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NO. 49933-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent/Cross Appellant,

vs.

ALEX QUINTANA,

Appellant/Cross Respondent.

BRIEF OF RESPONDENT

THOMAS A. LADOUCEUR
W.S.B.A #19963
Chief Criminal Deputy Prosecutor
for Respondent

Hall of Justice
312 SW First
Kelso, WA 98626
(360) 577-3080

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I. RESPONSE TO ASSIGNMENT OF ERROR

1. Defense counsel was not ineffective in (a) failing to move for a mistrial or seek a curative instruction based upon comments during jury selection; (b) failing to object to testimony regarding gangs; and (c) failing to propose a limiting instruction with respect to evidence of gang affiliation.

2. There was sufficient evidence to convict defendant on all counts.

3. The trial court did not err in denying defendant's motion to dismiss based upon insufficiency of evidence.

4. The trial court did violate the appearance of fairness doctrine.

5. State is not seeking requests for appellate costs.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1.(a) Was Defense counsel ineffective in failing to move for a mistrial or seek a curative instruction based upon several jurors' comments during jury selection?

(b) Was Defense counsel ineffective in failing to object to testimony regarding gangs?

(c) Was Defense counsel ineffective in failing to propose a limiting instruction with respect to testimony regarding gangs?

2. Was there sufficient evidence to convict defendant on all counts?

3. Did the trial court err in denying defendant's motion to dismiss based upon insufficiency of evidence?

4. Did the trial court violate the appearance of fairness doctrine?

5. Should the state be awarded appellate costs if it prevails?

III. STATEMENT OF THE CASE

The state supplements appellant's "trial testimony" as follows. In August of 2016 Erica Osorio-Heaton lived with her boyfriend Christopher Jones, at 3301 Ocean Beach Hwy. Defendant called her on the morning of August 23, saying something like, "see you later, sweetheart, or something like that." She had known the defendant about two years. RP (A) 144, 146, 147.[1] Ms. Osorio-Heaton was certain the person who called her the morning

[1] RP (A) indicates the verbatim report of proceedings, volume A, pages 1-186, from December 7, 2016. RP (B) indicates the verbatim report of proceedings, volume B, pages 187-253, from December 7, 2016. RP indicates the verbatim report of proceedings from December 8, 2016. RP (C) indicates the verbatim report of proceedings, volume C, pages 1-196, from December 9, 2016. RP (D) indicates the verbatim report of proceedings, volume D, pages 197-278, from December 9, 2016.

of August 23, 2016 was the defendant. RP(A) 157. She did not take the message as being friendly, because they were not friends. RP (A) 161.

Later that day she and Jones got in his car which was parked in the driveway of their house. RP (A) 144, 148, 154. They were about to leave when she heard someone shout "showoo," and when she looked she saw a gun coming out of the window of a vehicle. She recognized the vehicle as belonging to William Johnson, who used to hang out with Jones. She recognized the defendant's voice as the person who shouted the "showoo" call. She had heard that particular shout from defendant. RP (A) 148, 149, 164. She saw the defendant in the back seat behind the driver with a gun in his hand. He was wearing a black T-shirt. RP (A) 154. She heard three shots. RP (A) 151. She was scared that a bullet could have hit her or her son who was outside just before the shots were fired. She "put her entire body inside the car and ducked down." RP(A) 153, 154. She immediately called 911, saying that her home had gotten shot at. RP (A) 156.

Christopher Jones testified that a big part of the Nortenos is loyalty, and that if one person doesn't like somebody else the whole group doesn't like that person. RP (B) 220.

The 911 call was played for the jury. In addition to the 911 call excerpts included in appellant's brief, Osorio-Heaton also stated "the person who shot was Alex Quintana," and "I saw him in the vehicle." RP 14, 15.

Appellant asserts, in his statement of facts that on cross examination, "Ms. Osorio-Heaton *was equivocal* regarding the identity of the person who yelled showoo." (Appellant's brief, page 12) Although that may be appellant's interpretation of her testimony, whether she was equivocal or not was for the jury to determine. When asked on cross examination "is Alex Quintana the person you saw in this car," she answered, "yes." RP (A) 169.

