Supreme Court No. 89743-3
COA No. 30763-8-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SALVADOR GARCIA SANCHEZ,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Salvador Garcia Sanchez requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Garcia Sanchez, No. 30763-8-III, filed November 21, 2013. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. On appeal, Mr. Garcia Sanchez argued he received ineffective assistance of counsel because his attorney did not file a timely motion to bifurcate the gang aggravating factor from the guilt phase of the trial. The Court of Appeals agreed that the trial court had authority to bifurcate the aggravating factor, that the court would have granted such a motion if one had been made, and that the prior crime evidence would not have been admissible in the guilt phase of the trial if the court had granted bifurcation. Nonetheless, the court concluded Mr. Garcia Sanchez was not prejudiced. Does the Court of Appeals' conclusion conflict with case law from this Court and the Court of Appeals that consistently holds prior crime evidence is unfairly prejudicial, warranting reversal, when erroneously admitted in a criminal trial? RAP 13.4(b)(1), (2).

2. To prove the crime of witness intimidation, the State must prove the defendant threatened a current or prospective witness with the intent to: influence the person's testimony, induce the person to absent himself from an official proceeding, induce the person not to report information relevant to a criminal investigation, or induce the person not to provide truthful or complete information. The Court of Appeals concluded the evidence was sufficient where Mr. Garcia Sanchez merely approached a car carrying a potential witness, called him a "snitch," and threw rocks at his car. Does the Court of Appeals' conclusion conflict with case law requiring the State to prove the defendant's *specific intent* in making the alleged threat? RAP 13.4(b)(1), (2).

C. STATEMENT OF THE CASE

The charges arose from three incidents that occurred over a six-month period. CP 126-33. The State charged: (1) witness intimidation, RCW 9A.72.110; (2) felony harassment, RCW 9A.46.020(2)(b)(ii); (3) first degree assault, RCW 9A.36.011(1)(a)(c), with a deadly weapon enhancement allegation; (4) riot while armed, RCW 9A.84.010(2)(b), with a deadly weapon enhancement allegation; (5) first degree assault. RCW 9A.36.011(1)(a)(c), with a deadly weapon enhancement

allegation; and (6) riot while armed, RCW 9A.84.010(2)(b), with a deadly weapon enhancement allegation.[1] CP 126-33.

The State alleged Mr. Garcia Sanchez committed all of the crimes with the intent to benefit a criminal street gang, RCW 9.94A.535(3)(aa), and sought an exceptional sentence.[2] Id.

Prior to trial, the court granted the defense motion to sever the witness intimidation and felony harassment charges from the other charges because the incidents were unrelated. 11/23/11RP 48-50.

1. Martinez incident.

On Halloween night 2010, Luis Martinez left a party with Mr. Garcia Sanchez, Jose Nieves and two other men. 11/29/11RP 342. Mr. Martinez drove them in his car to Soap Lake to meet some girls. 11/29/11RP 343.

As Mr. Martinez was driving everyone back to Othello, he noticed a police car behind him. 11/29/11RP 344. The police officer flashed his lights and Mr. Martinez began to pull over. 11/29/11RP

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[1] The State also charged Mr. Garcia with bail jumping but that conviction is not at issue in this appeal.

[2] The State also alleged Mr. Garcia committed the crimes in order to advance his status in the hierarchy of a gang, pursuant to RCW 9.94A.535(3)(s), but the court later dismissed that allegation due to insufficient evidence. CP 11/23/11RP 34.

345. Mr. Martinez then heard gun shots out the window and saw Mr. Nieves holding a gun. 11/29/11RP 345. Mr. Martinez stepped on the gas and drove down a dead-end street, where he stopped the car and everyone got out. 11/29/11RP 345.

One or two days later, Mr. Martinez went to the sheriff's office and told them what had happened. 11/28/11RP 143; 11/29/11RP 348. Police took Mr. Nieves into custody for the shooting. 11/28/11RP 141-42. The police report and the certificate for determination of probable cause stated that Mr. Martinez had told police that Mr. Nieves was the shooter. 11/28/11RP 145-47.

Two months later, Mr. Martinez and a friend were driving around Royal City. 11/29/11RP 349. He saw Mr. Garcia Sanchez standing on the street near his house. 11/29/11RP 350. When Mr. Garcia Sanchez saw them, he ran to the side of the car, banged on the window and called Mr. Martinez "a snitch" and said he was going to kill him. 11/29/11RP 351. About a half hour later, Mr. Martinez and his friend drove by Mr. Garcia Sanchez again, whereupon Mr. Garcia Sanchez threw some rocks at their car. 11/29/11RP 352. Mr. Garcia Sanchez did not say anything about the incident when he banged on the window, and did not mention Mr. Nieves. 11/29/11RP 378.

The State presented evidence that both Mr. Garcia Sanchez and Mr. Nieves were members of a gang. 11/28/11RP 217; 11/29/11RP 355. A Grant County Sheriff deputy testified about the general behavior of gang members. 11/28/11RP 312-14, 317.

To prove the gang aggravator, the State was required to prove Mr. Garcia committed the crime to benefit a "criminal street gang," which is defined by statute as a group of persons that has "as one of its primary activities the commission of criminal acts," and whose members "have engaged in a pattern of criminal street gang activity." RCW 9.94A.030(12); CP 105, 107 (jury instructions). To prove the aggravator, the State offered extensive evidence of prior unrelated criminal offenses committed not only by Mr. Garcia Sanchez but also by several other alleged gang members. The court admitted the evidence, over defense objection. 11/28/11RP 159-61, 196-97, 214-22, 225-30, 245-46, 393-94.

Thus, the jury heard evidence that on three specific occasions, unrelated to the present charge, Mr. Garcia Sanchez and other suspected gang members assaulted a rival gang member.[3] 11/28/11RP

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[3] Two of those assaults are the subject of the charges tried in the second jury trial in this case.

162-63,183-84, 188-91, 199-01. A police officer also testified he had multiple prior contacts with Mr. Garcia Sanchez, who had been charged multiple times for assault. 11/28/11RP 178.

The jury also heard extensive evidence of unrelated criminal acts committed by several other suspected gang members, even though no evidence connected Mr. Garcia Sanchez in any way to those incidents. For instance, Police officer Korey Judkins testified that in September 2010, four gang members assaulted a boy at a high school and two of them were convicted for the assault. 11/28/11RP 212-16. In April 2010, Mr. Nieves and another gang member assaulted a rival gang member; Mr. Nieves was convicted for that assault. 11/28/11RP 217-22. Two other gang members were convicted of another assault that occurred in September 2010. 11/28/11RP 223-30. In August 2010, two gang members were seen spray painting windows and the side of a building; one of them was convicted of malicious mischief. 11/28/11RP 231-32, 245-46. In December 2010, someone wrote gang-related graffiti inside a laundromat at an apartment building; police never found out who wrote the graffiti. 11/28/11RP 247-52.

