SUPREME COURT NO. 94283-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE JESUS MANCILLA,

Petitioner.

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

The Honorable Richard Bartheld, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Jose Jesus Mancilla, the appellant below, requests review of the Court of Appeals decision referred to in section B.

B. COURT OF APPEALS DECISION

Mancilla requests review of the Court of Appeals published decision in State v. Mancilla, 197 Wn. App. 631, 391 P.3d 507 (2017), filed January 24, 2017 and attached to this petition as an appendix. The Court of Appeals denied a motion for reconsideration on February 23, 2017.

C. ISSUES PRESENTED FOR REVIEW

1. The prosecution's use of Mancilla's admissions that he is a gang member, made during the booking process, violated his constitutional rights under the Fifth Amendment to the United States Constitution. Moreover, the prosecution's use of a "gang expert" to testify concerning the dangers associated with gangs generally also denied Mancilla a fair trial. Is review appropriate under RAP 13.4(b)(1) where the Court of Appeals decision on these issues conflicts with this Court's opinion in State v. Deleon, 185 Wn.2d 478, 374 P.3d 95 (2016)?

2. The "to convict" instructions identified by name each of the seven alleged assault victims, requiring the State to prove both a specific intent to assault each named victim and a specific intent to inflict great bodily harm on that same victim. Is review appropriate under RAP 13.4(b)(1) where the Court of Appeals opinion dispensed with these proof requirements and conflicts with this Court's opinion in State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998)?

3. Over defense objections, the trial court instructed jurors on transferred intent, believing the instruction to be warranted under State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009). Is review appropriate under RAP 13.4(b)(1) where Elmi does not support the instruction, which was confusing and improperly eased the State's ability to obtain convictions for Assault in the First Degree?

D. STATEMENT OF THE CASE

1. Trial Proceedings

At approximately 4:00 a.m. on the morning of March 14, 2011, multiple shots were fired at a trailer home located in Outlook, Washington and occupied by Maria Rincon and her family. RP 213-215, 254-255. Seven individuals were asleep inside the home at the time. RP 214-215, 261-262. Although some rounds entered the interior of the trailer, no one was injured. RP 249, 263, 294-305.

While everyone inside the trailer heard the shots, no one saw any vehicles involved or the shooters. RP 247-249, 251, 257-258, 264-265, 273.

The Rincon home was associated with gang activities. RP 355-356. Ms. Rincon's son Angel is a "red," meaning he is associated with a Norteno gang, and previously lived in the trailer with the family. RP 211-213, 270-271. A younger son, Elias, also is a Norteno member. RP 271-272. The home had been shot at on four or five occasions prior to the shooting on March 14, 2011, and would be shot at again thereafter. RP 213, 250-252.

Two sisters delivering newspapers – Carla Starke and Veronica Lopez – heard gunshots and saw a dark, possibly charcoal colored Mitsubishi Gallant coming from the direction of the shots. RP 354-357, 376-380. They followed the car for several miles, called 911, and provided a description for police. RP 356-357, 381-382, 390-391. They were unable, however, to get close enough to see who was inside the car and unable to obtain a license plate number. RP 365-366, 430-431. When the two stopped following the vehicle, it was headed west toward Yakima. RP 358.

Around 4:30 a.m., Yakima County Sheriff's Deputy Jesus Rojas spotted a car matching the description of the suspect car.

RP 460-462. He turned his patrol car around and pursued the vehicle, which did not appear to be speeding. RP 466, 522. From behind, Deputy Rojas could see a driver, front passenger, and two individuals in the backseat, both of whom appeared to be ducking down. RP 468. Once a backup officer arrived in the area, he stopped the Mitsubishi Gallant. RP 468-469.

After an initial period where the car's occupants expressed their displeasure at being stopped and declined to leave the car, all four occupants finally exited. RP 469-470. Armando Lopez had been driving; Jose Mancilla was the front passenger; Jaime Lopez and Nicolas James were seated in the back. RP 470-472.