Longview police detective Michael Maini testified that Ocean Beach Highway was situated higher than the house at 3301 Ocean Beach Hwy. RP 27, 28.

Defendant testified that on August 23, 2016, while driving down Ocean Beach with William Johnson in his gold Mercedes, someone in the back seat shouted "showoo" and he heard gunfire. RP (C) 171-174. Explaining what the shout meant, he stated "it's like to represent where we're from," and was "to alert people that we are right there and what we stand for." RP (C) 173, 174. After the shooting they drove to "our home girl's house," and walked into the garage RP (C) 177, 178. He saw two people take off running through the backyard and through a little field.

Then, William ran up to defendant and said there were cops so they took off running because they were scared and don't like cops. RP (C) 179. He and William caught up with the other two while they were going down trails still trying to get away. He heard the police sirens at this point in time. RP (C) 180. He testified that Jones was still his friend even though "he's not affiliated with us." RP (C) 175. Regarding clothing, defendant's attorney asked "how many of you and your associates in this gang wear Converse shoes?" Defendant replied "all of us." RP (C) 182.

IV. ARGUMENTS

1.a. DEFENDANT'S ATTORNEY WAS NOT INEFFECTIVE FOR NOT MOVING FOR A MISTRIAL OR SEEKING A CURATIVE INSTRUCTION BASED UPON COMMENTS MADE DURING JURY SELECTION.

LEGAL PRINCIPLES

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-

36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Defendant asserts that his attorney was ineffective for failing to seek a mistrial or curative instruction when two members of the jury pool made negative comments during jury selection. Relying solely upon *Mach v. Stewart,* 137 F.3d 630 (9th Cir.1997) he argues the entire jury pool was irreparably tainted from these comments.

In Mach, the Ninth Circuit held that a prospective juror who was a social worker had tainted the entire jury venire with her responses to questions from counsel and the court. 137 F.3d at 631–33. The defendant was charged with sexual misconduct with a minor and, in response to questions, the prospective juror stated that she "would have a difficult time being impartial given her line of work, and that sexual assault had been confirmed in every case in which one of her clients reported such an assault." *Mach,* 137 F.3d at 632. Addressing further questions from the court, the prospective juror confirmed this opinion three additional times and also stated that she had taken courses in psychology and had worked "extensively" with psychologists and psychiatrists on these issues. *Mach,* 137 F.3d at 632. The Ninth Circuit relied in particular on the fact that the

prospective juror (a) ... had a certain amount of expertise in this area (she had taken child psychology courses and worked with psychologists and psychiatrists; she worked with children as a social worker for the state for at least three years); and (b) [made] four separate statements that she had *never* been involved in a case in which a child accused an adult of sexual abuse where that child's statements had not been borne out. *Mach,* 137 F.3d at 632–33. Relying on these considerations, the Ninth Circuit concluded that "[a]t a minimum," when the defendant moved twice for a mistrial, the trial court should have at least conducted further voir dire and because the court did not conduct further voir dire, the court presumed that "at least one juror was tainted" by the prospective juror's statements. *Mach,* 137 F.3d at 633.

In *State v. Strange*, 188 Wash. App. 679, 684–85, 354 P.3d 917, 920, review denied, 184 Wash. 2d 1016, 360 P.3d 818 (2015), defendant also argued the entire jury venire was tainted by statements of some prospective jurors. There, the statements involved their own prior experiences with child molestation, either in their families or among friends or acquaintances. Strange argued his case was factually similar to *Mach.*

The court disagreed, distinguishing *Mach* because (1) no prospective juror professed any expertise about these cases, and (2) none of the prospective jurors in this case stated multiple times that, in their experience, children who are sexually abused never lie about their abuse.

ARGUMENT

Like *Strange, Mach* is distinguishable from the case at bar. Unlike *Mach* the jurors who made comments here did not claim any particular expertise involving issues in the case. Rather their comments were generalizations about the judicial system and defense attorneys. Juror #43 said that his biggest problem was that he couldn't "afford to be here, he was losing over $200 a day to be here to listen to somebody who is constantly doing this to people. They give – they get convicted, shoot, they do it again." He went on about not being able to afford to be a juror and that he had a bad attitude about it. RP (A) 40. In response to defense counsel's questions, Juror #35 commented that" the judicial system is, actually, broken, because attorneys on your side are always looking for a small, little thing that doesn't line up with some sort of Miranda right or something." RP (A) 50. Juror #34 said he had a problem with defense attorneys. RP (A) 53.

