

**NO. 37348-3-II
(Consolidated Case)**

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

PO CHHUOY AND ANDY OEUNG, APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 07-1-02901-1
No. 07-1-02902-0

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did sufficient evidence exist to support the convictions and the gang enhancements?
2. Were the jury instructions sufficient so that the defendants' right to a unanimous jury was not violated where the defendants were charged with four separate counts of unlawful possession of a firearm based upon four separate weapons?

B. STATEMENT OF THE CASE.

1. Procedure

On May 31, 2007 defendant Po Chhuoy was charged by information several with six counts, four of which were for unlawful possession of a firearm in the first degree. CP 132-35. Defendant Andy Oeung, co-defendant to Chhuoy was also charged with six counts, four of which were for unlawful possession of a firearm in the second degree. CP 1-4. Three other defendants were charged as co-defendants, but are not part of this appeal. *See* CP 1; 132. On December 19, 2007 the State filed an amended information that in pertinent part added an enhancement that the crime was committed in furtherance of their position in the hierarchy of an organization or group, i.e. as gang members. CP 10-13, 184-187.

The case proceeded to trial and a jury was empaneled on January 31, 2008. CP 278, ????. The jury completed deliberations on February 7,

2008 and returned guilty verdicts on two of the counts of unlawful possession of a firearm as to each defendant. CP 96; 97; 234; 235. The jury also found the crimes were committed in furtherance of their position in the hierarchy of an organization, i.e. as gang members. CP 102; 103; 238; 239.

Sentence was imposed on February 8, 2008. CP 108-21; 256-267. This appeal was filed timely. CP 129; 240-250.

2. Facts

Tacoma Police served search warrants on a series of residences on May 30, 2007. RP 175, ln. 22-25; p. 177, ln. 8-9. One residence was at 701 98th Street East, which was a main house, and adjacent to it was a mobile home trailer, which had the street address of 9721 ½ East F Street where a second warrant was served. RP 175, ln. 22-25; 178, ln. 20-23; p. 180, ln. 3-17; p. 293, ln. 3-17.

Prior to the warrant being served, Lakewood police had conducted undercover narcotics purchases of crack cocaine from Pao Chhuoy (the brother of the defendant Po Chhuoy). RP 343, ln. 22-25; p. 345, ln. 2-13. On one of the purchases, they were able to observe him at the two residences that were the subject of the search warrant in this case. RP 344, ln. 1-17. After a phone call was made to Pao Chhuoy to arrange the transaction, Pao Chhuoy was observed at the house that was the subject of the warrant in this case. RP 344, ln. 1-10. He was observed going from

the house to the trailer and then proceed to the cocaine transaction. RP 344, ln. 7-20. Once the transaction was complete, he returned to the trailer and then the house. RP 344, ln. 21-24.

Prior to the service of the warrants, between May 15th and 30th, Tacoma Police Detective Bair participated in pre-op surveillance at the home at issue in this case several times. RP 179, ln. 7-13. Persons of interest were observed coming and going from both structures and between the structures. RP 180, ln. 18-25; p. 181, ln. 15-17. The persons of interest were young Cambodian males with clothing that had red markings that was typical of a particular type of gang set. RP 181, ln. 3-10.

Detective Bair testified that he was familiar with a gang that went by the moniker LBs or Loco Boys and that it was still an active gang in Tacoma. RP 120, ln. 2-4; 185, ln. 6-10. He said that he could recognize specific members by sight, including Andy Oeung, Tony Oeung, Po Chhuoy, Pao Chhuoy, and Srouch Chhuoy and knew them personally and had spoken with all of them except Andy Oeung and Tony Oeung. RP 175, ln. 16-19; 185, ln. 14-22.

Officer Bair positively identified Pao Chhuoy (the brother of defendant Po Chhuoy), as present at the scene during the surveillance. RP 186, ln. 2-15. He said that the other four mentioned above appeared to be the other persons who were there as well, but that he couldn't positively identify them. RP 186, ln. 5-15.

Sergeant Davidson was also a gang expert for the Tacoma Police Department. RP 88, ln. 5 to p. 89, ln. 2. He testified that the Loco Boyz is primarily a Cambodian gang that is a Blood gang set and that hangs out on the East side of Tacoma. RP 92, ln. 2-5. Red is generally the color associated with Blood gangs, and is specifically the color of the Loco Boyz. RP 94, ln. 2-5; 116, ln. They would display their gang colors in their clothing, which might include a red bandana, baseball cap, shoe laces, shoes shirt, pants, etc. RP 116, ln. 15-19.

