

FILED  
NOV 17 2010  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 282996

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Appellant,

vs.

MIZAEL MAGANA,

Respondent/Cross-Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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REPLY BRIEF OF APPELLANT

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Prosecuting Attorney

Kenneth L. Ramm  
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### ASSIGNMENTS OF ERROR

1. The trial court erred in sentencing the defendant/respondent by sentencing him outside the standard range for each first degree assault convictions without a sufficient factual basis or a clear legal basis under RCW 9.94A.535.
2. The trial court failed to enter written findings of fact and conclusions of law regarding the exceptional sentence for the downward departure for the two counts of first degree assault, serious violent offenses, as required by RCW 9.94A.535.
3. The trial court erred in using the multiple offense policy under RCW 9.94A.535(1)(g) as a basis for a mitigated sentence when it sentenced the defendant/respondent to a term of confinement below the standard range for the first degree assault convictions contrary to established case law.
4. The trial court erred in using the fact that a juvenile codefendant received a lighter sentence and/or that the two other codefendants had neither been tried nor sentenced for the crimes.
5. The trial court erred in using the fact that the defendant was an accomplice to the crimes in order to justify its decision to sentence the defendant/respondent to a sentence below the standard range.

6. The length of the standard range sentence would have been appropriate given the circumstances.

7. The mitigated sentence is clearly too lenient given the circumstances.

#### ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Whether the trial court erred in failing to set forth in writing its reasons for granting the defendant's request for a sentence below the standard range for the two counts of first degree assault?

2. Whether the trial court erred by sentencing the defendant to a mitigated sentence based upon the factor that the presumptive sentence that is clearly excessive in light of the SRA's purpose under RCW 9.94A.535(1)(g), when the sentence imposed is less than the bottom of the range for a single offense?

3. Whether the trial court erred in granting an exceptional sentence below the standard range running two serious violent offenses concurrently based upon the court's view that the defendant was merely an accomplice when the evidence shows that the defendant organized the attack on the victims after he threw his gang signs at the victim's boyfriend minutes earlier?

4. Whether the trial court erred in granting an exceptional sentence below the standard range and running two serious violent offenses concurrently based upon the sentence given to a juvenile codefendant and the other two codefendants who had yet to be convicted?
5. Whether the trial court erred in granting an exceptional sentence below the standard range based upon the fact that the defendant was an accomplice who had minutes prior to the shooting been involved in a confrontation with the boyfriend of one of the victims and who likely organized the assault on the victims?
6. Whether the trial court erred in granting an exceptional sentence below the standard range given all of the circumstances surrounding the assault?
7. Whether the trial court's sentence was clearly too lenient given the standard range that the legislature set for the crimes for which the defendant/respondent was convicted?
8. Whether the terms of community custody imposed by the trial court exceeded the terms authorized by applicable law?
9. Whether the community custody provision allowing the Department of Corrections to determine without a hearing as to whether a

treatment counseling program is necessary and crime-related violates due process and constitutes an excessive delegation of judicial authority?

#### STATEMENT OF THE CASE

Mizael Magana was tried as an adult on a charges of first degree assault (counts 1 and 2) with firearm enhancements, and drive by shooting (count 3). (CP 108-109). The defendant waived his right to a trial by jury, and the case proceeded to a bench trial. (03-24-09 RP 84-93).

The bench trial commenced on March 26, 2009, and the following testimony was presented: On December 5, 2008, eighteen year old Yessenia Bravo of Grandview, Washington, left school at 11:30 a.m. and went to pick up her daughter from the babysitter. (03-26-09 RP 109-110). She then picked up her baby's dad, Jose Cervantes. (03-26-09 RP 110). Jose Cervantes stayed with them in the car for about 15 minutes before Ms. Bravo dropped him off at Jordan's house. (03-26-09 RP 110).