After hearing this irrelevant and prejudicial evidence, the jury found Mr. Garcia guilty of witness intimidation and felony harassment

as charged. CP 111-12. The jury also answered "yes" on the special verdict form as to the gang aggravator. CP 115-16.

2. Coria incidents.

Two police officers testified Richard Coria was a member of a rival gang. 1/26/12RP 629-30; 1/27/12RP 879. On January 14, 2011, Mr. Coria was standing by his car in the driveway of a house when Mr. Garcia Sanchez and a group of young men walked toward him and displayed gang signs. 1/26/12RP 791, 799, 818-19. Mr. Garcia Sanchez hit him in the head with something hard, like metal. 1/26/12RP 793. A fight started but broke up soon thereafter when the police arrived. 1/26/12RP 795.

Later, police found a set of silver brass knuckles on the ground nearby. 1/25/12RP 564. Mr. Coria was not seriously injured and did not request medical assistance. 1/26/12RP 634.

On May 14, 2011, Mr. Coria was sitting in his car in the parking lot of the post office when he noticed a group of four young men standing about 100 yards away staring at him and "throwing" gang signs; Mr. Garcia Sanchez was in the group. 1/26/12RP 802-04. The young men approached his car, called him names and said if he was a "northerner" he should come out and fight. 1/26/12RP 804. Mr.

Garcia Sanchez reached through the window and hit Mr. Coria in the head a few times with his fist. 1/26/12RP 805. His friend hit Mr. Coria in the shoulder. 1/26/12RP 806-07. Mr. Coria had bumps on his head but was not seriously hurt. 1/27/12RP 912.

The State again offered evidence of the prior unrelated criminal acts of several other suspected gang members and the defense again objected. 1/25/12 RP 581-98. Outside the presence of the jury, the court ruled the evidence was relevant and admissible to show the South Side Locos qualified as a "criminal street gang" under the statute. 1/25/12RP 597. But the court noted at length the prejudicial nature of such evidence and its potential to unfairly bias the jury. 1/25/12RP 597-99. The court cogently observed that, pursuant to the statute,

> once a criminal defendant is believed to be a member of a gang, every crime ever committed by any member of the gang is admissible into evidence. That is so contrary to the notion of fair [sic] trial and so contrary to the principles of Evidence Rule 404 that we don't allow prior bad acts to come into evidence, that it's actually chilling to a trial judge to say, all you have to do to make this allegation is show that the defendant is a member of the gang, and then all of this other stuff comes into evidence.

1/25/12RP 597-98. Such a procedure is "fundamentally unfair" because it is "contrary to the notion that people should have criminal charges resolved based on the evidence that relates to those criminal

charges. Not based on what [a gang associate] did on some day half year before." 1/25/12RP 598-99.

The court stated it was "nonsense" to believe a limiting instruction would cure the unfair prejudice caused by such evidence. 1/25/12RP 598. Thus, the court concluded, "if ever there was a motion to bifurcate the trial, so as not to permit any of this stuff to come in in the case in chief, I would grant it. I would be compelled to grant it." 1/25/12RP 598; see also 1/30/12RP 1035-36 (judge again observes he would have given "great[] consideration" to a motion to bifurcate had one been timely made, given the ineffectiveness of a limiting instruction); 4/03/12RP 55 (judge observes that, had counsel argued before trial that the aggravator should be tried after the guilt phase, "because of the nature of this particular aggravator, what the State is required to prove, that would be a pretty persuasive argument").

The next day, in response to the court's comments, defense counsel filed a motion to bifurcate the gang aggravator from the substantive offenses. 1/26/12RP 605; CP 141-43. But, because the jury had already heard a considerable amount of evidence offered in support of the aggravator, the court denied the motion as untimely. 1/26/12RP 610-11.

Thus, the jury heard, over defense objection, extensive evidence about the prior unrelated criminal acts and convictions of other suspected gang members. 1/26/12RP 615-27; 1/27/12RP 978-92.

As for the January incident, the jury found Mr. Garcia not guilty of first degree assault as charged but guilty of the lesser crime of second degree assault. CP 174-75. The jury also found him guilty as charged of riot while armed. CP 178. The jury found he was armed with a deadly weapon and answered "yes" on the gang aggravator verdict form. CP 182-85. As for the May incident, the jury found Mr. Garcia guilty of fourth degree assault and simple riot.[4] CP 180-81.

3. Sentencing.

The court declined to impose an exceptional sentence, noting that Mr. Garcia Sanchez's conduct was not sufficiently egregious. 4/03/12RP 75.

The Court of Appeals affirmed.

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[4] After the State had rested its case, the court there was not sufficient evidence that a weapon was used during the May incident and therefore the jury could be instructed only on the lesser crimes of fourth degree assault and riot. 1/27/12RP 1009-15.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **Mr. Garcia Sanchez received ineffective assistance of counsel because his attorney did not file a timely motion to bifurcate the irrelevant and damaging gang aggravator evidence from the trial on the substantive offenses**

On appeal, Mr. Garcia Sanchez argued he received ineffective assistance of counsel because his attorney did not file a timely motion to bifurcate the aggravating factor from the trial on the underlying offenses. The Court of Appeals agreed that under State v. Monschke, 133 Wn. App. 313, 334-35, 135 P.3d 966 (2006), the trial court had inherent authority to bifurcate the trial if the evidence supporting the sentencing enhancement would prejudice the defendant during the guilt phase of the trial, and that the trial court would have granted a motion to bifurcate if one had been made. Slip Op. at 16-17. But the court concluded counsel's conduct was not deficient because there was a "substantial overlap between the gang evidence and the evidence relevant to establish the substantive crimes." Slip Op. at 17. The court acknowledged that the evidence of unrelated crimes would *not* have been admissible during a separate guilt phase of the trial and that the evidence was inherently prejudicial. Slip Op. at 19. Nonetheless, the court concluded Mr. Garcia Sanchez had not shown prejudice because

there was not a reasonable probability that he would have been acquitted without the evidence. Slip Op. at 19.

The Court of Appeals' conclusion conflicts with case law from this Court and the Court of Appeals which holds that unrelated criminal offense evidence is highly prejudicial and warrants reversal when erroneously admitted. Therefore, review is warranted under RAP 13.4(b)(1), (2).

To establish ineffective assistance of counsel, the defendant must show his counsel's representation was deficient and he was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI. Counsel's performance is deficient if it falls below an objective standard of performance. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010). Prejudice results where there is a reasonable probability that but for counsel's deficient performance, the outcome would have differed. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A reasonable probability is one sufficient to undermine confidence in the outcome. Id. at 226; Strickland, 466 U.S. at 694.