Sergeant Davidson testified that he is familiar with both defendants in this case, Andy Oeung, and Po Chhuoy. RP 122, ln. 9-11. He said he knew them from prior contact with them, as well as through other police officers, reports, and investigations. RP 122, ln. 13-18. They are hardcore members of the Loco Boyz gang. RP 122, ln. 23. Sergeant Davidson said that he is also familiar with Srouch Chhuoy, Tony Oeung and Pao Chhuoy. RP 122, ln. 24 to p. 123, ln. 1. Defendant Po Chhuoy goes by the street moniker Red; defendant Andy Oeung goes by the name Baby Ra; Srouch goes by the names Smiley and Tonight; Tony goes by the name Tone Dog; and Pao goes by KP. RP 119, ln. 1; 123, ln. 16-17. Defendant Po Chhuoy is known to drive a black Cutlass. RP 124, ln. 25 to p. 125, ln. 1. He also knew that all five lived together at a prior address in Tacoma in 2005. RP 125, ln. 14-25. Sargeant Davidson testified that he has seen all five dressed in Red gang attire. RP 126, ln. 1-8.

Officers served the warrants and located a large number of items of evidence.

In the house at 701 98th street East officers searched the residence and for investigative purposes identified the rooms by the letters A through I. RP 188, ln. 25 to p. 189, ln. 4; p. 193, ln. 11-20; RP 223, ln. 13-20; p. 228, ln. 3-5; p. 243, ln. 11-13. Of particular relevance here, the officers found four guns. A Remington bolt-action rifle with scope, and internal magazine loaded with four rounds found behind an entertainment center in the garage (room C). RP 245, ln. 14 to p. 246, ln. 7. Officers also found a Marlin Model 60 SB .22 caliber semi-automatic rifle behind the entertainment center in the garage. RP 247, ln. 23 to p. 248, ln. 8. Under bedding in a closet that had been converted to a bedroom (room I), officers found a pump action shot gun and Army flak vest. RP 243, ln. 11-19. RP 248, ln. 9-19. In that room the officers also found a Savage bolt-action rifle with a scope. RP 246, ln. 14-21; p. 247, ln. 14-19.

In addition to the guns, in the room identified as "F" officers found a number of narcotics related items including three baggies of cocaine in a jacket, additional baggies with an eight-ball graphic, and a gram scale. RP 231, ln. 13 to p. 232, ln. 25; p. 244, ln. 16 to p. 245, ln. 13; p. 304, ln. 12 to p. 305, ln. 1. Located in the nightstand was \$1,436 in cash in a black wallet that contained the ID for Pao Chhuoy. RP 196, ln. 16-24; p. 233, ln. 5 to p. 234, ln. 4. Officers also found social security cards and documents in the name of Pao Chhuoy, which documents included or were

among other gang related materials (Exs. 24, 25, 26,148), as well as gang related photos (Exs. 7-11, 13, 14, 147). RP 133, ln. 21 to p. 135, ln. 10; p. 135, ln. 12 to p. 138, ln. 6.

Room E contained an expired ID card in the name of defendant Po Chhuoy (Ex. 254). RP 240, ln. 17-25.

Scattered throughout the ground floor were gang related documents (Exs. 149 and 57-62), with additional gang related documents and photos being located in various rooms. (Ex. 259) RP 238, ln. 23 to p. 239, ln. 6; p. 248, ln. to p. 250, ln. 16. There was also a strip of wood with red writing graffiti (Ex. 281, item 25). RP 247, ln. 20. In addition to the gang related documents, there were several items of red gang related clothing. RP 229, ln. 22-25; RP 242, ln. 10-24.

Defendants Po Chhuoy and Andy Oeung resided in the trailer/manufactured home at 9721 ½ East F Street. RP 399, ln. 13-16. There, officers found narcotics related items, including a gram scale with crib notes and white residue, a box for a digital gram scale RP 264, ln. 14; p. 269 ln. 24 to p. 270 to ln. 10. A large amount of white powder that could be used to cut cocaine was found in a plastic bag inside a shoe (Ex. 251). RP 258, ln. 19 to p. 262, ln. 24; p. 306, ln. 14 to p. 307, ln. 25. Officers also found \$1,621 cash found in black wallet, and another \$206 inside a piggy bank. RP 256, ln. 17-25; p 257, ln. 18-25.