During the 15 minutes that Jose was in her car, Ms. Bravo saw the defendant, whom she has know for a long time, at Sunburst Video. (03-26-09 RP 110-111). Ms. Bravo saw the defendant, Mizael Magana, raise his hands up and throw some gang signs at them as they were passing by. (03-26-09 RP 179-80). Ms. Bravo acknowledged that Jose Cervantes

belonged to the North Side gang, a Norteno gang that claims the color red, which he was wearing that day. (03-26-09 RP 112, 180).

After dropping off Jose Cervantes, Ms. Bravo saw her brother walking by the West Side Market and she picked him up. He was wearing black and red clothing. (03-26-09 RP 112-113, 199). Ms. Bravo started for home, but first stopped at Tayan's Market to get food. (03-26-09 RP 113). After getting the food, she started for home. She drove toward the high school and noticed that a bluish green or teal colored car was behind her, being driven by Saul Valles. (03-26-09 RP 114, 200).

A second car driven by Eddie Cardenas, was in front of her. Ms. Bravo turned right in order to evade her pursuers. She turned left, with Saul Valles still behind her. She sped up to get away, but was unable to shake his pursuit. (03-26-09 RP 115). Ms. Bravo saw that Cardenas had turned and she sped up and went straight to get away from him. (03-26-09 RP 115).

Ms. Bravo then got on the roundabout and heard noises, that turned out to be shots. (03-26-09 RP 116, 117). In the mirror Ms. Bravo saw Eli Alaniz in the front passenger seat of the car, and Angel Faz and Mizaël Magana were in the back seat. She became scared. She saw that that the left side back person had the window down and saw of the guys with a gun. In all, she saw two guns. (03-26-09 RP 118, 147).

Ms. Bravo saw that they were shooting out the left side of the car. She testified that she was certain that Angel Faz was one of the shooters. (03-26-09 RP 119). The front passenger was sitting in the window, shooting over the top of the car. (03-26-09 RP 122). Ms. Bravo acknowledged that at the time that she reported the incident to the police, and in a written statement, she stated that Mizael Magana and Angel Faz were the shooters. Additionally, she acknowledged that during an interview with the attorneys in the prosecutor's office she stated that she said the same. (03-26-09 RP 120-21).

Mike Crume, a postal employee, was parked by the water tower, was out delivering mail. He was on his way to the second house in the delivery area when he heard a sharp, unusual noise. He turned around to see what was going on and he observed a person seated out the passenger side front window shooting over the top of the dark green car at another car. (03-26-09 RP 215-16, 230). He heard the person shoot four or five rounds. (03-26-09 RP 220). Mr. Crume called 911 to report the incident, and then proceeded on his delivery route. (03-26-09 RP 223). After finishing his deliveries in that area, he contacted a police officer who was investigating the crime scene. (03-26-09 RP 223). He observed the officer pick up several shell casings. (03-26-09 RP 223). Mr. Crume

provided a statement to the police after he got off work that day. (03-26-09 RP 225).

Ms. Bravo drove to her friend's house, where she got out and saw the bullet holes in her car and she got mad. She then drove straight home and called 911. (03-26-09 RP 123-24). The police arrived right away. Ms. Bravo found four bullet holes in the car, and that the left back tire was flat, possibly from a bullet. (03-26-09 RP 124). One of the police officers who came to her house took photos of her car and the bullet holes, and removed the bullets. (03-26-09 RP 125). Grandview Police Officers Colley and Ware removed the tire. (03-26-09 RP 127). One bullet jacket was found in the trunk, close to the baby seat, where her daughter was seated during the shooting. (03-26-09 RP 128).

During the shooting, Ms. Bravo recalled that there was a mailman who was ducking down while the shooting was taking place. (03-26-09 RP 128-29). Ms. Bravo testified that like herself, her brother was scared while the shooting was occurring. (03-26-09 RP 130). Ms. Bravo did not know why they were shooting at her. (03-26-09 RP 131).

