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No. 30763-8-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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

APPELLANT'S REPLY BRIEF
CROSS-RESPONDENT'S RESPONSE BRIEF

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A. ARGUMENT IN REPLY

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

a. Counsel's failure to file a timely motion to bifurcate was not reasonable trial strategy

The State contends counsel did not provide deficient representation because it is reasonable to presume counsel simply concluded there was no merit to a motion to bifurcate. SRB at 12-13. But the question is not whether counsel believed a motion to bifurcate had any merit. The question is whether failure to bring the motion was reasonable trial strategy. In this case, failure to bring the motion was not reasonable trial strategy because such a motion would likely have succeeded if it had been timely made.

The question in an ineffective assistance of counsel claim is whether there was a "legitimate strategic or tactical reason" behind defense counsel's decision. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Counsel's representation is deficient if there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130-31, 101 P.3d 80 (2004). Failure to bring a plausible motion to suppress is deemed ineffective if

it appears that a motion would likely have been successful if brought. Id.; State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006). Similarly, failure to bring a plausible motion to bifurcate should be deemed ineffective if it appears such a motion would likely have been successful if brought. Here, such a motion was plausible and would likely have been successful.

The State contends the trial court did not have inherent authority to bifurcate the trial but that is not correct. Washington courts have inherent supervisory authority to adopt procedures governing the conduct of criminal trials "for the purpose of furthering sound judicial practice." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). Also, the evidence rules expressly provide trial courts with wide discretion to determine the manner in which evidence is presented to the jury. See ER 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.").

The appellate courts have applied these principles to conclude that trial courts have inherent authority to bifurcate the presentation of evidence in criminal trials even where no rule or statute expressly

provides such authority. In State v. Monschke, 133 Wn. App. 313, 334-35, 135 P.3d 966 (2006), for example, the Court concluded that trial courts have inherent authority to bifurcate aggravated first degree murder trials.[1] The Court explained that the trial court's authority to bifurcate the trial derives from ER 611 and the court's inherent authority over trial procedures. Id. Although bifurcated trials are "not favored," they are appropriate if a unitary trial would significantly prejudice the defendant and there is no substantial overlap between evidence relevant to the proposed separate proceedings. Id. at 335. A trial court has wide discretion to determine whether a bifurcated trial is appropriate and the court's decision will be overturned on appeal only if it is manifestly unreasonable or based on untenable grounds. Id.

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[1] The State contends that Monschke is no longer controlling authority because it did not analyze State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), and was decided before State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). SRB at 19. But those cases address a different question and therefore have no effect on the continuing validity of Monschke. The relevant question in Hughes and Pillatos was whether trial courts have inherent authority to impanel sentencing juries to hear aggravated sentencing factors. Pillatos, 159 Wn.2d at 469-70; Hughes, 154 Wn.2d at 149-50. In Monschke, by contrast, there was no question that the trial court had authority to impanel a jury to hear the aggravating factor. Instead, the question was whether the court had authority to determine the *manner* in which the evidence supporting the aggravating factor was presented to the jury. As stated, trial courts have discretion to determine the manner in which evidence is presented to the jury. ER 611; Monschke, 133 Wn. App. at 334-35; State v. Jeppesen, 55 Wn. App. 231, 236-37, 776 P.2d 1372 (1989).

Similarly, in State v. Jeppesen, 55 Wn. App. 231, 236, 776 P.2d 1372 (1989), the Court noted that it is well-settled in Washington that trial courts have inherent authority to bifurcate a trial when a defendant asserts both a defense on the merits and the absence of criminal responsibility due to insanity. Bifurcation is warranted if both defenses are supported by the facts and the law and the defendant would be prejudiced by presenting both defenses to the jury. Id. at 237-39.

Under ER 611, Monschke and Jeppesen, and the principles on which they rely, the trial court had inherent authority to bifurcate the trial on the substantive offenses from the trial on the aggravating factor. Mr. Garcia Sanchez was significantly prejudiced when the jury heard the extensive evidence of his prior criminal offenses and the prior criminal offenses of other gang members. That evidence would not have been admissible absent the gang aggravator. The court would have acted well within its discretion in ordering a bifurcated trial. Monschke, 133 Wn. App. at 334-35; Jeppesen, 55 Wn. App. at 236-37.

The trial court also had statutory authority to bifurcate the trial. RCW 9.94A.537(4) provides:

> 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.

The gang aggravator at issue, RCW 9.94A.535(3)(aa), is not one of the aggravators listed in the statute for which the trial court may conduct a separate proceeding. But the nature of the aggravator and the timing of the statutory amendments indicate the Legislature intended the aggravator to be one for which the court may order a separate proceeding.

The Legislature enacted RCW 9.94A.537 in 2005 in response to the United States Supreme Court's holding in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Laws 2005, ch. 68, § 4. The statute was meant to provide a procedure whereby aggravating factors are to be proved to a jury beyond a reasonable doubt. Id. The statute was amended one time, in 2007, in response to State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). Laws 2007, ch. 205, § 2. The amendment was intended to provide trial courts with

authority to impanel juries to find aggravating circumstances in all cases regardless of the date of the original trial or sentencing. Id.

