FILED
July 25, 2012
Court of Appeals
Division III
State of Washington

NO. 30555-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ELY HERNANDEZ GARCIA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

C. STATEMENT OF THE CASE 5

D. ARGUMENT 8

1. The State presented insufficient evidence to convict Mr. Hernandez of drive-by shooting, requiring reversal of the convictions and dismissal of the charges 8

   a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. 8

   b. The State failed to prove Mr. Hernandez's alleged accomplice created a substantial risk of serious physical injury to another person because the State's evidence showed the shooter aimed at and hit only empty cars, not the house in which the alleged victims were sleeping. 9

   c. The remedy is reversal and dismissal with prejudice 12

2. Over Mr. Hernandez's objections, the court instructed the jury on the definition of "physical injury" instead of "serious physical injury," thereby lowering the State's burden of proof and violating Mr. Hernandez's right to due process 13

   a. Mr. Hernandez proposed an instruction on "serious physical injury" but the court instructed the jury only on "physical injury". 13

   b. The court's instruction lowered the State's burden of proof and violated due process. 14

   c. The remedy is reversal and remand for a new trial. 16

3. The trial court violated Mr. Hernandez's Fifth and Fourteenth Amendment rights by admitting statements he made to jail personnel in response to questions he was told would be used only for booking purposes 17

4. The trial court exceeded its authority and deprived Mr. Hernandez of a fair trial when it permitted the jury to hear evidence supporting the alleged aggravating factor and imposed an additional three years of imprisonment based on the aggravating factor 22

5. The State presented insufficient evidence to prove Mr. Hernandez committed the crimes to benefit a criminal street gang, requiring reversal of the exceptional sentence 24

6. The prosecutor dismissed the allegation under RCW 9.94A.535(3)(s), but the judgment states Mr. Hernandez was "found guilty" of this aggravating factor. The judgment must be corrected 28

E. CONCLUSION 29

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

City of Seattle v. Slack, 113 Wn.2d 850, 784 P.2d 494 (1989) 8

In re the Personal Restraint Petition of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980) 22

State v. Davis, 163 Wn.2d 606, 184 P.3d 689 (2008) 22

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 8

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) 13

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 14, 16

State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980) 9

State v. Rodgers, 146 Wn.2d 55, 43 P.3d 1 (2002) 9

State v. Stubbs, 170 Wn.2d 117, 240 P.3d 143 (2010) 28

State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007) 29

Washington Court of Appeals Decisions

Born v. Thompson, 117 Wn. App. 57, 69 P.3d 343 (2003), rev'd on other grounds, 154 Wn.2d 749 (2005) 16

State v. Bluehorse, 159 Wn. App. 410, 248 P.3d 537 (2011) 25, 26, 27

State v. Denney, 152 Wn. App. 665, 218 P.3d 633 (2009) 19, 20

State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011) 15, 16, 17

State v. Smith, 64 Wn. App. 620, 825 P.2d 741 (1992) 25, 27

State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990) 12

State v. Taitt, 93 Wn. App. 783, 970 P.2d 785 (1999) 16

State v. Welker, 37 Wn. App. 628, 683 P.2d 1110 (1984) 16

United States Supreme Court Decisions

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) 8

Ball v. United States, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985) 29

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) 24

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) 17, 21

Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) 20

In re Winship, 397 U.S. 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 8

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970) .. 8

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 2, 6, 17

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) 13

Decisions of Other Jurisdictions

Boushehry v. State, 648 N.E.2d 1174 (Ind.Ct.App. 1995) 11

State v. Anspach, 627 N.W.2d 227 (Iowa 2001) 10

State v. Hartley, 194 Ohio App.3d 486, 957 N.E.2d 44 (Ohio Ct. App. 2011) 10, 11

State v. Smith, 241 S.W.3d 442 (Mo.App. W.D. 2007) 10, 11

Constitutional Provisions

Const. art. I, § 3 8

U.S. Const. amend. V 12

U.S. Const. amend. VI 24

U.S. Const. amend. XIV 8, 24

Statutes

RCW 9.94A.535 ..... passim

RCW 9.94A.537 ..... passim

RCW 9A.36.045 ..... 9, 11, 13

Other Authorities

WPIC 2.03 ..... 13, 16

WPIC 2.03.01 16

WPIC 35.35 16

A. ASSIGNMENTS OF ERROR

1. Mr. Hernandez's three convictions for drive-by shooting violate the Due Process Clause of the Fourteenth Amendment because the State presented insufficient evidence that his alleged accomplice created a substantial risk of death or serious physical injury to other persons.

2. The trial court lowered the State's burden of proof and violated Mr. Hernandez's right to due process by instructing the jury on "physical injury" instead of "serious physical injury".