Appellant argues trial counsel was not acting strategically, or exercising a particular trial tactic, and there was no legitimate strategy for failing to move for a mistrial. His argument goes to the first prong of the Strickland test, that trial counsel was deficient.

The State replies that defendant's trial counsel was not deficient. There were legitimate tactical reasons why the defense may not have

wanted to move for a mistrial. For example, defendant may have been very satisfied with the jurors that remained on the panel after the jurors who made negative comments were removed. Also, Defendant may not have wanted the continuance that a mistrial would have necessitated.

As to the second prong of the Strickland test, the defendant cannot show the requisite prejudice. In other words, there is not a reasonable probability that had trial counsel moved for a mistrial, to strike the jury panel, or seek a curative instruction, the result of the proceeding would have been different. The result of the trial would not have been different if such motions were made because, as discussed above there simply was no legal authority to support the motions. If trial counsel moved for a mistrial, his motion would have been denied. The only case appellant now cites in support of a motion for mistrial is clearly distinguishable from the case at bar.

1.b. DEFENDANT'S ATTORNEY WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO TESTIMONY REGARDING GANGS.

LEGAL PRINCIPLES

"[W]here the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have

been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted." *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

ARGUMENT

Defendant's ineffective assistance claim fails on each of the three factors noted above. As to the first prong, there were legitimate and tactical reasons why defendant's trial counsel did not object to testimony regarding gangs. In fact, defendant's attorney himself introduced evidence of gang affiliation. The first witness the defense called was Justice Arquette. The very first question defense counsel asked was whether he was a member of a local gang. RP 114. Defendant testified that the shooter was seated in the back seat of the car, but he would not name who that individual was, even though his testimony clearly established that he knew who the person was. Part of the overall "gang evidence" elicited involved loyalty to the gang. The defendant's membership in the gang, and the loyalty he had to it, would have explained why the defendant would not name the actual shooter. Gang culture explained behavior in a way that was beneficial to the defense.

Regarding the second prong, had defense counsel objected to the gang affiliation evidence, the court would have admitted it. There is ample authority allowing gang affiliation evidence to be admitted provided there

is a nexus between the crime and gang membership. In *State v. Embry*, 171 Wash. App. 714, 287 P.3d 648 (2012), the court held gang-related evidence was admissible to establish motive, intent, and plan or preparation. Courts have regularly admitted gang affiliation evidence to establish the motive for a crime or to show that defendants were acting in concert. *State v. Yarbrough*, 151 Wash. App. 66, 210 P.3d 1029 (2009), *State v. Boot*, 89 Wash. App. 780, 789, 950 P.2d 964, 968 (1998), *State v. Campbell*, 78 Wash. App. 813, 822–23, 901 P.2d 1050, 1056 (1995). In each instance, there was a connection between the gang's purposes or values and the offense committed. *State v. Scott*, 151 Wash. App. 520, 527, 213 P.3d 71, 75 (2009).

Just as in the cases cited above, testimony regarding gang affiliation showed motive for the crime, explained the dynamics of the gang membership, and was relevant to the victim's reluctance to testify. Gang culture and customs were inextricably intertwined with the facts and issues in the case. Violation of gang rules was the motivation for the crime. One member sleeping with another member's girlfriend was a violation of the gang rules. Christopher Jones, Osorio-Heaton's boyfriend, was kicked out of the gang due to disputes with defendant and other members over their girlfriends. RP (B) 207, 208. This caused ill will between Jones and the

defendant. RP (B) 209. On the 911 call, Osorio-Heaton was asked what the reason for the drive-by shooting was, and she replied that her boyfriend is a dropout for gang stuff and ever since he's been a dropout they've been messing with us. RP 15. As the state argued to the jury, the gang was harassing the victims and threatening them because Jones did something violating the gang rules. RP 237 (C).

