No. 296571
(Consolidated with 296792 and 296911)

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY DELEON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. COUNTERSTATEMENT OF ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the doctrine of transferred intent, as it is incorporated into the first degree assault statute, impermissibly shifted the burden of proof to the defendant in Instruction 16?

2. Whether the Supreme Court's decision in State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009), is contrary to constitutional principles of due process?

3. Whether evidence of the defendant's gang involvement, as well as statements made by his codefendants as to *their* involvement with gangs, deprived Mr DeLeon of his right to a fair trial and his right to confront witnesses against him.

4. Whether the trial court abused its discretion in denying DeLeon's motions to bifurcate the proceedings, as well as his motion for a new trial.

5. Whether defense counsel was ineffective in: a.) not requesting a lesser included offense instruction; b.) not recognizing a venue challenge to Count 4; c.) not requesting a mistrial based upon a juror's communication via Twitter;

d). not filing a timely motion to join a motion for a new trial; e). not challenging an exceptional sentence; f). not recalling a prosecution witness for cross-examination?

6. Whether a juror's use of Twitter constituted juror misconduct, requiring reversal and a new trial?

7. Whether sufficient evidence supported the trial court's imposition of a gang aggravator, as well as a doubling of the firearm enhancements based upon a prior conviction which involved a firearm enhancement?

8. Whether the trial court's restrictions on Mr. DeLeon's use of gang clothing and tattoos was properly imposed?

B. ANSWERS TO THE ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. The court properly instructed the jury on the transferred intent doctrine, since the evidence established that all three victims were assaulted. The burden of proof was not shifted to the defense.

2 The Supreme Court's decision in Elmi is dispositive as to the application of transferred intent, and the transferred intent instruction did not violate due process.

3. The court properly weighed the admission of the gang evidence, and the admission of the booking forms and codefendants' statements did not violate Mr. DeLeon's right to confront witnesses against him, since the statements did not implicate him, and the jury was properly instructed to consider the counts and codefendants separately.

4. The court did not abuse its discretion in denying the motion to bifurcate or grant a new trial, as there was no basis upon which to separate the trial from consideration of the gang evidence, and the court properly weighed the admission of the gang evidence.

5. Mr. DeLeon was not denied effective counsel, as counsel competently represented his client. Even if counsel's performance was deficient, DeLeon has not demonstrated prejudice.

6. The juror's Twitter feeds did not clearly demonstrate misconduct, and reversal is not required.

7. Sufficient evidence supported imposition of the exceptional sentence, which was based upon a finding that Mr. DeLeon intended to directly or indirectly cause any benefit to a criminal street gang. Further, the defense affirmatively

agreed that Mr. DeLeon had a prior conviction which included a firearm enhancement.

8. The community custody restrictions on gang clothing and tattoos were crime-related prohibitions pursuant to the community custody statute.

II. STATEMENT OF FACTS

The State supplements Mr. DeLeon's Statement of the Case with the following.

The clothing worn by Mr. DeLeon at the time of his arrest included indicators of gang identification. The 'N' on his belt has been identified with "Nuestra Familia" or "North Side". **(RP 1670-71; RP 1952; Ex. 3B)**

The red stars on his shoes were consistent with an affiliation with a gang which claimed the color red. **(RP 1952; Ex. 3D)**

The victim, Mr. Cardenas, as well as Miguel Acevedo, are members of the LVL gang in Sunnyside. That gang claims the color blue. **(10/11/10 RP 1358, 1438-39; 10/12/10 RP 1608; 10/15/10 RP 1801)**

At trial, the jury was instructed that they were to consider the respective counts and defendants separately. **(CP 614)**

Members of LVL were known to frequently hang out in the yard of 1111 Tacoma. **(RP 1782)**

Immediately prior to the shooting on May 9, 2009, Miguel Acevedo and Ignacio Cardenas were in front of the residence. Acevedo threw a gang sign at the silver car passing by. In response, someone in the car shouted that they would shoot, or words to that effect. **(RP 1772-1774)**

