br>V.<br><br>STATE OF WASHINGTON,<br>Respondent,<br>Plaintiff. | YAKIMA COUNTY CAUSE NO.<br>09-1-00977-1<br><br>CERTIFICATE OF SERVICE<br>BY MAIL |

I certify under penalty of perjury under the laws of the State of Washington that on this 24th day of June, 2012, I caused a true and correct copy of Appellant's Statement of Additional Grounds to be served on :

RENEE S. Townsley, CLERK
Court of Appeals, Divison III
500 North Cedar Street
Spokane, WA 99201

Respectfully Submitted

Ricardo Juarez Deleon DOC# 346529

Ricardo Juarez Deleon # 346529