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No. 30763-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT – CROSS-APPELLANT,

v.

SALVADOR GARCIA SANCHEZ,

APPELLANT – CROSS-RESPONDENT.

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

BRIEF OF RESPONDENT – CROSS-APPELLANT

D. ANGUS LEE
PROSECUTING ATTORNEY

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A. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

B. RELIEF REQUESTED

The State asserts that no error worthy of reversal of the convictions occurred. The trial court should be affirmed in this regard. The court did error in dismissing the aggravator under RCW 9.94A.535(3)(s). The trial court should be reversed on this issue and the case remanded back to the trial court.

C. ISSUES

1. Did the trial court have authority to present the gang aggravator (RCW 9.94A.535(3)(aa) to the jury?

2. Was defense counsel ineffective for not moving to bifurcate the gang aggravator prior to being all but ordered to by the trial judge?

3. Did the State introduce enough evidence to prove the crime of witness intimidation beyond a reasonable doubt?

4. Was the information charging witness intimidation required to define "true threat", and was the definition of true threat required in the to convict instruction, or was a separate definition elsewhere in the jury instructions adequate to inform the jury of the law?

5. Statement of Additional Grounds. Did the State present adequate evidence to prove felony riot and assault with a deadly weapon?

6. State's Cross Appeal. Did the trial court error in dismissing the aggravator alleged under RCW 9.94A.535(3)(s) prior to trial?

D. STATEMENT OF THE CASE

November 1, 2010[1]

On Halloween night, 2010 Luis Flores Martinez went to a party in Othello, WA. Report of Proceedings[2] (RP) 342. After about an hour and a half he left with Jose Nieves, Salvador Garcia and Eduardo Nejera Cruz to pick up some girls in Soap Lake, WA. After they picked up the girls they headed back towards Othello, with Martinez driving, Nieves in the passenger seat, Cruz and Garcia in the back with three of the girls and one of the girls sitting between Martinez and Nieves. An officer saw them and attempted to pull them over. With the officer behind them with his lights on, Nieves pulled out a gun and shot several times out the window. Martinez accelerated and the officer backed off. Martinez then pulled the car off on a side road. The group exited the car and ran off into the sagebrush. They walked for a couple of hours. Nieves then pulled the

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[1] See Court of Appeals cause number 30340-3-III, *State v. Nieves*, for a more detailed recitation of the facts of this incident.

[2] Report of proceedings prepared by Tom Bartunek.

group together, pulled out a gun, loaded it and said if anybody said something, he was going to kill them. After walking a bit more the group made some calls. Nieves wandered off on his own and was picked up. Martinez called his mother and she came to pick the group up and took them home. Report of Proceedings (RP) 342-47. Martinez had never talked to Garcia before this incident. RP 349.

Afterwards Martinez went to the Othello Sheriff's Office and reported his car stolen. He went back the next day and told the truth about what had happened. RP 347-49. That information made its way into a report generated by Chief Deputy (then detective) Ryan Rectenwald, including Luis Martinez's name and the fact that a search warrant based on the information provided by Martinez was served at Nieves' home. This report would have been seen by Nieves. RP 141-43. Garcia is a good friend of Nieves and his family members, and they both belong to the same gang. RP 159, 195-254.

December 20, 2010

On December 20, 2010 Martinez and his friend Jose Robles were driving around Royal City when they came across Garcia and Nejera Cruz. Garcia ran into the street in front of the car. Robles slowed down. Garcia ran to the passenger side of the car and tried to open the door, but the door handle was broken. When he was unable to open the door he started

banging on the window, calling Martinez a snitch and a bitch, and that he was going to kick Martinez's ass and kill him. Robles then drove off. Martinez took the threat seriously. RP 349-52. Later Robles and Martinez saw Garcia and Cruz again. This time Garcia and Cruz threw rocks at the car. RP 352-53. Martinez then reported the incident to the police. RP 353. He was also hesitant to continue participating in the case against Jose Nieves. RP 354.

January 14, 2011

On January 14, 2011 Officer Korey Judkins was on duty in Royal City and observed five members of the South Side Locos walking down the street, including the appellant. He noted their presence and continued on his patrol. RP 549-51. At approximately the same time Ricardo Coria was visiting his nephew's house in Royal City. He went outside to place his phone on a charger in the car. Coria is affiliated with the gang PVL, a Norteno set that is a rival to the South Side Locos, the appellant's Sureno set. The appellant and a group of South Side Locos were walking down the street and saw Coria. The appellant came up to Coria, declared "Southside", and then hit him with a set of brass knuckles. Coria went down and the appellant continued to hit him. Coria's son, nephew and friend observed this and came in to help. This started a general brawl between the SSL and the Coria family. This brawl lasted until Officer

Judkins arrived, at which point the SSL members started to flee. RP 791-797. Officer Judkins commanded all the subjects to stop and took control of the situation. RP 553.

