NO. 31187-2-III

Consolidated with 31188-1-III, 31205-4, 31225-9-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE JESUS MANCILLA,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

In this consolidated appeal the four appellant's raise numerous issues. The Respondent shall address the common issues at the beginning of this response and set forth responses to allegations raised by individual appellants at the end of the document. The numerous assignments of error which appear to be raised by all appellants can be summarized as follows;

1. The court erred by submitting the "to convict" instructions – 16-22.
2. The court erred when it admitted gang evidence – gang expert testimony.
3. The court erred when it admitted "booking" information.
4. There was insufficient evidence to support the convictions for first degree assault.
5. The court erred by instructing the jury regarding transferred intent.
6. The court violated Appellant's constitutional public trial right.
7. Mancilla only – The court erred by imposing 180 months for 3 firearm enhancements on each of the 7 counts of first degree assault.
8. Jaime Lopez only - The trial court improperly gave Instruction 9 Accomplice.
9. Armando Lopez only – The "to convict" instructions for assault did not contain the persistent offender "element."
10. The determination of prior offenses for the finding of Persistent Offender Accountability Act (POAA) should be found by a jury not the court.
11. POAA based on information not proven reliable or accurate.

12. POAA should be elemental not a sentencing factor.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The "to convict" instruction were proper.
2. The court did not err when it admitted gang testimony and gang expert testimony
3. There was no error when the court admitted "booking" information.
4. There was sufficient evidence to support the First Degree Assault convictions.
5. The transferred intent instruction was not improperly given.
6. There was no violation of the right to a public trial.
7. Mancilla – the firearm enhancements are authorized by law.
8. Jaime Lopez – The Accomplice instruction was properly given
9. Armando Lopez – The "to convict" instructions were proper for POAA purposes.
10. Prior offenses were properly found by the trial court
11. The information that was used to elevate Lopez's sentence under the POAA was reliable and accurate.
12. POAA was properly imposed by the trial court.

II. STATEMENT OF THE CASE

Between the four briefs and the supplemental briefing that has been submitted the substantive and procedural facts have been adequately set forth therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. Within this brief the State has set forth a synopsis of the case and shall refer to specific sections of the verbatim report of proceeding in the body of this brief as needed. Apparently due to requests from separate attorneys and/or supplemental request for verbatim

reports there are more than one "volume one" and volume two of this trial. Therefore the Respondent shall attempt to refer to the date and name labelling the record as supplied by the transcriptionist.

III. ARGUMENT.

RESPONSE TO ALLEGATION ONE – TO CONVICT INSTRUCTION.

All the necessary elements can be found in the challenged instruction. This allegation appears to be more of a challenge to the sufficiency of the evidence presented. Further, the instruction that is now being challenged was one that was also proposed by Appellant Jaime Lopez (aka Andrew Loberg) CP 1364-1400

> THE COURT: …Mr. Hintze has complied with our local rule as far as jury instructions and Mr. Heilman-Schott, I believe you've also filed your proposed jury instructions, is that correct?
> MR. HEILMAN-SCHOTT: That's correct, Your Honor. I need to have a hundred bucks to give you.
> THE COURT: But the other three haven't.
> MR. BANDA: I will get them, Your Honor. I don't believe in duplicating it. (Unintelligible) so I'll look at them. If I (unintelligible), Your Honor, I'll go present my own, of course.
> THE COURT: And I'll give you until noon tomorrow.
> MR. BANDA: All right.
> Vol. 1 082712 Pretrial pgs. 105-6

The jury instructions that were filed by appellant Jaime Lopez are identical to those now challenged by the appellant's. State v. Bradley, 96 Wn. App. 678, 681-1, 980 P.2d 235 (1999);

> The doctrine of invited error applies when an instruction given by the trial court contains the same error as the defendant's proposed instruction. State v. Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989); see also State v. Jacobsen, 74 Wn. App. 715, 724, 876 P.2d 916 (1994), review denied, 125 Wn.2d 1016 (1995); State v. Ahlquist, 67 Wn. App. 442, 447-48, 837 P.2d 628 (1992); State v. Miller, 40 Wn. App. 483, 486, 698 P.2d 1123, review denied, 104 Wn.2d 1010 (1985).

None of the other co-defendant's objected to the instruction that was proposed by both the State and Jaime Lopez. Vol. Vol. IX 091212 pgs. 949-54

The challenged instruction is WPIC 35.02 which reads as follows;

> WPIC 35.02 Assault—First Degree—Great Bodily Harm or Deadly Weapon—Elements
> To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about (date), the defendant assaulted (name of person);
> (2) That the assault was committed with *[a firearm] [or] [with a deadly weapon] [or] [by a force or means likely to produce great bodily harm or death]*;
> (3) That the defendant acted with intent to inflict great bodily harm; and
> (4) That this act occurred in the State of Washington.
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

It is true that the word "assault" is not defined in Washington. Courts, therefore, the courts have turned to the common law definition. This definition establishes that an assault is an "intentional" act. State v. Taylor, 140 Wn.2d 229, 996 P.2d 571 (2000) "assault" commonly connotes intentional or knowing act; failure to explicitly allege intent not fatal under strict construction standard; State v. Davis, 119 Wn.2d 657, 835 P.2d 1039 (1992) (information charging fourth-degree assault conveyed constitutionally required notification of charge), and State v. Chaten, 84 Wn. App. 85, 925 P.2d 631 (1996) a charging document asserting an "assault" reasonably includes the element of intent. State v. Allen, 67 Wn. App. 824, 829, 840 P.2d 905 (1992) (finding charging language for third degree assault of a police officer that does not include the words "intent" or "intentionally" to be constitutionally adequate).

"A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with ... any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1).

Even if this court were to determine that there was something omitted from this pattern jury instruction automatic reversal of a conviction would only be required when an omission or misstatement in a jury instruction "relieves the State of its burden to prove every element of

a crime." State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). "However, not every omission or misstatement in a jury instruction relieves the State of its burden." *Id.* If automatic reversal is not required, Mr. Posey's claim of error is subject to harmless error analysis. State v. Sibert, 168 Wn.2d 306, 320, 230 P.3d 142 (2010).

In determining whether instructional error has relieved the State of its burden to prove every element of first degree assault, the term "every" means "each and every"; the error requires automatic reversal only when the State fails to instruct the jury on *all* the essential elements. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003) "DeRyke would be eligible for an automatic reversal only if the trial court failed to instruct the jurors on all the elements"; Sibert, 168 Wn.2d at 320 (Alexander, J., dissenting) (automatic reversal is not required, "[a]s the 'to convict' instructions included some elements of the crimes charged"); Sibert, 168 Wn.2d at 328. This approach is consistent with the United States Supreme Court's decision in Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), which held that a jury instruction that improperly omitted an essential element is subject to harmless error review rather than automatic reversal. *See* 527 U.S. at 33. The Washington Supreme Court elected to follow the high court's Neder opinion in Brown, supra, 147 Wn.2d at 340, "The United States

Supreme Court has held that an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis:

> Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). We find no compelling reason why this Court should not follow the United States Supreme Court's holding in Neder.*"*

All of the necessary elements were present in the "to convict" instructions. The state proved beyond a reasonable doubt that the four defendants were the persons who were at the Outlook home and who shot an unknown number of bullets through a home containing seven people. In this case, the trial court's to-convict instruction for the crime of assault first degree was not flawed. Further, other instructions included the required element of intent as mutually understood by the parties. Even if there had been error applying the direction provided by Brown, DeRyke, and Sibert, the convictions would be subject to harmless error review. When this court engages in harmless error review, "[a]n instructional error is presumed to [be] prejudicial unless it affirmatively appears that it was harmless." Smith, 131 Wn.2d at 263. "In order to hold the error harmless, we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" Brown, 147 Wn.2d at 341 (quoting

Neder, 527 U.S. at 19); O'Donnell, 142 Wn.App. at 322-23. "When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." Brown, 147 Wn.2d at 341.

Appellants did not argue nor was their defense that they did not "intend" to commit these criminal acts. The defense was the police apprehended the wrong people, that these four defendants had nothing to do with this crime Therefore even if this court were to find that the State had omitted the intent element, the error "can be harmless . . . only if the defense theory of the case does not involve the element of intent." State v. Jackson, 62 Wn.App. 53, 60, 813 P.2d 156 (1991).

