

NO. 298426-III

FILED

DEC 15 2011

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OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
By _____

RAUL ALVAREZ, Appellant,

v.

STATE OF WASHINGTON, Respondent,

AMENDED BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State failed to provide sufficient evidence that Mr. Alvarez intended to commit an assault against each of the victims.
2. The prosecutor committed misconduct when he violated the witness-advocate rule and vouched for and against several witnesses' credibility.
3. Defense counsel was ineffective because he failed to object to the prosecutor's misconduct, as described in the section above, and that conduct prejudiced the Mr. Alvarez.
4. Defense counsel was ineffective by not reviewing the discovery with Mr. Alvarez, which prevented him from making an informed decision with regard to a plea agreement.
5. Defense counsel was deficient at sentencing because he failed to inform the court that it could impose an exceptional sentence downward.
6. The trial court erred in imposing an exceptional sentence because the evidence does not support the jury's gang aggravator finding.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State failed to provide sufficient evidence that Mr. Alvarez intended to commit an assault against each of the victims. (Assignment of Error 1)
2. Whether the prosecutor committed misconduct when he violated the witness-advocate rule and vouched for and against several witnesses' credibility. (Assignment of Error 2)
3. Whether defense counsel was ineffective because he failed to object to the prosecutor's misconduct, as described in the section above, and that conduct prejudiced the Mr. Alvarez. (Assignment of Error 3)
4. Whether defense counsel was ineffective by not reviewing the discovery with Mr. Alvarez, which prevented him from making an

informed decision with regard to a plea agreement. (Assignment of Error 4)

5. Whether defense counsel was deficient at sentencing because he failed to inform the court that it could impose an exceptional sentence downward. (Assignment of Error 5)
6. Whether the trial court erred in imposing an exceptional sentence because the evidence does not support the jury's gang aggravator finding. (Assignment of Error 6)

III. STATEMENT OF THE CASE

1. Procedural Facts

On September 29, 2010, the State charged Raul Alvarez with Four Counts of Assault in the First Degree, one Count of Drive by Shooting, and one count of Bein a Felon in Possession of a Firearm. CP 1-2. The First Amended Information added a Firearm Enhancement. CP 3-5. The State also alleged a gang aggravator. CP 5.

Mr. Alvarez was represented by Jack Fiander, court appointed counsel. RP 1. On February 23, 2011, just before jury selection, Mr. Alvarez moved for a continuance in order to hire private counsel. RP 49-53. Mr. Alvarez told the court that in the five months prior to trial, his attorney had only met with him one time. RP 50. Mr. Fiander told the court that because Mr. Alvarez said he was not present at the scene of the crime, "he can't really help" Mr. Fiander defend his case. CP 51. He also told the court that, "I'm not allowed to show him this stuff [discovery]." RP 53.

In response to this question, the State quickly speculated, “I don’t know if I - - Obviously showing versus giving him unfettered copies, two different things.” RP 53. The court did not inquire any further into whether Mr. Fiander *did* in fact go over the discovery with Mr. Alvarez. Mr. Fiander had earlier informed the Court that Mr. Alvarez had not been given an opportunity to review the discovery, stating, “I’m *sure* Mr. Alvarez feels a little bit in the dark.” RP 53. On February 24, 2010, the State’s key witness, Mr. Ezekiel Almaguer, did not show up to court to testify. CP 6; RP 98-102. Mr. Almaguer was the State’s only witness who could possibly identify the shooter. CP 6. On February 24, 2011, the State moved the court for a material witness warrant in the name of Ezekiel Almaguer. CP 6; RP 98-102. The next day, he was apprehended on the warrant. RP 178.

After some deliberating, the jury returned verdicts of guilty on all six counts, also finding that Mr. Alvarez committed each assault with a firearm. CP 90-99. Additionally, the jury found that each count was done “with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage to or for criminal street gang, its reputation, influence, or membership.” CP 100-05.

The State requested that the court impose an exceptional sentence above the standard range, which was 671 – 875 months (or approximately 56 to 69 years). RP 511. The State asked for of an additional five years for

counts I-IV, to run consecutive to each other. CP 114. The gang aggravator, therefore, would add a total of 20 years to the defendant's sentence, and 20 years above the standard range. CP 114. In total, the prosecutor requested that the court impose a sentence of 1065 months in prison. CP 114. In response, defense counsel did not file a sentencing memorandum with the court or even present one in his client's defense. RP 511. Ultimately, the court imposed the 1065 month sentence as requested by the State, basing the exceptional sentence upon the gang aggravator. RP at 527.

2. Substantive Facts

On July 10, 2010, several men drove by a home located at 106 Hawthorne Drive in Sunnyside, Washington. RP 69. Multiple men got out of a white trailblazer and began shooting into the home. RP 125. Approximately 24 shell casings were found at the scene, from two separate guns, a .9mm and a .22. RP 154. Located in the home were four people, the alleged victims for counts I–IV.

During trial, none of the witnesses identified Mr. Alvarez as one of the shooters. Also, it was verified several times during trial that Mr. Alvarez had a twin brother, Raul. *See* RP at 145. Like the appellant, Raul had also been through the juvenile court system. RP at 146. The only evidence that was introduced that implicated Mr. Alvarez in the shooting was a prior, out-of-court identification by a Mr. Ezekiel Almaguer, a man

who lived at a house near the shooting on the corner of the street. RP 183. From near his home, Mr. Almaguer testified that he saw “Some young kid taking shots at a house down the road.” RP 183. Mr. Almaguer was approximately 50 feet away from the shooter. RP 184. At trial, Mr. Almaguer testified that, from this distance, he was not able to identify the shooter. RP 185.

At trial Mr. Almaguer testified that the shooter was definitely not Mr. Alvarez. RP 186. But after the shooting occurred, Mr. Almaguer saw a picture of the defendant on the news and he called 911 to report what he had seen that night. RP 188. The State offered the 911 call as evidence, in which Mr. Almaguer stated that “there was a police officer holding a picture of a kid, and that kid right there was the same kid that was shooting.” RP 192. Mr. Almaguer tried to clarify his mistaken identification, but the prosecutor continued to impeach him by asking Mr. Almaguer questions about conversations he had with the prosecutor and his staff, a paralegal for the prosecutor’s office, Ms. Kaitlin Mee. RP 201, 337.

In addition, the prosecutor asked Mr. Almaguer questions about an encounter between Mr. Almaguer and the prosecutor after he was apprehended on the material witness warrant, “Now at that time, did you again reaffirm . . . that you were 100% sure it was him.” RP 203. Mr. Almaguer again denied that he identified Mr. Alvarez as the shooter. The

prosecutor again continued to impeach Mr. Almaguer by questioning him about conversations with the defendant in which he was obviously a witness. RP 227.

In addition to questioning Mr. Almaguer directly about the conversations he had with the prosecutor, the prosecutor also questioned Ms. Mee on the stand about Mr. Almaguer's statements made in his presence. RP 341. Ms. Mee testified that she was speaking on the phone with Mr. Almaguer and he was not going to testify in the Alvarez case. RP 341. The prosecutor then, pointed out that he was present for these conversations. RP 341. Ms. Mee stated that Mr. Almaguer never expressed doubt about his prior identification. RP 342.

Mr. Alvarez presented an alibi defense to the shooting and called several witnesses, including, Mr. Alvarez, Mr. Robert Cruz Jr., and Ms Sandra Cardenas. All of these witnesses testified that Mr. Alvarez was at a barbeque in Grandview on the night of the shooting, which occurred in Sunnyside. RP 361-69; RP 377-88; RP 403-410. On direct examination, Mr. Cruz testified that Mr. Alvarez was with him at the barbeque from five or six to ten at night, and, therefore, could not have been involved in the shooting. RP 388. On cross examination, the prosecutor questioned Mr. Cruz about statements that Mr. Cruz allegedly made in the presence of the prosecutor earlier that morning, "So this day—Now this barbeque, and we

talked a little bit before—a little earlier this morning. *I was there*, Mr. Fiander was there and Detective Layman was there, correct?” RP 392.