Neither weapons nor ammunition were found inside the car. RP 475-476. Officers went back to the area where Rojas had first spotted the car and, about 100 yards beyond that location, found three discarded firearms along the roadside: a 7.62 caliber SKS rifle, a .22 caliber Marlin rifle, and a .40 caliber semi-automatic handgun. RP 476-479, 484-489, 540-541. Shell casings found at the scene of the shooting matched casings from test firings of the .22 caliber rifle and the handgun. RP 646-648. The 7.62 rifle was merely tested to

confirm operability.[1] RP 644.

The newspaper deliverers (Starke and Lopez) were brought back to the scene of the stop to identify the Gallant as the car they had seen near the shooting. RP 358-359. According to officers, the two were certain it was the same car. According to Starke and Lopez, the car looked similar but they could not be certain because both thought it possible the car they followed had a small "fin" or spoiler on the back, whereas the car deputies stopped did not have one. RP 359-361, 364-367, 390, 403-404, 412-414. Such a spoiler was in fact on option for the Gallant. RP 899.

Mancilla exercised his right to silence after being advised of his Miranda rights. RP 135-138. Despite this invocation, at booking, Mancilla was asked to disclose any gang affiliations, and he responded "Sureno." RP 603. He was asked to identify his "clique," and he said "LVL." RP 603. Mancilla denied having a "tag name." RP 603. This evidence was admitted over defense objections. RP 24-27, 117, 147-149, 153-158, 598.

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[1] There is no evidence the 7.62 rifle was ever fired. On the ground near the trailer, however, officers did find an ammunition magazine that apparently had been dropped or had fallen out of this rifle. RP 286-287, 580-582, 622, 643-644.

Mancilla was convicted of 7 counts of Assault in the First Degree (one count for each person inside the trailer home), Drive-By Shooting, and First Degree Unlawful Possession of a Firearm. CP 212-214, 1235-1243, 1305-1306. Moreover, each assault conviction included three firearm enhancements (one for each firearm). CP 183; 1244-1247, 1249-1251, 1306.

Mancilla filed a Motion To Arrest Judgment challenging the sufficiency of the State's proof. CP 1271-1285. That motion was denied. RP (10/1/12 sentencing) 12-21. The Honorable Richard Bartheld sentenced Mancilla to 1,956 months in prison, 1,260 of which (105 years) consists of firearm enhancements. CP 1308.

2. Court of Appeals

Acknowledging the facts of this case are "strikingly similar" to those in DeLeon, the Court of Appeals found that the trial court had violated Mancilla's Fifth Amendment rights when it admitted his admissions, during the booking process, that he was affiliated with the Surenos and a member of the LVL gang. Slip op., at 3, 7-8. But the Court of Appeals denied Mancilla a new trial, reasoning that this violation of his constitutional rights was rendered harmless beyond a reasonable doubt by other evidence suggesting his gang status. Slip op., at 8-10.

The Court of Appeals also rejected challenges to the admission of expert gang testimony, challenges to several jury instructions, challenges to the sufficiency of the State's proof for the assault charges, and sentencing challenges. Slip op., at 10-23. With the exception of Jaime Lopez – whose convictions were reversed under DeLeon – the Court of Appeals affirmed. Slip op., at 10, 23.

Mancilla now seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S OPINION IN DeLEON CONCERNING THE FIFTH AMENDMENT VIOLATION.

The Fifth Amendment provides, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. In DeLeon, this Court held that the State's use of a defendant's admissions of gang affiliation, required at booking to ensure inmate safety, violates this prohibition. DeLeon, 185 Wn.2d at 486-487. The defendant is entitled to a new trial unless it necessarily appears, beyond a reasonable doubt, that the constitutional violation did not affect the verdict and that "*any reasonable jury* would have reached the same result, despite the error." Id. at 487 (quoting State

v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011); State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995)).