RCW 9.94A.537 has not been amended since 2007 although the Legislature has created several new statutory aggravators—RCW 9.94A.535(3)(z) through (cc)—since 2005. See Laws 2007, ch. 377, § 10 (adding subsection (3)(z)); Laws 2008, ch. 276, §303 (adding subsection (3)(aa)); Laws 2010, ch. 227, § 10 (adding subsection (3)(bb)); Laws 2011, ch. 87, § 3 (adding subsection (3)(cc)). The Legislature has not amended RCW 9.94A.537 to account for any of the new aggravators. But the nature of the statutory scheme suggests the Legislature's failure to amend RCW 9.94A.537(4) in order to include RCW 9.94A.535(3)(aa) as one of the enumerated aggravators for which the trial court may order a separate proceeding, is an unintentional oversight.

RCW 1.12.028, a fundamental principle of statutory construction, provides: "If 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, RCW 9.94A.537, which refers to the list of aggravators in RCW 9.94A.535(3), must be deemed to include all of the aggravators added to the list since 2005.

The State contends the Legislature did not intend to provide trial courts with authority to try the gang aggravator separately because it is

similar to the aggravators that are to be tried during the guilt phase of the trial and dissimilar to the enumerated "status based" aggravators that are permitted to be tried separately. SRB at 16-17. But that is an inappropriate characterization. Instead, the gang aggravator is *similar* to the enumerated aggravators. Like the gang aggravator, the enumerated aggravators all encompass highly prejudicial evidence about the offender's prior unrelated criminal activity. Presumably, the Legislature intended to allow such evidence to be presented to the jury in a separate proceeding because evidence of an offender's prior criminal behavior is ordinarily inadmissible at trial and is widely recognized to have great potential to sway the jury unfairly.

The four aggravators listed in RCW 9.94A.537(4) all require proof that the offender engaged in criminal activity beyond the allegations underlying the current charges. The first one, RCW 9.94A.535(3)(e)(iv), requires proof that "[t]he circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy." RCW 9.94A.535(3)(h)(i), in turn, requires proof that "[t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time."

Similarly, RCW 9.94A.535(o) requires proof that "[t]he defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment." Finally, RCW 9.94A.535(3)(t) requires proof that the offender "committed the current offense shortly after being released from incarceration."

Like these aggravators, RCW 9.94A.535(3)(aa) requires proof that the offender committed other, uncharged, criminal acts. To prove the aggravator, the State must prove "[t]he 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." A "criminal street gang" is defined as a group or organization that has "as one of its primary activities the commission of criminal acts." RCW 9.94A.030(12). Thus, by charging the aggravator, the State is permitted to introduce evidence of all manner of highly incriminating and unrelated criminal acts committed not only by the defendant but also by any other alleged member of the defendant's street gang. Absent the aggravator, such evidence would be inadmissible because it is irrelevant and unfairly prejudicial. It is

reasonable to conclude the Legislature intended that trial courts have authority to submit such evidence to the jury in a separate proceeding.

The "rule of lenity" also requires the Court to interpret the statute as providing authority for separate proceedings. The "rule of lenity" "refer[s] to the policy of the court not to interpret a criminal statute so as to increase the penalty imposed, *absent clear evidence of legislative intent to do so*." State v. Horton, 59 Wn. App. 412, 417, 798 P.2d 813 (1990); State v. Workman, 90 Wn.2d 443, 454, 584 P.2d 382 (1978). In Horton, the defendant was convicted of second degree assault with a deadly weapon and received a deadly weapon sentence enhancement. 59 Wn. App. at 414. At the time of the offense, the deadly weapon enhancement statute referred only to second degree assault under former RCW 9A.36.020, and not to second degree assault under the new statute, RCW 9A.36.021, under which Horton was charged. Id. But soon after the assault statute was amended (and after Horton committed his crime), the Legislature amended the enhancement statute to specifically refer to the new second degree assault statute. Id. at 415-16. Because the amendment indicated a clear intent by the Legislature that the enhancement applied to Horton's offense, the "rule of lenity" did not apply. Id. at 417 & n.5. Also,

applying the rule of lenity would have an absurd result because it was unreasonable to assume the Legislature intended to abrogate the deadly weapon enhancement for all assaults involving use of a weapon during the 11-month period before the new statute took effect. Id. at 417-18.

Here, unlike in Horton, the rule of lenity applies because the Legislature did not clearly express an intent that the gang aggravator not be submitted to the jury in a separate proceeding. Instead, it is reasonable to conclude the Legislature intended to include the gang aggravator among the list of aggravators for which trial courts have express authority to conduct separate proceedings, because the aggravator is similar in nature to those enumerated aggravators. At most, the Legislature's intent is ambiguous. That ambiguity must be resolved in Mr. Garcia Sanchez's favor.