As the Court of Appeals recognized, trial courts have broad discretion to control the order and manner of trial proceedings. State v.

Monschke, 133 Wn. App. 313, 334-35, 135 P.3d 966 (2006). A court should grant a motion to bifurcate the trial if a unitary trial would prejudice the defendant and there is no substantial overlap in evidence relevant to the proposed separate proceedings. Id. at 335.

Here, defense counsel was deficient for not filing a timely motion to bifurcate the aggravating factor from the trial on the underlying offense. Much of the evidence offered in support of the aggravator was not relevant to prove the elements of the substantive offenses and was unfairly prejudicial to the jury's determination of guilt. Counsel had no strategic reason not to request bifurcation. Indeed, counsel's untimely motion demonstrates counsel believed there were sound reasons for moving to bifurcate the proceedings. See CP 1/26/12RP 605; CP 141-43.

The trial court's comments indicate the court would have granted a timely motion to bifurcate. The court denied counsel's motion because it was untimely, not because it was unwarranted. 1/26/12RP 610-11. The court stated repeatedly and at length that it believed admission of the gang aggravator evidence at the trial on the substantive offenses was profoundly unfair. 1/25/12RP 597-99; 1/30/12RP 1035-36; 4/03/12RP 55. At sentencing, the court reiterated

that, had counsel filed a timely motion to bifurcate, "because of the nature of this particular aggravator, . . . that would be a pretty persuasive argument." 4/03/12RP 55.

Contrary to the Court of Appeals' conclusion, counsel's deficient performance in failing to keep out the irrelevant and prejudicial prior crime evidence from the guilt phase of the trial was sufficient to undermine confidence in the outcome.

Gang evidence may be admissible in a criminal trial if it is relevant to prove the defendant's motive for committing the crime. E.g., State v. Yarbrough, 151 Wn. App. 66, 210 P.3d 1029 (2009); State v. Boot, 89 Wn. App. 780, 789, 950 P.2d 964 (1998); State v Campbell, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995).

But a defendant's unrelated criminal acts, and the unrelated criminal acts of other alleged gang members, are not admissible simply because the current offense is gang-related. The court in this case expressly noted that the evidence regarding whether Mr. Garcia Sanchez or other gang members were convicted of other unrelated crimes was not admissible under ER 404(b). 1/26/12RP 612.

Contrary to the Court of Appeals' holding, the unrelated criminal offense evidence significantly prejudiced Mr. Garcia Sanchez.

Washington courts consistently recognize that prior conviction evidence has a great capacity to arouse prejudice among jurors. "Evidence of prior felony convictions is generally inadmissible against a defendant because it is not relevant to the question of guilt yet very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes." State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997); see also State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989) (prior conviction evidence is inherently prejudicial because it tends to shift the jury's focus "from the merits of the charge to the defendant's general propensity for criminality").

Courts find compelling statistical studies showing that "even with limiting instructions, a jury is more likely to convict a defendant with a criminal record." Jones, 101 Wn.2d at 120; see also Hardy, 133 Wn.2d at 710 (citing statistical studies showing that probability of conviction increases dramatically when jury learns a defendant has previously been convicted of a crime).

Here, the jury heard extensive evidence of the prior unrelated criminal convictions of both Mr. Garcia Sanchez and his alleged

associates. 11/28/11RP 162-63, 183-84, 188-91, 199-201, 212-32, 245-52; 1/26/12RP 615-27; 1/27/12RP 978-92. The evidence painted Mr. Garcia Sanchez as a criminal type who associated with other known criminals. It had the unfair potential to lead the jury to believe he must have committed the current offenses because he had a propensity to commit crimes. Because defense counsel was deficient for failing to file a timely motion to bifurcate the trial and because counsel's deficient performance undermines confidence in the outcome, Mr. Garcia Sanchez received ineffective assistance of counsel and is entitled to a new trial. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 230-32.

2. **The State did not prove the elements of witness intimidation beyond a reasonable doubt because it did not prove Mr. Garcia Sanchez's specific intent in threatening Mr. Martinez**

The State must prove every element of a charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. In reviewing the sufficiency of the evidence to uphold a conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier

of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

To prove witness intimidation, the State must prove:

> That on or about December 20, 2010, the defendant, or an accomplice, by use of a threat against a current or prospective witness attempted to:
> (a) influence the testimony of that person; or
> (b) induce that person to absent himself from an official proceeding; or
> (c) induce that person not to report the information relevant to a criminal investigation; or
> (d) induce that person not to give truthful or complete information.

CP 97 (instruction number 6); RCW 9A.72.110(1).

The crime requires the State to prove the defendant's specific intent in making the alleged threat. A jury may infer intent from a defendant's words and actions only if the "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), overruled on other grounds by State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003) (internal quotation marks and citation omitted). The evidence of intent must be more than guess, speculation or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

In State v. Brown, 162 Wn.2d 422, 426, 173 P.3d 245 (2007), the defendant told the witness she would "pay" if she spoke to police. That evidence was not sufficient to prove the defendant uttered the threat with the specific intent to influence her testimony. Id.

Similarly, in Savaria, the defendant threatened to kill a prospective witness and the next day, when she appeared at the courthouse to testify, he exhibited his middle finger and glared at her. 82 Wn. App. at 835. Although the evidence was sufficient to show the defendant was unhappy about the witness's presence at the courthouse, it was not sufficient to show he had a specific intent to influence her testimony. Id. at 841.

Finally, in State v. Jensen, 57 Wn. App. 501, 510, 789 P.2d 772 (1990), the defendant threatened a potential witness in an attempt to induce her to "drop the charge or make it a lesser charge." That was not sufficient to prove the defendant uttered the threat with the specific intent to induce the witness to absent herself from the proceedings. Id.

Here, as in those cases, the evidence was not sufficient to prove Mr. Garcia Sanchez had a specific intent in uttering the alleged threat. The evidence showed only that, almost two months after Mr. Martinez reported the Halloween shooting incident to police, Mr. Garcia Sanchez

approached him in a car, banged on the window, called him a "snitch," and said he would kill him. 11/29/12RP 349-51. About half an hour later, he threw rocks at Mr. Martinez's car. 11/29/12RP 352.

Because the evidence was insufficient to prove the element of specific intent beyond a reasonable doubt, the conviction must be reversed and the charge dismissed.

E. CONCLUSION

Mr. Garcia Sanchez received ineffective assistance of counsel when his attorney failed to file a timely motion to bifurcate the aggravating factor from the guilt phase of the trial. The Court of Appeals' conclusion that the irrelevant prior crime evidence did not prejudice Mr. Garcia Sanchez is contrary to case law from this Court and the Court of Appeals, warranting review. RAP 13.4(b)(1), (2). Also, the Court of Appeals' conclusion that the evidence was sufficient to show Mr. Garcia Sanchez's specific intent for purposes of the witness intimidation charge is also contrary to the case law. Review is therefore warranted on that issue as well. RAP 13.4(b)(1), (2).

