

**FILED**

**MAR 29 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 298426

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

RAUL ROBERT ALVAREZ,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE BLAINE G. GIBSON, JUDGE

---

BRIEF OF RESPONDENT

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JAMES P. HAGARTY  
Prosecuting Attorney

Kevin G. Eilmes  
Deputy Prosecuting Attorney  
WSBA #18364  
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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether there was sufficient evidence that Mr. Alvarez intended to assault each of the four victims on Counts 1 through 4?
2. Whether the prosecutor committed misconduct by vouching for or against the credibility of witnesses who testified at trial?
3. Whether defense counsel was ineffective in not lodging an objection to misconduct on the part of the prosecutor?
4. Whether defense counsel was ineffective in not reviewing discovery with Mr. Alvarez?
5. Whether defense counsel was ineffective by failing to inform the sentencing court that it could impose an exceptional sentence?
6. Whether the trial court erred in imposing a gang aggravator in that insufficient evidence supported the jury's finding?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was sufficient evidence introduced at trial that Alvarez specifically intended to assault each of the four victims, as a logical probability. The State did not rely upon the transferred intent doctrine to prove its case, nor was the jury so instructed.
2. The prosecutor did not commit misconduct by vouching for or against any witness; he did not interject any unsworn testimony nor did he express a personal opinion about the credibility of any witness.
3. Defense counsel was not ineffective by not objecting to what was not prosecutorial misconduct.
4. The record does not clearly demonstrate to what extent counsel reviewed discovery materials with his client. No prejudice is shown in any event, as counsel presented an alibi defense on behalf of his client.
5. Defense counsel was not ineffective by not informing the court that it could impose an exceptional sentence downward, as there is no suggestion in the record that the court did not know it could do so. There is no prejudice

shown, as there is nothing on the record to suggest that the trial court would have imposed such an exceptional sentence.

6. Substantial evidence supported the jury's finding as to the gang aggravator.

## II. STATEMENT OF FACTS

The State respectfully takes issue with some portions of the Appellant's Statement of Facts, and thus offers this supplement to that narrative.

On the evening of July 10, 2010, Jose Rodriguez was the residence on 106 Hawthorne Street which he shared with his brother Ismael, his sister Maribel, and Maribel's eleven-month old son, Antonia Aguilar. **(RP 69-70)**

Jose had had a gang affiliation in the past, specifically with "9 Deuce". **(RP 71-72)**

On the evening in question, it was just "barely dark", and all four were outside, in front of the house. **(RP 72)**

Jose was sitting close to the front door, when he heard gunshots and saw a car drove by the residence. As he got down on the ground, he could hear that house being struck several times, including close to where he had been sitting. **(RP 73-74)**

As he dove to the ground, Jose could feel the bullets go past him. He did not look to see who was shooting, as he thought that they were all going to die. **(RP 75-76)** He did believe that the vehicle was a white Trailblazer, similar to his neighbor's vehicle. **(RP 76)**

Jose testified that his stepmother rented a residence to his sister's boyfriend's brother, who was associated with the BGL gang, and on occasion Jose collected rent from him. **(RP 79)**

Ismael Rodriguez testified that on July 10<sup>th</sup>, he had been standing outside right in front of the door to the residence. **(RP 110-111)**

He heard one shot, and wondered whether it was a firecracker. At the same moment he heard a second gunshot, he heard the window behind him break. **(RP 112)** He curled into a ball on the ground with his nephew. **(RP 113)**

The window was six inches above Ismael's head; he felt the heat of the bullet. **(RP 114-15)** He believed he heard two different weapons firing, with multiple shots of 10-15 rounds per gun. **(RP 113; 125)**

Ismael has another brother who was involved in gangs, and was previously sentenced to prison. **(RP 118-19)**

Maribel testified that the shooting occurred at approximately quarter to nine on the evening in question, that the sky was "dark blue" at

that time. **(RP 250)** She admitted that her boyfriend's family was associated with BGL. **(RP 252)**

