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WASHINGTON STATE
SUPREME COURT

No. 93435-5

COA No. 72497-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS HO,

Petitioner.

FILED
Jul 27, 2016
Court of Appeals
Division I
State of Washington

ON REVIEW FROM THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE AND THE SUPERIOR COURT OF THE STATE OF WASHINGTON, KING COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER. 1

B. COURT OF APPEALS DECISION. 1

C. ISSUES PRESENTED FOR REVIEW. 1

D. STATEMENT OF THE CASE. 2

1. Procedural facts. 2

2. Overview of facts relevant to issues on review. 2

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED. 4

1. THE COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER AN APPELLANT IS ENTITLED TO RELIEF BASED ON O'DELL WHEN HIS APPEAL WAS STILL PENDING WHEN THAT CASE WAS DECIDED AND DIRECTLY APPLIES TO THE UNIQUE CIRCUMSTANCES OF THE CASE. 4

2. REVIEW SHOULD BE GRANTED TO ADDRESS WHETHER IT IS IMPROPER OPINION WHEN AN OFFICER TESTIFIES THAT NORMALLY PEOPLE MAKE A PROTESTATION OF INNOCENCE BUT APPELLANT AND HIS CODEFENDANT DID NOT. . . 8

F. OTHER REASONS SUPPORTING REVIEW. 10

3. REVIEW SHOULD ALSO BE GRANTED ON ALL OF THE ISSUES HO RAISED PRO SE 10

G. CONCLUSION. 11

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). 7

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). 10

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001). 8

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). 9

State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997), limited by, State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015). . . . 1, 4, 6, 7

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007). 10

State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1994). 8

State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015). 1, 4, 6-8

WASHINGTON COURT OF APPEALS

State v. Ho, __ Wn. App. __, __ P.3d __ (NO. 72497-5-I, filed June 27, 2016). 1

FEDERAL AND OTHER STATE CASELAW

Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). 5

Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). 5

Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). 4, 5

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

5th Amendment. 9

6th Amendment... 8

8th Amendment.. 5

Article 1, section 21. 8

RAP 10.10 .. 10

RAP 13.4(b)(3). 1, 7, 8, 10

RAP 13.4(b)(4). 1, 7, 10

RAP 13.7(b). 10

OTHER AUTHORITIES

Emma Alleyne and Jane L. Wood, *Gang Involvement: Psychological and Behavioral Characteristics of Gang Members: Peripheral Youth and Nongang Youth,* 36 AGGRESSIVE BEHAV. 423 (2010). 8

A. IDENTITY OF PETITIONER

Douglas Ho, appellant below, petitions this Court to grant review of the unpublished opinion of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(3) and (4), Petitioner seeks review of the portion of the unpublished decision of the court of appeals, Division One, in State v. Ho, __ Wn. App. __, __ P.3d __ (NO. 72497-5-I, filed June 27, 2016), which held that Petitioner is not entitled to resentencing and that the officer did not give improper opinion or comment on the exercise of Petitioner's rights.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Is a defendant who was 18 at the time of the crimes and was subjected to more than 600 months in prison as his sentence entitled to resentencing in light of State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), decided after the sentencing below?

2. At the time of sentencing, State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997), limited by, O'Dell, supra, had held that a sentencing court was prohibiting from considering the youth of the defendant as a mitigating factor in sentencing someone convicted as an adult. That ruling was overturned in O'Dell. Are defendants who were sentenced while Ha'mim was still good law but whose cases are not final on appeal when O'Dell was decided entitled to resentencing if O'Dell would apply, regardless whether a standard range sentence was imposed?

3. Is it improper opinion testimony when a detective testifies that "normally you would arrest someone, put them in handcuffs, and take them to the police station. They would - some protestation about guilt or innocence or whatever or why they're there," and "[t]here was no such attitude" from appellant?

[1]A copy of the Opinion is filed herewith as Appendix A (hereinafter "App. A").

4. Should this Court grant review on the issues presented <u>pro se</u> in Mr. Ho's Statement of Additional Grounds for Review?

D. STATEMENT OF THE CASE

1. Procedural facts

Petitioner Douglas Ho was charged with and convicted in King County Superior Court with first-degree unlawful possession of a firearm, three counts of first-degree assault, and firearm enhancements and a "gang intent" aggravating factor, for an incident which occurred when he was just 18. CP 189-91. He was ordered to serve a standard-range sentence of 606 months - more than 50 years. CP 419-20.