The day after the shooting, Steve Stockton, a resident of the area around the water tower, was on a walk and observed some shell casings in front of his driveway, along the fence line on the south side of the street. (03-27-09 RP 234-35). Mr. Stockton figured that the shell casings were

from the shooting the day before, but missed by the police, so he called them to report his find. A police officer responded, and collected each shell casing. Mr. Stockton thought that there were five that were recovered at that time. (03-27-09 RP 235). The police officer marked each bullet and took photographs of the area. (03-27-09 RP 236, 240). The shell casings were spread over a distance of more than 50 feet in the grass between the road and the fence. (03-27-09 RP 237-38).

Officer Robert Colley of the Grandview Police Department responded to the call of the shooting. Initially he was tasked with looking for the suspect vehicle. After doing so for 15 minutes, he went to the roundabout by the water tower to investigate the scene. (03-27-09 RP 244-45). At the scene Officer Colley contacted Mr. Clume, the postman who described what he had observed. Officer Colley looked in the area where Mr. Clume stated the shooter's car was at when he heard and saw the shots being fired, and Officer Colley located four 9mm shell casings in the road. (03-27-09 RP 246, 252). Officer Colley placed cones at the location of each shell casing he located, and took photographs of the area and each casing found. (03-27-09 RP 246).

Officer Colley was directed to go to the victim's residence on Victoria Circle in order to obtain information on the vehicle involved in the shooting. (03-27-09 RP 252-53). The victim was able to identify the

other car, and Officer Colley took a statement from her about the incident. (03-27-09 RP 253).

Detective Rick Abaraca of the Grandview Police Department also testified regarding the shooting. Detective Abarca testified that he is assigned as the gang detective and is responsible for investigating gang related crimes. (03-27-09 RP 257-60). Detective Abarca testified that the defendant, Mizael Magana, was a self admitted gang member, belonging to the BGL gang. (03-27-09 RP 260). Detective Abarca did not have any information that either Yessina Bravo or her brother, Anthony Denato, were gang members. He did have information that Jose Cervantes, the boyfriend of Yessina Bravo, was a gang member, belonging to the NSV gang. He further testified that the BGL and the NSV gangs are rival gangs. (03-27-09 RP 262-63).

Detective Abarca further testified that when members of these two groups come into contact with one another they generally display their gang signs using their hands. (03-27-09 RP 263). It is also common for guns to be displayed also. (03-27-09 RP 263).

On December 5, 2008, the day of the shooting, Detective Abarca was on patrol and contacting gang member from rival BGL and LVL gangs that were about to start a fight when he received the shots fired call. (03-27-09 RP 264). Detective Abarca went looking for suspects and was

directed to the residence of Saul Valles. Detective Abarca contacted Valles mother, but Saul Valles nor the described car were at the residence. (03-27-09 RP 266). It was confirmed that the family had a bluish green 2003 Saturn vehicle that Saul had taken earlier in the day. (03-27-09 RP 267).

Detective Abarca then travelled to the Magana residence in an attempt to locate Mizael Magana. Two older brothers were home and Detective Abarca asked whether their mother was at home, which they denied. Moments later the mother came out the front door, and one of the sons told her to be quiet and go back inside. (03-27-09 RP 268). Detective Abarca told them that if Mizael had nothing to hide, that he should come to the police station and give a statement. (03-27-09 RP 268). Mr. Magana came to the police station at 4:45 p.m. and was ultimately placed under arrest. (03-27-09 RP 269).

Prior to Magana's arrival at the police department, at 2:55 p.m., Ms. Valle called and advised that her son had returned home with the car. (03-27-09 RP 270). Detective Abarca went to the Valle residence and observed the bluish green Saturn in the driveway. He instructed Officer Colley to transport Ms. Bravo to the residence to view the car. (03-27-09 RP 270). Detective Abarca was permitted inside the residence where he contacted Ms. Valles and her son Saul Valles. (03-27-09 RP 270).