Finally, as explained in the opening brief, a timely motion to bifurcate would probably have been successful if brought. The trial court stated on several separate occasions that it would likely have granted a motion to bifurcate if one had been timely made. 1/25/12RP 597-99; 1/30/12RP 1035-36; 4/03/12RP 55.

In sum, there was no legitimate strategic reason not to bring a motion to bifurcate. The trial court had inherent and statutory authority

to grant a motion to bifurcate and the court's comments indicate the court would probably have granted such a motion if it had been timely made. Thus, counsel was ineffective for failing to bring a timely motion to bifurcate. McFarland, 127 Wn.2d at 336; Reichenbach, 153 Wn.2d at 130-31; Meckelson, 133 Wn. App. at 436.

b. Mr. Garcia Sanchez was prejudiced by counsel's deficient performance

The State contends Mr. Garcia Sanchez was not prejudiced by counsel's deficient performance because the gang evidence would have been admissible at trial even without the gang aggravator. SRB at 13-16. But even if some of the gang evidence would have been admissible at trial, the most damaging evidence—evidence of prior unrelated criminal acts committed by Mr. Garcia Sanchez and other alleged gang members—would *not* have been admissible. Prior criminal conduct evidence was not relevant to prove the current offenses and is widely recognized to be unduly prejudicial when admitted at a criminal trial.

Gang evidence may be admissible in a criminal trial if it is relevant to prove the defendant's motive for committing the crime or any of the other exceptions provided in ER 404(b).[2] E.g., State v.

[2] ER 404(b) provides prior misconduct evidence may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

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). In Yarbrough, the following evidence was admissible to show the defendant's motive for shooting at a rival gang member: (1) that Yarbrough belonged to a gang; (2) that the intended victim belonged to a rival gang; (3) that the two gangs had an altercation days before the shooting; and (4) that a gang member can elevate his status by shooting a rival gang member. 151 Wn. App. at 84-87. Similarly, in Boot and Campbell, evidence that the defendants belonged to a gang, that their status had recently been challenged, and that gang members can heighten their status by committing violent crimes, was admissible to show motive and intent. 98 Wn. App. at 789; 78 Wn. App. at 822.

Here, the trial court noted the following gang-related evidence would probably have been admissible at the second trial under ER 404(b): (1) that Mr. Garcia Sanchez belonged to a gang; (2) that the victim belonged to a rival gang; and (3) that the other individuals involved were also affiliated with gangs. 1/26/12RP 612.

But there is no authority—and the State cites none—for the proposition that a defendant's unrelated criminal acts, and the unrelated

criminal acts of other alleged gang members, are admissible under ER 404(b) 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 would not have been admissible under ER 404(b). 1/26/12RP 612. Contrary to the State's argument, SRB at 16, such evidence was not part of the "res gestae" of the current offenses.

Although the State argues otherwise, SRB at 16, there is no reason why the trial court could not have admitted some of the gang-related evidence at the trial on the substantive offenses and reserved the highly prejudicial evidence regarding the unrelated criminal offenses for a trial in a separate proceeding. As noted, trial courts have wide discretion to determine how evidence is presented to the jury in a criminal trial. ER 611. The question in determining whether bifurcation is appropriate is whether a unitary trial would significantly prejudice the defendant and whether there is substantial overlap between evidence relevant to the proposed separate proceedings. Monschke, 133 Wn. App. at 335. Here, presentation of the unrelated prior offense evidence at Mr. Garcia Sanchez's trial significantly prejudiced him. That evidence did not overlap at all with the evidence

that was otherwise admissible. The trial court would have acted well within its discretion if it had ordered separate proceedings.

Finally, there should be no question that 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 Mr. Garcia Sanchez was prejudiced, he received ineffective assistance of counsel and is entitled to a new trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

2. The State did not prove the elements of witness intimidation beyond a reasonable doubt

The State essentially contends it was not required to prove any of the alternative means of witness intimidation. The State argues the evidence was sufficient if it merely showed that Mr. Garcia Sanchez wanted to discourage Mr. Martinez from cooperating with the process

against Jose Nieves[3] in a general way, even if it did not show that Mr. Garcia Sanchez had a specific intent. SRB at 22-23. To the contrary, the State was required to prove Mr. Garcia Sanchez intended to commit each of the charged alternative means.

It is well-settled that witness intimidation is an alternative means crime. State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007); State v. Boiko, 131 Wn. App. 595, 599, 128 P.3d 143 (2006); State v. Chino, 117 Wn. App. 531, 539, 72 P.3d 256 (2006).

