

NO. 94953-1

THE SUPREME COURT OF
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

LUIS ALBERTO ANGUIANO,
Appellant/Petitioner.

ANSWER TO PETITION FOR REVIEW
BY YAKIMA COUNTY

David B. Trefry
WSBA #16050
Senior Deputy Prosecuting Attorney
P.O. Box 4846
Spokane, WA 99220

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2nd St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS	PAGE
TABLE OF AUTHORITIES	ii-iii
A. INTRODUCTION	1
ISSUES PRESENTED BY PETITION	1
1. The Supreme Court should accept review to determine the unit of prosecution for firearm enhancements.	
A. The unit of prosecution is one firearm enhancement per offense, regardless of the number of firearms carried.	
B. The Court of Appeals erroneously applied this court’s dicta in DeSantiago as “binding authority.”	
2. The Supreme Court should accept review and determine if the admission of prior “bad act” evidence can violate due process.	
A. The Supreme Court should clarify that discretionary decisions violating constitutional rights are reviewed de novo.	
B. The Supreme Court should reverse because jurors may have voted to convict Mr. Anguiano based on propensity evidence.	
C. The Court of Appeals failed to apply the correct standards to Mr. Anguiano’s argument.	
3. The evidence was insufficient to convict Mr. Anguiano of Murder by Extreme Indifference.	
ANSWER TO ISSUES PRESENTED BY PETITION.....	2
1. The Court of Appeals opinion does not meet the edicts of any section of RAP 13.4(b).	4
2. This Court should not and need not accept review to determine the unit of prosecution for firearms, that was decided by this Court fourteen years ago in <u>State v. DeSantiago</u> , 149 Wn.2d 402, 68 P.3d 1065 (2003)	
3. The Court of Appeals opinion affirming the trial court’s allowance of the use of ER 404(b) information was such that there is no basis for this court to further review this allegation.	
4. The Court of Appeals correctly affirmed Anguiano’s conviction for murder by extreme indifference. The evidence presented by the State was sufficient to find him guilty beyond a reasonable doubt.	
B. STATEMENT OF THE CASE.....	2

C. ARGUMENT	3
D. CONCLUSION	14
APPENDIX	15

TABLE OF AUTHORITIES	PAGE
State Cases	
<u>State v. Adams</u> , 138 Wn.App. 36, 155 P.3d 989 (2007)	12
<u>State v. Clark</u> , 143 Wn.2d 731, 24 P.3d 1006 (2001)	10
<u>State v. DeSantiago</u> , 149 Wn.2d 402, 68 P.3d 1065 (2003)	3,5
<u>State v. Graham</u> , 153 Wn.2d 400, 103 P.3d 1238.	3
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	11
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	14
<u>State v. Houston-Sconiers</u> , 188 Wn.2d 1, 391 P.3d 409 (2017).....	4
<u>State v. Jacobs</u> , 154 Wn.2d 596, 115 P.3d 281 (2005).....	3
<u>State v. Norlin</u> , 134 Wn.2d 570, 951 P.2d 1131 (1998).....	7
<u>State v. Ose</u> , 156 Wn.2d 140, 124 P.3d 635 (2005).....	4
<u>State v. Pastrana</u> , 94 Wn.App. 463, 972 P.2d 557 (1999)	12
<u>State v. Stein</u> , 140 Wn. App. 43, 165 P.3d 16 (2007).....	7
<u>State v. Varnell</u> , 162 Wn.2d 165, 170 P.3d 24 (2007)	4
Federal Cases.	
Rules	
RAP 13.4.....	passim
Statutes	
RCW 9A.32.030(1)(b).....	11

A. INTRODUCTION.

A jury found Anguiano guilty as charged. He was convicted of first degree murder – extreme indifference, second degree murder, first-degree assault - against the deceased, Mr. Burkybile, first degree assault - against Yolauni Hueso the deceased wife, and attempted first-degree burglary. The jury also found fifteen firearm enhancements based on the three guns that were used and the number of counts which they found to have been committed beyond a reasonable doubt.

Anguiano was sentenced to just over 69 years for the conviction for first degree murder and the first degree assault of Yolauni Hueso. The trial court amended the judgment and sentence to vacate counts III and VI, this was done by agreement of the parties after the appeal was filed.

The Court of Appeals affirmed the convictions and the weapons enhancements.

ISSUES PRESENTED BY PETITION

1. The Supreme Court should accept review to determine the unit of prosecution for firearm enhancements.
 - A. The unit of prosecution is one firearm enhancement per offense, regardless of the number of firearms carried.
 - B. The Court of Appeals erroneously applied this court's dicta in DeSantiago as "binding authority."
2. The Supreme Court should accept review and determine if the admission of prior "bad act" evidence can violate due process.
 - A. The Supreme Court should clarify that discretionary decisions violating constitutional rights are reviewed de novo.

- B. The Supreme Court should reverse because jurors may have voted to convict Mr. Anguiano based on propensity evidence.
- C. The Court of Appeals failed to apply the correct standards to Mr. Anguiano's argument.
- 3. The evidence was insufficient to convict Mr. Anguiano of Murder by Extreme Indifference.

ANSWER TO ISSUES PRESENTED BY PETITION

- 1. The Court of Appeals opinion does not merit review under any section of RAP 13.4(b).
- 2. This Court should not and need not accept review to determine the unit of prosecution for firearms, that was decided by this Court fourteen years ago in State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003)
- 3. The Court of Appeals opinion affirming the trial court's allowance of the use of ER 404(b) information was such that there is no basis for this court to further review this allegation. The Court of Appeals correctly addressed constitutional aspects of whether the process used to select the jury was fair and impartial. Therefore, review of that portion of the opinion is not warranted.
- 4. The Court of Appeals correctly affirmed Anguiano's conviction for murder by extreme indifference. The evidence presented by the State was sufficient to find him guilty beyond a reasonable doubt.