Officers also found numerous documents and photos of gang related materials. Miscellaneous documents in the names of Andy Oeung,

were found on top of a refrigerator (Ex. 291). RP 264, ln. 15 to p. 265, ln. 10; p. 280, ln. 12 to p. 281, ln. 5. A notebook with gang writing and crib notes found on bottom shelf of TV stand (Exs. 6, 151). RP 254, ln. 12-24. Miscellaneous documents connecting the defendants to the Loco Boyz Gang. (Exs. 266) (Exs. 124-145, 153 (RI item# 38), 266. RP 263, ln. 1-12; 267, ln. 17 to p. 268, ln. 6; p. 278, ln. 17 to p. 279, ln. 19. Miscellaneous photographs connecting the defendant's to the Loco Boyz gang. (Exs. 15-23,150). RP 138, ln. 7 to p. 140, ln. 20; 255, ln. 1-14. Additional gang related documents were found in the Chevy Caprice, that defendant Po Chhuoy drove. (Exs. 34-39, 152). RP 275, ln. 9-11; p. 277, ln. 24 to p. 278, ln. 16.

Further, there was a stunningly large number of red articles of clothing. RP 11-21; p. 252, ln. 22 to p. 253, ln. 8.; p. 263, ln. 13 to p. 264, ln. 5; p. 265, ln. 22 to p. 266, ln. 5; p. 266, ln. 15 to p. 267, ln. 7 ln. 16; p. 268, ln. 23 to p. 269, ln.15; p. 271, ln. 7-14; p. 272, ln. 18-24; 273, ln. 11-25.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle*

v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations;

these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[...]great deference [...] is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity. [*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).]

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld. There was ample evidence to support the jury's finding of guilt. The jury heard that the defendants were hardcore members of the Loco Boyz (a.k.a. LBs) gang together with the other subjects who were located at the house where the guns were found. RP 120, ln. 2-4; 122, ln. 9 to p. 123, ln. 1; p. 175, ln. 16-19; p. 185, 14-22. The jury heard that the Loco Boyz was still a pretty active gang in terms of their criminal activity and that in the past seven years they had been involved in homicides, robberies, assaults, drug dealing and car theft. RP 120, ln. 20 to p. 121, ln. 12.

As to the two residences that were the subject of the search warrants in this case, officers reported seeing persons regularly moving between the two residences. RP 180, ln. 18-25; p. 181, ln. 15-17. Po Chhuoy's expired driver's license was at the house where the guns were located. Defendant Po Chhuoy's mother resided at the house. Ex. 45, 50, 53, 54, 55. Defendant Po Chhuoy's brother, Pao Chhuoy also resided at

the house. The jury also heard that all five members of the Loco Boyz identified by Sargeant Davidson, including defendants Andy Oeung and Po Chhuoy previously lived in single a house together. RP 125, ln. 14-25.

Items related to the distribution of cocaine were located at both residences. RP 196, ln. 16-24; 231, ln. 13 to p. 232, ln. 25; p. 233, ln. 5 to p. 234, ln. 4; p. 244, ln. 16 to p. 245, ln. 13; p. 304, ln. 12 to p. 305, ln. 1. While the jury was unable to find beyond a reasonable doubt that either defendant was particularly involved in the cocaine distribution, the narcotics evidence in and of itself nonetheless was also suggestive of common and combined activity between the two houses. Moreover, Pao Chhuoy, the brother of defendant Po Chhuoy was observed going from the house to the trailer before conducting a cocaine transaction and was then observed returning first to the trailer and then back to the house after the transaction. RP 344, ln. 1-24. Numerous items of gang related red clothing were found at both residences, as were gang related documents and photos.

Among letters to Andy Oeung was a note that said , "I don't slip." Ex 134. The jury was advised that 'slippin' is a gang term for making oneself vulnerable or exposing ones self to victimization by rival gangs, generally by being unarmed. RP 115, ln. 4-10; 145, ln. 14. Gang members arm themselves to avoid 'slippin.' RP 115, ln. 1-10.

Here, the jury was instructed on accomplice liability. CP 69; 207. That instruction properly informed the jury that a person has constructive possession where that person had dominion and control over an item, and that dominion and control need not be exclusive to establish possession. [CP 71, 209]

The jury could infer from the evidence that the two separate residences constituted a shared area openly accessible to all of the gang members. When the totality of the evidence is considered in the light most favorable to the State, there was ample evidence to support the jury's finding that each of the defendants, either as a principal or through an accomplice had dominion and control over the weapons and therefore possessed them.

