94283-8

Supreme Court No. _____
Court of Appeals No. 31225-9-III
(consolidated with 31187-2)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

NICOLAS J. JAMES,

Defendant/Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals Opinion filed January 24, 2017, affirming his conviction and sentence. A copy of the Court's published opinion is attached as Appendix A. A copy of the Court's Order Denying Motion for Reconsideration is attached as Appendix B. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW.

1. Should statements to the booking officer regarding gang affiliation have been suppressed at trial, where the statements were coerced and involuntary?

2. Did the trial court abuse its discretion in allowing Officer Ortiz to testify as an expert regarding gang-affiliation and gang-related activity?

3. Was Mr. James' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove an essential element of the crime of first degree assault?

4. Was the transferred intent instruction improper because the alleged victims were already named in the to-convict instructions? Did the instruction further improperly relieve the State of its burden of proving Mr. James acted with the intent to cause bodily harm to each alleged victim named in the to-convict instructions?

IV. STATEMENT OF THE CASE.

On March 14, 2011, Maria Rincon lived in a trailer in Outlook, Washington with her husband and four children. RP[1] 211-15. One of her children had a friend staying with her on that date. RP 215. Two of Maria's sons who were living in the trailer at that time were Norteno gang members. RP 211-15, 270-71. The trailer was a known gang residence and had been shot at 4-5 times prior to March 14, 2011. RP 213, 355-56, 432.

Around 4:00 a.m. on March 14, 2011, the trailer was shot at again awakening all the occupants. RP 215-68. No one was injured. RP 249. After the shooting stopped, Maria's husband and one of her sons went outside but the shooters were gone. RP 216, 256.

Two sisters delivering newspapers heard the shooting and saw a charcoal Mitsubishi driving with its lights off coming from the direction of

[1] Citations to the record other than the sentencing hearing, which was numbered separately, will be designated "RP" followed by the page number.

the fired shots. RP 354-56. They assumed the car had something to do with the shooting. One of the sisters called the police. They then followed the car for several miles until it did a U-turn and went the other way. RP 357-58. By that time the police had arrived. The sisters gave a description of the car and which way it had gone. RP 358, 381.

Police stopped the car a short time later. The four people in the car were Mr. James and the three codefendants consolidated in this appeal. RP 433-34, 470-72. The sisters were brought to the scene and identified the car as the one they had seen earlier. RP 435-36. No weapons or other contraband was found in the car. RP 530. After the suspects were arrested police checked the area where the Mitsubishi was first seen and discovered three weapons, weapons components and some ammunition lying along the road. RP 478-79, 540-41.

Mr. James and the others were arrested and read *Miranda* rights. RP 135-37. All four of them invoked their right to remain silent. RP 137. A corrections officer questioned them about gang affiliation when they were booked into jail. He did not tell them they did not have to answer any questions. All four defendants admitted to being Sureno gang members. RP 114-19, 133.

Prior to trial Mr. James and the others moved to suppress the booking statements regarding gang affiliation. RP 146-53. The Court denied the motion finding the questioning by the corrections officer fell under the exception of routine booking questions. The court also found the evidence admissible because gang affiliation was not an element of any of the charges. RP 153-57. This evidence was subsequently introduced at trial. RP 601-05.

At trial, over defense objection, the Court allowed Officer Jose Ortiz to testify as a gang expert. RP 233, 784-835. The defense argued that any expert testimony that rival gangs engaged in acts of violence against each other was common knowledge to the jury particularly in the Yakima area where gang activity is prolific. Therefore, the testimony would not be helpful to the jury and was inadmissible under ER 702. RP 819-23. Ortiz testified at trial that one of the characteristic of the Sureno gang was to commit violent acts against rival gangs. RP 836-80. The State relied on this evidence when it argued in closing that Mr. James and the others acted in conformity with those same characteristics when they shot at the trailer. RP 995, 1009.

No evidence was presented that Mr. James or any of his codefendants knew anyone in particular was inside the trailer at the time of the shooting. RP 209-881.

In the jury instructions each one of the trailer occupants was named as a victim in the seven to-convict instructions for first degree assault. RP 981-84. The trial court also provided the jury with instruction 15 over defense objection, which addressed transferred intent:

> 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.

RP 927-32, 949-50, 972-73.

The State argued and the trial court concluded that *State v. Elmi* had approved the use of this instruction, and the factual situation in the current case was identical to that in *Elmi*. RP 949-50.

