

FILED
Court of Appeals
Division II
State of Washington
5/25/2018 3:04 PM
NO. 49534-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JERMOHNN ELIJAH GORE,
ALEXANDER JABBAAR KITT, and
CLIFFORD JACARE KRENTKOWSKI,

APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Stephenie Arend

No. 15-1-02061-9,
15-1-01787-1, and
15-1-02088-1

Brief of Respondent

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

1. Was the search of the Cadillac sedan lawful where it was conducted pursuant to a lawfully issued search warrant that has not been challenged, and where the Cadillac was seized for the purpose of obtaining the warrant?
2. Did the trial court abuse its discretion when it admitted gang related evidence but excluded drug related evidence, and where the ruling was not made on untenable grounds or for untenable reasons?
3. Did the trial court commit reversible error in its conflict ruling when there was no evidence of an actual conflict with a current client, and no showing that trial counsel's representation was materially limited by a duty to a former client?
4. Was sufficient evidence introduced to prove the intent element of first degree assault, where the defendants fired multiple shots from two handguns on flat trajectories at multiple people, and where two people were hit by bullets, and where one person was killed?
5. Where the possession of firearm charge was proved by a continuing course of conduct, and where the defendant possessed two firearms at the same time, was jury unanimity assured by the court's unobjected to instructions?
6. Did the trial court abuse its discretion when it denied the post-trial motion for a new trial based on juror misconduct, where neither misconduct nor prejudice was established in the seating of a lawfully eligible juror who responded to a summons in his name?

7. Should defendants Gore and Krentkowski, both of whom were under the age of eighteen at the time of the shooting, be remanded for *Miller*¹ compliant sentencing hearings?

B. STATEMENT OF THE CASE.

1. *Procedural Facts.*

On May 8, 2015, Appellant Alexander Jabbarr Kitt (“defendant Kitt”) was charged with two counts of murder and four counts of first degree assault. CP 1-4. The two murder charges involved the same victim, a young man named Brandon Morris. *Id.* The murder charge in Count One was first degree extreme indifference murder while the charge in Count Two was second degree felony murder predicated on first or second degree assault or drive-by shooting. *Id.* As to the four assault charges, each involved a different victim, all of whom were shown to have been companions of Mr. Morris and in the line of fire at the time of the shooting that claimed his life. CP 1-4. *See* 6 RP 1136 et. seq. and 7 RP 1243, et. seq.

Appellants Jermohnn Elijah Nathaniel Gore and Clifford Jacare Krentkowski (“defendant Gore” and “defendant Krentkowski”) were charged with the same offenses as defendant Kitt a few weeks later. CP 468-73. CP 601-04. The initial charging in defendant Gore’s case also

¹ *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

included a first degree unlawful possession of a firearm charge. *Id.* The charges were subsequently amended in defendant Gore's case to include also a witness intimidation charge premised on an incident that occurred while he was being held in custody pending trial and involving a testifying codefendant. CP 515-18.

All of the charges arose from the same drive by shooting incident that took place on May 1, 2015. The shooting targeted a group of rival gang members from a set known as the Knoccout Crips. *See* 13 RP 2385, *et. seq.*, Trial Testimony of Trevion Tucker. The Knoccouts were thought to have perpetrated a prior shooting on Tacoma's Hilltop in which defendant Kitt was the target. *Id.* At the time of the drive by, a group of suspected Knoccouts were congregated at a convenience store known as the red store (because of its color) located at Union and South 45th Streets in Tacoma's south end. *Id.* The defendants were in a Cadillac Escalade driven by a testifying codefendant, accomplice, Lance Milton Ausley. 7 RP 1302, *et. seq.* and 9 RP 1484, *et. seq.* As the Escalade turned down an alley adjacent to the red store multiple shots were fired in the direction of the store. Brandon Morris and his group of unaffiliated friends happened to be between the Escalade and the store at the time of the shooting. Mr. Morris was killed by a gunshot wound to the head. 11 RP 1961.

All of the defendants were joined for trial. The trial was called on July 5, 2016. 1 RP 3. Preliminary matters included a motion to suppress firearms and other evidence seized via a search warrant from a Cadillac sedan (not the drive by shooting vehicle) that was found at a drug treatment agency on May 5, 2015, four days after the shooting². See CP 11-22, 136-142, and 150-191. 1 RP 38-41. 2 RP 268 et. seq. On appeal defendant Gore challenges the search based on an issue not raised or ruled upon by the trial court, namely the lawfulness of the impound of the sedan. See Defendant Gore, Opening Brief §E.1. The issue submitted to the trial court concerned the lawfulness of the arrest of defendant Kitt. The trial court denied the motion and ruled that the search was lawful because it was authorized by a lawfully issued search warrant. 2 RP 289.

The trial court also ruled on two other preliminary matters that have been challenged in these appeals. The first was a motion to suppress gang and drug evidence under ER 404(b). CP 51-60. 2 RP 181, *et. seq.* The trial court ruled that certain peripherally relevant drug distribution evidence would be excluded but that the gang related evidence would be admitted. The court explained its ruling as follows:

² It should be noted that this court upheld the validity of the search warrant in its unpublished opinion in a direct appeal brought by the owner of the car. See *State v. Jermaine Laron Abdul Gore*, No. 48960-1, Unpublished Opinion filed July 11, 2017. The impound argument included in this case by defendant Gore was not addressed in this court's Jermaine Gore opinion. *Id.*

And so I do think that it's more prejudicial than probative to allow the actual evidence of drugs to be admitted, and so I'm going to grant the 404(b) motion on that issue.

I don't conclude similarly with regard to the category of gang evidence. As I understand it, at this time, based upon my reading of the various briefs, the police reports and so forth and the recitation of counsel, this evidence clearly has been established by a preponderance of the evidence, and it clearly is relevant. It's a very relevant -- I don't think you can sanitize this to say, well, it was just a shooting because one of the defendants -- it was over a girlfriend, I think was suggested, or any of the other suggestions that were made on how you could explain it away. I think it's clearly relevant for purposes of motive, why this happened, and why all of those particular people were in that specific car at the time that the shooting took place.

2 RP 226.

The second issue was a motion by defendant Krentkowski's attorney to withdraw on the first day of trial and for a continuance. CP 713-757. In that motion defendant Krentkowski's assigned attorney argued that he had a conflict of interest because he had previously represented a rival gang member, LeShaun Alexander. *Id.* Mr. Alexander was not on anyone's witness list, was not expected to testify and was not called or attempted to be called to the stand during the trial. *Id.* 1 RP 4, et. seq. The trial court denied the motion to withdraw and its accompanying motion to continue the trial. 1 RP 31-34, 113. *See* 3 RP 544. The court explained its ruling:

1.7 deals with conflicts of interest of current clients and the representation of one client will be directly adverse to

another client. If they're totally unrelated matters, the representation of either Mr. Krentkowski or Mr. Alexander is not directly adverse to the other client. It says, "Or there's a significant risk that the representation of one or more clients will be materially limited by a lawyer's responsibility to another client, a former client or a third person or by a personal interest of the lawyer." And for me to find that in this case would suggest that his gang affiliation is adequate

1 RP 31-32.

Upon completion of preliminary matters and the pretrial motions, the trial commenced with opening statements on July 12, 2016. Thereafter the state presented its case. The state called 42 witnesses. CP 966-68. Of the 42 witnesses, two were testifying codefendant accomplices who were in the Cadillac Escalade with the three defendant at the time of the shooting. *Id.* Another twelve were bystanders who happened to be present at the scene of the shooting. *Id.* Those twelve included the four surviving companions of Brandon Morris. *Id.* The bystanders also included several other witnesses who were in the vicinity of the red store at the time of the shooting, and two witnesses to the prior Hilltop shooting in which defendant Kitt was targeted. *Id.* The state also called numerous police and forensic witnesses and experts and introduced 86 exhibits. CP 935-65. The exhibits included photographs showing bullet strikes both in the area near Brandon Morris and his friends and in the area near the

Knocouts behind them at the red store. *See* 6 RP 1051-56. Trial Exhibits 107 – 110.

The defense called two witnesses. Defendant Kitt called a woman who was in her apartment at the time of the shooting. 17 RP 3233, et. seq. And defendant Gore called one of the state's forensic officers, a latent print examiner. 17 RP 3326. None of the defendants testified.

The jury heard closing arguments on August 8th and 9th. 18 RP 3501, 18 RP 3610. It then deliberated two days and returned guilty verdicts on August 11th. 20 RP 3682. All three of the defendants were found guilty as charged. All of them were convicted of both murder charges and the first degree assault charges. CP 445-459, 577-591, and 919-933. In all three cases the second degree murder was dismissed for double jeopardy reasons. *Id.* Defendants Kitt and Gore were also found guilty of first degree unlawful firearm possession, and defendant Gore was also convicted of the witness intimidation charge. CP 445-459, 577-591.