In an attempt to prove the gang aggravator, the State questioned several witnesses about the victim’s associations with gang members in the community and also called an expert witness regarding gang activities in the Yakima County region of Washington. *See, e.g.*, RP 79, 252, 331. Also, the State called Juvenile Probation Officer Fairbanks to testify as to Mr. Alvarez’s alleged “gang involvement.” RP at 96. Yet, Officer Fairbanks provided no evidence as to whether Mr. Alvarez had a gang related motive for the shooting that occurred on July 10, 2010.

IV. ARGUMENTS

A. The State failed to provide sufficient evidence that Mr. Alvarez intended to shoot all four of the three victims.

Due process requires the State to prove every element of the crime charged beyond a reasonable doubt. *State v. Nicholson*, 119 Wn. App. 855, 862, 84 P.3d 977 (2003). Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Tilton*, 149 Wn. 2d 775, 786, 72 P.3d 735 (2003).

To convict Mr. Alvarez of first degree assault, the State must prove all elements in RCW 9A.36.011. Because none of the victims in this case

were harmed, to sustain Mr. Alvarez's convictions, the State must have proved that Mr. Alvarez attempted, with unlawful force, to injure the victims (attempted battery). CP 72. As instructed, to convict Mr. Alvarez of each of the Assaults, the jury had to find (1) that he committed attempted battery (*against anyone*), (2) that the assault was with a firearm, (3) that the defendant intended to inflict great bodily harm (*upon anyone*), and (4) that these acts occurred in Washington. CP 72-81.

Under these jury instructions, which are supported by the holding in *State v. Elmi*, the jury was allowed and, was in fact **required** to convict Mr. Alvarez of four counts of assault in the first degree, even if he did not know any of those victims were in the home, so long as it found that he intended to shoot *someone*. See *State v. Elmi*, 166 Wn. 2d 209, 207 3.Pd 439 (2007). Although these jury instructions have recently been upheld under circumstance similar to that here, in *Elmi*, this court should refuse to uphold Mr. Alvarez's assault convictions in this case.

In *State v. Wilson*, the Court held that RCW 9A.36.011 does not require that specific intent match a specific victim, under a literal interpretation of the statute, Wilson's specific intent to inflict great bodily harm transferred to the two people who were **actually physically injured**. *Id.* Recently, however, the Supreme Court of Washington extended the holding of *Wilson* too far and beyond purpose of the assault statute. See *id.*

Then, more recently, in *State v. Elmi*, the Court incorrectly held that the plain language of the statute allows the specific intent in injure one victim transfers to another unintended **and uninjured victims**. *Id.* In this section, the appellant argues that this decision was wrongly decided because it broadened the holding of *Wilson* and impermissibly expanded upon the assault I statute, which itself embodies the idea of transferred intent.

In *Elmi*, the defendant was charged with attempted murder and four counts of assault in the first degree after he fired several gunshots into the living room of the home of his estranged wife, where she lived with her three young children and siblings. *Elmi*, 166 Wn. 2d 209. No one was physically injured. At trial, Elmi's estranged wife testified, but none of the children did. Ultimately, Elmi was convicted of one count of attempted murder and four counts of first degree assault. Elmi appealed, arguing that the evidence was insufficient to support the convictions for the first degree assaults against the four children. Our Supreme Court accepted review and considered whether a defendant's specific intent to harm one victim transferred "to meet the intent element" against other, unintended victims. *Id.* In a hotly contested 4-3 decision, the *Elmi* majority affirmed.

In rejecting Elmi's sufficiency of the evidence claim, the Majority concluded that it need not analyze the issue under the common law doctrine of transferred intent because the first degree assault statute itself

“encompasses transferred intent.” *Id.* at 218. The court reasoned that the first degree assault statute “provides that once [intent] is established, any unintended victim is assaulted *if they fall within the terms and conditions of the statute.*” *Id.* These “terms and conditions” include not only a mens rea element, but also an actus reus element of any of the three common law forms of assault, i.e., “(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.” *Id.* Although the *Elmi* majority may have fairly analyzed the statute according to a literal reading of the statute, that statute as advanced by the *Elmi* dissent, is not in accord with the doctrine of transferred intent and is not supported by the Court’s holding in *Wilson*.

1. This court must look to common law transferred intent to understand the breadth of the assault statute.

With regard to the issue of transferred intent, the *Elmi* dissent disagreed with the majority on its conclusion that under *Wilson*, once the State established “*Elmi’s* intent to harm Fadumo Aden, ‘the mens rea is *transferred* under RCW 9A.36.011’ to the children.” *Id.* at 209 (J. Madson Dissenting). The dissent also disagreed that the court could “proceed under RCW 9A.36.011 without analysis of the doctrine of transferred intent. The dissent pointed out that the *Elmi* majority dismissed discussion of the

transferred intent altogether, recognizing that the statute “encompasses transferred intent.” *Id.* However, the majority’s analysis dismissed discussion of the doctrine altogether.

The doctrine of transferred intent was developed at common law in order to provide a mechanism to find a defendant who shoots at B but misses and *hits* C instead “just as guilty as if his aim had been accurate.” *Id.* As the dissent pointed out, such a situation does not exist when no one is physically injured, as was the case in *Elmi* and as is the case here

“In *Wilson* this court recognized that RCW 9A.36.011 *codifies* the doctrine of transferred intent and makes application of the doctrine a function of the statute instead of a function of the common law: “once the intent to inflict great bodily harm is established ... the mens rea is *transferred under* RCW 9A.36.011 to any unintended victim.” However, there is nothing in RCW 9A.36.011 to suggest that the legislature intended to codify a concept broader than the common law doctrine that would allow multiple first degree assault convictions to stand where there is proof that the person the defendant intended to assault was in fact assaulted and no unintended victim received actual injury.

Id. at 221(citing *Wilson*, 125 Wn. 2d at 218).

The dissent pointed out that the legislature clearly established the punishment structure for certain crimes to be “commensurate with mental culpability,” and that the assault statute “was not intended to reach beyond the scope of the common law concept to impose multiple punishments where no unintended victim received injury.” *Id.* “Simply put, the doctrine of transferred intent, whether at common law or as codified, is not and

never has been intended to apply in circumstances where no unintended victim is injured.” *Id.* at 221-22. The dissent found it especially baffling, and rightfully so, that the majority would turn to common law definitions of assault to interpret the meaning of the statute, while refusing to turn to common law guidance for the doctrine of transferred intent, even though it recognized that the statute “encompassed that doctrine.” *Id.*

2. The *Elmi* majority unreasonably expanded its previous holding in *State v. Wilson*, which does not support using transferred intent to apply to uninjured and unintended victims of an assault.

In *Wilson*, the Court reinstated the defendant's two first degree assault convictions, holding that under RCW 9A.36.011, once the specific intent to inflict great bodily harm is established, this intent may transfer to any unintended victim. 125 Wn. 2d at 218. After being ejected from a tavern for rowdy behavior, Wilson fired several gunshots into the tavern, missing his intended victims, Jones and Judd, but striking two unintended victims, Hurles and Hensley. Reading the various assault statutes in combination with the common law definitions of assault, the Court concluded that Wilson assaulted Hurles and Hensley in the first degree “when, with an intent to cause great bodily harm to Jones or Judd or both, Wilson discharged bullets from a firearm into the neck of Hurles and into the side of Hensley.” *Id.*

Although the *Elmi* majority recognized that “*Wilson* is distinguishable to the extent that the case involved an actual battery,” it nonetheless found that *Wilson* was applicable to the circumstances here where no actual battery occurred. But the factual distinction in *Wilson* is critical. *Wilson* relied on the actual injuries suffered by the unintended victims to prove the defendant’s specific intent to inflict great bodily harm: “we concluded that Wilson assaulted Hurles and Hensley [the unintended victims] in the first degree ‘when ... Wilson discharged bullets from a firearm *into the neck* of Hurles and *into the side* of Hensley.’ ” *Id.* (citing *Wilson*, 125 Wn. 2d at 217).