The evidence of the criminal act in Outlook is uncontroverted. Once again the theory of the defendants was plain and simple, it was not them. A review of the evidence supports the State's theory that these four individuals arrested within fifteen minutes of the shooting, in the car seen leaving the scene of the drive-by shooting, with weapons forensically tied to the crime found at a location very near where an officer first observed the fleeing car may be reviewed to determine intent. "Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt." State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

State v. Baker, 136 Wn.App. 878, 883, 151 P.3d 237 (Wn.App. Div. 3 2007) "Washington recognizes three definitions of assault derived from the common law: (1) an attempt to inflict bodily injury upon another with unlawful force; (2) an unlawful touching with criminal intent; and (3) putting a person in apprehension of harm with or without the intent or present ability to inflict harm. Clark v. Baines, 150 Wn.2d 905, 908 n. 3, 84 P.3d 245 (2004). To prove assault based solely on an attempt to injure, the State must show that the defendant specifically intended to cause bodily injury. State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996)." There is no doubt that the party or parties who shot up the house in Outlook specifically intended to cause bodily injury to those inside the home. The home that was the known residence of one member gang that is a rival to the gang to which all four defendants belonged. A residence that had been shot at four or more times a home that had been shot at so many times that the rival member stated that he was used to being shot at.

RESPONSE TO ALLEGATION TWO GANG INFORMATION-EXPERT.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Gang evidence is so prejudicial that there must be a nexus between the

gang evidence and the charged crimes before the gang evidence is admitted. State v. Embry, 171 Wn.App. 714, 772, 287 P.3d 648 (2012), *review denied,* 177 Wn.2d 1005 (2013). There was a nexus here because the State had charged and was required to present gang evidence to support gang-related aggravating factors. The trial court dismissed that aggravator but the State still had a duty to present that evidence.

Further, the simple fact is that although defense counsel argued that there was no need for expert testimony because the residents of Yakima County are so familiar with gangs does not make it true. The knowledge of gangs without a doubt is something that is known to the general public, however traits such and "claiming" a color number is something that a lay person may have no familiarity with.

This court will review evidentiary rulings for abuse of discretion. State v. Morales, 154 Wn.App. 26, 37, 225 P.3d 311, *affirmed in part*, *reversed in part*, 173 Wn.2d 560 (2012). This court will not disturb a trial court's ER 404(b) ruling absent a manifest abuse of discretion such that no reasonable trial judge would have ruled as the trial court did. State v. Yarbrough, 151 Wn.App. 66, 81, 210 P.3d 1029 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). A trial court abuses its

discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. Lord, 161 Wn.2d at 284.

Gang evidence falls within the scope of ER 404(b). Yarbrough, 151 Wn.App. at 81. A trial court may admit gang evidence offered for proof of motive, intent, or identity. Yarbrough, 151 Wn.App. at 81. But, before the 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 sought 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. Yarbrough, 151 Wn.App. at 81-82.

To determine whether misconduct occurred, the trial court need only hear testimony when it cannot fairly decide—based upon the proponent's offer of proof—that the ER 404(b) incident probably occurred. State v. Kilgore, 107 Wn.App. 160, 190, 26 P.3d 308 (2001), *affirmed*, 147 Wn.2d 288 (2002). A court should hear this offer of proof for admissibility of evidence outside the presence of the jury. Kilgore, 107 Wn.App. at 190.

Here, prior to trial, the defendants raised the issue in a motion in limine. Pretrial RP 082712 pgs. 21-41 The State made an offer of proof

in opposition to defendant's motion to prohibit introduction of gang affiliation evidence. The State offered that the defendants were Sureno's from the LVL sect. That the trailer, residence, in Outlook that had been shot was the home of a Norteno gang member.

The court's findings satisfy the four Yarbrough elements. The court: (1) indicated that it found by a preponderance of the evidence that the shooting had occurred; (2) identified that the State would introduce the evidence of gang affiliation to show motive; (3) determined that the evidence was relevant to prove an element of the crime charged; and (4) weighed the probative value against prejudicial effects stating;

> THE COURT:… Please be seated. Gentlemen, as promised, I spent time during the noon recess to review the issue of testimony that is being proffered by the State in this case about gang activities or gang behavior offered as an explanation to the jury to assist them in understanding the scenario in which this particular crime -- alleged crime took place, and explain the involvement of the various defendants. And in particular, I looked at two recent cases that caught my attention. Both of them arise out of Division III Court of Appeals cases. The first is State v. Scott and the second is State v. Rodriguez. State v. Rodriguez is at 163 Wn. App 215 and *State v. Scott* is cited at 151 Wn. App 520. That's a 2009 case and *State v. Rodriguez* is a 2011 case.
>
> State v. Scott, the Court finds as being very instructive on this particular issue. State v. Scott the Court addressed the principle issues addressed in Mr. Hintze's brief and also argued by Mr. Banda in this case that evidence of street crime gang affiliation is not admissible in a criminal case when it merely reflects a person's beliefs or associations. State v. Scott also goes on to cite the Dobson

> *v. Delaware* case where that principle arises out of and also finds that there must be a connection between the crime and the organization before the evidence becomes relevant.
> …
> This Court finds that in this particular circumstance that while the evidence may be prejudicial to the defendants in this case, that there is proper basis upon which this evidence may be admitted. First of all, the evidence is admissible to show the motive behind the crime. In this particular case, to send a message to a rival gang that it is not appropriate to take violent actions against members or family members of the Sureno gang. And it also explains why the multiple individuals in this case took part in a single crime -- allegedly took place in a single crime. In other words, it also establishes a motive why they acted in concert. This evidence not only reinforces the issue of motive, intent and design, it also arguably explains the interaction between the various parties in this particular case and also potentially establishes the res gestae in this particular case.
>
> Lastly, there is evidence proffered by the defense in this particular case that one or more of the witnesses that are anticipated to be called are reluctant to testify or have changed their initial statements for fear of reprisal or retaliation, and that also is the basis upon which the Court can admit gang affiliation evidence into trial. This Court is going to allow that evidence to come in. Vol. I 082712 Pretrial 38-41.

The issue was raised again later in the trial and the court once again found that there was a basis for the admission of the expert testimony. Vol. VII pgs. 785-835. There the court ruled;

> THE COURT: Well, the Court finds that based on the testimony that Officer Ortiz has specialized knowledge concerning gangs to the extent that not only has he attended numerous seminars since 1998 through 2010, he has also taught seminars to other law enforcement agencies, other cities in the Lower Valley. He has also taught at Heritage

> College. He has been previously determined to be an expert in this area by the Yakima Superior Court and the Federal Court.
>
> The important factor in this case is is that an expert need not have a specific degree in a particular area. A witness doesn't have to possess certain academic credentials to be an expert. Practical experience may suffice. And that is specifically addressed in Teglund on his comments on Evidence Rule 702 and there are repeated examples of persons that don't have the academic background that have the special expertise in the particular area that he has testified to and the Court finds that the evidence in this case is overwhelming that he does qualify as an expert.
>
> Vol. VII pgs. 823-4

The court rules again at RP 831 and 835 that Officer Ortiz qualifies as an expert "established that Officer James Ortiz does qualify based upon his knowledge and experience and hands-on training and involvement in gang activities, that he is an expert in this particular area. In addition to his knowledge, he also has an educational background. Teaching, attendance at seminars and a variety of different matters. So he is clearly an expert in this case."

The court then goes on and sets forth an extensive ruling regarding the reason for the admission of the gang information;

> The Court finds in this particular case that while I've been a resident of the county for 50 plus years clearer because of the testimony of Officer James Ortiz. For example, the LVL street gang is associated with the color blue. He can testify as to the significance of the number 13 and how the number 13 comes up and the reasons that underlie that. He can testify as to the motive of a particular

> circumstance. Why did these individuals act in this particular way and his testimony clearly provides insight as to actions taken by gangs and the reasons for that. He has testified in this particular circumstance that it is a -- that acts of violence will increase status in the gang. That acts of violence usually occur with two or more individuals involved which goes to the issue of why did the defendants act in concert in this particular circumstance.