2. Overview of facts relevant to issues on review

Gunshots were fired on the streets of Seattle's Beacon Hill neighborhood on the evening of July 22, 2012, leaving damage to the windows of a home, bullet holes in a fence, railing, the side of a house and two parked cars. 6RP 46-47, 52, 55-56, 76-69, 102-104. Laurence West, a member of the "Tiny Raskal Gangsters," was injured in the incident, which he and his fellow gang members claimed had to do with a "beef" with a rival gang. 8RP 12-14, 21-27. The shooting occurred over several minutes and it was alleged that it started when the car in which West was riding was at a stop light and another car pulled up. 8RP 27-29, 31. Conflicting versions of events led to confusion but someone shot from the other car into West's car and a chase ensued. 10RP 43-44.

Douglas Ho was alleged to have been one of the people shooting, and forensic testing linked a shell casings at the scene to guns found in the car of a girl who was at a barbecue where Ho and his alleged co-assailant

were arrested, and Ho's fingerprints were found on the magazine of one weapon. 7RP 34-35, 39-40, 174-77. West identified Ho and another man, Victor Contreras, as members of the rival gang and as the people firing the shots that night. 8RP 12-17. A gang unit detective testified about an incident at Ho's home more than a month earlier where the Ho family house had been shot at, after some shootings at the homes of rival gang members. 10RP 95-96. That detective also talked at length about gang culture, how it was necessary to commit "more risky crimes, more personal crimes, more dangerous crimes" to "elevate" within a gang, the detective's "professional opinion" that Ho had moved up in the hierarchy because of the charge crimes. 9RP 69-97.

The officer also testified that Ho and his co-defendant were "nonchalant" about being arrested which the gang unit detective declared was "not at all unusual," and he went on:

> Well, you know, normally you would arrest someone, put them in handcuffs, and take them to the police station. They would - - **some protestations about guilt or innocence or whatever or why they're there.** There was no such attitude from them. They were - really were kind of indifferent, just sat there.

9RP 98-99 (emphasis added).

On appeal, Mr. Ho argued, *inter alia,* that the Court should remand for resentencing under O'Dell, supra, which had been decided after Ho was ordered to serve an effective-life sentence of 50 plus years in prison. Brief of Appellant (BOA) at 1, 2, 17-36). Ho also argued that the officer's testimony about his failing to protest his guilt and his "attitude" was improper opinion and an unconstitutional comment on his right to be free

from self-incrimination. BOA at 35.

In an unpublished decision issued June 27, 2016, Division One of the court of appeals affirmed. This Petition follows.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER AN APPELLANT IS ENTITLED TO RELIEF BASED ON O'DELL WHEN HIS APPEAL WAS STILL PENDING WHEN THAT CASE WAS DECIDED AND DIRECTLY APPLIES TO THE UNIQUE CIRCUMSTANCES OF THE CASE

Mr. Ho was barely 18 at the time of the crimes, and the sentence imposed of 606 months - more than 50 years - is an effective life sentence. At the time he was sentenced, under this Court's decision in Ha'mim, supra, the law did not support asking for an exceptional sentence below the standard range or any consideration of the defendant's youth in sentencing. Ha'mim was consistent with then-holdings of the U.S. Supreme Court rejecting the idea that youth were any different than adults when it came to determining what punishment to impose. But since Ha'mim, there has been a fundamental change in our understanding of youth and human development.

Starting in 2005, the U.S. Supreme Court began recognizing there were significant, relevant differences between adults and youth which must be considered in determining what sentence to impose. See, Roper v. Simmons, 543 U.S. 551, 561-63, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). The three main differences reflect neurological development and indicate that youth does, in fact, matter. First, youth have a lack of maturity and "underdeveloped sense of responsibility" which can "often result in

impetuous and ill-considered actions and decisions." 543 U.S. at 569. The second difference is that juveniles are more vulnerable to and "susceptible to negative influences and outside pressures, including peer pressure." 543 U.S. at 569. The third was that juveniles have not yet fully formed their character, and the personality traits a juvenile shows are not necessarily fixed and there is far more likelihood that a juvenile's immature and irresponsible conduct is transitory and will abate in adulthood. Id.

In Roper, the Court relied on those differences in concluding that it was now unconstitutional to impose the death penalty for a crime - even a homicide - committed when someone was a youth. 543 U.S. at 569. The court found that the diminished capacity of juveniles makes it so that even the goal of retribution is blunted, because "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." 543 U.S. at 571.