Respectfully submitted this 23rd day of December, 2013.

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APPENDIX

FILED
NOV. 21, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent and Cross-Appellant, v. SALVADOR GARCIA SANCHEZ, Appellant.	)	No. 30763-8-III UNPUBLISHED OPINION

KULIK, J. — Salvador Garcia Sanchez appeals his convictions for intimidating a witness, harassment, second degree assault while armed with a deadly weapon, and riot while armed with a deadly weapon. He contends the trial court exceeded its authority in allowing the jury to consider gang aggravator evidence and that trial counsel was ineffective for failing to timely move to bifurcate the gang enhancement from the trial on the substantive offenses. Additionally, he contends the State failed to prove the witness intimidation charge and that the charging documents and "to convict" instructions were constitutionally deficient for failing to include the "true threat" element. In a pro se statement of additional grounds, he contends insufficient evidence supports his

convictions for felony riot and second degree assault. Finally, the State cross appeals the trial court's pretrial dismissal of a gang enhancement. We conclude that all of Mr. Garcia Sanchez's contentions are without merit and accordingly affirm the trial court.

FACTS

The charges in this case arose from four incidents that occurred over a six-month period. The first incident occurred on October 31, 2010, when Salvador Garcia Sanchez, Jose Nieves, Eduardo Cruz, and Luis Enrique Flores Martinez attended a Halloween party in Othello, Washington. Around 11:00 p.m., the four men left together in Mr. Martinez's car to meet up with some young women in Soap Lake. Later, as Mr. Martinez was driving the group back to Othello, a police officer saw him make an illegal U-turn. The police officer attempted to make a traffic stop. However, Mr. Martinez then heard gun shots and saw Mr. Nieves holding a gun. He accelerated and drove down a dead-end street where he stopped the car. Everyone got out of the car and hid for several hours.

The next day, Mr. Martinez went to the police, confessed to the incident, and told them of Mr. Nieves's involvement. After the identification of Mr. Nieves as the shooter, police went to his mother's house and arrested him. The State filed seven felony charges against him.

About two months later, Mr. Martinez and a friend were driving around Royal City. Mr. Garcia Sanchez saw them and ran into the middle of the street to stop them. They slowed down and Mr. Garcia Sanchez ran to the passenger side of the car where Mr. Martinez was sitting and unsuccessfully tried to open the door. He then attempted to break the window, called Mr. Martinez "a snitch," and threatened to kill him. Report of Proceedings (RP) at 351. Mr. Martinez and his friend were able to drive away. About 30 minutes later, Mr. Martinez saw Mr. Garcia Sanchez again as they continued their drive through town. When Mr. Garcia Sanchez saw them, he threw rocks at their car.

On January 14, 2011, Ricardo Coria and his son Mario went to Mr. Coria's nephew's house in Royal City. At some point, he walked out to his car to recharge his telephone battery. He then saw a group of five or six men walking toward him, including Mr. Garcia Sanchez. Mr. Coria stood between the approaching men and his nephew's house. Mr. Garcia Sanchez then walked up to him and said something about the "south side" and some of the men in the group flashed gang signs. RP at 799. As Mr. Coria looked back at the house to tell his son to go back in the house, he felt something metallic hit him on his forehead. He fell to the ground and Mr. Garcia Sanchez hit him four or five times on the head with the metal object. Mr. Coria's son came out of the house and

pushed Mr. Garcia Sanchez off his father. A group fight ensued. The group dispersed when police arrived.

A few months later, Mr. Coria was talking on his telephone in his car in a parking lot. After a few minutes, he noticed a group of four young men, including Mr. Garcia Sanchez, standing about 100 yards away, staring at him and throwing gang signs. The men called out to Mr. Coria to get out of the car, but he ignored them. The men approached his car, knocked on his window, and began calling him a "northerner." RP at 804. He rolled down his window and the men urged him to get out and fight. Mr. Garcia Sanchez then reached through the window and hit Mr. Coria on the head a few times with his fist. Mr. Coria had bruises on his head, but was not seriously hurt. The men ran away when police arrived.

The State charged Salvador Garcia Sanchez with witness intimidation, felony harassment, two counts of first degree assault with deadly weapon enhancements, and two counts of riot with deadly weapon enhancements.[1] It also alleged that the crimes were committed to benefit a street gang under RCW 9.94A.535(3)(aa) and to advance gang standing under RCW 9.94A.535(3)(s). Before trial, the court granted Mr. Garcia

[1] The State also charged Mr. Garcia Sanchez with bail jumping, but that is not at issue in this appeal.

Sanchez's motion to sever the witness intimidation and felony harassment charges from the other charges. Two separate jury trials followed.

Mr. Garcia Sanchez also filed a *Knapstad*[2] motion to dismiss the gang aggravators under RCW 9.94A.535(3)(s) and RCW 9.94A.535(3)(aa). He argued in part that the State could not produce evidence that he was motivated to advance his gang status. The court granted his motion as to the aggravator alleged under RCW 9.94A.535(3)(s), finding there was "no evidence beyond speculation regarding an intent of the defendant to enhance his status within his gang, a status which, according to the state, he already occupied prior to the first of the incidents that is charged, with the incarceration of Mr. Nieves." RP at 34.

At the first trial, the State's theory was that Mr. Garcia Sanchez threatened Mr. Martinez to benefit his gang by discouraging Mr. Martinez from testifying against Mr. Nieves, the jailed leader of the gang. Mr. Martinez testified as detailed above. He explained that he hung out with the "South Side Locos" (SSL) gang and that he believed Mr. Garcia Sanchez had threatened to kill him because he had reported Mr. Nieves to the police. Mr. Martinez believed that if Mr. Garcia Sanchez had been able to open the car door, he would have tried to kill him.

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[2] *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

Deputy Ryan Rectenwald, a police officer with the Grant County Sheriff's Office, testified that he was assigned to investigate the Halloween 2010 incident. He stated that Mr. Martinez gave him the information that provided the basis for the search warrant for Mr. Nieves's home and eventually led to Mr. Nieves's arrest. He further testified that he included Mr. Martinez's name in the probable cause statement and police report and that "[d]efendants always read my reports if they're charged with a crime." RP at 143.