At sentencing, both defendants Gore and Kitt were sentenced within the standard range while defendant Krentkowski was given an exceptional sentence below the standard range. CP 445-459, 577-591, and 919-933. Defendant Krentkowski was sentenced to zero months for the standard ranges of the murder and assault charges but sixty months on

each count consecutive for five firearm sentence enhancements. CP 445-459.

2. *Statement of Facts.*

On May 1, 2015, Brandon Morris, his girlfriend, and three other friends were at home in the vicinity of the red store. 6 RP 1137-40. They decided to walk to a marijuana dispensary that is located across the street from the red store. 6 RP 1141. As they walked back from the dispensary in the direction of their homes, in an alley that runs behind the red store, "When we get to a certain spot in the alley, that's when one shot went off. Right after that shot, maybe two, three seconds later, a truck turned into the alley and there was rapid fire." 6 RP 1142. Anthony Stone described the aftermath:

Q: And what happened next?

A: The white car kept going. The truck kept going by while firing, and then they took off, and we all got up and we were making sure that every one of us, all five of us, was okay, but then there was one who didn't get up.

Q: Was that Brandon?

A: Yeah.

7 RP 1175.

Brandon Morris had been shot in the head and was lying face down when the first responding officer, Sergeant Paul Jagodinski arrived. 5 RP 862. Medical aid was summoned and Mr. Morris was transported to the

hospital but subsequently died from a through and through gunshot wound to the head. 11 RP 1958-61. One of his companions, Dylan Browning, was also hit by a bullet. 7 RP 1187. That bullet did not penetrate his body only because it was stopped by the beer in his backpack. *Id.*

No one with Brandon Morris was expecting a shooting. Unbeknownst to them events across town in Tacoma's Hilltop neighborhood earlier in the day led to the defendants driving across town and opening fire at a convenience store in the middle of the day. Latasha Rector and Brandie Clark testified about the earlier shooting and said that they saw two young men shooting at each other and that one of them fled to a nearby residence at 1420 South M Street. 5 RP 755-60, 779-88. One of the two young men was identified as defendant Kitt in testimony by the two testifying co-defendants.

The testifying co-defendants linked the Hilltop shooting with the south end shooting. Lance Milton Ausley testified that on the day of the shooting he borrowed his girlfriend's white Cadillac Escalade and planned to meet a friend in the Hilltop. 7 RP 1306-09. He subsequently picked up several other people, including the three defendants, and learned that defendant Kitt had been shot at in the area of 15th and M Streets by suspected Knoccout Crips. 7 RP 1309-19, 1327. When they were picked up defendants Gore and Kitt both had guns. 7 RP 1313, 1324-27.

Defendant Gore had a guitar case holding an assault rifle and defendant Kitt had a backpack with two semi-automatic handguns. *Id.* 7 RP 1357-59.

Mr. Milton Ausley admitted membership in a set affiliated with the Hilltop Crips street gang. 7 RP 1327-30. He also identified the five other individuals (including the three defendants) who ended up in the Escalade as also being affiliated with Hilltop Crips sets. *Id.* He identified defendant Kitt's street name as "Too Real." 7 RP 1330. As all the defendants were being picked up, everyone in the Escalade knew that a black Monte Carlo had been used in the shooting of defendant Kitt and suspected that a Knoccout Crip rival, LeShaun Alexander was the perpetrator. 7 RP 1331-33. Once everyone was in the Escalade, they drove defendant Kitt to an appointment and then made their way to the south end. 7 RP 1330-36.

Mr. Milton Ausley explained that they knew the Knoccouts claimed the red store at 45th and South Union as their turf. 7 RP 1333. They decided to go "to get some money from [Trevion Tucker's] auntie" (witness Rebecca Timpe) because she lived near the red store. 7 RP 1335. They had the assault rifle and handguns with them as they headed in that direction. 7 RP 1336. After stopping at the aunt's house for a short time, Mr. Milton Ausley drove toward the red store. 7 RP 1339. He identified

the seating positions of the occupants of the Escalade with all three defendants in the back seat along with the other testifying codefendant, Trevion Tucker. *Id.*

Mr. Milton Ausley testified that as they left the Timpe residence the plan was to “take some pictures.” 7 RP 1339. He explained that taking photos in a rival’s territory and posting them on social media was a show of disrespect. 7 RP 1339-42. He denied that a shooting was planned before they left. *Id.* He admitted however that a shooting is what happened as they drove the block or two toward the red store. 7 RP 1347-50. Using an aerial photograph Mr. Milton Ausley explained that they saw 15 – 20 suspected Knoccouts (including they thought LeShaun Alexander) congregated at the red store, they saw the Monte Carlo, and defendants Gore and Kitt started shooting. 7 RP 1344-49. They were shooting as the Escalade turned into the alley and they didn’t stop shooting until it moved further down the alley to the south of the Brandon Morris group. *Id.* Defendant Gore fired out the front passenger window by leaning over the front seat and defendant Kitt opened the back door and fired out the open back door because the window on that door would not roll down. *Id.* Mr. Milton Ausley testified that as the Escalade moved down the alley both defendants were firing in a backward direction through the open back door:

Q: When did the shooting stop? Where was the vehicle when the shooting stopped?

A: Like -- probably, like, right here.

Q: Okay. Could you tell which direction Mr. Gore, Mr. Kitt were shooting when it got to that area?

A: It was towards the same area.

Q: Back behind them at that point?

A: Yes.

7 RP 1349

The other testifying codefendant, Trevion Tucker, gave a similar but not identical account of the shootings. He was a witness to the earlier shooting on the Hilltop and he also identified the gang affiliation of the defendants and the others involved in the two shootings. 13 RP 2388-99. As to the earlier shooting, he explained that he was sleeping when he heard gunfire and a short time later defendant Kitt came to his house located at 1420 South M Street. 13 RP 2399. He learned from defendant Kitt that the shooters were driving the black Monte Carlo and Mr. Tucker knew that LeShaun Alexander was known to drive that vehicle. 13 RP 2399-2409. Mr. Tucker had himself been shot at by Knoccouts several months before. 13 RP 2410-14. After defendant Kitt came in the house, they engaged in a speakerphone conversation with defendant Gore who had heard about the shooting and wanted to go after the Knoccouts. 13 RP 2417-21.

Trevion Tucker and defendant Kitt were picked up by Lance Milton Ausley and the others in the Escalade from the alley behind Mr. Tucker's house. 13 RP 2421-28. They avoided the police. 13 RP 2422. After stopping for Kitt's appointment the Escalade headed for the south end. 13 RP 2428-30. Mr. Tucker explained their purpose:

Q: You made mention that on the phone when Mr. Kitt is in the house and on speakerphone with Mr. Kitt on one end -- by the way, in that conversation, were you talking or just Mr. Kitt?

A: We were all talking.

Q: Okay. So you and Mr. Kitt on one side, Mr. Bolieu, Mr. Gore and Mr. Krentkowski on the other side; is that right?

A: Yes.

Q: And you made mention that Mr. Gore said that they were fixing to go look for the guys?

A: Yeah.

Q: Which guys?

A: For the black car. We was looking for the car. . .

* * *

Q: So same group shooting at you guys; is that right?

A: Yeah. . .

* * *

I didn't feel it. They just keep doing it and keep doing, and we weren't going to let him keep doing it.

13 RP 2432-33

Trevion Tucker identified the three guns in the Escalade as it headed to the south end. Two were handguns, a .40 caliber and a nine millimeter, and both came from defendant Kitt's backpack. 13 RP 2434. He specified that defendant Gore had the nine millimeter while defendant

Kitt had the .40 caliber. 13 RP 2435. He said that defendant Krentkowski had the assault rifle on his lap wrapped in a blanket. 13 RP 2435-39. In contrast to Mr. Milton Ausley's claim that they were planning only to take pictures, Mr. Tucker testified that the reason for going to the south end was to shoot at the Knoccouts who had been shooting at them. 13 RP 2440-41. He described how the shooting was originally going to occur:

Q: (By Mr. Williams) Where is everyone headed?

A: We're just headed towards the mall, towards the store.

Q: Why?

A: To look for the car, the black car.

Q: Why?

* * *

THE WITNESS: So we can shoot at them.

Q: (By Mr. Williams) Why?

A: Because they keep shooting at us.

Q: How is the shooting going to happen?

A: It wasn't supposed to be the truck. We were supposed to park somewhere and hop out the truck and supposed to walk, so -- because Lance didn't want to pull up in the truck, so we were supposed to hop out and park somewhere.

Q: Why didn't Lance want to use the truck?

A: Because it wasn't his.

Q: And so where was everyone -- where were you going to park and get out?

A: There was really no specific place. There was just that we were supposed to park somewhere and hop out.

Q: And when is that discussion happening?

A: Once we get toward the area. Once we get around the store.

Id.