During a search of Saul Valles bedroom, Detective Abarca located a photograph with Saul Valles, and the defendant Mizael Magana, and other BGL gang members, throwing up gang signs with their hands. (03-27-09 RP 274, 276). Detective Abarca stated that Mizael Magana goes by “Mecha” and that his gang moniker is “Menace.” (03-27-09 RP 280).

Detective Abarca had the recovered shell casings and some spent rounds that recovered from Ms. Bravo’s car sent to the Washington State Patrol Crime Lab for comparison. (03-27-09 RP 285). Richard Wyant of the Washington State Patrol Crime Lab testified regarding his examination of the shell casings. Mr. Wyant is the supervisor of the Seattle office of the Firearm and Tool Marks Division of the Crime Lab. (03-27-09 RP 316). Mr. Wyant examined the shell casings in this case that were submitted to the lab. (03-27-09 RP 317-18). Mr. Wyant determined that, based upon his training and experience, all nine casings were fired from the same firearm. (03-27-09 RP 324-25).

Officer Scott Ames testified regarding his response to the shooting. (03-31-09 RP 346). Officer Ames was instructed to go to the residence of Ms. Bravo. On arrival he processed the her car, a 2000 Dodge Neon, for evidence. (03-31-09 RP 348). As he photographed the vehicle, he noted that there were two small holes in the trunk, two holes on each door on the passenger side of the vehicle, and a fifth hole in the driver’s side

rear bumper where the bullet went through and struck the tire and caused it to go flat. (03-31-09 RP 349). Upon examination of the truck, he observed that bullet fragments hit the rear seat brace. One bullet fragment ricocheted off the brace behind the rear driver's seat, just behind a child's seat and ricocheted off the brace and into the rear tire well of the trunk. (03-31-09 RP 350-51). When Officer Ames spoke to Ms. Bravo, she was very emotional, very distraught. (03-31-09 RP 362).

The next morning Officer Ames went to the roundabout and inspected the area and found one spent 9mm casing. (03-31-09 RP 363-64). Later in the afternoon Officer Ames again went to the roundabout to contact a citizen who reported finding spend shell casings. Upon contact with the citizen he was directed to an area where there were 4 additional shell casings. (03-31-09 RP 367-70).

The defense called Saul Valles as a witness. . (03-31-09 RP 453). During direct examination he testified that Mr. Magana was not in the vehicle at the time of the shooting. On cross examination, he admitted that he identified the defendant as being in the car, occupying the middle of the rear seat and that the police had asked him who was in his car at the time of the shooting. (03-31-09 RP 466-69, 479-80).

The trial court found the defendant guilty as to the charges of first degree assault and drive by shooting, as well as the firearm enhancement allegations. [CP 35-39].

The defense sought a mitigated sentence. The trial court agreed and sentenced Mr. Magana to consecutive 24 month sentences in the two first degree assault convictions, well below the standard range sentence. (CP 24-31]. The State filed a timely notice of appeal. [CP 13].

## ARGUMENT

### A. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO A SENTENCE BELOW THE STANDARD RANGE BASED UPON THE MULTIPLE OFFENSE POLICY.

#### 1. STANDARD OF REVIEW.

“Appellate review of a sentence outside the standard range is governed by former RCW 9.94A.210(4) (2000). Under that statute, the appellate court is to engage in a three-part analysis. First, the court must determine if the record supports the reasons given by the sentencing court for imposing an exceptional sentence. As this is a factual inquiry, the trial court's reasons will be upheld unless they are clearly erroneous. *Id.* at 517-18. The appellate court must next determine, as a matter of law, whether the reasons given justify the imposition of an exceptional sentence. *Id.* at 518. The sentencing court's reasons must, as we observed above, be

"substantial and compelling." Former RCW 9.94A.120(2). Finally, the court is to examine whether the sentence is clearly excessive or clearly lenient under the "abuse of discretion" standard. Former RCW 9.94A.210(4); State v. Jeannotte, 133 Wn.2d 847, 855-56, 947 P.2d 1192 (1997) (citing State v. Allert, 117 Wn.2d 156, 163, 815 P.2d 752 (1991)).” State v. Fowler, 145 Wn.2d 400, 405-406, (2002).