To establish the gang enhancement under RCW 9.94A.535(3)(aa),[3] the State presented witnesses to testify about the characteristics of criminal street gangs. Officer Korey Judkins, a gang intelligence officer for the Royal City Police Department, testified that he had had anywhere from 15 to 20 contacts with Mr. Garcia Sanchez. He testified that on January 14, 2011, he received a call about a fight in progress. When he arrived at the scene, he saw Mr. Garcia Sanchez with known SSL gang members running from the yard of a rival gang member. Mr. Garcia Sanchez had a bloody face. Officer Judkins also testified that he witnessed Mr. Garcia Sanchez and other SSL members burning a blue bandana in August 2010. When he asked Mr. Garcia Sanchez why they were burning the bandana, Mr. Garcia Sanchez told him that the bandana had fallen on the

[3] RCW 9.94A.535(3)(aa) provides: "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,

ground and it would "disrespect . . . their colors" if they did not burn it. RP at 203. Officer Judkins also testified that in August 2010, police discovered a large amount of graffiti on police department buildings and other buildings around town. A security video showed SSL gang members spray painting graffiti on the side of one of the police department buildings. The court admitted numerous photographs of the graffiti.

Deputy Joe Harris testified as an expert on street gangs. He explained that people join gangs for a number of reasons, including socioeconomic reasons, a need for protection and community, and a need for respect. Deputy Harris testified that in gang culture "respect equates to fear. If you fear me, then you will respect me." RP at 297. According to Deputy Harris, gang members gain respect by "putting in work," which he explained meant "committing crimes to the benefit of the gang, doing things like residential burglaries or vehicle prowls to steal pawnable items that the gang can then go pawn and make money." RP at 298. He elaborated that "putting in work" could also include drive-by shootings, selling drugs, and beating up a rival gang member. RP at 298.

Deputy Harris also explained that gang members identify themselves by wearing certain colors, tattoos, and using hand signals. According to Deputy Harris, the number 13 is indicative of the SSL gang. He explained, "[t]he 13 represents the letter M in the

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influence, or membership."

alphabet, it's the 13th letter of the alphabet, the letter M then represents the Mexican mafia which would be kind of the overseer of Sureno gangs." RP at 301. He also explained that a "NK" tattoo on Mr. Garcia Sanchez's leg signified "Norteno killer" and is a very common tattoo among Hispanic street gangs. RP at 302. Deputy Harris also testified that gang members view "snitches" as "[t]he lowest form of existence on the planet." RP at 308.

The State then admitted numerous exhibits depicting Mr. Garcia Sanchez's tattoos, which included the number 13, and dots on another SSL gang member's hands that allegedly represented the number 13. The State also admitted a video that showed a September 2010 fight at a high school between Mr. Garcia Sanchez and his gang members and a rival gang member. The State presented evidence that SSL gang members had a history of criminal activity, including a juvenile court disposition for fourth degree assault for Jesus Torres, a SSL gang member, an information for Eric Haro, another SSL member, alleging riot and fourth degree assault, and an information charging Mr. Nieves with second degree assault.

The jury returned guilty verdicts on the intimidating a witness charge and the nonfelony harassment charge and answered "yes" on the special verdict form as to the gang aggravator.

During the second trial, Mr. Coria testified as detailed above. Eyewitnesses to the January 14, 2011 incident corroborated Mr. Coria's testimony. His son, Mario Ricardo Coria, testified that he saw Mr. Garcia Sanchez, accompanied by four other "south siders," approach his father, and then hit him with brass knuckles, knocking his father to the ground. RP at 680, 682-83. He stated that Mr. Garcia Sanchez then approached him with the brass knuckles and "started swinging." RP at 684. Victor Bahena, Mr. Coria's nephew, and Jesus Valentin, both testified that a group of "south siders" approached Mr. Coria and that Mr. Garcia Sanchez hit Mr. Coria on the head several times. RP at 714, 756. They stated that when they intervened to help, the other "south siders" started attacking them. The fighting lasted until police arrived, at which point the SSL gang members left.

Officer Reynaldo Rodriguez corroborated Mr. Coria's testimony regarding the second incident. He testified that on May 14, 2011, he saw Mr. Garcia Sanchez walking across a street in Royal City with three other males. He testified that two of the males were affiliated with the SSL street gang. Shortly thereafter, Officer Rodriguez saw the males "jumping and punching" into Mr. Coria's vehicle. RP at 163.

As at the first trial, Deputy Harris testified about gang culture. He opined that the January and May incidents were gang related because the actors were gang members,

used gang slurs, wore gang attire, and were members of rival gangs with a history between them. He also believed the May and January assaults were related, explaining "[r]etaliation is a huge motivator in gang-related crime." RP at 965.

Over repeated defense objections, Officer Judkins recited the extensive criminal histories of SSL members. The court ruled that the evidence was relevant to show the SSL gang qualified as a "criminal street gang" under the statute. RP at 597. However, the court noted the prejudicial nature of the evidence:

> [O]nce a criminal defendant is believed to be a member of a gang, every crime ever committed by any member of that gang is admissible into evidence.
>
> That is so contrary to the notion of a fair trial and so contrary to the principles of Evidence Rule 404 that we don't allow prior bad acts to come into evidence, that it's actually chilling to a trial judge to say, all you have to do to make this allegation is show that the defendant is a member of the gang, and then all of this stuff comes into evidence.

RP at 597-98.

The judge then stated that he would grant a defense motion to bifurcate the trial, explaining, "[This] sentencing enhancement is being used to dump truckloads of otherwise inadmissible evidence into a trial that is supposed to determine guilt or innocence." RP at 599.

The next day, Mr. Garcia Sanchez moved to bifurcate his trial, arguing the jury's consideration of the substantive evidence of his charges should be separated from the

evidence supporting the gang aggravator. However, the court denied the motion as untimely, noting "the jury has already heard considerable evidence that in my view would not be admitted absent the gang aggravator." RP at 610-11.

As to the January charges, the jury found Mr. Garcia Sanchez not guilty of first degree assault, but guilty of the lesser included crime of second degree assault. The jury also found Mr. Garcia Sanchez guilty of riot while armed with a deadly weapon. As for the May charges, the jury found Mr. Garcia Sanchez guilty of fourth degree assault and simple riot.

At sentencing, Mr. Garcia Sanchez argued that the court did not have the authority to impose an exceptional sentence because the aggravator at issue, RCW 9.94A.535(3)(aa), is not specifically listed in RCW 9.94A.537(4). The court overruled the objection, concluding it had the statutory authority to submit the aggravator to the jury. However, the court imposed a standard range sentence of 79 months, concluding an exceptional sentence would be excessive in view of Mr. Garcia Sanchez's conduct.

ANALYSIS

Aggravating Circumstance Under RCW 9.94A.535(3)(aa). Mr. Garcia Sanchez argues that the trial court improperly allowed the jury to consider whether he committed

the crimes "with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang[,] its reputation, influence, or membership" under RCW 9.94A.535(3)(aa). He contends that it was improper because RCW 9.94A.537(4) states that "[e]vidence 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," but the aggravating factor at issue here was not listed in (a) through (y).

