No. 942838
Court of Appeals No. 31188-1-III
(consolidated with 31187-2-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ARMANDO LOPEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner Armando Lopez asks the court to accept review of the partially published opinion in *State v. Mancilla*, _ P.3d__, 2017 WL 354306.

B. OPINION BELOW

In a partially published opinion, the Court of Appeals affirmed Mr. Lopez's convictions rejecting his arguments that the elements or "to convict" instruction must include each element of the offense. The court also rejected Mr. Lopez's argument that the State was required to prove the crimes as charged in those instruction.

C. ISSUES PRESENTED

1. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This in turn, requires a trial court to instruct the jury on each element of the offense. Where there is no actual battery, a specific intent to cause injury or fear is an essential element of assault. Instructions 16 through 22, the "to convict" instructions, omitted this element. Do the instructions relieve the State of its burden of proof?

2. The Due Process Clause of the Fourteenth Amendment requires the State to prove each element of an offense beyond a

reasonable doubt. Where there is no actual battery, a specific intent to cause injury or fear is an essential element of assault. In the absence of proof of that element, do Mr. Lopez's convictions for first degree assault deprive him of due process?

3. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This in turn, requires a trial court instruct the jury in manner which conveys this requirement. Instruction 15 suggests to the jury that if a person acts recklessly or negligently in firing a gun into a building, that the jury may find the requisite intent necessary for first degree assault. Does Instruction 15 relieve the State of its burden of proving the elements of first degree assault?

4. This Court has recognized that in certain circumstances "routine booking questions" are not custodial interrogation for purposes of the Fifth Amendment. This Court has also recognized a defendant's admission of gang membership is highly prejudicial. Did the Court of Appeals properly apply harmless-error analysis to the improper admission of Mr. Lopez's statements regarding gang affiliation?

5. Expert opinion is proper under ER 702 where the witness (1) possesses sufficient knowledge, experience, and familiarity with the

matter to offer an opinion; (2) the opinion is rationally related to this experience and knowledge; and (3) the opinion is helpful to the jury. The trial court permitted the State to offer the testimony of a police officer as a gang expert where the jury was equally knowledgeable of the subject matter of the testimony. Did the trial court abuse its discretion in admitting the testimony?

9. The Equal Protection Clauses of the Fourteenth Amendment and Article I, section 12 require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, statutes authorize greater penalties for specified offenses based on recidivism. However, in some instances the prior convictions are treated as "elements" that must be proven to a jury beyond a reasonable doubt, and in other instances, they are treated as "sentencing factors" proven to a judge by a mere preponderance of the evidence. Where no rational basis exists for this arbitrary distinction and its effect is to deny some persons the protections of a jury trial and proof beyond a reasonable doubt, does it violate equal protection?

D. STATEMENT OF THE CASE

Early one morning, Maria Rincon and her family were awoken by gunshots outside their home in Outlook. The Rincon family was

familiar with gunshots, as their home had been the target of drive-by shootings on four or five prior occasions. RP 213. Presumably this was due to the family association with the North Side Varrio (NSV) gang, a group associated with the Norteños. RP 212, 271, 840.

Immediately following the shooting, witnesses saw a car leaving the area of the shooting and followed it several miles out of Outlook. RP 355-57. Police subsequently stopped the car driven by Mr. Lopez with three other inside. RP 462-70. The four men were arrested, advised of their rights, and taken to the Yakima County jail. P 137.

At the jail, and despite having asserted their right to remain silent, the four were each asked whether they were members of a gang. They were told by jail staff that the information was needed only to ensure they were safely housed in the jail. RP 132. Mr. Lopez and the others acknowledged they were members Little Valley Locos (LVL) a Sureños gang. RP 116-20. That information was then provided to prosecutors who offered it at the subsequent trial. RP 601-05.

Police found three guns on the roadside along the route the car took from Outlook to the point of the stop. RP 540. Ballistics and tool mark analysis indicated the three guns matched bullets and magazines found at the Rincon home. RP 644-54.

The State charged Mr. Lopez with drive-by shooting, unlawful

possession of a firearm, and seven counts of first degree assault each with three firearm enhancements. CP 33-35. The State also alleged Mr. Lopez was a persistent offender. CP 35.

A jury convicted Mr. Lopez as charged, except for the persistent offender allegation. CP 84-108. That allegation was determined by the trial court by a mere preponderance of the evidence. CP 115-18.

E. ARGUMENT

1. Instructions 16-22 omitted an essential element of the crime of first degree assault.

"The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.'" *Alleyne v. United States*, U.S. , 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013). This right, together with the Fourteenth Amendment Due Process Clause, requires the State prove each element to a jury beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A similar requirement flows from the jury-trial guarantee of Article I, section 22 and the due process provisions of Article I, section 3 of the Washington Constitution. *State v. Mills*, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). This requirement is violated where a jury

instruction relieves the State of its burden of proving each element of the crime. *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

"[S]pecific intent either to create apprehension of bodily harm or to cause bodily harm **is an essential element**" of assault. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995) (emphasis added.). The Court reiterated its holding a year later saying "[a]s we settled in *Byrd,* specific intent represents an 'essential element' and its omission results in manifest error." *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). Instructions 16 through 22 do not include any mention of this element of the offense.

"A 'to convict' instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Therefore, "an instruction purporting to list all of the elements of a crime must in fact do so." *Id.* (citing *State v. Emmanuel,* 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). Here, the to-convict instructions do not include the specific-intent element discussed in *Eastmond* and *Byrd.*

On appeal the State concedes the instructions do not contain this

specific intent element. Brief of Respondent at 7. Despite that the Court of Appeals concludes the instruction do include each of the "statutory" elements. Opinion at 16. The court says nothing of the omitted common law essential elements. Instead, the opinion reasons there was no basis for confusion by the jury. *Id.* That, however, is not the proper standard. Either the element is in the to-convict or it is not. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (citing *Smith*, 131 Wn.2d at 262-63). Here, the parties agree the instructions do not include these elements.