May 14, 2011

On May 14, 2011 Officer Rey Rodriguez was on duty in Royal City. He drove by the post office and observed Coria's vehicle parked there. He also observed four SSL members, including the appellant walking nearby. As he continued on his patrol a citizen drove up to him and mouthed fight and gestured back towards the post office. Officer Rodriguez activated his lights and immediately returned to the post office. There he observed the appellant, Yajiro Calzada, Sergio Reyes Cruz and another unidentified individual throwing punches into the driver's side window of Coria's car. As soon as the SSL members saw Officer Rodriguez they took off running. Officer Rodriguez managed to taze Sergio Reyes Cruz, while the other three got away. Officer Rodriguez observed that Coria was in the driver's seat, and that he had been assaulted. A few days later he took pictures of the injuries to Coria. RP 863-73.

Procedural History

The State initially charged the appellant for each incident separately. Prior to trial the State joined all three incidents in one

information in accordance with CrR 4.3 and *State v. Wilson*, 71 Wn. App. 880, 863 P.2d 116 (1993). Just prior to the first trial the Court severed the December 20th and associated bail jumping counts from the January 14th and May 14th incidents. All counts except for the bail jumping were charged with aggravators under RCW 9.94A.535(s) (Group aggravator) and RCW 9.94A.535(3)(aa) (Gang Aggravator). Prior to trial the court dismissed aggravators charged under RCW 9.94A.535(3)(s). RP 48. The first trial proceeded on the December 20th incident and bail jumping charge. The second trial proceeded approximately one month later. The defendant was found guilty on all counts in the first trial, and of assault 2, felony riot, assault 4, riot and deadly weapons enhancements in the second trial. During both trials the State introduced evidence to establish motive and prove the gang aggravator. During the second trial the judge, sua sponte, outside the presence of the jury and without argument or input from either side, expressed his opinion on the gang statues, and suggested that if there had been a motion to bifurcate the trial he would have granted it. RP 597-600.

During sentencing the trial judge, again sua sponte, raised an issue of whether the gang aggravator was outside the court's ability to try under *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007). Transcript of

Proceedings[3] (TP) 36-41. After the State had a chance to address the issues raised by the court in the sentencing hearing the court reached the proper result, and denied a motion for a new trial based on those concerns. TP 44-60.

E. ARGUMENT

1. *The Court had the authority to hear the aggravator.*

a. Standard of Review.

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

b. History and structure of RCW 9.94A.535 and .537.

i. *Timeline*

June 26, 2000 U.S. Supreme Court decides *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).

June 24, 2004 U.S. Supreme Court decides *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

April 15, 2005 In reaction to *Blakely* the Washington State Legislature passes Laws of 2005 c 68, which requires juries to hear aggravating factors. Included are changes to RCW 9.94A.535 and the creation of RCW 9.94A.537.

January 25, 2007 Washington State Supreme Court decides *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007) .

April 27, 2007 In reaction to *Pillatos*, the legislature amends RCW 9.94A.537, providing that juries may hear aggravators on remand. "The legislature intends that the superior courts shall have the authority to

[3] Transcript of proceedings prepared by Teresa L. DiTommaso

impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing." Laws of 2007 c 205 § 1.

March 31, 2008 Governor signs into law Laws of 2008 c 276, amending, among other things, RCW 9.94A.535 to add the Criminal Street Gang Aggravator, RCW 9.94A.535(3)(aa).

ii. *Structure*

RCW 9.94A.535 (§.535) contains aggravating and mitigating factors for a jury and/or the court to consider. There are currently 29 aggravators (a-cc) that may be tried to a jury. RCW 9.94A.537 (§.537) contains the procedures to be followed when a defendant is provided notice that the State intends to seek an aggravated sentence. In relevant part, §.537 reads:

> (3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.
>
> (4) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to

> the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.
>
> (5) If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

c. RCW 9.94A.537(3) provides the procedure to hear the gang aggravator.

The appellant argues that because §.537(4) only addresses aggravators a-y the remaining four aggravators are legal nullities. However, §.537(4) only exists to tell the trial courts when to try aggravators in a separate, sentencing phase hearing. §.537(3) provides the authority for the court to hear aggravators, and it is not restricted as to which aggravators it addresses. If §.537(4) did not exist, §.537(3) would provide all the authority the court needs to hear the aggravators, and §.537(4) does not take any authority away from §.537(3).

This is consistent with the other procedural statutes regarding aggravators and enhancements. Aggravators and enhancements are scattered throughout the RCW. *State v. Guzman Nuñez*, 174 Wn.2d 707, 711-12, 285 P.3d 21 (2012). Procedural rules for aggravators and enhancements should be the same. *Id.* at 716. A review of procedural

statutes for enhancements and aggravators reveal that §.537 is the only one that discusses hearings during trial versus a penalty phase. *See* RCW 9.94A.825, et seq. Therefore RCW 9.94A.537(4) is unnecessary to the court's authority to hear the aggravator.

d. RCW 9.94A.537(4) should be in conjunction with RCW 1.12.028.