## 2. ARGUMENT.

### A. THE REASONS GIVEN BY THE TRIAL COURT DO NOT JUSTIFY A SENTENCE OUTSIDE THE STANDARD RANGE.

- (1) The multiple offense police of the SRA does not justify a downward departure from the standard range.

“A court must generally impose a sentence within the standard sentence range established by the SRA for the offense. RCW 9.94A.120(1). However, there are some exceptions to this general rule. RCW 9.94A.120. The SRA authorizes judges to impose sentences outside the standard range if, considering the purposes of the SRA, "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.120(2); State v. Ritchie, 126 Wash. 2d 388, 391, 894 P.2d 1308 (1995).” State v. Ha'Mim, 132 Wn.2d 834, 839-840, 940 P.2d 633 (1997).

In this case the defense sought a mitigated sentence at the sentencing hearing. Defense counsel suggested that the basis for an exceptional sentence could be that operation of the multiple offense police of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purposes of the Sentencing Reform Act. [07-06-09 RP 9]. That is the basis the court gave for the downward departure. [07-06-09 RP 9-10; CP 25].

“Appellate review of an exceptional sentence is governed by RCW 9.94A.210(4). An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review:

1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion. RCW 9.94A.210(4).”

State v. Ha'Mim, 132 Wn.2d 834, 840 (1997).

In the case at hand the court was advised of the standard range for each count of first degree assault, and for the count of drive by shooting, which involved placing the baby of Yessenia Bravo in danger. [07-06-09 RP 5]. Seeking a basis for the departure, the defense counsel suggested the multiple offense policy results in a presumptive sentence that is clearly excessive. Based upon that mitigating factor, the court sentenced the defendant to a sentence of 24 months consecutive for each count of first degree assault. [07-06-09 RP 5; CP 25].

“In determining whether a factor legally supports departure from the standard sentence range, this Court employs a two-part test: first, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range; second, the asserted aggravating or mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. State v. Alexander, 125 Wash. 2d 717, 725, 888 P.2d 1169 (1995).” State v. Ha'Mim, supra 840.

In sentencing the defendant to a sentence of 24 months, the trial court disregarded the presumptive range for even one count of first degree assault, and sentenced the defendant to a sentence concurrent with the drive by shooting count. In State v. Bridges, 104 Wn. App. 98, 15 P.3d 1047 (2001), this court rejected just such reasoning. In Bridges, the court

stated: “essentially arguing the sentence is "clearly too lenient," the State contends the Sanchez reasoning supports an exceptional sentence only if the sentence imposed is at least as great as the standard range for a single offense. The State is correct. In Sanchez, for example, the sentence imposed was greater than the presumptive sentence for a single delivery. Sanchez, 69 Wn. App. at 261. see Fitch, 78 Wn. App. at 554 (sentence at minimum of standard range for single offense); Hortman, 76 Wn. App. at 458 (sentence at high end of standard range for single offense). The distorting effect of the multiple offense policy does not justify a sentence below the standard range for a single offense.” Bridges, supra at 104.

Here, the sentence of 24 months for one count of first degree assault is well below the range of 93-123 months for a single count of first degree assault for a person without criminal history. The matter is clearly controlled by State v. Bridges, supra, which prohibits using the multiple offense policy as a basis for a mitigated sentence if the resulting sentence is less than the low end of the standard range for a single count of the charged offense.

(2) Different sentences.