Mr. James was convicted of seven counts of first degree assault with a total of 21 firearm enhancements, drive-by shooting and unlawful possession of a firearm. CP 3375-99. He received a sentence of 1956 months. CP 3400-09. This appeal followed. CP 3410.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court (RAP 13.4(b)(1)), and involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)).

1. The statements to the booking officer regarding gang affiliation were coerced and involuntary and should have been suppressed at trial.

In *State v. DeLeon*, 185 Wn.2d 478, 374 P.3d 95 (2016), this Court addressed the issue of the admissibility of statements made by defendants in response to questions from jail staff regarding their past or current gang affiliation as part of the jail booking process. 185 Wn.2d at 486. The jail staff asked these questions so they can provide safe housing for jail inmates and protect them from the violence. *Id.* The Court held statements made under these circumstances could not be considered voluntary, and the admission of those statements was a violation of the defendants' Fifth Amendment rights. 185 Wn.2d at 487.

The facts in the current case are remarkably similar to *DeLeon*. Mr. James was in custody when the jail booking officer asked about his

gang affiliation. He admitted to being a Sureno gang member. RP 114-19, 133. Prior to trial Mr. James moved to suppress the booking statements regarding gang affiliation. RP 146-53. The Court denied the motion finding the questioning by the corrections officer fell under the exception of routine booking questions. The court also found the evidence admissible because gang affiliation was not an element of any of the charges. RP 153-57. This evidence was subsequently introduced at trial. RP 601-05.

The Court of Appeals acknowledged the holding in *DeLeon* but found the error harmless because Mr. James had identified himself as "Little Rascal," which, according to the Court's interpretation of the gang expert's testimony, was an acknowledgment by Mr. James of his status as the mentee of Armando Lopez, whose gang name was "Rascal." Slip Op pp 7-9. The Court stated, "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." Slip Op pp 8-9.

In *DeLeon*, this Court conducted a harmless error analysis by considering the other untainted evidence presented at trial. *DeLeon*, 185 Wn.2d at 487–89. The other evidence included the clothes the defendants

were wearing (some of which included the color red, which is associated with Norteño gangs), certain tattoos that included gang symbols, a photo on Anthony DeLeon's cell phone that derogatorily referenced the Sureño gang, and certain songs and music groups that were on Anthony DeLeon's phone. *Id.* at 488. The State also presented evidence from a witness who indicated she had known two of the defendants to be gang members when they were in high school. *Id.* Officer Ortiz, who interviewed the three defendants after their arrest, testified Ricardo DeLeon denied any gang affiliation, and that Anthony DeLeon mentioned two gangs. *Id.*

The *DeLeon* Court held, "none of this untainted evidence of gang involvement was as strong, direct, or persuasive as admissions made by the defendants themselves. The strongest evidence that a person is a gang member is their own clear admission." *Id.* (internal citations omitted). The Court further stated:

> The heavy weight of that evidence does not compare to the untainted evidence presented by the State, which was largely indirect and outdated. Therefore, we cannot say that beyond a reasonable doubt that any reasonable jury would have reached the same result if given only the untainted evidence. In light of the harmful unconstitutional evidence presented at trial, we must reverse these convictions and gang aggravators. Defendants are entitled to a new trial untainted by such evidence.

Id. at 489

The present case in indistinguishable from *DeLeon*. Contrary to the Court of Appeals holding, evidence of Mr. James identifying himself as "Little Rascal" in a jail phone call does not overcome the *DeLeon* error or satisfy its harmless error test. This evidence is not dissimilar to the untainted indirect evidence mentioned in *DeLeon* and is certainly less extensive. As in *DeLeon*, the indirect evidence, herein, does not compare to Mr. James' confession in the booking statement. One cannot say beyond a reasonable doubt that any reasonable jury would have reached the same result if given only the untainted indirect evidence. Therefore, Mr. James is entitled to a new trial.

2. The trial court abused its discretion in allowing Officer Ortiz to testify as an expert regarding gang-affiliation and gang-related activity.

Under ER 702, the court may permit "a witness qualified as an expert" to provide an opinion regarding "scientific, technical, or other specialized knowledge" if such testimony "will assist the trier of fact." The two key criteria for admission of expert testimony are a qualified witness and helpful testimony. *State v. Yates*, 161 Wn.2d 714, 762, 168 P.3d 359 (2007).