In the absence of the requirement of specific intent. The jury was able to conclude Mr. Lopez committed or was an accomplice to an assault merely by shooting into a building which happened to be occupied. The jury was not required to find that Mr. Lopez or an accomplice specifically intended to injure or cause fear in any specific person.

The published opinion of the Court of Appeals is contrary to this Court's decision and presents a substantial constitutional issue warranting review under RAP 13.4.

2. **The State did not prove each essential element of the crimes beyond a reasonable doubt.**

As set forth above, where there is not an actual battery the

specific intent to either cause fear or cause injury in a specific person is an essential element of an assault. *Eastmond*, 129 Wn.2d at 502 (citing *Byrd*, 125 Wn.2d at 713-14). *Eastmond* observed

> These two forms of assault . . . require inapposite elements of fear: although the State need not prove fear in fact to support a conviction for assault by attempt to cause injury, fear is a necessary element of assault by attempt to cause fear.

129 Wn.2d at 503-04.

Mr. Lopez makes a straightforward argument: The State did not prove Mr. Lopez or an accomplice had the intent to cause great bodily injury to a specific person. The State did not prove Mr. Lopez or an accomplice had a specific intent to cause injury or fear to a specific person. The State never established that Mr. Lopez or an accomplice knew who was inside the building.

In *State v. Elmi*, this Court recognized that under the first degree assault statute the specific intent to cause great bodily injury to a specific person could transfer to other unintended victims. 166 Wn.2d 209, 218, 207 P.3d 439 (2009). Critically, the Court recognized that transfer can only occur where the State can first establish a specific intent to harm a specific person. *Id.* Here, again the State did not offer any proof of that threshold fact.

The Court of Appeals reasons that this standard is met so as the

State offers "proof [that] the defendant intended to inflict great bodily harm on *someone,* even if that someone is unknown." Opinion at 16 (citing *Elmi* 166 Wn.2d at 218).

But *Elmi* did require that the State first establish a specific intent to harm a specific person. Importantly, in that case it was undisputed that Elmi intended to assault a specific person. Thus, the Court never had occasion to endorse the far-broader rule that the Court of Appeals adopts. This Court framed the issue:

> It is undisputed that Elmi fired gunshots specifically intending to inflict great bodily harm upon Aden. The question remains whether Elmi's intent against Aden transfers under RCW 9A.36.011 to meet the intent element against the children.

Elmi, 166 Wn.2d at 216. The Court held "[the] specific intent to harm Aden transferred to the children under RCW 9A.36.011. *Id.* at 219.

Elmi plainly did require a specific intent to assault a specific person. When the Court said the intent to assault "someone" could be transferred, it necessarily meant a specific person. Anything, more than that would have been dicta as it would have been beyond the fact of the case and would have been unnecessary to the holding.

Moreover, Mr. Lopez notes that even if the law did not generally require the State to prove a specific intent tied to a specific individual, the to-convict instruction in this case do. This is so because each of the

seven instructions separately identified one of the seven alleged victims and required the jury find Mr. Lopez or an accomplice intended to assault the named person. CP 61-67. "In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Thus, the to-convict instructions required the State to prove a specific intent tied to a specific person.

The Court of Appeals excuses the State's failure to prove what the to-convict instructions plainly required. The opinion states "[t]he instructions for each count did specify different victims. But this was only to ensure separate findings." Opinion at 17. While it is certainly true that the instruction sought to ensure separate verdicts for each alleged victim, that intent does obviate the State's burden to prove what the instruction required; that Mr. Lopez intended to assault the named victim. *Hickman* makes clear the State must meet that burden.

The State did not prove Mr. Lopez or an accomplice assaulted any of the named victims. The opinion of the Court of Appeals on this point is plainly contrary to *Hickman*. Review is warranted under RAP 13.4

3. Instruction 15 misstated the law and relieved the State of its burden of proving each element of the assault.

The Sixth and Fourteenth Amendments require the State prove each element to a jury beyond a reasonable doubt. *Gaudin,* 515 U.S. at 510. Instructions must convey to the jury that the State must prove each element beyond a reasonable doubt. *State v. Schulze,* 116 Wn.2d 154, 167–68, 804 P.2d 566 (1991). An instruction which relieves the State of that burden of proof violates this constitutional protection. *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995); *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011).

Over defense objection, the court instructed the jury

> If a person assaults a particular individual or group of individuals with a firearm with the intent to inflict great bodily harm and by mistake, inadvertence, or indifference, the assault with the firearm took effect upon an unintended individual or individuals, the law provides that the intent to inflict great bodily harm with a firearm is transferred to the unintended individual or individuals as well.

CP 60 (Instruction 15); RP 952.

The State contended, and the trial court found, that *Elmi* had approved the use of this instruction. RP 950-51; *Elmi*. 166 Wn.2d at 213. However, the Supreme Court expressly declined to address

whether it was appropriate to give such an instruction where the unintended victim did not suffer injury. The Court said:

> Because RCW 9A.36.011 encompasses transferred intent, the Court of Appeals did not need to analyze this matter under the doctrine of transferred intent. As such, we do not need to reach the doctrine of transferred intent either and proceed, instead, under RCW 9A.36.011.

Elmi, 166 Wn. 2d at 218. Indeed, the dissent chastised the majority's failure to address the instruction, "I respectfully cannot see how this court can grant Elmi's 'petition for review on the issue of transferred intent' and refuse to discuss application of the doctrine under the statute." *Elmi*, 166 Wn.2d at 220 (Madsen, J., dissenting, joined by Sanders and Fairhurst, JJ).