B. STATEMENT OF THE CASE

The State set forth the facts of this criminal act in great detail in its opening brief, this fact section was nearly twenty-two pages in length.

The briefing done in the court of appeals file in totality has been forwarded to this court. The State has also appended the original statement of the case from the State's opening brief as an appendix to this answer therefore, the State will not set forth a separate facts section in the body of this answer.

ARGUMENT

1. There is absolutely no basis or reason for this court to accept review of this allegation. The ruling in State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003) is not dicta and therefore the Court of Appeals reliance on this court ruling in that case need not be reviewed.

Anguiano alleges that this issue has not been properly addressed by this court. He declares that this court's ruling in *DeSantiago* is "dicta" and therefore, the Court of Appeals wrongly used the ruling in *DeSantiago* as a bases to uphold the numerous firearm enhancements found by the jury and imposed by the trial court.

This claim is unfounded.

This court cited *DeSantiago* in *State v. Graham*, 153 Wn.2d 400, 406, 103 P.3d 1238 (2005) stating; "In *State v. DeSantiago*, 149 Wn.2d 402, 68 P.3d 1065 (2003), we applied the *Westling* analysis to the use of "a," rather than "any," in weapon enhancement statutes to support our holding that the plain language of the statutes required a sentence enhancement for each weapon carried during offense. *Id.* at 419, 68 P.3d 1065."

In *State v. Jacobs*, 154 Wn.2d 596, 602, 115 P.3d 281 (2005) this court stated "The Court of Appeals quoted *State v. DeSantiago*, 149 Wash.2d 402, 418, 68 P.3d 1065 (2003), for our holding that all firearm

and deadly weapon enhancements are mandatory and must be served consecutively. Jacobs, 121 Wn.App. at 683, 89 P.3d 232.”

State v. Ose, 156 Wn.2d 140, 147, 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. See also State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (Wash. 2005)

State v. Varnell, 162 Wn.2d 165, 174, 170 P.3d 24 (Wash. 2007)
“Just as in Ose, the word "a" makes the unit of punishment each crime solicited. See also State v. Root, 141 Wash.2d 701, 710-11, 9 P.3d 214 (2000) ("a minor" makes the unit of prosecution each minor); State v. DeSantiago, 149 Wash.2d 402, 419, 68 P.3d 1065 (2003) ("a firearm" means the prosecution unit is each firearm)”

Finally, in a very recent case, State v. Houston-Sconiers, 188 Wn.2d 1, 25, 391 P.3d 409 (Wash. 2017) this court indicated that a trial court had the discretion to alter the mandatory nature of certain sentencing provisions, however the court stated in that opinion “We have also held that our firearm enhancement statutes require a sentencing court to impose

separate sentence enhancements consecutive to the substantive crime and to other enhancements for **each firearm** or deadly weapon used, but without referring to juveniles. State v. DeSantiago, 149 Wn.2d 402, 416, 420-21, 68 P.3d 1065 (2003).” (Emphasis added.)

The law is clear, the imposition of multiple enhancements for multiple weapons is what the legislature mandated. The trial court correctly sentenced Anguiano and the Court of Appeals correctly applied the rulings of this court set forth as black letter law, not dicta, in DeSantiago. There is no basis for review under RAP 13.4(b) (3) and (4) as claimed by Petitioner. This court should deny review.

2. The Court of Appeals affirmed the trial court’s decision regarding the admission of ER 404(b), prior bad act, information on two bases: ER 404(b) and harmless error. Petitioner now asks this court to review this case and to reset an enormously broad area of appellate review. Stating that all cases of this nature should be reviewed “de novo” a change that would have enormous implications and allow a defendant to in effect have his second day in court merely by alleging that there were “discretionary decisions violating constitutional rights.” (Petition at 9) The is no basis under RAP 13.4(b) for this court to accept review.

Anguiano sets forth in his petition a section that alleges that this court has used a conflicting standard to review claims of this nature and this case would be appropriate for review because of that. He claims that this court should require de novo review for any allegation “of discretionary decisions violating an accused constitutional rights.”

(Petition at 9). Such a test, a standard of review if implemented by this court would result in nearly any allegation raised by an appellant being reviewed de novo because, if Anguiano's argument is taken to its fullest, this standardized test would be based purely on those allegations raised by the defendant/appellant themselves. This would be an impossible burden on the courts and is completely unneeded.

Most importantly the Court of Appeals did as Anguiano demands, "Appellate courts "review the trial court's interpretation of ER 404(b) de novo as a matter of law." State v. Fisher, 165 Wn.2d 727,745,202 P.3d 937 (2009). Where the trial court correctly interprets the rule, its decision to admit evidence of misconduct is reviewed for abuse of discretion. Id. "A trial court abuses its discretion where it fails to abide by the rule's requirements." Id." (Slip at 9) There is no basis under RAP 13.4(b) for review of this case based on this alleged inconsistent standard of review.

The trial court admittedly did not make the type of record that would preclude review. However, as the Court of Appeals determined, there was sufficient evidence presented and a sufficient record to allow review of the record pursuant to "State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Before a trial court can admit the 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." State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).” (Slip at 8-9)

The Court of Appeals then addressed these criteria and found the trial court did not make explicit findings that the burglary occurred that the it was connected to him by a preponderance of the evidence. The first and second criterion set forth in Graham, supra.