This contention presents an issue of statutory interpretation that we review de novo. *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789 (2004). The purpose of statutory interpretation is to discern the legislature's intent. *Id.* To do that, this court looks first at the plain language of the statute. *Id.* If the statute's meaning is plain on its face, then we must give effect to that plain meaning. *State v. Theilken*, 102 Wn.2d 271, 275, 684 P.2d 709 (1984). We discern the plain meaning of a statute from "the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

A trial court may impose an exceptional sentence outside the standard range only if it finds that there are substantial and compelling reasons to do so. RCW 9.94A.535.

RCW 9.94A.535(3) sets forth "Aggravating Circumstances – Considered by a Jury – Imposed by the Court." That provision includes "an exclusive list of factors that can support a sentence above the standard range." RCW 9.94A.535(3). And that list includes the aggravating factor at issue here. RCW 9.94A.535(3)(aa).

Our Supreme Court has concluded that "trial courts lack authority during trial to submit special interrogatories to juries in deviation from the [Sentencing Reform Act of 1981, chapter 9.94A RCW (SRA)]'s exceptional sentencing procedures." *State v. Davis*, 163 Wn.2d 606, 611, 184 P.3d 639 (2008). The SRA requires that facts supporting aggravating circumstances should be found "by procedures specified in RCW 9.94A.537." RCW 9.94A.535(3). RCW 9.94A.537(4) provides that "[e]vidence 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." Relying on that statute, Mr. Garcia Sanchez contends that the trial court lacked authority to allow the jury to consider the aggravating factor at issue here, which is not listed in (a) through (y).

However, that statute does not address what a jury can and cannot consider. Instead, it addresses whether a jury must consider certain issues at trial or whether it may consider them in a separate proceeding. RCW 9.94A.537(4). It states:

> 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.

RCW 9.94A.537(4) (emphasis added). While that provision does not clearly state whether a jury is required to consider RCW 9.94A.535(3)(aa) at trial, it does not give or deprive the court of the authority to submit RCW 9.94A.535(3)(aa) to a jury.

RCW 9.94A.535 clearly provides that a jury may consider the aggravating circumstance. The trial court correctly allowed the jury to consider it.

Ineffective Counsel—Motion to Bifurcate. Mr. Garcia Sanchez next contends that defense counsel was ineffective for failing to file a timely motion to bifurcate his trial to separate the jury's consideration of the evidence supporting the gang enhancement from that supporting the substantive offenses. He argues that most of the evidence offered in support of the aggravator was not relevant to prove the substantive offenses and was unfairly prejudicial. The State responds there was no reason to bifurcate proceedings

because the gang aggravator evidence was admissible during the guilt phase of the trial to prove motive.

Effective assistance of counsel is guaranteed by the federal and state constitutions. U.S. CONST. amend VI; CONST. art. I, § 22. To prevail on his ineffective assistance of counsel claim, Mr. Garcia Sanchez must show that counsel made errors serious enough as to make his performance nonfunctional and that this performance prejudiced the defense enough to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Even if a defendant shows that particular errors of counsel were unreasonable, . . . the defendant must show that they actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. Courts engage in a strong presumption that counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995) (quoting *State v. Thomas*, 109 Wn.2d 22, 226, 743 P.2d 816 (1987)). To rebut this presumption, a defendant bears the burden of establishing the absence of any "conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have differed absent the deficient performance. *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a

probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The burden is on the defendant to show ineffective assistance based on the trial record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The legislature has mandated the procedure for establishing aggravating circumstances. As noted in the preceding section, RCW 9.94A.537(4) provides that "[e]vidence regarding any facts supporting aggravating circumstances . . . shall be presented to the jury during the trial of the alleged crime . . . unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3)(a)(iv), (h)(i), (o), or (t)." With regard to these listed exceptions, the statute states that the 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." RCW 9.94A.537(4) (emphasis added).

In failing to request bifurcation, trial counsel was simply following the statutorily prescribed procedure for proving aggravating circumstances. However, citing *State v. Monschke*, 133 Wn. App. 313, 334-35, 135 P.3d 566 (2006), Mr. Garcia Sanchez points out that trial courts have discretion to bifurcate trials if the evidence supporting the

sentencing enhancement would prejudice the defendant during the guilt phase of the trial, and that the trial court here would have done so had trial counsel filed a timely motion.

Despite the trial court's indication that it would have granted a timely motion to bifurcate, Mr. Garcia Sanchez fails to establish deficient performance. Bifurcation is not necessary when there is overlap between the evidence necessary to establish the aggravating circumstance and the substantive offense. *Id.* at 335.

In *Monschke*, the defendant moved to bifurcate his trial into a murder phase and an aggravating circumstances phase, arguing that bifurcation was necessary to keep the jury from considering his white supremacist beliefs when deliberating on the first degree murder elements. *Id.* at 322. Noting the "current statutes do not provide for bifurcated trials on first degree murder and the alleged aggravating circumstance," the court acknowledged that bifurcated trials may sometimes be necessary. *Id.* at 334. However, it also noted that "[b]ifurcation is inappropriate . . . if there is a substantial overlap between evidence relevant to the proposed separate proceedings." *Id.* at 335. The *Monschke* court ultimately determined that the defendant's white supremacist beliefs were relevant to establish motive and that he intended to cause an "inferior" person's death. *Id.*

Here, there is a substantial overlap between the gang evidence and the evidence relevant to establish the substantive crimes. Evidence that Mr. Garcia Sanchez was a

member of a criminal street gang, that gang members exact revenge on "snitches," and that they fight with rival gang members was relevant to motive in both trials. During the first trial, the State introduced evidence that Mr. Garcia Sanchez's attack on Mr. Martinez was motivated by his allegiance to his gang. The relationship between Mr. Garcia Sanchez and Mr. Nieves was central to establishing the State's theory of the case and proving the motive for the attack. Motive was also at issue in the second trial. Mr. Garcia Sanchez's gang membership explained his attacks on Mr. Coria, allegedly a rival gang member.

Thus, in both trials, motive would have been at issue even if the case had been bifurcated. To the extent the evidence supporting the gang enhancement would have been admissible to establish motive during the guilt phase of trial, it was not unreasonable for defense counsel to fail to request bifurcation. Defense counsel's choice was well within the range of professionally competent assistance.

Even if we were to decide that defense counsel's strategy was unreasonable and that he should have moved to bifurcate the trial, Mr. Garcia Sanchez would still have to show prejudice. He argues that even if some of the gang evidence would have been admissible at trial, the most damaging evidence—the evidence of prior, unrelated criminal

acts committed by Mr. Garcia Sanchez and other gang members—would not have been admissible.