The defendant asserts that because a juvenile codefendant had received a lesser sentence, that this fact justifies his receiving of a lesser sentence. This justification ignores the intent of the legislature when it

provided for automatic adult jurisdiction for 16 and 17 year olds accused of committing serious violent offenses.

In adopting the automatic decline provision, the Legislature expressed an intent to "increase the punishment for youthful offenders for the most serious violent crimes by statutorily expanding the jurisdiction of the adult criminal court over 16- and 17-year-olds who commit such crimes without a hearing in juvenile court under RCW 13.40.110." Boot, 130 Wn.2d at 563. Unquestionably, the purpose of RCW 13.04.030(1)(e)(iv) is to ensure that 16- and 17-year-olds who commit serious violent crimes will be tried and punished as adults.

RCW 13.04.030(1)(e)(iv) is triggered whenever the conduct of a particular 16- or 17-year-old meets the requirements of subsection A or B. Under subsection A, the Legislature has determined that a 16- or 17-year-old who commits a "serious violent offense" is subject to the jurisdiction of adult court. In effect, the term "serious violent offense" was adopted by the Legislature as a benchmark to be applied to determine whether the conduct in question was serious enough to cause jurisdiction to vest in adult criminal court rather than juvenile court. It follows then that the conduct in question must be evaluated solely against this benchmark rather than the context of the juvenile court system.

State v. Gilmer, 96 Wn. App. 875, 882, 981 P.2d 902 (1999).

The legislature had to set a demarcation point between juvenile punishment and adult punishment. Defendants who are 16 years of age and older will be treated as adults when they commit serious violent offenses such as first degree assault. And when they commit those crimes with firearms, those defendants are also sentenced under the "Hard Time for Armed Crime" (Laws of 1995, ch. 129, Initiative Measure No. 159,

approved Apr. 20, 1995). Thus in this case, by sentencing the defendant below the standard range the trial court ignores the defendant's role in this attack and disregards the intent of the legislature.

The trial court seems to also have taken into consideration the fact that two other codefendants had not been punished. (Br. Of Res/Cr App., pg 3). It was inappropriate for the trial court to even consider that fact in sentencing this defendant when those two had cases pending, or pending being charged.

(3) Role as an accomplice.

A defendant's minimal involvement must be "significantly out of the ordinary for the crime in question" in order to qualify as a mitigating factor. State v. Nelson, 108 Wn.2d 491, 501, 740 P.2d 835 (1987). In the case at hand, the defendant's involvement in the crimes was that of an organizer. The evidence is clear that he threw up gang signs at the sight of Jose Cervantes, a rival gang member, when he was in Ms. Bravo's car minutes before the shooting. (CP 35, (03-26-09 RP 112, 180)). Minutes after this confrontation, the defendant and his cohorts are chasing Ms. Bravo's car, and shots are fired at Ms. Bravo who is in the car with her teenage brother and 20 month old daughter.

This involvement in the first degree assaults was not minimal. It is reasonable to infer that the defendant organized this attack upon Ms.

Bravo and her family. He knew that she was driving and leading an armed attack on this car could result in death or great bodily harm. Nor did he show any caution or concern for the victims. This was a gang related attack during the middle of the afternoon on a school day. The general public, as well as Yessina Bravo, her brother A.D., and her 20 month old daughter, were all placed in grave danger.

The respondent's reliance upon State v. Moore, 73 Wn. App. 789, 871 P.2d 642 (1994) is misplaced. Moore involved a marijuana distribution investigation conducted by the Clark-Skamania Narcotics Task Force. The court in affirming the sentence noted that "Moore was only assisting Bunney from "time to time", that Moore's involvement in the illegal operation was "minimal", and that Moore was not "involved in the planning of sales or marijuana nor the purchasing of stolen property". Id at 796. The trial judge also noted that the illegal operation was "nonviolent". Id. At 794. On the other hand, in the case at hand, Mr. Magana was the shot caller on this attack. He organized his fellow gang members and they went after the car driven by Ms. Bravo that their rival, Mr. Cervantes, had minutes before occupied. These facts do not indicate minimal participation.