After the stop and meeting with Rebecca Timpe, the plan changed. Ms. Timpe had walked to the store to get money she owed defendant Kitt and before she got back they drove to meet her. 13 RP 2451. Someone in the car alerted them that the Monte Carlo was at the red store. 13 RP 2458. They then drove toward the store and defendants Gore and Kitt opened fire:

- A: The shooting started as soon as we pulled into the alley.
- Q: Who shot?
- A: Gore started shooting first.
- Q: Who else shot?
- A: Kitt.
- Q: What was Gore shooting?
- A: He was shooting nine.
- Q: And what was Mr. Kitt shooting?
- A: A .40 gun.
- Q: You said Mr. Gore shot first?
- A: Yeah.
- Q: How?
- A: As soon as we turned into the alley, Bolieu was sitting in the front seat, so Bolieu had to, like, duck, and Gore jumped over the passenger side and started shooting out the passenger window.
- Q: Out of the front passenger window?
- A: Yes.
- Q: Do you know how many shots Mr. Gore fired?
- A: I really don't. I wasn't estimating the shots.
- Q: You said Mr. Kitt also shot but after Mr. Gore?
- A: Yeah.
- Q: How did Mr. Kitt shoot?
- A: He opened -- the back window didn't roll down, so he opened the door, he opened the back door. He started shooting out the back door.

13 RP 2462-63.

Mr. Tucker denied that anyone they were shooting at was armed. 13 RP 2466. He also testified that he did not see the Brandon Morris bystander group, which had been positioned in the alley near a carport. 13 RP 2468. The defendants fled the area but not before going head to head with another car that was being driven by a witness from a nearby dental clinic. 13 RP 2467. They made their way back to the Hilltop, disposed of the cartridge cases from the two semi-automatic handguns from the Escalade and Lance Milton Ausley dropped the others off at locations around the Hilltop. 13 RP 2468-70. Defendants Kitt and Gore kept the two handguns and the assault rifle stayed in the Escalade. The guns were during service of the search warrant and admitted into evidence during testimony from a forensic officer. 11 RP 2080-2103.

The defendants remained at large after the shooting. Defendants Kitt and Gore were arrested together on May 5th when the police learned that defendant Kitt had an appointment at an agency downtown. 11 RP 2016-31. Defendant Krentkowski was arrested during service of a search warrant on July 6th. 12 RP 2247-49.

After the completion of testimony on August 4, 2016, the jury was instructed concerning all seven crimes and the parties presented their closing arguments. 18 RP 3496. As to the instructions, the court gave a

transferred intent instruction, Instruction No. 26, which was not objected to by any party. CP 294-375. The court did not give a unanimity instruction as to the first degree firearm possession charges because no one proposed one. After closing arguments, during most of two days, the jury retired to deliberate on August 9th. RP 3671.

C. ARGUMENT.

1. THE SEARCH OF THE CADILLAC SEDAN WAS LAWFUL BECAUSE IT WAS CONDUCTED PURSUANT TO A SEARCH WARRANT THAT HAS NOT BEEN CHALLENGED, THAT HAS BEEN UPHELD BY THIS COURT, AND BECAUSE THE POLICE MAY SEIZE AND HOLD A VEHICLE FOR THE TIME REASONABLY NEEDED TO OBTAIN A SEARCH WARRANT.

With a couple of exceptions this court may properly refuse to review claims of error not preserved in the trial court. RAP 2.5 expressly states that, “The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise . . . manifest error affecting a constitutional right.” This preservation rule applies even where an objection is lodged in the trial court but on a different basis than on appeal. *State v. Higgs*, 177 Wn. App. 414, 423, 311 P.3d 1266 (2013). “The purpose underlying issue preservation rules is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding

unnecessary appeals.” *Id. citing State v. Robinson*, 171 Wn.2d 292, 304–05, 253 P.3d 84 (2011) and *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). *See also State v. Lee*, 162 Wn. App. 852, 857, 259 P.3d 294 (2011) and *State v. Embry*, 171 Wn. App. 714, 741, 287 P.3d 648 (2012).

In this case it was defendant Kitt who filed a suppression motion somewhat related to the search of the Cadillac de Ville. On appeal it is defendant Gore seeking to appeal the search but he is doing so on a different basis than was argued by Mr. Kitt in the court below. The suppression motion in the trial court focused on the lawfulness of the arrest of Mr. Kitt, not on the lawfulness of the impoundment of the car. *See* CP 11-22, 61-35, and 150-191. Accordingly it can be said that neither defendant preserved the impoundment issue and that this court should properly refuse to review it.

Even if the court elects to consider this issue, the defendant’s argument should be rejected. The Cadillac de Ville was impounded for a search warrant not because it was blocking traffic. The defendants do not address the validity of the search warrant. Nor could they. This court upheld the validity of the search warrant in its unpublished opinion in the direct appeal brought by the owner of the car. *See State v. Jermaine Laron Abdul Gore*, No. 48960-1, Unpublished Opinion filed July 11,

2017. It is worth noting that impoundment of a vehicle for a search warrant is permitted if not encouraged. *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992). “When an officer has probable cause to believe that car contains contraband or evidence of crime, he or she may seize and hold car for time reasonably needed to obtain search warrant and conduct subsequent search, and it makes no constitutional difference whether this is done by placing guard on car at scene or by towing it to police station or an impound yard.” *Id.* See also *State v. Terrovona*, 105 Wn.2d 632, 645, 716 P.2d 295 (1986) and *State v. Flores–Moreno*, 72 Wn. App. 733, 740, 866 P.2d 648, *review denied*, 124 Wn.2d 1009 (1994).

In the case before the court the defendants rely on general impoundment authority, namely that an impoundment inventory must be supported by reasonable cause. Where there is a valid search warrant supported by probable cause that standard will necessarily have been met. But more to the point an impoundment inventory search is itself an exception to the warrant requirement. *State v. Houser*, 95 Wn.2d 143, 147–48, 622 P.2d 1218, 1222 (1980) and *State v. Montague*, 73 Wn.2d 381, 385, 438 P.2d 571 (1968). Here the car was searched via a search warrant that has previously been upheld by this court and has not even been challenged by these defendants. It follows that in this case the search was lawful and this assignment of error should be rejected.

2. THE TRIAL COURT'S RULING ADMITTING GANG EVIDENCE BUT EXCLUDING DRUG EVIDENCE WAS NOT MANIFESTLY UNREASONABLE NOR BASED ON UNTENABLE GROUNDS NOR MADE FOR UNTENABLE REASONS AND WAS THEREFORE CORRECT.

Gang-related evidence is generally challenged via the propensity rule. The propensity rule is a general rule of exclusion with a number of enumerated and case law-supported exceptions. The rule itself specifically provides:

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

ER 404(b).

It has been observed that ER 404(b) is not intended to deprive the state of relevant evidence that may be necessary to establish an element of the crime or crimes charged. *State v. Mee*, 168 Wn. App. 144, 154, 275 P.3d 1192, *review denied*, 175 Wn.2d 1011, 287 P.3d 594 (2012), *quoting State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) and *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). Rather, the rule prevents the state from introducing evidence and argument that the defendant is guilty because he or she may have had a propensity or

proclivity to commit the crime. *Id.* ***State v. McCreven***, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) citing ***State v. Everybodytalksabout***, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). ER 404(b) rulings are reviewed for an abuse of discretion. ***State v. Embry***, 171 Wn. App. 714, 732, 287 P.3d 648 (2012), *review denied*, 177 Wn.2d 1005, 300 P.3d 416 (2013). The standard of review is thus whether the trial court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.* at 731–32.

It is well-established that before gang-related evidence may be admitted, the trial court should apply the following analysis: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the intended purpose for the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) determine whether the probative value outweighs the prejudicial effect. ***State v. Yarbrough***, 151 Wn. App. 66, 82, 210 P.3d 1029 (2009). Such a ruling is reviewed for abuse of discretion. *Id.* at 81. ***State v. Foxhoven***, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). When reviewing a trial court's analysis an appellate court should reverse the ruling only if the trial court abused its discretion. That is only if the appellate court has "a definite and firm conviction that the court below committed a clear error of judgment

in the conclusion it reached.” *United States v. Schlette*, 842 F.2d 1574, 1577 (9th Cir. 1988).

Trial courts have admitted gang-related evidence under the propensity rule for a variety of legitimate purposes. These include as proof of identity, motive, intent, *res gestae*, or that the defendants were acting as accomplices. *State v. McCreven*, 170 Wn. App. at 461 (“As to the *Hidalgos* evidence, however, the trial court did not err. It conducted the required ER 404(b) analysis and properly admitted that evidence to prove [complicity]”). In some cases specific evidence of gang membership such as gang monikers and the specific names of gang sets are referred to directly by witnesses. It has been said of such evidence that there is no requirement that trial courts “edit eyewitness testimony in a way that will sanitize the event being described.” *State v. Filitaula*, 184 Wn. App. 819, 825, 339 P.3d 221 (2014), *review denied*, 184 Wn.2d 1020, 361 P.3d 747 (2015) (Gang-related evidence properly admitted “to show ‘the taunting back and forth’ that preceded the assault and supplied a motive for it.”), *State v. Yarbrough*, 151 Wn. App. 66, 86, 210 P.3d 1029, 1039 (2009) (“[G]ang-related evidence was highly probative to establish the inducing cause for [the defendant] to assault another with a deadly weapon”), *State v. Boot*, 89 Wn. App. 780, 790, 950 P.2d 964 (1998) and *State v. Campbell*, 78 Wn. App. 813, 822–23, 901 P.2d 1050 (1995).