RCW 1.12.028 provides "[i]f a statute refers to another statute of this state, the reference includes any amendments to the referenced statute unless a contrary intent is clearly expressed." Thus the first clause of .537(4) should be read to say "Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (cc) shall be presented to the jury during the trial of the alleged crime." RCW 9.94A.537(4) does not say it should not be read to include the updated statute it references. At most it is ambiguous as to whether it should be read as updated. Because the legislature did not clearly indicate that §.537(4) should not be read as being updated when §.535 was updated, the statute §.537 references is read as updated. Correctly read, §.537(4) requires aggravators z-cc to be heard during the guilt phase of the trial. There is no case law the State is aware of interpreting RCW 1.12.028.

The most on point case the state is aware of is *Jenkins v. Bellingham Mun. Court*, 95 Wn.2d 574, 627 P.2d 1316 (1981). In that case the State legislature amended the traffic code, placing the DUI statute in another part of the code, outside the model traffic code. Bellingham, along with other cities, had a local ordinance that adopted the model traffic code. Several defendants challenged DUI convictions under the municipal codes as being invalid. The court agreed, as the municipal codes no longer correctly referred to the DUI statute. In the next legislative session the legislature passed RCW 1.12.028, requiring referring statutes to be read as updated. Laws of 1982 c 16 § 1. Similarly, §.537 should be read as updated. The general rule in §.537(4) is that aggravators are heard during the trial, and the exceptions are explicitly listed. Therefore §.537(4) requires the gang aggravator to be heard in the guilt phase of the trial.

2. *Defense Counsel was not ineffective for failure to move for a bifurcated trial.*

To prevail on a claim of ineffective assistance, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239

(1997). Scrutiny of defense counsel's performance is highly deferential, and it employs a strong presumption of reasonableness. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Where a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained." *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test defeats a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

a. Appellant fails the first prong of *Strickland.*

As is demonstrated through both sections 1 and 2 of this brief, whether a motion to bifurcate is permitted by law and/or would have been effective in keeping out inculpatory information is, at best, a complicated and iffy question for the defendant. "Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point, however frivolous, damaging or inconsequential it may appear at the time, or to argue every point to the court . . . which in retrospect may seem important to the defendant." *State v. Lottie*, 31 Wn. App. 651, 654, 644

P.2d 707 (1982). To require a defense counsel to raise every open issue of law conceived of by an appellate attorney or trial judge, or even an appellate court, raises the bar of reasonably competent counsel to an inhuman standard. Even after all the evidence presented during the first trial defense counsel did not move for severance in the second trial until all but ordered to by the trial judge. Given the presumption of reasonable representation it is reasonable to presume that defense counsel simply concluded that there was no merit to a motion to bifurcate. Thus appellant fails the first prong of *Strickland.*

b. Appellant fails the second prong of *Strickland.*

i. *Gang evidence was part of the res gestae of the crime.*

The aggravator charged, RCW 9.94A.535(3)(aa) reads "The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership." The core of this aggravator is intent and motive, which are traditional, explicit exceptions to ER 404(b). Thus the information that the appellant was committing his crimes to benefit a criminal street gang was admissible. This was recognized in unchallenged limiting instructions provided to the jury. RP 1057-58.

In the first trial the State proved the appellant was guilty of witness intimidation and harassment.[4] The State introduced evidence that Jose Nieves was a leader of the South Side Locos, RP 254, 344-45, and that after he was removed from Royal City the appellant took over that role. RP 254. The State also introduced evidence that the appellant's attack on Luis Martinez was motivated by Martinez's statement to the police and possible future cooperation with the investigation against Nieves. RP 351-355. The relationship between Garcia and Nieves is crucial to establishing the State's theory of the case and providing the motive for the attack. Establishing relationships is one permissible use of gang evidence. *State v. Embry*, __ Wn.App. __, 287 P.3d 648, 2012 Wash. App. LEXIS 2552 (2012) (Slip Op. at 17-22). This relationship could not be established without relating back to the gang. Proving that Nieves and Garcia were part of the same gang, and the attack was to benefit its membership by reducing the criminal liability risk for its leader and extracting revenge for someone who provided information on one of its members was part and parcel of the State's case. Because motive information was admissible, the basic parts of the aggravator were admissible.

In the second trial the State produced evidence that the assaults were flat out gang fights started by the appellant against a perceived rival

[4] Witness intimidation is essentially attempted harassment with a particular motive. The State agrees that in this case they were the same criminal conduct.

gang member. Again his motive was at issue, and the fact that he belonged to one gang, and that the person he assaulted was perceived as a rival gang member goes to that issue. The fact that these were two incidents in a long running rivalry between the two gangs was admissible to show the gangs were rivals. The fact that the graffiti admitted showed hostility towards the rival gang also reinforces this motive. The evidence admitted in this case would have been admissible regardless of the aggravator.