Mr. Alvarez self-admitted to his former juvenile probation officer that he was involved in the LVL gang, and went by the name, "Chaos". During a home visit, the probations officer, Mr. Fairbanks, found photographs which depicted Raul, his twin brother, Saul, and other individuals displaying gang signs. **(RP 137-40; Ex. 53-56)**

Detective Layman testified that Ezekiel Almaguer, who had witnessed the shooting, told him initially that he could identify the shooter if he saw his photograph. **(RP 262)**

It was not until three weeks later that the detective showed Almaguer a photo-montage which included a photograph of Raul Alvarez at the number two position. Mr. Almaguer identified Alvarez as the shooter. **(RP 267; Ex. 57)** At that time, Almaguer also indicated that the shooter had no tattoos. **(RP 270-71)**

After the case proceeded to trial, Detective Layman picked up Almaguer on a material witness warrant. While being transported to the prosecutor's office, Almaguer expressed no reservation about his identification of Alvarez, only fears of retaliation. **(RP 274)**

Prior to his testimony in court, and for the first time in Detective Layman's hearing, Almaguer stated that the suspect had tattoos on his

face. The detective also noted that Almaguer had spoken to Alvarez' family before court started. (RP 276)

Detective Layman had also had prior dealings with Raul's twin, Saul. Saul has tattoos on his face, an 'N' under one eye, a 'K' under the other. (RP 281-82; Ex. 60-64)

Officer Jim Ortiz of the Sunnyside Police Department, a qualified expert on gang activity in Sunnyside, was also personally familiar with Raul Alvarez, and testified that Alvarez was associated with LVL. (RP 328)

Further, Ortiz testified that the residence at 106 Hawthorne was associated with BGL. The BGL and LVL are "mortal enemies". (RP 329-30)

The police found 24 shell casings of two different calibers, most of them were in the street or the sidewalk in front of the residence. (RP 154; 159)

### III. ARGUMENT

1. **The State did not rely upon the transferred intent doctrine, and sufficient evidence supported the guilty verdicts on all four counts of first degree assault.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State

v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

In this case, Alvarez asserts that the State failed to provide sufficient evidence that he intended to shoot all four of the victims named in Counts 1-4. Further, he argues that as instructed, the jury would have been required to find him guilty of all four counts of first degree assault

“even if did not know any of those victims were in the home, so long as it found that he intended to shoot *someone*.” **(Appellant’s Brief, p. 8)**

In support of his argument, he asks this court to reject a decision of the Washington Supreme Court in State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2007), as he believes that court incorrectly expanded the transferred intent doctrine to uninjured victims, beyond the authority of its previous holding in State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994), and beyond the common law definition of the doctrine.

There are some problems with this argument.

First, the State did not rely upon the transferred intent doctrine in its theory of the case, instead arguing that Alvarez specifically intended to assault all four victims. Indeed, the court’s instructions to the jury do not include a transferred intent instruction. **(CP 63-89)**

In Wilson, the court concluded that specific intent to inflict great bodily harm under the first degree assault, RCW 9A.36.011, was transferred to victims who were not targeted or intended victims, but who were actually struck by bullets fired by the defendant into a tavern. 125 Wn.2d at 217.

In Elmi, the court affirmed that defendant’s convictions on four counts of first degree assault, holding that intent to inflict great bodily harm transfers to unintended and uninjured victims. 166 Wn.2d at 211-12.

In that case, gunshots were fired into a house after the defendant argued with his estranged wife. Bullets pierced a window, curtains, a television screen and a kitchen cabinet. *Id.*, at 212. The trial court gave a transferred intent instruction. *Id.*, at 213. While it was undisputed that the defendant intended to inflict great bodily harm on his estranged wife, the court concluded that that intent was transferred to children who were also in the home, and were placed in reasonable apprehension of harm. *Id.*, at 218-19.

This court should decline the invitation to reject *Elmi*, a decision of the Supreme Court which is authoritative on scope of transferred intent, and must be followed. However, on the facts present here, it was not necessary to instruct the jury on the transferred intent doctrine, and there was sufficient evidence that Alvarez specifically intended to assault all four victims.