However, citing State v. Norlin, 134 Wn.2d 570, 951 P.2d 1131 (1998) and State v. Stein, 140 Wn. App. 43, 66, 165 P.3d 16 (2007) the court found the facts which were presented to the trial court sufficient to excuse the failure to make explicit findings for this factor. “Here, we are not presented with evidence of items in Mr. Anguiano's possession so common that they would be found in the possession of many people. Ms. Hueso testified that the Girl Scout Cookies cannabis was a type she had purchased only from a small dispensary in Seattle. The items were sufficiently unusual that evidence Mr. Anguiano possessed them was circumstantial evidence connecting him to the prior burglary by a preponderance of the evidence.” (Slip at 11)

The record is clear and the Court of Appeals so found that the State

did not introduce this information in an attempt to say that because this prior bad act occurred and that a preponderance of the evidence connected Anguiano to that act that therefore he was guilty of the current charge. The Court of Appeals correctly reviewed the record and determined that the "...State did not rely on the evidence of the earlier burglary to argue to the jury that Mr. Anguiano was a criminal type or a burglar-it relied on the evidence for the purpose identified to the court: to explain that Mr. Anguiano traveled with the others to the remote gun club not to buy marijuana, but because he was aware from the earlier burglary of drugs and cash likely to be found in the caretaker's home." (Slip at 12)

Regarding the fourth and final Graham factor the Court of Appeals also found that the trial court did not explicitly weigh the probative value versus the prejudicial effect of the proffered evidence. However, once again the de novo review allowed the Court of Appeals to determine that the record "is sufficient to permit meaningful review..." (Slip at 11) The opinion states "The evidence is highly probative. Absent some prior knowledge of the home, why would Mr. Anguiano have traveled so far, and enlisted others, to burglarize it? Absent evidence that Mr. Anguiano knew that there was ample marijuana and cash to be found in the Burkybile/Hueso home, Mr. Anguiano could easily have argued to jurors that a plan to travel all the way to Harrah to attempt a burglary or home

invasion robbery in broad daylight made no sense.”

As important as the Court of Appeals analysis under Graham is the court’s finding that even if there was error in the admission of this evidence that admission would have been harmless. Once again the State would strongly urge this court to review the facts of this case set forth in Appendix A.

The Court of Appeals concluded its review of this allegation stating; “We would also find any error to be harmless. There was overwhelming untainted evidence against Mr. Anguiano in the form of Ms. Hueso's and Mr. Hernandez's consistent testimony; the evidence of Mr. Anguiano's and his accomplices' flight; and the implausibility of his testimony that the shootout was prompted by his three frustrated kicks to the door, Mr. Burkybile's overreaction, and the regrettable coincidence that he, his brother, and Mr. Alvarez all brought handguns to the marijuana buy. We are satisfied that the result of the trial would have been the same had the trial court sustained Mr. Anguiano's ER 404(b) objection.” (Slip at 13.)

Anguiano argues the State cannot show beyond a reasonable doubt that the jury did not convict based on the facts presented regarding the prior burglary at the victim’s home, that argument is specious.

As the facts in Appendix set forth in great detail this case was not

one of minimal evidence. This case involved four men purposefully driving far out into the countryside of Yakima County to a home situated at the end of a long driveway. Three of the four came to this remote location armed with guns and the fourth person remained in the car, the proverbial “get-away” driver. When the deceased frustrated their efforts to gain entry they tried to first kick the door down and then they proceeded to literally shoot up this family’s home with all of the occupants present.

The evidence of was overwhelming, any possible error was harmless, State v. Clark, 143 Wn.2d 731, 775-76, 24 P.3d 1006 (2001) “The test for harmless error is whether the state has overcome the presumption of prejudice when a constitutional right of the defendant is violated when, from an examination of the record, it appears the error was harmless beyond a reasonable doubt or whether the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached.” (Citations omitted.)

State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985) “Under the "overwhelming untainted evidence" test, the appellate court; looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.”

3. The evidence was more than sufficient to support the jury’s finding that Anguiano killed Mr. Burkybile with “extreme indifference.”

RCW 9A.32.030(1)(b). The statute defines that that a person is guilty of murder in the first degree when "[u]nder circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person."

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)).

It of great importance that the defendant used the "girl scout cookie" herb jar in his case in chief arguing that the reason that he had this was because he had been to "Weed Man's" home before and Weed Man had sold him that jar. And, that was why they were there, that it was Weed Man's actions that escalated this entire situation to the point where Anguiano had to fire back in order to save himself. RP 844, 859-60.

The defendant's own testimony was sufficient to prove that this act was done with "extreme indifference." The is not means that he can claim to have been to "weed man's" home on numerous occasions and not know that there were other family members living there too.

State v. Adams, 138 Wn.App. 36, 50, 155 P.3d 989 (2007)

“Extreme indifference to human life may be proved by evidence of "an aggravated form of recklessness which falls below a specific intent to kill." This element may be proved where the defendant engages in extremely reckless conduct that creates a grave risk of death.” (Citations omitted.)

This was an accomplice liability case, this was not the act of just one shooter, the defendant, it was the actions of three armed men who drove to a family home out in the country.

These three men discharged as many as two-dozen rounds of .40, .45 and 9 mm ammunition into a home that this defendant testified he had been to numerous times before. Clearly if he had been there as often as he testified Anguiano would have known that a family live in this home, not just Mr. Burkybile. RP 844, 859-60.

State v. Pastrana, 94 Wn.App. 463, 972 P.2d 557 (1999) addresses the allegation that these acts were not reckless it stated that “Anderson and Berge are distinguishable because in each only the life of the victim was endangered. But here, as in Pettus, the bullet created a grave risk of death to others who were in the vicinity.”

The allegations by Petitioner throughout this appeal that because this home was out in a rural area does not negate extreme indifference of

their crime. The testimony was the three shooters entered the car and they continued to shoot at the house and even continued until they were part way down the driveway. RP 661. Hernandez testified after the three entered the car Anguiano was still shooting his gun. RP 679, 687 and that after they had done the U-turn in the field and came from behind a tractor Anguiano started shooting again, “[h]e was the only one still shooting...it was the only handgun going off.” RP 687-9. Hernandez estimated that Appellant has shot twelve times that day RP 689 and that the other shooters had shot about six or seven times each. RP 679.