Additionally, there was ample evidence that the possession of the weapons was committed in order to obtain or maintain membership or to advance each defendant's position in the hierarchy of the gang group.

2. THE APPELLANTS' WERE NOT DEPRIVED OF THEIR RIGHT TO A UNANIMOUS JURY VERDICT.

It is well established that in Washington, jury verdicts in criminal cases must be unanimous. *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984); *State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963). Washington courts have repeatedly affirmed that the right to a unanimous jury verdict in criminal cases is of constitutional magnitude and may be raised for the

first time on appeal.¹ See *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1977)(citing *State v. Holland*, 77 Wn. App. 420, 424, 891 P.2d 49 (1995)); *State v. Green*, 94 Wn.2d 216, 231, 616 P.2d 628 (1980)(citing Wash. Const. art. 1, § 21).

The court has divided cases involving jury unanimity issues into two types: cases involving multiple acts and cases involving alternative means. See *State v. Kitchen*, 110 Wn.2d 403, 409-410, 756 P.2d 105 (1988). Multiple acts cases are where the State presents evidence of several acts that could form the basis of one count charged. See *Kitchen*, 110 Wn.2d at 409. In multiple acts cases, the State must either tell the jury which acts to rely upon, or the court must instruct the jury that they must unanimously agree as to which act has been proved. *Kitchen*, 110 Wn.2d at 409 (citing *Petrich*, 101 Wn.2d at 570). See also WPIC 4.25; 4.26; and *State v. Moultrie*, 143 Wn. App. 387, 392-94, 177 P.3d 776 (2008)(approving the current version of WPIC 4.25).

In alternative means cases, a single offense may be committed in more than one way. *Kitchen*, 110 Wn.2d at 410. There must be jury unanimity as to guilt, but the jury need not be unanimous as to the means

¹ The right to a unanimous jury verdict is a matter of constitutional magnitude, and therefore a matter that may be raised for the first time on appeal, only under the Washington Constitution. The United States Constitution does not require a unanimous jury verdict. See *Burch v. Louisiana*, 441 U.S. 130, 136, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979)(citing *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972)).

by which the crime was committed so long as substantial evidence supports each alternative means. *Kitchen*, 110 Wn.2d at 410.

- a. No unanimity instruction was required because the defendants were charged with four separate counts based upon four separate acts.

The appellant argues that this was a multiple acts case that violated the appellant's right to a unanimous jury. Br. App. 17. That argument is mistaken. As indicated above, multiple acts cases exist where the State puts forth evidence of multiple criminal acts that can form the basis of one charged count. *Kitchen*, 110 Wn.2d at 409. Here, however, four separate counts of unlawful possession of a firearm were charged. CP 10-13, 184-187. Because of that, this is not a multiple acts case, and therefore not properly a unanimity case.

The real issue behind the defense argument is that the jury instructions did not specify for the jury which firearm related to which count. However, where the charges were identical in each of the four counts it was not error for the jury to make such a determination itself, nor has the appellant cited to any authority that suggests it was erroneous.

Moreover, the appellant was not deprived of a unanimous verdict. It is a well established principle, both in Washington and under federal law that a jury is presumed to follow its instructions. *Weeks v. Angelone*, 528 U.S. 225, 235, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000); *Richardson*

v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987); *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007); *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

Here, the jury received several instructions that gave it proper guidance as to this issue. Jury instruction number 5 stated that:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count. CP 67, 205.

Jury instruction 28 advises the jurors that they have a duty to deliberate with one another in an effort to reach a unanimous verdict. CP 90, 228.

Jury instruction 29 advises the jurors that because this is a criminal case, each of them must agree for them to return a verdict. CP 92, 230.

The fact that the jury could not reach a verdict on all but two counts provides strong support for the fact that the jury properly followed its instructions.

Here, neither defense counsel objected to the jury instructions. RP 511, ln. 25 to p. 512, ln. 13. Because this is not properly an issue of jury unanimity, it is also not an issue of constitutional magnitude. Therefore, it is not an issue that can be raised for the first time on appeal where counsel

did not object at the trial level. Accordingly, the court should decline to consider it.

In their brief, the appellants cite to *State v. Holland* in support of the proposition that the failure to provide a unanimity instruction (where required) may be raised for the first time on appeal. Br. App. 18, n. 3. (citing *Holland*, 77 Wn. App. 420, 424, 891 P.2d 49 (1995)). It is surprising that the appellants do not cite to *Holland* for their substantive argument as it appears to be the unanimity opinion most clearly on point to the facts of this case, and this court might consider it controlling precedent that operates in favor of the appellants. The State therefore brings this case to the court's attention as relevant authority worthy of consideration.