In fact, *Wilson* did not apply the first degree assault statute beyond the reaches of the common law doctrine; by holding otherwise, the *Elmi* majority extended the *Wilson* holding far beyond what the Court had intended when it decided *Wilson*. The majority’s extension of *Wilson* to cases where no one was injured simply because “the assault statute provides for the various methods of assault to be treated equally,” simply ignores the reasoning in *Wilson* and the transferred intent doctrine altogether. *Id.* at fn 5. This court, should therefore, refuse to make the same mistake that the court made in *Elmi*, as pointed out by the dissent.

3. The majority’s holding in *Elmi* is incompatible with the common law concept of transferred intent.

At least one Washington case has criticized the Court's holding in *Elmi* as being incompatible with the concept of transferred intent." See *State v. Abuan*, 161 Wn. App. 135, 157, 257 P.3d 1 (2011) (agreeing with the *Elmi* dissent that the majority's holding was "difficult to reconcile with the common law doctrine of transferred intent and may result in a concept of 'statutory' transferred intent severed from and far broader than the limited doctrine of common law transferred intent"). In *State v. Abuan*, the court of appeals rejected the argument that the reasoning in *Elmi* should apply to an Assault 2 charge because "if we were to use the dissent's transferred intent analysis from *Elmi*, arguably anyone in the neighborhood who heard the gunshots could be a victim of an assault by Abuan. We are unwilling to extend *Elmi* this far." *Id.* at 158.

However, the *Abaun* court was able to distinguish *Elmi* from the facts of that case on statutory grounds, because the defendant in *Abaun* was only charged with Assault in the second degree, which did not follow the same statutory structure as assault in the first degree. Unfortunately here, this court may not decide the issue on different grounds, as did the *Abaun* court, because *Elmi*, although incorrectly decided, is directly on point with this case. This court should, therefore, undertake its own analysis of the assault statute and read it in conjunction with the transferred intent doctrine, as the dissent did in *Elmi*. In doing so, this court should conclude

that Mr. Alvarez lacked the requisite intent to commit four separate assaults when no victim was injured.

4. Following the *Elmi* holding in this case is especially problematic here, where the state only alleged “attempted battery” as the basis for the assaults and could lead to “limitless liability.

In *Elmi*, the State instructed the jury on all three common law definitions of assault, i.e., “(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.” *Id.* 215. Here, by contrast, the court only instructed the jury on two of those definitions, actual battery and attempted battery. CP 72. Thus, the dissent’s analysis of the assault by creating “reasonable apprehension” is not particularly relevant here. However, its analysis of the transferred intent doctrine when applied to “attempted” battery is especially important here because this was the basis upon which the jury convicted Mr. Alvarez of all found counts of assault in the first degree.

The *Elmi* dissent strongly criticized the application of transferred intent when the state alleges attempted battery because using “the transferred intent doctrine to hold a defendant liable for inchoate crimes like attempted battery criminalizes the unintended and unaccomplished potential consequences of a defendant's actions.” *Id.* at 224. The dissent elaborated on this point, stating:

The majority's extension of the doctrine of transferred intent to the case of attempted battery is particularly problematic. Assault by attempted battery is defined as an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. By the terms of its definition and Washington case law, assault by attempted battery requires proof of specific intent to cause bodily injury. As a crime of attempt, first degree assault by attempted battery sanctions what a defendant intended to do but did not accomplish, not the defendant's unintended and unaccomplished potential consequences. Using the transferred intent doctrine to hold a defendant liable for inchoate crimes like attempted battery criminalizes the unintended and unaccomplished potential consequences of a defendant's actions.

Id. at 224 (citations omitted). In support of this argument, the dissent cited several cases from numerous other jurisdictions, citing cases from Florida, Connecticut, California, Arizona, and Alaska. Several of these cases described the complexity of transferring intent from one victim to another for “inchoate crimes” and the fact that doing so often results in punishment that goes beyond the actual culpability of the defendant.

In *State v. Hinton*, 227 Conn. 301, 305, 630 A.2d 593 (1993), the defendant fired one shot from a sawed-off shotgun loaded with “triple ought” buckshot. This one shot contained eight pellets and killed three people while injuring one other. *Elmi*, 166 Wn. 2d at 225. (J. Madson Dissenting). The defendant was convicted at trial of three counts of murder (for the three murdered victims), one count of capital felony (for use of a firearm), one count of attempted murder (for the nonfatally injured victim), and one count of assault (also for the nonfatally uninjured victim). *Id.* The

Connecticut Supreme Court refused to uphold the trial court's application of the doctrine of transferred intent and overturned the defendant's attempted murder and assault in the first degree convictions. *Id.* at 318. In overturning the attempted murder conviction, the court noted that a **very small number of jurisdictions** apply the doctrine of transferred intent to attempt crimes and held that the “*rule of lenity leads us to conclude that the transferred intent doctrine should not be applied*” to attempt crimes. *Id.*

Likewise, the dissent cited a California case, *People v. Bland*, the defendant intended to kill and did kill one victim. The defendant also injured, though did not kill, two unintended victims. *Elmi*, 166 Wn. 2d at 225 (J. Madson Dissenting) (citing 28 Cal 4th 313, 317, 48 P.3d 1107 (2002)). Noting that “[t]he business of ‘transferring’ ” mens rea is more complex for inchoate crimes, the California Court of Appeals held that doctrine does not extend to “unintended victims to an inchoate crime like attempted murder.” *Id.* “The crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences.” *Id.*

These cases represent the *majority* view on transferred intent, i.e. allowing the doctrine of transferred intent to apply to cases in which no unintended victim is injured theoretically makes a defendant’s potential liability limitless. *See id.* at 226. Here, even assuming that Mr. Alvarez was

the man who shot into the home, which was hotly contested at trial, allowing his intent to harm anyone in that home to uphold convictions for first degree assault of four unharmed, unintended victims creates a principle of limitless liability. There was no evidence introduced at trial that Mr. Alvarez knew who, if anyone was in the home at the time of the shooting. Each of the alleged victims that testified stated that they could not see the shooter and that they had no idea why anyone who shoot at them specifically.

To convict Mr. Alvarez of each of the Assaults, the jury had to find (1) that he committed attempted battery (*against anyone*), (2) that the assault was with a firearm, and (3) that the defendant intended to inflict great bodily harm (*upon anyone*). CP 72-81. Under these jury instructions, the jury was *required* to convict Mr. Alvarez of four counts of assault in the first degree, even if he did not know any of those victims were in the home, so long as it found that he intended to shoot *someone*. Taking these jury instructions and the corresponding holding of *Elmi* to its logical extreme, had there been 100 people in the home when the home was shot at, the shooter would be subject to 100 counts of first degree assault simply because he “bears the risk of multiple convictions ... regardless of whether the defendant knows of their presence.” *Id.* 228.