(4) Length of sentence.

The legislature is responsible for determining the standard range for crimes. As the court in State v. Nelson, 108 Wn. 2d 491, 502, 740 P.2d 835 (1987) stated,

The legislative intent that punishment for a criminal offense be proportionate to the seriousness of the offense and the offender's criminal history has been largely achieved by the creation and application of a statewide sentencing grid and criminal history scoring system detailed in RCW 9.94A.310-.420.

The defendant relies on State v. Smith, 124 Wn. App. 417, 102 P.3d 158 (2004) and argues that that case is of a similar fact pattern. However, the facts of Smith are quite different than those of the present case. In Smith, the defendant was an estranged wife of one of the victims who reported that she had been the victim of an ongoing pattern of domestic violence. Smith had been charged with three counts of first degree assault, and claimed self defense. The jury returned guilty verdicts of second degree assault, with deadly weapon findings as to each come. In Smith the defendant only discharged one shot into the car occupied by the victims. In the case at hand, the police recovered nine spent shell casings that matched one pistol. (03-27-09 RP 324-25). There was additional testimony that more shots were fired by another shooter who used a revolver. (03-27-09 RP 292).

In Smith the trial court noted that Ms. Smith had a long history of being victimized by Anthony Smith, and that on the day of the incident she was in fear of Mr. Smith. Further, that the jury did not find for the defendant on self-defense, the evidence demonstrated that it was an “incomplete defense”. Smith, supra, at 436. Contrary to the evidence in *Smith*, in the present case the defendant and his cohorts were the aggressors and there was no evidence of self defense. As noted in the dissent in *Smith*, “[t]he trial judge initially resisted imposing firearm enhancements. The State cited State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999), and the trial court properly determined that it lacked authority to depart from the firearm sentence enhancements mandated by the legislature.” *Smith*, supra, at 440.

The case at hand presented a situation that could have resulted in the death of the three people in the car, which included a 20 months old child. The car was hit with four bullets. These were completely innocent people targeted by these BGL gang members. One bullet came very close to where the 20 month old child was sitting. Had any one of the three victims been killed, the defendant and his cohorts would have been facing aggravated first degree murder charges. RCW 9A.32.030(1)(a) and RCW 10.95.020 (7). The punishment would be life without parole. RCW 10.95.030.

Thus the trial court's decision to sentence the defendant to both a mitigated sentence of 24 months, for a total term of 48 months on two counts of first degree assault where his sentence should have been within the range of 111-147 months on the first count and 93-123 months on the second count was error. Considering the disparity between what the sentence was and what it should have been, the sentence was clearly too lenient.

B. THE TERM OF COMMUNITY CUSTODY WAS IMPROPERLY SET AT 48 MONTHS.

The State concedes that the term of community custody for first degree assault was improperly set. Pursuant to ESSB 5288 and SSB 6162, the term of community custody should have been 36 months. See State of Washington Sentencing Guidelines Commission, Adult Sentencing Manual Supplement 2009, pg. 12.

C. THE TRIAL COURT SHOULD DETERMINE THE APPROPRIATE CRIME RELATED TREATMENT AFTER A HEARING.

The State concedes that the trial court should determine the appropriate crime related treatment after a hearing, not the supervising

community corrections officer. This court should remand with instructions to conduct such a hearing.

CONCLUSION

The trial court did not have "substantial and compelling reasons" to justify the exceptional sentence and it failed to enter the appropriate findings of fact and conclusions of law. Based upon the foregoing argument, this Court should remand the case back to the trial court for resentencing within the standard range. The State concedes that the community custody term was 36 months and that the treatment counseling provision of the community custody order was not an appropriate delegation..

Respectfully submitted this 16<sup>th</sup> day of November, 2010.



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