3. The trial court violated Mr. Hernandez's Fifth and Fourteenth Amendment rights by admitting statements he made to jail personnel in response to questions he was told would be used only for booking purposes.

4. The trial court exceeded its statutory authority by submitting an aggravating factor to the jury that was not listed in RCW 9.94A.537.

5. The sentence enhancements violate due process because the State presented insufficient evidence to prove Mr. Hernandez committed the crimes to benefit a criminal street gang.

6. The judgment and sentence erroneously states Mr. Hernandez was found guilty of three counts of an aggravating factor the State had dismissed.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict a person of drive-by shooting, the State must prove the person or an accomplice recklessly discharged a firearm in a manner which created a substantial risk of death or serious injury to another person. Here, the State presented evidence that someone in Mr. Hernandez's car fired one shot each at two parked cars in retaliation for his own car having been damaged the day before. The State's expert testified that the shots were fired at an angle away from the house in which three people were sleeping and toward the empty cars. Did the State fail to prove beyond a reasonable doubt that Mr. Hernandez is guilty of three counts of drive-by shooting?

2. The drive-by shooting statute requires the State to prove the defendant created "a substantial risk of death or serious physical injury to another person." Over Mr. Hernandez's objection, the trial court instructed the jury on "physical injury" instead of "serious physical injury". Did the trial court lower the State's burden of proof, violating Mr. Hernandez's Fourteenth Amendment right to due process?

3. The U.S. Supreme Court has held that a jail guard's questions regarding name, date of birth and the like fall within a "routine booking question" exception to the Fifth Amendment and Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). This Court has held

that a jail officer's question about drug use did not fall within this "routine booking question" exception because the booking officer should have known the question was reasonably likely to elicit an incriminating response. Did the trial court err in concluding the jail officers' questions to Mr. Hernandez regarding gang affiliation fell within the "routine booking question" exception to Miranda?

4. The U.S. Supreme Court has held that the use of a defendant's post-arrest silence to impeach him violates due process because Miranda warnings at least imply that post-arrest silence will not be used against a defendant in any way. In other words, it violates Due Process for a defendant to be misled about the consequences of his actions. Did the trial court violate Mr. Hernandez's right to due process by allowing the State to introduce his answers to jail booking questions, where the jail officers had assured Mr. Hernandez the questions were only for "housing" purposes?

5. Sentencing courts lack authority to employ procedures for imposing exceptional sentences beyond those set forth in RCW 9.94A.537. RCW 9.94A.537 does not permit a court to submit evidence supporting the aggravating factor in RCW 9.94A.535(3)(aa) to a jury nor does it permit the jury to return a special verdict. Despite that, the trial court here permitted the jury to hear a substantial amount of evidence supporting the aggravating factor and permitted the jury to return special

verdicts. Did the trial court exceed its authority, requiring vacation of the sentence enhancements?

6. Where evidence supporting an aggravating factor was wrongly presented to the jury and infected the trial so as to deprive Mr. Hernandez of a fair trial, should this court reverse his convictions, in addition to vacating the enhancements?

7. Did the State fail to present sufficient evidence to prove Mr. Hernandez committed these crimes with the intent to benefit a criminal street gang, where all evidence showed he was not a member of a gang but at most "hung out" with gang members, he was not the shooter, he did not flash any gang signs or say anything about gangs, he did not wear any gang clothing, and a gang "expert" testified only about gang behavior generally, not about Mr. Hernandez specifically?

8. Before the case went to the jury, the State dismissed the aggravating factor it had alleged under RCW 9.94A.535(3)(s). The judgment and sentence states that Mr. Hernandez was "found guilty" of three counts of this aggravating factor. Must the judgment and sentence be corrected to delete all references to this aggravating factor?

C. STATEMENT OF THE CASE

After Ely Hernandez Garcia ("Mr. Hernandez") got off of work on June 15, 2011, he went out with his friend, Angel Mendez. 5 RP 409.[1] The two eventually picked up Mr. Mendez's friends, Manuel and Marco Campos. 5 RP 426. Mr. Hernandez did not know the Campos brothers, but apparently the Campos brothers and Mr. Mendez were all in the "LVL" branch of the Sureños gang. 3 RP 163-65; 5 RP 326-27, 426. Mr. Hernandez was not in the gang. 5 RP 327, 408.

According to Mr. Hernandez, who was driving, Mr. Mendez told him he wanted to go to the house of a friend named Luna. 5 RP 427. As they were driving, Mr. Mendez told Mr. Hernandez to slow down, at which point either Mr. Mendez or Manuel Campos fired two shots at two empty cars. 3 RP 121; 5 RP 332, 384, 428-29.