Acevedo observed the vehicle slow down, and then saw a gun come out. **(RP 1777)**

As shots were fired from the silver Taurus, Acevedo had ducked down behind the tire of a parked vehicle, as he was afraid. **(RP 1778-81)**

Mr. Acevedo believed that his gang sign prompted the shooting. **(RP 1785)**

Angelo Lopez had just left the residence, and was a few feet from the front door, when he heard the shots. He could see Mr. Cardenas and Mr. Acevedo in front of him on the sidewalk side of the front fence. **(RP 1351-52)** He too was afraid of being shot. **(RP 1353)**

Codefendant Octavio Robledo moved for a mistrial based upon the juror tweet. That motion was denied. **(1-20-11 RP 20-23)**

Counsel for Anthony DeLeon moved to join the codefendants' motion for a new trial. While the court found the motion was untimely, the new trial motion was denied in the companion cases. **(RP 2435-37)**

III. ARGUMENT

1. The principle of transferred intent, as it is encompassed in the first degree assault statute, establishes that all three victims were assaulted.

In Washington, it has long been established that a defendant who intends to assault one person, but instead injures or kills a different person, is legally responsible for the injury of the other individual. State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994); State v. Salamanca, 69 Wn. App. 817, 851 P.2d 1242 (1993). The intent required for the crime need not match a specific victim; under Washington's first degree assault statute, the *mens rea* is transferred to the unintended victim. RCW 9A.32.030(1)(a); RCW 9A.36.011 (1)(a); Wilson, 125 Wn.2d at 218.

There is also authority for the proposition that a defendant may be convicted of assaulting persons who are not injured, but who are within close proximity of the person the defendant is trying to injure or kill. In Salamanca, the defendant was convicted of five counts of first degree assault for being the driver of a car from which an accomplice fired multiple shots at five people in another vehicle. Three shots hit the vehicle, one going through the back window, and a bullet fragment struck one of the occupants. This court upheld the first degree assault convictions as to each of the occupants. The court held that transferred

intent, while not necessary to resolve the case, was consistent with the assault statute. Id., at 825-26.

There is, therefore, no requirement that a shooter must be aware of the precise number of people he or she is shooting at, as long as there is reason to believe that the area he is directing his fire towards is occupied.

More recently Supreme Court has held that under the principle of transferred intent, as it is embodied within RCW 9A.36.011, an assault "does not, under all circumstances, require that the specific intent match a specific victim." State v. Elmi, 166 Wn.2d 209, 216, 207 P.3d 439 (2009). In Elmi, the defendant shot into a house occupied by his estranged wife and three small children. Elmi was convicted of the attempted first degree murder of his wife, and three counts of first degree assault with regard to the children. On appeal, he asserted that the evidence was insufficient as o the assault convictions, since there was no evidence of a specific intent to assault them.

The Supreme Court reiterated its previous holding in Wilson that while first degree assault required specific intent to produce the intended result, it did not in all circumstances require that intent to match a specific victim. Elmi, 166 Wn.2d at 216. Although Wilson contained reference to specific unintended victims, the Court declined to read that reference as limiting "intent to that which was aimed at a person wounded as a result of

the assault." Id. Because under the assault statute the common law definitions of assault are treated equally, the Court concluded that the type of common law assault suffered by the victims was "irrelevant for purposes of determining whether an assault occurred." Elmi, 166 Wn.2d at 218.

The Court emphasized, as it did in Wilson, that its holding was not based upon the *doctrine* of transferred intent, but rather a plain reading of the assault statute, which does not include the "rigid requirement" of matching specific intent with a specific victim. Elmi, 166 Wn.2d at 219; Wilson, 125 Wn.2d at 219; Elmi, 166 Wn.2d at 219.