Retaliation by other members of the gang arguably explained why the victims were harassed and fearful, which could account for the differences between their early statements and their later testimony. Osorio-Heaton testified that she was scared and did not want to be in court. RP 144 (A). Gang expert testimony may also help explain a witness's reluctance to testify. *State v. Mancilla*, 197 Wash. App. 631, 644, 391 P.3d 507, 513, review denied, 188 Wash. 2d 1021, 398 P.3d 1145 (2017), citing *State v. Scott* at 528, 213 P.3d 71.

Testimony about the gang was also relevant to the idea of loyalty to the gang. Gang loyalty, in turn, helped to understand why various witnesses testified as they did. For example, defendant's refusal to say who it was who fired the gun. Defendant testified that "*someone* from the back seat yelled "showoo" and fired the shot. RP (C) 173. He then testified that he was angry that "that person" fired at Chris and Erika. RP(C) 176. The defendant obviously knew who the person was. Defendant testified "I told him as soon

as we got out of the car we're gonna fight." RP (C) 175. Defendant testified about his loyalty to the gang and the gang members' loyalty to him. As the state argued to the jury, gang loyalty and dynamics explained why Jones still felt a sense of loyalty to the gang even after he was shot at and harassed, why Noah Custer did not want to testify to anything, and why Justice Arquette said in court that he did the shooting, after having told the police that he did not. RP 245 (D).

The significance of the gang call (showoo) was also explained through testimony about the gang's culture. That particular call was relevant to identify the defendant. Osorio-Heaton heard the call right before the shots were fired and identified the voice as defendants. She heard him make the particular call before. The same call was again made by the defendant when he was being transported by the police, and defendant explained its meaning.

1. c. DEFENDANT'S ATTORNEY WAS NOT INEFFECTIVE FOR FAILING TO PROPOSE A LIMITING INSTRUCTION WITH RESPECT EVIDENCE OF GANG AFFILIATION.

Defendant argues his trial counsel was ineffective for failing to propose a limiting instruction with respect to the gang evidence. The state

replies that defendant's trial counsel was not ineffective for failing to oppose a limiting instruction because this was a proper tactical decision.

The law is well settled that not proposing a limiting instruction is presumed to be a sound tactical decision. Defense counsel's failure, in prosecution against defendant for assault and harassment of fellow inmate, to propose a limiting instruction with respect to prior act evidence of defendant's earlier assaults on inmates did not constitute ineffective assistance; it had to be presumed that counsel decided not to request limiting instruction in order to avoid reemphasizing damaging evidence. *State v. Barragan*, 102 Wash. App. 754, 9 P.3d 942 (2000). Where an attorney does not request a limiting instruction regarding a prior conviction, courts have applied a presumption that the omission was a tactical decision to avoid reemphasizing prejudicial information. *State v. Humphries*, 181 Wash. 2d 708, 720, 336 P.3d 1121, 1127 (2014) citing *State v. Price,* 126 Wash.App. 617, 649, 109 P.3d 27 (2005); *State v. Barragan,* 102 Wash.App. 754, 762, 9 P.3d 942 (2000). Decision to decline a limiting instruction for evidence of other crimes, wrongs, or acts is a tactical decision not to highlight damaging evidence, and is not a basis for finding counsel ineffective. *State v. Kloepper*, 179 Wash. App. 343, 317 P.3d 1088 (2014).

This principle and the authorities cited above applies in the context of gang affiliation. Appellate court would presume that defendant's trial counsel decided not to request a limiting instruction on the gang-related evidence as a legitimate trial strategy not to reemphasize damaging evidence, and a legitimate trial strategy or tactic could not serve as a basis for an ineffective assistance of counsel claim. *State v. Yarbrough*, 151 Wash. App. 66, 210 P.3d 1029 (2009).

2. TAKEN IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT INTENTIONALLY ASSAULTED OSORIO-HEATON AND JONES, AND COMMITTED THE DRIVE-BY SHOOTING.

