29657-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT/CROSS-APPELLANT

v.

RICARDO DELEON, APPELLANT/CROSS-RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S REPLY & CROSS-RESPONDENT'S ANSWER

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A. ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

1. LACK OF AN EXPRESS PROMISE DOES NOT RENDER CORPORAL SAENZ'S REMARKS ANY LESS THREATENING AND COERCIVE.

The State suggests that once the accused has waived his right to remain silent, all of his subsequent statements are admissible even if they are induced by intervening coercion.

To be admissible in Washington, an accused's confession must pass two voluntariness tests: (1) the due process test, whether the statement was the product of police coercion; and (2) the *Miranda* test, whether a defendant who has been informed of his rights thereafter knowingly and intelligently waived those rights before making a statement. *State v. Reuben,* 62 Wn. App. 620, 624, 814 P.2d 1177, *review denied,* 118 Wn.2d 1006 (1991).

The State's assertion that Mr. DeLeon had waived his rights before making statements to the jail officer is not relevant to the issue before the court.

The State seeks to distinguish *Arizona v. Fulminante,* 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) and *Payne v. Arkansas,* 356 U .S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958) on the grounds that they involved promises by the officers. But those cases do not address issues of unkept promises or trickery; they address coercion by law

enforcement. A credible threat of violence may constitute coercion even when the actual threat is posed by a third party when the officer relies on it to extract statements from the accused. *Fulminante at 287, citing Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S. Ct. 274, 279, 4 L. Ed. 2d 242 (1960). And in any case, Corporal Saenz's remarks would likely be understood by the accused as an implied promise of protection if the requested information was not provided.

2. STATEMENTS THAT TEND TO IMPLICATE A CODEFENDANT ARE INADMISSIBLE ABSENT STRINGENT PROTECTION NOT PRESENT HERE.

The State relies on *Bruton v. United States*, 391 U.S. 123, 135, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) and *Richardson v. Marsh*, 481 U.S. 200, 204, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), for the claim that so long as the jury was cautioned not to use codefendant's out-of-court statements as to their gang affiliation as evidence against the defendant, the codefendants are not considered witnesses against the defendant.[1] But *Bruton* prohibits use of a codefendant's statement when the nature of that statement "powerfully incriminates" the defendant,

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[1] The State's attempt to distinguish *Frasquillo* on the basis of an unpublished portion of that opinion should be disregarded. "A party may not cite as an authority an unpublished opinion of the Court of Appeals." *State v. Nysta*, 168 Wn. App. 30, 44, 275 P.3d 1162, 1170 (2012), *quoting* GR 14.1(a).

posing a "substantial threat" to the defendant's rights under the Confrontation Clause. *Mason v. Yarborough*, 447 F.3d 693, 698 (9th Cir. 2006), *citing Bruton* at 135-36

The State cites *In re Hegney* for the proposition that "a witness whose testimony is introduced at a joint trial is *not considered to be a witness 'against' a defendant* if the jury is instructed to consider that testimony only against a codefendant." *In re Hegney*, 138 Wn. App. 511, 545, 158 P.3d 1193 (2007), *citing Mason v. Yarborough*, 447 F.3d at 697 (Wallace, J., concurring), *cert. denied sub nom., Mason v. Harrison*, 549 U.S. 902, 127 S. Ct. 225, 166 L. Ed. 2d 179 (2006). This is because the jury is presumed to follow the court's instructions.

But in *Bruton*, 391 U.S. at 137, the trial court gave "concededly clear instructions to the jury to disregard [the codefendant's] inadmissible hearsay evidence inculpating petitioner" and nonetheless concluded such instructions were not an "adequate substitute for petitioner's constitutional right of cross-examination." And in *Richardson v. Marsh*, 481 U.S. at 204, cited by the respondent, at the time the codefendant's statement was admitted, the jury was admonished not to use it in any way against respondent.

Here, no such admonishment was given to the jurors. Several days later the court's instructions to the jury included the statement: "You may consider a statement made out of court by one defendant as evidence against that defendant, but not as evidence against another defendant." (CP 118)

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

Bruton v. United States, 391 U.S. at 135. In this case, the court's eventual instruction was an inadequate substitute for Mr. DeLeon's constitutional right of confrontation.

Moreover, the court later instructed the jury:

> INSTRUCTION NO. 29
> If you find the defendant guilty of the crime of First Degree Assault in Count 1; or of the crime of First Degree Assault in Count 2; or of the crime of First Degree Assault in Count 3, then you must determine if the following aggravated circumstance exists as to that count:
> Whether the defendant committed the crime of First Degree Assault with 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. When deliberating on this aggravating circumstance *you may consider all the evidence presented during the trial without limitation.*

(CP 641) (emphasis added) Thus, the court invited the jury to consider the statements of his codefendants in determining whether Mr. DeLeon should

be given a sentence including a gang enhancement, thereby clearly violating the confrontation clause. Moreover, in the Respondent's brief, the prosecuting attorney specifically cites the fact that the defendant was "acting in concert with [the codefendants]" as evidence supporting the aggravating circumstance. Resp. Br. at 9-10, 14.

B. RESPONSE TO THE STATE'S CROSS-APPEAL.

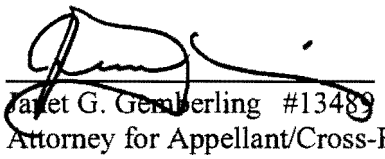
The State filed a notice of cross appeal relating to the trial court's imposition of a sentence outside the standard range. (CP 209) Respondent's brief contains no assignment of error, issue statement or argument relating to this issue. This court need not consider claims that are inadequately argued or unsupported by authority. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority or analysis need not be considered); *State v. Elliott,* 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider claims that are insufficiently argued); *State v. Marintorres,* 93 Wn. App. 442, 452, 969 P.2d 501 (1999) (appellate court need not consider pro se arguments that are conclusory).

C. CONCLUSION

Mr.DeLeon's conviction should be reversed. Alternatively, the 60-month exceptional sentences should be reversed because the admissible evidence is insufficient to support them.

Dated this 8th day of April, 2013.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent/Cross-Appellant,	)	No. 29657-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
RICARDO DELEON,	)	
	)	
Appellant/Cross-Respondent.	)	

I certify under penalty of perjury under the laws of the State of Washington that on April 8, 2013, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Kevin Eilmes
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I certify under penalty of perjury under the laws of the State of Washington that on April 8, 2013, I mailed a copy of the Appellant's Brief in this matter to:

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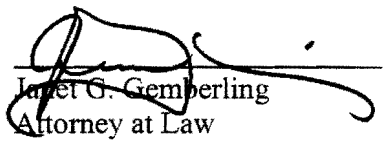
Signed at Spokane, Washington on April 8, 2013.



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