In DeLeon, the State argued – and the Court of Appeals had agreed – that evidence of the two defendants' admissions to gang affiliation during booking was harmless because of other admissible evidence proving their gang affiliation. DeLeon, 185 Wn.2d at 485, 488. That other evidence included the defendants' red clothing (associated with Norteno gangs), tattoos of gang symbols, a photo on DeLeon's phone with a derogatory reference to the Surenos, certain music found on that same phone, and evidence of the defendants' gang membership years earlier. Id. at 488. The strongest untainted evidence, however, consisted of statements by one of the defendants to an investigating officer mentioning two gangs when asked about gang affiliation, although there was some ambiguity surrounding the exact nature of the question and answer. Id. at 488. In finding that none of this additional evidence repaired the taint of the defendants' admissions during booking, this Court stated:

> Overall, 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. *See, e.g.*, [*Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)] ("A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" (quoting *Bruton v. United States*, 391 U.S. 123, 139-40, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (White, J., dissenting))). . . .

DeLeon, 185 Wn.2d at 488.

This discussion in DeLeon should have dictated the outcome for Mancilla. Compared to others in the Gallant, Mancilla displayed few, if any, of the hallmarks of gang affiliation. He has no gang tattoos; in fact, he has no tattoos whatsoever. RP 24-25. A photo of Mancilla taken shortly after his arrest shows him wearing jeans, a black sweatshirt over a white T-shirt, and tennis shoes with white shoe laces. RP 480, 491-492, 590. This photo contradicted a deputy's testimony that Mancilla had been wearing a blue shirt.[2] See RP 585, 589-590. When asked to examine the photo, the State's gang expert (Sunnyside Officer Jose Ortiz) testified there was nothing

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[2] This same deputy also claimed that a blue bandana had been confiscated from Mancilla prior to the deputy's contact with Mancilla. RP 585, 590-591. Outside the jury's presence, the defense contested this assertion. RP 25. The State did not produce the supposed bandana at trial. The deputy may have mistakenly been referring to a bandana worn by Armando Lopez. See RP 470-471.

about Mancilla's appearance that made him think Mancilla was a gang member. RP 872. Officer Ortiz also testified that, whereas he is familiar with certain LVL gang members, he did not know Mancilla. Compare RP 840, 853-854, 857, 859, 866 with RP 872-873.

In nonetheless finding the violation of Mancilla's constitutional rights harmless, the Court of Appeals relied on evidence that, during a jail phone call made more than a month after his arrest, Mancilla referred to himself as "Solo from LVL." Slip op., at 8 (citing RP 773, 776). But this is not the "strong, direct, or persuasive" evidence under DeLeon that serves as the equivalent of a defendant's "own clear admission" during the booking process. DeLeon, 185 Wn.2d at 488. Defense counsel correctly referred to the recording as "supposedly my client." RP 752. Before a call can be placed, the system requires use of a pin number (unique to each inmate) and that the inmate say his name or the phrase "United States" so that his identity can be confirmed with voice recognition software. RP 761-762. But the system can be defeated, and inmates sometimes hand the phone to other inmates immediately after gaining access with their pin and voice login. RP 762.

There was reason for jurors to doubt Mancilla was the caller. At booking, Mancilla denied that he had a "tag name." RP 603. Yet, this caller used the tag name "Solo." To help establish that Mancilla was in fact the individual who identified himself as "Solo from LVL," the State had Yakima Sheriff's Detective David Johnson listen to the call attributed to Mancilla, and calls attributed to his co-defendant Armando Lopez, to determine whether he recognized their voices on the recordings. RP 617, 770-779. When asked, for example, whether he recognized Armando Lopez's voice on recordings from speaking to Lopez, Detective Johnson unequivocally responded, "I did." RP 770-771. He also was confident that Lopez's voice matched the voice he heard on other calls attributed to Lopez. RP 771. When asked, however, whether the voice of the caller identifying himself as "Solo from LVL" matched the voice on other recordings of Mancilla, Detective Johnson was less certain, replying, "As much as I could tell, yes." RP 773.

Ultimately, the only "clear admission" of gang membership and "the strongest evidence" came from Mancilla himself, at booking, when he quite clearly admitted his affiliation with the Surenos generally and LVL specifically to ensure his welfare in custody. RP 603. Under DeLeon, this requires a new trial without the offending

evidence. Mancilla is serving a life sentence (163 years) and all concerned should be confident before labeling a clear violation of his Fifth Amendment rights harmless beyond any reasonable doubt. The Court of Appeals' conclusion that that this constitutional violation could not have impacted the decisions of even a single juror is not supported by the record and conflicts with DeLeon. Review is appropriate under RAP 13.4(b)(1).

2. THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S OPINION IN DeLEON CONCERNING THE ADMISSION OF EXPERT TESTIMONY ON GANGS.

The Court of Appeals decision also conflicts with DeLeon in a second respect. In DeLeon, this Court ruled that some generalized gang testimony offered by Officer Jose Ortiz – the same gang expert that testified against Mancilla – was inadmissible and should never have been presented to jurors. Specifically, this Court found that aspects of Ortiz's testimony on gangs had no relevance to the circumstances of that case, "such as gangs 'jumping in' new members, leaders 'ordering hits' from prison, and members threatening others via the Internet" and an inflammatory assertion that "[t]hey do some really, really bad crimes out there, whether they get caught or not." DeLeon, 185 Wn.2d at 490. Not only was this

testimony irrelevant, it was highly prejudicial and improperly suggested under ER 404(b) that the defendants committed the charged offenses because they were criminal types. Id. at 491.

Mancilla's trial predated this Court's decision in DeLeon. Therefore, neither the trial court, the State, nor Officer Ortiz had the benefit of that decision. This explains why jurors heard similar irrelevant and highly prejudicial evidence. Ortiz testified that the LVL gangs had ties to the "Mexican Mafia," a well-known "prison gang," and suggested LVL members were "foot soldiers" for those already incarcerated. RP 838-839. Yet, there was no evidence the notorious Mexican Mafia played any role in this case. Ortiz testified that one of LVL's primary purposes was "a lot of criminal activity," which included "robberies, shooting, homicides, assaults." RP 855. Associating the defendants with "a lot of criminal activity" was irrelevant beyond general propensity to commit crimes, and none of the defendants was charged with a robbery or a homicide.[3] Ortiz also told jurors that gang members share drugs and alcohol. RP 856. Yet, no evidence was presented that the defendants were under the influence, much less involved in the use or delivery of illegal substances.

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[3] The Court of Appeals found this testimony "not particularly prejudicial" in light of evidence the Rincon house had previously been targeted for drive-by shootings and that one of Ms. Rincon's daughters was killed in a subsequent

The cumulation of this otherwise irrelevant information served only to make the defendants more threatening, scarier, and therefore more likely to have committed the charged offenses. It should have been excluded under ER 402, 403, and 404(b), and a new trial should have been ordered under DeLeon. Review of this issue also is appropriate under RAP 13.4(b)(1).

3. THE COURT OF APPEALS DECISION ON THE SUFFICIENCY OF EVIDENCE FOR ASSAULT CONFLICTS WITH THIS COURT'S DECISION IN HICKMAN AND THE LAW OF THE CASE DOCTRINE.

A person is guilty of Assault in the First Degree if, with intent to inflict great bodily harm, he or she assaults another with a firearm. RCW 9A.36.011(1)(a).

Mancilla's jury was instructed that the mens rea for assault is either a specific intent to create apprehension of bodily harm or intent to cause bodily harm. CP 1208.[4] Moreover, the mens rea for Assault in the First Degree also includes intent to inflict great bodily harm. Regarding this latter intent:

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drive-by. Slip op., at 12; see also RP 221, 252 (prosecutor elicits testimony concerning subsequent shooting death). But Ortiz's expert testimony that LVLs commit homicides improperly suggested Mancilla and his co-defendants were connected to those who committed this subsequent homicide. Indeed, further encouraging that connection, the prosecutor elicited that the shooters from the later incident wore blue. RP 252.

[4] Jurors also were instructed that an assault is an intentional touching or striking. CP 1208. But there was no evidence satisfying this definition.

> Assault in the first degree requires a specific intent; but it does not, under all circumstances, require that the specific intent match a specific victim. Consequently, once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the means rea is transferred under RCW 9A.36.011 to any unintended victim.