LEGAL PRINCIPLES

The Washington Supreme Court has stated:

> When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977); *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

In the sufficiency context, circumstantial evidence is considered as probative as direct evidence. *State v. Goodman,* 150 Wash.2d 774, 781, 83 P.3d 410 (2004). Specific criminal intent of the accused may be inferred from conduct that plainly indicates such intent as a matter of logical probability. *Goodman,* 150 Wash.2d at 781, 83 P.3d 410. The court defers to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas,* 150 Wash.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). Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Hosier,* 157 Wash.2d 1, 8, 133 P.3d 936 (2006).

ARGUMENT

a. <u>assault in the second degree</u>

Defendant argues that the state failed to prove he caused fear and apprehension of bodily injury in Christopher Jones. He points out the state presented no testimony that Jones was fearful or in apprehension of bodily harm during the incident.

The state replies that there was sufficient evidence that defendant assaulted Jones as assault was defined to the jury. The jury was instructed as to the definition of assault. Instruction #10, CP 39. This instruction informed the jury that an assault is an intentional touching or striking of another person with unlawful force that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is harmful or offensive if it would offend an ordinary person who is not unduly sensitive. *An assault is also on act, with unlawful force, done with the intent to inflict bodily injury upon another person, intending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that the bodily injury be inflicted.* An assault is also on act with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury. (Emphasis added).

In arguing insufficiency of the evidence, defendant focuses solely on the "reasonable apprehension" aspect of assault, but ignores that an assault is also defined as an act, with unlawful force, done with the intent to inflict bodily injury upon another person, intending but failing to accomplish it.

Regarding the sufficiency claim as to reasonable apprehension, although Jones did not specifically state that that he was in fear and apprehension, there was circumstantial evidence from which the jury could infer that he was. For example, he was aware of the hostility toward him by his former gang associates, he heard the shots fired right after the *showoo* shout, he was seated next to Osorio-Heaton and saw her frightened reaction and heard her panicked call to 911. The transcript of the trial itself tells us nothing of his emotions in relating the event and the manner he displayed while testifying. Apprehension of an assault may be inferred. *State v. Miller*, 71 Wash. 2d 143, 146, 426 P.2d 986, 988 (1967).[2]

Aside from the reasonable apprehension aspect of an assault, there was also ample evidence of assault based upon the intent to inflict bodily injury. It was within the jury's province to conclude that when defendant shot a gun towards Osorio-Heaton and Jones, he did so intending to inflict bodily harm. He shot not just once but three times, with one bullet hitting their house. The context of this act was that it occurred right after a particular "gang call" (showoo), and was motivated by hostility towards Jones because of his behavior within the gang.

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[2] Apprehension of a person at whom a revolver is pointed may be inferred, unless he knows it to be unloaded. *Miller*, at 146.

A rational person could conclude that the defendant intended to inflict bodily injury when he fired a gun three times towards Osorio-Heaton and Jones. In considering all of the evidence, and viewed in the light most favorable to the state, a rational trier of fact could have thus found that the essential elements of assault in the second degree were proven beyond a reasonable doubt.

Defendant next argues the state failed to prove that "the shooter was aware that either person was in the Camry." The state replies that there was sufficient evidence that the defendant was aware the victims were in the car. The incident happened during the afternoon of a summer day, not when it was dark outside. The victim's car was parked outside their own home. The defendant had a motive to lash out against Jones for his transgressions against the gang. The shout was intended to communicate their presence. There was nothing that would have prevented the defendant from being able to see them enter the car or see them through the windows of the car. The fact that the defendant had a motive to act against Jones, that he gave a particular shout announcing their presence before shooting, and that a bullet hit their house are certainly circumstances from which the jury could infer that the defendant was aware of their presence. Since no witness could have testified to what the defendant was actually thinking, the jury was free to draw reasonable inferences from these facts. It would not have been

unreasonable for the jury to infer the defendant was aware of the victims' presence when he gave the gang shout and then shot at them three times in broad daylight.

b. Drive-by shooting

Defendant argues that absent any evidence regarding any damage to the car or lower on the house showing a bullet trajectory aimed at or near the car, no reasonable juror could have found beyond a reasonable doubt that Jones and Osorio-Heaton were at substantial risk of death or serious physical injury.