When a defendant challenges the evidence in an alternative means case, appellate review focuses on whether sufficient evidence supports *each* charged alternative means. State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012); see also State v. Cordero, 170 Wn. App. 351, 365, 284 P.3d 773 (2012) ("In the case of an element that may be proved by alternative means, we ordinarily test whether the evidence was sufficient to prove each of the alternative means because

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[3] The State encourages the Court to refer to the record in a separate case, State v. Nieves, Court of Appeals cause number 30340-3-III, for a more detailed recitation of the facts of the Nieves incident. SRB at 2 n.1. But the Court does not accept evidence on appeal that was not before the trial court. RAP 9.11; State v. Madsen, 153 Wn. App. 471, 485, 228 P.3d 24 (2009), review denied, 168 Wn.2d 1034, 230 P.3d 1061 (2010). Also, on direct appeal, the Court does not consider matters outside the record. McFarland, 127 Wn.2d at 338 n.5. Thus, this Court may not consider any part of the record of cause number 30340-3-III that is not also a part of the record in Mr. Garcia Sanchez's case.

we cannot know the means that individual jurors relied upon."). The standard of review for a challenge to the sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Sweany, 174 Wn.2d at 914; State v. Green, 94 Wn2d 216, 221, 616 P.2d 628 (1980).

To prove witness intimidation as charged in this case, the State was required to prove *all four* statutory alternative means:

> 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 126 (information); CP 97 (instruction number 6); RCW 9A.72.110(1).

The State essentially concedes the evidence is not sufficient to prove any one of these alternatives. When viewed in the light most favorable to the State, 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, Mr. Garcia threw rocks at Mr. Martinez's car. 11/29/12RP 352.

That evidence is insufficient to show Mr. Garcia had a specific intent in banging on the window and uttering the alleged threat. At most, the evidence shows Mr. Garcia Sanchez was angry at Mr. Martinez for reporting Mr. Nieves to police and wanted to frighten him. That is insufficient to demonstrate Mr. Garcia Sanchez was attempting to influence Mr. Martinez's testimony, induce him to absent himself from an official proceeding, induce him to withhold information relevant to the police investigation, and induce him not to give truthful information. CP 97; RCW 9A.72.110(1). Because the evidence is insufficient to prove the elements of the crime beyond a reasonable doubt, the conviction must be reversed and the charge dismissed. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

B. RESPONSE TO CROSS-APPEAL

1. **Counter-statement of the case**

The State charged Mr. Garcia Sanchez with committing counts I through VI under the following two aggravated circumstances: (1) that "[t]he 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," RCW 9.94A.535(3)(aa); and (2) that "[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," RCW 9.94A.535(3)(s). CP 126-33.

Prior to the first trial, defense counsel moved to dismiss the two gang aggravators based on insufficient evidence. 11/23/11RP 12-17. The court responded that, to prove the gang "status" aggravator under RCW 9.94A.535(s), the State must show that Mr. Garcia Sanchez committed the crimes with the *intent* to improve his status in the gang, and not simply that the crimes had that effect. 11/23/11RP 22-23. In response, the deputy prosecutor stated that he would present evidence to show that Jose Nieves had been the leader of the gang until he was

incarcerated following the Halloween shooting incident, and that Mr. Garcia Sanchez became the leader of the gang after Nieves' incarceration. 11/23/11RP 31. The State would also present the detective's testimony that, in general, committing crimes and attacking a gang's rivals can increase a gang member's status within the gang. 11/23/11RP 32.

The court ruled this evidence was insufficient as a matter of law to prove that Mr. Garcia Sanchez committed the crimes in order to advance his status within the gang, as required by RCW 9.94A.535(3)(s). 11/23/11RP 34. The court explained that, according to the State's offer of proof, Mr. Garcia Sanchez was already the leader of the gang when the charged crimes occurred. 11/23/11RP 34. The charged crimes allegedly occurred *after* Mr. Nieves was incarcerated and Mr. Garcia Sanchez purportedly took over his leadership position in the gang. 11/23/11RP 34. Thus, it was merely "speculation" that Mr. Garcia Sanchez committed the crimes with the intent to enhance his status within the gang. 11/23/11RP 34. At the same time, the court ruled the evidence was sufficient to present the other gang aggravator, RCW 9.94A.535(3)(aa), to the jury. 11/23/11RP 40. The court made the same rulings prior to the second trial. 1/25/12RP 525-26.

At the first trial, Officer Judkins testified that he had seen Mr. Nieves many times with other members of the "South Side Locos," which is a subdivision of the "Surenos" gang, prior to the Halloween shooting incident. 11/28/11RP 253-54. He would see Mr. Nieves walking at the head of the group. 11/28/11RP 254. When Officer Judkins tried to talk to other members of the group, Mr. Nieves would interfere. 11/28/11RP 254. But after the Halloween incident, Officer Judkins would see Mr. Garcia Sanchez walking at the head of the group of gang members. 11/28/11RP 254.

Grant County Sheriff Deputy Joe Harris testified that, in general, gang members gain respect within the gang by "putting in work," that is, by committing crimes to benefit the gang, by fighting against rival gang members, or by doing anything that would put word on the street that the gang had committed the act. 11/28/11RP 298. Those acts also further the street credibility of the gang among other gangs. 11/28/11RP 298. Keeping a witness from testifying against another gang member benefits the gang by maintaining and bolstering the gang's reputation in the community and by discouraging other witnesses from testifying. 11/28/11RP 312. Deputy Harris did not specifically investigate this case, however. 11/28/11RP 314.