Because gang evidence was admissible regardless of the aggravator, bifurcating the aggravator would not have kept out the fact that the appellant was a gang member, or that his crimes were committed to benefit the gang. The defendant cannot show "a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance."

Even defense trial counsel admitted the State had proved that the defendant was guilty of assault and riot, only arguing degree. RP 1079. However, brass knuckles were found at the scene where they would have been dumped by the SSL members, providing overwhelming support for the testimony that the SSL members used brass knuckles and the assault 2 charge. RP 533,564-68. As to the witness intimidation and harassment charges, Jose Nieves' shooting at Officer Slabach was admissible to

establish the motive for that charge. *State v. Sanders*, 66 Wn. App. 878, 885, 833 P.2d 452 (1992). An exploration of Salvador Garcia and Jose Nieves' relationship was also necessary to prove the motive for the witness intimidation and harassment charge. This would be impossible to do without a discussion of gang involvement.

To sever the gang enhancement would require the court not to sever the gang enhancement, but to pick and choose which parts of the gang enhancement would be presented during the guilt phase, and which parts would be presented in the penalty phase. There is no precedent or authority for doing this. A review of §.537(4) shows this was not the legislature's intention. §.537(4) explicitly lays out a res gestae exception for those aggravators it does allow to be tried separately. The gang involvement was part of the res gestae of these crimes, and thus the aggravator would be tried with them.

In addition the aggravators that are permitted to be tried separately are status based aggravators. An individual is guilty of these aggravators based on a status he has achieved prior to the commission of the crime. Aggravator e(iv) is based on a defendant's position in a drug distribution hierarchy. (H)(i) is based on having committed a pattern of behavior over time. (O) is based on having committed prior sex offenses. (T) is based on being just released from incarceration. The motive based aggravators

(f, j, k, s, and x) are all tried during the guilt phase of the trial under §.537(4).

The gang aggravator is very similar in structure to the group aggravator under §.535(3)(s). The group aggravator requires (1) the existence of an identifiable group, (2) that the defendant be a member or desires to be a member of that group and (3) commit the crime to benefit his status in the group. The gang aggravator requires (1) the existence of a gang, which is by definition a group (2) that the defendant had a desire to benefit the gang and (3) the crime is committed to benefit the gang. §.537(4) requires the group aggravator to be tried during the guilt phase of the trial, as it is motive based, just like the gang aggravator is motive based. Because the gang aggravator is motive based, and motive based aggravators are tried during the primary trial, the court could not have severed the gang aggravator.

ii. *The trial court is not authorized to bifurcate the trial.*

CrR 4.4 allows the court to bifurcate offenses and try them to separate juries. §.537 allows a penalty phase aggravator to be heard for certain aggravators. RCW 10.95.050 allows a jury to hear a sentencing proceeding in a death penalty case. Beyond those limited explicit exceptions, the court does not have authority to bifurcate trials.

Washington courts have considered whether the trial courts have inherent powers to empanel juries for penalty phase proceedings, and have concluded that they do not.

In *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005) (Overruled on other grounds *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546 (2006)), the Supreme Court held that it would be an usurpation of the legislative power to invent a procedure on remand to try aggravators. *Hughes* occurred after appellants challenged their exceptional sentences because the facts supporting them were found by a judge in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). § .537 had not yet been enacted. The Supreme Court held that trial courts did not have the authority on remand to empanel juries to hear the aggravators, it was up to the legislature to come up with a procedure. "[E]mpanelling a jury, either *after conviction* or on remand after reversal of an exceptional sentence on appeal, to determine whether the facts supporting an exceptional sentence have been proven beyond a reasonable doubt is a procedure which has not been authorized by statute and any action to follow this procedure would be void." *Id.* at 149 (emphasis added).

The Supreme Court affirmed *Hughes* in *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007). It ruled that "trial courts do not

have inherent authority to empanel sentencing juries." In *Pillatos* two defendants plead guilty to first degree murder, with an agreement that the State could argue for an exceptional sentence. Between plea and sentencing the U.S. Supreme Court decided *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). The State tried to empanel a jury for sentencing purposes. The court ruled that absent a law such as §.537, the court did not have the power to fashion a remedy for *Blakely*, and it was up to the legislature to do so, which the legislature promptly did, passing §.537.

State v. Monschke, 133 Wn. App. 313, 334-35, 135 P.3d 966 (2006), states, in dicta, that it is within the Court's discretion to bifurcate trials. In all of the cases cited by *Monschke*, as well as *Monschke* itself, the courts ruled that the facts did not justify bifurcation. More importantly, *Monscke* never analyzed the issue under *Hughes*, decided the year prior, and *Pillatos* had yet to be decided. All of the cases relied upon *Monschke* were decided prior to *Hughes*. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 220, 995 P.2d 63 (2000) (quoting *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 541, 869

P.2d 1045 (1994) (if a case fails to specifically raise or decide an issue, it cannot be controlling precedent for the issue)). Thus, because the Court of Appeals did not analyze this issue *Monschke* and its predecessor cases are not controlling precedent.