Roper has been followed by a series of rulings extending the recognition of the differences of youth beyond the death penalty and into the general sentencing scheme. See Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (unconstitutional to impose life without the possibility of parole for non-homicide offenses committed while a youth, even for extremely brutal or "cold-blooded" seeming crimes; the mitigating factors of youth require a less serious punishment); Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (violation of 8th Amendment to impose automatic life without the

possibility of parole on a juvenile without considering all of the unique mitigating factors of youth which counsel against such extreme punishment).

In Ha'mim, supra, this Court had held, years ago, that it "borders on the absurd" and could not be "seriously" claimed that a person's age had any effect on their maturity or judgment, or to appreciate the wrongfulness of his acts, when they were convicted as an adult. 132 Wn.2d at 847. In O'Dell, supra, this Court recognized that Ha'mim had been seen by many "as absolutely barring any exceptional downward departure sentence below the range on the basis of youth." 183 Wn.2d at 689. The Court looked at youth as a mitigating factor in light of the fundamental changes in our understanding of youth culpability since Ha'mim, including the recognition of the mitigating factors inherent in youth which the U.S. Supreme Court had reached. O'Dell, 183 Wn.2d at 689.

This Court then held that, while the legislature had generally found that defendant's 18 or over were "equally culpable for equivalent crimes," it had not, by definition, considered the particular youth in each case and how the vulnerability and vagaries of youth and its immaturity may have affected the crime. Id. It concluded that, while the defendant in that case was slightly older than 18 at the time of the crimes, the sentencing court erred in failing to consider the mitigating factors of youth and the more limited culpability of youth in sentencing the appellant. Id.

Mr. Ho was just 18 when these crimes occurred. At the time of his sentencing, however, the controlling authority was Ha'mim, which did not

allow counsel to request any consideration of Ho's youth as a mitigating factor before the court imposed an effective life sentence of more than 50 years. On review, Ho asked for remand for resentencing in light of O'Dell. App. A at 5-6. While the court of appeals recognized that O'Dell was issued after the sentencing in this case, it refused to grant remand for resentencing, declaring that Ho cannot ask for such relief, because he received a standard-range sentence and did not ask for an exceptional sentence downward based on youth. App. A at 6. The court therefore summarily denied relief to Mr. Ho based on the "general rule" that a defendant "may not appeal the imposition of a standard range sentence unless the court refuses to exercise its discretion at all or denies an exceptional sentence for impermissible reasons." App. A at 6.

This Court should grant review under RAP 13.4(b)(3) and (4). It is by now well-settled that, when this Court issues a decision relevant to issues on appeal, that decision applies to all cases not final on direct appeal. See, e.g., In re Hinton, 152 Wn.2d 853, 859, 100 P.3d 801 (2004). The court of appeals decision adopts an artificial barrier for those caught in a specific window of time - whose sentencing occurred before O'Dell but whose appeal was still pending when O'Dell overruled Ha'mim. Because Ha'mim had not yet been overruled, such appellants cannot claim ineffective assistance for failing to argue, contrary to Ha'mim, that an exceptional sentence should be granted based on the mitigating factors of youth. But if the sentencing occurred today and counsel failed to raise the issue after O'Dell, relief *would* be granted. And in this case, the crimes were all gang-related - exactly the kind of conduct which defies

understanding for adults, involving an "attitude" and degree of what appears to be casual violence and lack of remorse but which is just the kind of behavior which characterizes the recklessness and irresponsibility of youth and which is in fact exacerbated by the gang context. See, Emma Alleyne and Jane L. Wood, *Gang Involvement: Psychological and Behavioral Characteristics of Gang Members: Peripheral Youth and Nongang Youth,* 36 AGGRESSIVE BEHAV. 423, 424 (2010).

With its ruling in this case, the court of appeals decision effectively creates a subclass of people who will be deprived of the opportunity presented by O'Dell through no fault of their own and no negligent failures of counsel, because of the happenstance of timing. This Court should grant review under RAP 13.4(b)(3) and (4) to address the very significant constitutional questions created by the court of appeals decision and its creation of what amounts to an arbitrary class of defendants who are deprived of relief others will receive.

2. REVIEW SHOULD BE GRANTED TO ADDRESS WHETHER IT IS IMPROPER OPINION WHEN AN OFFICER TESTIFIES THAT NORMALLY PEOPLE MAKE A PROTESTATION OF INNOCENCE BUT APPELLANT AND HIS CODEFENDANT DID NOT

As part of the state and federal rights to trial by jury and a fair trial, the accused is entitled to have the jury serve as the sole judge of the weight of the testimony and credibility of witnesses. See, State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1994); Sixth Amend., Article 1, section 21. Based on these rights, it is improper for any witness to testify in a way which conveys their opinion about the guilt of the defendant, his veracity or credibility or that of any witness. State v. Demery, 144 Wn.2d 753,

758-59, 30 P.3d 1278 (2001).