In the second trial, Mr. Coria testified that he was a member of a "Nortenos" gang. 1/26/12RP 799. The "Nortenos" are rivals of the "Surenos" in the area. 1/27/12RP 923-28. On January 14, 2011, when Mr. Coria was outside in front of his nephew's house, Mr. Garcia Sanchez and four or five other men approached him. 1/26/12RP 789-90. The men were wearing colors and a bandana associated with the Surenos. 1/26/12RP 632. Mr. Garcia Sanchez walked up to Mr. Coria and said "sur," which refers to Surenos. 1/26/12RP 799, 824. When Mr. Coria told him to go away, Mr. Garcia Sanchez hit him four or five time on the head, at which time the other men joined in. 1/26/12RP 792-94.

On May 14, 2011, Mr. Coria was sitting in his car in the parking lot of the post office talking on the phone. 1/26/12RP 800-01. He saw four men down the street staring at him, "throwing" gang signs and yelling for him to get out of the car. 1/26/12RP 802-03. When he ignored them, the men approached his car and called him names. 1/26/12RP 804. Mr. Garcia Sanchez and another man said, if you are a "northerner," let's fight. 1/26/12RP 804. Mr. Garcia Sanchez approached the window and punched him in the head two or three

times. 1/26/12RP 805-06. Then Mr. Garcia Sanchez backed away and the other man hit him in the shoulder. 1/26/12RP 806-07.

Again Deputy Harris testified that, in general, a gang member gains status for himself and the gang by "putting in work," that is, by doing things to benefit the status of the gang. 1/27/12RP 922. If a gang member assaults a member of a rival gang, the gang gains street credibility in the area. 1/27/12RP 929. When a member of one gang approaches a person of a rival gang, that is a sign of disrespect. 1/27/12RP 925. In Deputy Harris's opinion, the motive for the January 14 incident was that a group of Surenos came across a group of Nortenos, which is a "fight on sight." 1/27/12RP 958. As for the May 14 incident, it was simply a continuation of the earlier January incident, which involved the same parties. 1/27/12RP 964. But Deputy Harris was not involved in the investigation of this particular case. 1/27/12RP 930.

After both the first and second trials, the juries answered "yes" on the special verdict forms for the gang aggravator that the court had not dismissed, RCW 9.94A.535(3)(aa). CP 115-16, 182-85.

At sentencing, although the jury had found the State proved the existence of the gang aggravator, the court refused to impose an

exceptional sentence. 4/03/12RP 75. The court found that the crimes were not sufficiently egregious to justify an exceptional sentence upward. 4/03/12RP 75.

2. The evidence was insufficient to prove the "status" gang aggravator beyond a reasonable doubt

Defense counsel moved to dismiss the aggravator based on insufficient evidence under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). CP 66-70. Under Knapstad, a defendant may move pretrial to dismiss a charge and challenge the State's ability to prove all of the elements of the crime. State v. Montano, 169 Wn.2d 872, 876, 239 P.3d 360 (2010). The trial court has inherent power to dismiss a charge when the undisputed facts are insufficient to support a finding of guilt. Id. The court must decide "whether the facts which the State relies upon, as a matter of law, establish a prima facie case of guilt." Knapstad, 107 Wn.2d at 356-57. This Court reviews de novo a trial court's dismissal of a criminal charge under Knapstad. Montano, 169 Wn.2d at 876.

In 2005, the Legislature amended RCW 9.94A.535 in response to the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Laws of 2005, ch. 68, § 1; State v. Bluehorse, 159 Wn. App. 410, 425-26, 248 P.3d 537 (2011). As part of these amendments, the Legislature enacted RCW 9.94A.535(3)(s), which provides that the trial court may impose an exceptional sentence if the jury finds beyond a reasonable doubt that "[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." Laws of 2005, ch. 68, § 3. Unlike the previous version of the aggravating factors statute, the enumerated aggravating factors justifying an exceptional sentence are "exclusive," not merely illustrative. Laws of 2005, ch. 68, § 3(3)(s); Bluehorse, 159 Wn. App. at 426. Thus, unlike the generalized, non-statutory "gang motivation" or "furtherance of a criminal enterprise" aggravating factors relied upon by trial courts prior to the 2005 amendments, the amended statute's plain language defines the gang-related aggravating factor the State must prove under RCW 9.94A.535(3)(s). Bluehorse, 159 Wn. App. at 426.

To prove the "status" gang aggravator under RCW 9.94A.535(3)(s), the State must provide specific evidence to show the defendant committed the crime to obtain or maintain his gang membership or to advance in the gang. Bluehorse, 159 Wn. App. at

430-31. The State may not simply rely on generalized testimony about the motivations of gang members. Id. at 429.