The State charged everyone in the car with crimes. The State's theory was that Manuel Campos fired shots at the empty cars in retaliation for his own car having been damaged by a rock the day before. 5 RP 384. The person who threw a rock at his car was allegedly a member of a rival

[1] There are six volumes of verbatim reports of proceedings in this case labeled "Volume I," Volume II," etc. Those volumes will be cited "1 RP," "2 RP," etc. One other volume has several dates of proceedings, and will be cited by date.

gang ("BGL"), and the cars Mr. Campos or Mr. Mendez shot at on June 15 belonged to a BGL member. 3 RP 152; 5 RP 336-38.

Unlike his acquaintances, Mr. Hernandez exercised his right to a jury trial. The State charged him as an accomplice to three counts of drive-by shooting, on the basis that three people were sleeping in the house next to the empty cars that were shot. The State also charged him with the aggravating factor of committing the crimes with intent to benefit a gang. CP 51-52.

Mr. Hernandez objected to the testimony of a gang "expert," but the trial court overruled the objection. 2 RP 35-44; 3 RP 142-49. Mr. Hernandez also objected to the use of statements he made to a jail booking officer, on the grounds that use of the statements violated his rights under the Fifth Amendment and Miranda, 384 U.S. 436. The court overruled his objection, and allowed the State to introduce the statements at trial. 4 RP 189-229.

After the State presented its case, Mr. Hernandez moved to dismiss all three counts on the basis that the State failed to prove he had any knowledge the shooting would occur and in any event the shooter aimed away from the house and toward empty cars, thereby not creating a substantial risk of serious harm to another person as required under the drive-by shooting statute. The trial court denied the motion. 5 RP 318-25.

Mr. Hernandez objected to the proposed jury instruction defining "physical injury," because the drive-by shooting statute requires a substantial risk of "serious physical injury." Mr. Hernandez proposed that the word "serious" be added to the instruction to comport with the statute and the information. The court denied the request, and provided the jury with a definition of "physical injury" instead of "serious physical injury". 6 RP 470-72; CP 90, 105. Mr. Hernandez also objected to the jury being instructed on the gang aggravator, on the basis that insufficient evidence was presented to support it. The trial court overruled the objection and submitted the aggravator to the jury. 6 RP 472-77; CP 90, 118-20.

The jury convicted Mr. Hernandez of three counts of drive-by shooting, each with the aggravating factor of committing the crime to benefit a gang. CP 115-20. The court sentenced Mr. Hernandez, who had no prior criminal history, to a term of 48 months for the drive-by shootings plus 12 months each for the gang aggravators for a total of 84 months' confinement. CP 122-23; 1/10/12 RP 46-47.

D. ARGUMENT

1. **The State presented insufficient evidence to convict Mr. Hernandez of drive-by shooting, requiring reversal of the convictions and dismissal of the charges.**

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L. Ed. 2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. The State failed to prove Mr. Hernandez's alleged accomplice created a substantial risk of serious physical injury to another person because the State's evidence showed the shooter aimed at and hit only empty cars, not the house in which the alleged victims were sleeping.

The legislature has defined the crime of drive-by shooting as follows:

> A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

RCW 9A.36.045(1); State v. Rodgers, 146 Wn.2d 55, 61, 43 P.3d 1 (2002). The State must prove beyond a reasonable doubt not just that the defendant or an accomplice fired a gun from a car, but that he created "a substantial risk of death or serious physical injury to another person." RCW 9A.36.045(1) (emphasis added).

Although not defined in the statute, it is generally understood that "substantial risk" means "the forbidden result is likely to happen." State v. Parr, 93 Wn.2d 95, 97, 606 P.2d 263 (1980) (emphasis added). There is a dearth of caselaw elucidating the meaning of "substantial risk" in Washington, but other state courts have construed the term in a variety of contexts. The Ohio Court of Appeals emphasized that under that state's

statutes, "[a] substantial risk involves a 'strong possibility, as contrasted with a remote or significant possibility.'" State v. Hartley, 194 Ohio App.3d 486, 494, 957 N.E.2d 44 (Ohio Ct. App. 2011) (citing Ohio Rev. Code 2901.01(A)(8)). "A finding of substantial risk may not be based on an inference upon inference in order to transform a speculative risk into a substantial risk." Id. (internal citation omitted).