It is not up to the court to come up with a procedure different than the default that aggravators are heard during trial. Washington courts have previously found that, because the prosecution and courts often save time, personnel, and resources by having a single trial, where joinder is proper under CrR 4.3, severance generally is appropriate only when necessary to avoid prejudice to the defendant from a joint trial. *Id., citing State v. Grisby*, 97 Wn.2d 493, 506-07, 647 P.2d 6 (1982) (separate trials are not favored); *State v. Jones*, 93 Wn. App. 166, 968 P.2d 888, 891 (1998). There are several constitutional ways to hear an aggravator. The court may hear them with the main trial. The court may hear them in a bifurcated trial with the same jury. The Court could, within the bounds of the constitution, empanel a second jury to hear the aggravators. Ultimately the holdings of *Hughes* and *Pillatos* are that it is up to the legislature to decide which the court will do. If the legislature wishes to bifurcate trials with a gang aggravator, it is free to say so and has proven that it knows how to do so.

Because the appellant cannot show a reasonable probability that the severance would have been granted had it been properly briefed to the trial judge, and even if the severance had been he cannot show that the outcome of the trial would have been different, he fails the second prong of *Strickland.*

3. *There was sufficient information for a reasonable jury to conclude the appellant committed the crime of witness intimidation.*

> A defendant's challenge to the sufficiency of the evidence requires the reviewing court to view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences.

State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A jury may infer intent 'where a defendant's conduct plainly indicates the requisite intent as a matter of logical probability.'" *State v. Savaria*, 82 Wn. App. 832, 841, 919 P.2d 1263 (1996).

The defendant called the victim a snitch and a bitch and threatened to kill him. RP 351. A snitch is defined as "one who snitches : tattletale." Synonyms for snitch include "betrayer, canary [slang], deep throat, fink, informant, nark [British], rat, rat fink, informer, snitcher, squealer, stoolie, stool pigeon, talebearer, tattler, tattletale, telltale, whistle-blower."

(Miriam-Webster online dictionary, available at http://www.merriam-webster.com/dictionary/snitch, last visited Dec 12, 2012). A reasonable inference was that the defendant was (1) unhappy with Mr. Flores' cooperation with the police and (2) wanted to discourage future cooperation with the process against Jose Nieves.

The various prongs of witness intimidation protect various parts of the criminal justice process. Specifically it criminalizes a threat that is intended to:

> (a) Influence the testimony of that person;
> (b) Induce that person to elude legal process summoning him or her to testify;
> (c) Induce that person to absent himself or herself from such proceedings; or
> (d) Induce that person not to report the information relevant to a criminal investigation.

No doubt the defendant would have been happy if Mr. Martinez had eluded legal process and not testified, or absented himself from the proceedings, or testified falsely or not reported any more information to the police. It is doubtful that he actively considered which part of the process he wanted to interfere with. What is clear from his use of the word snitch and the context is that he did not want Mr. Martinez to cooperate with the legal process against Jose Nieves. This is the essence of witness intimidation. What particular prong the threat was aimed at is

irrelevant, and the threat could reasonably be construed to cover all four prongs.

The cases cited by the appellant are easily distinguishable. In *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007), the defendant threatened that the witness "would "pay" if she spoke to the police." *Id.* at 426. The State did not charge Brown under prong (d), but only under the prongs related to an official proceeding. *Id.* at 429-30. Given the exact language of the threat, only referring to talking to the police the State could not prove the official proceeding portion as charged in the information. If the State had included part d of the witness intimidation statute in the pleadings, the outcome in *Brown* would have been different.

In *State v. Savaria*, 82 Wn. App. 832, 919 P.2d 1263 (1996), the defendant threatened to kill the victim and then flicked her off in the courthouse. Not a word was said about testimony. While the court concluded there was enough evidence to conclude that the defendant was mad about the victim being at the courthouse, this was insufficient to conclude it necessary followed this was an attempt to influence testimony.

State v. Jensen, 57 Wn. App. 501, 510 789 P.2d 772 (1990), is similar. There the defendant directed a threat to the victim to make her "drop the charges." Again, this specific language was too remote from

"absent herself from an official proceeding" to conclude that was what the threat was intended to do.