Thus, the theory of transferred intent approved in *Elmi* was that encompassed in the statutory language and was not a separate theory. 166 Wn.2d at 218 (the *mens rea* is "transferred under RCW 9A.36.011.") Because the theory is encompassed in the language of RCW 9A.36.011, it stands to reason, that the statutory theory of transferred intent is fully communicated to the jury if the jury is instructed in terms of the statutory elements. Here the jury received such an instruction. *Compare* RCW 9.36.011; CP 61-67 (Instructions 16-22). Having instructed the jury in the statutory terms, there is no

recognized basis to further instruct the jury on transferred intent. Doing so blurs the State's burden of proof if not wholly eliminating it.

Critical to the holding in *Elmi* is that the actor first had the specific intent to assault a particular person. 166 Wn.2d at 618-19. *Elmi* did not conclude that a person commits first degree assault simply by firing a gun into a building which happens to be occupied. That would be an extraordinary expansion of the crime of assault. Instead, *Elmi* is grounded in the common-sense idea that before intent may be transferred there must be an intended victim.

Instruction 15 goes far beyond the holding of *Elmi*. The instruction's included terms "mistake, inadvertence, or indifference" are terms that define recklessness or negligence and suggest those lower mental states as substitutes for intent. That is especially prejudicial in a case such as this where the State never endeavored to prove who the intended victim was. In doing so, Instruction 15 relieved the State of its burden of proving the requisite specific intent.

This instruction was not endorsed by *Elmi* and is contrary to the narrow holding of that case. Moreover, this instruction reduced the State's burden of proving intent. Review of this issue is proper under RAP 13.4.

4. The trial court erred in refusing to suppress statements obtained in violation of Mr. Lopez's constitutional rights.

Consistent with this Court's decision in *State v. DeLeon*, 185 Wn.2d 171, 341 P.3d 315 (2014), the Court of Appeals properly concluded Mr. Lopez's statements made during a jail interview under were obtained in violation of the Fifth Amendment. However, the opinion finds the admission of these statement harmless by improperly assessing the the resulting prejudice.

The relevant harmless-error requires reversal unless the State proves beyond a reasonable that the error did not effect the jury's verdicts. *Deleon*, 185 Wn.2d at 487. That is, a finding beyond a reasonable doubt that the verdict would have been the same without the erroneously admitted evidence.

DeLeon's conclusion that the error in that case required reversal is instructive. Despite a wealth of other evidence establishing gang membership, the court noted "[t]he strongest evidence that a person is a gang member is their own clear admission." *DeLeon* 185 Wn.2d at 488. The great weight of such an admission is not easily overcome by other less direct pieces of evidence. *Id.*

The opinion here, however, states:

> "In light of *[Deleon]*, we focus on whether the State presented evidence of the defendants' admitted gang affiliation, apart from their booking statements. Such evidence exists for three of the four defendants.

Opinion at 8. That is a misstatement of the harmless-error analysis. The question is not **could** a jury have reached the same result, but rather **would** the jury have necessarily reached the same result.

In *Deleon* this Court focused on whether there was other evidence of gang-affiliation, because the question before the court was whether the jury would have reached the same verdict on a gang aggravating factor without the unconstitutionally obtained admission. Here by contrast the question is whether the jury would have necessarily reached the same verdict on the seven counts of assault and one count of drive-by shooting. The opinion of the Court of Appeals never asks much less answers that question.

Importantly, the State has consistently relied upon Mr. Lopez's gang membership as a proxy for actual evidence of intent. In short the State has contended Mr. Lopez was an admitted member of a gang, the house was the known residence of rival gang members, and thus the shooting was done with the intent to injure. Without the introduction of the unconstitutionally obtained admission of gang membership, of Mr. Lopez and his codefendants, the

Contrary to the opinion, the question of prejudice does not turn on whether other evidence was admitted. The opinion is contrary to this Court decision and affirms an unconstitutionally obtained conviction. Review is warranted under RAP 13.4.

5. The trial court impermissibly permitted a witness to testify as a "gang expert."

Prior to its admission, Mr. Lopez objected to the State's proposal to offer Sunnyside Police Office Jose Ortiz as a gang expert. RP 235. Mr. Lopez argued the proffered testimony was not helpful to the jury and thus not admissible under ER 702. RP 819. Specifically, Mr. Lopez argued the officer's proposed testimony that rival gangs engage in acts of violence against one another was a matter of common knowledge. RP 819-20.

The court admitted the testimony determining the officers was qualified as an expert. RP 823.

A witness may offer an opinion on a matter which is based on the perceptions of the witness and helpful to a clear understanding of a fact in issue. ER 701. Moreover, if the witness is qualified as an expert based on his or her experience, training, or knowledge, the witness may testify by way of opinion where doing so will assist the trier of fact. ER 702. Neither a lay opinion nor an expert opinion are excludable merely

"because [they] embrace[] an ultimate issue." ER 704.

To be admissible:

> [u]nder [ER] 701 and [ER] 602, the witness must have personal knowledge of matter that forms the basis of testimony of opinion; the testimony must be based rationally upon the perception of the witness; and of course, the opinion must be helpful to the jury (the principal test).

State v. Ortiz, 119 Wn.2d 294, 308-09, 831 P.2d 1060 (1992) (citing, E. Cleary, *McCormick on Evidence* (3d ed. 1984)).

Such evidence is also limited by notions of relevancy and prejudice found in ER 402 and ER 403. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Expert testimony is further limited by the rule that "[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *Black*, 109 Wn.2d at 348; *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967).

A court has said:

> [a]s a general rule, profile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice.

State v. Braham, 67 Wn. App. 930, 936, 841 P.2d 785 (1992). Where testimony "[implies] guilt based on characteristics of known offenders"

the evidence is inadmissible because of its undue prejudice. *Id.* at 937.