Hernandez testified that Anguiano apparently emptied the clip in his gun, expending all of his bullets, expressly stating on cross-examination “...I heard the gun lock when its’ empty.” RP 677-8. As they were driving away Anguiano stuck his hand out the window and shot two times RP 854-5 and continued to shoot as the car was driving away. Anguiano’s own testimony was that he heard another shot, but he was not sure where it came from, and yet he again shot at the house. RP 855. “I heard another shot. I didn't know where it was coming, if it was coming from the house or what. I know I heard another shot. At this point I shot again out the window when we were leaving. I shot again out the window. That's when we left.” RP 856. Anguiano admitted that he still had his gun in the car and that he had run out of ammo. RP 857.

The trial court addressed this issue:

First off, the target is a residence. It's a place where people live. There's more than one car in the driveway. Shots were fired not only towards where Mr. Burkybile was located but also other portions of the residence were targeted as well. It would seem reasonable that a person is going to -- a shooter is going to have strong suspicion or certainly some inherent knowledge that there are or may be other people in the residence besides Mr. Burkybile.

Like I said, shots were fired at other portions of the residence, not just at the door where Mr. Burkybile was located. RP 830.

As the State said in closing;

This house, they made Swiss cheese of this house...The very fact that all three of these people are taking out guns and firing away under these circumstances, what can be more extreme? What can create more indifference to human life than he and his accomplices did?

D. CONCLUSION

The Court of Appeals opinion thoroughly addressed each and every allegation and after a full and complete review of the record correctly upheld Anguiano's convictions. This case does not merit further review by this court under RAP 13.4(b)

Respectfully submitted this 29th day of September 2017,

s/David B. Trefry

David B. Trefry WSBA #16050
Senior Deputy Prosecuting Attorney
P.O. Box 4846, Spokane, WA 99220
Telephone: (509) 534-3505
David.Trefry@co.yakima.wa.us

APPENDIX A

About two weeks' prior the crime charged there had been a break-in at the victims' home. RP 273. The family dog had been injured, a storage box full of DVD's was "ready to go" a PS3 Play Station was missing, a canister full of change that she had collected, a lever action rifle and the bullets for that gun were also missing. RP 273-4. She stated there was also some medical marijuana medicine that was stolen. RP 274.

On the day of this crime, Ms. Hueso, was home at a residence that is part of a private duck hunting club. RP 271. Ms. Hueso, one of the victims and the wife of the decedent, Mr. Burkybile was home recovering from an injury when she heard the family guard dog, a German Shepard barking like crazy and a car racing down her driveway. RP 272, 295. From her position she was able to look out and she observed a small green car driving by her window. She observed that there were four people in the car, two in front and two in back and that all of the occupants were male. RP 272, 296-8. She was concerned because she and her family lived in the country and no one came out there without contacting them first. RP 273.

At the time of this crime there were four people in the home, Ms. Hueso, Mr. Burkybile and their two sons, Colby age 15 months and Tyler age three. RP 275. Burkybile was in the back room with his two sons and came out to the front door to see who it was in the car. RP 275.

Burkybile opened the back door where the car had pulled up RP 276-7. Ms. Hueso testified that she heard the end of a conversation and peek around the refrigerator. Before Mr. Burkybile closed the door she observed the back of the green car and one person sitting in the back, passenger side back window, looking back. RP 277, 296-8. Mr. Burkybile's conversation, according to Ms. Hueso was "...this is a gun club. We don't do that here." Burkybile closed the door and locked it. RP 296 He then stated to her "I don't know who they are. They're just a bunch of Mexican gangster (sic)" RP 278. She then heard gun shots and the dog yelp as it was shot. She heard cars doors open and running to the house. She then saw on shot through the door. RP 278. Ms. Hueso testified that Burkybile was holding shut the locked door as the intruders started kicking the door trying to break it down. RP 279. She observed another shot through the door and she called 911 RP 279. She told 911 that there was a green car at her house with four guys and they were shooting and had shot their dog. She testified that "they were shooting throughout at us." RP 280. One of the bullets came through about three feet above her three-year-old son's head and at that time she got the children to the floor and covered them. RP 280.

Ms. Hueso testified that there "[a] lot" of gun shots. That when the intruders came to the front door she heard at least six or seven and when

they started to drive off she heard at least another six or so. RP 281. She stated 14 or 15 shots in total. RP 281.

After the shots had ended Ms. Hueso went out and saw Mr. Burkybile on the ground and that he had been shot, she informed 911 that he had been shot. RP 281. When she first saw Mr. Burkybile he was still breathing and his eyes were open. She testified that there was a rifle next to him and that he lifted his shirt and showed her that he had been shot. She testified that he did not speak to her. She testified that she did CPR and tried to keep him alive and put pressure on the wound. RP 282. Soon police and paramedics came and Mr. Burkybile was taken away in an ambulance. RP 283. She testified that her dog was lying shot just outside the home and that police officers shot him the dog because he was not going to make it. RP 283, 293.

Ms. Hueso testified that she had a prescription for marijuana and that Mr. Burkybile may have delivered some marijuana. RP 284. She testified she, Mr. Burkybile and their two children were all enrolled members of the Yakama tribe and had received a check for each member in about \$17,000. RP 284.

During her testimony Ms. Hueso was shown items that had been seized from the defendant. She was able to identify two items, a jar that had had "herb" in it and some bullets. She was presented with a printout

that showed items that were purchased at Bi-Mart and asked to identify if that was her transaction. She was able to identify that the record reflected what she had purchase, a “30-30 rifle, to packs of 50 ammo...some PJ pants and sweat pants. RP 285-9, 291, 301. On cross-examination she was able to further identify the ammo and the jar that had been stolen. She testified that that jar was;

A. An eighth of Girl Scout Cookies flower herbal.

Q. How do you know that that's the jar?

A. Because I know this is my jar because only specific dispensaries, specific stores, only sell it only in Seattle, yeah. I would buy it all the time.