Expert testimony is not admissible unless it will be helpful to the trier of fact, i.e. the subject matter is otherwise beyond common

understanding. *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). The jury herein, comprised of persons of ordinary experience and knowledge, could draw its own inferences from evidence presented by the State as to gang affiliation or gang-related motive. Testimony that rival gangs engage in acts of violence against each other was common knowledge to this jury particularly in the Yakima area where gang activity is prolific. The improper use of Officer Ortiz's expert" testimony placed emphasis on this subject in a manner which could only be prejudicial to the defendant.

The issue of helpfulness includes the question whether the prejudicial nature of the testimony is so great as to render the testimony inadmissible. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). "As 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).

The Court of Appeals, herein, held Officer Ortiz's expert testimony regarding gang affiliation and gang related activity was properly admitted and helpful to the jury. Slip Op pp 10-14. As part of its analysis the Court

noted, "To the extent Officer Ortiz simply provided commonly understood information about gangs, it is difficult to understand how his testimony could be prejudicial." Slip Op p. 13. The Supreme Court arrived at the opposite conclusion in *DeLeon*:

> We agree that large portions of Officer Ortiz's testimony should not have been admitted because the information at issue related to certain aspects of gang operations (such as gangs "jumping in" new members, leaders "ordering hits" from prison, and members threatening others via the Internet) that had absolutely no relevance to this case. We note that the improperly admitted evidence did not consist of simply one or two offhand comments. Officer Ortiz gave extensive testimony on how gangs generally operate, which frequently crossed the line into inflammatory statements regarding gang members. For instance, he testified that "[t]hey do some really, really bad crimes out there, whether they get caught or not." 12 CDP (Oct. 18, 2010) at 1930. We do not see any probative value in such a statement, but there is certainly prejudice.

DeLeon, 185 Wn.2d at 490.

Similarly, Officer Ortiz's testimony, herein, was highly prejudicial and constituted an opinion as to Mr. James's guilt of the crimes charged. No witness, lay or expert, may testify to his opinion as to the defendant's guilt whether by direct statement or inference. *Black*, 109 Wn.2d at 348. Admission of Officer Ortiz's testimony allowed the jury to hear an "expert" state that because the alleged incident appears gang related, because gangs are known for violence, and because Mr. James is a gang member, the inference is he must be guilty. The proposed testimony

invaded the province of the jury, was not helpful to the jury, was irrelevant and was highly prejudicial. Therefore, it should not have been admitted.

3. Mr. James's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove an essential element of the crime of first degree assault.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial

evidence may be attacked for the first time on appeal as a due process violation. *Id.*

RCW 9A.36.011 provides in pertinent part:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
>
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death . . .

RCW 9A.36.011(1)(a). The term "assault" is not defined in the criminal code, and thus Washington courts have turned to the common law for its definition. *State v. Aumick,* 73 Wn. App. 379, 382, 869 P.2d 421 (1994); *State v. Hupe,* 50 Wn. App. 277, 282, 748 P.2d 263, *review denied,* 110 Wn.2d 1019 (1988). Three definitions of assault are recognized in Washington:

> (1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm [common law assault].

State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994).

Each of these three definitions of assault requires the specific intent to either create apprehension of bodily harm or to cause bodily harm as an essential element of the offense. *Id.*; *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d

577 (1996). The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. *Winship,* 397 U.S. at 364.

Here, the to-convict instructions named each person inside the trailer as a victim in the seven counts of first degree assaults. First degree assault does not, under all circumstances, require that the specific intent match a specific victim. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). However, "[i]n 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, in the present case the State was required to prove beyond a reasonable doubt that Mr. James or an accomplice acted with the specific intent to inflict great bodily harm on the particular individual named in each count.

The State failed to meet this burden. No evidence was presented that Mr. James or any of his codefendants knew who, if anyone, was inside the trailer at the time of the shooting. None of the alleged victims ventured outside the trailer until after the shooting had stopped. By then the perpetrators were gone. Therefore, not knowing who was in the trailer,

it was impossible for Mr. James to have the requisite specific intent required to sustain any of his convictions for first degree assault.

4. The transferred intent instruction was improper because the alleged victims were already named in the to-convict instructions. The instruction further improperly relieved the State of its burden of proving Mr. James acted with the intent to cause bodily harm to each alleged victim named in the to-convict instructions.