The Iowa and Missouri appellate courts have interpreted the term as applied to their child-endangerment statutes. The Iowa Supreme Court held "substantial risk" means "[t]he very real possibility of danger to a child's physical health or safety." State v. Anspach, 627 N.W.2d 227, 233 (Iowa 2001). The Missouri Court of Appeals emphasized that "substantial risk" does not mean "there is only a potential for risk;" rather, "[a] substantial risk is an actual or practically certain risk." State v. Smith, 241 S.W.3d 442, 445 (Mo.App. W.D. 2007). Thus, the court reversed a child-endangerment conviction where the child witnessed his parents throwing pots at each other and there were bloody knives on a nearby table. Id. Although the evidence showed there was "a potential risk to the child," this was insufficient to convict the defendant of a crime requiring a showing of substantial risk. Id.

In this case, the State proved only a potential risk to the persons named in the charging document, not a substantial risk of death or serious

injury. The State's theory of the case was that either Angel Mendez or one of the Campos brothers fired one shot at each of the Gonzalezes' two cars in retaliation for Manuel Campos's car having been damaged the day before. 6 RP 511. It was undisputed that the cars were parked and empty in the middle of the night when the shooter hit them. 3 RP 121, 159, 162. It was also undisputed – indeed the State's expert testified – that Mr. Hernandez's car was directly in front of the Gonzalezes' house during the incident and instead of shooting straight at the house, the shooter shot at an angle away from the house and toward the empty cars. 3 RP 172, 174. Thus, although there may have been a potential risk to the persons asleep in the house, the State failed to prove a substantial risk of death or serious injury to those persons. See RCW 9A.36.045(1); Hartley, 194 Ohio App.3d at 494; Smith, 241 S.W.3d at 445.

An Indiana appellate decision is instructive. See Boushehry v. State, 648 N.E.2d 1174 (Ind.Ct.App. 1995). There, the defendant was convicted as an accomplice to criminal recklessness, which requires proof of "an act that creates a substantial risk of bodily injury to another person." Id. at 1177 (citing Ind. Code 35-42-2-2 (1988)). The defendant invited an acquaintance to shoot geese with him. They went to a vacant lot next to the defendant's home, and the defendant's friend fired two or three shots in the direction of a road bordering the lot. Id. at 1176. A

woman who lived in the same subdivision heard the gunshots, looked outside, and saw the defendant's friend put a gun back in his car. Id. The appellate court reversed the conviction because the State failed to prove substantial risk of bodily injury to another person, given the absence of evidence that anyone was in or near the line of fire. Id. at 1177. Although the accomplice created some risk by shooting toward a road and close to a neighbor, the risk must be substantial, not merely speculative. Id.

The same is true here. Mr. Hernandez does not dispute that whoever fired the gun created some risk to the occupants of the home. But that is not enough. Given the trajectory of the bullets and the alleged motive of the shooter, the State failed to prove the shooter created a substantial risk of death or serious injury to the persons sleeping in the house. This Court should reverse the convictions on all three counts.

c. The remedy is reversal and dismissal with prejudice.

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Hernandez committed the offenses for which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient

evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969)). The appropriate remedy for the error in this case is reversal of all three convictions and dismissal of the charges with prejudice. This Court need not reach the alternative arguments below.

2. Over Mr. Hernandez's objections, the court instructed the jury on the definition of "physical injury" instead of "serious physical injury," thereby lowering the State's burden of proof and violating Mr. Hernandez's right to due process.

a. Mr. Hernandez proposed an instruction on "serious physical injury" but the court instructed the jury only on "physical injury".

As noted above, to prove drive-by shooting the State must show the defendant created a substantial risk of death or serious physical injury. RCW 9A.36.045(1). A risk of any physical injury is not enough. Id.

Nevertheless, the trial court instructed the jury: "Bodily injury, physical injury or bodily harm means physical pain or injury, illness, or an impairment of physical condition." CP 105 (Instruction 12). Mr. Hernandez objected to this instruction, both orally and in writing. His written objection stated:

> Defense Objection to WPIC 2.03. The instruction speaks of bodily injury. The statute (both the charged offense and the lesser included) require risk of GREAT bodily injury. The instruction is therefore inapposite and overbroad. It

> could possibly be tailored to become applicable to these statutes.

CP 90. He reiterated the objection orally, stating the statute "requires great bodily injury. This instruction only gives the definition of bodily injury" 6 RP 470. He noted, "it does not track the language of the statute with which the defendant is charged as it is written now. It's actually a lesser standard." 6 RP 470.

The court protested that the WPIC did not include a definition of serious physical injury. Mr. Hernandez proposed adding the word "serious" to both the initial clause and the defining clause, so it would track the language of the information and the statute. 6 RP 471. The court rejected the proposal, stating, "I'm going to go with the WPIC. The WPIC at 35.35 says to use 2.03." 6 RP 471. Mr. Hernandez reiterated, "my objection is that the word 'serious' is in the statute. It's in the information but it's not in the instruction."

b. The court's instruction lowered the State's burden of proof and violated due process.