Q. Okay. Did you have multiple jars like that?

A. Yes. I still have jars at home of this. RP 302

Ms. Hueso testified that she had never seen or met the defendant, Mr. Anguiano before. RP 292.

Ms. Hueso testified they had a .22 caliber rifle that was above a cabinet in the kitchen and when she went to check on her mortally wounded husband that gun was beside him. RP 297-8. She testified that she moved the gun back above the cabinet, she stated that she had put the gun back because her husband was a felon and she believed that he could not have possession of a guns. RP 298-9. She stated that he was alive and breathing when he was still in the home. RP 299 Ms. Hueso testified that Mr. Burkybile did sell marijuana from inside their house to friends who had their medical marijuana papers. RP 300.

She testified that “[t]he last words” to her from her husband “I don’t know who they are.” RP 307.

Dr. Wilson, the emergency room physician who was present when Mr. Burkybile arrived at the hospital testified that the victim had a wound in the left shoulder area and a big bruise that suggested that the bullet had traversed across his body. RP 313. The doctor further testified that “[h]is eyes were fixed and dilated. He was cold he didn’t have any color. So he was pretty much dead on arrival.” He also stated that Burkybile had arrested in the field and that your chances of survival are pretty much none when that happens. RP 314. Dr. Wilson pronounce him dead. RP 314.

Dep. McIlrath testified that he was dispatched to the residence after a report that there had been a shooting. When he arrived at the house he observed the Ms. Hueso waving to him from the residence and that was a dog shot in the front yard. When he went to the home the victim was up against the door and the deputy had to push the body to get the door open. Burkybile had no pulse and was not breathing at that time. RP 317-8. He testified that he had to squeeze through the opening of the door. RP 327. After medical help arrived this deputy began to investigate the scene. He observed bullet holes in the house and shell casing outside the home. The casings were from “a lot of different types of caliber firearms.” RP 319. He also observed what he described as “peel-out marks” from a car that

went around the house. RP 319, 322, 349. He also identified as accurate a photograph that was admitted as evidence that depicted bullet holes in the door where the victim was found. RP 322

Det. Gray testified as to what he observed and photographed at the scene. Found at the scene outside the home were .40 caliber, 9 mm, .45 caliber shell casings. RP 350-61. He took pictures of the door where the victim was found and testified that the door had been penetrated by several bullets as well as the adjacent screen door had also been struck. RP 362-65. He testified that the door has been struck four times. RP 363-8. He also testified regarding other bullet strikes to the home including a window RP 369 and trim on the outside of the home. RP 370. He also identified bullet strikes to the interior of the home. RP 375. He testified that there were additional bullet strikes even to side walls inside the residence. RP 376.

Det. Gray testified that as a portion of the investigation the used rods to allow them to ascertain the angle and direction of travel of the bullets that made the holes in this home. RP 381-96. His testimony regarding defects and strike marks in this home covers PR 381-??? and details damage caused by bullets to shelves, flashlights, laundry detergent bottles, closets, walls, windows, doors and these were found in bedrooms, laundry rooms closets, the living room. and other rooms throughout this

home. RP 381-403

Det. Gray testified regarding several items, shell casings from 9 mm weapon and a .45 caliber gun were seized from the scene was identified by Det. Gray. RP 405-410, 413-14. These items were submitted to the Washington State Patrol Crime Laboratory for additional testing. RP 407,411, 413-14.

Det. Gray testified that on the day of the shooting he observed a rifle that was on a shelf in the laundry room. RP 429. There was also a .22 caliber shell casing found in this laundry room. RP 430. Det. Tucker also observed this weapon and ammunition when he entered the residence as a portion of the investigation. RP 441-2. Det. Tucker seized the .22 rifle and ammunition. When he seized the weapon he ejected on spent round from the chamber and he believed that there were five additional live rounds in the weapon. RP 443, 458-60

Det. Gray was involved in a search of an area of Progressive Road looking for weapons. A CZ 9 mm semiautomatic pistol was found. RP 433-45. This gun was seized, packaged and sent to the Washington State Patrol Crime Lab. RP 435-6

Det. Tucker was examined by counsel for the defendant extensively regarding the amount and types of marijuana, marijuana products and other material related to marijuana that was found in the

residence. RP 446-51.

Det. Russell testified that it appeared that there were two persons firing two different weapons from two separate positions on the outside of the door. RP 470. He further testified that he counted the number of bullet holes in the residence that were readily observable. The detective counted 10 bullet holes on the east side of this home, this was the side where the door behind which Mr. Burkybile was found. There were also bullet holes found on the south side of this residence. RP 470. This detective testified that there were bullet holes through interior walls as well. RP 470. This detective also participated in a search for firearms and he was present when two guns were found along Progressive Road. RP 473-4.

Officer Enriquez testified that he was responding to a call for assistance from the Yakima County Sheriff's Office. Information had been sent out to be on the watch for a green car possibly a Honda with four Hispanic males riding in it. This officer observed a vehicle matching this description, turned and followed it and took down the license number, 048 WBO. RP 481-2. This officer noticed certain things that he found odd, a window that was broken or down, the day was very cold, one of the passengers kept turning to watch the officer. RP 481. The vehicle turned eastbound onto Progressive Road, the officer attempted to initiate a stop,

turning on his overhead lights and his siren. The vehicle accelerated at a high rate of speed, the officer testified that his vehicle “maxed out at 98 miles an hour, and (he) was losing distance. RP 482-3. The fleeing vehicle continued down Progressive Road at a speed that the officer estimated was in excess of 100 miles per hour. RP 483-4. Officer Enriquez was able to keep this car in view and the car eventually crashed into a fence at a residence on 107 North Harding Ave. RP 484. He observed the four male occupants flee the car after the crash. RP 485. Office Graybeal arrived shortly thereafter and took one person found in the area into custody. RP 486.