The court's ruling goes on for another two pages wherein the judge details the reasons that this testimony should and will be admitted. Vol. VII pgs. 831-835

The trial court put great effort into its analysis of this issue. This was a case where it was essential for the State to present the gang information. The motivation of a carload of young men to shoot up a home at the end of a cul-de-sac in the very early morning hours had to be demonstrated. There was no other means to prove that there was intent to assault someone, a Norteno, in this home and that therefore this intentional act allowed the transfer of that intent to the other people at home that morning in Outlook.

There was also discussion regarding admissibility of expert testimony under ER 702 is within the trial court's discretion. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003), *citing* State v. Kalakosky, 121 Wn.2d 525, 541, 852 P.2d 1064 (1993). State v. Simon, 64 Wn. App. 948, 963, 831 P.2d 139 (1991):

> Expert testimony is admissible under ER 702 if the witness qualified as an expert and if the expert testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue . . .." ER 702. The decision to admit expert testimony will be reversed only for an abuse of discretion. "If the reasons for admitting or excluding the opinion evidence are 'fairly debatable', the trial court's exercise of discretion will not be reversed on appeal."(Citations omitted.)

The trial court as quoted above, considered this question and ruled that the gang information would be helpful to the jury. While it is true that the general public in Yakima County is exposed on a regular basis to the acts of gangs the inner workings of those gangs and the mentality of those in gangs cannot be said to be common knowledge. An ordinary juror would not know that the reason for this shooting was that a person who “claimed” a specific number, color and geographic area happened to be in an area that was perhaps under the control of another group that “claimed” another number and color and geographic region. It would be safe to say that the mere “claiming” of a color and a number in a way that requires you as a member of the group claiming that color or number to assault or kill a person “claiming” anther color or number if that other person is found to disrespect that color or number or have the bad luck to have crossed into territory claimed by the other group. The very thought that a person can die for wearing the wrong color in a specific section of a town is something that no lay juror would likely know of or fully

understand. The State needed to present the jury with this other-worldly conscription of colors, numbers and streets.

RESPONSE TO ALLEGATION THREE BOOKING INFORMATION.

The State is very aware of this court's ruling in State v. DeLeon, 185 Wn.App. 171, 341 P.3d 315 (Div. 3 2014). It is essential for this court to review this allegation with the specific facts of the case firmly in mind;

Early one morning, Maria Rincon her husband and four children all lived in a trailer in Outlook, Washington. They were awakened by gunshots outside their home. The Rincon family was familiar with gunshots, as the trailer had been the frequent target of drive-by shootings and had been shot at on four or five prior occasions. RP 213, 355-56, 432. The evidence point to this being because of a familial association with the North Side Varrio (NSV) gang, which is an affiliate group of the Norteños. RP 212, 271, 840. Two of Mrs. Rincon's sons who were living at the trailer at that time of this shooting were Norteno gang members. RP 211-15, 270-71

After the shooting stopped, Maria's husband and one of her sons went outside but the shooters were gone. RP 216, 256. Immediately following the shooting, witnesses, two sisters, saw a car leaving the

area of the shooting and followed it several miles out of Outlook. RP 355-57. These two sisters were delivering newspapers and heard the shooting and saw a charcoal Mitsubishi driving with its lights off coming from the direction of the fired shots. RP 354-56. They assumed the car had something to do with the shooting. They began to follow the car and one of the sisters called the police. They then followed the car for several miles until it did a U-turn and went the other way. RP 357-58. By that time the police arrived at the last location of the sisters the car they had been following was gone. The sisters gave a description of the car and the direction it was traveling the last time they observed it. RP 358, 381.

Deputy Rojas was in the area where the charcoal car was last seen. RP 460-61. He was driving on the Yakima Valley Highway near Zillah when he saw a vehicle that matched the description of the fleeing vehicle. The vehicle turned and went the opposite direction of the deputy who then turned his patrol vehicle around and attempted to catch up to the other car. RP 466 The vehicle Police subsequently stopped the car driven by Mr. Lopez with the three codefendants consolidated in this appeal. RP 433-34, 470-72. The driver of the car when he exited during the felony stop was wearing a blue bandana

loosely around his neck. RP 470-1

The sisters who had followed the car involved in the shooting were brought to the scene and without hesitation or qualification identified the car as the one they had seen earlier. RP 435-36, 473-5 No weapons or other contraband was found in the car. RP 530, 475-6. Officer Rojas was certain that this was the vehicle involved in the shooting and felt that it did not seem right that there were no guns in the car. RP 476. He and Sgt. Russell went back to the area where Deputy Rojas first saw the car. RP 476-77. They checked the route taken by the Mitsubishi and discovered three weapons, weapons components and some ammunition lying along the road. RP 478-79, 540-41. These three guns, a SKS assault rifle, a .22 Marlin long barreled rifle and a Ruger .40 caliber semi-automatic handgun were found on or alongside the roadside along the route the car took from Outlook to the point of the stop. RP 540. Sgt. Russell noticed that there appeared to be "gouge marks" indicating the trajectory of the firearms when they were in motion before they came to rest. RP 574-5 Ballistics and tool mark analysis indicated the three guns matched bullets and magazines found at the Rincon home. RP 644-54.

The four men were arrested, advised of their rights, and taken to

the Yakima County jail. P 137.

At the jail, the four were each asked whether they were members of a gang. They were told by jail staff that the information was needed only to ensure they were safely housed in the jail. RP 132. All four defendants acknowledged they were members Little Valley Locos (LVL) a Sureños gang. RP 116-20. That information was then provided to prosecutors who offered it at the subsequent trial. RP 601-05.

The trial court conducted a CrR 3.5 hearing prior to trial to address this issue. At that hearing Officer Winmill testified extensively regarding the booking process. That testimony sets forth details regarding the policy and procedure and goal of the jail staff with regard to the questions asked. This officer's testimony should be read in totality and with this court's ruling in DeLeon in mind. RP II 0828-29,2012 Trial pgs. 114-133 Officer Winmill testified, in part, as follows;

> A. Well, my understanding the booking process is that once the law enforcement brings him in, we have to verify whether or not we can actually hold him and they go through a series of questions to make sure that he's going to be housed safely by the pre-book officer, then once they're brought into the facility then we will classify them. We check their criminal history, any in-house disciplinary issues, anything they may have had in the past to determine where it would be an appropriate place to house them, and then of course I have to do a face-to-face interview just to verify with those inmates that -- whether they're going to

be housed is going to safe place.
…
A When I do the interview, the first thing -- first, I identify the inmate, make sure that I have the individual, and then what I do is I explain to them that this is a classification interview to ensure that they're housed safely. Then I go through the questionnaire. We ask them if they've ever served time in any other jail besides Yakima, whether it be prison, federal prison, or the county jails. Then we ask them if they have any enemies here in jail. We ask them if they're involved in any gangs, if they have any mental health or medical issues. We ask them if they're suicidal and if so, when was the last time you may have attempted suicide. And, of course, you ask them if they've ever served in the U.S. military.
Q Why do you ask these questions? Let me -- why would ask questions about gang involvement?
A Well, we have so many gangs in the facility, we want to make sure they're housed safely. We don't normally house Nortenos with Surenos to avoid all the fights and whatnot.
Q Okay, do you ask these questions of everybody that's booked in?
A Everyone they book in.
Q Okay, so what if somebody is arrested on a simple DUI, do you ask those same questions?
A We still ask those same questions.
Q In this case, the people you interviewed this day, were you trying to gather evidence against these people in this booking process?
A No, that's not my job.
Volume II 08.28-8.30.12 Trial pgs. 114-16
…
CROSS EXAMINATION
Q So why would you be asking about any safety issues if he already answered no?
A Because I'm required to answer every one of these questions. Whatever he may answer, I'm required to put that response down and I'm required to answer every single question, whether or not the previous answer conflicts or does not conflict with the other question.