Nonetheless, the State argues that *Holland* was both wrongly decided, and is distinguishable based upon its facts. In *Holland*, the defendant was charged with three separate counts of child molestation based on the victim's claim that she was assaulted on three different occasions during the charged time period even though she was unable to give any further detail or description to separate out the three events. *Holland*, 77 Wn. App. at 422-23. The jury returned verdicts on two of the three counts. The court held that: "It is impossible, on this record, to conclude that all 12 jurors agreed on the same act to support convictions

on each count.” *Holland*, 77 Wn. App. at 425. In reaching this conclusion the court relied on an inaccurate statement of the unanimity requirement: “Included in the constitutional requirement of jury unanimity is the requirement that the jury unanimously agree on the act underlying each charge.” *Holland*, 77 Wn. App. at 424 (citing *Petrich*, 101 Wn.2d at 572). However, this formulation of the unanimity requirement by the court in *Holland* is inaccurate, and in fact incorrect.

As indicated above, multiple acts issues arise where the State presents evidence of several acts that could form the basis of one count charged. See *Kitchen*, 110 Wn.2d at 409.

[...] When the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, jury unanimity must be protected. [*Petrich*, 101 Wn.2d at 572. Emphasis added].

[...] “*Petrich* [...] held that in cases where the evidence indicates that several distinct criminal acts have been committed but the defendant is charged with only one count of criminal conduct, the constitutional requirement of unanimity is assured by...”. [*State v. Brown*, 55 Wn. App. 738, 746, 780 P.2d 880 (1989)]. [Emphasis added.]

However, *Petrich*, like *Osborne* and *Workman*, involved evidence tending to prove several distinct offenses where only one count of criminal conduct was charged. [...] [*Brown*, 55 Wn. App. at 747. Emphasis added.]

Holland is also factually distinguishable from the present case. In *Brown*, the court noted that the issues associated with evidence of multiple

offenses and jury unanimity usually arise in the context of case involving sexual molestation of children. *Brown*, 55 Wn. App. at 746. That is because those cases are typically the ones that involve a continuing offense based upon multiple acts. *See Brown*, 55 Wn. App. at 746 (describing the common factual qualities of child sexual molestation cases that cause them to be the types of cases in which multiple acts unanimity issues arise.)

Holland was in fact a child sexual molestation case in which they were in fact a continuing offense even though the offenses were charged as multiple counts. All three counts had the same charging period, from October 2, 1991 to November 2, 1991. *See Holland*, 77 Wn. App. at 424. Moreover, the only fact in evidence to distinguish the acts was the victim's mere assertion that the molestation had occurred on at least three separate occasions during the period charged. Thus, in *Holland* the offense was actually a continuing offense case based upon multiple acts that were generally identified as separate, but about which no further factual distinction was given. Thus, *Holland* can be distinguished from the present case where the possession of four separate and specifically identified guns formed the basis of four separate counts.

- b. Even if the court were to hold that the appellants were deprived of the right to a unanimous jury, any error was harmless where the logical inference from the verdicts rendered was that the jury was unanimous.

With regard to multiple acts cases, the court has held that the error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt.

[*State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)(quoting *State v. Loehner*, 42 Wn. App 408, 411, 711 P.2d 377 (1985)(Sholfield, A.C.J., concurring)).²]

The court presumes that the error was prejudicial. *Kitchen*, 110 Wn.2d at 411. That presumption can be overcome if no rational juror could have a reasonable doubt as to any one of the incidents alleged. *Kitchen*, 110 Wn.2d at 411.

Here no rational juror could have a reasonable doubt as to any of the incidents alleged. That is precisely because there were four incidents (separate firearms) and four counts alleged. The jury returned unanimous verdicts as to two of the counts and could not reach a verdict as to the other two counts. The fact that the jury split as to the counts leads to a reasonable inference that they followed their instructions and that any error was harmless. [CP 95-104, 233-239]

² By coincidence, the opinions in *Kitchen* and *Loehner* happen to have identical page numbering where they address this issue.

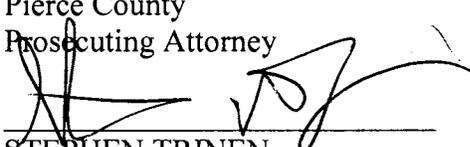
D. CONCLUSION.