The trial court's refusal to include the word "serious" in the instruction lowered the State's burden of proof and violated Mr. Hernandez's right to due process. Kyllo is instructive. See State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009). There, the State charged the defendant with second-degree assault and the defendant claimed he acted

in self-defense. In support of the self-defense theory, the defendant proposed an instruction stating a person is entitled to defend himself if he reasonably believes he is in danger of "great bodily harm." Id. at 860. The court so instructed the jury. The instruction followed the relevant WPIC but was incorrect under the statute, which allowed self-defense based on a reasonable fear of any "injury". Id. at 863 (citing RCW 9A.16.020(3)).

The Supreme Court reversed the defendant's conviction for ineffective assistance of counsel, despite the fact that the instruction followed the WPIC. In describing the incorrect level of injury, the instruction impermissibly lowered the State's burden of proof. Id. at 864-65.

Similarly here, although the trial court followed the WPIC, the WPIC did not describe the correct level of injury for this crime, so giving this instruction impermissibly lowered the State's burden of proof. See id. Unlike in Kyllo, defense counsel objected, so Mr. Hernandez may raise this issue on appeal as a direct due process violation. See State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011) (reversing for due process violation where definition of "reckless" impermissibly lowered State's burden of proof).

Furthermore, although WPIC 35.35 cross-references WPIC 2.03, the comment to WPIC 2.03.01 supports Mr. Hernandez's position. It suggests that the definition of "substantial bodily harm" should be used rather than the definition of mere "bodily injury" in cases where the statute requires proof of "serious physical injury". Cmt to WPIC 2.03.01. The comment cites this Court's decision in Born v. Thompson, 117 Wn. App. 57, 72-73, 69 P.3d 343 (2003), rev'd on other grounds, 154 Wn.2d 749 (2005) for the proposition that "there is no meaningful difference" between "serious physical injury" and "substantial bodily harm". The comment notes two earlier decisions had stated in dicta that a jury need not be instructed on "serious" physical injury, but suggests Born's approach is better. Cmt to WPIC 2.03.01 (citing State v. Taitt, 93 Wn. App. 783, 970 P.2d 785 (1999); State v. Welker, 37 Wn. Ap. 628, 683 P.2d 1110 (1984)).

Born's approach – or something similar – is not only better, it is required by the Due Process Clause. See Kyllo, 166 Wn.2d at 864-65; Peters, 163 Wn. App. at 847. The trial court erred in ruling to the contrary.

c. The remedy is reversal and remand for a new trial.

Because this error was of constitutional magnitude, reversal is required unless the State proves beyond a reasonable doubt the error did

not contribute to the verdicts obtained. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Peters, 163 Wn. App. at 850. The State cannot meet this heavy burden in this case. As explained above, the shooter shot at two empty cars, but Mr. Hernandez was convicted as an accomplice to three counts of drive-by shooting based on the fact that three people were sleeping in a house next to the cars. The statute required the State to prove these shots created a substantial risk of serious physical injury to the people, but the instruction defining the level of injury required described only any "physical pain or injury". CP 105. Thus, the jury could have convicted based on the risk the shooter would hit the people on any part of the body, even if a shot had only barely nicked the person. The State cannot prove beyond a reasonable doubt the jury would have convicted Mr. Hernandez if properly instructed. This Court should therefore reverse the convictions and remand for a new trial. Peters, 163 Wn. App. at 851.

3. The trial court violated Mr. Hernandez's Fifth and Fourteenth Amendment rights by admitting statements he made to jail personnel in response to questions he was told would be used only for booking purposes.

After Mr. Hernandez was arrested, Officer Seth Bailey advised him of his Fifth Amendment rights pursuant to Miranda, 384 U.S. 436. 1 RP 14. Officer Kevin Glasenapp subsequently interviewed Mr.

Hernandez. 1 RP 21. Mr. Hernandez explained, consistent with his later testimony at trial, that he was driving the car but did not know any of his passengers had a gun and was startled and scared when he heard the shots. 2 RP 98-99; 5 RP 428-29. Mr. Hernandez said nothing to police officers about gang membership or affiliation.

Mr. Hernandez was booked into jail. The booking officers asked him some questions – including questions about gang affiliation – but assured Mr. Hernandez the answers would be used only for "housing" purposes. 4 RP 192, 201, 212-14, 220. Mr. Hernandez told them he associated with Sureños and should not be housed with Norteños. 4 RP 194. The jail passed this information on to the prosecutor's office, as is their regular procedure when the prosecutors request it. 4 RP 201. The prosecutor then introduced this evidence at trial to support its claim that Mr. Hernandez committed three counts of drive-by shooting with intent to benefit a criminal street gang. Had Mr. Hernandez known the answers to these questions could be used against him in court, he probably would not have answered them. 4 RP 221.