Officer Graybeal testified that he was going to assist Officer Enriquez and when he arrived he observed a green Honda that had wrecked out there was no one in the car when he arrived. He and Officer Enriquez searched the immediate area and found no one. But just after Officer Graybeal returned to the crash scene he observed a male who was walking away from the scene and was only about 20 yards from the scene. Officer Graybeal testified that he found it unusual that this person was wearing only a T-shirt, it was January, and he was avoiding any contact, specifically he was not looking in the direction of the two officers. Office Graybeal took this person into custody, he was identified as Jose Davilla. RP 513-4.

Det. Michael testified that he was one of the detectives who was sent to look for firearms along Progressive Road. He testified that he found a .45 caliber 1911 Springfield handgun. RP 492-95. This weapon was then sent to the Washington State Patrol Crime Lab. RP 494-5.

Det. Johnson testified that he directed that several items seized at this crime scene be sent to the crime lab. He identified items 191-202 as items that had been sent to the crime lab. RP 500-2.

Det. Durand testified that he was sent to the location of the crashed out Honda. He took pictures of the vehicle to include photographs of the interior that show shell casings that were inside this Honda. RP 523-6.

Mr. Allen, a forensic scientist from the Washington State Patrol Crime Lab assisted the Yakima County Sheriff's Office in this investigation. He was requested to assist in searching the Honda Civic that was the subject to chase, the crash and the subsequent seizure. Mr. Allen testified that he searched a 1997 Honda Civic, Washington license 048 WBO. He was tasked with sampling for DNA and looking for defects caused by bullets. RP 553. Mr. Allen testified that he recovered a .40 caliber S&W cartridge from the lid of the trunk. RP 556. He collected two more cartridges from the interior front passenger compartment as well as a black hat. RP 557. He found a bullet strike on the "B" pillar of the

driver's side of the vehicle and was able to determine that the path of travel was from the passenger's side to the driver's side of the car. RP 558. The lab team also found a copper jacket portion from a bullet in the rear driver's side portion of the car. RP 560. They also found two bullet defects on the side "C" passenger pillar. RP 561. In total there were three cartridge cases that were collected from the interior as well as a black zip-up jacket, a wallet, an unspent cartridge, and an additional bullet jacket fragment. RP 561-62. The wallet was found in the rear driver's side footwell. RP 563. He testified that one of the bullet fragments that was recovered from inside the car was not a .22 caliber bullet, it was too large at its base to be a .22 caliber. RP 567-8.

The cartridges found inside the vehicle were four 40 caliber; one from the trunk frame, one from the front driver's seat, one from under the front passenger seat and, one from the rear seat cushion and one unfired round found under the zip-up coat on the rear driver's side seat, Also; six 9 mm Luger casings from the parking brake pocket, two from the right floorboard, passenger side and one from the rear floorboard. RP 568-70. 9 mm Luger: one was in the parking brake pocket right underneath the park brake, item 13, item 14 from the front passenger seat, resting on top of the seat item 16 17 and 18 all from the same general area on the right floorboard, front passenger side between the door and the seat and item 25

from the rear floorboard. RP 583-4

Deputy Haley testified that after he had arrested the defendant, Anguiano asked him two questions. The first question was how the police found him and the second was what the typical prison time was for a murder 2 charge. RP 641

Mr. Carlos Hernandez was given a cooperation agreement by the State in return for his testimony against Mr. Anguiano, Mr. Davilla and Mr. Martinez. RP 665-6.

He testified that the green Honda was his car, but was registered in his father's name. He was the driver of the green Honda, the vehicle used in the commission of this crime. He testified that he knew the three other occupants of the car, to include Mr. Martin Alvarez, Mr. Luis Anguiano – the defendant and, Mr. Jose Davilla. RP 648-51. He testified that the Alvarez had approached him regarding an individual who was “trying to buy some weed.” RP 651. He stated the defendant told him that they were going to go buy some weed. RP 652.

The others told Hernandez to drive towards Harrah but Hernandez did not know where that was so they had to direct him to where they were going. It was Martin, Jose and Luis in the car with Martin Alvarez in the front seat, the defendant/appellant was seated in the rear behind the driver, Mr. Hernandez and seated in the rear on the passenger side was Jose

Davilla. RP 652-3. Mr. Hernandez testified that it was the defendant “Luis” who was directing him where to go. RP 653. He testified that he drove “pretty much in the middle of nowhere, like farmland type.”

He was told to turn up a driveway. He testified that about half-way up this 30-40-yard-long driveway the three men in his car started pulling out guns. RP 673-4. He was able to state what guns each person was carrying. He testified that Martin Alvarez had “a nine” and when asked what a nine was he further stated, “[a] 9mm.” He then testified that Davilla “had a Glock .40 but that it looked like the XD...XD .40” He then testified that he believed the defendant Anguiano had “a .45” then clarified that it was “a 1911 from the way it looked.” RP 654-5, 671-2.

Hernandez stated that at the house they tucked the guns back in their clothes, trying to conceal them. RP 674-75.

Hernandez testified that he drove up to the house at the end of this driveway and parked his car in front of a tractor. RP 655-6. He testified that exhibit 215 was a drawing he had made for a detective and it accurately portrayed where he had parked on that day. RP 656.