> Indeed, RCW 9A.36.011 provides that once the mens rea is established, any unintended victim is assaulted if they fall within the terms and conditions of the statute. Wilson, 125 Wn.2d at 219. This conclusion is supported by the plain language of RCW 9A.36.011(1)(a): "A person is guilty of assault in the first degree if he or she, with *intent to inflict* great bodily harm: . . [a]ssaults *another* with a firearm . . . ." (emphasis added). In so reasoning, we hold in accord with Wilson, that once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.011 to any unintended victim.
>
> Id.

As there was sufficient evidence that the children were put in apprehension of harm, Elmi's intent to assault his wife was properly transferred to the child victims. Id.

Division II of the Court of Appeals has followed Elmi, though that court held that an error in the transferred intent instruction was harmless, and it did not apply, in any event, to attempted assault charges. State v. Frasquillo, 161 Wn. App. 907, 916, 255 P.3d 813 (2011).

The court observed, further, that "[f]rom Elmi, it is clear that the intent to assault one victim transfers to all victims who are unintentionally harmed or put in apprehension of harm. The logical corollary of Elmi is that intent does not transfer to 'victims' who are neither harmed nor put in apprehension of harm." Id.

Transferred intent is thus not unfettered. In order for intent to transfer, the State must first prove intent, as well as the fact of a common law assault as to each unintended victim. The pattern instruction then did not dictate that the jury must find a presumed fact from a proven one; the State must still prove all of the elements of the offense of first degree assault. Further, it is supported by the court's decision in Elmi. Mr. DeLeon's reliance upon Justice Madsen's dissent is not persuasive. The decision of the majority is controlling authority, which may not be disregarded in favor of a dissenting opinion. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006); MP Med. Inc. v. Wegman, 151 Wn. App. 409, 417, 213 P.3d 931 (2009).

Instruction 16 here was appropriate. Mr. Cardenas was actually shot, and both Mr. Acevedo and Mr. Lopez were placed in fear for their lives, so common law definitions of assault apply as to each victim. The mens rea was clearly established. The shooter and his accomplices intended to inflict great bodily harm, and that intent was evidenced by the slow u-turns in front of the residence, the threat emanating from the car, in response to Mr. Acevedo's gang sign, that he would be shot, as well as the firing of multiple shots in his direction. Both Mr. Acevedo and Mr. Cardenas were in the front of the residence, not hidden, and any shooter would have had reason to believe that individuals would be present at the residence, such as Mr. Lopez.

Apart from application of transferred intent, on the facts present here, the jury could have reasonably inferred that the shooter and his accomplices intended to inflict great bodily harm upon each and every one of the victims. As discussed above, none of the victims were hidden in the residence or in a vehicle. Mr. Acevedo and Mr. Cardenas were on the front sidewalk; Mr. Lopez had left the residence and was walking towards the front.

2. <u>The court did not abuse its discretion in admitting the gang evidence, or in denying the motion for a mistrial.</u>

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> ER 404(b)

The admissibility of evidence is within the discretion of the trial court, and a reviewing court will reverse only when the trial court abuses its discretion. State v. Atsbeha, 142 Wn.2d 904, 913, 16 P.3d 626 (2001); State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

Evidence of gang affiliation is admissible as evidence of other crimes or bad acts under ER 404(b) as proof of premeditation, intent, motive and opportunity. In applying ER 404(b), a trial court is required to engage in a four-step analysis: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. State v. Pirtle, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995), *collateral relief granted on other grounds,* Pirtle v. Morgan, 313 F.3d 1160 (9th Cir. 2002), *cited in* State v. Asaeli, 150 Wn. App. 543, 576, 208 P.3d 1136 (2009). *See, also,* State v. Campbell, 78 Wn. App. 813, 821, 901 P.2d

1050 (1995); State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); State v. Yarbrough, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009).

Gang evidence may be properly admitted under ER 404(b) to establish not only motive to commit a crime, but also to show that defendants acted in concert. State v. Scott, 151 Wn. App. 520, 527, 213 P.3d 71 (2009), *review denied*, 168 Wn.2d 1004 (2010); State v. Embry, ___ Wn. App. ___, 287 P.3d 648 (2012).

