

FILED
November 15, 2012
Court of Appeals
Division III
State of Washington

NO. 30555-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ELY HERNANDEZ GARCIA,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Attorney for Respondent

JAMES P. HAGARTY
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii-iii
I. <u>ASSIGNMENTS OF ERROR</u>	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u>	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u>	1
II. <u>STATEMENT OF THE CASE</u>	1
III. <u>ARGUMENT</u>	2
<u>RESPONSE TO ALLEGATION ONE</u>	2
<u>RESPONSE TO ALLEGATION TWO</u>	15
<u>RESPONSE TO ALLEGATION THREE</u>	18
<u>RESPONSE TO ALLEGATION FOUR</u>	22
<u>RESPONSE TO ALLEGATION FIVE</u>	27
<u>RESPONSE TO ALLEGATION SIX</u>	31
V. <u>CONCLUSION</u>	32

TABLE OF AUTHORITIES

PAGE

Cases

Born v. Thompson, 117 Wn.App. 57, 69 P.3d 343 (2003)..... 18

In re Bowman, 162 Wn.2d 325, 172 P.3d 681 (2007)..... 9

State v. Bencivenga, 137 Wash.2d 703, 974 P.2d 832 (1999)..... 12

State v. Bluehorse, 159 Wn.App. 410, 248 P.3d 537 (2011)..... 30

State v. Brooks, 45 Wn.App. 824, 727 P.2d 988 (1986) 2

State v. Bucknell, 183 P.3d 1078, 1080 (WA 2008)..... 3

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990)..... 3

State ex rel. Carrol v. Junker, 79 Wash.2d 12, 482 P.2d 775 (1971)..... 28

State v. Dejarlais, 88 Wash.App. 297, 944 P.2d 1110 (1997),
aff'd, 136 Wash.2d 939, 969 P.2d 90 (1998)..... 3

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980)..... 2

State v. Denney, 152 Wn.App. 665, 218 P.3d 633 (2009)..... 18, 19, 21

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

State v. Hill, 83 Wn.2d 558, 520 P.2d 618 (1974)..... 3

State v. Longuskie, 59 Wn.App. 838, 801 P.2d 1004 (1990)..... 13

State v. McChristian, 158 Wn.App. 392, 241 P.3d 468 (2010),
review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011)..... 7

State v. Monschke, 133 Wn.App. 313, 135 P.3d 966 (2006) 30

State v. Nguyen, 165 Wn.2d 428, 197 P.3d 673 (2008) 26

TABLE OF AUTHORITIES (continued)

	PAGE
<u>State v. Perez</u> , 137 Wn.App. 97, 151 P.3d 249 (Wash.App.Div 3 2007).....	8
<u>State v. Price</u> , 126 Wn.App. 617, 109 P.3d 27 (2005), <i>review denied</i> , 155 Wn.2d 1018, 124 P.3d 659 (2005).....	6
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	2
<u>State v. Taitt</u> , 93 Wn.App. 783, 970 P.2d 785 (1999)	17
<u>State v. Webb</u> , 162 Wn.App. 195, 252 P.3d 424 (2011)	29
<u>State v. Welker</u> , 37 Wn.App. 628, 683 P.2d 1110 (1984)	17
<u>State v. Wheeler</u> , 108 Wash.2d 230, 737 P.2d 1005 (1987).....	19
<u>State v. Williams</u> , 94 Wn.2d 531, 617 P.2d 1012 (1980).....	25
<u>State v. Yarbrough</u> , 151 Wn.App. 66, 210 P.3d 1029 (2009).....	29
 Federal Cases	
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct.2781, 61 L.Ed.2d 560 (1979).....	2
 Rules and Statutes	
ER 404(b)	23
RAP 10.3(b)	1
RCW 9.94A.535	23, 24
RCW 9.94A.535(3)	28
RCW 9.94A.535(3)(aa).....	29, 31
RCW 9.94A.535(3)(s).....	29, 31
RCW 9.94A.537	24
RCW 9.94A.537(4)	24
RCW 10.31.100(1)	15
WPIC 2.03.01	15
WPIC 35.30	15

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. There was insufficient evidence to prove beyond a reasonable doubt that appellant was guilty drive-by shooting.
2. The “physical injury” instruction was error.
3. The admission of statements made in by defendant in jail was error.
4. The court exceeded its authority when it submitted an aggravator to the jury.
5. The State presented insufficient evidence the acts committed by Appellant were to benefit a criminal street gang.
6. The Judgment and Sentence contains improper information regarding an aggravator that was dismissed.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was sufficient evidence to support the conviction.
2. The jury instruction was proper.
3. The court did not err when it admitted the jail statements.
4. The court did not exceed its authority with regard to the aggravator that was submitted to the jury.
5. There was sufficient evidence to support the gang aggravator.
6. The judgment and sentence contains a clerical error which must be fixed.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall

not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

The actions of the trial court were well within its discretion, were based on the rules of evidence and case law.