Contrary to the Appellant's description of the events, all four individuals were outside the home, not inside. The gunshots were aimed at them so closely that both Jose and Ismael Rodriguez could feel the bullets go past them. The State would submit that there were no *unintended* victims at all. Given the short distance between Mr. Alvarez and the victims, where the shots were hitting, as well as the sheer number of shots fired, sufficient evidence supported the jury's verdict as each

count of first degree assault. The victims themselves were targeted, not just a house.

Indeed, the “specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) *quoting Delmarter*, 94 Wn.2d at 638.

It is true that specific intent is not presumed from the act of shooting. State v. Louthier, 22 Wn.2d 497, 502 156 P.2d 672 (1945). However, the court in State v. Salamanca, 69 Wn. App. 817, 826, 851 P.2d 1242 (1993), *rev. denied* 122 Wn.2d 1020 (1993), applied the Delmarter test in affirming convictions on five separate counts of accomplice to first degree assault, (as well as observing that a transferred intent instruction was ‘superfluous’). The facts are instructive: Salamanca drove a vehicle from which his accomplice fired a series of shots at another car in which there were five occupants. Reasoning that all the occupants of the second vehicle were at risk of death or serious injury, not just from the gunfire, but also from a potential traffic accident, the court found “[i]n this case, too, there is evidence from which the jury could infer Mr. Salamanca (and the shooter) intended to inflict great bodily harm on all of the Mustang occupants . . . Mr. Salamanca kept the Mustang in close range while the shooter fired a series of shots at the vehicle, apparently

took time to reload, then fired another series of shots.” Salamanca, 69 Wn. App. at 826.

Just as in Salamanca, and employing logic, a jury could reasonably infer specific criminal intent as to each count.

2. **The prosecutor did not express a personal opinion about the credibility of any witness or otherwise commit misconduct.**

Alvarez’ reliance upon the cases cited in support of his argument that the prosecutor impermissibly vouched for or against witnesses at trial is misplaced. It must be emphasized that in each and every instance cited by Alvarez, the prosecutor was asking questions of witnesses such as Mr. Almaguer, Detective Layman, or Ms. Mee, all of whom were participants in, or witnesses to the conversations in question.

In the case of Mr. Almaguer, who ultimately became a hostile witness, the prosecutor was entitled to examine him, and do so aggressively, as to prior inconsistent statements made before trial. In so doing, it is appropriate for the prosecutor to remind the witness of where and when the prior statement was made, and that would include the fact that the prosecutor was present. The prosecutor did not make statements or offer opinions during his questioning of Mr. Almaguer in front of the

jury, he asked leading questions of a hostile witness. **(RP 201-11)** The cross-examination of Mr. Cruz was similar. **(RP 392)**

As the prosecutor was not the sole witness to the conversations referenced, Ms. Mee of the prosecutor's office was called to the stand, and rebutted Mr. Almaguer's changed testimony. **(RP 337-44)**

State v. Horton, 116 Wn. App. 909, 68 P.3d 1145 (2003) is thus not implicated here, since unlike in that case, where the prosecutor pronounced that "I believe Jerry Lee Brown," this prosecutor expressed no personal opinion as to whether any witness was telling the truth. Id., at 921.

Similarly, the prosecutor did not indicate that he believed that any witness had lied, which was quite clearly misconduct in State v. Sargent, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985).

Instead, the prosecutor's closing argument here only reiterated what the jury had heard through the testimony of Ms. Mee, that the prosecutor was present during her speakerphone conversation with Mr. Almaguer. **(RP 473-74)**

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004), *citing* State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. Further, a prosecutor's closing statements are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Carver, 122 Wn.2d at 306, *cited in* State v. Jackson, 150 Wn. App. 877, 882, 209 P.3d 553 (2009).

If there is no objection to the prosecutor's statements, reversal is required only if the misconduct was so flagrant and ill intentioned that no instruction could have cured the resulting prejudice. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

There is no misconduct demonstrated on this record, and Mr. Alvarez was not prejudiced in any event.

**3. There was no ineffective assistance of counsel.**

In order to establish a claim of ineffective assistance of counsel, Barron must show that (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced by his counsel's deficient representation, such that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

Furthermore, the basis for the claim of ineffective assistance of counsel must be apparent from the record. State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). The courts also engage in a strong presumption that counsel's representation was effective. Id., 127 Wn.2d at 335.