An appellate court will review a trial court's ER 404(b) decision for abuse of discretion. Id., State v. Walker, 75 Wn. App. 101, 108, 879 P.2d 957 (1994), *review denied*, 125 Wn.2d 1015, 890 P.2d 20 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004), *quoting* State ex rel. Carroll v. Junker, 79 wn.2d 12, 26, 482 P.2d 775 (1971). On appeal, the appellant bears the burden of proving abuse of discretion. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

Here, the trial court engaged in just the process required by case law and ER 404(b). The court properly weighed the purposes for which the evidence would be admitted, and further, determined that any

prejudicial effect of the evidence was outweighed by its probative value. **(RP 576-82)**

Having admitted the gang evidence, the court properly exercised its discretion in denying the motion for the mistrial. Detective Ortiz, as an expert in the gang culture of Sunnyside, provided testimony which was helpful to the jury in describing the history and associations of the area gangs, as well as the significance of clothing, signs and language employed by them, and more specifically, evidence found with these defendants.

Indeed, in denying the motion, the court observed that the evidence of gang membership "was either created or displayed by the defendants. It's evidence that was out there . . . I think it has been limited. . . " **(RP 1997)**

The reason why such evidence would be helpful to the jury was best summed up by the deputy prosecutor at the close of the trial:

> Gang-motivated assaults. You've heard a lot of evidence about who these groups are, who belongs to what group, whether or not the Defendant committed the crime 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. And it's abundantly clear that the reason these things happen that seem so random, so senseless, is because in their culture you gain respect by doing this kind of thing to a rival gang member. You gain respect. You up

their representation as a violent organization that you don't mess with. And if you do, there's consequences.

(RP 2335)

The ER 404(b) was properly admitted. Far more than simply generalized testimony about gang involvement, the evidence was probative of gang members' motivation to engage in concerted and violent activities which could otherwise seem to be random and senseless to the average lay person.

3. Admission of the codefendants' statements did not violate DeLeon's right of confrontation.

The Sixth Amendment to the United States Constitution grants defendants the right to be "confronted with the witnesses against him." In Crawford v. Washington, 541 U.S. 36, 60-61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Supreme Court held that the Confrontation Clause applies to witnesses against the accused, thus the State can present prior testimonial statements of an absent witness only if the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. Id., at 68.

In Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Court recognized that admitting a non-testifying codefendant's confession that implicates the defendant may be so

damaging that even instructing the jury to use the confession only against the codefendant is insufficient to cure the resulting prejudice. But, admitting a non-testifying codefendant's confession that is redacted to omit all references to the defendant, couple with an instruction that the jury can use the confession against only the codefendant, does not violate the Confrontation Clause. Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed.2d 176 (1987). This is true, even where the codefendant's confession, although not facially incriminating, becomes incriminating when linked with other evidence introduced at trial. Id., at 208-09. Redaction of a codefendant's references to the defendant, coupled with an instruction, creates the same situation with respect to a non-testifying codefendant's confession. Id., at 211.

The Washington Court of Appeals has recently held that while Crawford heightened the standard under which a trial court can admit hearsay statements, it did not overrule Bruton and its progeny. In re Pers. Restraint of Hegney, 138 Wn. App. 511, 546, 158 P.3d 1193 (2007). The court recognized that Bruton answers the threshold question of whether one defendant can be considered a witness against another in a joint trial, but if a statement is properly redacted and the jury is instructed not to use it against the defendant, the declarant is not a "witness against" the

defendant, and admitting the codefendant's statement does not implicate the Confrontation Clause. Hegney, 138 Wn. App. at 547.