This case is similar to other gang-motivated retaliatory drive-by shooting cases. The trial court was well aware of this and applied reasoning similar to the reasoning applied by this court in the *Embry* case, which was summarized as follows:

The present matter is analogous to *Yarbrough*, as there we held that the trial court properly admitted gang evidence under ER 404(b) to show the defendant's mental state and intent to commit the crime charged. Here the State presented evidence of the defendants' gang affiliation, the victim's affiliation with a different gang, and a previous altercation between members of the victim's and defendants' gangs. As in *Yarbrough*, the trial court here found that the gang evidence was probative in proving the elements of the charged crime. Finding no manifest abuse of discretion such that no reasonable trial court would have ruled as the trial court did, we affirm the trial court's ER 404(b) ruling.

State v. Embry, 171 Wn. App. 714, 736, 287 P.3d 648 (2012).

Material issues in murder cases obviously include mental processes of the participants. Whether a murder case arises from a drug debt gone bad or a violent domestic relationship or anger in the workplace, the reasons for the killing, that is the motive, informs whether there was intent or premeditation or knowledge or recklessness or collaboration in the killing. This case is no different. The animosity between the Knocout Crips and the Hilltop Crip sets in this case is comparable to animosity between other groups that leads to murder. The trial court's rulings on the

ER 404(b) issues were an appropriate exercise of discretion which served to admit that which was probative and minimize what could be deemed unfairly prejudicial. *See* 2 RP 222 et. seq.

Compared to past gang evidences cases, there could hardly be a more analogous case than this one. Also, like prior gang cases, the prejudice component in this case was diminished because all of the participants on both the defendants and targets side were gang members. In its offer of proof the state acknowledged that the targets were Knoccouts and that its two cooperating witnesses were from the same Hilltop set as the defendants. CP 51-60. 2 RP 188. The targets and the two cooperating witnesses thus had the same baggage that the defendants had in terms of the danger of unfair prejudice from gang membership. CP 51-60. 2 RP 182-93.

Contrasted with the diminished prejudice was the high probative value. This shooting did not happen by chance out of the blue. The state's proffer included the fact that the shooting was retaliation for a shooting by the target group at defendant Kitt earlier in the day. 2 RP 182-89. The retaliatory shooting was prompted by a particular Knoccout Crip, LeShaun Alexander, who had fired shots at defendant Kitt earlier in the day. *Id.* The back and forth shootings were motivated by the rivalry between the two street gang sets. *Id.*

The state offered gang-related evidence “to establish motive, intent, plan and to provide the jury with the necessary and relevant res gestae of the crime.” CP51-60. p. 8-9. The trial court reviewed the state’s offer of proof both oral and written, considered the defense memoranda in opposition, and issued an oral ruling. 2 RP 222, et. seq. In its oral ruling the court drew a distinction between gang-related evidence and evidence of drug dealing on the part of defendant Kitt. 2 RP 223-24. It then weighed the probative value versus the danger of unfair prejudice on the record:

It's a very relevant -- I don't think you can sanitize this to say, well, it was just a shooting because one of the defendants -- it was over a girlfriend, I think was suggested, or any of the other suggestions that were made on how you could explain it away. I think it's clearly relevant for purposes of motive, why this happened, and why all of those particular people were in that specific car at the time that the shooting took place.

Is it prejudicial? Sure, it's prejudicial, but prejudicial by itself isn't the basis. It's whether or not it's so unduly prejudicial that that prejudice outweighs any probative value. I think that the converse is true; it's clearly more probative than prejudicial, and I'm going to allow the gang category of evidence as has been presented to me at this point to be admitted.

2 RP 226.

The court however disallowed the drug dealing evidence. 2 RP 224-25. It reasonably concluded that the specific purpose of the

defendants having contacted Rebecca Timpe was not sufficiently probative of the identity issue that it outweighed the prejudice to defendant Kitt. *Id.* In these two aspects of the ruling the court cannot be said to have rubber-stamped admission but instead made a manifestly reasonable decision by applying the correct legal standard.

Defendant Kitt finds fault with the trial court's ruling but does not explain how it constituted an abuse of discretion. Instead he argues that revenge is a universal motive and that therefore the gang-related evidence had low probative value. Revenge may be universal in the sense that most people have desired to exact revenge at some point in their lives. But it is not universal that revenge leads to back and forth retaliatory drive-by shootings. The probative value of the gang-related evidence stems from the unique attributes of gang membership. Whereas an average citizen shooting victim might desire revenge, it is the unique and powerful attributes of gang membership that leads to the actual taking up of arms, traveling to a rival's turf to shoot back at one's unsuspecting rivals.

Defendant Kitt cites a Division Three case as supporting his argument. Kitt Opening brief, p. 21. See *State v. Scott*, 151 Wn. App. 520, 213 P.3d 71 (2009). However *Scott* is readily distinguishable.

In the first place *Scott* did not involve back and forth retaliatory shootings but instead involved a drug debt. There is no indication that the

Scott court found fault with the admission of drug distribution evidence, and for obvious reasons. What was problematic was the gang evidence which was offered to show that the stabbing was additionally motivated by a lack of respect. Pre-trial the prosecution identified three bases on which admission of the evidence. They included that the evidence was admitted to prove that the stabbing was committed (1) “to send a message” to the victim, (2) that it showed “the connection between [the defendant] and his co-defendants”, and (3) that it was admitted “to explain the threats to [the victim] and her refusal to initially identify the assailants.” *Id.* at 527-28. At trial the prosecution did not actually pursue any of these bases for admitting the evidence and this was the error. *Id.*

Had the prosecution admitted the evidence proffered pre-trial there would have been no error. The error stemmed from the prosecution’s failure to follow through. *Id.* at 528. The court’s reasoning is instructive:

While the offer of proof and the arguments of counsel suggested all of these proper reasons for admitting the gang evidence, the actual testimony presented fell far short of proving the connection between gang affiliation and the crime. The only person identified as a gang member was Mr. Scott. The record is utterly silent on whether any of the other actors were also members of the 18th Street gang. Thus, the evidence did not show that joint gang affiliation was a reason for the three men to attack Jeramie together or

to explain why they would care whether [a co-defendant] was not paid for the drugs he delivered to [the victim].

Id.

The evidence admitted in this trial is a far cry from *Scott*. Here, the prosecution introduced at trial exactly what it said it would during the pre-trial motion. The three witnesses identified in the state's pretrial proffer all testified at the trial. 7 RP 1302, et. seq., 12 RP 2326 et. seq. and 13 RP 2385 et. seq. Their testimony was a complete description of the prior precipitating shooting by the Knoccouts, the preparation and planning for the retaliatory shooting by the Hilltops, and the reasons for the retaliatory shooting. *Id.* Furthermore they testified at the trial consistent with the offer of proof.

Trevion Tucker, for example, identified himself as a member of a Hilltop set and identified all three defendants as members or affiliates of the same set, the Hosmer 1-7. 13 RP 2389-96. Mr. Tucker then described having heard, because he was present for it, the precipitating LeShaun Alexander shooting perpetrated by the Knoccouts. He then went on to testify about what he and the defendants did as a result of that prior shooting. 13 RP 2401-18. His testimony included that the two gang sets bore animosity toward each other and that there had been several prior shooting incidents involving the Knoccout Crips as a result of a falling

out. 13 RP 2409-15. In the minutes after the precipitating LeShaun Alexander shooting the three defendant's conferred via telephone and in person and then went in a vehicle armed with guns to the area where the Knoccouts were known to hang out. 13 RP 2415-33. He described their purpose as, "They just keep doing it and keep doing, and we weren't going to let him keep doing it." 13 RP 2433. At the so-called red store, in Knoccout territory, the defendants saw the vehicle involved in the precipitating shooting and fired at the people who were there because it was believed that they were the Knoccouts who had earlier fired the shots at defendant Kitt. 13 RP 2458-69. Mr. Tucker also viewed surveillance video and identified the Knoccout targets in the video before and during the shooting. 13 RP 2479-85.

Lance Milton-Ausley and Rebecca Timpe likewise testified in accordance with the prosecution's offer of proof. 7 RP 1344, et. seq. 12 RP 2345-47, 15 RP 2842-48. Mr. Milton-Ausley in particular described the shooting specifically as a retaliatory shooting motivated by prior shootings in which Hilltop Crips had been targeted by Knoccouts. 7 RP 1344-51. He added that the shooting took place after they had originally planned to "take pictures." This was a curious, gang-specific method of conveying contempt for a rival:

- Q: Can you explain what you're talking about, taking pictures?
- A: We were going to take a picture of somebody else's territory as disrespect.
- Q: And doing what with the pictures?
- A: Post them on Facebook.
- Q: Okay. And would the individuals be in the pictures such as yourself or other Hilltops?
- A: Yes.
- Q: So, in other words, you're invading, so to speak, the other's territory taking a picture, and that's disrespectful?
- A: Yes.