…
Q. Now, you indicate, sir, that all you told them is it's for our own safety, correct?
A. Correct.
Q. So your implying that if he doesn't answer or give you an answer as to what gang he belongs to, if he belongs to a gang, then he would be very (sic) unsafe for him that jail, correct?
A. It could.
Q. In fact, isn't it true, sir, if they don't answer – if you think that – well, never mind. Strike that. You put him in segregation, correct?
A. Depending on the response to the questions and their criminal history and he just put in a (inaudible), yes
Q. Now explain to me this segregation housing.
A. If the inmate claims to be a gang member or claims that they've been out of a gang, obviously we can't house him with them, yes, and if they would like either protective – to be in protective custody, and if they say so then we do put them in protective custody. If they say they'd still lke to be in general population, I usually confer with my corporal, Corporal Theresa Hatley…to verify, you know, whether she fells it would be safe to put them in general population.
Q. So if they don't answer you put him in a non-safe – you're telling me you're going to put in in a unsafe place or you're going to put him in some sort of segregation, correct.
A. Say it again, please.
Q. If they don't answer you r question, then – either you tell him I'm going to put you in a unsafe place or I'm going to put you in some sort of segregation, correct?
A. **I do not tell them that. I go by what the responses they give on here. I don't tell them that I'm going to put you here because you did not answer**.
…
Q. And this unsafe place that you would put them in, is it like with general population?

THE COURT: Well, Mr. Banda, rephrase your question. It does not comport with the testimony. It's your testimony that it's unsafe, so rephrase your question, please.

Q…You place them wherever you feel it's the correct place to be, correct.
A. Correct
Q. And it could be at a very unsafe place, correct?
A. There's always that possibility.
RP 8.28-8.30.12 pages 121-24

The State filed a motion for reconsideration in DeLeon, which was denied by this court. The State has now filed a Petition for Review in DeLeon. The State argues in that petition and maintains the viability of that argument in this case as well, that the issue of coercion was not properly before this court.

Here as was the case in DeLeon, because coercion was not raised below, there was no hearing or testimony on the issue. No witnesses were called to talk about factors typically looked at in coercion cases to determine if a defendant's will was overborne such as the location, length, and continuity of the interrogation, and the defendant's maturity, education, physical condition, and mental health. See State v. Unga, 165 Wn.2d 95, 101, 196 P.3d 645 (2008). There was no argument or briefing on the issue of coercion because it was never raised at the hearing. As evidenced from the transcript, the whole focus of the hearing was on interrogation and Miranda rights and the fact that defendants had indicated they did not wish to speak to officers. There are no facts before this court that would allow it to review this issue from the standpoint of the ruling in

DeLeon, there simply is not record on appeal that could or would support review of the possible coercive nature of this type of interview. This court should not review that aspect of the law, the error is not manifest.

The State of course must acknowledge that at this juncture the decision of in DeLeon is the law of this court but it was a fact specific ruling. This court was very concerned in DeLeon that the actions of the jail officers could and would be interpreted as coercive, clearly that is not the case here. Whether the questioning was coercive was not raised in the trial court and therefore need not be addressed on review. However it is clear from the totality of the testimony of this corrections officer that the main goal and purpose of his job is to insure the safety and well-being of the population, there was nothing coercive about the questions that were asked.

These jails are not some cage match where the officers throw members of different gangs together in retaliation for refusing to answer questions. This officer makes it abundantly clear that even without the input from an inmate the jail staff does what it can to insure the safety and well-being of the population, it is his sworn duty and the repercussions to his life and career are enormous if he fails in that endeavor.

As detailed above and as was the case with DeLeon the evidence here was overwhelming. Even if this court were to decide that the

decision to allow the use of "booking" information was improper this court need not overturn the jury's verdict:

> Again, we examine whether the error was harmless; in this instance, the standard that applies is constitutional harmless error. That standard requires that-as to the verdicts to which the evidence is relevant (and here it was relevant only to the gang aggravator)-we look only to the untainted evidence to decide if it is so overwhelming that it necessarily leads to a finding of guilt. State v. McDaniel, 83 Wn.App. 179, 187-88, 920 P.2d 1218 (1996) (quoting State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985)). DeLeon at 205

The issue presented by all appellants was whether the questioning constituted an interrogation **none of the parties raised the issue or complain that the questions were coercive in nature.**

An officer must give a Miranda warning before a custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). There is no dispute that Officer Winmill did not give any of the Appellants a *Miranda* warning before questioning them and that appellants were in custody. Whether questioning by corrections officers constitutes an interrogation is a question of fact that this court will review under the clearly erroneous standard. State v. Denney, 152 Wn.App. 665, 671, 218 P.3d 633 (2009). A decision is clearly erroneous if we are "'left with a definite and firm conviction that a mistake has been committed.'" Id. (quoting State v. Hundley, 54 Wn.App. 377, 380, 773 P.2d 879 (1989),

aff'd, 115 Wn.2d 275, 796 P.2d 1266 (1990)).

A *Miranda* warning should be given "whenever a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Routine booking questions rarely constitute interrogation. Denney, 152 Wn.App. at 671. Whether the questions constitute interrogation ultimately depends on whether the officer should have known that the questions were "reasonably likely to elicit an incriminating response." Denney, 152 Wn.App. at 671. The focus of that test is the suspect's perception. Innis, 446 U.S. at 301. In addition, the officer's subjective intent and the connection between the crime charged and the question asked are probative. Denney, 152 Wn.App. at 671-72.

In Denney, a routine booking question constituted interrogation when it was directly probative of the crime charged. Denney, 152 Wn.App. at 673-74. In that case, Ms. Denney was arrested on suspicion of unlawful possession of morphine. *Id.* at 667. Jail personnel asked Ms. Denney whether she had taken any drugs in the last 72 hours and she replied that she had taken morphine. *Id.* at 668. The appellate court concluded that question constituted interrogation because it invited Ms. Denney to comment directly on the charge against her. *Id.* at 673-74. Appellants also cite State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127

(1988) “[T]he nature of the procedure during which the question is asked is not decisive; the nature of the question is.” Unlike Denney, the question here did not "invite[] an answer that would be a direct admission of guilt." Denney, 152 Wn.App. at 673.

Appellants’ argue that this is akin to that in Denney. But here the trial court reasoned that the questions were not directly probative of the crime charged. RP 153-57 The trial court in its ruling discussed, Miranda and Innis as well as Sargent and Denney and ruled as follows;

> The interview and the questionnaire is a standard questionnaire that the jail uses all the time. It is a routine questionnaire, but as we know from State v. Denny and the State v. Sargent case, we know that not all routine questions fall within the exception. The issue in this case is whether or not the question posed, are you a member of any gang is reasonably likely to produce an incriminating response because it invited the defendants to comment directly on the charges against them. That is the language right out of State vs. Denny. And this Court cannot find, based upon the evidence submitted and the arguments of counsel that gang affiliation is an element of any crime charged in this particular circumstance. While it may be the theory of the State as to why this particular crime took place the motive or intent of the parties, it is not a specific element of the crime charged

There is no ability to determine what appellant’s perception was regarding these questions, none of them took the stand. Officer Winmill was even unaware that the Prosecutor’s office had a gang unit. Vol. II RP 08,28,29,3012 Trial pg. 130. There was no error by the trial court in

admitting the statements made to Officer Winmill.

Once again not all police questioning constitutes interrogation. The Washington Supreme Court has noted that routine booking procedures do not require *Miranda* warnings where questions necessarily relate to booking a suspect. Sargent, 111 Wn.2d at 651; State v. Wheeler, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987). "A request for routine information necessary for basic identification purposes is not interrogation even if the information revealed is incriminating." State v. Walton, 64 Wn.App. 410, 414, 413, 824 P.2d 533 (1992). Because the determination of interrogation is essentially factual, we will not reverse the court's finding unless its determination was clearly erroneous. Walton, 64 Wn.App. at 414. Under a clearly erroneous standard, we will not overturn a finding of the lower court unless we are "left with a definite and firm conviction that a mistake has been committed." State v. Handley, 54 Wn.App. 377, 380, 773 P.2d 879 (1989).

Appellants also argue that using the statements violated their Fourteenth Amendment right to due process. They reason that it was fundamentally unfair to tell them that the answers would be used only for housing purposes, but later use them against him. They rely on Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and Johnson v. United States, 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704 (1943).

However, those cases hold that it is fundamentally unfair to use a defendant's silence against him. Doyle, 426 U.S. at 618 (using *post-Miranda* silence for impeachment violated due process); Johnson, 318 U.S. at 195-96 (supporting an adverse inference that invocation of Fifth Amendment right violated due process). They do not address the facts in this case.