For instance, the State may meet its burden by presenting specific evidence to show the defendant had a desire to increase his status within the group and committed the crime for that purpose. In State v. Monschke, 133 Wn. App. 313, 135 P.3d 966 (2006), the State charged Monschke with premeditated first degree murder under RCW 9A.32.030 and also alleged that the murder was aggravated under RCW 10.95.020(6). RCW 10.95.020(6) allows the State to prove that "[t]he person committed the murder 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" as an aggravating factor. The jury found Monschke guilty as charged and returned a special verdict finding that he committed the murder to advance his position within a white supremacist organization. Id. at 328-29. The Court upheld the aggravator, based on the State's evidence that: (1) Monschke was a member of a violent white supremacist group; (2) he had often stated his desire to advance his position within the group and to open a local chapter; (3) violent acts advanced a member's status in many white supremacist groups; (4) he sought to advance a

companion's status in the group through violent acts; (5) he wore clothing specifically indicating his own previous advancement in the group through violent acts; (6) witnesses testified that, shortly before the murder, Monschke or one of his companions stated that they planned on "'doing' someone 'inferior'"; (7) Monschke and his accomplices perceived the victim as inferior; (8) the victim's murder advanced the status of one of Monschke's accomplices; and (9) Monschke wondered aloud whether the murder elevated his status with God. Id. at 333-34.

The State may also meet its burden by presenting specific evidence to show the defendant's status had recently been challenged and he committed the crime in retaliation or for the purpose of regaining his status. In State v. Yarbrough,151 Wn. App. 66, 210 P.3d 1029 (2009), the trial court imposed an exceptional sentence under RCW 9.94A.535(3)(s). At trial, the State presented evidence that, four days before Yarbrough shot the victim, Yarbrough and a group of his friends confronted the victim and a group of his friends. Id. at 75. Someone from Yarbrough's group shouted, "'This is Hilltop [Crips],'" and someone from the victim's group responded by shouting a rival gang's name. Id. Someone from Yarbrough's group then indicated that

he would have opened fire on the victim's group if police had not been nearby. Id. Furthermore, a witness to the shootings testified that Yarbrough uttered, "This is Hilltop Crip, cuz, what you know about that," before shooting the victim. Id. at 75-76. The State's gang expert testified that "the statement, '[W]hat's up, cuz' said to a rival gang member is a sign of disrespect because 'cuz' is a term that Crips use to refer to one another" and that "a Crips member frequently utters this phrase just before shooting at a Blood." Id. at 80. Finally, the gang expert testified that gang members could advance or maintain their gang membership by shooting at rival gang members, and that gang members were expected to maintain their status by not allowing a show of disrespect by a rival gang. Id. at 79-80. The Court upheld the exceptional sentence based on the State's presentation of evidence that: (1) Yarbrough was a Crips gang member; (2) Yarbrough perceived the victim as a member of a rival gang; (3) the two gangs had had a previous confrontation four days earlier, during which a Crip threatened to open fire on the rival gang; and (4) Yarbrough shot the victim after uttering, "This is Hilltop Crip, cuz, what you know about that," an insulting challenge and warning to the rival gang that gunfire might soon erupt. Id. at 97.

In earlier cases, before the 2005 statutory amendments, courts similarly held the State could prove a defendant committed a crime in order to maintain or enhance his status within a gang if the State presented specific evidence to show the defendant's status had recently been challenged and he committed the crime in retaliation or for the purpose of regaining his status. In State v. Boot, 89 Wn. App. 780, 789, 950 P.2d 964 (1998), for instance, the defendant acknowledged he was a gang member. The State presented evidence that two days before the murder, he pointed a gun at a woman's head. Id. at 785. When he did, onlookers laughed at him and told him he was too much of a baby to shoot her. Id. On the night of the murder, he pointed a gun at a different woman as she left her car in a parking lot, then he drove her to a park and shot her. Id. Testimony on gangs established that killing someone heightened a gang member's status. Id. at 789. This evidence was sufficient to show Boot committed the crime in order to enhance his status in the gang. Id.

Similarly, in State v. Campbell, 78 Wn. App. 813, 815, 901 P.2d 1050 (1995), Campbell was a self-proclaimed gang member and in the business of selling crack cocaine. The two murder victims were affiliated with a rival gang and also in the business of selling crack

cocaine from the same location as Campbell and to some of the same customers. Id. at 815-16. Soon before the murders, one of the victims confronted Campbell and told him he had no right to sell crack from that location. Id. at 816. Campbell believed the victim was "out of pocket" and needed to be disciplined. Id. The State presented expert testimony on gang culture for the purpose of showing premeditation, intent, motive, and opportunity. Id. at 818. The Court held the gang-related evidence was admissible and highly probative of the State's theory—that Campbell was a gang member who responded with violence to challenges to his status and to invasions of his drug sales territory. Id. at 822.

In contrast to these cases, the State cannot prove a defendant committed a crime for the purpose of enhancing his status in a gang by simply providing evidence that the defendant was in a gang, that the victim was in a rival gang, that gang symbols or signs were displayed at the time of the crime, and that, in general, gang members enhance their status in a gang by committing crimes against rival gang members. In Bluehorse, the defendant was associated with a Crips gang and the victims of the drive-by shooting were associated with a rival gang. 159 Wn. App. at 429. An unidentified bystander at the shooting uttered a

phrase containing the Crip word "loc" before the shooting began. Id. A police detective testified generally about gang culture and that individuals may commit a retaliatory shooting against rival gang members to obtain, maintain, or advance their own gang membership or status. Id.