Here, Officer Ortiz's testimony did just this. Officer Ortiz testified all LVL members are enemies "to all Norteño" gangs, and that they "hate each other." RP 839-40. He opined that the enmity alone "is enough for retaliation." RP 841. The mere fact that Mr. Lopez was allegedly a member of LVL was sufficient for him to commit the alleged crime. That is an improper and irrelevant inference of guilt.

Further, the evidence was not helpful to the jury. The notion that rival gangs sometimes act out violently against each other is not novel or complicated. And as argued to the trial court, it is well within the common understanding of jurors, particularly in places such as Yakima County which have witnessed so much gang violence. All the State's evidence afforded the jury was the testimony of a government official implying Mr. Lopez's guilt based upon his association with a gang. That is not helpful to the jury.

Indeed, it was precisely this sort of evidence, offered by Officer Ortiz no less, that caused this Court to caution:

> We . . . urge courts to use caution when considering generalized gang evidence. Such evidence is often highly prejudicial, and must be tightly constrained to comply with the rules of evidence.

DeLeon, 185 Ws.2d at 491. That caution was not heeded in this case.

Because the evidence was not relevant, was overly prejudicial, and was an improper opinion, the evidence should have been excluded under ER 702.

6. The arbitrary judicial labeling of a persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.

a. Because a fundamental liberty interest is at stake, strict scrutiny applies to the classification at issue.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); U.S. Const. amend. 14. When analyzing equal protection claims, courts apply strict scrutiny to laws implicating fundamental liberty interests. *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. *Plyler*, 457 U.S. at 217.

The liberty interest at issue here – physical liberty – is the prototypical fundamental right; indeed it is the one embodied in the text of the Fourteenth Amendment. "[T]he most elemental of liberty

interests [is] in being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. *Skinner*, 316 U.S. at 541.

b. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. *State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause because it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

The legislature has an interest in punishing repeat criminal offenders more severely than first-time offenders. Defendants who have twice previously violated no-contact orders are subject to significant

increase in punishment for a third violation. RCW 26.50.110(5); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Defendants who have twice previously been convicted of "most serious" (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(37); RCW 9.94A.570. However, the prior offenses that cause the significant increase in punishment are treated differently simply by virtue of the arbitrary labels "elements" of a crime or "sentencing factors" which courts have attached to them.

Where prior convictions increase the maximum sentence available are labeled "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. *See State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008) (prior conviction for sex offense must be proved to the jury beyond a reasonable doubt when elevating communicating with a minor for immoral purposes to a felony); *Oster*, 147 Wn.2d at 146 (prior convictions for violation of a no-contact order must be proved to jury beyond a reasonable doubt to punish current conviction for violation of a no-contact order as a felony). The State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. *State v. Chambers*, 157 Wn. App. 465, 475, 237 P.3d 352 (2010), *review denied*, 170 Wash.2d 1031

(2011). The courts have simply treated these factors as elements.

But where prior convictions increase the maximum sentence to life without the possibility of parole these same facts have been termed "sentencing factors," and treated as findings for a judge by a preponderance of the evidence. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003) *cert. denied*, 124 S. Ct. 1616 (2004). Just as the legislature has never labeled the facts at issue in *Oster*, *Roswell*, or *Chambers* as "elements," the Legislature has never labeled the fact at issue here as a "sentencing factor." Instead in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. *See* RCW 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years "shall be punished under RCW ch. 9.94A").

If anything, there might be more of a reason for requiring proof of prior convictions to a jury beyond a reasonable doubt in the "three strikes" context due to the severity of the punishment. Rationally, the greatest procedural protections should apply in that context. It makes no sense for greater procedural protections where the necessary facts

only marginally increase punishment, but not where the necessary facts result in the most extreme increase possible.

The scheme at issue here forever deprives Mr. Lopez of basic liberty; it subjects him to life in prison without the possibility of parole. It does so based on proof by only a preponderance of the evidence, to a judge and not a jury – even though proof of prior convictions to enhance sentences in other cases must be proved to a jury beyond a reasonable doubt.

As the Supreme Court explained in *Apprendi*, "merely using the label 'sentence enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." 530 U.S. at 476. But Washington treats prior convictions used to enhance current sentences differently based only on such labels. *See Roswell*, 165 Wn.2d at 192.

This Court should accept review and hold that the judge's imposition of a sentence of life without the possibility of parole violated the equal protection clause. The case should be remanded for resentencing within the standard range.

F. CONCLUSION

For the reasons set forth above this Court should accept review and reverse Mr. Lopez's convictions and sentence.

Respectfully submitted this 23rd day of March, 2017.

s/ *Gregory C. Link*
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JOSE JESUS MANCILLA, Appellant.	No. 31187-2-III (consolidated with No. 31188-1-III No. 31205-4-III No. 31225-9-III)
STATE OF WASHINGTON, Respondent, v. ARMANDO LOPEZ, Appellant.	PUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. JAIME LOPEZ, Appellant.	

STATE OF WASHINGTON,)
)
Respondent,)
)
v.)
)
NICHOLAS JACOB JAMES,)
)
Appellant.)

PENNELL, J. — In the context of a criminal trial, gang evidence is a double-edged sword. On the one hand, such evidence can help jurors understand relationships between defendants and how various symbols and terminology suggest motive and intent. But on the other hand, gang evidence can be problematic. Merely suggesting an accused is a gang member raises the concern he or she will be judged guilty based on negative stereotypes as opposed to actual evidence of wrongdoing. Accordingly, the State's use of gang evidence requires close judicial scrutiny.

The State's gang evidence here largely stands up to our review. The objective evidence suggested the defendants' crime was gang related, and the State presented narrowly tailored gang evidence to support its theory of the case. The State did err in introducing the defendants' booking statements where they admitted gang affiliation. *State v. Juarez DeLeon*, 185 Wn.2d 478, 374 P.3d 95 (2016). However, with the

exception of Jaime Lopez, this error was rendered harmless by other independent evidence of admitted gang affiliation.