In Frasquillo, the Court of Appeals restated the general holding of Crawford, that the testimonial statement of a witness is unavailable unless the defendant had a prior opportunity to cross-examine the witness. The court further found that a statement, made by a codefendant to law enforcement with regard to his knowledge that a shotgun was in the trunk of a car, was testimonial. The court held, however, that as the statement by the codefendant was not admitted for the truth of the matter asserted, i.e., that the defendant owned the shotgun, but rather to show that the codefendant knew the weapon was in the trunk, the admission of the statement did not violate Crawford. Frasquillo, 161 Wn. App. at 918.

Here, the jury was properly instructed that they were to consider the counts and defendants separately. The statements were not redacted, but they did not need to be, as each defendant's statement to the jail officer pertained only to that defendant's gang affiliation. No statement by a codefendant constituted testimony against Mr. DeLeon. Crawford is not implicated, and the court did not err in admitting the statements.

4. DeLeon has not met his burden of showing that his counsel was ineffective. Even if counsel was deficient, there has been no showing of prejudice.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *citing* State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In weighing the two prongs found in Strickland, a reviewing court begins with a strong presumption that defense counsel's representation was effective. In fact, the presumption "will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). A claim of ineffective assistance of counsel presents a mixed question of law and fact, reviewed *de novo.* In re Personal Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Because the presumption runs in favor of effective representation, a defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The defendant also

bears the burden of showing that, but for counsel's deficient representation, the result of the trial would have been different. Thomas, 109 Wn.2d 225-26.

Here, DeLeon argues that counsel's performance was deficient in several respects.

A. Lesser included instruction.

DeLeon maintains that deficient performance was demonstrated by his counsel's request for a lesser included instruction on the offense of drive-by shooting, and his failure to request a lesser included instruction for second degree assault.

A defendant has a statutory right to present a lesser included offense to a jury. RCW 10.61.006. Two conditions must be met, however:

> First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.
>
> State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)

Stated another way, a criminal defendant is entitled to a jury instruction on a lesser included offense if (1) each element of the lesser offense is a necessary element of the charged offense and (2) the evidence supports an inference that only the lesser crime was committed. State v.

Huyen Bich Nguyen, 165 Wn.2d 428, 434, 197 P.3d 673 (2008), *cited in* State v. Sublett, 156 Wn. App. 160, 191, 231 P.3d 231 (2010).

As to the first, or legal prong of Workman: "if it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime." State v. Frazier, 99 Wn.2d 180, 191, 661 P.2d 126 (1983).

To satisfy the second, or factual prong there must be a "factual showing more particularized than [the sufficient evidence already] required for other jury instructions. Specifically, we have held that the evidence must raise an inference that *only* the lesser included . . . offense was committed to the exclusion of the charged offense." State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). The "evidence must affirmatively establish the defendant's theory of the case-it is not enough that the jury might disbelieve the evidence pointing to guilt." Id., at 456, *citing* State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808, *overruled on other grounds*, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

The State agrees that drive-by shooting is not a lesser included offense of first degree assault. State v. Ferreira, 69 Wn. App. 465, 470, 850 P.2d 541 (1993), (comparing the elements of recklessness in the former offense of first degree reckless endangerment with those of first

degree assault). However, DeLeon is incorrect in his assertion that second degree assault, assaulting another "with intent to commit a felony" pursuant to RCW 9A.36.021(1)(e), is a lesser included offense when the felony in question is drive-by shooting. The element of recklessness remains in the crime of drive-by shooting, so second degree assault based upon RCW 9A.36.021(1)(e) could no more be a lesser included offense than drive-by shooting by itself.

The Washington Supreme Court has held that second degree assault with a deadly weapon, RCW 9A.36.021(1(c), is a lesser included offense of first degree assault with a deadly weapon with intent to inflict great bodily harm under RCW 9A.36.011(1)(a), and the lesser included instruction should have been given where substantial evidence supported a theory that only the lesser crime was committed. Fernandez-Medina, 141 Wn.2d at 460.