5. Other statutes were enacted to punish this crime.

Finally, applied properly, “the assault statute will not permit risky or dangerous behavior to go unpunished.” *Id.* at 228. As the *Elmi* dissent pointed out, the State has numerous other avenues by which to punish the risk created by a specific intent crime to unintended and uninjured victims in cases such as these. In cases where no victim suffers actual injury but the defendant “creates a substantial risk of death or serious physical injury to another person,” the legislature has created the crimes of drive-by shooting or reckless endangerment.¹ Adherence to the *Elmi* majority’s holding, especially in this case, would result in the watering down of the specific intent requirement in first degree assault cases by equating those statutes to require only a general form of recklessness that the legislature clearly intended to be handled by their crimes, such as drive by shooting and reckless endangerment. *Id.*

Here, Mr. Alvarez has been convicted of the crime of drive by shooting, which requires no specific intent. Arguably, the risk created by the shooting that the legislature wished to punish was punished by his conviction for this crime. Fairly charged, Mr. Alvarez should have faced

¹ *Id.* at 228 (citing RCW 9A.36.045(1)); compare 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 35.03 (2008) (WPIC), stating that “a person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another *and* inflicts great bodily harm” with 11 WPIC 35.32, stating that “[a] person commits the crime of reckless endangerment when he or she recklessly engages in conduct that creates a substantial risk of death or serious injury to another person.”

four counts of drive by shooting, for each person in the home because no specific intent is required for that crime. Mr. Alvarez's convictions for assault in the first degree are even more troubling because the State did not allege that Mr. Alvarez had the specific intent to shoot any of the victims in the house, i.e. by providing a specific motive to do so or even by showing that Mr. Alvarez could see the potential victims in the home. The State only argued generally that the shooting was done as a retaliatory gang shooting, but it identified no intended victims. The facts of this case, at best fit the general intent of recklessness for shooting into a home.

6. This court should dismiss three of the four assault convictions with prejudice.

Under *Elmi* and the jury instructions given here, the jury was allowed to convict Mr. Alvarez based upon the assumption that someone who shoots into a home intends to hit someone, and once that intent is established, he has assaulted every person who happens to be in the home. As such, this court should ignore the holding in *Elmi* and find that the State, here failed to prove each count of Assault in the First Degree.

A finding of insufficient evidence in support of a verdict requires dismissal with prejudice rather than remand for a new trial. *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). To proportion Mr. Alvarez's convictions and sentence with his culpability and to reconcile the

assault statute with the transferred intent statute, this court should vacate three of the four of Mr. Alvarez's convictions for assault in the first degree and remand for re-sentencing and any remaining convictions.

B. Prosecutorial Misconduct—the prosecutor committed misconduct when he violated the witness-advocate rule and vouched for and against several witnesses' credibility.

A prosecuting attorney is held to a higher standard than the typical defense attorney because he represents the people and should act with impartiality in the interest of justice. As a quasi-judicial officer, a prosecutor must subdue courtroom zeal for the sake of fairness to the defendant. *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011). In general, a prosecutor errs by expressing a "personal opinion about the credibility of a witness and the guilt or innocence of the accused." *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Just as it "is improper for a prosecutor personally to vouch for the credibility of a witness[,]" it is improper for a prosecutor to personally vouch against the credibility of a witness. *Id.* Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact. *Id.*

1. The Witness-Advocate Rule implicates the common law rule against Improper Vouching.

In particular, a prosecutor may not place the integrity or prestige of her office on the side of a witness's credibility. *State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985). Improper vouching generally

occurs if the prosecutor expresses his or her personal belief about the veracity of a witness, or if the prosecutor indicates that evidence not presented at trial supports the witness's testimony. *Id.* The advocate-witness rule imposes a related prohibition—a prosecutor may not take the stand at a trial he or she is litigating. RPC 3.7. The particular “danger in having a prosecutor testify as a witness is that jurors will automatically presume the prosecutor to be credible and will not consider critically any evidence that may suggest otherwise.” *United States v. Edwards*, 154 F.3d 915 (9th Cir. 2998). In *U.S. v. Prantil*, the Ninth Circuit court of Appeals elaborated on the importance of adhering to this long standing rule so a defendant may obtain a fair and unbiased trial:

Accordingly, adherence to this time-honored rule is more than just an ethical obligation of individual counsel; enforcement of the rule is a matter of institutional concern implicating the basic foundations of our system of justice. Other, more specific, policies are served by the advocate-witness rule in the context of a criminal prosecution. First, barring testimony by the participating prosecutor "eliminates the risk that a testifying prosecutor will not be a fully objective witness given his position as an advocate for the government." Second, the rule prevents the prestige and prominence of the prosecutor's office from being attributed to testimony by a testifying prosecutor. Third, the rule obviates the possibility of jury confusion from the dual role of the prosecutor wherein the trier-of-fact is asked to segregate the exhortations of the advocate from the testimonial accounts of the witness.

Naturally, the potential for jury confusion is perhaps at its height during final argument when the prosecutor must marshal all the evidence, including his own testimony, cast it in a favorable light, and then urge the jury to accept the government's claims. Hence

there is a very real risk that the jury, faced with the exhortations of a witness, may accord testimonial credit to the prosecutor's closing argument. Finally, the rule expresses an institutional concern, especially pronounced when the government is a litigant, that public confidence in our criminal justice system not be eroded by even the appearance of impropriety.

United States v. Prantil, 756 F.2d 758, 764-65 (9th Cir. 1985). These policies underlying the advocate-witness rule “apply equally when a prosecutor implicitly testifies to personal knowledge or otherwise attains witness verity in a case in which he appears as an advocate for the government.” *Id.* at 921-22. Thus, “it would be improper for a government attorney who has independent personal knowledge about facts that will be controverted at the trial to act as prosecutor “if he uses that inside information to testify indirectly by implying to the jury that he has special knowledge or insight.” *Id.*

2. It is improper for a prosecutor to inject himself into a proceeding as an unsworn witness because it violates the witness advocate rule and the rule against vouching.

In *State v. Reed*, the Supreme Court remanded for a new trial because of prosecutorial misconduct, even though the trial court sustained defense objections to the offending remarks during trial. *State v. Reed*, 102 Wn. 2d 140, 147, 684 P.2d 99 (1984). On appeal, Reed argued that the comments of the prosecuting attorney during closing argument denied him of a fair trial. The prosecutor not only expressed his personal opinion that

the defendant was a liar, but also impugned the defense witnesses as being unbelievable because they were from out of town and drove fancy cars. Based upon these actions, the court found that the prosecutor had violated the RPCs by asserting his personal opinion of the credibility of the witnesses and the guilt or innocence of defendant.

Likewise, in *State v. Sargent*, the defendant was charged with first degree murder for beating his wife to death and arson from then burning down their home. 40 Wn. App. 340, 698 P.2d 598 (1985). At trial, Jerry Lee Brown, Sargent's cellmate in Oregon, testified that Sargent told him that during an argument with his wife, Sargent had hit her repeatedly with a weapon while he was either drunk or on drugs. Brown stated that Sargent didn't remember anything about a fire. During closing arguments, the deputy prosecutor stated to the jury:

I believe Jerry Lee Brown. I believe him when he tells us that he talked to the defendant, that the defendant told him that he had beaten his wife in the past and had gone into counseling, just like Mr. VanderVelden said. *I believe him* when he said that his wife was once beaten, Mr. Sargent once beat his wife, and his attitude towards it was she had it coming, just as another witness testified, Chris Giles.

Id. On appeal, the court found that, although this comments were not as reprehensible as those in *Reed*, they were still improper and prejudicial.