There was sufficient evidence to support the convictions where defendants were identified as hardcore members of the Loco Boyz gang, and strong gang connections at both residences showed them an area over which all members exercised dominion and control. The jury could infer that the defendants or their accomplices had dominion and control over the weapons which were possessed in furtherance of gang membership and hierarchy within the gang group.

No unanimity instruction was required as this was not a case of multiple acts serving as the basis for the jury to find the defendants guilty as to a single count. Rather, the defendants were charged with four counts based on four separate weapons.

DATED: January 12, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

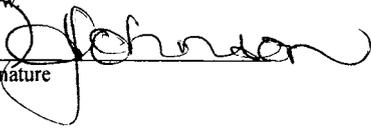
COURT OF APPEALS
DIVISION II

03 JUN 12 PM 1:58

STATE OF WASHINGTON

BY _____
REPLY

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/12/09 
Date Signature

APPENDIX "A"

Chart of Evidence by Number and Location

Chart of Evidence by Exhibit Number

Items with multiple exhibit entries are bundles of documents or photos that came in a single outer package and were then individually numbered as well. They are listed under the main number for the outer bundle

| Location | Room | Description of Item | Citation to the Record | EX# |
|----------|------------------|--|------------------------|---|
| Trailer | C | Nothing listed | RP | |
| | | | | |
| House | D | Documents | RP 243-244 | 146 |
| House | F | Photographs found in closet | RP 239-240 | 147 |
| House | F | Documents in the name of Pao Chhuoy found in closet | RP 241 | 148 |
| Trailer | D | Miscellaneous photographs | RP 255 | 150 |
| Trailer | B | Notebook with gang writing and crib notes | RP 254 | 151 |
| Trailer | Chevy Caprice | Miscellaneous documents | RP 275-278 | 152 34-39 |
| Trailer | E | Miscellaneous documents | RP 267 to 279 | 153 124-145 (ex 282 not admitted) |
| House | A | Prescription bottle in name of Chhan Oeung | RP 228 | 235 |
| House | A (kit.) | Red baseball hat | RP 229 | 236 |
| House | B (kit.) | Several small Ziploc baggies | RP 195, 236 | 238 |
| House | B (kit.) | Tablet of notepaper with what appeared to be credit card numbers | RP 235 | 239 |
| House | B (kit.) | Prescription bottle for Doxazoin in the name of Chhuoy Oeung | RP 195, 235 | 241 |

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|---------|------------|--|-------------------------|-----|
| House | F | Social Security cards (2) in name of Pao Chhuoy | RP 234 | 242 |
| House | B (kit.) | WA vehicle registration for GMC Safari registered to Polly Oeung | RP 195-196, 234 | 243 |
| House | F | \$1,436 in cash in black wallet with ID for Pao Chhuoy | RP 196, 233-234 | 245 |
| House | F | Small plastic baggies with eight-ball graphic design | RP 232 | 246 |
| House | F | Electronic gram scale under nightstand | RP 231-232 | 247 |
| House | G | ID card in name of Tony Oeung | RP 230-231 | 248 |
| House | G | Driver's license in the name of Srouch Chhuoy | RP 230 | 249 |
| House | G | Cell phone found on floor under window | RP 236-237 | 250 |
| Trailer | E | Large amount of unknown white powder, possible cocaine cut | RP 258 to 262, 306, 307 | 251 |
| House | E | Cell phone | RP 242 | 252 |
| House | E | Bandana | RP 242 | 253 |
| House | E | ID card in name of Po Chhuoy (expired) | RP 240 | 254 |
| House | E | Cell phone | RP 238 | 255 |
| House | E | Documents in name of Sina Men | RP 237 | 256 |
| House | H | Black leather pouch with three baggies of powder cocaine, found in garbage | RP 238, 304-305 | 257 |
| House | D | Red hat under sink | RP 242 | 258 |
| House | E | Documents in name of Tony Oeung | RP 238-239 | 259 |
| House | I | Army flak vest found under bedding | RP 243 | 260 |
| Trailer | D | Three pairs of red and white tennis shoes | RP 268-269 | 265 |
| Trailer | D | Miscellaneous documents | RP 263 | 266 |
| Trailer | B | Cell phone on TV stand | RP 258 | 268 |
| Trailer | Back porch | Red bandana | RP 257 | 269 |
| Trailer | D | \$1,621 cash in black wallet | RP 257 | 270 |
| Trailer | E | \$206 found in piggy bank | RP 256 | 271 |
| Trailer | B | Miscellaneous drug and gun magazines | RP 272 | 272 |
| Trailer | A (kit.) | Gram scale with crib notes | RP 269 to 270 | 273 |
| Trailer | B | Cell phone on window sill | RP 258 | 274 |