State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994); accord State v. Elmi, 166 Wn.2d 209, 216-219, 207 P.3d 439 (2009).

Thus, under Wilson, where the defendant intended one target, but accidently assaulted a second person, RCW 9A.36.011(1)(a) generally does not require a specific intent to assault the second person because the intent to inflict great bodily harm is transferred from the intended victim to the actual victim.

At Mancilla's trial, however, the State identified a specific victim for each of the seven counts of assault. For example, count 1 required proof beyond a reasonable doubt:

> (1) That on or about March 14, 2011, the defendant or an accomplice assaulted Jose Lopez;
> (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.

CP 1212. Every subsequent instruction addressing an additional

assault charge specifically identified a different victim by name. See CP 1213-1218.

By identifying each named victim in each assault "to convict" instruction, the State took on an additional burden of proving that Mancilla or his accomplice intended to assault each person identified. See State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (under the "law of the case" doctrine, unnecessary assertions in "to convict" instructions, for which there was no objection, must be proved by the State beyond a reasonable doubt). This burden included proof that Mancilla or an accomplice specifically intended to cause apprehension of bodily harm or actual bodily harm as to each named individual (intent for assault generally) and included proof that Mancilla or an accomplice specifically intended to inflict great bodily harm upon the named individual (intent for first degree). Yet, the State failed to present any evidence that Mancilla or his accomplices even knew who was inside the trailer at the time of the shooting.

In rejecting this argument, the Court of Appeals acknowledged that each assault "to convict" instruction identified a specific victim by name, and acknowledged the State's failure to prove intent to harm specific victims, but downplayed the significance:

> 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 means 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, 158-159, 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.

Slip op., at 17.

While the Court of Appeals may have correctly identified the reason each "to convict" identified a specific individual by name, this does nothing to change the impact of that identification. Under Hickman, the State took on the burden to prove a specific intent to assault and an intent to inflict great bodily harm on each named individual. It then failed in its proof. Because the Court of Appeals decision conflicts with Hickman, review is appropriate. RAP 13.4(b)(1).

4. THE TRANSFERRED INTENT INSTRUCTION WAS UNWARRANTED, CONFUSING, AND RELIEVED THE STATE OF ITS PROPER BURDEN OF PROOF.

Over defense objections, the trial court provided jurors with instruction 15:

> 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 1211; RP 927-932, 949-950, 952.

The trial court found this instruction warranted and correct under State v. Elmi. RP 949-950. But the Elmi court never analyzed such an instruction, much less approved it. Instead, it relied on transferred intent inherent in the statute for Assault in the First Degree:

> 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.

Moreover, in Elmi the defendant had the specific intent to assault a particular individual and, while doing so, unintentionally placed others inside the home in fear of harm. Id. at 212, 218-219. Neither Elmi nor any other case stands for the proposition that where, as here, the defendants had no idea who (if anyone) was inside a building when shots were fired (i.e., they had no specific intent to assault a particular individual), an intent to commit first degree assault is nonetheless transferred to anyone and everyone inside. Such a rule improperly and significantly expands the circumstances under which a first-degree assault occurs.

Not only was instruction 15 unwarranted by the facts and the law, it was confusing it light of the "to convict" instructions, which – as discussed – required proof of specific intent to assault and specific intent to inflict great bodily harm as to each named individual. The instruction's use of the mental states "mistake, inadvertence, and indifference" only exacerbated the confusion.

Because Elmi does not support instruction 15, which improperly eased the State's burden to prove all elements of Assault in the First Degree, review is appropriate under RAP 13.4(b)(1).

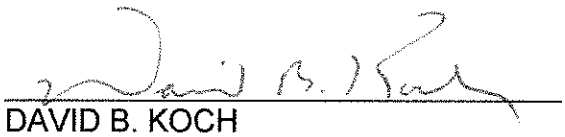
F. CONCLUSION

Review is appropriate under RAP 13.4(b)(1), and Mancilla respectfully asks that this petition be granted.

DATED this 10th day of May, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

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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,)
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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

[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.

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[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

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[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.

NIELSEN, BROMAN & KOCH P.L.L.C.

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