First, the jury was instructed that to convict the defendant of drive-by shooting the state had to prove beyond a reasonable doubt that the discharge created a substantial risk of death or serious physical injury to *another person.* (See jury instructions #19 and #20, CP 39) The state was not required to prove that it was Jones or Osorio-Heaton who were in substantial risk. As the court stated in *State v. Duncan*, 180 Wash. App. 245, 255, 327 P.3d 699, 704 (2014), aff'd and remanded, 185 Wash. 2d 430, 374 P.3d 83 (2016), "A victim of a drive-by is the general public," *Citing State v. Rodgers,* 146 Wash.2d 55, 62, 43 P.3d 1 (2002). It is worth noting that Osorio-Heaton testified she was afraid not only for herself but also for her

son who was playing outside. Further, their house was in a residential area where any number of people were presumably in the vicinity.

Second, aside from the issue of exactly who was placed in substantial risk, there was sufficient evidence to sustain the drive-by shooting conviction. Based upon all the evidence presented, the jury could very well have made the following reasonable inferences: the shots were fired at the victims who were in front of their house; shooting out the window of a moving car made it difficult for the shooter to hit his intended target; the recoil of firing the handgun would have caused it to tilt upward thus sending a bullet higher than the intended target; and the bullet found on the roof of the victim's house came from one of the three shots fired. It is again worth noting that detective Maini testified that Ocean Beach Highway was situated higher than the house at 3301 Ocean Beach Hwy. This fact would have been relevant to the question of the angle of the gun when it fired the bullet that ended up on the roof of Osorio-Heaton's home.

In *State v. Oakley*, 158 Wash. App. 544, 550, 242 P.3d 886, 889 (2010), the court analyzed the sufficiency of the evidence on a charge of attempted drive-by shooting. The court found the evidence sufficient, noting, the defendant "took a substantial step towards committing a drive-by shooting when he pointed a gun at the Lynns from the vehicle and attempted to fire it. Several witnesses observed the gun protruding from the

car window as the car drove past the Lynns' house and identified Oakley as the individual holding the gun. Christopher heard a "cracking sound" like the sound of a gun jamming when Oakley "tried to shoot again." The firearms expert stated that the gun was operable if loaded correctly. Thus, although the gun did not discharge, there was sufficient evidence for a jury to convict Oakley of attempted drive-by shooting beyond a reasonable doubt."

Where pointing a gun from a car at people but failing to shoot because the gun malfunctioned is sufficient evidence of *attempted* drive-by shooting, pointing a gun from a car at people and succeeding in shooting, three times, is surely sufficient evidence of a completed drive-by shooting.

3. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO DISMISS BASED UPON INSUFFICIENCY OF EVIDENCE.

Appellant recasts the same claim of sufficiency of the evidence in his argument #3 – that the trial court erred in giving the case to the jury when no rational trier of fact could have found the defendant guilty. He simply restates his argument that no rational trier of fact could have found the defendant was the person who fired shots from the SUV. He continues by making arguments that were made to the jury regarding the weight of the evidence, and specifically the credibility of Osorio-Heaton. For example,

he argues her testimony was "far from compelling," she described the shooter as "wearing a black T-shirt but defendant was wearing a white T-shirt when he was arrested," and that she made inconsistent statements regarding whether William Johnson was the driver. Defendant points out that "no physical evidence links Mr. Quintana to the SUV." That may be so but he testified that he was present in the SUV when the shots were fired. Defendant points out that no gunshot residue evidence was collected from Mr. Quintana showing a recent discharge of a weapon. This point was argued to the jury as an example of a lack of evidence.

All of these points go to the persuasiveness of the evidence and the credibility of the witnesses. The court defers to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, supra. It was undisputed that *someone* fired three shots from a car as it passed by the home of the victims. The bullet found in the roof of their home corroborated that Osorio-Heaton and Jones were shot at. It was undisputed that the defendant was in the car from which the three shots were fired, and that he later ran from the police. He testified to those facts. It was also undisputed that the defendant was a member of a gang that had a bone of contention with Jones. The jury was free to disbelieve the statement of Arquette and the testimony of the defendant, and believe the testimony and 911 call of Osorio-Heaton where she unequivocally

identified defendant as the shooter. Taking this evidence in the best light to the state, it cannot be concluded that no rational person could have found the defendant guilty.