(The State would strongly urge this court to read this section of the verbatim report of proceedings in totality. RP 657-90. These nearly eleven pages of direct examination RP 657-68 and twenty-two pages of cross examination by themselves present testimony sufficient for the jury

to find the defendant guilty beyond a reasonable doubt and establish that even if information regarding a past burglary was admitted in error that error was harmless. RP 668-90)

Mr. Hernandez testified in detail about what happened after they arrived at the house. He stated that once they arrived at the actual house Appellant got out and spoke with the home owner, Mr. Burkybile. He testified that Appellant asked if the shooting range was open. Burkybile told them that they were on private property, that they should get out of there and that they had no reason to be there. The next thing he heard was when Appellant asked Burkybile if he knew anyone who sold weed, Burkybile told Appellant no and told them to get out of there Burkybile then reentered the home and closed the door. RP 657-8, 675-76.

It was then that Martin Alvarez exited the car and the dog that lived there began barking. Alvarez shot the dog. RP 676. He then went up to the door with Appellant and the two of them began to kick the door in an attempt to kick the door in. they were not successful in kicking the door although Hernandez testified that they were kicking it hard. RP 659, 685-86. As they were kicking the door they were screamed DEA trying to act like they were police. When Alvarez and Anguiano could not kick the door in the backed away and Hernandez testified it was at that time he observed a rifle barrel come out the door and “that’s when all the shooting

happened.” RP 658-9, 676-7. On cross-examination Hernandez testified that when the barrel of the gun “came out that’s when they all started shooting.”

He heard a shot hit his window at this time all three others were out of the car. Hernandez was ducked down in the car but was able to and did see the shooting in his mirror. RP 660. Hernandez was trying to get out of there and eventually the three other men jumped back into the car. He testified that he did a U-turn and was heading out from the home. RP 660, 678-9. Even after the three entered the car they continued to shoot at the house and continued until they were part way down the driveway. RP 661.

Hernandez said that after the three entered into the car only the Appellant was still shooting his gun. RP 679, 687. He testified that after they had done the U-turn in the field and came from behind a tractor Appellant started shooting again, “[h]e was the only one still shooting...it was the only handgun going off.” RP 687-9. Hernandez estimated that Appellant has shot twelve times that day. RP 689. He estimated that the other shooters had shot about six or seven times each. RP 679.

After they exited the driveway onto the main road Hernandez became aware that there was a police car following them. He then eluded the officer who was following. While he was eluding this officer the other

three men were throwing their guns out of the car along Progressive Road. RP 662-63, 667-8, 679-81. He testified that he continued to drive way from the officer. There was discussion about stopping but Appellant told him no because they had the guns in the car. PR 663.

At trial Hernandez was able to identify the different weapons that where shown to him and describe for the jury who was carrying which gun on the day of the murder. He testified that identification 206 was carried by Jose and identification 204, a silver gun, had been carried by the Appellant, Luis. RP 666, 671-3. These two guns were eventually admitted as exhibits. RP 760-61.

Hernandez testified that they eventually crashed the car and all of them ran away. He testified that he ran until he made it to Union Gap and there he called his father and eventually confessed to his father what he had done. RP 663-64

On cross-examination Hernandez affirmed his testimony set forth above and gave in many instance more detail. This include testimony that Appellant apparently emptied the clip in his gun, expending all of his bullets, expressly stating on cross-examination "...I heard the gun lock when its' empty." RP 677-8.

Det. Dave Johnson and Det. Michael testified that they served a search warrant a bag that was seized from Appellant. Within that bad was

a box of 30-30 ammunition, specifically Hornaday ammunition, 20 cartridges, 30-30 caliber. RP 702, 707-8. The box had a UPC number, a universal product code of 090255827309. He also removed a “green leaf jar” from this bag. RP 704. On cross-examination the detective testified that he had taken these items out of evidence to show them to victim/witness Yolauni Hueso. She identified them as having come from her house. RP 705-6. Det. Michael clarified that the empty jar was a jar of “high-grade cannabis, Gold Label” the label “says Girl Scout Cookies on the bottom.” RP 709. Det. Michael also testified that found within the bag seized when the Appellant was arrested was a jar with a partial label on it that contained some change. Also found within this bag was Appellant’s birth certificate. RP 711. There was also some marijuana “shake” found in this bag. RP 712.

Mr. Schroeder, a store manager from Bi-Mart was called to testify regarding the ammunition. He was called as the custodian of records for that company. The receipt that noted the purchase of ammunition from Bi-Mart was admitted into evidence as 216.

Dr. Reynolds, a forensic pathologist, testified regarding the autopsy performed on Mr. Burkybile. RP 732. The deceased had received a bullet wound to the left side of his chest, nipple level, back of the armpit. RP 766-7, 748. The bullet travelled downward and was able to felt under

the skin just above the hip. RP 736-7. Dr. Reynolds removed the slug from inside of Mr. Burkybile's body, it was a "9 mm fully jacketed slug." RP 738. He was also to opine that this slug had gone through something else before I had entered Mr. Burkybile. RP 740. The doctor ascertained that the bullet had severed the abdominal aorta and that this laceration would have caused him to bleed internally and was the immediate cause of death. He further testified that this type of injury was not survivable. RP 744.

Ms. Heather Pyles of the Washington State Patrol Crime Lab testified that she was able to obtain a substantial amount of DNA from the .45 caliber handgun that was recovered. The match for the DNA was to the defendant/appellant Luis Anguiano. The chance of that sample occurring on unrelated individual at random from the U.S. population was 1 in 440 quadrillion. RP 786-88.

Mr. Johan Schoeman of the Washington State Patrol Crime Lab testified that he did analysis on several items. This testing that was done was to compare that slugs found at the crime scene and/or in the green Honda to test fired bullets. He was able to opine that the bullets that were evidence from this crime scene came from a gun that was the same make and model as the 9 mm Luger CZ model 75 seized, it was an operating firearm. RP 799, 805. But he was not able, due to damage to the

evidentiary bullet, to state definitively that the bullet was fired from the found weapon. He next test fired the gun and compared shell casings and the markings on the test fired casings with those from the crime scene and the Honda and he was able to definitively testify that they came from the same gun, which was seized as evidence. RP 800-4. He also did test firings from the .45 model 1911 Springfield Armory semiautomatic pistol. RP 807. He determined it was an operable firearm. RP 804-5. He also determined that the casings found at the crime scene were fired from this weapon. RP 805-6.