Mr. Garcia Sanchez is correct that the evidence of unrelated crimes would generally not be admissible during the guilt phase of a trial. Prior conviction evidence is considered inherently prejudicial because it tends to shift the jury's focus "from the merits of the charge to the defendant's general propensity for criminality." *State v. Jones*, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989). Nevertheless, Mr. Garcia Sanchez cannot show that there was a reasonable probability he would have been acquitted absent this evidence.

During the first trial, the State presented uncontroverted evidence that Mr. Martinez had reported Mr. Nieves to police and that Mr. Garcia Sanchez, a member of Mr. Nieves's gang, later called Mr. Martinez a "snitch" and threatened to kill him. There was no evidence suggesting someone else threatened to kill Mr. Martinez. In the second trial, Mr. Coria testified that Mr. Garcia Sanchez, accompanied by other gang members, hit him on the head four or five times with a metallic object, causing Mr. Coria to fall to the ground unconscious. There were multiple eyewitnesses to the attack. The jury acquitted Mr. Garcia Sanchez of first degree assault, finding him guilty of the lesser

included crime of second degree assault. This verdict undermines Mr. Garcia Sanchez's assertion that defense counsel's performance adversely affected his trial.

Moreover, in both trials, the trial court gave a limiting instruction that any evidence relating to unlawful acts of Mr. Garcia Sanchez or others on occasions other than the dates of the substantive crimes could only be used in resolving the alleged aggravating circumstance. A jury is presumed to follow the trial court's instructions. *Carnation Co. v. Hill*, 54 Wn. App. 806, 811, 776 P.2d 158 (1989) (quoting *Tennant v. Roys*, 44 Wn. App. 305, 315, 722 P.2d 848 (1986)), *aff'd*, 115 Wn.2d 184, 796 P.2d 416 (1990).

In view of the strength of the State's evidence to support the jury verdicts, Mr. Garcia Sanchez fails to show a reasonable probability that the outcome of the trials would have been different if the evidence of the unrelated criminal acts had been presented at a separate proceeding.

Defense counsel's decision not to request bifurcation of trial was not ineffective assistance. Even assuming that a reasonably professional level of performance would have included this request, Mr. Garcia Sanchez cannot show that there was a reasonable probability of a better outcome if the request had been made.

Sufficient Evidence—Witness Intimidation. Mr. Garcia Sanchez next contends that the evidence is insufficient to establish any of the alternative ways to commit witness intimidation because the State failed to prove his specific intent in making the threat. He argues that calling Mr. Martinez a "snitch" and threatening to kill him does not establish that he was attempting to influence Mr. Martinez's testimony, induce him to absent himself from an official proceeding, or withhold evidence relevant to the police investigation. He asserts that, at most, the evidence shows that he was angry with Mr. Martinez for reporting Mr. Nieves to police. The State responds that the evidence was sufficient to support a reasonable inference that Mr. Garcia Sanchez intended to induce Mr. Martinez's absence from future proceedings, even though Mr. Garcia Sanchez did not explicitly make a statement to that effect.

We review a defendant's challenge to the sufficiency of the evidence by asking whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967 (1999) (quoting *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995)). In answering this question, we view the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Gregory*, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006) (quoting *State v. Clark*, 143 Wn.2d 731, 769, 24 P.3d 1006 (2001)). We consider

circumstantial and direct evidence equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Here, the court instructed the jury that to convict Mr. Garcia Sanchez of intimidating a witness, it had to prove that "by use of a threat against a current or prospective witness [Mr. Garcia Sanchez] attempted to:"

(a) influence the testimony of that person; or
(b) induce that person to absent himself from an official proceeding; or
(c) induce that person not to report the information relevant to a criminal investigation; or
(d) induce that person not to give truthful or complete information.

Clerk's Papers (CP) at 97.

The State provided evidence that Mr. Martinez went to police and informed them about Mr. Nieves's involvement in a shooting. Officer Rodriguez testified that based on that information, he obtained a search warrant for Mr. Nieves's home. He also testified that Mr. Martinez was named in the police report and certificate of probable cause in Mr. Nieves's case. There was evidence that Mr. Nieves's defense counsel had the police report and that criminal charges resulted from the incident. Moreover, the State established that Mr. Nieves and Mr. Garcia Sanchez were members of the same gang and that about two months after Mr. Martinez reported Mr. Nieves to police, Mr. Garcia Sanchez approached Mr. Martinez in a car, tried to break a window, called him a

"snitch," and threatened to kill him, all in the context of Mr. Nieves's pending criminal charge.

Under these circumstances, the trier of fact could infer that Mr. Garcia Sanchez intended to intimidate Mr. Martinez from testifying against Mr. Nieves. In considering charges of intimidating a witness, jurors must ascertain the inferential meaning of statements alleged to be threats, because the literal meaning of words is not necessarily the intended communication. *State v. Gill*, 103 Wn. App. 435, 445, 13 P.3d 646 (2000) (quoting *State v. Scherck*, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973)). Considering the evidence in the light most favorable to the State and drawing all reasonable inferences in the State's favor, the evidence was sufficient to support the conviction for intimidation of a witness.

Sufficient evidence supports Mr. Garcia Sanchez's conviction for intimidation of a witness.

Charging Documents and "To Convict" Instructions. For the first time on appeal, Mr. Garcia Sanchez argues that (1) a "true threat" is an essential element of felony harassment and witness intimidation, and (2) the respective charging documents and "to convict" instructions were constitutionally deficient because they did include this

essential element of the offense. Mr. Garcia Sanchez fails to meet the RAP 2.5(a)(3) exception for our consideration of this unpreserved issue for the first time on appeal.

Generally, we do not review issues raised for the first time on appeal unless the issue involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Under this standard, the defendant has the initial burden of showing that the error was of constitutional magnitude and manifest. *State v. Grimes*, 165 Wn. App. 172, 185-86, 267 P.3d 454 (2011), *review denied*, 175 Wn.2d 1010, 287 P.3d 594 (2012). If the defendant can show that a claim raises a manifest constitutional error, then the burden shifts to the State to prove that the error was harmless. *Id.* at 186.

Both the United States and Washington Constitutions require that all "essential elements" of a crime be pleaded in the information and proved beyond a reasonable doubt. *State v. Allen*, 176 Wn.2d 611, 627 n.10, 294 P.3d 679 (2013). The trial court's "to convict" instruction must also contain all the essential elements of the offense, and its failure to do so constitutes "automatic reversible error." *State v. Smith*, 131 Wn.2d 258, 263, 265, 930 P.2d 917 (1997).