In *Horton*, the defendant argued that the prosecutor omitted misconduct during closing argument when he stated, “Then you have the

defendant. The manner in which he testified, the State believes, this prosecutor believes that he got up there and lied.” 116 Wn. App. at 921. The defendant’s argument was that this was clearly misconduct and that his counsel was deficient in failing to object to it. The State conceded, and the court concluded, that it was in fact misconduct. In addition, the court concluded that counsel’s failure to object was deficient and prejudiced the defendant, warranting a new trial. *Id.*

In *U.S. v. Edwards*, where the prosecutor searched a bag that had already been admitted into evidence, found a bail receipt that implicated the defendant and offered evidence of the receipt through police officers’ testimony. 154 F.3d at 917. The court reversed the conviction, holding that the prosecutor had improperly vouched for the officers’ testimony. *Id.* The court concluded that once the jury learned that the prosecutor found the receipt, its discovery would be attributed to the authority of the prosecutor office. By putting the officers on the stand and asking them to testify to the circumstances under which the prosecutor found the evidence, the prosecutor implicitly vouched for the accuracy of their testimony. *Id.*

3. The prosecutor made himself an unsworn witness, violating the witness-advocate rule and the rule against vouching.

In this case, the prosecutor’s actions were improper. The comments and actions of the prosecutor, just as those in *Reed*, *Sargent*, and *Edwards*

were improper vouching. By improperly injecting himself as a witness to the proceedings, the prosecutor both expressed a personal belief about the veracity of Mr. Almaguer, and improperly injected himself as a witness to the proceedings by indicating that he witnessed several of Mr. Almaguer's impeaching statements. Moreover, because impeaching Mr. Almaguer's in court testimony was so crucial to the State's case in chief, the prosecutor's actions prejudiced Mr. Alvarez and denied him a fair trial.

Like the court noted in *Edwards*, even though the prosecutor was not called officially as a witness, per the witness advocate rule, the prosecutor's actions during trial clearly violated the witness advocate rule and constituted vouching by the prosecutor. Moreover, like the prosecutors in *Reed* and *Sargent*, several of the prosecutors questions and statements throughout the trial expressed or at least implied a personal belief in the truth of some witnesses (i.e. Ms. Mee), while acting the veracity of others (i.e. Mr. Almaguer). Furthermore, the prosecutor made numerous comments throughout the trial and during closing argument that made it clear he was a witness in the case, which he used to impeach Mr. Almaguer's in court testimony and to impeach the defense's alibi witnesses. For instance, the prosecutor questioned Mr. Almaguer about a conversation that he had with the prosecutor and his staff just a week before his testimony. The prosecutor asked the Mr. Almaguer, "And then,

when it came to Wednesday of last week, was you on the phone from anyone with our office, the Prosecutor's Office?" RP 201.

A paralegal for the prosecutor's office, Ms. Kaitlin Mee, called Mr. Almaguer to discuss the case. Then, the prosecutor asked "And did somebody else get on the phone at that time?" RP 201; RP 337. Mr. Almaguer replied, "You," referring to the prosecutor. RP 201. Immediately after the prosecutor injected himself as a witness to the phone call, the prosecutor followed up with a question that implied Mr. Almaguer identified the shooter as recently as a week prior, "Did you again acknowledge that you're 100% certainty in this case?" Mr. Almaguer replied, "No." The prosecutor also implied that Mr. Almaguer told him that he did not want to testify against the defendant because he feared that the defendant would retaliate against his family. RP at 202.

This line of questioning, had the prosecutor not been a witness to it, may have been reasonable. However, once the prosecutor made it clear that he was a witness to the conversation. That line of questioning implied that anything but a "yes" answer was a lie, which created the obvious danger "that jurors will automatically presume the prosecutor to be credible and will not consider critically any evidence that may suggest otherwise." *Edwards*, 154 F.3d at 915.

As if the above line of questioning was not enough, the prosecutor continued to inject himself and his office as a witness to the proceedings when he asked Mr. Almaguer questions about an encounter between Mr. Almaguer and the himself after he was apprehended on the material witness warrant, “Now at that time, did you again reaffirm . . . that you were 100% sure it was him.” RP 203. Mr. Almaguer again denied that he identified Mr. Alvarez as the shooter.

The prosecutor again continued to impeach Mr. Almaguer by questioning him about conversations with the defendant in which he was obviously a witness, “Did you say that, or did you just leave that portion out in all the times you’ve spoken to us.” RP at 204. “Okay so after you stated you refused to testify at all, answer any questions up on the stand, at that point, were you arrested.” RP at 204. Mr. Almaguer responded, “No,” you said you were going to give me one more reconsider.” Again, on re-direct, the prosecutor questioned Mr. Almaguer about statements he allegedly made in the presence of the prosecutor, “Okay let me ask you: Didn’t you, when you first walked in here this morning, in front of Detective Layman, and they’d brought (sic). Brought the defendant in, didn’t you announce in front of us, “That’s not the guy. The person who was there had tattoos on his face.” RP at 227. “Please, I want to clarify my question, Mr. Almaguer. Did you or did you not, when you first walked in

here, say that the person that—the shooter had tattoos on his face.” Mr. Almaguer replied, “No.” RP at 227.

In addition to impeaching Mr. Almaguer’s testimony about the conversations he had with the prosecutor, the prosecutor also helped corroborate the State’s witness’s testimony. For instance, the prosecutor questioned Ms. Mee on the stand about Mr. Almaguer’s statements made in the prosecutor’s presence. RP 341. On direct, the prosecutor asked Ms. Mee about the above phone conversation between Mr. Almaguer, Ms. Mee, and the prosecutor on February 18, 2010. RP 340. Ms. Mee testified that she was speaking on the phone with Mr. Almaguer and he was not going to testify in the Alvarez case. RP 341. Then, the prosecutor, obviously intentionally injected himself as a witness, asking Ms. Mee, “Now did anybody else walk up to your desk by happenstance?” RP 341. Ms. Mee replied, “Actually, yes. You had walked up and I had asked Mr. Almaguer if I could put him on speakerphone.” RP 341. Now, with the prosecutor as a witness, essentially endorsing Ms. Mee’s testimony as true, the prosecutor continued to ask Ms. Mee about the content of that conversation. During that conversation, Ms. Mee stated that Mr. Almaguer never expressed doubt about his prior identification and implied that Mr. Almaguer was not testifying because he was afraid for his family’s safety. RP 342.

At trial, Mr. Alvarez presented an alibi defense to the shooting and called several witnesses, including, Mr. Alvarez, Mr. Robert Cruz Jr., and Ms Sandra Cardenas. To disprove this defense, the prosecutor again used his position as prosecutor to gain the trust of the jury when he questioned Mr. Cruz about statements that Mr. Cruz allegedly made in the presence of the prosecutor earlier that morning, “So this day—Now this barbeque, and we talked a little bit before—a little earlier this morning. I was there, Mr. Fiander was there and Detective Layman was there, correct?” After establishing himself as a witness to the conversation, the prosecutor then attempted to impeach Mr. Cruz, pointing out what the prosecutor *thought* Mr. Cruz stated in their earlier conversation, “And you denied that there was a barbeque either the week before or the week after.”RP 392. However, Mr. Cruz denied that he said that. RP at 392.

Finally, to sum up his arguments in closing, the prosecutor pointed out to the jury that he was present during many conversations with the witnesses, again injecting himself as a witness into the proceedings when arguing that Mr. Almaguer, his only witness, was now lying about his identification of the shooter:

Our witness, our definite, 100% witness, he was contacted a week before this trial. He reiterated again after going over all the witness -- all the, all the evidence and all the things he had previously said, reiterated, yes, he’s absolutely sure. Yes, he’ll be showing up. He’ll look forward, you know, he’ll be there again. But when it came to

the day before, Wednesday afternoon, he's suddenly taking the position that he doesn't want to come in. He refuses to testify. *And when questioned about it by both -- and you heard the testimony of Kaitlin Mee regarding this interaction, especially when the Prosecutor, yours truly came into the conversation on speakerphone, he said he was going to take the Fifth.* He reiterated again, "Yes, that's definitely the guy," but because he nosed around and asked around, he now knew details about Raul Alvarez and his brother. He was scared to death. He said not for him, but for his family.

RP at 473-74.

Finally, Sargent's defense counsel, like Mr. Alvarez's trial counsel, did not object to the statements. On review, the Court reversed Sargent's conviction, holding that that the prosecutor vouched for the witness's credibility because the prosecution had improperly placed its integrity on the side of the witness's credibility. *Sargent*, 40 Wn. App. at 340.