Because neither gang related evidence nor other alleged errors impacted the convictions of Jose Mancilla, Armando Lopez, and Nicholas James, those results are affirmed. Only Jaime Lopez's conviction was compromised by impermissible gang evidence. Accordingly, Jaime Lopez's conviction is reversed without prejudice and remanded for retrial.

BACKGROUND

This case involves a Yakima County drive-by shooting. The facts are strikingly similar to another Yakima County drive-by shooting recently addressed by the Supreme Court in *Juarez DeLeon*. The target of this shooting was the Rincon house. Although several people were inside the house at the time of the shooting, no one was hurt. When law enforcement arrived to investigate the shooting, blue graffiti could be seen near the home's entrance. Law enforcement also recovered spent ammunition and a rifle magazine from the scene.

This was not the first time the Rincon house had been fired upon. It had been targeted four or five times in the past, presumably because two of the household members were affiliated with the Norteños gang.

On the morning of the shooting, two women were delivering newspapers in the area. After hearing the shots, they noticed a vehicle coming from the direction of the Rincon house. The vehicle had its headlights off and turned in front of their car. The women called the police and identified the vehicle as a gray Mitsubishi Galant.

A responding deputy saw a vehicle matching the women's description stop at an intersection. The deputy turned to pursue the vehicle, eventually stopping it. He removed four individuals from the vehicle, driver Armando Lopez, front seat passenger Jose Mancilla, and back seat passengers Jaime Lopez and Nicolas James. The deputy noted Armando Lopez had a blue bandana hanging from his neck. No firearms or ammunition were found inside the vehicle. Suspicious that firearms may have been discarded prior to the stop, officers went back to the intersection where the deputy first saw the Mitsubishi Galant. Three firearms were located in the area. A later forensic examination confirmed the three firearms matched the ammunition and magazine found at the Rincon house.

At the police station, law enforcement took the defendants' photographs. Armando Lopez is depicted "throwing up a gang sign." Ex. 68; 5 Report of Proceedings (RP) (Sept. 6, 2012) at 497-98. Law enforcement also took pictures of his many tattoos, including the number 13. The photograph of Jaime Lopez shows numerous tattoos, including a forearm tattoo of a zip code and the number 13 tattooed on his shoulders.

Nicolas James is pictured wearing a blue shirt with a blue belt; his belt buckle prominently featuring the number 13. Both the color blue and the number 13 are associated with the Sureños gang.

After being read their *Miranda*[1] rights and invoking their right to remain silent, the four defendants were booked into jail. During the booking process, a corrections officer questioned the defendants about gang affiliation in order to ensure they were safely housed. In response to that questioning, all four men admitted they were Sureños. Armando and Jose specifically identified themselves as members of Little Valley Locos or Lokotes (LVL), a Sureño clique.

The State charged the four men with seven counts of first degree assault and one count of drive-by shooting, all carrying gang aggravators. The seven counts of first degree assault also carried up to three potential firearm enhancements per count. In addition, the State charged Jose Mancilla, Armando Lopez, and Nicolas James with one count of first degree unlawful possession of a firearm, also carrying a gang aggravator.

The four defendants were tried together. At trial, the State introduced the defendants' booking statements acknowledging gang membership. In addition, the State introduced recorded jail phone calls where Jose Mancilla and Nicolas James implicated

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[1] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

themselves as members of LVL. The State also called Officer Jose Ortiz as a gang expert. Officer Ortiz testified about the meaning of gang terminology and symbols, the types of criminal activities in which gangs were involved, gang codes of conduct and discipline of violators, gang interactions with other gangs, the hierarchy of gang membership, and how to achieve status within a gang. He also testified Armando Lopez is a member of LVL.

The jury found the defendants guilty as charged. Following a motion to arrest judgment, the trial court dismissed the gang aggravators. The court sentenced Jose Mancilla and Nicolas James to consecutive sentences for the seven counts of first degree assault and imposed the three firearm enhancements per count consecutively, for a total sentence of 1,956 months. The court sentenced Armando Lopez, a persistent offender, to life in prison without the possibility of release. The court sentenced Jaime Lopez to consecutive sentences for the seven counts of first degree assault and imposed the three firearm enhancements per count consecutively, for a total sentence of 1,929 months.[2] All four defendants appeal.

[2] All sentences imposed for the convictions for the drive-by shooting and first degree unlawful possession of a firearm ran concurrently to the above-enumerated sentences.

ANALYSIS OF TRIAL CLAIMS

Fifth Amendment challenge to booking statements

The trial court erred in admitting the defendants' jail booking statements regarding gang affiliation. *Juarez DeLeon*, 185 Wn.2d at 487. Because the statements were made to ensure the defendants' personal safety, they cannot be used as adverse evidence at trial. *Id.*

While the State committed constitutional error in admitting the defendants' statements, reversal is not automatic. When faced with a constitutional error, we apply a harmless error test. *Id.* The State must prove the erroneously admitted evidence was harmless beyond a reasonable doubt. Under this level of scrutiny, we examine whether "'*any reasonable jury* would have reached the same result, despite the error.'" *Id.* (quoting *State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995)).

Application of the harmless error analysis to this case is guided by the factually similar case of *Juarez DeLeon*. At trial in *Juarez DeLeon*, the State had presented substantial gang affiliation evidence, apart from booking statements. The evidence included gang related clothing and tattoos. Witnesses also testified about the defendants' past gang affiliations. While this evidence would seem substantial, *Juarez DeLeon* held it was insufficient to meet the State's burden. As explained by the court, "[t]he strongest

evidence that a person is a gang member is their own clear admission." *Juarez DeLeon*, 185 Wn.2d at 488. Because the State had no such evidence, apart from the improperly admitted booking statements, the *Juarez DeLeon* court reversed the defendants' convictions.