The Court held this evidence was not sufficient to show that Bluehorse committed the crime in order to obtain or maintain his gang membership or advance his status in a gang for purposes of RCW 9.94A.535(3)(s). Id. at 430-31. The State presented no evidence that Bluehorse had recently confronted and been disrespected or provoked by rival gang members. Id. at 430. The State presented no evidence that Bluehorse had made any statements or otherwise demonstrated that he wanted to advance his position in the gang or committed the drive-by shooting for reasons of status. Id. at 430-31. The State could not rely on the generalized testimony from the police detective that gang members shoot at rival gang members in order to enhance their status. Id. at 431. The Court explained, "without evidence relating to Bluehorse's motivation, the gang sentencing aggravator would be intolerably broadened by allowing it to attach automatically whenever

an aspiring or full gang member is involved in a drive-by shooting based on the detectives' generalized testimony." Id.

This case is indistinguishable from Bluehorse. The evidence was not sufficient to prove the "status" gang aggravator because the State did not present specific evidence to show Mr. Garcia Sanchez committed the crimes in order to obtain or maintain his gang membership or to advance in the gang. See Bluehorse, 159 Wn. App. at 430-31.

At the first trial, Officer Judkins testified that before the Halloween shooting incident, before Jose Nieves was incarcerated, he would see Mr. Nieves walking at the head of the group of gang members. 11/28/11RP 254. After Mr. Nieves was incarcerated—and before the crimes occurred in this case—he would see Mr. Garcia Sanchez at the head of the group. 11/28/11RP 254. Thus, the trial court was correct to rule that the State's evidence did not show Mr. Garcia Sanchez committed the crimes to advance his status in the gang because at the time of the crimes, he was already the leader of the gang. 11/28/11RP 34.

Mr. Martinez testified that, almost two months after he reported Mr. Nieves to police, Mr. Garcia Sanchez approached him in his car,

banged on the window, called him a "snitch," and said he would kill him. 11/29/11RP 349-51. Deputy Harris testified that, in general, a gang member gains status in the gang by doing anything that furthers the street credibility of the gang among other gangs. 11/28/11RP 298. Keeping a witness from testifying against another gang member bolsters the gang's reputation in the community. 11/28/11RP 312.

Thus, the State presented no specific evidence at the first trial to show that Mr. Garcia Sanchez committed the crime in order to maintain his membership in the gang or to enhance his status in the gang. The State presented no specific evidence to show Mr. Garcia Sanchez's status within the gang had been challenged—indeed the evidence suggests his status within the gang was secure at that point. The State presented no specific evidence to show Mr. Garcia Sanchez had a desire to increase his status within the group and committed the crime for that purpose. Thus, the evidence was insufficient at the first trial to prove the "status" gang aggravator beyond a reasonable doubt. Bluehorse, 159 Wn. App. at 430-31.

At the second trial, the evidence showed that Mr. Garcia Sanchez and the other individuals who were with him were affiliated with one gang and Mr. Coria was affiliated with a rival gang.

1/26/12RP 632, 799; 1/27/12RP 923-28. The members of Mr. Garcia Sanchez's group were wearing gang colors and a gang bandana and "throwing" gang signs. 1/26/12RP 632, 802-03. In the first incident, Mr. Garcia Sanchez approached Mr. Coria, said "sur," which refers to Surenos, and then hit him. 1/26/12RP 799, 824. In the second incident, five months later, Mr. Garcia Sanchez approached Mr. Coria, called him a "northerner" and challenged him to a fight, and then hit him. 1/26/12RP 804. Deputy Harris testified that, in general, a gang member can gain respect within the gang by assaulting a member of a rival gang. 1/27/12RP 922, 929.

Again the State presented no specific evidence to show that Mr. Garcia Sanchez acted with the intent to maintain his membership in the gang or to enhance his status within the gang. Unlike in Yarbrough, there was no evidence of any prior confrontation between Mr. Garcia Sanchez's group and Mr. Coria's group. See Yarbrough,151 Wn. App.at 75, 97. Unlike in Campbell, there was no evidence that Mr. Coria had ever challenged or threatened Mr. Garcia Sanchez's status. See Campbell, 78 Wn. App. at 816, 822. Indeed, Mr. Coria did not even know who Mr. Garcia Sanchez was before these incidents. 1/26/12RP 792, 810. He did not know why Mr. Garcia Sanchez's

group wanted to fight him. 1/26/12RP 805. There was no evidence of any prior incidents between the two groups. Finally, unlike in Monschke, the State presented no specific evidence to show that Mr. Garcia desired to increase his status within the group and committed the crimes for that purpose. See Monschke, 133 Wn. App. at 333-34.