4. Mr. Alvarez was prejudiced by the prosecutor's actions as described above and therefore, his convictions should be reversed.

Where the defense fails to object to an improper comment, as happened here, the error is waived "unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." *State v. McKenzie*, 157 Wn. 2d 44, 134 P.3d 221 (2006). But when the prosecutor's remarks directly address the sole defense theory and the State has not presented overwhelming evidence of the defendant's guilt, the improper remarks are reversible error. *Reed*, 102 Wn. 2d at 147. Likewise when a

prosecutor improperly vouches for or against a witness's credibility and that witness is "the only witness directly linking [the defendant] to the crime," the defendant has established prejudice and an appellate court should reverse the defendant's conviction. *Sargent*, 40 Wn. App. at 340.

The *Sargent* court noted that although the comments were not as egregious as *Reed*, they still warranted reversal because the comments

bolstered the credibility of the only witness directly linking Sargent to the crime. All of the other evidence against Sargent is circumstantial. The court in *Reed* considered that the State's case was not overwhelming in reaching its decision. As in *Reed*, the evidence against Sargent is not overwhelming. There is evidence of motive and opportunity, but the State's case is weak without Sargent's confession to Brown.

Id. at 344.

Here, the prejudice of the prosecutor's actions are clear when the State had one key witness—like in *Sargent*—upon whom the State's case relied to convict. In this case, Mr. Almaguer was that witness and attacking his credibility was crucial to the State's case against Mr. Alvarez because the only eye-witness to the shooting that identified Mr. Alvarez as one of the shooters at any point. In fact, Mr. Almaguer was so crucial to the State's case that the prosecutor flatly admitted that he could not proceed without him in his request for a material witness warrant. RP 97. The court even emphasized the importance of this testimony: "And if Ezekial Almaguer doesn't show up, you're in some serious trouble, aren't you."The

prosecutor responded, “Oh, yes, of course.” RP 97. Thus, there can be no question that Mr. Almaguer testimony—and his credibility—were at least as crucial as the testimony of the witness in *Sargent*. Moreover, the prosecutor also used his position to verify the credibility of other witnesses, including Ms. Mee by directly and purposefully pointing out the fact that he was present during the conversations.

Even though no objection was made during trial, the prosecutor’s actions of injecting himself as a witness were “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury,” because the prosecutor imputed himself as a witness into the two central issues of the case—the ID of the shooter and the defendant’s alibi defense. As such, the prosecutor essentially forced the jury to either convict, unless it concluded that the prosecutor himself was not credible.

C. Mr. Alvarez’s counsel was ineffective.

To establish ineffective assistance of counsel, Mr. Alvarez must show that his attorney’s performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The first element of *Strickland* is met by showing that counsel’s performance was not reasonably effective under prevailing professional norms. The second test is met by showing a reasonable probability that, but

for counsel's unprofessional errors, the result would have been different. *State v. Hendrickson*, 129 Wn. 2d 61, 77-78, 917 P.2d 563 (1996). In general, performance is deficient when it falls below an objective standard of reasonableness, but not when it is undertaken for legitimate reasons of trial strategy or tactics. *Horton*, 116 Wn. App. 909. Here, Mr. Alvarez's counsel was deficient in several ways counsel rendered deficient performance in three ways, as described below.

1. Defense counsel was ineffective because he failed to object to the prosecutor's misconduct, as described in Section "B" above, and that conduct prejudiced the Mr. Alvarez.

Failure to object to prosecutorial vouching or a violation of the witness advocate rule has been held to be deficient, as there is "likely no legitimate reason for not objecting" to such an error. *See, e.g., Horton*, 116 Wn. App. At 921 (state conceded that the "argument was improper, a timely objection would have been sustained, and there is likely no legitimate strategic reason for not objecting. In other words, trial counsel's performance was deficient for failing to object to this statement.").

Here, as discussed in depth in Section "B" above, defense counsel failed to object to numerous comments by prosecutor that injected himself into the proceedings as a witness. At every chance he could, the prosecutor made it clear to the jury when he was present during particular statements

made by the witnesses. Defense counsel should have objected based upon the witness-advocate rule and the RPCs, as discussed above.

Defense counsel could have requested that the prosecutor refrain from intentionally imputed his presence in the conversations by asking the witness if he was present for these conversations. At the very least, defense counsel could have asked for a limiting instruction to limit the jury's use of the statements, although it is unlikely such an instruction would have reduced the damage already done by the prosecutor's closing argument, when the jury already knew which witnesses the prosecutor endorsed and which he did not. Thus, if the court finds, per the argument above, that the prosecutor's actions were improper, then it follows that Mr. Alvarez's trial representation was deficient, and the only issue left is prejudice.

Prejudice requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In other words, counsel's deficiencies must have adversely affected the defendant's right to fair trial to an extent that "undermine[s] confidence in the outcome." *Id.* at 694. For instance, in *Horton*, once the court found that the prosecutor's comments were improper, the court looked to the amount of evidence that showed the defendant's guilt, and found it less than certain. *See Horton*, 116 Wn. App. at 921. In that case, the State's case

came down to a jury decision between the credibility of two witnesses, the victim and the defendant. Thus, the prosecutor's statements that he personally did not believe the defendant, "there was a 'reasonable probability' that the result would have been different absent counsel's errors, and our confidence in the outcome has been undermined." *Id.*

Likewise here, as established above, the only evidence that identified Mr. Alvarez as the shooter was evidence of prior identifications of the defendant through Mr. Almaguer. Quite simply, if the jury believed Mr. Almaguer's in court testimony, Mr. Alvarez's would have been acquitted on all charges. Additionally, if the jury had believed any of the alibi witness's testimony (i.e. Mr. Cruz), then it would have also had to acquit, because it would have placed Mr. Alvarez miles away from the crime when it happened. Taking all these circumstances into account, there was a "reasonable probability" that the result would have been different absent counsel's errors, and our confidence in the outcome has been undermined so that a new trial is required. *See id.*

2. Defense counsel was ineffective by not reviewing the discovery with Mr. Alvarez, which prevented him from making an informed decision with regard to a plea agreement.

The Supreme Court has held that the *Strickland* standard is applicable in the plea process. *Hill v. Lockhard*, 474 U.S. 52, 58 (1985). A criminal defendant is entitled to effective counsel in plea negotiations. *State*

v. *Swindell*, 93 Wn. 2d 192, 198, 607 P.2d 852 (1980). By failing to properly negotiate a plea bargain, defense counsel can stand as a basis for ineffective assistance of counsel. *See In re Pers. Restraint of Riley*, 122 Wn. 2d 772, 780-81 (1993). Here, by not reviewing the discovery with Mr. Alvarez, his counsel was deficient and prevented him from making an informed decision with regard to a plea agreement

A defendant has a constitutional right to obtain and view discovery in a criminal case against him.² These rights are grounded in the defendant's due process rights and his right to a fair trial under both the federal and Washington Constitutions. Further, within constitutional limits, the Washington Criminal Discovery rules regulate the disclosure of discovery, primarily under CrR 4.7. The principles underlying CrR 4.7 require meaningful access to copies based on fairness and the right to adequate representation. *State v. Boyd*, 160 Wn.2d 424, 158 P.3d 54 (2007). CrR 4.7(3) reads: a defense attorney shall be permitted to provide a copy of the [discovery] to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court. The discovery rules "are designed to enhance the search for truth," and their application by the trial court should "insure a fair trial to all

² *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *State v. Martin*, 171 Wn.2d 521, 252 P.3d 872 (2011) (prosecutor impugned on [the defendant's] credibility by pointing out [the defendant] exercised his constitutional right to review pretrial discovery materials that the prosecution had a constitutional duty to furnish him").

concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.” *Id.* Part of the reasoning behind these rules is specifically, “to provide *adequate information for informed pleas.*” *Id.*