In light of *Juarez DeLeon*, we focus on whether the State presented evidence of the defendants' admitted gang affiliation, apart from their booking statements. Such evidence exists for three of the four defendants. With respect to Armando Lopez, the State introduced a postarrest photo in which Armando Lopez displayed a gang related hand sign. While not verbal, this was an unambiguous admission of current gang membership. The State also introduced incriminating jail calls from Jose Mancilla and Nicholas James. During Jose Mancilla's recorded call, he identified himself as "Solo" from the LVL gang. 7 RP (Sept. 10, 2012) at 773, 776. During Nicholas James's call, he identified himself by the name "Little Rascal." *Id.* at 774, 777. This testimony was significant because Armando Lopez's gang name was "Rascal." *Id.* at 796. According to the State's gang expert, using the adjective "Little" denotes an individual as a mentee of a named gang member. 8 RP (Sept. 11, 2012) at 857. Referring to himself as "Little Rascal" was an acknowledgment by Mr. James of his status as the mentee of Armando Lopez, whose gang name was "Rascal." While indirect, Mr. James's statement served to

identify himself as a gang cohort. Admission of this statement to the jury was sufficient for the State to meet its burden of overcoming *Juarez DeLeon* error.

Our analysis with respect to Jaime Lopez is much different. Other than Jaime Lopez's booking statements, the State did not present any evidence of admitted gang affiliation. Jaime Lopez was not involved in any recorded jail calls. He was not photographed throwing a gang sign or wearing gang related clothing.[3] The only evidence suggesting Jaime Lopez's gang affiliation was his tattoos. Yet *Juarez DeLeon* held that gang tattoos, even if accompanied by other indicia of gang membership, is insufficient to overcome the taint of an inadmissible booking statement. Thus, nothing about Jaime Lopez's words or appearance is sufficient to take his case outside the holding of *Juarez DeLeon*.

The only possible distinction between *Juarez DeLeon* and this case is the fact that the State has been able to meet its harmless error burden as to Jaime Lopez's codefendants. The question then becomes whether the combination of Jaime Lopez's tattoos and his presence in a vehicle shortly after a drive-by shooting with three admitted

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[3] During oral argument, counsel for the State proffered that Jaime Lopez was wearing a blue "wild west" style bandana. Wash. Court of Appeals oral argument, *State v. Lopez*, No. 31188-1-III (Oct. 20, 2016) at 27 min., 35 sec. to 28 min., 20 sec. (on file with court). However, the record does not bear this out. The testimony at trial was the "wild west" bandana pertained to Armando Lopez. 5 RP (Sept. 6, 2012) at 470-71.

gang members is sufficient to overcome the taint of the *Juarez DeLeon* error. We hold it is not. The jury was presented with evidence suggesting only three individuals were involved in the drive-by shooting. Three guns were found near the scene of the crime, not four. And when Nicholas James discussed his gang affiliated codefendants, he mentioned only Armando Lopez (Rascal) and Jose Mancilla (Solo). He did not mention Jaime Lopez. While the State presented significant evidence of Jaime Lopez's involvement, it was not sufficiently strong to meet the difficult burden of establishing harmless error beyond a reasonable doubt. Jaime Lopez's convictions are therefore reversed pursuant to *Juarez DeLeon.*

Gang expert testimony

The defendants challenge Officer Ortiz's expert testimony regarding gang affiliation and gang related activity. They argue the evidence constituted improper propensity evidence under ER 404(b) and was prejudicial under ER 403. They also claim the testimony did not meet the standards for admission as expert testimony under ER 702. We review the trial court's evidentiary rulings for abuse of discretion. *State v. Asaeli,* 150 Wn. App. 543, 573, 208 P.3d 1136 (2009). The defendants bear the burden of proof in this context. *Id.*

ER 404(b) prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Because it is a limitation on "*any* evidence offered to 'show the character of a person to prove the person acted in conformity' with that character at the time of a crime," it encompasses gang affiliation evidence that a jury may perceive as showing a law breaking character. *State v. Foxhoven*, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007) (quoting *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002)).

Given the inherent prejudice of gang evidence, the State's decision to introduce gang expert testimony is a risky one. *Id.* Generalized expert testimony on gangs, untethered to the specifics of the case on trial, is impermissible. *Juarez DeLeon*, 185 Wn.2d at 490-91. But gang expert testimony can also be quite helpful. It can assist in establishing a motive for a crime or showing the defendants were acting in concert. *Id.* at 490; *State v. Scott*, 151 Wn. App. 520, 527, 213 P.3d 71 (2009). It may also help explain a witness's reluctance to testify. *Id.* at 528.

This is a case where gang expert testimony was helpful. Officer Ortiz's testimony supported the State's theory of motive and explained why the defendants, as members of the Sureño affiliated LVL gang, would seek to target a house affiliated with Norteños. The testimony also explained why the jury should believe the four defendants were acting

in concert as opposed to the possibility that one or more were merely innocent associates. Finally, the gang testimony explained why certain witnesses from the Rincon household might fear reprisal and be reluctant to testify.

The relevance of Officer Ortiz's testimony outweighed the risk of undue prejudice. The State did not present Officer Ortiz's testimony simply in an effort to portray the defendants as bad people. The objective evidence, including the blue graffiti left on the Rincon house and the colors worn by the defendants at the time of arrest, provided the State with ample reason to believe the assault on the Rincon house was gang related. Officer Ortiz's testimony appropriately supplied the jury with the tools necessary to interpret this evidence and understand the State's theory of the case.