In contrast, the defendant in *State v. Scherck*, 9 Wn. App. 792, 514 P.2d 1393 (1973), told the witness "'If you will refuse to appear as a witness in a trial against [Scherck's friend], the State will have no course but to drop the case.'" When the victim responded that he could not refuse to appear, Scherck observed that he (the victim) had a nice house in a nice neighborhood and that "[i]t would be a shame if anything happened to it." Further, Scherck said that if the case came to trial it "would be very embarrassing for [the victim]." *Id.* at 795. The court ruled that "The jurors were required to consider the inferential meaning as well as the literal meaning of Scherck's conversation with the witness. The literal meaning of words is not necessarily the intended communication. The true meaning of words may be lost if they are lifted out of context." *Id.* (Upholding a witness tampering charge) (At the time witness tampering and intimidation were combined in the same statute.)

In contrast to *Savaria, Jensen* and *Brown* the defendant here used the word "snitch." Snitch is a derogatory term for one who cooperates with the authorities. The attack was in response to a previous cooperation with authorities, and a message that if Mr. Martinez continued to cooperate with authorities he would be attacked on sight. Mr. Martinez

got that message loud and clear, RP 354, as did 12 jurors. Because the defendant used language specific to one who cooperates with the authorities when he uttered his threat, a reasonable juror could conclude that the defendant was attempting to dissuade future cooperation, and reasonable jurors did so.

4. *Both the charging document and jury instructions were adequate to support the appellant's convictions for witness intimidation and felony harassment.*

a. The charging document was sufficient to inform the defendant of the charges against him.

For the first time on appeal, appellant argues that the felony harassment and witness intimidation charging document was insufficient because it omitted an essential element -- "true threat." Br. of Appellant at 32.

A charging document must allege "[a]ll essential elements of a crime, statutory or otherwise," to provide a defendant with sufficient notice of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend.10). The rule's primary purpose is to give the defendant sufficient notice of the charges so he can prepare an adequate defense. *State v. Tandecki*, 153 Wn.2d 842, 846-47, 109 P.3d 398 (2005).

Where, as here, the defendant fails to challenge the sufficiency of a charging document at trial and instead raises his challenge for the first time on appeal, the court liberally construes the document in favor of validity. *State v. Brown*, 169 Wn.2d 195, 197, 234 P.3d 212 (2010). In determining the sufficiency of a charging document, we engage in a two-part inquiry: (1) whether the essential elements appear in any form, or can be found by any fair construction, in the information; and (2) if so, whether the defendant nonetheless was actually prejudiced by the unartful language used. *Brown*, 169 Wn.2d at 197-98.

The amended information alleged in relevant part that

> The ... defendant direct a threat to a former witness because of a witness's testimony in any official proceeding and/or by use of a threat directed to a current witness or a person the defendant had reason to believe was about to be called in an official proceeding...

CP 38. To avoid infringement of protected speech, the witness intimidation statute, like the felony harassment statute, prohibits only "true threats." *State v. Schaler*, 169 Wn.2d 274, 283-84, 236 P.3d 858 (2010); *State v. Tellez*, 141 Wn. App. 479, 482, 170 P.3d 75 (2007). Our Supreme Court defines "true threat" as

> "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person."

Schaler, 169 Wn.2d at 283 (quoting *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)). "The speaker of a 'true threat' need not actually intend to carry it out. It is enough that a reasonable speaker would foresee that the threat would be considered serious." *Schaler*, 169 Wn.2d at 283 (citation omitted).

In *Tellez,* the court held that the true threat concept is definitional and "limits the scope of the essential threat element," but "is not itself an essential element of the crime." *Tellez*, 141 Wn. App. at 484; *see also State v. Atkins*, 156 Wn. App. 799, 805, 236 P.3d 897 (2010); *State v. Allen*, 161 Wn. App. 727, 755-56, 255 P.3d 784 (2011), review granted, 172 Wn.2d 1014 (2011).

In *Schaler*, the defendant challenged the jury instructions defining the crime of felony harassment. *Schaler*, 169 Wn.2d at 281-82. Because the instructional definition of threat was not limited to true threats, the court concluded the jury could have erroneously convicted Schaler based on "something less than a 'true threat'" and reversed. *Schaler*, 169 Wn.2d at 287-88. But the *Schaler* court expressly declined to reach the question of whether a true threat is an essential element of the crime of felony harassment that must be alleged in the charging document:

> The situation is not identical to omitted-element cases. Whether the constitutionally required mens rea is an "element" of a felony harassment charge is a question that we need not decide. (We note that there is a Court of Appeals opinion on point, *State v. Tellez*, 141 Wn. App. 479, 170 P.3d 75 (2007), but we express no opinion on the matter.)

Schaler, 169 Wn.2d at 288 n.6. And in *Allen*, the court rejected the argument that *Schaler* establishes that true threat is an essential element of felony harassment. *Allen*, 161 Wn. App. at 755 (thoroughly reviewing the *Schaler* decision and rejecting appellant's argument that *Schaler* established that true threat is an essential element of felony harassment: "true threat is merely the definition of the element of threat which may be contained in a separate definitional instruction.").