The trial court provided the jury with instruction 15 over defense objection, which addressed transferred intent:

> 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.

RP 927-32, 949-50, 972-73.

The State argued and the trial court concluded that *State v. Elmi* had approved the use of this instruction, and the factual situation in the current case was identical to that in *Elmi*. RP 949-50. The trial court was mistaken in both of these conclusions.

First, the *Elmi* court did not even address whether this instruction was appropriate. The Court instead found the basis for transferred intent was contained in the language of the assault statute:

> 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.

Second, the facts in *Elmi* are not the same as this case. The holding in *Elmi* is predicated on the fact that the defendant had the specific intent to assault a particular person but some children were put in apprehension of harm as unintended victims. *Elmi*, 166 Wn.2d at 218-19. The Court reached a similar result in *State v. Wilson*, where the defendant intended to inflict great bodily harm on a specific person, but instead assaulted an unintended victim. *Wilson*, 125 Wn.2d at 218.

The facts in the present case are quite different. The State failed to show that Mr. James or his codefendants had the specific intent to assault any particular person present in the trailer. No evidence was presented that Mr. James or any of his codefendants even knew if anyone was inside the trailer at the time of the shooting. Applying the doctrine of transferred intent under this scenario would mean that a person commits first degree

assault by firing guns at a building that happens to be occupied. *Elmi* and *Wilson* did not reach such a conclusion.

Most significantly, the transferred intent instruction at the very least contradicts the assault instructions and could have easily confused the jury. The inclusion of the terms "mistake, inadvertence, or indifference" conflicts with the higher mental state of specific intent required by the assault statute. It allowed the jury to convict based on mere recklessness or negligence and relieved the State of its burden of proving the requisite specific intent for each alleged victim. "[A] conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden." *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). Therefore, the assault convictions should be reversed.

VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals. Petitioner also adopts by reference the issues and arguments set forth in the briefs of co-defendants Armando Lopez and Jose Mancilla.

Respectfully submitted March 22, 2017,

s/David N. Gasch
Attorney for Petitioner
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on March 22, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the petition for review:

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January 24, 2017

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CASE # 311872
State of Washington v. Jose Jesus Mancilla
YAKIMA COUNTY SUPERIOR COURT No. 111003626

Consolidated with CASE # 311881
State of Washington v. Armando Lopez
YAKIMA COUNTY SUPERIOR COURT No. 111003596

Consolidated with CASE # 312054
State of Washington v. Jaime Lopez
YAKIMA COUNTY SUPERIOR COURT No. 111003618

Consolidated with CASE # 312259
State of Washington v. Nicholas Jacob James
YAKIMA COUNTY SUPERIOR COURT No. 111003600

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
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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

[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

[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.

Renee S. Townsley
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CASE # 311872
State of Washington v. Jose Jesus Mancilla
YAKIMA COUNTY SUPERIOR COURT No. 111003626

Consolidated with CASE # 311881
State of Washington v. Armando Lopez
YAKIMA COUNTY SUPERIOR COURT No. 111003596

Consolidated with CASE # 312054
State of Washington v. Jaime Lopez
YAKIMA COUNTY SUPERIOR COURT No. 111003618

Consolidated with CASE # 312259
State of Washington v. Nicholas Jacob James
YAKIMA COUNTY SUPERIOR COURT No. 111003600

Enclosed is a copy of the Order Denying Motions for Reconsideration of the court's January 24, 2017, opinion.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file an original and one copy (unless filed electronically) of a Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed. RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

FILED
FEBRUARY 23, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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) ORDER DENYING MOTIONS FOR RECONSIDERATION
STATE OF WASHINGTON, Respondent, v. ARMANDO LOPEZ, Appellant.	
STATE OF WASHINGTON, Respondent, v. JAIME LOPEZ, Appellant.	

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

THE COURT has considered the motions for reconsideration of our January 24, 2017, opinion filed by 1) appellant Armando Lopez, 2) appellant Nicolas James, 3) the respondent, State of Washington, and 4) the joinder of appellant Jose Jesus Mancilla in appellant Armando Lopez's motion for reconsideration, and the record and file herein.

IT IS ORDERED that the motions for reconsideration are denied.

PANEL: Judges Lawrence-Berrey, Siddoway and Pennell

FOR THE COURT:

George Fearing

GEORGE FEARING
Chief Judge