Fernandez-Medina is distinguishable on its facts, however, as testimony showed that the defendant only pointed a gun at the head of one of the victims. Id. Here, there is not substantial evidence that only second degree assault was committed to the exclusion of first degree assault. Several shots in fact were fired at the three victims. The factual prong of Workman was not met. As DeLeon cannot demonstrate that the

instruction would likely have been given, counsel was not ineffective in failing to request it.

B. Challenge to venue.

As DeLeon points out in his opening brief, the trial court denied his motion to dismiss Count 4, attempting to elude, based upon the fact that the offense may have been committed in Benton County. The State would submit that the record is anything but clear that the offense was committed only in Benton County. **(RP 958-61; 1850-59)** If any element of the offense occurred in Yakima County, then venue is appropriate there. CrR 5.1(a).

In any event, the court was correct in denying DeLeon's motion, as it came far too late, after jeopardy had attached. State v. Pejsa, 75 Wn. App. 139, 145, 876 P.2d 963 (1994); State v. Dent, 123 Wn.2d 467, 869 P.2d 392 (1994). As the question of venue only came up during the trial itself, and still remained unclear, DeLeon cannot demonstrate deficient performance on the part of defense counsel.

C; D. Juror misconduct, and the motion for a new trial.

DeLeon maintains that his counsel was ineffective in that he failed to move for a mistrial based upon the misconduct of the juror who tweeted as their experience on the trial, and for failing to timely join his

codefendant's motion for a new trial. Here, while counsel's performance may have been deficient or dilatory, there is no prejudice shown.

The motion for a mistrial based upon juror misconduct was heard and considered by the court. It was denied. Mr. DeLeon has not shown that the result would have been any different if his counsel had brought the same motion.

An appellate court reviews a trial court's investigation into juror misconduct for abuse of discretion. State v. Earl, 142 Wn. App. 768, 774, 177 P.3d 132 (2008); *citing* State v. Elmore 155 Wn.2d 758, 761, 123 P.3d 72 (2005). The party alleging juror misconduct has the burden of proof of showing that misconduct occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). A new trial is granted only where misconduct has prejudiced the defendant. State v. Boling, 131 Wn. App. 329, 332, 127 P.3d 740, *review denied* 158 Wn.2d 1011 (2006).

Even if the juror committed misconduct by violating the court's orders, there is no prejudice apparent from this record. The court and counsel first learned of the Twitter posting just as a verdict was reached. It is apparent from counsel's comments at that time that it was not clear just who had posted each of the tweets, or whether it even disclosed the status of the deliberations or introduced extraneous evidence. **(RP 2407-10)**

Again, while the court found that defense counsel's motion to join his co-defendants' motion for a new trial was not timely, it is clear from the record that that motion was already considered and rejected. There has been no showing that a different result would have been reached if the motion from Anthony DeLeon's counsel would have been timely. Further, for the reasons stated above, the juror's conduct does not dictate reversal.

E. Failure to challenge the firearm enhancement.

Counsel for Mr. DeLeon admitted in his sentencing memorandum that Mr. DeLeon had a prior conviction for an offense involving a firearm enhancement. **(CP 684)** This was an affirmative acknowledgement, and the State then had no further obligation to prove the prior enhancement. This is in accord with the cases cited by DeLeon. State v. Mendoza, 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009) (citations omitted).

DeLeon argues that counsel was deficient in failing to challenge the exceptional sentence. Counsel did, however, argue at sentencing that the respective firearm enhancements at issue here should be imposed concurrently instead of consecutively, as well as the underlying sentences. It was a strategy which was unsuccessful, but a strategy nonetheless, to minimize Mr. DeLeon's length of incarceration. **(RP 2442-48)**

F. Maria Mendoza.

Mr. DeLeon claims also that counsel was ineffective in failing to recall Maria Mendoza to the stand for cross-examination. The record does appear to be silent as why Ms. Mendoza did not retake the stand, but counsel argue to the jury that her testimony was inconsistent, and that in her initial statement to the police, she did not mention that she recognized Anthony DeLeon in the car. Counsel also suggested that she, along with other gang-affiliated individuals, may have had a motive to be less than truthful in their testimony. **(RP 2368-72)** On this point, DeLeon has neither demonstrated deficient performance nor prejudice.