Further, it is a violation of due process and the 5th Amendment right to be free from self-incrimination for a witness to "chill" the exercise of a constitutional right by drawing a negative inference therefrom. See State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

In this case, the lead gang detective testified at trial that, after he was arrested, Ho and Contreras "couldn't account" for where they were at the time of the shooting, seemed "kind of indifferent to the whole incident, being interviewed, being advised of their rights," and that it was "like nonchalant to them," which he, as a gang expert who had interviewed "thousands" of gang members accused of crimes, did not find "at all unusual." RP 97-98. A moment later, the detective told the jury that, not only were the two men "nonchalant" and "indifferent" in the face of extremely serious charges, they failed to make the kind of statements you would "normally" expect, so that "normally," someone who was arrested and taken to the police station would make "**some protestations about guilt or innocence or whatever or why they're there**." 9RP 98-99 (emphasis added). The officer opined there was "no such attitude" from Ho and Contreras. 9RP 98-99.

On appeal, Ho argued that this testimony was improper opinion testimony about guilt and further chilled his exercise of his rights. BOA at 30-35. In upholding the convictions, the court of appeals held that this testimony "was not an opinion on Ho's guilt," because the detective did not "imply that, in his experience, guilty people acted calm and relaxed in

police custody" and the testimony on Ho's demeanor was thus permissible observation of Ho's behavior. App. A at 8. The court also found that it was not a comment on the right to silence for the detective to say that people who are arrested typically protest their innocence but Ho did not. App. A at 10.

Review should be granted under RAP 13.4(b)(3) and (4) on this issue. Improper admission of opinion testimony violates substantial constitutional rights, as does commenting on a defendant's exercise of his rights. See State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

F. OTHER REASONS SUPPORTING REVIEW

3. REVIEW SHOULD ALSO BE GRANTED ON ALL OF THE ISSUES HO RAISED PRO SE

Ho filed a pro se RAP 10.10 Statement of Additional Grounds for Review ("SAG"), raising a number of issues, all of which the Court of Appeals rejected. See App. A. Counsel was not appointed to assist or to research the issues contained in Ho's SAG. See RAP 10.10(f). In State v. Brett, 126 Wn.2d 136, 206, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996), this Court indicated it would not address arguments incorporated by reference from other *cases*, but did not state anything about incorporation by reference of arguments or issues in the *current* case. Thus, to comply with RAP 13.7(b) and raise all issues in this Petition without making any representations about their relative merit, incorporated herein by reference are Ho's pro se arguments, contained in his RAP 10.10 SAG. This Court should grant review on those issues.

G. CONCLUSION

For the foregoing reasons, this Court should accept review of the unpublished decision of Division One of the court of appeals in this case

DATED this 27th day of July, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel via this court's portal upload at king county prosecutor's office at paoappellateunitmail@kingcounty.gov, and first-class postage prepaid, to Mr. Douglas Ho, DOC 377746, Clallam Bay CC, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

DATED this 27th day of July, 2016

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

STATE OF WASHINGTON, Respondent,	)	No. 72497-5-I
v.	)	
DOUGLAS HO,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: June 27, 2016

VERELLEN, C.J. — Douglas Ho appeals his convictions for three counts of first degree assault while armed with a firearm and one count of unlawful possession of a firearm. Ho contends that he was denied his constitutional right to counsel of choice and that a law enforcement officer's testimony amounted to an impermissible opinion on his guilt and a comment on his right to remain silent. Ho also raises claims relating to prosecutorial misconduct, jury unanimity, and mitigating factors considered at sentencing. We affirm.

FACTS

On the evening of July 22, 2012, William Ngeth and two other men, Lawrence West and Troung Ngo, were driving in the Beacon Hill neighborhood of Seattle in Ngeth's car. All three men were members of a street gang called the Tiny Raskal Gangsters (TRG). While waiting at an intersection, a car driven by Victor Contreras pulled up alongside Ngeth's car. Ho was in the front passenger seat. Both Contreras

and Ho were members of a rival street gang, the Insane Boyz. Ho emerged from the sunroof of Contreras's car holding a gun and fired a shot at Ngeth's car. A high speed chase ensued. About 20 blocks away, Ngeth's car crashed onto a curb and Ngeth, West, and Ngo fled the car. Contreras and Ho pursued the men on foot and shot at them, striking West in the arm and torso.