Nor was Officer Ortiz's testimony overly general. The vast majority of Officer Ortiz's comments were directly linked to the specifics of the defendants' case. At one point, Officer Ortiz did testify to general criminal activities by gangs, such as "disorderly conduct, drinking, vehicle prowls, thefts, robberies, shooting, homicides, assaults." 8 RP (Sept. 11, 2012) at 855. This testimony might be characterized as general. However, it was not particularly prejudicial, especially given the testimony by nonlaw enforcement witnesses that the Rincon house had been the target of numerous drive-by attacks, including one which resulted in death. The least specific aspect of Officer Ortiz's

testimony, which involved a discussion of how gang leaders issue orders from prison and how new members are jumped into a gang, was elicited on cross-examination. Because this testimony was not elicited by the State, it is not something the defendants can now challenge on appeal.

Apart from the objections to the relevance of gang expert testimony under ER 404(b) and 403, the defendants also challenge the nature of the State's gang expert testimony under ER 702. Specifically, the defendants claim Officer Ortiz's testimony failed to supply any information outside the realm of common knowledge.[4] They contend it was not a proper subject for presentation to the jury under the guise of an expert witness.

The defendants' arguments regarding the quality of information supplied by Officer Ortiz run counter to their claims of prejudice. To the extent Officer Ortiz simply provided commonly understood information about gangs, it is difficult to understand how his testimony could be prejudicial. But in any event, we disagree that Officer Ortiz's

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[4] The defendants also claim Officer Ortiz's testimony constituted an impermissible comment on the defendants' guilt. However, none of the defendants timely and specifically objected to Officer Ortiz's testimony on the grounds it constituted an opinion regarding their guilt. They objected solely on the grounds the proposed testimony was a matter of common knowledge and constituted propensity evidence. Their failure to specifically object bars them from claiming error. RAP 2.5(a); *State v. Embry*, 171 Wn. App. 714, 741, 287 P.3d 648 (2012).

testimony was so bland it failed to be useful and meet the criteria for admission under ER 702. While it may be common knowledge that rival gangs engage in violence against each other, this was not the full extent of Officer Ortiz's testimony. Officer Ortiz explained the meaning of gang terminology and symbols, the types of criminal activities in which gangs are involved, gang codes of conduct and discipline of violators, gang interactions with other gangs, the hierarchy of gang membership, and how a member achieves status within the gang. This was technical information, important to the State's theory of the case. It was therefore the proper subject for expert testimony.

Jury instruction challenges

The defendants challenge three of the court's jury instructions: (1) the "to convict" instruction regarding first degree assault, (2) the transferred intent instruction, and (3) the accomplice liability instruction. They also argue the State presented insufficient evidence to meet the terms of the "to convict" instruction. We review the court's jury instructions de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Instructions are flawed if, taken as a whole, they fail to properly inform the jury of the applicable law, are misleading, or prohibit the defendant from arguing their theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). In our review of the defendants' sufficiency challenge we view the evidence in the light most favorable to the State and ask whether

any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"To convict" instruction

A "to convict" instruction is an instruction that apprises the jury of the elements of an offense. In relevant part, the court's "to convict" instruction for first degree assault states:

> To convict the defendant of the crime of First Degree Assault in Count [x], each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about March 14, 2011, the defendant or an accomplice assaulted [specific person];
> (2) That the assault was committed with a firearm;
> (3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and
> (4) That this act occurred in the State of Washington.

Clerk's Papers (CP) at 61.[5] According to the defendants, this instruction was inadequate because it failed to clarify the State's burden to prove specific intent.

The crime of first degree assault requires proof of four elements—that the defendant, (1) with intent to inflict great bodily harm, (2) assaulted (3) another (4) with a

[5] This instruction mirrors the language of the pattern jury instruction, 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 35.02, at 453 (3d ed. 2008) (WPIC).

firearm. *State v. Elmi*, 166 Wn.2d 209, 214-15, 207 P.3d 439 (2009); *see also* RCW 9A.36.011(1)(a). The nature of the defendant's intent is an important aspect of a court's instructions on first degree assault. First degree assault requires the State to prove the defendant intended a specific result; i.e., the infliction of great bodily harm. *Elmi*, 166 Wn.2d at 216. It is not sufficient merely to prove the defendant intended to act in a way likely to bring about the specific result. If the jury instructions fail to make this distinction, they are inadequate. *State v. Byrd*, 125 Wn.2d 707, 716, 887 P.2d 396 (1995).

Contrary to the defendants' arguments, the instructions here did not misstate the requisite form of intent. The third prong of the instruction unambiguously required the State to prove intent to accomplish the result required by statute. There was no reasonable basis for jury confusion on this point.

The court's instructions were not required to specify that the defendants intended to harm a specific person or persons. While the State certainly can present proof of intent to harm a specific person, doing so is unnecessary. All the statute requires is proof the defendant intended to inflict great bodily harm on *someone*, even if that someone is unknown. *Elmi*, 166 Wn.2d at 218 ("Where a defendant intends to shoot into and to hit *someone* occupying a house, a tavern, or a car," a conviction for first degree assault will stand) (emphasis added). The instructions here met this standard.

Specific intent matching specific victims

Apart from the legal adequacy of the "to convict" instructions, the defendants claim the instructions, as worded, required the State to prove intent to assault a specific person. Because no proof was presented at trial that the defendants knew who was inside the Rincon house, the defendants claim the State presented insufficient evidence to support their convictions.

We disagree with the defendants' reading of the instructions. The instructions for each count did specify different victims. But this was only to ensure separate findings. This was important because even though a defendant's generalized intent to harm one or more persons is sufficient to establish the mens rea of first degree assault, proof that an actual person was in fact assaulted is necessary to complete the crime. *See State v. Abuan*, 161 Wn. App. 135, 158-59, 257 P.3d 1 (2011). Without an individual victim, there is no assault. The instructions here appropriately separated the defendant's intent from the identity of the victim. Because there was no link between these two components, the State's failure to prove intent to harm specific victims was inconsequential.