7 RP 1341-42.

The defendant has not found fault with any specific discrepancy between what was proffered and what was introduced at trial. A discrepancy error is what was at issue in *Scott*. Thus *Scott* offers little support for the defendant's gang evidence argument.

The evidence in this case included evidence that the police responded to investigate the earlier shooting committed by LeShaun Alexander. Had the shooting at the red store not been explained as the product of the earlier shooting by the targeted group, the jury would have had an inaccurate, half-complete picture of what happened. This was not a random shooting. It did not happen out of the blue. The shooting in this case happened for reasons having to do with rivalry, disrespect, animosity, and allegiance between two distinct groups of young men. The trial court surely cannot be deemed to have abused its discretion by allowing

evidence of why this shooting happened in addition to the fact that it did happen. On this assignment of error the convictions should be affirmed.

3. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ITS CONFLICT RULING WHERE THERE WAS NO ACTUAL CONFLICT AND WHERE THERE WAS NO SHOWING OF A MATERIAL LIMITATION RESULTING FROM REPRESENTATION OF A FORMER CLIENT.

Defendant Krentkowski assigns error to the trial court's pretrial ruling on his attorney's motion to withdraw due to a conflict involving a former client. "The Sixth Amendment right to counsel includes the right to conflict-free counsel." *State v. Jensen*, 125 Wn. App. 319, 330, 104 P.3d 717 (2005), citing *State v. Davis*, 141 Wn.2d 798, 860, 10 P.3d 977 (2000) and *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103, 67 L. Ed. 2d 220 (1981). However for an alleged conflict to create reversible error there must generally be a showing of actual prejudice. *State v. White*, 80 Wn. App. 406, 411, 907 P.2d 310 (1995). "Thus, 'a defendant asserting a conflict of interest on the part of his or her counsel need show only that a conflict adversely affected the attorney's performance to show a violation of his or her Sixth Amendment right.'" *State v. Jensen*, 125 Wn. App. at 330-31, quoting *State v. Dhaliwal*, 150 Wn.2d 559, 571, 79 P.3d 432 (2003).

The mere theoretical existence of a conflict is not sufficient by itself to require reversible error. “In the Sixth Amendment context, an actual conflict is defined in part as a conflict that adversely affects counsel's performance. *Id.*, citing *Mickens v. Taylor*, 535 U.S. 162, 172, n. 5, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) and *State v. Dhaliwal*, 150 Wn.2d at 571.

The alleged conflict in this case is comparable to the conflict in *White* that did not require reversal. *State v. White*, 80 Wn. App. at 412–13. In *White* an attorney represented two co-defendants early in the proceedings but not at the same time. The attorney withdrew from one of the co-defendant’s case but continued to represent the other through the joint trial. This court observed,

Nor does the record contain any indication that the alleged conflict of interest adversely affected Appointed Counsel's defense of White. White concedes as much in his brief, stating that, but for the ostensible conflict of interest, Appointed Counsel performed satisfactorily.

Nonetheless, White contends we must presume an adverse impact from the RPC 1.7(b) violation. White is confusing standards. A RPC 1.7(b) violation may provide grounds for disqualification on the trial level. . . The RPC, however, does not embody the constitutional standard for effective assistance of counsel on appeal.

Lacking any evidence in the record that Appointed Counsel's appearance for Shim impaired his defense of White, we will not presume prejudice. (citation omitted)

Id.

In this case the same holds true. The trial court reviewed the ethics rules and correctly determined that there was a theoretical possibility of a material conflict but not an actual conflict. 1 RP 31-334. RPC 1.7 states, "A concurrent conflict of interest exists if . . . (1) the representation of one client will be directly adverse to another client. . . ." Because LeShaun Alexander was not a current client of defendant Krentkowski's attorney at the time of trial, there was no concurrent conflict. 1 RP 11-17.

Defendant Krentkowski's attorney also sought to withdraw on the basis of a conflict with a former client. The rule provides, "A concurrent conflict of interest exists if . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." RPC 1.7(a)(2). Under that rule it was necessary that there be a showing of material limitation in the representation of defendant Krentkowski.

The trial court found no such limitation. This finding was consistent with the representations of defendant Krentkowski's attorney during the colloquy. In the first place he intimated that he could continue

to represent the defendant throughout the pretrial proceedings which included the gang evidence motion. 1 RP 25. One would think that if there were in fact any material limitation on the lawyer's representation, the gang evidence issue is where it would make its appearance since the basis of the conflict was simply that both clients were gang members.

In addition the matter on which the attorney previously represented LeShaun Alexander had nothing to do with this case. The prosecution described the other case as follows:

I don't want my silence to mean that I'm agreeing with the things that have been stated that happened in Judge Rumbaugh's courtroom last week, but on point, I believe I need to re-address, factually, so the Court clearly understands Mr. Alexander and Mr. Krentkowski and any potential conflict, which the State believes there is none.

Mr. Alexander and Mr. Tolbert -- another person named Tolbert and LeShaun Alexander and another individual are charged, one of them we've dismissed out, I believe, but two remain charged with a shooting that has nothing to do with this incident. The victim is a person by the name of Atere Norman, and that case has absolutely nothing to do with this case. So compartmentalize, no mention of Krentkowski or any of the defendants in this case or any witnesses in this case, his case stands alone.

1 RP 28.

The defendant identified no area in which he would be limited by having previously represented Mr. Alexander. In fact his averments during the colloquy were to the contrary; he initially sought to represent

both defendants after disclosing nothing more than an appearance of a conflict to both of them:

Now, it occurred to me that Mr. Alexander may be unhappy having a lawyer who is representing one of the people that he's alleged to either have shot at or who came to shoot at him, so I gave advice on that to him that exists. I did not feel it prevented me from representing Mr. Alexander in terms of the legal activity and my personal -- how those facts affected my personal ability to represent Mr. Alexander, but it creates at least an appearance of conflict. I also told Mr. Krentkowski that I represented Mr. Alexander for the same reasons. I understood Mr. Krentkowski to be aware of that representation.

1 RP 5.

Thereafter during the rest of the colloquy and later during other trial proceedings no material limitation was brought to the court's attention. In fact, six days after the conflict motion, the defendant expressed confidence in his attorney's performance by affirmatively requesting that the attorney continue with his representation. 3 RP 534, 544. One would have thought that if there had been a material limitation by the attorney's representation of former client LeShaun Alexander, it would have been apparent six days into the trial. No limitation was identified and therefore it can be said with confidence that there was no concurrent conflict and no prejudice on which to claim ineffective assistance based on nothing more than the appearance of a conflict. As to

this assignment of error defendant Krentkowski's conviction should be affirmed.

4. SUFFICIENT EVIDENCE WAS INTRODUCED TO PROVE THE INTENT ELEMENT FOR THE FIRST DEGREE ASSAULTS WHERE THE DEFENDANTS FIRED MULTIPLE SHOTS FROM TWO HANDGUNS AT A LARGE GROUP OF PEOPLE, AND WHERE TWO PEOPLE SHOT AT WERE HIT BY BULLETS AND ONE WAS KILLED.

Defendant Kitt challenges sufficiency of the evidence as to intent to inflict great bodily harm for the four first degree assault charges. Error has not been assigned to the instructions related to those charges. The instructions include a transferred intent instruction. The evidence established that the shooting was a retaliatory drive-by shooting in which rival gang members were the intended targets, that multiple shots were fired from two handguns from a moving vehicle on flat trajectories at the rival gang member targets, and that a group of five uninvolved, unaffiliated bystanders were caught in the crossfire. Two of the bystanders were hit and one was killed. There is more than sufficient evidence to sustain the assault charges.

As to sufficiency of the evidence, the standard is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt.” *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Furthermore, “[a]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* at 8.

In an insufficiency claim, the defendant “admits the truth of the State's evidence” and all reasonable inferences that can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The court defers “to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970, abrogated in part on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Only when no rational trier of fact could have found that the state proved all of the elements of the crime beyond a reasonable doubt can a claim of insufficiency be sustained. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

Defendant Kitt was identified as one of the two shooters. He was firing shots through a car door at the rival gang members who were suspected of shooting at him on the Hilltop at 15th and M Streets just a

couple of hours before. On these facts alone the jury could draw the reasonable inference that Mr. Kitt's animosity toward the Knoccouts was such that he intended to inflict great bodily harm, if not kill the gang rivals who nearly did the same to him. *See State v. Woo Won Choi*, 55 Wn. App. 895, 906-07, 781 P.2d 505 (1989) (“[T]he testimony of [the victim] that the [defendant] shot at him without provocation through an open window, and the physical evidence which revealed a shot at close range that would have hit [the victim’s] head if he had not ducked. From that evidence, the trier of fact could have found intent to kill beyond a reasonable doubt.”).