The State charged Ho with three counts of first degree assault and two counts of first degree unlawful possession of a firearm. A jury convicted Ho as charged and the trial court imposed a standard range sentence. Ho appeals.

ANALYSIS

Right to Counsel of Choice

Ho contends that the trial court violated his constitutional right to counsel of his choice when it denied his request for a continuance of the trial date in order to substitute court-appointed counsel with retained counsel. We disagree.

Attorney Erick Spencer was appointed to represent Ho at the time of Ho's arraignment on August 9, 2012. Spencer later withdrew due to a conflict involving one of the State's witnesses, and Brian Todd was appointed to represent Ho on June 12, 2013. The trial date was set for April 10, 2014.

On April 8, 2014, two days before trial was scheduled to begin, Ho moved for a continuance of 90 days in order to retain attorney John Crowley. Crowley stated that he had met with Ho more than a year previously to discuss representation "but there were just some problems that the family was not able to go forward at that time."[1] Crowley emphasized that Ho was not dissatisfied with appointed counsel, nor was there a

[1] Report of Proceedings (RP) (Apr. 8, 2014) at 76.

breakdown in communications, but "[h]e just wanted the counsel of his choice at this time."[2] Contreras, Ho's codefendant, objected to any continuance. The deputy prosecutor informed the trial court she was also handling another trial that was expected to begin the following day, April 9, and would last five weeks. The trial court provisionally denied Ho's request, stating:

> COURT: Well, I think that—I think I'm going to have to deny this without prejudice. Mr. Crowley, I may let you in, actually. But it depends on what happens with [the deputy prosecutor's April 9 case]. But that case would have a huge—it would have a huge ripple effect on all the other cases in the system. So at this point I'm going to keep you on for trial in two days.
>
> CROWLEY: Very well.
>
> COURT: All right. Mr. Todd, you're still on the case.
>
> TODD: Thank you.
>
> COURT: Thank you. And I assume Mr. Todd would notify you if things change with [the deputy prosecutor] going out to trial in [the April 9 case].
>
> CROWLEY: That's great.[3]

The record contains no further mention of the prosecutor's other trial, and Ho's trial began on April 10 as scheduled. There is no indication that Ho renewed his motion for a continuance or substitution of counsel.

Where a defendant retains counsel, the Sixth Amendment encompasses the right to counsel of his or her choice.[4] But the right to retain counsel of choice is not

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[2] Id.

[3] Id. at 78.

[4] United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).

unlimited, and a trial court must balance this right with the need to efficiently administer justice.[5] These situations are highly fact dependent and "'[t]here are no mechanical tests'" that can be used.[6] Instead, a trial court must consider all relevant information, including

> (1) whether the request came at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar;
>
> (2) the length of the continuance requested;
>
> (3) whether the continuance would carry the trial date beyond the period specified in the state speedy trial act;
>
> (4) whether the court had granted previous continuances at the defendant's request;
>
> (5) whether the continuance would seriously inconvenience the witnesses;
>
> (6) whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel;
>
> (7) whether the defendant's own negligence placed him or her in a situation where he or she needed a continuance to obtain new counsel;
>
> (8) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation;
>
> (9) whether there was a "rational basis" for believing that the defendant was seeking to change counsel "primarily for the purpose of delay";
>
> (10) whether the current counsel was prepared to go to trial;

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[5] State v. Hampton, 184 Wn.2d 656, 662-63, 361 P.3d 734 (2015), cert. denied, No. 15-8300, 2016 WL 777205 (U.S. Apr. 25, 2016).

[6] Id. at 669 (quoting Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)).

(11) whether denial of the motion was likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.[7]

This court reviews the denial of a continuance in order to allow a defendant to retain counsel for abuse of discretion.[8] A trial court abuses its discretion when its decision "'is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'"[9]

Here, Ho did not move to substitute retained counsel until two days before trial. Thus, he failed to move "at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar."[10] Additionally, Ho candidly admitted he had no "legitimate cause for dissatisfaction with [appointed] counsel."[11] And the record shows that the trial court had granted at least 16 previous continuances at Ho's request. Finally, the trial court denied Ho's motion without prejudice, contingent upon the deputy prosecutor's schedule, and invited Ho to renew his motion, which Ho did not do. We conclude the trial court's order was an appropriate exercise of its discretion.[12]

Youth as Mitigating Factor in Sentencing

After Ho was sentenced, the Washington Supreme Court issued its opinion in State v. O'Dell, holding that a defendant's youth can justify an exceptional sentence

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[7] Id. (quoting 3 WAYNE R. LAFAVE, ET AL, CRIMINAL PROCEDURE § 11.4(c) at 718-20 (3d ed. 2007)).