As our Supreme Court stated in *Boyd*, under CrR 4.7, “The defendant should be allowed access to the evidence only under defense counsel’s supervision.” *Id.* at 438. This criminal rule, echoes “an attorney’s professional responsibilities.” *Id.* at 439. Like the prosecutor has a duty to disclose the evidence to defense counsel, the defense attorney has a duty to allow his client to view the discovery and keep him reasonably informed so that he can make an educated decision regarding his case.³

Here, the record shows that defense counsel failed to meet with his client and allow him to view discovery, or to provide him redacted copies of the discovery. The record makes it clear that defense counsel did not allow Mr. Alvarez to review the discovery, either by spending the time to do so with him, or by providing him with his own redacted copies, per court rule CrR 4.7. Specifically, in speaking to Mr. Alvarez’s concern regarding viewing his discovery, defense counsel stated,

No, the only thing is I’m [] sure this gentlemen [Mr. Alvarez] feels a little bit in the dark, but, you know, under Court Rules, absent the

³See RPC 1.7 (The duty to communicate requires a lawyer to keep his or her clients “reasonably informed about the status of a matter,” and to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

consent of the State or an order of the Court, you know, I'm not allowed to *show* him this stuff [discovery].

RP 53 (emphasis added).

In response to this question, the State was very quick to “save” counsel’s comments regarding the defendant’s right to discovery, stating, “I don’t know if I - Obviously showing versus giving him unfettered copies, two different things.” RP 53. Without further inquiry, Court did not inquire any further into whether counsel *did* in fact go over the discovery with Mr. Alvarez. In fact, the conclusion that he did does not make sense in light of counsel’s earlier statement that “I’m *sure* Mr. Alvarez feels a little bit in the dark.” RP 53. If counsel did in fact review the discovery, then it would not make sense for Mr. Alvarez to “feel in the dark” because he would have seen the discovery, as he obviously requested of counsel. Defense counsel’s own words to the court showed that he clearly did not understand that he was obligated to *show* the discovery to the defendant. As a result, his failure to do so was deficient and his actions fell below “prevailing professional norms.” *See Strickland*, 466 U.S. 668.

In satisfying the *Strickland* test for prejudice when a defendant decides to plead guilty, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Riley*, 122 Wn. 2d at 780-81. Similarly, prejudice should be established when a defendant chooses to

reject a plea offer because his defense attorney's conduct is clearly deficient and there was a "reasonable probability that, but for counsel's errors, he would [have] pleaded guilty." *State v. Sandoval*, 171 Wn. 2d 163, 249 P.3d 1015 (2011).

Here, Mr. Alvarez was forced with a difficult decision: (1) plead guilty, presumably as charged in the original information, or (2) go to trial, at which time the State was going to amend the information to include both a firearm enhancement and a gang aggravator on four separate charges, all to run consecutively to one another. The record does not contain the explicit plea agreement, but the parties made it clear on the record in pre-trial motions that they were continuing negotiations and doing so before the State amended to add the gang enhancements. However, once negotiations broke down, the State filed the amended information and added a Firearm Enhancement for all Four Counts of Assault. CP 3-5. In addition, the State also alleged that Mr. Alvarez "committed any of the above offenses with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined RCW 9.94A.030, its reputation, influence, or membership, and the court may impose an exceptional sentence above the standard range for this crime." CP 5. These enhancements increased Mr. Alvarez's sentence by 40 years.

3. Defense counsel was deficient at sentencing because he failed to inform the court that it could impose an exceptional sentence downward.

Failure to request an exceptional sentence downward may constitute ineffective assistance of counsel. In *State v. McGill*,⁴ the defendant was sentenced to a prison term within the standard range for convictions on two cocaine delivery charges and one possession with intent to delivery charge. After McGill was convicted, his counsel failed to request an exceptional sentence below the standard range. *Id.* On appeal, McGill argued that his amounted to ineffective assistance of counsel. The court of appeals agreed with McGill, holding that failure to inform a sentencing court of the proper scope of its discretion when sentencing a defendant was both deficient and prejudicial. *Id.*

Here, prior to sentencing, the State filed a sentencing memorandum in which it requested that the court impose an exceptional sentence above the standard range, which was approximately 56 to 68 years 671 – 875 months (or 56 to 69 years). RP at 511. The State asked for of an additional five years for counts I-IV, to run consecutive to each other. The gang aggravator, therefore, would add a total of 20 years to the defendant's sentence, and 20 years above the standard range. In total, the prosecutor requested that the court impose a sentence of 1065 months in prison.

⁴ 12 Wn. App. 95, 98, 47 P.3d 173 (2002).

In response, defense counsel did not file a sentencing memorandum with the court or even present one in his client's defense, even though Mr. Alvarez was facing a sentence that would put him in prison for the rest of his life. RP 511. The defense requested a bottom of the range sentence. Defense counsel's remarks to the court at sentencing showed that he did not know he could make such a request and that the court had no discretion to order a concurrent sentence:

“As I calculate the standard range for this offense, and it's very high, the reason being is four of the courts are classed as serious, violent offenses. And as [the prosecutor] said, the sentences for those can't run concurrent, they have to be consecutive.”

RP at 519. Ultimately, the court imposed the 1065 month sentence as requested by the State, basing the exceptional sentence upon the gang aggravator. RP at 527. Like in *McGill*, defense counsel failed to inform the court that it would depart downward; failure to inform the court of that discretion was prejudicial. Counsel was deficient at sentencing because he failed to argue for an exception sentence downward under RCW 9.94A.535, falsely believing that RCW 9.94.A.010 prevented the court from doing so. Just as in *McGill*, the court was not aware that it had the authority to depart downward from the sentence when it clearly did.

RCW 9.94A.589 provides that when a person is sentenced for two or more serious violent offenses arising from separate and distinct criminal

conduct, the sentences “shall be served consecutively to each other.” RCW 9.94A.589(a)(b). But, RCW 9.94A.535 grants a trial court the discretion to order sentences for multiple serious offenses to run concurrently as an exceptional sentence below the standard range if the court finds there are mitigating factors justifying such a sentence. RCW 9.94A.535. Prior to 2007, it was unresolved whether a court still had authority to impose an exceptional sentence downward.

In *Mulholland*, the Supreme Court resolved the issue, holding that despite the seemingly mandatory language of RCW 9.94A.589(a)(b) the sentencing court has discretion to order multiple sentences for serious violent offenses to run concurrently, rather than consecutively, as an exceptional sentence under RCW 9.94A.535.⁵ Under RCW 9.94A.535, at least one such circumstance could have been argued at Mr. Alvarez’s sentencing, specifically, RCW 9.94A.535(1)(g), which states, “The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94.A.010.” Defense counsel’s remarks to the court at sentencing showed that he did not know he could make such a request and that the court had no discretion to order a concurrent sentence:

⁵ *In Re Personal Restraint of Mulholland*, 161 Wn. 2d 322, 166 P.3d 677 (2007).

As I calculate the standard range for this offense, and it's very high, the reason being is four of the courts are classed as serious, violent offenses. And as [the prosecutor] said, the sentences for those can't run concurrent, they have to be consecutive.

RP at 519. This failure made counsel's performance deficient.

Finally, any attempt by the State to frame this mistake as a "tactical decision" would be meritless. A look to the record and the length of Mr. Alvarez's potential sentence makes it clear that counsel's performance was objective unreasonable and deficient. In fact, counsel's failure to request an exceptional sentence downward is even more unreasonable given the length of time in prison Mr. Alvarez was facing, even if the judge granted the sentence that defense counsel requested, or 57 years. Even if the judge granted that sentence, defense counsel noted that this was essentially "a life sentence." RP 511.