This case is distinguishable from DeLeon, the actions of the trial court were not error and if there was error the other evidence was overwhelming.

RESPONSE TO ALLEGATION FOUR SUFFICIENCY

Appellant challenges the sufficiency of the evidence to support his three convictions for drive-by shooting. In reviewing a challenge to the sufficiency of the evidence, this court will view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992);

State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd,* 136 Wash.2d 939, 969 P.2d 90 (1998).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

The facts presented to the jury were without a doubt sufficient to meet the test set forth in, State v. Bucknell, 183 P.3d 1078, 1080 (WA 2008);

> In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 16 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of

> the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime may be established by either direct or circumstantial evidence, and one type is no more valuable than the other. State v. Thompson, 88 Wn.2d 13, 16, 558 P.2d 202, *appeal dismissed*, 434 U.S. 898 (1977). "Credibility determinations are within the sole province of the jury and are not subject to review." State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). (Emphasis mine.)

The appellants were in a car that fled the scene with the lights off at 4:00 AM; flight is a factor that can be weighed by the jury. State v. Price, 126 Wn. App. 617, 645, 109 P.3d 27 (2005), review denied 155 Wn.2d 1018, 124 P.3d 659 (2005):

> Evidence of flight is generally admissible as tending to show guilt, but the inference of flight must be "substantial and real" not "speculative, conjectural, or fanciful." State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). The evidence must be sufficient so as to create a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. Bruton, 66 Wn.2d at 112-13.

The appellant's culpability is further supported by their actions when the car was stopped and they acted very aggressively to the stopping officer and did not reveal that there were two people in the rear seat until after the stop occurred. This along with the fact that there were guns that

were obviously thrown from the car found along the side of the road and a nearly continuous chase by the two women who delivered newspapers and the police to include that this identified car was stopped only minutes after the shooting of an obviously occupied residence of a known rival gang member a house that had been shot at numerous times in the past.

State v. McChristian, 158 Wn.App. 392, 400-01, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011):

> Washington's complicity statute, RCW 9A.08.020, provides that a person is guilty of a crime if he is an accomplice of the person that committed the crime. A person is an accomplice under the statute if, with knowledge that it will promote or facilitate the commission of the crime, he aids another person in committing it. RCW 9A.08.020. General knowledge by an accomplice that a principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow. State v. Roberts, 142 Wash.2d 471, 513, 14 P.3d 713 (2000). Our Supreme Court has made clear, however, that an accomplice need not have knowledge of each element of the principal's crime to be convicted under RCW 9A.08.020; general knowledge of " the crime" is sufficient. Roberts, 142 Wash.2d at 513, 14 P.3d 713 (citing State v. Rice, 102 Wash.2d 120, 683 P.2d 199 (1984); State v. Davis, 101 Wash.2d 654, 682 P.2d 883 (1984)). " [A]n accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." Davis, 101 Wash.2d at 658, 682 P.2d 883. In other words, "an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor level assault, and need not have known that the principal was going to use deadly force or that the principal was armed." In re Pers.

> Restraint of Sarausad, 109 Wash.App. 824, 836, 39 P.3d 308 (2001).

Once a trigger is pulled that projectile does not stop until it has expended the incredible energy that propelled it from the gun. There is no dispute that this act occurred; the claim is that the police stopped the wrong Mitsubishi Gallant that was gray that was out on the roads near Outlook at 4:00 AM. The analysis must start at the more basic level as set forth in State v. Perez, 137 Wn.App. 97, 103, 151 P.3d 249 (Div. 3 2007):

> The test for sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wash.2d 1, 8, 133 P.3d 936 (2006); State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980).

Further in, In re Bowman, 162 Wn.2d 325, 332, 172 P.3d 681 (2007) the Washington State Supreme Court addressed whether drive-by shooting could be used as a bases for a felony murder conviction. The court stated the following analysis which is applicable to this case and the claim that the State did not show that the risk need not be to a specific person. There can be proof of this crime and that "does not require a victim."

> It is plain to see that the drive-by shooting statute does not criminalize conduct that causes bodily injury or fear of

> such injury. Rather, the statute criminalizes specific reckless conduct that is inherently dangerous and creates the risk of causing injury or death. Although a drive-by shooting may cause fear of bodily injury, bodily injury, or even death, such a result is not required for conviction. Drive-by shooting does not require a victim; it only requires that reckless conduct creates a risk that a person might be injured.

There were seven counts of assault filed, this was a situation where there were spent round found in various location to include the oven and the refrigerator. One witness testified the window next to her had a hole in it. The circumstances of the shooting here provided sufficient evidence of these shooter's intent to assault the known Norteno member in his home and whomever else was in the home who obviously were associating with the Norteno gang. "Intent to attempt a crime may be inferred from all the facts and circumstances." State v. Bencivenga, 137 Wash.2d 703, 709, 974 P.2d 832 (1999). The reasoning set out in the trial court's oral ruling denying the motion to dismiss at the end of the State's case is very helpful;

> THE COURT: On a motion of this type the Court must view the evidence in a light most favorable to the State. In viewing the evidence in this case it appears to the Courtthat the State has proved the following:
> That on March 14, 2011, that seven individuals were occupying a residence at 10 First Street in Outlook, Washington. At approximately 4:00 a.m. in the morning shots were fired upon that residence. The court's count of approximately 22 separate firings based upon the shell casings at the residence that was secured by police.That a charcoal gray Mitsubishi automobile was observed leaving from that general area approaching a stop sign with its lights

off. They failed to stop at the stop sign and turned to drive away from the scene. That was specifically observed in this case by two independent witnesses who then followed in behind the vehicle and specifically identified the vehicle as a charcoal gray Mitsubishi automobile. They continued to follow that automobile while one of the occupants called the police through 9-1-1, gave a description of the automobile. They actually lost sight of the automobile when the vehicle occupied -- when the charcoal gray Mitsubishi automobile turned around and started heading back towards them. They continued to see his tail lights for a period of time. Shortly thereafter they were stopped by law enforcement. The witnesses were stopped by law enforcement and advised of the general direction that the vehicle was traveling. It was traveling in a general direction towards the intersection of North Zillah Road and Yakima Valley Highway.

At that location the vehicle was approaching a stop sign intending to turn on Yakima Valley Highway. That vehicle was observed by Deputy Rojas who recognized the vehicle as the general description out for this particular incident. He was able to turn around after he passed through the intersection and crossed over an irrigation canal and as he turned around he then started following the vehicle, but for a short period of time
he could not have direct contact with the vehicle or direct sight with the vehicle except to see its tail lights. The vehicle was later stopped about three miles from that intersection and the four defendants were located in the vehicle. Mr. Mancilla was in the front passenger seat.

A subsequent investigation revealed that about 100 yards -- I think the direction was south of the intersection where the vehicle was first observed by Deputy Rojas that three weapons were discovered. Those weapons viewed in a light most favorable to the State would indicate to the Court that they were thrown from the passenger side of the gray Mitsubishi automobile. That the specific guns have been connected to the scene of the incident both by evaluation of the shell casings and the bullet fragments and also there appears to be some evidence from a DNA standpoint that could not exclude certain defendants in this particular case.

The evidence further shows that subsequent

> investigation into this matter by law enforcement convinces this Court that the defendants, each one of them, are members of the same LVL gang, that the house that was subjected to the firing in this case was a known house occupied by a member of the Norteno gang and specifically Mr. Elias Rincon. There is also evidence that the brother Angel also used to reside at that residence.
>
> There is also evidence submitted by the State in this case that there was a blue gang sign painted on a telephone pedestal or a connecting box out in front of the house which would indicate that there was -- and again, in a light most favorable to the State that there was a specific reason why this particular house was hit and that it was hit by a house associated with a gang -- associated with blue which is that of the LVL gang.
>
> The Court also finds in this case that under the accomplice statute that the -- in fact cited by Mr. Alford, that the WPIC defines accomplice as a person who is present at the scene and ready to assist by his presence in the aiding of the commission of a crime. There is no direct evidence of that. However, there is in the opinion of the Court substantial circumstantial evidence for this jury to conclude that one or more of the defendants in this case were an accomplice to this particular act. And it also convinces the Court that the State has proved by a preponderance of the evidence at this point in time that there was the four individuals named in this case were present at the scene of the accident [sic] and the jury could conclude -- and the Court finds that there is sufficient evidence for the jury to conclude that their mere presence at the scene was -- or actually not their mere presence but their presence at the scene and their ability to assist by that presence in aiding the commission of the crime that undertook in this case would implicate all of the named defendants in this particular circumstance. Vol. 091112 VIII pgs. 887-889

State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990).