[8] Id. at 670.

[9] Id. (quoting State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

[10] Id. at 669.

[11] Id.

[12] Though Ho argues that the trial court's denial of his right to counsel of choice constituted structural error requiring reversal, Gonzalez-Lopez is clear that only the *erroneous* deprivation of this right is structural error. 548 U.S. at 150.

below the standard range.[13] Ho, who was 18 when he committed the crimes, contends that he is entitled to resentencing in light of O'Dell. But O'Dell does not provide a basis for the relief Ho seeks.

As a general rule, a defendant may not appeal the imposition of a standard range sentence unless the court refuses to exercise its discretion at all or denies an exceptional sentence for impermissible reasons.[14] In O'Dell, the defendant asked the court to impose an exceptional sentence downward because his capacity to appreciate the wrongfulness of his conduct was impaired by his youth.[15] Witnesses testified that the defendant acted much younger than his chronological age and that his bedroom contained childish memorabilia such as toys and stuffed animals.[16] The trial court denied the request based on its belief that it could not consider the defendant's age as a possible mitigating factor.[17] Because this belief was erroneous, resentencing was warranted.[18]

Here, in contrast, Ho did not request an exceptional sentence downward based on his youth, nor did the trial court state that it could not impose one. Thus, Ho has not demonstrated that the trial court refused to exercise its discretion or misconstrued its authority.

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[13] 183 Wn.2d 680, 358 P.3d 359 (2015).

[14] State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005).

[15] O'Dell, 183 Wn.2d 685.

[16] Id. at 697-98.

[17] Id. at 685-86.

[18] Id. at 696-97.

Comment on Right to Silence

Ho contends that the testimony of one of the State's witnesses amounted to an impermissible opinion on guilt and a comment on his right to remain silent.[19] We decline to review these claims because Ho fails to establish a manifest error affecting a constitutional right.[20]

At trial, Detective Robert Sevaaetasi testified regarding Ho's attitude and demeanor following his arrest:

> Q. When asked about their whereabouts on the night in question, was there an answer?
>
> A. They couldn't account for where they were.
>
> Q. Did both of them give the same kind of answers?
>
> A. Yes. They . . . were kind of indifferent to the whole incident, being interviewed, being advised of their rights. It was like nonchalant to them, and I found this not at all unusual.
>
> Q. The nonchalance you didn't find unusual?
>
> A. Yeah, or the indifference to it and that there was similar behavior.
>
> Q. Explain nonchalance and indifference.
>
> A. Well, you know, normally you would arrest someone, put them in handcuffs, and take them to the police station. They would—some protestation about guilt or innocence or whatever or why they're there. There was no such attitude from them. They were – really kind of indifferent, just sat there. And when I asked them if they could account for their—their whereabouts, it was, "I don't remember. I don't know."[21]

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[19] We note that this same argument, as well as the subsequent two arguments regarding jury unanimity and prosecutorial misconduct, were raised and rejected in Contreras's direct appeal.

[20] RAP 2.5(a).

[21] RP (May 6, 2014) at 97-98.

Because Ho did not object to this testimony below, we must first determine whether it can be challenged for the first time on appeal. In general, failure to raise an issue at trial waives the issue on appeal unless it is a manifest error affecting a constitutional right.[22] An error is manifest only if it had practical and identifiable consequences in the case.[23]

Ho argues that the testimony was an improper expression of Detective Sevaaetasi's personal opinion that Ho was guilty. A witness may not offer opinion testimony regarding the defendant's guilt; whether a defendant is guilty is a question "solely for the jury and [is] not the proper subject of either lay or expert opinion."[24] However, testimony describing a defendant's demeanor is not opinion and is admissible if relevant.[25]

Detective Sevaaetasi's testimony was not an opinion on Ho's guilt. His testimony that Ho acted "nonchalant" and "indifferent" to being interviewed did not convey an opinion but merely his observation of Ho's behavior. Furthermore, Detective Sevaaetasi did not imply that, in his experience, guilty people acted calm and relaxed in police custody. In fact, he stated that Ho's demeanor was "not at all unusual."[26] Consequently, the testimony does not warrant review for the first time on appeal.

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[22] State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

[23] State v. Schaler, 169 Wn.2d 274, 282-83, 236 P.3d 858 (2010).

[24] State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967).

[25] State v. Day, 51 Wn. App. 544, 552, 754 P.2d 1021 (1988).