5. <u>The court's aggravated sentence was supported by the evidence.</u>

The Appellant argues that, aside from what he believes to be improperly admitted evidence, there is insufficient evidence to support the jury's gang aggravator finding. He is incorrect, and his reliance upon <u>State v. Bluehorse</u>, 159 Wn. App. 410, 428, 248 P.3d 537 (2011), is misplaced.

As noted previously, the shooting described in this case occurred after Mr. Acevedo flashed an "LVL" sign. There was an abundance of evidence of gang involvement, including the fact that Mr. DeLeon was wearing articles of clothing indicating gang affiliatin, and was observed by

the witness Mendoza wearing a red bandana over his mouth immediately prior to the shooting. He had previously claimed NSV, and was acting in concert with his brother Ricardo DeLeon and Octavio Robledo.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's case.

State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

A jury's verdict on a gang aggravator is evaluated in much the same manner as the sufficiency of the evidence supporting the elements of the crime. State v. Webb, 162 Wn. App. 195, 205-06, 252 P.3d 424 (2011).

The gang aggravator at issue in Bluehorse is found at RCW 9.94A.535(3)(s), which is imposed based upon a finding that a defendant commits a crime in order "to obtain or maintain his or her membership or to advance his or her position" in a gang.

Here, the jury answered in the affirmative that Mr. DeLeon's behavior, as a principal or accomplice, showed an "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", pursuant to RCW 9.94A.535(3)(aa).

This aggravator, quite clearly broader in its language than RCW 9.94A.533(3)(s) was added to the list of aggravating factors by the Legislature in 2008.

The final bill report for Wash. *E2SHB* 2712, 60th Leg., 2nd Sess., (June, 12, 2008), explains the legislative intent behind expanding the

exclusive list of aggravating factors in the Sentencing Reform Act to include a gang aggravating circumstance:

> In 2007 legislation was enacted that required the Washington Association of Sheriffs and Police Chiefs (WASPC) to establish a work group to evaluate the problem of gang-related crime in Washington. The work group included members from both the House of Representatives and the Senate as well as representatives from the following groups: the Office of the Attorney General, local law enforcement, prosecutors and municipal attorneys, criminal defense attorneys, court administrators, prison administrators and probation officers, and experts in gang and delinquency prevention.
>
> The work group was charged with evaluating and making recommendations regarding
> additional legislative measures to combat gang-related crime, the creation of a statewide gang information database, possible reforms to the juvenile justice system for gang-related juvenile offenses, best practices for prevention and intervention of youth gang membership, and the adoption of legislation authorizing civil anti-gang injunctions. The WASPC and the work group met monthly during the 2007 interim and on December 11, 2007, provided a report to the Legislature on its findings and recommendations regarding criminal gang activity.

Wash. *E2SHB* 2712, 60th Leg., 2nd Sess., (June, 12, 2008).

As a result of the workgroup's recommendations, the legislature expanded the exclusive list of aggravating factors contained in the Sentencing Reform Act to include any crime that is intentionally committed directly or indirectly for the benefit, aggrandizement, gain,

profit, advantage, reputation, membership, or influence of a gang. *2008 Wa. Laws Ch. 276 sec. 303.*

