

No. 30763-8-III

**FILED**  
Apr 10, 2013  
Court of Appeals  
Division III  
State of Washington

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,  
RESPONDENT-CROSS-APPELLANT,**

**v.**

**SALVADOR GARCIA SANCHEZ,  
APPELLANT-CROSS-RESPONDENT.**

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

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**REPLY BRIEF  
OF RESPONDENT-CROSS-APPELLANT**

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**D. ANGUS LEE  
PROSECUTING ATTORNEY**

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**1. *There was ample evidence to support an aggravator under RCW 9.94A.535(3)(s) "Group aggravator".***

*a. Nature of group aggravator.*

RCW 9.94A.535(3)(s) is an aggravator based on the motive of the person who commits the crime. Specifically "the defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group." Any group must align the group's aims and the individual member's aims if the group is to exist for any length of time. Thus it is a reasonable inference to presume that taking action to benefit the group's goals also benefits the individual's status within the group, particularly when the individual's actions are communicated to the group and contain a declaration of group solidarity with the group. Indeed, in the only case so far addressing the gang aggravator RCW 9.94A.535(3)(aa) the court noted the close relationship between the two aggravators and the transferability of precedents from one to the other. *State v. Moreno*, \_\_Wn. App\_\_, \_\_P.3d\_\_, 2013 Wash. App. LEXIS 289 (2013) (Slip Op. at 21-22). The respondent did not assert there was insufficient evidence to support the gang aggravator, and does not explain why there was a significant difference in the evidence required between the two aggravators.

*b. Evidence supporting group aggravator.*

In addition to the discussion in the State's first brief the defendant brings up a couple of additional points of evidence that should be discussed. The State agrees with the defendant that there was circumstantial evidence presented that the defendant recently took over leadership of the SSL from Jose Nieves. This fact supports the contention that these crimes were done, at least in part, to maintain the defendant's position in the gang. The defendant needed to show that he was worthy of maintaining leadership in the gang by leading them in gang related activities. If a gang member who does not put in work would be ostracized from the gang, a leader who does not lead by example would not last long as the leader of the gang. Just because the defendant had a position does not mean that the crimes did not fit the aggravator.

The defendant also asserts that "there was no evidence of any prior confrontation between Mr. Garcia Sanchez's group and Mr. Coria's group." Reply Brief of Appellant/Cross Respondent at 34. This is simply incorrect. The State introduced evidence of three prior assaults by the SSL on PVL members, including a prior assault on Victor Bahena, a PVL member who was with Mr. Coria when he was assaulted in January of 2011. In addition the graffiti introduced that was done by SSL members contained anti-Norteno symbology. RP 582-592, 614-627, 721-722, 926-

929. This information was relevant to motive and the aggravators, and was clearly introduced at trial.

***2. The court may well impose an exceptional sentence on remand.***

In order to avoid a remand for an aggravating factor the reviewing court must be convinced that the trial judge would impose the same sentence regardless of the presence or lack of an aggravating factor. *See State v. Cardenas*, 129 Wn.2d 1, 12, 914 P.2d 57 (1996). In *Cardenas* the trial court specifically stated in its conclusions of law that it would have imposed the same sentence if one of the aggravators had not been found, thus negating the need for a remand if one of the aggravating factors was not supported by sufficient evidence. In the present case there was no such statement or conclusion by the trial judge. The trial judge also imposed a sentence at the top end of the standard range, indicating that this crime was more significant than the standard crime of this type. There is simply insufficient evidence to conclude the trial judge would not impose an exceptional sentence if remanded and the evidence proves that the defendant did his crimes for personal, as well as gang, motives.

***3. The issue is not moot, and the defendant may be resentenced on remand.***

The cross respondent argues that because an aggravated sentence was not imposed after the first trial, the State is barred, under RCW

9.94A.537(2) from seeking an aggravated sentence on remand. This argument has already been considered and rejected by *State v. Douglas*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2013 Wash. App. LEXIS 380 (2013). §.537(2) 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.

§.537(2) was created to deal with cases remanded pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and is inapplicable to this case because the first prong, requiring an exceptional sentence to be imposed, was not met. *Douglas* (Slip Op. at 10). Therefore §.537(2) is inapplicable. Instead the aggravating circumstance is remanded to the trial court for a rehearing, just like a charge would be if it had been incorrectly dismissed under CrR 8.3(c).

The rule advocated by the cross appellant that the State cannot retry the aggravator leads to an absurd result when read in conjunction with *Douglas*. *Douglas* held that the State may retry aggravators and seek an above the standard range sentence when the entire case is remanded because of an error after the imposition of a standard range sentence. The rule the cross respondent advocates would lead to the conclusion that if the

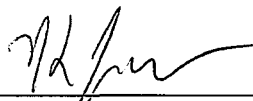
original trial had sufficient error to require remand for the entire trial, then the aggravators could be sought, but there could be no remand solely on the aggravators. This is an absurd rule, and should not be accepted by the court.

**Conclusion.**

As discussed in the cross-appellant's opening brief, these cases are much more comparable to *State v. Yarbrough*, 151 Wn. App. 66, 96-97, 210 P.3d 1029 (2009), than *State v. Bluehorse*, 159 Wn. App. 410, 248 P.3d 537 (2011). There was more than sufficient evidence to support the (s) aggravator. The court has the authority to consider the aggravator on remand and may well impose an exceptional sentence, therefor the trial court should be reversed on the matter of the group aggravator and the issue be remanded for a new trial.

Dated this 10<sup>th</sup> day of April, 2013.

D. ANGUS LEE  
Prosecuting Attorney

By:   
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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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

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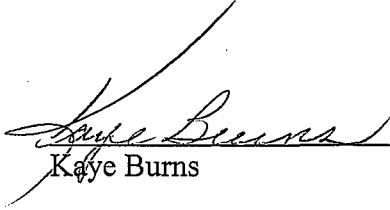
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

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

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Dated: April 10, 2013.

  
\_\_\_\_\_  
Kaye Burns

Declaration of Mailing.