The defendant's argument to the contrary is resolved by transferred intent. The intent definition advised, “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 294-375, Instruction 25. The act of pointing a gun and pulling the trigger is without a doubt an intentional act under this definition. Since the defendant acknowledges that he was firing in the direction of the bystanders it follows that the jury could have determined that the defendant intended to accomplish the precise result that he did in fact accomplish, namely hitting people with bullets that were in his line of fire. There was nothing preventing the defendant from seeing the people actually hit and in danger of being hit because they were

openly standing between his moving vehicle and his ultimate targets at the red store.

Even if the defendant or his accomplices were somehow unaware of the bystander's presence despite the fact that they were not concealed, transferred intent applied. Transferred intent has been described as applying in circumstances such as these:

Where a defendant intends to shoot into and to hit someone occupying a house, a tavern, or a car, she or he certainly bears the risk of multiple convictions when several victims are present, regardless of whether the defendant knows of their presence. And, because the intent is the same, criminal culpability should be the same where a number of persons are present but physically unharmed.

State v. Elmi, 166 Wn.2d 209, 218, 207 P.3d 439 (2009), *State v. Wilson*, 125 Wn.2d 212, 219, 883 P.2d 320 (1994) (“Transferred intent is only required when a criminal statute matches specific intent with a specific victim. RCW 9A.36.011 does not include such a rigid requirement.”)

To prove intent the state presented testimony from a number of eyewitnesses and two cooperating accomplices. The eyewitnesses included two young men, Anthony Stone and Dylan Browning, who were part of a group of five friends who had walked to the red store and were headed home and walking toward the alley where the defendants were driving and from which they opened fire. 6 RP 1146. 7 RP 1173-75, 1186-87, 1227, 1245-47, 1249, 1253. Brandon Morris the victim of the

murder was also in their group and was shot in the head. Mr. Browning was very nearly killed but his backpack stopped the bullet that might well have ended his life. 7 RP 1187.

Other eyewitnesses were not in the direct line of fire but saw the shooting. They included a resident who was loading her children in her car and who used her body to shield them from bullets [15 RP 2802-10.], two workers from a nearby dental office, Maria Baker and Kyla Moss, who saw the shooting from further down the alley [10 RP 1903-07.] and an acquaintance of the defendants who had walked to the red store to withdraw money and who saw them drive toward the store and heard them open fire [12 RP 2326 and 15 RP 2820].

The state's evidence also included two witnesses who were in the Cadillac at the time defendants Kitt and Gore opened fire. As to Mr. Kitt, the testimony included that he opened the back door because the window wouldn't go down. 13 RP 2462-63. The witness Trevion Tucker indicated that he saw a large group of Knoccouts, including LeShaun Alexander and Amancio Tolbert, who were thought to have perpetrated the shooting at Mr. Kitt on the Hilltop at 15th and M earlier in the day. *Id.* at 2464-65. None of them appeared to be armed. *Id.* Then after they entered the alley Mr. Tucker testified that defendant Gore opened fire through the front passenger window and defendant Kitt through the back

passenger door. Thus the evidence established that the defendants were shooting at known, intended targets from a moving vehicle using handguns.

The evidence also included extensive forensic testimony and ballistic evidence. That evidence included photographs of bullet strikes both in the vicinity of the bystanders and behind them at the store where the Knoccout targets were congregated. 6 RP 1051-55. The photographs were supplemented by numerous recovered bullets, bullet fragments and cartridge cases. The bullet strikes in particular proved that multiple shots were fired on a flat trajectory from the moving Cadillac SUV in the direction of the intended targets and the bystander assault victims. *See* 6 RP 1109.

Instruction No. 26 provided the jury with the law of transferred intent. “If a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person.” CP 294-375, Instruction 26. There can be no doubt that the defendant’s and his accomplice’s acts were intended to cause harm. If their intent was not to harm the bystanders then their intent was to harm the Knoccouts behind them. In either case as to intent the jury instructions “deemed [the defendant’s] to have acted with intent to assault” the bystanders. *Id.*

The defendant argues that the ability or inability to hit what is aimed at negates intent. A handgun, whether it be a nine millimeter or a .40 caliber is a lethal weapon. A first degree assault is committed when a defendant or an accomplice [a]ssaults another with a firearm” or “by any force or means likely to produce great bodily harm or death. . . .” RCW 9A.36.011(a). There could be no stronger proof of the capacity of the two handguns that were actually fired in this case to produce great bodily harm or death than that one of them did in fact cause the death of Brandon Morris. 11 RP 1956-61. The bullet that caused the death of Mr. Morris passed through his head and therefore not only created a probability of death but actually caused a death. *Id.* There can be little serious argument that any of the other bullets intentionally sent down range by the defendant and his accomplices did not have the same capacity.

The intent behind the aiming of the gun and the pulling of the trigger that caused the bullet to strike Brandon Morris in the head and Dylan Browning in the backpack is self-evident. There was little or no evidence as to the marksmanship capabilities of the two gunmen. There is also no evidence that they were firing up in the air so as to make sure that no one would be hit by their bullets. Multiple shots were fired on flat trajectories in the direction of human beings. The passage of a bullet through a human body cannot help but create a probability of death. A

gunshot wound to the head as in Mr. Morris' case is an obvious example but there are many other vital organs and major blood vessels, the disruption of which can readily cause death. Had any of the bullets fired on a flat trajectory hit anyone else, the impact of the bullet would have been just as fatal as it was in Mr. Morris' case.

Even a trained marksman (and there is no evidence that the defendants fit that description) would have no reasonable argument against intent to inflict great bodily harm. There may be marksmen who could fire a bullet near or in the vicinity of another person with assurance that the other person would not be hit. But from a moving vehicle, no degree of marksmanship could assure the path of the bullet would not be fatal. No matter how good they might have been with a gun, the gunmen in this case fired their guns at people without any assurance that the people would not be hit. It can be said therefor that they intentionally created "a probability of death" as to anyone in their line of fire. CP 294-375, Instruction 36. RCW 9A.04.110(4)(c). It is due to no effort of the defendants that only one person lost his life.

The claim that the defendants could not be guilty of the first degree assaults in this case is belied by the overwhelming evidence and the instructions. As to this assignment of error the defendant's convictions should be affirmed.

5. JURY UNANIMITY WAS ASSURED BY A CONTINUING COURSE OF CONDUCT AND BY THE DEFENDANT POSSESSING TWO FIREARMS AT THE SAME TIME AND HAVING FIRED SHOTS FROM ONE OF THE GUNS.

Conviction by a unanimous jury includes a requirement that a unanimous jury find that the act constituting the crime charged in the charging document was committed by the person charged. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Where a single criminal offense is based on evidence of multiple separate and distinct acts, any one of which could form the basis of the count charged, the court must either instruct the jury to agree unanimously on a specific act, or the prosecutor must elect which act the state relies on for the conviction. *Id.* at 572.

There is a distinction between multiple act cases and cases involving continuing conduct. *State v. Crane*, 116 Wn.2d 315, 325-30, 804 P.2d 10 (1991). Not all crimes are committed by a single exertion. A continuing course of conduct may form the basis of a single charge and requires neither a unanimity instruction nor an election by the state. *Id.* at 326. In such cases jury unanimity is assured when the jury unanimously agrees that the defendant engaged in the course of conduct constituting the crime. *Id.*

A continuing course of conduct reflects the reality that not all crimes are susceptible of being committed by a single muscle exertion. “A continuing course of conduct requires an ongoing enterprise with a single objective. . . . Common sense must be utilized to determine whether multiple acts constitute a continuing course of conduct.” *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996), citing *State v. Gooden*, 51 Wn. App. 615, 619–20, 754 P.2d 1000, review denied, 111 Wn.2d 1012 (1988) and *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

Because many distinct items can be possessed at the same time, possessory offenses committed during a short period of time are considered a continuing course of conduct. *State v. Love*, 80 Wn. App. at 362. In *Love*, the criminal acts at issue were acts of possession of separate and distinct quantities of crack cocaine in separate locations. While it may be said that the defendant had engaged in multiple acts, all of the acts “reflect his single objective to make money by trafficking cocaine; thus, both instances of possession constituted a continuous course of conduct.” *Id.*

Possessory offenses are not the only offenses involving continuing conduct. In the *Crane* case the continuing conduct consisted of multiple assaults resulting in the death of a three year old child during a two hour

period of time. *State v. Crane*, 116 Wn.2d 315, 325-30. Each assaultive act contributed to the death and was a continuing course of conduct.

Consistent with *Crane*, this Court viewed a series of threatening communications not as individual instances of harassment but of a continuing course of harassment. *State v. Locke*, 175 Wn. App. 779, 803, 307 P.3d 771 (2013). “Furthermore, all three communications served the same objective of communicating, at the very least, [the defendant’s] desire that the Governor or her family be harmed or killed. Accordingly, the facts here demonstrate a continuous course of conduct, and no multiple acts unanimity instruction was required.” *Id.*

In this case defendant Gore was charged with a single count of firearm possession on a single occasion. For that charge the statute provided that, “A person . . . is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state or elsewhere of any serious offense as defined in this chapter.” RCW 9.41.040(1)(a). The state’s direct evidence included testimony from two accomplices, both of whom testified that the defendant used a handgun that he got from defendant Kitt to fire shots out the front passenger window of the Cadillac. He also had an assault rifle with him in the truck. Both of these weapons were firearms and thus it

can be said that the defendant had “in his or her possession” or had “in his control any firearm.” RCW 9.41.040(1)(a). Jury unanimity was assured because the defendant’s purpose was to go armed into Knoccout territory and fire shots from a gun at his gang member rivals. The possession here is little different from the possession of the cocaine in *Love*, except that here the guns were possessed at the same time and location.