The Defendant testified. He testified that he went to Mr. Burkybile's home to purchase "weed" and that he had been there numerous times before. RP 843-4. On this occasion he decided to take it gun to protect himself. He was totally unaware that anyone else in the car was carrying a gun. RP 846-47 He testified that he and Martin got out of the car and only the defendant went up to the house. Mr. Burkybile came out and it appeared to the defendant that he was angry or mad. RP 850-1. Appellant stated that the victim told him that he was not doing business out of the gun club anymore and that Appellant and his "friend have to get the fuck out of here." RP 851. The victim slammed the door in his face and Appellant "reacted. (he) kicked the door...three times" RP 852. He stated that after the third time he heard a shot.

He testified that he did not know who shot but it sounded like it came from the house. He stated that he then ran and jumped back into the car and he and the others took cover. RP 852. After he got in the car he could not see where Martin was and he heard more shots going on. Throughout this time he did not shoot his gun. He then looked out and saw a barrel sticking out of the door. He stated that the shooter in the house shot two more times then the defendant rolled out of the car and pulled his gun and "loaded it" indicating that he took action to put a round into the chamber. PR 853.

It was only after he was hiding behind the car and loaded his gun that he started shooting at the house. RP 853. After he shout about 4 times he then reentered the car. He stated that Martin was not in the car at the time and had actually fallen down when Mr. Hernandez was driving away. Appellant told Hernandez to wait for Martin. As they were driving away Anguiano then stuck his hand out the window and shot two times. RP 854-5. Then again as the car was driving away Appellant heard another shot, but he was not sure where it came from, and yet he again shot at the house. RP 855. "I heard another shot. I didn't know where it was coming, if it was coming from the house or what. I know I heard another shot. At this point I shot again out the window when we were leaving. I shot again out the window. That's when we left." RP 856.

Anguiano stated that when they got onto the road there was already a cop and that cop followed them. Mr. Hernandez was speeding and appellant told him to slow down. He also testified that he still had his gun and that he had run out of ammo. RP 857. He testified that they ran because they had just been in a shootout and they were scared. He stated that he threw his gun out while they were running from the police officer. RP 858.

Soon after the car wrecked and he got out and ran. He called for a ride and eventually on the same night fled to Seattle. He stated that he did not know that the police were looking for him. RP 859. The reasons that he fled were: because he was scared, he didn't know what was going to happen, he just wanted to let things cool off, he just wanted to see what would happen. RP 859

Appellant stated that the jar that he had in his possession in Seattle with marijuana in it was purchased from the deceased, Mr. Burkybile. RP 859. He stated the bullets that were found were also his and that he had purchased them so he and a friend with a 30-06 could go shooting but they were the wrong caliber. However, he had given a couple of these wrong bullets to this friend. RP 860.

On cross examination Appellant admitted that most of his actions made him look guilty. RP 865-8. He admitted on the day that Mr.

Burkybile died he was carrying a .45 caliber handgun. RP 868-9. He testified that he did not see any of the other occupants of the car shooting either while outside or inside the car. And further, he had no idea how all the 9 mm and .40 caliber casings got inside the car. RP 668-9. He also never saw anyone throwing a gun out of the car as they were fleeing the scene of the crime. RP 870

Appellant did not believe that anyone would have been hit by all the shots or that anyone would die. He had also never seen anyone else at the residence and he had never been inside the home before. RP 871-2

He testified that he did not know how many times he shot nor how many rounds of ammunition that he had in his .45 caliber handgun. RP 872-3. He also could not explain how his weapon that ejected from the right could leave shell casings in the locations that they were found in. Locations that were not in an area that he testified he was shooting from. RP 873-4.

When asked by the State if he had seen the second gun before he denied ever seeing it and denied again that he did not notice others shooting from inside the car and did not hear any other gun fire from inside the car, nor did he know about the other gun that was found. RP 878-9. And again on redirect Appellant stated that he did not think anyone else had a gun out at Mr. Burkybile's home nor did he have any idea

where all the other shell casings came from. RP 881-2.

DECLARATION OF SERVICE

I, David B. Trefry, state that on September 29, 2017, I emailed a copy of the State's Answer to: Jodi R. Backlund and Manek R. Mistry at backlundmistry@gmail.com

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

DATED this 29th day of September at Spokane, Washington.

s/ David B. Trefry
DAVID B. TREFRY, WSBA #16050
Senior Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane WA 99220
Telephone: (509) 534-3505
David.Trefry@co.yakima.wa.us

YAKIMA COUNTY PROSECUTORS OFFICE

September 29, 2017 - 10:15 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94953-1
Appellate Court Case Title: State of Washington v. Luis Alberto Anguiano
Superior Court Case Number: 14-1-00150-4

The following documents have been uploaded:

- 949531_Answer_Reply_20170929101320SC598801_5216.pdf
This File Contains:
Answer/Reply - Answer to Petition for Review
The Original File Name was Anguiano 949531 Answer Pet for Rev.pdf

A copy of the uploaded files will be sent to:

- backlundmistry1@gmail.com
- backlundmistry@gmail.com
- joseph.brusic@co.yakima.wa.us

Comments:

Sender Name: David Trefry - Email: David.Trefry@co.yakima.wa.us
Address:
PO BOX 4846
SPOKANE, WA, 99220-0846
Phone: 509-534-3505

Note: The Filing Id is 20170929101320SC598801