The trial court violated Mr. Hernandez's Fifth and Fourteenth Amendment rights by denying his motion to suppress these statements and allowing two booking officers to testify about Mr. Hernandez's alleged gang affiliation. 4 RP 228-36, 248-50. Although the police had provided

Mr. Hernandez with Miranda warnings, the booking officers did not. To the contrary, the booking officers told Mr. Hernandez the interview was only for housing purposes.

The trial court ruled there was no Fifth Amendment violation because "this was not an interrogation." 4 RP 229. The ruling was erroneous under this Court's opinion in State v. Denney, 152 Wn. App. 665, 218 P.3d 633 (2009). In Denney, as here, the defendant was arrested and given Miranda warnings. Id. at 667. The defendant said nothing to the police officers, but then was transported to jail, where she was subjected to routine booking questions. Id. at 667-68. In response to a standard question about drug use, which was asked for medical purposes, the defendant admitted she had taken a morphine tablet that day. Id. The statement was then used against her in a trial for theft and possession of a controlled substance. Id. at 668.

As here, the State argued the use of the answers was proper because standard booking questions are not an "interrogation" within the meaning of Miranda. Id. at 668-69. This Court agreed that where routine booking questions are not "reasonably likely to produce an incriminating response," they are exempt from the requirements of the Fifth Amendment. Id. at 669. However, "[t]his limited exception to Miranda allowing background, biographical questions necessary to accomplish

booking procedures does not encompass all questions asked during the booking process." Id. at 671. The Court held "regardless of their routine nature, the questions in this case were reasonably likely to produce an incriminating response. Thus, the trial court erred when it admitted [the defendant's] custodial statements." Id. at 670.

The same is true here. It cannot be reasonably disputed that asking a person charged with any crime – particularly drive-by shooting – about gang affiliation is "likely to produce an incriminating response." See id. Although jail personnel may legitimately use such information for housing and safety purposes, it may not be used against a defendant at trial. Id. at 673. Indeed, doing so will cause suspects to stop answering gang- and drug-related questions at booking, thereby compromising institutional safety. See id. The trial court erred under Denney in holding the jail officers' questions about gang affiliation did not constitute an interrogation for Fifth Amendment purposes.

Furthermore, the admission of the statements at trial violated Mr. Hernandez's right to due process because he was told the answers would be used only for housing purposes. 4 RP 220; Cf. Doyle v. Ohio, 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (Use of defendant's post-arrest silence for impeachment violates due process because Miranda warnings imply that silence will carry no penalty). "Elementary fairness

requires that an accused should not be [so] misled." Id. at 619 n.9 (citing Johnson v. United States, 318 U.S. 189, 197, 63 S. Ct. 549, 87 L. Ed. 704 (1943)).

The State cannot prove beyond a reasonable doubt the error was harmless, as required under Chapman, 386 U.S. at 24. As to the gang aggravators, the State's primary evidence was Mr. Hernandez's statements at booking. Indeed, the State called both jail officers to testify regarding Mr. Hernandez's booking statements, and emphasized them in closing argument. 4 RP 234-36, 248-50; 6 RP 512. The other evidence showed Mr. Hernandez had only just met the Campos brothers, and they did not think Mr. Hernandez was affiliated with their gang. 5 RP 327. It is doubtful the State would have even charged Mr. Hernandez with the gang aggravators if not for these statements used in violation of his Fifth and Fourteenth Amendment rights. 1 RP 9-10.

Furthermore, the because gang evidence is so prejudicial, the State cannot show Mr. Hernandez would have been convicted of the underlying offenses of drive-by shooting absent the evidence. Not only should his statements have been suppressed, but had they been suppressed, the alleged "expert" gang testimony would have been suppressed as well, because the State would not have had sufficient evidence to proceed with the gang aggravator. 1 RP 9-10 (prosecutor admits that the only evidence

of gang affiliation she has for Mr. Hernandez was the jail booking form). The booking statements and gang "expert" testimony infected the entire trial. This Court should accordingly reverse and remand for a new trial on the drive-by shooting charges, and for dismissal of the gang aggravator charges.

4. The trial court exceeded its authority and deprived Mr. Hernandez of a fair trial when it permitted the jury to hear evidence supporting the alleged aggravating factor and imposed an additional three years of imprisonment based on the aggravating factor.