Tellez, Atkins, and *Allen* control, and the court should adhere to those decisions. The witness intimidation amended information sufficiently informed appellant of all essential elements.

b. The Jury Instructions Sufficiently Informed the Jury of the Definition of a Threat.

Appellant argues that because the definition of "threat" was not contained in the "to convict" instructions for witness intimidation and harassment that the instructions were faulty. However, Jury instruction 6 contains the definition of a "true threat". CP 98. "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are

not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010). "We hold that this court's previous cases addressing this issue are dispositive and hold that true threat is merely the definition of the element of threat which may be contained in a separate definitional instruction." *Allen*, 161 Wn. App. at 755. Because true threat was defined for the jury, and not required to be in the to convict instruction, this argument fails.

5. *Statement of Additional Grounds.*

a. Felony Riot

The appellant asserts that because he claims he was not armed with a deadly weapon he cannot be found guilty of felony riot. This is basically a challenge to the sufficiency of evidence. (*See* witness intimidation instruction, *supra*, for relevant legal standard.) His legal analysis is correct, in that the State had to put a deadly weapon in his hands, vice an accomplice's, under *State v. Montejano*, 147 Wn. App. 696, 703-04, 196 P.3d 1083 (2008). *Montejano* held that for the crime a felony riot the normal accomplice liability statute did not apply, and that the riot statute controlled. However, the jury was informed of this fact, and a reasonable juror could have concluded that the appellant used brass knuckles.

The jury instruction on accomplice liability states that it is only used in regards to the crime of assault. CP 150. During closing argument the prosecutor specifically told the jury that they need to believe that the deadly weapon was in the defendant's hand to convict him of felony riot, otherwise they should convict him of misdemeanor riot. RP 1075. There was testimony that the appellant had metal knuckles on his hand when he struck Mr. Coria Lara. RP 682-83, RP 793. Therefore a reasonable juror could have convicted the appellant of felony riot.

b. Assault 2

The appellant complains that the State never established Mr. Coria suffered substantial bodily harm as required under RCW 9A.36.021(1)(b). However, the Assault 2 charge was a lesser included of count three of the information, which, in relevant part, alleged that the appellant or an accomplice, with intent to cause great bodily harm, assaulted the victim with a deadly weapon. CP 129. The lesser included of this charge is not RCW 9A.36.021(1)(b), but RCW 9A.36.021(1)(c), assaults another with a deadly weapon. The jury was instructed under the use of a deadly weapon prong of assault 2, RCW 9A.36.021(c), not the substantial bodily harm prong. CP 154. There was more than adequate testimony that the SSL used brass knuckles on Mr. Coria, and a reasonable juror could find those

are deadly weapons, capable of causing substantial bodily harm. There is no requirement that they actually cause such harm.

In addition he claims that he cannot be held responsible for an assault by a co-defendant who used brass knuckles where he did not. First, as previously discussed, there was substantial evidence that the appellant used brass knuckles himself. However, even accepting the appellant's recitation of facts as true, that he simply intended a misdemeanor assault and riot, and his friend, unknown to him, had a deadly weapon, he is still guilty of second degree assault as an accomplice. "[A]n 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." *State v. McChristian*, 158 Wn. App. 392, 401, 241 P.3d 468 (2010).

6. *State's Cross Appeal re: aggravating circumstance, crime committed to benefit standing in a group.*

In addition to the gang aggravator, RCW 9.94A.535(3)(aa), the State charged the defendant with the group aggravator, RCW 9.94A.535(3)(s). This aggravator allows for an exceptional sentence when: "The defendant committed the offense to obtain or maintain his or

her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group." The court dismissed this aggravator prior to trial.

By definition a gang is an identifiable group. RCW 9.94A.030(12). It has one of its primary activities the commission of criminal acts. *Id.* Gang experts routinely testify that the way to enhance an individual's status in a gang is to commit crimes, or "put in work." CP 298, CP 922, *State v. Yarbrough*, 151 Wn. App. 66, 96-97, 210 P.3d 1029 (2009). Thus committing crimes that other gang members know about is likely to enhance the defendant's status in a gang. The trial court's ruling found that the fact that this was likely to occur was immaterial, that it is the defendant's intent that matters. CP 526. It is true that it is the defendant's intent that matters.

Juries are routinely allowed to infer intent from foreseeable result. For example, if a defendant intentionally points a loaded gun at a victim, takes the safety off and pulls the trigger, the jury is typically allowed to infer that the defendant intended to kill the victim, or at least cause him great bodily harm. Why? Because it logically follows that if a victim is shot, they are going to suffer great bodily harm or death. This is an allowable, but not mandatory presumption. It follows, arguably with more certainty than the firearms example, that if a gang member commits a

crime that is done in conjunction with other gang members, his status in the gang is going to increase. That this was an intended result is an allowable, logical, but not mandatory, presumption.