4. THE TRIAL COURT DID NOT VIOLATE THE APPEARANCE OF FAIRNESS DOCTRINE.

Here, Arquette invoked his Fifth Amendment right to remain silent during his testimony. In order for the court to make a reasoned ruling it was necessary to have a colloquy with him. When Arquette stated that he would be testifying consistent with his earlier statement, in which he denied being the shooter, the court properly ruled that he had no Fifth Amendment right to refuse to answer questions. When Arquette later blurted out that he was the one who pulled the trigger, the court properly determined that he now could invoke his Fifth Amendment right and appropriately allowed him to speak with his attorney. There was nothing improper or unfair about this procedure.

Defendant seems to argue that because the judge did not base his ruling on what was beneficial solely to the defendant, he appeared to be unfair. To the contrary, the court allowed Arquette's statement to be played to the jury despite the fact that the state was deprived of an opportunity to cross-examine him. The state provided the following authority to the court,

which held that because Arquette asserted his Fifth Amendment right, and the state could not cross examine him, his testimony should be stricken.

> Where a defense witness refuses to answer questions that go to the heart of the direct testimony on a central issue, however, the truth-seeking function of the court is impaired. "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Taylor,* 484 U.S. at 412-13, 108 S.Ct. at 654-55, *quoting United States v. Nobles,* 422 U.S. 225, 241, 95 S.Ct. 2160, 2171, 45 L.Ed.2d 141 (1975). Where a defense witness's invocation of Fifth Amendment protection against self-incrimination amounts to a refusal to be cross-examined, the testimony cannot be considered reliable. We therefore join with those circuits that have permitted the exclusion of a defense witness's testimony when the witness has refused on cross-examination to respond to questions on non-collateral matters. *See United States v. Esparsen,* 930 F.2d 1461, 1469-70 (10th Cir.1991); *United States v. Doddington,* 822 F.2d 818, 822 (8th Cir.1987); *United States v. Frank,* 520 F.2d 1287, 1292 (2d Cir.1975).
>
> *Denham v. Deeds,* 954 F.2d 1501, 1504 (9th Cir. 1992). (Emphasis added)

The court did not violate the appearance of fairness doctrine. The court allowed the jury to consider Arquette's incriminating statement while sparing him from being cross examined. The defense was able to have their cake and eat it too. If there was any appearance, it was that the court erred in favor of the defense.

5. STATE IS NOT SEEKING REQUESTS FOR APPELLATE COSTS.

The state provides no response to Appellant's issue #5 as it is not seeking costs.

V. STATE'S CROSS-APPEAL

The state timely filed a notice of cross-appeal. CP 62.

A. ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DENYING THE STATE'S MOTION TO STRIKE ALL OF DEFENSE WITNESS JUSTICE ARQUETTE'S TESTIMONY AFTER HE INVOKED THE FIFTH AMENDMENT PRIVILEGE PRIOR TO CROSS EXAMINATION.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court err in denying the state's motion to strike the entirety of Justice Arquette's testimony after he invoked the Fifth Amendment privilege prior to cross examination?

C. STATEMENT OF THE CASE

The state agrees with appellant's statement of the trial testimony with the following additions. As set out in appellant's statement of the case, the defense called Justice Arquette as its first witness. He initially testified that he was not familiar with what happened on August 23, 2016, regarding Mr. Quintana. He went on to answer several questions from defense counsel

but then said that he was not going to answer any more questions, "pleading the Fifth." RP (C) 115-118. At this point the court excused the jury and engaged in a colloquy with Arquette. During this colloquy, outside the presence of the jury, he made the incriminating statement that he, not defendant was the shooter. The court heard from both defense counsel and the deputy prosecutor and was able to have Arquette's attorney speak with him via telephone. The court ruled that Arquette could not be subject to any further questions, and heard from both defense counsel and the deputy prosecutor as to what would be done with his incriminating statement. RP (C) 130. The Deputy prosecutor asked the court to strike all of his testimony because the state would be denied the opportunity to cross-examine him. RP (C) 132. After the court made its ruling to play a recording of Arquette's statement to the jury, the state again objected. RP (C) 137.