"A trial court only possesses the power to impose sentences provided by law." In re the Personal Restraint Petition of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). "Trial courts lack authority during trial to submit special interrogatories to juries in deviation from the [Sentencing Reform Act's] exceptional sentence procedures." State v. Davis, 163 Wn.2d 606, 611, 184 P.3d 689 (2008) (citing State v. Pillatos, 159 Wn.2d 459, 474, 150 P.3d 1130 (2007)). Here, the Court exceeded its authority by permitting the jury to hear evidence and return a special verdict on the gang aggravating factor set forth in RCW 9.94A.535(3)(aa).

RCW 9.94A.537(4) provides:

> Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535 (3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating

> circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res gestae of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

The aggravating circumstance in Mr. Hernandez's case is set forth in RCW 9.94A.535(3)(aa). The aggravating factor is not among those listed factors for which RCW 9.94A.537 permits the State to submit the evidence to the jury. Thus, the trial court lacked the authority to permit the introduction of that evidence to the jury. Nonetheless, the trial court did precisely that in Mr. Hernandez's case. The court permitted the State to introduce testimony of a supposed gang expert detailing the workings of street gangs. 2 RP 35-44; 3 RP 141-74.

Because the sentencing court lacked the authority to impose an exceptional sentence based on this aggravating factor, the three-year exceptional sentence must be reversed. But the error requires more than that. Because of the prejudicial nature of the evidence, this Court should also reverse Mr. Hernandez's drive-by convictions and remand for a new trial.

Based upon the mistaken belief that RCW 9.94.537 permitted the jury to hear the evidence and consider the aggravating factor, the trial court allowed Detective Abarca to testify at length about the rivalries among LVLs, BGLs, and Norteños, and allowed testimony that Mr. Hernandez asked not to be housed with Norteños at the jail. 2 RP 35-44; 3 RP 141-74; 4 RP 189-236; 5 RP 439. But in fact this evidence was not admissible under RCW 9.94A.537. The jury likely considered this evidence not only in determining whether the gang aggravator applied, but in deciding whether Mr. Hernandez was guilty of drive-by shooting. Thus, this Court should not only vacate the exceptional sentence, but should remand for a new trial on the underlying charges.

5. The State presented insufficient evidence to prove Mr. Hernandez committed the crimes to benefit a criminal street gang, requiring reversal of the exceptional sentence.

The State bears the burden of proving aggravating factors to the jury beyond a reasonable doubt. RCW 9.94A.537(3); U.S. Const. amend. VI; U.S. Const. amend XIV; Blakely v. Washington, 542 U.S. 296, 298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In this case, the jury found that Mr. Hernandez committed three counts of drive-by shooting "with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang, its reputation,

influence, or membership." CP 118, 119, 120; RCW 9.94A.535(3)(aa). But the State presented insufficient evidence as a matter of law to prove this aggravating factor beyond a reasonable doubt.

Assuming, arguendo, that the "expert" gang testimony and answers to booking questions were properly admitted (and that the court had the statutory authority to submit this aggravator to the jury), the evidence still fell short of the quantum necessary to find the factor beyond a reasonable doubt. All evidence presented showed that Mr. Hernandez was not a member of any gang but at most "associated" with LVL Sureños. 3 RP 163; 4 RP 235, 249; 5 RP 327, 408. He did not know Manuel Campos, whose car had been vandalized the day before - possibly by a rival gang member. 5 RP 336-40, 389, 426. Manuel Campos himself pled guilty only to drive-by shooting, stating in his plea form that he committed the crime in retaliation for someone having vandalized his car, not for any gang-related reason. 5 RP 384. But even if the jury believed either Manual Campos or Angel Mendez committed the crime to benefit the LVLs instead of to avenge their own loss, this would be insufficient to prove Mr. Hernandez intended to benefit a gang.

This case is like Bluehorse and unlike Smith. See State v. Bluehorse, 159 Wn. App. 410, 248 P.3d 537 (2011); State v. Smith, 64 Wn. App. 620, 825 P.2d 741 (1992). In Bluehorse, as here, the defendant

was convicted of drive-by shooting. Bluehorse, 159 Wn. App. at 415. The jury found he committed the crime to maintain or advance his position in a gang, pursuant to the aggravating factor under RCW 9.94A.535(3)(s). This Court reversed the exceptional sentence for insufficient evidence of the aggravating factor even though (1) the defendant was identified as the shooter, (2) his vehicle was recognized as one associated with a particular gang, (3) before shooting he or someone in his car yelled a phrase associated with a particular gang, (4) he had been seen earlier that year repeatedly wearing clothing associated with a particular gang and making gang signs, and (5) a gang expert testified that gang members maintain their status by retaliating when rival gang members assault fellow gang members or encroach on their own gang's territory. Bluehorse, 159 Wn. App. at 416-418, 423. This Court admonished, "the gang sentencing aggravator would be intolerably broadened" if it could be attached in that case.