Additionally, deficient performance "is not shown by matters that go to trial strategy or tactics." State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), State v. Alires, 92 Wn. App. 931, 938, 966 P.2d 935 (1998).

A reviewing court looks to the facts of the individual case to see if the Strickland test has been met, resisting *per se* application of the holding in State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001), *citing* State v. Robinson, 138 Wn.2d 753, 767-68, 982 P.2d 590 (1999).

For the reasons stated above, the prosecutor did not commit misconduct by vouching for witnesses, or inserting his opinion or testimony into the proceedings. Defense counsel therefore was not deficient in failing to object to what was not misconduct.

Alvarez also asserts ineffective assistance of counsel in that defense counsel did not review the discovery materials with him. That that was the case is not so apparent from the record, and the State would

submit that Mr. Alvarez has not met his burden of showing deficient performance.

The exchange at issue involved Mr. Alvarez' assertion that he had only seen his attorney once in the five months prior to trial, and came in the context of his request for new counsel. His attorney did respond that since Mr. Alvarez' defense was that he was somewhere else when the crime was committed, he "can't really help". **(RP 53)**

However, counsel was prepared to begin the trial, and had spoken to the witnesses he planned to call in support of the alibi defense. **(RP 51)** As the court correctly pointed, in preparing for trial, an attorney does a lot of work which may not be evident to the client. **(RP 52)**

Further, while counsel allowed that it was his belief that he couldn't show the discovery materials to Mr. Alvarez without court order or agreement of the State, there is no discussion about the extent to which counsel *had* discussed what was in the materials while deciding on a strategy for trial. It is evident that the strategy they decided upon was to present testimony, including that of Mr. Alvarez, that he was not even in Sunnyside on July 10<sup>th</sup>. Alvarez cannot show from this record that counsel's performance was deficient. The jury was convinced beyond a reasonable doubt that he was guilty of the crimes charged, and necessarily did not believe the alibi defense.

Mr. Alvarez' reliance on the authorities cited is misplaced. It is well settled that the State has an obligation to disclose discovery to the defense under relevant case law as well as CrR 4.7. This is to protect the defendant's interests in getting meaningful access to evidence which would be used by the State at trial, in order to "prepare for trial and provide adequate representation." State v. Boyd, 160 Wn.2d 424, 432, 158 P.3d 54 (2007), *citing* CrR 4.7(a)(1)(v).

What was at issue in Boyd was whether the defense was entitled to copies of child pornography evidence consisting of images, videos and computer hard drives, or whether the State's discovery obligations were met by providing only access to those materials. Id., at 429-31. The court held that defense, in several cases combined for appeal, was entitled to copies of the images, and a mirror image of computer hard drives. Id., at 441.

Necessarily a part of the court's analysis was the extent to which the privacy interests of the alleged victims would be protected by means of protective orders. Along those lines the court stated:

In cases such as these, safeguarding the interests of the victims requires conditions that account for the ease with which the evidence can be disseminated. The defendant should be allowed access to the evidence only under defense counsel's supervision. Defense counsel is personally and professionally responsible for any "unauthorized" distribution of or access to the evidence.

Id., at 438.

Alvarez reads Boyd to require that the *defendant* must have access to the discovery materials, but as is clear from the quote above, it does not. Instead, the court set out the professional obligations of defense counsel to supervise any viewing of materials by the defendant.

Similarly, CrR 4.7(h)(3) does not mandate direct review by the defendant, only that a defense attorney “shall be permitted to provide a copy of the materials” to the defendant, after appropriate redactions are made.

Alvarez also asserts that his right to effective counsel was violated when his attorney failed to inform the court that it could impose an exceptional sentence

It is correct that pursuant to RCW 9.94A.589, a sentencing court must impose consecutive sentences for serious violent offenses, unless it finds that there are mitigating factors supporting exceptional, concurrent sentences under RCW 9.94A.535. State v. Mulholland, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007).