Deference must be given to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and

generally weighs the persuasiveness of the evidence.

Appellants move for an arrested judgment one of the allegations was that there was insufficient proof of the first degree assault charges, this trial court ruled as follows:

> THE COURT: Thank you, Mr. Hintze. I'm going to address the issue s that were raised by the defense in Mr. Alford's motion in the order in which they are presented.
>
> The first issue is the allegation that there was not a sufficient evidence to support a finding that the shooter had possessed the requisite intent to inflict great bodily harm, which is one of the elements of first degree assault. The evidence in this case is very clear that the defendants arrived at the location in Outlook. That they got out of their vehicle and at least three of the four stood spread out in the front entrance of this particular mobile home at 4:00 in the morning and opened fire. And there is further evidence in this case suggests that they knew, or should have known, that there were people inside that mobile home at the time they opened fire.
>
> Mr. Gomez's vehicle was parked right in front of the vehicle -- or right in front of the mobile home, which is an indication to this Court that they clearly knew or should have known that that particular mobile home was occupied at the time the y opened fire. And to suggest that they did not have the requisite intent to cause grievous bodily harm or serious injury to the occupants of that mobile home in this Court's opinion is foolish.
>
> The next issue is whether or not there was sufficient evidence that the victims felt the requisite apprehension and fear of bodily injury.
>
> Maria Rincon testified, quote, I was frightened. I covered my children with my body to protect them , close quote. She testified that she was scared and angry that her children were crying and scared.
>
> Jose Lopez Gomez testified that he was awakened to the sound of gunfire. He was frightened and he was worried what was happening.

Daisy Cordoso testified that she was afraid while the shots were being fired. She testified that the window by the bunk bed where she slept was broken. It looked like a bullet had gone through it.

Elias Rincon Mendoza. He was the tough guy. He was the guy that came before this Court and testified that he doesn't get worried when he hears gunfire. He testified that he didn't know if it was gunfire or fireworks going off and thought it was fireworks. He also made it clear that he doesn't want to testify in this case because he's not a snitch. He testified that he was a member of the North Side Gang which are rivals with the LVL.

Veronica Lopez, one of the witnesses that was delivering papers that morning testified she was scared because she had just heard gun shots. And under cross examination she testified, I was shocked.

The Court finds that this is ample evidence that the victims in this case testified to the requisite apprehension and fear of bodily injury because of the gunfire that was opened on the mobile home in this case and the court finds there is sufficient evidence to substantiate that.

RP 100112 Sentencing pgs. 12-14

RESPONSE TO ALLEGATION FIVE TRANSFERRED INTENT.

As stated by the court in State v. Johnson, 147 Wn.App. 276, 194 P.3d 1009 (2008);

As our Supreme Court explained in State v. Wilson, so far as first degree assault is concerned, the doctrine of transferred intent had been codified by RCW 9A.36.011:

Under a literal interpretation of RCW 9A.36.011, a person is guilty of assault in the first degree if he or she, with the intent to inflict great bodily harm, assaults another with a firearm, administers poison to another, or assaults another person and causes great bodily harm. The mens rea for this crime is the "intent to inflict great bodily harm" . Assault in the first degree requires

> a specific intent; but it does not, under all circumstances, require that the specific intent match a specific victim. Consequently, once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 to any unintended victim. 125 Wash.2d 212, 218, 883 P.2d 320 (1994).

This was a known gang home. At trial there was testimony that was introduced without objection, that this home had been hit by gunfire on numerous previous occasions. The four defendants were by their own admission members of the LVL –Sureno's street gang and wore blue clothing and had tattoo's that identified then as belonging to that gang. The Sureno's claim the number 13 and the color blue. Officer Ortiz does not just testify to the general actions and conduct of gangs, throughout his testimony he is asked to identify from states exhibits, pictures of the defendants, what the various tattoos and items of clothing mean in the gang culture. Vol. VII 091012 pgs. 836-43 – Vol. VIII 091112 pgs. 853-60

One of the victims testified that he was in fact a Norteno who's gang claimed the color red. (This victim, Elias Rincon Mendoza's testimony also makes it crystal clear why the introduction of gang information was necessary.) This young man testified that he had nothing to say, that he was awakened by fireworks, that he was not nervous while

bullets were flying toward him, that his home had been shot at "plenty of times" that he was not nervous when his house is shot at and that he was not nervous because he was "just used to it." He testified that the only reason that he was in court to testify was that "…you guys are making me come or else I get a warrant." Vol. III 0831,090412 pg 268-9 Mr. Mendoza further testified that both he and his brother are north side Nortenos and that he was Norteno and Surenos were enemies. Vol. III pgs. 271-2.

While there was no testimony that the four defendants went to that house to specifically assault or shoot the self-professed gang member from the rival gang who testified at trial the facts placed into evidence do support the fact that a person approaching that home at 4:00 am would know that there were people in that home, sleeping or awake. It would be a reasonable assumption by the jury that the Norteno was home at that time, therefore as in State v. Elmi, 166 Wash.2d 209, 215, 207 P.3d 439 (2009) where the court upheld the transferred intent instruction this court should do so here because the Norteno can be equated to the estranged wife of Elmi and the other persons within the home in Outlook can therefore be clearly and reasonably equated to the children in Elmi.

Appellants argue that there is insufficient evidence that anyone intended to shoot someone inside the residence because there is no

evidence that the shooters knew there was anyone in the house. Because the first degree assault statute does not require that the specific intent to inflict great bodily harm match a specific victim, this argument fails.

A person is guilty of first degree assault if, with intent to inflict great bodily harm, he assaults another with a firearm. RCW 9A.36.01 l(1)(a). A person acts with intent when he acts with the objective or purpose to accomplish a result constituting a crime. RCW 9A.08.010(1)(a). Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances. State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). "Great bodily harm" means "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). An assault may be (1).an attempt to inflict bodily injury upon another, (2) an unlawful touching with criminal intent, (3) or putting another in apprehension of harm whether or not the actor intends to inflict harm. Wilson, 125 Wn.2d at 218 (quoting State v. Bland, 71 Wn.App. 345, 353, 860 P.2d 1046 (1993)). First degree assault does not, under all circumstances, require that the specific intent match a specific victim. Wilson, 125 Wn.2d at 218.

In State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009), our

Supreme Court affirmed the defendant's convictions for first degree assault against three unintended victims. There, the defendant fired shots into a house where his estranged wife was staying with three children. Elmi, 166 Wn.2d at 212. The jury convicted him on four counts of first degree assault. Elmi argued that the State did not prove specific intent to assault the children. Elmi, *166* Wn.2d at 213-214. The court disagreed, holding that, where a defendant intends to shoot into and to hit someone occupying a house or a car, he bears the risk of multiple convictions when multiple victims are present, regardless of whether the defendant knows of their presence. Elmi, 166 Wn.2d at 218.

Here, Appellants do not dispute that shots were fired into the house but that there was any specific intend to inflict great bodily harm on anyone or as alleged by the State the Norteno gang member known to reside there. Although appellants may not have known of Elias Mendoza was present, an assault may be committed by putting another in apprehension of harm, even if the actor does not intend to inflict harm. *See* Wilson, 125 Wn.2d at 218. Therefore, under Elmi, the appellants—as principles or through accomplice liability, bore the risk of assault convictions for any individuals who were in the home, whether or not they knew of their presence. As the trial court indicted this case is factually similar to Elmi. The logical conclusion of appellants argument that the

charge cannot stand if there is not "known" person who the shooter was intending to assault is ludicrous. Perhaps as here the person is just a rival gang member. The holding in Elmi is not such that an individual would be free to spray a building with an assault weapon and not face assault charges if no one was hit based on the theory that the shooter had just picked a random building and did not intend to hit a specific, named, person.