D. ARGUMENT

LEGAL PRINCIPLES

A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Lormor,* 172 Wash.2d 85, 94, 257 P.3d 624 (2011). *State v. Grier*, 168 Wash. App. 635, 644, 278 P.3d 225, 230 (2012). Abuse of discretion occurs when trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. *State v.*

Blackwell, 120 Wash. 2d 822, 845 P.2d 1017 (1993). Decision is based on "untenable grounds" or made for "untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Rohrich*, 149 Wash. 2d 647, 71 P.3d 638 (2003).

Numerous federal cases hold that when a defense witness invokes the Fifth Amendment and cannot be cross-examined on non-collateral matters by the state, the entirety of the witness's statement is subject to exclusion. In *Denham v. Deeds*, 954 F.2d 1501, 1504 (9th Cir. 1992), the court wrote,

> Where a defense witness refuses to answer questions that go to the heart of the direct testimony on a central issue, however, the truth-seeking function of the court is impaired. "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Taylor,* 484 U.S. at 412-13, 108 S.Ct. at 654-55, *quoting United States v. Nobles,* 422 U.S. 225, 241, 95 S.Ct. 2160, 2171, 45 L.Ed.2d 141 (1975). Where a defense witness's invocation of Fifth Amendment protection against self-incrimination amounts to a refusal to be cross-examined, the testimony cannot be considered reliable. <u>We therefore join with those circuits that have permitted the exclusion of a defense witness's testimony when the witness has refused on cross-examination to respond to questions on non-collateral matters.</u> *See United States v. Esparsen,* 930 F.2d 1461, 1469-70 (10th Cir.1991); *United States v. Doddington,* 822 F.2d 818, 822 (8th Cir.1987); *United States v. Frank,* 520 F.2d 1287, 1292 (2d Cir.1975). (Emphasis added).

See also *U.S. v. Esparsen*, 930 F.2d 1461, 1469–70 (10th Cir. 1991) (may exclude testimony by defense witness who refuses to submit to appropriate cross); *U.S. v. Doddington*, 822 F.2d 818, 822 (8th Cir. 1987) (trial court properly struck direct testimony of defense witness who invoked Fifth Amendment during cross-examination); *U.S. v. Rosario Fuentez*, 231 F.3d 700, 706 (10th Cir. 2000) (striking testimony by defense witness who claimed Fifth Amendment and for that reason could not be cross-examined); *U.S. v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990) ("It is well-accepted that a witness's direct testimony can be stricken if she invokes the fifth amendment on cross-examination to shield that testimony from scrutiny."); *Lawson v. Murray*, 837 F.2d 653 (4th Cir. 1988), (State trial court was authorized to strike all of defense witness' testimony when witness cutoff cross-examination by invoking Fifth Amendment privilege.); *United States v. Crews,* 856 F.3d 91 (D.C. Cir. 2017), (District court did not plainly err when, as remedy for defense witness' invocation of her privilege against self-incrimination when prosecutor attempted to cross-examine her about specific events of the crime charged, it struck witness' testimony in its entirety.)

ARGUMENT

Given the weight of authorities providing that exclusion of the entirety of a witness's testimony is the proper remedy when that witness

cannot be cross-examined because he invoked the Fifth Amendment, the trial court here applied the wrong legal standard. Because the court applied the wrong legal standard its decision was based on "untenable grounds" or made for "untenable reasons" and was therefore an abuse of discretion. It is worth noting that the record here shows that the trial court engaged in no discussion whatsoever regarding the cases the state cited in support of its motion to strike all of Arquette's testimony.

VI. CONCLUSION

For the above stated reasons Quintana's convictions should be affirmed.

Respectfully submitted this 18 day of December, 2017

By:

THOMAS LADOUCEUR/WSBA # 19963
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. Peter Tiller
The Tiller Law Firm
P.O. Box 58
Centralia, WA 98531-0058
ptiller@tillerlaw.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on Dec 18th, 2017.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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