Sufficiency of the evidence

Our disagreement with the defendants' interpretation of the law and instructions

disposes of the majority of their claims that the State presented insufficient evidence to satisfy the terms of the "to convict" instructions. One issue remains: whether the State produced sufficient evidence for the jury to find the defendants intended to harm *someone* as opposed to simply shoot at an empty house. Although proof as to a specific victim is not required, the defendants are correct that the State must prove the defendants intended harm to an actual person.

In satisfying its burden of proving intent, the State is entitled to rely on circumstantial evidence. Relevant factors may include the manner in which an assault is committed and the nature of any prior relationship between the alleged assailant and victim. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

The evidence here showed the shooting took place at 4:00 a.m. on a Monday. Several cars were parked outside the Rincons' small, single-wide trailer home. Faced with these circumstances, the defendants could be expected to know the house they were shooting at was occupied. In addition, given the home's small size, the defendants would also know injuries were likely. These circumstances permitted the jury to find the requisite degree of intent. *Cf. State v. Ferreira*, 69 Wn. App. 465, 469, 850 P.2d 541 (1993) (evidence insufficient to support first degree assault when it was only "likely apparent" that a house was occupied). The State satisfied its burden of proof.

Transferred intent jury instruction

Apart from the "to convict" instruction, the defendants challenge the court's transferred intent instruction. The instruction reads as follows:

> If a person assaults a particular individual or group of individuals with a firearm with the intent to inflict great bodily harm and by mistake, inadvertence, or indifference, the assault with the firearm took effect upon an unintended individual or individuals, the law provides that the intent to inflict great bodily harm with a firearm is transferred to the unintended individual or individuals as well.

CP at 60.

The defendants' primary argument is the transferred intent instruction relieved the State of its burden to prove mens rea. They argue the use of the words "mistake, inadvertence, or indifference" suggests the lower mental states of recklessness or negligence substitute for intent. We disagree. The court's instruction clearly lays out the intent needed for first degree assault: "the intent to inflict great bodily harm." *Id.* The instruction then uses a conjunctive "and" to state intent can be transferred to an unintended victim by mistakenly, inadvertently, or indifferently assaulting an unintended person. The words "mistake, inadvertence, or indifference" only apply to the identity of the victim, not to the intent. The instruction does not conflate mental states and is not confusing.

The defendants also argue the transferred intent instruction was unnecessary. Regardless of whether this is true, relief is unwarranted. The transferred intent instruction may have been superfluous given the "to convict" instruction. However, inclusion of the instruction did not negatively impact the defendants, especially where the defense did not involve intent but rather identity. *See State v. Salamanca*, 69 Wn. App. 817, 827, 851 P.2d 1242 (1993).

Accomplice liability instruction

The final instructional challenge goes to the court's accomplice liability instruction, which reads as follows:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:
>
> > (1) solicits, commands, encourages, or requests another person to commit the crime; or
> > (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP at 2296.[6]

The defendants claim this instruction was confusing and included erroneous language that mere presence was sufficient to give rise to accomplice liability. We find no error. The instruction unambiguously informed the jury the State was required to prove more than mere presence. By distinguishing mere presence and requiring proof the defendant knew his conduct would promote or facilitate the commission of a crime, the instruction appropriately apprised the jury that the State must prove more than the defendant was a knowing observer of a crime. No error was committed in issuing the instruction.

Public trial

Nicolas James contends the trial court violated his right to a public trial by allowing the trial to continue past 4:00 p.m. on several days when a sign on the courthouse door indicated the courthouse closed at 4:00 p.m. His argument is foreclosed by the Washington Supreme Court's decision in *State v. Andy*, 182 Wn.2d 294, 340 P.3d 840 (2014).

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[6] This instruction is identical to the language from the Washington Pattern Jury Instructions. WPIC 10.51, at 217. It is also drawn directly from the accomplice liability statute, RCW 9A.08.020.

ANALYSIS OF SENTENCING CLAIMS

Firearm enhancement

Jose Mancilla contends the trial court had no authority to "stack" the three firearm enhancements. Br. of Appellant at 14. He argues that there should have been a 60-month enhancement for each count of first degree assault instead of a 180-month enhancement for each count. The Washington Supreme Court specifically addressed this argument in *State v. DeSantiago*, 149 Wn.2d 402, 415-21, 68 P.3d 1065 (2003), holding "the plain language of [RCW 9.94A.533][7] requires a sentencing judge to impose an enhancement for *each* firearm or other deadly weapon that a jury finds was carried during an offense." *Id.* at 421 (emphasis added). Here, the jury found Mr. Mancilla carried three separate firearms for each of the seven counts of assault. Thus, the court properly imposed an enhancement for each of the three firearms.

Constitutionality of the Persistent Offender Accountability Act

Armando Lopez claims his life sentence under the Persistent Offender Accountability Act, RCW 9.94A.030 and .570, was imposed in violation of his rights to due process, equal protection and to a jury trial. His arguments are contrary to our case

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[7] The *DeSantiago* court analyzed RCW 9.94A.510. The language at issue there has now been recodified in RCW 9.94A.533.

law. *State v. Witherspoon*, 180 Wn.2d 875, 892-94, 329 P.3d 888 (2014); *State v. Brinkley*, 192 Wn. App. 456, 369 P.3d 157, *review denied*, 185 Wn.2d 1042, 377 P.3d 759 (2016); *State v. Williams*, 156 Wn. App. 482, 496-98, 234 P.3d 1174 (2010).

CONCLUSION

The judgments and sentences of Jose Mancilla, Armando Lopez, and Nicholas James are affirmed. Jaime Lopez's conviction is reversed without prejudice, and his case is remanded for further proceedings, consistent with this opinion.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Siddoway, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ARMANDO LOPEZ, Petitioner.	)))))))))	COA NO. 31187-2-III

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