After Mr. Garcia Sanchez filed his opening brief, the Washington Supreme Court decided the issue before us and rejected Mr. Garcia Sanchez's argument, holding that the definition of a true threat is not an essential element that needs to be included in an

information or to convict instruction. *Allen,* 176 Wn.2d at 629-30. The court clarified that the constitutional concept of a "true threat" is merely definitional and is "not itself an essential element of the crime." *Id.* at 630 (quoting *State v. Tellez*, 141 Wn. App. 479, 484, 170 P.3d 75 (2007)). It also explained that because the true threat requirement is merely definitional, it is not error if the true threat requirement is not included in the information or "to convict" instruction "so long as the jury [is] instructed as to the true threat requirement." *Id.* In *Allen*, because the jury received a separate instruction explaining the true threat requirement, the court held that the defendant's First Amendment rights were protected and he failed to demonstrate that a "manifest error affecting a constitutional right" had occurred. *Id.*

Allen is dispositive here. While the charging documents and "to convict" instructions for the felony harassment and witness intimidation charges did not mention the true threat requirement, the trial court gave the jury a separate instruction, identical to the one given in *Allen.* This instruction read, in part:

> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP at 98.

Because the jury instruction included a separate instruction explaining the "true threat" requirement, the instructions as a whole were sufficient.

In view of *Allen*, no constitutional error occurred warranting our review for an unpreserved alleged error under RAP 2.5(a)(3).

Statement of Additional Grounds (SAG) Issues. In his pro se statement of additional grounds, Mr. Garcia Sanchez first contends insufficient evidence supports his conviction for felony riot because the State failed to prove that he was armed with a deadly weapon. Evidence is sufficient to support a verdict if the trier of fact has a factual basis for finding each element of the offense beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

The riot statute provides:

> A person is guilty of the crime of riot if, acting with three or more persons, he or she knowingly and unlawfully uses or threatens to use force, or in any way participates in the use of such force, against any other person or against property.

RCW 9A.84.010(1).

Guilt for riot is predicated on group conduct: "'[a] person . . . acting with three or more other persons.'" *State v. Montejano*, 147 Wn. App. 696, 700, 196 P.3d 1083 (2008) (quoting RCW 9A.84.010(1)). The crime of riot becomes a felony if "the actor is armed with a deadly weapon." RCW 9A.84.010(2)(b). The *Montejano* court clarified that for

the commission of felony riot, "the accused must be the one with the deadly weapon." *Montejano*, 147 Wn. App. at 700. Here, the evidence at trial established that Mr. Garcia Sanchez approached Mr. Coria with a group of five or six other young men. Mr. Coria's son testified that Mr. Garcia Sanchez was holding brass knuckles when he attacked Mr. Coria. And Mr. Coria testified that Mr. Garcia Sanchez hit him several times with brass knuckles. The evidence was sufficient to convict Mr. Garcia Sanchez of felony riot.

Mr. Garcia Sanchez next contends the evidence was insufficient to establish second degree assault because there was no evidence that Mr. Coria suffered "substantial bodily harm," as required under RCW 9A.36.021(1)(a). He argues, "[n]owhere in any police report, nor in Ricardo Coria Lara's testimony does it refer [t]o or relate to any fracture [or] loss of impairment of any bodily organ." SAG at 3.

Mr. Garcia Sanchez overlooks the fact that the second degree assault charge was a lesser included of count three, which alleged that Mr. Garcia Sanchez or an accomplice, with intent to cause great harm, assaulted Mr. Coria with a deadly weapon. In order to prove that Mr. Garcia Sanchez committed the crime of second degree assault, the State was required to prove that he assaulted the victim "with a deadly weapon." RCW 9A.36.021(1)(c). The jury was instructed that to convict Mr. Garcia Sanchez of the lesser included offense it had to find beyond a reasonable doubt that "the defendant or an

accomplice assaulted Ricardo Coria Lara with a deadly weapon." CP at 154. As just detailed, there was sufficient evidence that Mr. Garcia Sanchez assaulted Mr. Coria with a deadly weapon.

Sufficient evidence supports Mr. Garcia Sanchez's convictions for felony riot and second degree assault.

State's Cross Appeal—Knapstad *Motion.* In its cross appeal, the State contends that the trial court erred in granting the defense's *Knapstad* motion to dismiss the gang aggravator under RCW 9.94A.535(3)(s). It argues that sufficient evidence established that Mr. Garcia Sanchez committed the offenses to advance his position in the gang. Mr. Garcia Sanchez counters that any error was harmless because the trial court would not have imposed an exceptional sentence even if the aggravator had been presented to the jury.

RCW 9.94A.535(3)(s) allows for an exceptional sentence when "[t]he 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." Here, the trial court dismissed this aggravator pursuant to a pretrial *Knapstad* motion, concluding there was no evidence of the defendant's intent to advance his gang status.

Under *Knapstad*, a trial court may grant a pretrial motion to dismiss a criminal charge if there are no disputed facts and the undisputed facts are insufficient to support a finding of guilt. *State v. Knapstad*, 107 Wn.2d 346, 356, 729 P.2d 48 (1986). However, it is well settled that the trial court "'shall not dismiss a sentence enhancement or aggravating circumstance unless the underlying charge is subject to dismissal under this section.'" *State v. Meacham*, 154 Wn. App. 467, 473-74, 225 P.3d 472 (2010) (quoting CrR 8.3(c)(3)). The *Meacham* court explained that "CrR 8.3(c)(3) permits a defendant to move to dismiss an 'aggravating circumstance' allegation, but only when the underlying charge is also subject to dismissal. The court may not separate the aggravating circumstances from the underlying charge." *Id.* at 474.

Here, in the absence of a motion to dismiss the underlying charges, the trial court did not have the authority to separately dismiss the special gang allegation pursuant to a *Knapstad* motion. Nevertheless, any error was harmless. As Mr. Garcia Sanchez points out, it is unlikely the trial court would have imposed an exceptional sentence even if the gang aggravator had been submitted to the jury and the jury had answered "yes." As detailed above, the State presented extensive gang-related evidence at trial and the jury answered "yes" on the special verdict form related to the "status" gang aggravator under RCW 9.94A.535(3)(s). Despite this evidence, the court imposed a standard range

sentence, finding an exceptional sentence would be "excessive in light of [Mr. Garcia Sanchez's] conduct." RP (April 3, 2012) at 75. Nothing in the record suggests the court would have changed its opinion about the seriousness of the crimes even if the State had been allowed to submit the "status" aggravator to the jury.

Any error in dismissing the gang aggravator under RCW 9.94A.535(3)(s) was harmless.

We affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, J.

Kulik, J.

WE CONCUR:

Brown, J.

Brown, J.

Korsmo, C.J.

Korsmo, C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 30763-8-III
	)	
SALVADOR SANCHEZ,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] D. ANGUS LEE, DPA KEVIN MCCRAE, DPA GRANT COUNTY PROSECUTOR'S OFFICE PO BOX 37 EPHRATA, WA 98823-0037	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] SALVADOR SANCHEZ 357421 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF DECEMBER, 2013.

X_____

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