Remand for resentencing is appropriate when a sentence is based upon a trial court’s erroneous interpretation of governing law. State v. Hale, 65 Wn. App. 752, 757-58, 829 P.2d 802 (1992); State v Bonisisio,

92 Wn. App. 783, 797, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999), *cited in* State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

However, remand is not mandated when a reviewing court is confident the trial court would impose the same sentence if it only considered valid factors. *Id.*, at 100, *citing* State v. Pryor, 115 Wn.2d 445, 456, 799 P.2d 244 (1990).

The facts in McGill are easily distinguished from those present here. In that case, the sentencing court indicated that “I have no option” but to impose a sentence within the standard range, while identifying several mitigating factors which supported a sentence at the low end of the standard range. *Id.*, 99-100.

Finding that the trial court’s comments indicated that it might have entered an exceptional sentence, if it knew it could, the Court of Appeals remanded the case for the trial court to “exercise its principled discretion.” *Id.*, at 101.

The court further found that the defendant was denied effective assistance of counsel, who failed to cite relevant case law to the court in requesting an exceptional sentence. *Id.*, at 101-02.

Here, the court did not indicate that it did not know it could impose a mitigated sentence, and instead found substantial and compelling reasons

to impose an aggravated sentence in light of the jury's findings as to the gang aggravator. **(RP 526-29)** There is little doubt that the sentencing court would impose the same sentence on remand.

Further, defense counsel argued for a sentence at the bottom of the range, with no gang aggravator, in light of the mitigating factors he brought to the court's attention. **(RP 519-21)** This was not deficient performance, nor is there prejudice to Mr. Alvarez apparent from the sentencing hearing.

This court has previously held that there was no ineffective assistance of counsel even where counsel failed to cite authority which would allow a mitigated sentence. State v. Hernandez-Hernandez, 104 Wn. App. 263, 266, 15 P.3d 719 (2001). The facts in Hernandez-Hernandez are more on point; just as here, there was no indication on the record that court did not know that it could enter an exceptional sentence downward.

**4. Substantial evidence supported the aggravator.**

As pointed out in the Appellant's opening brief, a jury's findings that aggravating factors have been proven are reviewed under the "clearly erroneous" standard. Such findings are reversed only if substantial evidence does not support them. State v. Bluehorse, 159 Wn. App. 410, 423, 248 P.3d 537 (2011) (citations omitted).

Here, substantial evidence supports the jury's special verdict:

1. The residence at 106 Hawthorne had been associated with BGL according to the expert, Officer Ortiz;
2. The family of Maribel Rodriguez' boyfriend was associated with BGL;
3. Raul Alvarez openly claimed LVL, and was known to the police to be associated with that gang; and
4. A brother to the Rodriguez family had gang ties, and had been sentenced to a prison term.

The court did not err in accepting the jury's verdict, and finding substantial and compelling reasons to impose an exceptional sentence.

#### IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions and sentences.

Respectfully submitted this 28<sup>th</sup> day of March 2012.

  
Kevin G. Eilmes, WSBA No. 18364  
Deputy Prosecuting Attorney  
Attorney for Respondent

**FILED**

**MAR 29 2012**

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STATE OF WASHINGTON,	)	NO. 298426
	)	
Respondent,	)	SWORN STATEMENT OF SERVICE
	)	BY MAIL
vs.	)	
	)	
Raul Robert Alvarez,	)	
	)	
Appellant.	)	

I, Elaine Chartrand, state that I am and was at the time of the service of the Respondent's Brief, herein referred to, a citizen of the United States, residing at Yakima, Yakima County, Washington; that I am over the age of twenty-one years and am not a party to the within entitled action.

That on the 28th day of March, 2012, I served upon John R. Crowley, 506 2<sup>nd</sup> Avenue, Suite 1015, Seattle, WA 98104-2328 Attorney for Appellant, and Raul Robert Alvarez, #347822, Washington State Penitentiary, 1313 N 13<sup>th</sup> Avenue, Walla Walla, WA 99362, the appellant herein, a copy of the aforementioned instrument, by putting the same, enclosed in sealed envelopes, postage paid, into the post office.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Elaine Chartrand  
March 28, 2012  
at Yakima, WA