The trial court also ruled that the aggravator was for someone who was told "you can become a lieutenant if you go knock over a grocery store." However, formal advancement in a corporate or militaristic hierarchy is not required. "The hierarchy is not in the formal militaristic or corporate sense, but in a "social standing" sense: Someone who's perceived to be really standing up for the white race, really being a white warrior, gets more result of status, gets more respect." *State v. Monschke*, 133 Wn. App. 313, 330, 135 P.3d 966 (2006) (upholding the finding of the aggravator).

The two primary Washington cases on this issue are *Yarbrough* and *State v. Bluehorse*, 159 Wn. App. 410, 248 P.3d 537 (2011). In *Yarbrough* the court laid out five facts that allowed the jury to conclude that the aggravator applied.

> (1) Yarbrough was a member of the Hilltop Crips; (2) Yarbrough perceived Simms as associated with a rival gang, the 96th Street Murderville Folk; (3) these two gangs had a confrontation on July 4, 2006, where someone from the Hilltop Crips threatened to "bust" if there hadn't been a nearby police presence, and (4) Yarbrough shot Simms after uttering, "This is Hilltop Crip, cuz, what you know about that." The State's expert witness, Detective Ringer, testified that calling a rival gang member "cuz" is an

> insulting challenge and a warning that gunfire may soon erupt. Ringer also testified that gang members gain status within the gang by being willing to engage in gunplay to defend the gang's honor, while someone who is perceived as unwilling to defend his "home boys" may be kicked out. Any reasonable jury could infer from this evidence that Yarbrough committed the murder and assault to advance or maintain his position in his gang.

Id. at 96. In *Bluehorse* the Court noted the facts that did not meet the requirements for the group aggravator in that case.

> The only specific evidence regarding Bluehorse's potential retaliatory motive appears to be Francis's making gang signs in response to Bluehorse's doing the same. But according to Francis, these encounters took place during the five to six month period from August 2006 through January 2007, approximately six months before the July 5, 2007, shooting. The State presented no evidence that Bluehorse announced a rival gang status contemporaneously with the shooting or that he had recently confronted and been disrespected or provoked by rival gang members, which would, according to Bair and Frisbee, give rise to a contemporaneous gang requirement or desire to retaliate. Further, the State presented no evidence that Bluehorse made any statements that he wanted to advance his position in a gang or committed the drive-by shooting for reasons related to gang status. Bluehorse testified that he was not a gang member, despite his family's gang connections.

Id. at 430. The Court noted that such evidence did exist regarding another shooting incident that Bluehorse was acquitted of. "We note that such evidence existed regarding the August 15 drive-by shooting, as Francis testified that someone shouted, "N-G-C, cuz" before the shooting began." *Id.* at FN 19.

These cases are much more like *Yarbrough* than *Bluehorse*, and the January 14 assault is almost 100% on all fours to *Yarbrough.* First there was no dispute in either trial that the appellant was a member of the South Side Locos criminal street gang. Second, is that the State had the same type of expert testimony as presented in both *Bluehorse* and *Yarborugh* that committing criminal acts enhanced someone's status in the gang. In the December 20th attack the appellant had another gang member with him (Eduardo Nejera Cruz) and was motivated by the victim's cooperation with the police against another gang member. The appellant was standing up for a member of the gang in front of another member. This cannot help but increase his status in the gang and it is a reasonable inference that that was part of his motivation.

The January 14th attack was materially indistinguishable from *Yarbrough.* There was overwhelming undisputed evidence that the appellant was an SSL gang member. The victim, Mr. Coria, was perceived as a member of a rival gang. The two gangs had an ongoing history of confrontation. *See generally* Officer Korey Judkin's testimony. The appellant punched Mr. Coria after declaring Sur, or south, declaring his gang. RP 823-25. And, as previously discussed, the State introduced gang expert testimony about how one maintains or increases his reputation in a gang by putting in work. RP 312-13, 922. Because this case is

indistinguishable from *Yarbrough* the court should not have dismissed the group aggravator under RCW 9.94A.535(s).

F. CONCLUSION

The appellant threatened a witness in order to get him to cease his cooperation with the authorities against a fellow gang member. He then continued his gang activity by attacking a perceived rival gang member twice. He received a fair trial, and a jury justly and correctly convicted him of the crimes. However, the trial court should not have dismissed the aggravator under 9.94A.535(3)(s). The State asks that the convictions be upheld in all respects, and the case be remanded for a sentencing phase hearing on the group aggravator in accordance with RCW 9.94A.537.

Dated this 21st day of December 2012.

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent - Cross-Appellant, v. SALVADOR GARCIA SANCHEZ, Appellant - Cross-Respondent.	)	No. 30763-8-III DECLARATION OF MAILING

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant-Cross-Respondent and his attorney containing a copy of the Brief of Respondent – Cross-Appellant in the above-entitled matter.

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Declaration of Mailing.