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|---------|------------|---|------------------------|------------------|
| Trailer | A (kit.) | Red and White striped shirt | RP 263 | 275 |
| Trailer | D | Empty Taurus handgun box with pistol grips | RP 271-272 | 276 |
| Trailer | A (kit.) | Red and White Angels baseball jersey | RP 267 | 277 |
| House | I | Pump action shotgun found under bedding | RP 248 | 278 |
| House | C (gar.) | Marlin Model 60 SB .22 cal semi-auto rifle behind entertainment center in garage | RP 247-248 | 279 |
| House | F | Baggie with white rocks of cocaine and baggie of white residue found in right-hand pocket of jacket | RP 244-245, 304, 305 | 280 |
| House | C (gar.) | Remington bolt-action rifle with scope and internal magazine behind entertainment center | RP 245 to 247 | 281 (RI# 19) |
| House | G | Strip of wood with red writing graffiti | RP 247 | 281 |
| | I | Bolt-action rifle with scope | RP 246-247 | 281 (RI # 26) |
| Trailer | D | Three red shirts | RP 252-253 | 283 |
| Trailer | B | Three red coats and one red shirt | RP 269 | 284 |
| Trailer | E | White tennis shoes with red laces | RP 253 | 285 |
| Trailer | E | A glass bong drug pipe | RP 253 | 286 |
| Trailer | D | Cell phone on window sill | RP 254 | 287 |
| Trailer | D | Red hat and red shirt in box on shelf | RP 263 | 288 |
| Trailer | D | Driver's license for Po Chhuoy found in wallet | RP 275-276 | 289 |
| Trailer | A (kit.) | Box for digital gram scale | RP 264 | 290 |
| Trailer | A (kit.) | Documents in the name of Andy Oeung, et al. | RP 264 to 265; 280-281 | 291 |
| Trailer | A (kit.) | Two red caps | RP 273 | 292 |
| Trailer | Back porch | Red slippers | RP 273 | 293 |
| Trailer | D | Six red shirts in closet | RP 271 | 296 |
| Trailer | D | Red stocking cap in hamper | RP 266-267 | 297 |
| Trailer | D | Red bandana in dresser | RP 266 | 298 |
| Trailer | D | Black bandana on headboard | RP 265 | 299 |
| Trailer | E | Red bandana found on rail | RP 266 | 300 |

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|---------|----------|--|------------|------------------|
| Trailer | D | Red glove and red and black shoe laces | RP 265-266 | 301 |
| Trailer | D | Laptop computer | RP 274 | 302 |
| Trailer | B | Red Cardinals jersey found on couch | RP 272 | 303 |
| Trailer | E | Laptop computer and charger | RP 274-275 | 304 |
| Trailer | A (kit.) | Four pairs of red shoes | RP 273 | 305 |
| Trailer | B | Two SIM cards for T-Mobile cell phone | RP 281 | 307 |
| Trailer | B | Motorola cell phone | RP 282 | 308 |
| Trailer | D | WA driver's license in the name of Chanthorn Soeurig | RP 282-283 | 309 |
| Overall | | Photos by Steve Mell, PCSD forensics | 288-292 | 86-89 109-112 |

Chart of Evidence by Location Found

Items with multiple exhibit entries are bundles of documents or photos that came in a single outer package and were then individually numbered as well.