RESPONSE TO ALLEGATION SIX PUBLIC TRIAL.

This issue was addressed by the Washington State Supreme Court in State v. Andy, 182 Wn.2d 294, 340 P.3d 840 (Wash. 2014), which determined that there was no violation of Andy's rights based on a nearly identical fact pattern. The record in this case was supplemented with the verbatim report of proceedings from Andy. Based on the record before this court there can be no determination other than the rights of these defendants, as with Andy, were not violated. Andy at 305-6:

> When defendants assert public trial rights violations, they have the burden to show that a courtroom closure occurred. In this case, the trial judge made findings of fact that the courthouse was open at all times during Andy's trial and that the sign regarding courthouse hours did not deter the public from attending Andy's trial. Those findings of fact were supported by substantial evidence, including testimony by security officers. On this record, Andy has not shown that a closure occurred. We affirm his conviction.

RESPONSE TO ALLEGATION SEVEN – FIREARM ENHANCEMENTS (MANCILLA)

State v. Mandanas, 168 Wn.2d 84, 87-88, 228 P.3d 13 (2010)

addresses the analysis in this type of inquiry;

> Statutory interpretation is a question of law that this court reviews de novo." "When interpreting any statute, our primary objective is to 'ascertain and give effect to the intent of the Legislature.' 'In order to determine legislative intent, we begin with the statute's plain language and ordinary meaning.' If the plain language of a statute is subject to only one interpretation, then our inquiry ends. If a statute is subject to more than one reasonable interpretation, it is ambiguous. The rule of lenity requires us to interpret an ambiguous criminal statute in favor of the defendant absent legislative intent to the contrary. (Citations omitted.)

This issue has been addressed by the Washington State Supreme Court in State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003).

DeSantiago was cited by the trial court at sentencing;

> And the Court finds based upon State v. Miller that it was appropriate for the Court -- it was appropriate for the jury in this case to conclude that each defendant is charged with possession of each weapon that was recovered , which means that for each individual that the deadly weapon enhancement is basically for three weapons. The deadly weapon enhancement also applies not only to the seven convictions for first degree assault, it also applies to the conviction for the drive-by shooting.
> …
> And the records should reflect I made reference to State v. Wilson on the variety of different weapons enhancements. In fact , I was mistaken. The case is State v. De Santiago at 149 Wn.2d 402, a 2003 decision that indicates that if the standard range under this section exceeds the statutory maximum

> sentence for the offense the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of the firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense the portion of the sentence representing the enhancement may not be reduced because all firearms and deadly weapons enhancements are mandatory. So State v. De Santiago very clearly indicates that there are multiple enhancements in this particular circumstance.
>
> RP 100112 Sentencing pgs. 20-22

Clearly RCW 9.94A.533 "Adjustments to standard sentences" can be read no other way than mandating these sentences be run as was done by the trial court;

> (3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with **a** firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. **If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement.** If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020 :
>
> (a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f)

of this subsection;

…

(e) Notwithstanding any other provision of law, **all firearm enhancements under this section are mandatory,** shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for **all offenses** sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(3) ;

(f) **The firearm enhancements in this section shall apply to all felony crimes except** the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced. (Emphasis mine.)

See also State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (Wash. 2005); State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005);

Likewise, in State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003), we interpreted RCW 9.94A.533(3) and (4), which allows sentence enhancement if a defendant or an accomplice was armed with " 'a' firearm" or " 'a' deadly weapon." *Id.* at 418, 68 P.3d 1065. We concluded that the statute allows a defendant to "be punished for 'each' weapon involved." *Id.* at 419, 68 P.3d 1065.

The trial court correctly sentenced all of the Appellants to whom

this multiple weapon enhancement statute applied.

RESPONSE TO ALLEGATION EIGHT ACCOMPLICE.

State v. Gatlin, 158 Wn.App. 126, 132, 241 P.3d 443 (Div. 3 2010);

> A person is liable as an accomplice of another person in the commission of a crime if, "With knowledge that it will promote or facilitate the commission of the crime, he ... aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a)(ii). An accomplice need not participate in each element of the crime or be present when the crime is actually committed. State v. Boast, 87 Wn.2d 447, 455-56, 553 P.2d 1322 (1976). Instead, an accomplice need have only general knowledge that he is encouraging or assisting in the criminal act. State v. Ferreira, 69 Wn.App. 465, 472, 850 P.2d 541 (1993). Thereafter, having agreed to participate in the criminal act, he runs the risk that the principal will exceed the scope of the preplanned illegality. State v. Jackson, 87 Wn.App. 801, 818, 944 P.2d 403 (1997), *aff'd on other grounds,* 137 Wn.2d 712, 976 P.2d 1229 (1999).

The trial court addressed this issue on two separate occasions during the trial. The first came at the close of the State's case, the court ruled as follows;

> The Court also finds in this case that under the accomplice statute that the -- in fact cited by Mr. Alford, that the WPIC defines accomplice as a person who is present at the scene and ready to assist by his presence in the aiding of the commission of a crime. There is no direct evidence of that. However, there is in the opinion of the Court substantial circumstantial evidence for this jury to conclude that one or more of the defendants in this case were an accomplice to this particular act. And it also

> convinces the Court that the State has proved by a preponderance of the evidence at this point in time that there was the four individuals named in this case were present at the scene of the accident [sic] and the jury could conclude -- and the Court finds that there is sufficient evidence for the jury to conclude that their mere presence at the scene was -- or actually not their mere presence but their presence at the scene and their ability to assist by that presence in aiding the commission of the crime that undertook in this case would implicate all of the named defendants in this particular circumstance.
> Vol. VIII 091112 Trial RP 887-8

The trial court's ruling at the time it considered the motion to arrest judgment addresses this issue the ruling covers three pages RP 100112 Sentencing pgs. 14-17. The final paragraph is unequivocal;

> There is no evidence in this case that suggests Mr. Mancilla was not present at the scene, or any of the other individuals. The evidence of three guns used during the shooting, all four of the defendants in the same vehicle when it stopped 15 minutes or so after the shooting occurred, the descriptions of the vehicle and the observations made by the two individuals that testified concerning their observations of the vehicle leaving the scene of the shooting and following it in the general direction towards the Zillah area on the back roads was sufficient evidence -- circumstantial evidence to support the jury's conclusion that each was either acting as a principal or an accomplice in the shooting. Circumstantial evidence is to be given just as much weight as direct evidence in this case. While there is no direct evidence of a witness observing these four defendants, the circumstantial evidence in this case and in the opinion of the Court is clearly sufficient viewed in a light most favorable to the State to support the jury's conclusion in this case.
> RP 100112 Sentencing pgs. 17

All elements of a crime must be included in a "to convict"

instruction. State v. Teal, 152 Wn.2d 333, 338, 96 P.3d 974 (2004). But our Supreme Court has recognized that accomplice liability is not an element of an offense, and thus need not be added to a "to convict" instruction. Teal, 152 Wn.2d at 339. Rather, it is sufficient to include a separate instruction on accomplice liability. Teal, 152 Wn.2dat 339. Such a separate instruction was provided here.

A person is an accomplice to a crime if,

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
(i) Solicits, commands, encourages, or requests such other person to commit it; or
(ii) (ii) Aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020(3).

As stated in State v. Hoffman, 116 Wn.2d 51, 104, 804 P.2d 577 (1991);

> The defendant in State v. Guloy, 104 Wn.2d 412, 413, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 116 Wn.2d 104 S.Ct. 1208, 89 L.Ed.2d 321 (1986) argued that in order for him to be convicted of aggravated murder in the first degree the State must prove that the accomplice intended to murder the victim. As we there pointed out, however, the accomplice statute (RCW 9A.08.020(3)(a)) contains no such requirement. Guloy then quoted from State v. Bockman, 37 Wn.App. 474, 491, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984):
> RCW 9A.08.020(3)(a) states that an accomplice is one who aids a principal: "[w]ith knowledge that it will promote or facilitate the commission of the crime ..." (Italics ours.) The accomplice statute implicitly demonstrates that the State need not prove that the principal and accomplice share the same mental state. There was no

> error as to the instruction concerning the mental state of the accomplice.
>
> Guloy, 104 Wn.2d at 431, 705 P.2d 1182. Other decisions have similarly addressed this issue and have similarly concluded that the accomplice liability statute predicates criminal liability on general knowledge of the crime and not on specific knowledge of the elements of the participant's crime. Accomplice liability represents a legislative decision that one who participates in a crime is guilty as a principal, regardless of the degree of the participation. (Footnotes omitted)

To be an accomplice to a crime, the defendant must associate himself with the undertaking; participate in it as something he desires to bring about, and seek by his actions to make it succeed. In re Welfare of Wilson, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979).