While Bluehorse dealt with the gang aggravator under subsection (s), the same must be said of the gang aggravator under subsection (aa). It was undisputed that Mr. Hernandez was not in a gang, was not the shooter, did not say anything gang-related before or during the crime, did not flash gang signs, and was not wearing a gang color. Thus, if there was insufficient evidence of gang motivation in Bluehorse, there certainly was

here. It is questionable whether the State could have proved Mendez or Campos committed this crime to benefit a gang, but it certainly failed to prove it as to Mr. Hernandez.

In contrast, Smith demonstrates what would be a sufficient quantum of evidence to sustain this aggravating factor. There, the defendant was convicted of first-degree murder and an exceptional sentence was imposed based in part on a finding that he acted "in furtherance of a criminal enterprise." Smith, 64 Wn. App. at 621.[2] This Court affirmed the aggravator because the undisputed facts included that defendant was a member of the Hilltop Crips Gang, he was involved in the sale of crack cocaine as part of his gang duties, he protected his gang turf, he accumulated weapons to project the gang's power, and he participated in the deadly drive-by shooting of rival Bloods gang members because the Bloods had flashed a gang sign. Id. at 622-23. On these facts, the trial court was justified in finding the shooting "was in furtherance of a criminal enterprise, the Hilltop Crips Gang, to project its power and drug empire through violence." Id. at 623.

As explained above, this case is not like Smith. As in Bluehorse, the State presented insufficient to support the aggravating factor. Because

---

[2] Smith was before Blakely and the statutory amendments in response to Blakely, but the case is still relevant as it dealt with an aggravating factor that would later be codified and subject to a jury trial.

the exceptional sentence of three years was based solely on an aggravating factor for which insufficient evidence was presented, the remedy is reversal and remand for resentencing within the standard range. State v. Stubbs, 170 Wn.2d 117, 131, 240 P.3d 143 (2010).

6. The prosecutor dismissed the allegation under RCW 9.94A.535(3)(s), but the judgment states Mr. Hernandez was "found guilty" of this aggravating factor. The judgment must be corrected.

The State originally charged Mr. Hernandez with two aggravating factors for each count: first, that he committed the offenses with intent to benefit a criminal street gang (RCW 9.94A.535(3)(aa)), and second, that he committed the offenses to advance his position in the hierarchy of gang (RCW 9.94A.535(3)(s)). CP 52. Before the case went to the jury, the State conceded it had insufficient evidence to support the latter aggravating factor, and moved to dismiss the allegation. 6 RP 454. Thus, the jury was not instructed on this aggravating factor, and there were no special verdict forms for this aggravating factor. CP 91-120.

However, the judgment and sentence states that Mr. Hernandez was "found guilty by a jury verdict" of the aggravating factor under RCW 9.94A.535(3)(s) for each count. CP 121. This finding must be deleted from the judgment and sentence for each count. Although the sentencing court increased the sentence based solely on the other aggravating factor,

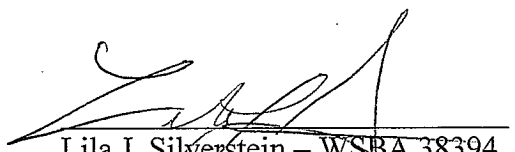
any reference to the 9.94A.535(3)(s) must be removed from the judgment because there are additional adverse effects, other than an increase in sentence, that could accrue. Cf. State v. Womac, 160 Wn.2d 643, 658, 160 P.3d 40 (2007) (citing Ball v. United States, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)) (conviction that violates double jeopardy must be deleted from judgment even where it did not result in increased sentence because the conviction itself, apart from the sentence, has potential adverse collateral consequences).

E. CONCLUSION

For the reasons set forth above, Mr. Hernandez asks this Court to reverse.

DATED this 25th day of July, 2012.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 30555-4-III
	)	
ELY HERNANDEZ GARCIA,	)	
	)	
APPELLANT.	)	

AMENDED DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF JULY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	JAMES HAGARTY, DPA YAKIMA CO PROSECUTOR'S OFFICE 128 N 2ND STREET, ROOM 211 YAKIMA, WA 98901-2639	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	DAVID BRIAN TREFRY ATTORNEY AT LAW PO BOX 4846 SPOKANE, WA 99220-0846	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X]	ELY HERNANDEZ GARCIA 355094 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326-9723	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF JULY, 2012.

X_____