In *McGill*, the court found that the defendant was prejudiced by his counsel's failure to not argue for a downward departure when it *could have* resulted in a lower sentence. *See id.* The court held that under similar case law, the trial court *could have* granted a downward departure, had it known that it was an option. *See id.* at 101. The State may attempt to differentiate *McGill* from the case at bar because the court expressly stated that it did not have the authority to depart downward, while the court here did not. However, such a distinction would run contrary to *McGill*:

A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise.

Id. The prejudice suffered by Mr. Alvarez is obvious. The court was not made aware that it even had the *option* of sentencing him to a lower sentence. Had the judge been made aware of that option, it is entirely possible that he could have sentenced Mr. Alvarez to a sentence that was below the standard range, or at least within the standard range, which would have been significantly lower than 1065 months. However, because defense counsel failed to appraise the court of its discretion to impose an exceptional sentence below the standard range, the court was thus made unable to exercise that discretion, just as in *McGill*.

D. The trial court erred in imposing an exceptional sentence because the evidence does not support the jury's gang aggravator finding.

Courts will review the jury's findings of aggravating factors under the clearly erroneous standard. *State v. Bluehorse*, 159 Wn. App. 410, 423, 248 P.3d (2011). In applying the "clearly erroneous" standard in reviewing the fact finder's reasons for imposing an exceptional sentence, we reverse the findings only if substantial evidence does not support them. *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).

In this case, the jury returned a verdict on the gang aggravator, finding that Mr. Alvarez committed Counts I – IV with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or

other advantage to for a criminal street gang its reputation, influence, or membership. CP 101. This finding was based upon RCW 9.94A.535(3)(s). In 2005, the legislature amended that statute in response to the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 (2005). *See Bluehorse*, 159 Wn. App. at 423. As part of these amendments, the legislature enacted RCW 9.94A.535(3)(s), which provides that the trial court may impose an exceptional sentence if the jury finds beyond a reasonable doubt that "[t]he defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group." *Id.* Unlike the previous version of the aggravating factors statute, the enumerated aggravating factors justifying an exceptional sentence are "exclusive," not merely illustrative. *Id.*

When challenged, the court must determine whether substantial evidence supports the jury's finding that the defendant committed the crime "to obtain or maintain his or her membership or to advance his or her position" in a gang. *Id.* Thus, unlike the generalized "gang motivation" or "furtherance of a criminal enterprise" aggravating factors relied on in previous cases, the amended statute's plain language defines the gang-related aggravating factor the State must prove under RCW 9.94A.535(3). RCW 9.94A.535(3)(s) requires the State to prove beyond a reasonable

doubt that Bluehorse's involvement in the drive-by shooting was based on his desire to obtain or maintain gang membership or to advance his gang status. Gang membership alone is not a factor that justifies an exceptional sentence. *Bluehorse*, 159 Wn. App. at 428. Therefore, without evidence relating to the defendant's "motivation, the gang sentencing aggravator would be intolerably broadened by allowing it to attach automatically whenever an aspiring or full gang member is involved in a drive-by shooting based on the detectives' generalized gang testimony." *Id.*

In *State v. Bluehorse*, for instance, the State charged the defendant, Bluehorse, with two separate drive by shootings and the state alleged that both were committed , with the intent to obtain, maintain, or advance his gang membership under RCW 9.94A.535(3)(s) and RCW 9.94A.537(3). *Id.* At trial, the State presented ample evidence that Bluehorse was a gang member with the "NGCs" and that there was a conflict with a rival gang, the "OLCKs." *Id.* at 430. Finally, two officers testified generally about gang culture and that individuals may commit a retaliatory shooting against rival gang members to obtain, maintain, or advance their own gang membership or status. Ultimately, the jury acquitted Bluehorse of one of the shootings but found him guilty of the second, also finding for the gang aggravator for that count. On appeal, Division II determined that the finding lacked substantial evidence and reversed. The court reasoned that "without

evidence relating to Bluehorse's motive for the shooting, that the State did not meet its burden to show that Bluehorse participated in the shooting "with the intent to obtain, maintain, or advance his gang membership under RCW 9.94A.535(3)(s) and RCW 9.94A.537(3)." *Id.*

The record in this case suffers from the same infirmity that the record in *Bluehorse* did: the State failed to present ***specific evidence*** regarding the shooter's motive to shoot at the house. In an attempt to prove that Mr. Alvarez shot at the victim's home to advance his gang status, the State questioned several witnesses about the victim's associations with gang members in the community and also called an expert witness regarding gang activities in the Yakima County region of Washington.

First, the only evidence that the State introduced regarding the victim's residence came in through the testimony of three of the victims; however, none of the witness's testimony provided any specific information as to the *specific motive for the shooting*. According to Jose Rodriguez, one of the victims inside the home when the shooting occurred, none of his family living at his residence had any current gang affiliations, although he did "grow up in a place where, you know, there were gangs and stuff." RP 72. When asked why someone might shoot at his home, Mr. Rodriguez speculated that it might be for "socializing with the wrong people," such as his sister's boyfriend, who is in a gang. RP 79. However,

no gang members ever frequented the home and he failed to elaborate on what “socializing meant.” RP 79.

Ismael Rodriguez, like Jose, was not personally involved with gangs but acknowledged that his sister’s boyfriend was involved in gangs. RP at 119. In addition, Ismael could not explain why the shooting happened or why his house specifically was targeted; however, he guessed that it might have been based upon “his involvement with the people.” RP 119. Maribel Rodriguez testified that her boyfriend had gang affiliations because his uncle and brother were “involved” in a gang but that Mr. Rodriguez as not ever officially part of the gang. RP 252. Based upon these witnesses testimony, "a fair-minded person" would not be persuaded “of the truth of the declared premises," i.e. that the shooter shot at their home to advance himself in a street gang.

Second, the State called Juvenile Probation Officer Fairbanks to testify as to Mr. Alvarez’s alleged “gang involvement.” RP 96. Fairbanks stated that, in 2008, Mr. Alvarez admitted to being in a gang. RP 132. In addition, Officer Fairbanks provided some other information that made it possible that Mr. Alvarez was still in a gang at the time of the shooting. RP 133. However, Officer Fairbanks provided no evidence as to whether Mr. Alvarez had a gang related motive for the shooting that occurred on July 10, 2010. Similarly, Officer Ortiz testified that Mr. Alvarez was involved

with a gang and wore the colors of the “LVL” gang in Yakima. However, the evidence that Mr. Alvarez was at one point in a gang, or that he still may have been in a gang does not establish that the Mr. Alvarez’s “involvement in the drive-by shooting was based on his desire to obtain or maintain gang membership or to advance his gang status.” *See Bluehorse*, 159 Wn. App. at 428.

Finally, without any knowledge of the shooting, Officer Ortiz speculated that, generally, gangs commit violence against one another in order to “get status.” RP 331. But, just as in *Bluehorse*, the fact that the State called a gang expert as a witness did not and could not establish a *specific motive* by for the shooting because he had no personal knowledge of the shooting.

V. CONCLUSION

For the reasons stated above, Mr. Alvarez respectfully requests that the court grant the relief as designated in his opening brief.

DATED this 12th day of December, 2011.



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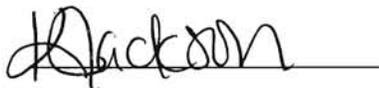


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PROOF OF SERVICE

On December 13, 2011 I filed with the Court of Appeals, Division III via the United States Postal Service to be delivered to their office at **500 N Cedar St, Spokane, WA 99201-1905** the attached Amended Appellant's Brief and proof of service. On this same date, I deposited into the United States Postal service a copy of this Amended Appellant's Brief and proof of service to the Yakima County Prosecuting Attorney's Office, Appellate Unit at 128 North 2nd Street, Room 329, Yakima, Washington 98901. The defendant on this case, Mr. Raul Alvarez, was sent a copy of this Amended Brief and this proof of service via the United States Postal Service at Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.

Dated this 13th day of December, 2011,



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