[26] RP (May 6, 2014) at 98.

Ho also contends that the testimony was a comment on his Fifth Amendment right to remain silent. "A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions."[27]

Here, however, Ho did not invoke his right to silence. Instead, Ho was responsive to questions, stating he did not remember where he had been the night of the shootings. And Detective Sevaaetasi's testimony that people who are arrested typically make "some protestation about guilt or innocence or whatever or why they're there" was not a comment on Ho's silence.[28] Instead, Detective Sevaaetasi explained how Ho appeared "nonchalant" and "indifferent" by contrasting his behavior with that of other people he had arrested.

Because Detective Sevaaetasi's testimony was not an opinion on guilt or a reference to Ho's right to remain silent, Ho fails to establish manifest error.[29]

Unanimity

Ho contends that his right to a unanimous jury verdict on the assault charges was violated. Because the evidence showed that shots were fired in two separate locations, Ho argues the State had to elect one location for the jury to consider or the court had to give the jury a unanimity instruction.

When the State presents evidence that the defendant committed two or more acts, any one of which could constitute the crime charged, the State either must elect

[27] State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996).

[28] RP (May 6, 2014) at 97-98.

[29] In his assignments of error Ho also contends that defense counsel was ineffective for failing to object to the testimony, but does not provide any argument in support of this claim. Appellants waive assignments of error that they fail to argue in their opening appellate briefs. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

one act or the jury must be instructed that it must unanimously agree on a single act.[30] No election or unanimity instruction is required, however, if the defendant's acts were part of a "continuing course of conduct."[31] We review the facts in a commonsense manner to determine whether criminal acts are a continuing course of conduct.[32] Generally, where the defendant engages in a series of actions intended to achieve a singular objective, the evidence establishes a continuing course of conduct.[33]

Here, neither an election nor an instruction was required because the shootings were a continuing course of conduct. The shootings in this case were relatively close together in time and location and involved the same victims. They occurred during a single, continuous pursuit involving the same vehicles. Finally, the objective of both shootings was the same: to kill a TRG member as part of a gang rivalry. Viewed in a commonsense manner, the shootings were a continuing course of conduct.

Prosecutorial Misconduct

Ho argues the prosecutor committed two instances of misconduct during closing argument. To prevail on a claim of prosecutorial misconduct, a defendant must establish that the conduct was both improper and prejudicial.[34] If the defendant objected at trial, he or she must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict.[35] However,

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[30] State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

[31] Id. at 571.

[32] Id.

[33] State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

[34] State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

[35] State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

where defense counsel fails to object, any error is waived unless "the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice."[36]

Ho contends the prosecutor improperly vouched for West's credibility by saying, "[W]e only know for certain two of the individuals that were shooting that night. That was Mr. Contreras and Mr. Ho."[37] He argues that this statement conveyed the prosecutor's personal opinion that West's testimony identifying Ho and Contreras as the shooters was credible.

A prosecutor commits misconduct by vouching for a witness's credibility.[38] However, a prosecutor's use of the word "we" amounts to vouching only if it places the prestige of the government behind the witness or suggests that information not presented to the jury supports the witness's testimony.[39] Here, the prosecutor's remark did not express a personal opinion about West's credibility. Rather, the prosecutor used the phrase "we know" to marshal evidence actually admitted at trial. Furthermore, Ho did not object to this statement and fails to show that any impropriety was flagrant, ill-intentioned, or incurable.

Ho also contends the prosecutor disparaged defense counsel by telling the jury that defense counsel had "gone through in their closing and tried to explain away or dismiss every single piece of the State's evidence. But it gets to a point where you

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[36] Id. at 760-61.

[37] RP (May 13, 2014) at 15-16.

[38] State v. Robinson, 189 Wn. App. 877, 892, 359 P.3d 874 (2015).

[39] Id. at 894.

lose—where it becomes nonsensical."[40] The trial court overruled Ho's objection to this remark.

It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn defense counsel's integrity.[41] It is not improper, however, to argue that the evidence does not support the defense theory or to comment critically on a defense argument.[42] The remark challenged here focused on the validity of defense counsel's arguments and did not directly or indirectly impugn defense counsel's role or integrity. Ho has not shown, and the record does not demonstrate, a substantial likelihood that the remark affected the jury's verdict.

Statement of Additional Grounds

Ho raises several arguments in a pro se statement of additional grounds. None have merit.