The defendant cites no authority contradictory of *Love*. Nor could he. “A unanimity instruction is not required merely because a jury could find from the evidence that the defendant committed the charged offense by more than one of several alternative means. If each juror finds that the defendant committed the crime by any one of such means, each juror finds that the defendant committed the crime, and the jury verdict is unanimous.” *State v. Simonson*, 91 Wn. App. 874, 884, 960 P.2d 955 (1998). Because the defendant’s possession of the two guns “served the same objective” the possession was properly viewed as a continuing course of conduct. *State v. Locke*, 175 Wn. App. at 803. The defendant’s conviction for the single count of firearm possession should be affirmed.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE POST TRIAL MOTION FOR A NEW TRIAL, WHERE NEITHER MISCONDUCT NOR PREJUDICE WAS ESTABLISHED BY THE SEATING OF A FULLY ELIGIBLE JUROR.

Defendant Kitt argues that the trial court erred in not granting a motion for a new trial based on alleged juror misconduct. The court rule that applies to post-verdict motions for a new trial provides:

The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected. . .

(2) Misconduct of the prosecution or jury;

* * * *

(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial. . . .

CrR 7.5(a)

New trial motions based on jury irregularities are entrusted to the sound discretion of the trial court. *State v. Reynoldson*, 168 Wn. App. 543, 547, 277 P.3d 700 (2012) (“We review the trial court's grant of a motion for a new trial to determine whether the trial court granted the motion on untenable grounds or for untenable reasons.”). “In a criminal proceeding, a new trial is necessary only when the “defendant has been so prejudiced that nothing short of a new trial can [e]nsure that the defendant

will be treated fairly.” *Id.*, quoting *State v. Chanthabouly*, 164 Wn. App. 104, 140, 262 P.3d 144 (2011), *review denied*, 173 Wn.2d 1018, 272 P.3d 247 (2012), *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 713 (2000) and *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

On this issue the defense has the burden of showing both that misconduct occurred and that it prejudiced the defendant. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). “The party alleging juror misconduct has the burden to show that misconduct occurred. . . We grant a new trial only where juror misconduct has prejudiced the defendant. *Id.* citing *State v. Hawkins*, 72 Wn.2d 565, 566, 434 P.2d 584 (1967), *State v. Boling*, 131 Wn. App. 329, 332, 127 P.3d 740, *review denied*, 158 Wn.2d 1011, 145 P.3d 1214 (2006) and *State v. Briggs*, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989).

In this case the defendant has established neither misconduct nor prejudice. The defendant’s argument hinges on an inaccurate claim that an ineligible juror deliberated. Random selection of eligible jurors is a duty entrusted to the “judges of the superior court to ensure continued random selection of the master jury list and jury panels, which shall be done without regard to whether a person's name originally appeared on the list of registered voters, or on the list of licensed drivers and identicard holders, or both.” RCW 2.36.065. No particular means for accomplishing

this task is required because the statute also says, “Nothing in this chapter shall be construed as requiring uniform equipment or method throughout the state, so long as fair and random selection of the master jury list and jury panels is achieved.” *Id.*

As to the eligibility to serve, that too is the subject of statutory criteria. RCW 2.36.070 provides:

A person shall be competent to serve as a juror in the State of Washington unless that person:

- (1) Is less than eighteen years of age;
 - (2) Is not a citizen of the United States;
 - (3) Is not a resident of the county in which he or she has been summoned to serve;
 - (4) Is not able to communicate in the English language;
- or
- (5) Has been convicted of a felony and has not had his or her rights restored.

In this case, there has not been a showing of either misconduct or prejudice. There can be no doubt that the juror at issue was qualified and competent to serve under RCW 2.36.070 and there is no claim to the contrary. Instead the claim is that the means by which he came to be part of the panel was improper. That argument is unavailing however where there is no mandatory requirement of a “uniform equipment or method” that leads to the compiling of random jury panels. If the defendant’s argument were deemed valid, the permissive, discretionary statutory

structure of the “random selection of the master jury list and jury panels” would be eliminated. No case holds this to be the case.

The juror at issue in this case had the same name as his son. Sentencing RP 14, *et.seq.* The jury summons that he responded to did not distinguish between the juror or his son. Sentencing RP 32. It commanded appearance by an individual bearing the jurors name who lived at the juror’s address. *Id.* Thus the juror did nothing improper when he complied with the summons.

It can be inferred from the record that the electronic system used to generate summonses may have included two people with the same first and last names. One of the two was not competent and eligible because he was not a Pierce County resident. The other was and that prospective juror is the one who appeared, endured *voir dire*, and was seated after full examination of his qualifications by the parties. Under these circumstances, it can be said that if the non-resident one had been the one who responded to the summons, the defendant might have an argument for prejudice. As it is his argument is not well taken.

The trial court did not abuse its discretion nor fail to carry out its duty of assuring a random jury panel. It ruled on the issue here much as other courts have ruled on other jury panel issues. In such cases, it has been said that:

Having determined that a fair and impartial jury was secured in *State v. Phillips*, 65 Wash. 324, 327, 118 P. 43, 45, we held that ‘* * * ‘if the prisoner has been tried by an impartial jury, it would be nonsense to grant a new trial or a Venire de novo * * * in order that he might be again tried by another impartial jury.’ . . .

It is therefore clear that where there is substantial compliance with the statute, as there was in the case before us, and the jury selected is fair and impartial, a defendant's right to a fair trial is protected.

State v. Finlayson, 69 Wn.2d 155, 157, 417 P.2d 624 (1966). *See also State v. Aleck*, 10 Wn. App. 796, 799–800, 520 P.2d 645 (1974) (“It is therefore clear that where there is substantial compliance with the statute, as there was in the case before us, and the jury selected is fair and impartial, a defendant's right to a fair trial is protected.”).

7. SENTENCING OF DEFENDANTS GORE AND KRENTKOWSKI SHOULD BE CONDUCTED CONSISTENT WITH THE REQUIREMENTS OF A *MILLER* HEARING.

Defendants Gore and Krentkowski challenge their sentences on the ground that the trial court insufficiently considered youth before imposing sentence. In defendant Gore’s case the trial court was asked to impose an exceptional sentence below the range but called no witnesses and introduced no evidence to support his request. He relied instead on the extensive trial record as providing the evidentiary basis for his requested

ruling. The trial court sentenced Mr. Gore to 984 months (eighty-two years) in prison.

Defendant Krentkowski likewise requested an exceptional sentence below the range. In his case the trial court concurred. The exceptional sentence was stipulated to by both the state and the defense because Mr. Krentkowski was shown not to have fired any shots during the incident. Both the defense and prosecutor requested that Mr. Krentkowski be sentenced to zero months for the standard range but that he should receive five years for each of the firearm sentence enhancements to run consecutive to each other. The trial court adopted the recommendation in its entirety and sentenced Mr. Krentkowski to a total of 300 months (twenty-five years).

- a. New rules for the conduct of sentencing hearings for youthful offenders apply to the sentencing proceedings of defendants Gore and Krentkowski and require remand for re-sentencing.

New rules for the conduct of criminal prosecutions apply “retroactively” to cases then pending on appeal even though the trial court could not have applied the new rules because they did not exist at the time of the trial court proceedings. *State v. Wences*, 189 Wn.2d 675, 681–82, 406 P.3d 267, 270 (2017), *State v. Harris*, 154 Wn. App. 87, 92, 224 P.3d

830, 832 (2010) and *State v. McCormick*, 152 Wn. App. 536, 539, 216 P.3d 475, 476 (2009). “[F]inal’ for the purposes of retroactivity analysis ... ‘mean[s] a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.’” *State v. Wences*, 189 Wn.2d at 682.

In early 2017, four months after the sentencings in this case, the Supreme Court issued two decisions under the Eighth Amendment that impact sentencing of offenders who were less than eighteen years of age at the time they committed their offenses. The first of those decisions was *Ramos*. “As a juvenile homicide offender facing a de facto life-without-parole sentence, [the defendant] was entitled to a *Miller* hearing, just as a juvenile homicide offender facing a literal life-without-parole sentence would be.” *State v. Ramos*, 187 Wn.2d 420, 429, 387 P.3d 650 (2017). The length of the sentence at issue in *Ramos* was 85 years, three years more than the sentence imposed on defendant Gore and 60 years more than defendant Krentkowski’s sentence. After *Ramos* there is little room for argument that defendant Gore was entitled to a *Miller* hearing. Less clear is what the minimum requirements for a *Miller* hearing are.