Instead, the State relied on the general testimony of Deputy Harris that a gang member can gain status in the gang by assaulting a rival gang member. 1/27/12RP 922, 929. But the State may not rely on the generalized testimony of a police officer that gang members assault rival gang members in order to enhance their status. Bluehorse, 159 Wn. App. at 431. "[W]ithout evidence relating to [Mr. Garcia Sanchez's] motivation, the gang sentencing aggravator would be intolerably broadened by allowing it to attach automatically whenever an aspiring or full gang member is involved in [an assault of a rival gang member] based on the [officer's] generalized testimony." Id.

In sum, the trial court did not err in dismissing the "status" gang aggravator based on insufficient evidence. The State did not present specific evidence to show Mr. Garcia Sanchez committed the crimes to obtain or maintain his gang membership or to advance in the gang. Bluehorse, 159 Wn. App. at 430-31.

3. The error, if any, in dismissing the aggravator is harmless because the court would not have imposed an exceptional sentence in any event

In determining whether the error is harmless, the question is whether, within reasonable probabilities, the outcome of the trial would have differed in the absence of the error. State v. Lucas, 167 Wn. App. 100, 111, 271 P.3d 394 (2012). If the outcome would not have differed, the error is harmless. Id.

Here, any error is harmless because the trial court would not have imposed an exceptional sentence even if the "status" gang aggravator had been presented to the jury and the jury answered "yes" on the special verdict form. Although the court dismissed the "status" gang aggravator, the court allowed the "gang benefit" aggravator, RCW 9.94A.535(3)(aa), to be submitted to the jury. The State presented extensive gang-related evidence at the trials. The jury answered "yes" on the special verdict forms. CP 115-16, 182-85. Nonetheless, at sentencing, the court refused to impose an exceptional sentence. In the court's judgment, an exceptional sentence was not warranted because the crimes were not particularly serious. Thus, the court imposed a standard-range sentence. 4/03/12RP 75.

It is not reasonable to conclude that the court would have imposed an exceptional sentence if it had not dismissed the "status" gang aggravator. There is nothing in the record to suggest that the State would have presented any additional evidence. There is nothing to suggest the court would have changed its opinion about the seriousness of the crimes. Therefore, any error in dismissing the gang aggravator is harmless. Lucas, 167 Wn. App. at 111.

4. The State's cross-appeal is moot because the Court cannot provide any effective relief

As a remedy for the purported error in dismissing the "status" gang aggravator, the State requests that the case be remanded for a new sentencing hearing in accordance with RCW 9.94A.537 but that the convictions be upheld. SRB at 36. The Court cannot provide the requested relief because there is no statutory authority that would allow the trial court to convene a jury on remand to consider the dismissed aggravator. Therefore, the State's cross-appeal is moot.

A case is moot if the Court cannot provide any effective relief. Yakima County v. Eastern Washington Growth Mgmt. Hearings Bd., 168 Wn. App. 680, 700, 279 P.3d 434 (2012).

Trial courts do not have inherent authority to empanel juries on remand to find aggravating factors. Pillatos, 159 Wn.2d at 469;

Hughes, 154 Wn.2d at 151-52. It would "usurp the power of the legislature" for the court to create a procedure to impose an exceptional sentence on remand that is not authorized by statute. Hughes, 154 Wn.2d at 152.

RCW 9.94A.537(2) is the statute that applies when a new sentencing hearing is requested on remand following an appeal. That statute provides:

> In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

RCW 9.94A.537(2).

The first clause of RCW 9.94A.537(2) establishes the circumstances both of which must be present for the statute to apply. State v. Douglas, __ Wn. App. __, 2013 WL 686728, at *4 (No. 41133-4-II; Feb. 26, 2013). First, an exceptional sentence must have been imposed; second, a new sentencing hearing must be required. Id.

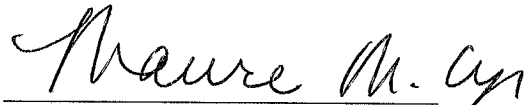
Here, the first requirement of the statute is not met. The trial court did not impose an exceptional sentence. Therefore, the trial court does not have authority to impanel a jury to consider the dismissed

aggravator on remand. Id.; RCW 9.94A.537(2). The Court cannot provide any effective relief and the cross-appeal is moot. Eastern Washington Growth Mgmt. Hearings Bd., 168 Wn. App. at 700.

C. CONCLUSION

For the reasons above and in the opening brief, Mr. Garcia Sanchez received ineffective assistance of counsel because his attorney did not file a timely motion to bifurcate the gang aggravator from the trial on the substantive offenses. Therefore, the convictions must be reversed and remanded for new trials. In addition, the State did not prove the elements of witness intimidation beyond a reasonable doubt. Therefore, that conviction must be reversed and the charge dismissed. Finally, the court did not err in dismissing the "status" gang aggravator based on insufficient evidence. Even if the court did err, any error is harmless. In addition, the cross-appeal is moot because the Court cannot provide any effective relief. The Court should therefore uphold the trial court's decision to dismiss the aggravator.

Respectfully submitted this 11th day of March, 2013.



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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT'S RESPONSE BRIEF** 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF MARCH, 2013.

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