As the trial court set forth in its ruling the testimony presented by the State was more than sufficient to convict the appellants as principles or as accomplices.

The facts are undisputed regarding what occurred at the home in Outlook "someone" shot numerous rounds of ammunition resulting in bullets piercing the walls of the home and parts of the interior of that home including the refrigerator and the oven, there was literally projectiles found in food. That at the scene the perpetrators fled in a car. That immediately after the shots witnesses say "a" Mitsubishi Gallant gray in color without it lights on some from the area of the shooting. The witnesses were fortuitously related to some of the people in the home.

These witnesses called 911 and followed this car but eventually lost sight of it. Soon after losing sight the witnesses were contacted by police looking for the car. That within 15 minutes of the shooting a gray Mitsubishi Gallant gray in color was stopped with all four appellants in the car. They were identified as member of the Sureno gang, the home was occupied by Norteno gang member(s) and family. There were no weapons in the car when stopped by not far from where the officer first saw this care the police recovered three weapons. All three were tied to the shooting at the home in Outlook. DNA was taken from defendants and weapons and many of the defendants could not be excluded from the test indicating that their genetic profile may have been found on the weapons.

There is no doubt that these members of the Sureno gang acted in concert to carry out this crime. There was no error in giving this instruction.

RESPONSE TO ALLEGATION NINE – TWELVE - PERSISTENT OFFENDER – POAA is a violation of the Equal Protection Clause or the 14th Amendment. (Armando Lopez)

The Washington State Supreme Court recently addressed the Persistent Offender Accountability Act (POAA) and once again found it to be that law to be constitutional. State v. Witherspoon, 180 Wn.2d 875, 892, 329 P.3d 888 (2014) Witherspoon upholds the use of the POAA and its method by which it is imposed.

The Witherspoon court states:

…the Court specifically noted, "By reversing the judgment below, we are not . . . 'find[ing] determinate sentencing schemes unconstitutional.' This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Id.* at 308 (second alteration in original) (citation omitted). Nowhere in Blakely did the Court question Apprendis exception for prior convictions or the propriety of determinate sentencing schemes.

…Like Blakely, nowhere in Alleyne did the Court question Apprendis exception for prior convictions. It is improper for us to read this exception out of Sixth Amendment doctrine unless and until the United States Supreme Court says otherwise. Accordingly, Witherspoon's argument that recent United States Supreme Court precedent dictates that his prior convictions must be proved to a jury beyond a reasonable doubt is unsupported.

We have long held that for the purposes of the POAA, a judge may find the fact of a prior conviction by a preponderance of the evidence. In Manussier, 129 Wn.2d at 681-84, we held that because other portions of the SRA utilize a preponderance standard, the appropriate standard for the POAA is by a preponderance of the evidence. We also held that the POAA does not violate state or federal due process by not requiring that the existence of prior strike offenses be decided by a jury. *Id.* at 682-83. This court has consistently followed this holding. We have repeatedly held that the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes. *See* State v. McKague, 172 Wn.2d 802, 803 n.1, 262 P.3d 1225 (2011) (collecting cases); *see also* In re Pers. Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005) ("In applying Apprendi, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt."); State v. Smith, 150 Wn.2d 135, 139, 75 P.3d 934 (2003) (prior convictions do not need to be proved to a jury beyond a reasonable doubt for the purposes of sentencing under the POAA).

…

United States Supreme Court precedent, as well as this court's own precedent, dictate that under the POAA, the State must prove previous convictions by a preponderance of the evidence and the defendant is not entitled to a jury determination on this issue.

This court in State v. Powell, 290 P.3d 353 (Wash.App. Div. 3 2012) ruled:

> We review de novo a sentencing court's offender score calculation and its interpretation of the POAA. State v. Knippling, 166 Wash.2d 93, 98, 206 P.3d 332 (2009).
>
> Under the POAA, the trial court must sentence a persistent offender to life in prison without the possibility of parole. *Id.;* RCW 9.94A.570.
>
> …To establish a defendant's criminal history for POAA and SRA sentencing purposes, the State must prove the existence of his or her prior convictions by a mere preponderance of evidence. Knippling, 166 Wn.2d at 100, 206 P.3d 332 (quoting In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005)). Although this burden of proof requires "some showing that the defendant before the court for sentencing and the person named in the prior conviction[s] are the same person," when the prior convictions at issue are under the same name as the defendant before the sentencing court, identity of names is sufficient proof of this requirement. State v. Ammons, 105 Wn.2d 175, 190, 713 P.2d 719, 718 P.2d 796 (1986).

There was no error by the trial court's jury instructions the POAA did not have to be included as an instruction to the jury, it is determined the court not the jury. There was no error on the part of the trial court in determining Appellants prior criminal history based on information presented to it by the State.

There is no violation of the Equal Protection Clause nor the Fourteenth Amendment. State v. Wheeler, 145 Wn.2d 116, 120-21, 34 P.3d 799 (Wash. 2001);

> We have previously upheld the POAA as constitutional. *See* State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996) (rejecting challenges based on substantive and procedural due process), *cert. denied,* 520 U.S. 1201, 117 S.Ct. 1563, 137 L.Ed.2d 709 (1997)
> …These companion cases hold that the prior convictions used to prove that a defendant is a persistent offender need not be charged in the information, submitted to the jury, or proved beyond a reasonable doubt. Manussier, 129 Wn.2d at 682, 921 P.2d 473; *Rivers,* 129 Wn.2d at 712, 921 P.2d 495; Thorne, 129 Wn.2d at 779-84, 921 P.2d 514.
> Generally, the State must prove every element of an offense charged beyond a reasonable doubt. Thorne, 129 Wn.2d at 783, 921 P.2d 514 (citing State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995)). However, traditional factors considered by a judge in determining the appropriate sentence, such as prior criminal history, are not elements of the crime. In Thorne, this court concluded that the POAA is a sentencing statute codified as part of the SRA and does not define the "elements" of the status of being a habitual criminal. *Id.* at 779, 921 P.2d 514. Therefore, the prior convictions that result in a sentence of life imprisonment without the possibility of parole need not be pleaded in the information. All that is required by the constitution and the statute is a sentencing hearing where the trial judge decides by a preponderance of the evidence whether the prior convictions exist. RCW 9.94A.110; Thorne, 129 Wn.2d at 782, 921 P.2d 514.

See also State v. Thorne, 129 Wn.2d 736, 771-2, 921 P.2d 514 (1996)

> Recidivist criminals are not a semisuspect class. Therefore the proper test to be applied in these cases, where

> only a liberty interest is asserted, is the "rational basis" test. Under this test, a legislative classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. The burden is on the party challenging the classification to show that it is purely arbitrary.
>
> …The rational basis test requires only that the statute's means are rationally related to its goal, not that the means are the best way of achieving the goal. The legislating body has broad discretion to determine what the public interest demands and what measures are necessary to protect that interest. The classification of criminals as "persistent offenders" based on having committed three serious offenses is rationally related to the goals enunciated in the Act. A state is justified in punishing a recidivist more severely than it punishes a first offender.
>
> We find that the Persistent Offender Accountability Act passes the rational basis test of the equal protection guarantee. (Citations omitted.)

IV. CONCLUSION

For the reasons set forth above this court should deny allegations and affirm the actions of the trial court.

Respectfully submitted this 21st day of July 2015,

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DECLARATION OF SERVICE

I, David B. Trefry state that on July 21, 2015, I emailed a copy, by agreement of the parties, of the Respondent's Brief, to : Andrea Burkhart at Andrea@BurkhartandBurkhart.com, Gregory Link at wapofficemail@washapp.org, Ken Kato at khkato@comcast.net and David Gasch at gaschlaw@msn.com

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

DATED this 21st day of July, 2015 at Spokane, Washington.

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