The re-sentencing hearing in *Ramos* satisfied the requirements of a *Miller* hearing. *State v. Ramos*, 187 Wn.2d at 453. “*Ramos* has not

shown that his second resentencing violated *Miller's* minimal requirements.” This meant that the re-sentencing hearing satisfied the criteria for a valid *Miller* hearing, which included the following:

The required *Miller* hearing is not an ordinary sentencing proceeding. *Miller* “establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered.” *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572 (2014). Therefore, a court conducting a *Miller* hearing must do far more than simply recite the differences between juveniles and adults and make conclusory statements that the offender has not shown an exceptional downward sentence is justified.

The court must receive and consider relevant mitigation evidence bearing on the circumstances of the offense and the culpability of the offender, including both expert and lay testimony as appropriate. The court and counsel have an affirmative duty to ensure that proper consideration is given to the juvenile's “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller*, 132 S.Ct. at 2468. It is also necessary to consider the juvenile's “family and home environment” and “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.” *Id.* And where appropriate, the court should account for “incompetencies associated with youth” that may have had an impact on the proceedings, such as the juvenile's “inability to deal with

police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.”

Id.

State v. Ramos, 187 Wn.2d at 443–44.

As to defendant Gore, the record does not support an argument that he received an adequate *Miller* hearing. No witnesses were called and no evidence was offered in support of his request for an exceptional sentence. The record does not indicate whether a mental capacity evaluation was obtained by the defense but it does indicate that no such evaluation or expert testimony was offered in support of the exceptional sentence request. In short the record in this case bears too much similarity to what the Supreme Court warned against, namely that a *Miller* hearing must include “far more than simply recite the differences between juveniles and adults. . . .” *Id.* As to defendant Gore, this court should remand his case to the trial court for a re-sentencing hearing that complies with the requirements of a *Miller* hearing.

Defendant Krentkowski requires a different analysis. ***Ramos*** involved a plea agreement. *Id.* at 455. “The plea agreement in this case was that the State would recommend [the defendant] serve the minimum standard range sentence of four consecutive 20-year terms.” Thus it is likely that absent an express knowing and voluntary waiver of a

defendant's Eighth Amendment right to a *Miller* hearing, a plea agreement by itself does not do away with the need for a *Miller* hearing. *Id.* at 444.

In defendant Krentkowski's case there was no plea agreement but there was a stipulation. The stipulation is comparable to a plea agreement except that there appears to be no consideration given for the prosecution's recommendation of exceptional leniency. The explicit terms of the oral stipulation included that that the defendant receive no prison time for the standard range part of his sentence and that therefore he would only receive 60 months for each of the five firearm sentence enhancements. Since *Ramos* was still four months in the future neither the prosecution nor the defense discussed the need for a *Miller* hearing. The record thus does not support any argument based on waiver.

In addition to there being no discussion of the need for a *Miller* hearing, there are additional reasons that defendant Krentkowski should also be remanded for resentencing. Five months after the sentencing hearing in this case the Supreme Court handed down its decision in *Houston-Sconiers. State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). The decision clarified the trial court's sentencing discretion, including in cases where the defendant's sentence rests primarily on firearm sentence enhancements. "We hold that in sentencing juveniles in the adult criminal justice system, a trial court must be vested with full

discretion to depart from the sentencing guidelines and any otherwise mandatory sentence enhancements, and to take the particular circumstances surrounding a defendant's youth into account.” *Id.* at 34.

The sentencings in *Houston-Sconiers* had a particular feature in common with the Krentkowski sentencing in this case. The trial court in *Houston-Sconiers* mistakenly believed that it did not have discretion when it came to the imposition of firearm sentence enhancements. *Id.* at 20-21. The trial court in this case labored under the same misconception and said to Mr. Krentkowski, “[Y]ou understand that the firearm enhancement, the Court has no discretion . . . They are mandatory and they must be run consecutively to each other.” Sentencing RP 139. Thus the Supreme Court’s holding applies particularly to Mr. Krentkowski’s sentencing:

In accordance with Miller, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles,⁵ they are overruled. Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.

Id. at 21.

In light of *Houston-Sconiers* there is little room for argument against resentencing in Mr. Krentkowski's case any more than in Mr. Gore's. Both defendants should be accorded a *Miller* hearing-compliant re-sentencing.

- b. The trial court had jurisdiction in this case pursuant to a lawfully enacted and constitutional decline statute.

Defendant Krentkowski leveled an additional constitutional challenge concerning his sentencing, namely that the juvenile justice jurisdiction statute contravenes Due Process. This challenge is not well taken. Washington's constitution grants the superior courts original jurisdiction "in all criminal cases amounting to a felony ... " Washington Constitution Art. 4, §6. The legislature may promulgate procedures directing which "sessions" of the superior court will hear certain types of cases. Washington Constitution Art. 4, §5. The juvenile court is one such session of the superior court created by the legislature to preside over juvenile cases in the Juvenile Court Law of 1913. See Washington Law 1913, Ch. 160, § 2. *State v. Salavea*, 151 Wn.2d 133, 140, 86 P.3d 125, 128 (2004) ("[W]e recognize the juvenile court is only a division of the superior court given statutory authority to adjudicate 'a phase of the business of the superior court.'" [Note 2].), citing *State v. Werner*, 129 Wn.2d 485, 918 P.2d 916 (1996), and quoting *Dillenburg v. Maxwell*, 70

Wn.2d 331, 352, 413 P.2d 940, 422 P.2d 783 (1967). *State v. Posey*, 174 Wn.2d 131, 136-137, 272 P.3d 840 (2012).

After the adoption of the Juvenile Court Law and until 1994 the session of the superior court designated to hear juvenile cases had original jurisdiction over most felony criminal offenses committed by juveniles except where a decline hearing was held. *See* RCW 13.04.030(e)(1). In 1994 as part of a comprehensive violence reduction enactment certain very serious violent crimes committed by teenagers who were sixteen or seventeen years old on the date the alleged offense was committed were exempted from the need for a decline hearing. RCW 13.04.030(e)(v). Such offenses have become known as auto-decline offenses. Also exempted are teenagers who have “been previously transferred to adult court. . . .” RCW 13.40.020(15). Both of these provisions have withstood Due Process challenges. *In re Boot*, 130 Wn.2d 553, 925 P.2d 964 (1996), *State v. Manro*, 125 Wn. App. 165, 175-76, 104 P.3d 708 (2005), and *State v. Sharon*, 100 Wn.2d 230, 668 P.2d 584 (1983).

The defendant nevertheless argues that the creation of auto decline offenses represents a violation of Due Process. Legislative enactments are presumed constitutional. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013). The party challenging the constitutionality of a statute has a heavy burden to prove the statute is unconstitutional beyond a

reasonable doubt. *State v. Leatherman*, 100 Wn. App. 318, 321, 997 P.2d 929 (2000). In addition the constitutionality of a statute is reviewed *de novo*. If possible statutes are construed to preserve constitutionality. *State v. Jorgenson*, 179 Wn.2d at 150.

The defendants argue that *Boot* has been undermined by the United States Supreme Court's Eighth Amendment juvenile justice decisions. *See Roper v. Simmons*, 543 U.S. 551, 554, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, _ U.S. _, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). This argument is not well taken.

Roper, *Graham*, and *Miller* were all decided under the Eighth Amendment's cruel and unusual punishments clause. They neither discuss nor rely on procedural or substantive due process. They provide no support for the proposition that the auto decline provisions of the juvenile court jurisdiction statute does not withstand due process scrutiny. These cases were decided under the Eighth Amendment's cruel and unusual punishments clause, not Due Process.

Due Process provides procedural protection. The Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 3 of the Washington Constitution all provide that no person may

be deprived of life, liberty, or property without due process of law. Due Process confers both substantive and procedural protections. *State v. Beaver*, 184 Wn.2d 321, 332, 358 P.3d 385, 391 (2015), citing *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006). Substantive Due Process protects against wrongful or arbitrary government conduct, notwithstanding the fairness of the implementing procedures. *Id.*, citing *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). Procedural Due Process requires elements of fundamental fairness such as notice and an opportunity to respond to government action. *Id.*, citing *United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

By contrast the cruel and unusual punishments clause protects against excessive or disproportionate punishment. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). “As the Court explained in [*Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)], the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’” *Id.* 543 U.S. at 560, quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910).

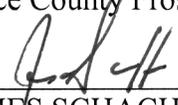
The most direct response to the defendant's due process argument is that the juvenile punishment at issue in *Miller* and the other eight amendment cases could not be made constitutional by modification of process. Due process concerns the procedural prerequisites. Cruel and unusual punishment concerns the mode and quantity of punishment. There is no validity in the defendant's attempt to graft one upon the other. This assignment of error should be rejected.

D. CONCLUSION.

For the foregoing reasons the defendant's convictions should be affirmed. However as to defendants Gore and Krentkowski, both should be remanded for sentencing hearings compliant with *Miller*. Defendant Kitt's sentence should be affirmed.

DATED: Friday, May 25, 2018

MARK LINDQUIST
Pierce County Prosecuting Attorney



JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

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PIERCE COUNTY PROSECUTING ATTORNEY

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