| Location | Room | Description of Item | Citation to the Record | EX# |
|----------|----------|---|------------------------|-----|
| Trailer | A (kit.) | Documents in the name of Andy Oeung, et al. | RP 264 to 265; 280-281 | 291 |
| Trailer | A (kit.) | Box for digital gram scale | RP 264 | 290 |
| Trailer | A (kit.) | Gram scale with crib notes | RP 269 to 270 | 273 |
| Trailer | A (kit.) | Red and White striped shirt | RP 263 | 275 |
| Trailer | A (kit.) | Red and White Angels baseball jersey | RP 267 | 277 |
| Trailer | A (kit.) | Two red caps | RP 273 | 292 |
| Trailer | A (kit.) | Four pairs of red shoes | RP 273 | 305 |
| Trailer | B | Notebook with gang writing and crib notes | RP 254 | 151 |
| Trailer | B | Motorola cell phone | RP 282 | 308 |
| Trailer | B | Miscellaneous drug and gun magazines | RP 272 | 272 |
| Trailer | B | Cell phone on window sill | RP 258 | 274 |
| Trailer | B | Cell phone on TV stand | RP 258 | 268 |
| Trailer | B | Three red coats and one red shirt | RP 269 | 284 |
| Trailer | B | Red Cardinals jersey found on couch | RP 272 | 303 |
| Trailer | B | Two SIM cards for T-Mobile cell phone | RP 281 | 307 |
| Trailer | C | Nothing listed | RP | |
| Trailer | D | \$1,621 cash in black wallet | RP 257 | 270 |
| Trailer | D | Miscellaneous documents | RP 263 | 266 |
| Trailer | D | Miscellaneous photographs | RP 255 | 150 |
| Trailer | D | Empty Taurus handgun box with pistol grips | RP 271-272 | 276 |
| Trailer | D | Driver's license for Po Chhuoy found in wallet | RP 275-276 | 289 |
| Trailer | D | WA driver's license in the name of Chanthorn Soeuring | RP 282-283 | 309 |

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|---------|---------------|--|-------------------------|---|
| Trailer | D | Cell phone on window sill | RP 254 | 287 |
| Trailer | D | Three red shirts | RP 252-253 | 283 |
| Trailer | D | Red hat and red shirt in box on shelf | RP 263 | 288 |
| Trailer | D | Black bandana on headboard | RP 265 | 299 |
| Trailer | D | Red glove and red and black shoe laces | RP 265-266 | 301 |
| Trailer | D | Red bandana in dresser | RP 266 | 298 |
| Trailer | D | Red stocking cap in hamper | RP 266-267 | 297 |
| Trailer | D | Three pairs of red and white tennis shoes | RP 268-269 | 265 |
| Trailer | D | Six red shirts in closet | RP 271 | 296 |
| Trailer | D | Laptop computer | RP 274 | 302 |
| Trailer | E | Miscellaneous documents | RP 267 to 279 | 153 124-145 (ex 282 not admitted) |
| Trailer | E | White tennis shoes with red laces | RP 253 | 285 |
| Trailer | E | A glass bong drug pipe | RP 253 | 286 |
| Trailer | E | \$206 found in piggy bank | RP 256 | 271 |
| Trailer | E | Large amount of unknown white powder, possible cocaine cut | RP 258 to 262, 306, 307 | 251 |
| Trailer | E | Red bandana found on rail | RP 266 | 300 |
| Trailer | E | Laptop computer and charger | RP 274-275 | 304 |
| Trailer | Back porch | Red bandana | RP 257 | 269 |
| Trailer | Back porch | Red slippers | RP 273 | 293 |
| Trailer | Chevy Caprice | Miscellaneous documents | RP 275-278 | 152 34-39 |
| House | A | Prescription bottle in name of Chhan Oeung | RP 228 | 235 |
| House | A (kit.) | Red baseball hat | RP 229 | 236 |
| House | B (kit.) | Several small Ziploc baggies | RP 195, 236 | 238 |

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|-------|----------|---|----------------------|-----------------|
| House | B (kit.) | Prescription bottle for Doxazoin in the name of Chhuoy Oeung | RP 195, 235 | 241 |
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| House | C (gar.) | Marlin Model 60 SB .22 cal semi-auto rifle behind entertainment center in garage | RP 247-248 | 279 |
| House | D | Red hat under sink | RP 242 | 258 |
| House | D | Documents | RP 243-244 | 146 |
| House | E | ID card in name of Po Chhuoy (expired) | RP 240 | 254 |
| House | E | Documents in name of Tony Oeung | RP 238-239 | 259 |
| House | E | Documents in name of Sina Men | RP 237 | 256 |
| House | E | Cell phone | RP 238 | 255 |
| House | E | Cell phone | RP 242 | 252 |
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| House | F | Electronic gram scale under nightstand | RP 231-232 | 247 |
| House | F | Small plastic baggies with eight-ball graphic design | RP 232 | 246 |
| House | F | \$1,436 in cash in black wallet with ID for Pao Chhuoy | RP 196, 233-234 | 245 |
| House | F | Social Security cards (2) in name of Pao Chhuoy | RP 234 | 242 |
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| House | G | Driver's license in the name of Srouch Chhuoy | RP 230 | 249 |
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| | | | | |