Even before the enactment of the most recent gang aggravator, trial courts in Washington have consistently been upheld for imposing exceptional sentences for gang motivated crimes and random acts of violence. *See*, State v. Smith, 64 Wn. App. 620, 626, 825 P.2d 741 (1992). Division Two of the Court of Appeals upheld an exceptional sentence imposed for a gang-related shooting which furthered the gang's reputation as a powerful and violent organization); In State v. Smith, 58 Wn. App. 621, 626-27, 794 P.2d 541 (1990), Division One affirmed an exceptional sentence for the defendant because he was shooting at random motorist. The Court held that random violence justified an exceptional sentence because "unpredictable, irrational violence, committed without warning, [is] particularly insidious . . . [and is] especially destructive of society's sense of security); State v. Johnson, 124 Wn.2d 57; 873 P.2d 514 (1994)(Holding that the gang-motivation aggravating sentencing factor was supported by the evidence, and that the sentence was justified by the impact of the crime on the community, State v.Riley, 69 Wn. App. 349; 848 P.2d 1288 (1993) (Gang membership, by itself, may not be a factor which justifies an exceptional sentence; however, the evidence of gang motivated crime is a sufficient basis to impose an exceptional sentence).

"Preserving the peace is the first duty of government, and it is for the protection of the community from the predations of the idle, the contentious, and the brutal that government was invented." People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 1116; 929 P.2d 596 (1997)(California Supreme Court decision upholding use of civil gang injuctions). Division Two of the Court of Appeals echoed the above sentiment in Smith:

> . . . we do not agree that the sentencing court may not consider a person's motivation for criminal conduct. Here, Smith was acting to further the criminal enterprise. It is that motivation, to further the illegal activities of the gang, that underlies the increased sentence, not the mere fact of gang membership. Consideration of Smith's motivation by the sentencing court did not impinge on Smith's right of freedom of association.
>
> In reaching the conclusion that we do, we observe that a community faces a greater peril from collective criminal activity than it does from criminal activity by one individual. A criminal enterprise which is composed of a number of persons, whether it is known as a gang, a mob, or a criminal syndicate, poses a great challenge to law enforcement agencies. Furthermore, the specter of such organized wrongdoing tends to make the general public feel that it is held hostage by the criminal enterprise. In cases such as this, where specific criminal activity is motivated by the desire of the criminal to further the illegal objectives of the gang, by projecting its image as a terrorist organization, an appropriate basis for an exceptional sentence is established.
>
> State v. Smith, 64 Wn. App. at 626..

The fact that NSV members would gain some benefit by shooting at LVL members was explained by Detective Ortiz at trial. Sufficient

evidence supported the jury's finding, and the court did not err in imposing the aggravated sentence.

DeLeon's assertion that the trial court erred in failing to bifurcate the trial itself from consideration of the gang aggravator evidence is without merit. He offers no authority that would require bifurcation, and the State is aware of none. Indeed, as the State pointed out at trial, the gang evidence, admitted for ER 404(b) purposes, would be the same evidence upon which the jury would rely in deciding whether the gang aggravator was proven beyond a reasonable doubt. It would have made no sense to send the jury back for further deliberations on the aggravator since no further evidence would have been introduced in a separate hearing. There was simply nothing to bifurcate.

6. The restriction on gang-related clothing and tattoos was an appropriate crime-related prohibition.

Mr. DeLeon relies upon the case of State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008) in support of his argument that the court's restriction on Mr. DeLeon's use of clothing or tattoos or other marks associated with or signifying membership in a criminal street gang is unconstitutional. He asserts that such a prohibition violates his First Amendment right, and should be struck from his judgment and sentence.

However, Bahl allows that a sentencing condition which constitutes a limitation upon a fundamental right, such as free speech, is appropriate if it is "imposed sensitively." Id., at 757. Such a restriction must be clear and "must be reasonably necessary to accomplish essential state needs and public order." Id., at 758.

Further, RCW 9.94A.703(3)(f) specifically grants authority to a court to require that a defendant "shall comply with any crime-related prohibitions." The prohibition on the use of gang attire or tattoos is not vague, as was the pornography prohibition at issue in Bahl. It restricts only that clothing which would signify gang affiliation, only tattoos which would convey the same message. Given the facts of this case, the court's prohibition was reasonably related to the crimes for which Mr. DeLeon was convicted, and it was reasonably necessary to maintain public order.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions, as the issues raised on appeal are without merit

Respectfully submitted this 30th day of January, 2013.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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