Ho contends that the trial court failed to make an individualized inquiry into his ability to pay legal financial obligations, as required by State v. Blazina.[43] But Blazina addressed only discretionary legal financial obligations. A review of the judgment and sentence shows that the trial court imposed only the victim penalty assessment and DNA collection fee. These obligations are mandated by statute, and a trial court lacks discretion to consider a defendant's ability to pay when imposing them.[44]

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[40] RP (May 13, 2014) at 87.

[41] State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011).

[42] Id. at 465.

[43] 182 Wn.2d 827, 344 P.3d 680 (2015).

[44] State v. Lundy, 176 Wn. App. 96, 105, 308 P.3d 755 (2013).

Ho raises additional claims of prosecutorial misconduct during closing argument. He contends the prosecutor misstated the burden of proof by stating:

> And again, finally, who had which firearm? We have a pretty good idea. Are you convinced beyond a reasonable doubt who was holding which gun? You don't need to be to find the defendants guilty of the charged crimes in this case.[45]

But the prosecutor did not tell the jury they did not need to find all of the elements of the crime beyond a reasonable doubt. Rather, the prosecutor explained to the jury that, because Ho had been charged as both a principal and an accomplice, it was not necessary for the jury to determine whether Ho's bullet or Contreras's bullet struck West. Ho also contends that the prosecutor "testif[ied] as a witness" by arguing that Ho's intent was to hurt or kill the three men.[46] But a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence.[47] Such a statement was supported by the evidence.[48]

Ho challenges the sufficiency of the evidence supporting the unlawful possession of a firearm conviction. But West testified that he saw Ho pointing a gun at him. And this testimony was consistent with the physical evidence, including the position of West's gunshot wounds and a bullet strike on Ngeth's car. Moreover, Ho's fingerprints

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[45] RP (May 13, 2014) at 36.

[46] Statement of Additional Grounds at 4.

[47] State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

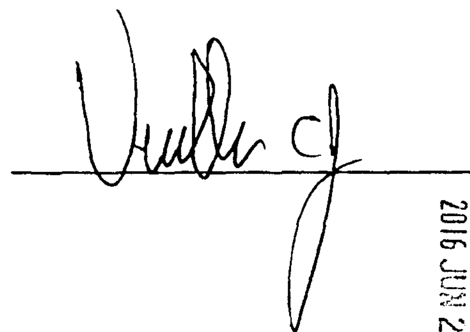
[48] Ho's other alleged instances of misconduct either repeat those made by appellate counsel or misstate the record. For example, Ho contends the prosecutor erred by stating, "It is clear . . . they are all guilty." However, the prosecutor actually stated, "It's clear, however, from all of the circumstantial evidence regarding these three individuals' intent that they did have the intent to inflict great bodily harm. If one of them did, then under accomplice liability, they all are guilty of assault in the first degree." RP (May 13, 2014) at 15. This was a proper characterization of the law.

were found on a Kimber handgun that matched shell casings found at the scene. This was sufficient evidence for the jury to find beyond a reasonable doubt that Ho possessed a firearm.[49]

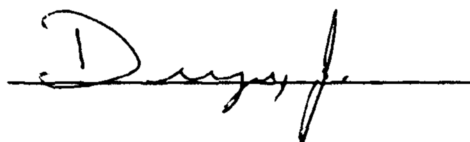
In his supplemental assignments of error, Ho contends this court should not award any costs on appeal. The State responds that costs should be awarded on appeal. Both raise arguments related to this court's recent decision in State v. Sinclair.[50]

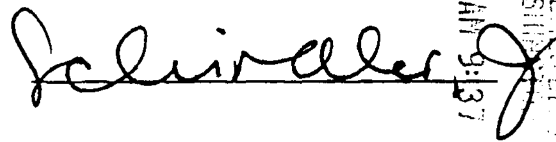
We adhere to Sinclair. Ho was found indigent both for trial and for appeal. He has been sentenced to more than 50 years in prison. The State has not provided any factual basis to overcome the continuing presumption of indigency. Consistent with Sinclair, we conclude that no costs should be awarded on appeal.

Affirmed.



WE CONCUR:





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[49] Ho's remaining claims involve matters outside the record and therefore cannot be addressed in a direct appeal. State v. McFarland, 127 Wn.2d 322, 335, 338 n.5, 899 P.2d 1251 (1995).

[50] 192 Wn. App. 380, 367 P.3d 612 (2016) (petition for review pending).

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Transmittal Letter

Document Uploaded: 724975-Petition for Review.pdf

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Court of Appeals Case Number: 72497-5

Party Respresented: Douglas Ho
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Trial Court County: ____ - Superior Court # ____

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- ◯ Affidavit of Attorney Fees
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