RESPONSE TO ALLEGATION ONE

Appellant challenges the sufficiency of the evidence to support his three convictions for drive-by shooting. In reviewing a challenge to the sufficiency of the evidence, this court will view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to

support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd*, 136 Wash.2d 939, 969 P.2d 90 (1998).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

The facts presented to the jury were without a doubt sufficient to meet the test set forth in, State v. Bucknell, 183 P.3d 1078, 1080 (WA 2008);

In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 16 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime may be established by either direct or circumstantial evidence, and one type is no more valuable than the other. State v. Thompson, 88 Wn.2d 13, 16, 558 P.2d 202, *appeal dismissed*,

434 U.S. 898 (1977). "Credibility determinations are within the sole province of the jury and are not subject to review." State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). (Emphasis mine.)

Just before the shots were fired which resulted in these charges three officers were ending their involvement in an unrelated call in close proximity to the house that was shot at. One officer indicated the shots were so close that they "made me duck." (RP 60-65) The officers immediately began to move toward the area they believed the shots were coming from. They also immediately heard the sounds of a car accelerating at a high rate and observed a red Honda come through the very intersection they were heading towards. Officer Bailey testified that as the car fled past him he "got a very distinct view of the driver..." (RP 64-5) Officer Bailey then identified the defendant, appellant herein, who was seated in the courtroom as that person who had been driving this car. Sgt. Ripplinger who was also at the first location was in a patrol car and began to follow. The fleeing vehicle was located shortly thereafter and at that time Officer Bailey was able to observe the driver once again and confirmed that the defendant was in fact the person whom he had observed driving the red Honda as it fled the scene. The officer also identified the

vehicle at the scene of the appellant arrest as the same vehicle he had seen flee the area of the shots fired. (RP 65-7) Officer Bailey testified that there were four persons in the Honda as it went past him but at the scene of the stop the other people had fled. (RP 67) The stop eventually resulted in the arrest of three other persons and the recovery of the weapon that was later determined to have the latent finger print of one of the people who fled the car that was driven away from the crime scene by appellant. (RP 185, 278, 280,282, 316-17) Appellant also stipulated that the weapon that was found was the weapon that discharged the casings found in front of the victim's house. (RP 68-69, CP 67)

Det. Abarca testified that the two shell casings were found in front of the victims home and that they were never able to find the bullet associated with the second spent shell casing. It is of note that the other bullet ricochet and ended at a location away from the vehicle that it struck. (RP 161-2) The lack of ability to determine the "angle" of the shots that were fired is also supported by the testimony of Sgt. Ripplinger who testified that the two shell casings were found 25-30 feet apart from each other. (PR 272)

The testimony of the witness who was in the truck next door is very essential. In Mr. Juan Espindola's testimony he states that a Honda went by the front of the victim's house and as it passed by the

light were off and he observed fire come from the car and “detonations” that he stated were shots fired. This is very telling evidentiary proof that appellant had to know what was occurring or was about to occur at the victim’s residence. There can be no other logical explanation for why a person would drive in the middle of the night with his lights off unless that was to lower the chance of detection and to minimize the chance of identification. (RP 237-44)

The appellant obviously drove the car to the scene, slowed the car so that the shooter could pointed the gun out of the window and discharged two rounds. The appellant was the driver of the car and fled the scene; flight is a factor that can be weighed by the jury. State v. Price, 126 Wn. App. 617, 645, 109 P.3d 27 (2005), review denied 155 Wn.2d 1018, 124 P.3d 659 (2005):

Evidence of flight is generally admissible as tending to show guilt, but the inference of flight must be "substantial and real" not "speculative, conjectural, or fanciful." State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). The evidence must be sufficient so as to create a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. Bruton, 66 Wn.2d at 112-13.

The appellant's culpability is further supported by his actions when the car had been stopped and the others fled from the scene, he hid inside the car "popping up" after the officers reached the car. One of the first officers at the scene of the stop stated he believed the car was empty when he arrived only to see the appellant "had popped up." (RP 179)

State v. McChristian, 158 Wn.App. 392, 400-01, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011):

Washington's complicity statute, RCW 9A.08.020, provides that a person is guilty of a crime if he is an accomplice of the person that committed the crime. A person is an accomplice under the statute if, with knowledge that it will promote or facilitate the commission of the crime, he aids another person in committing it. RCW 9A.08.020. General knowledge by an accomplice that a principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow. State v. Roberts, 142 Wash.2d 471, 513, 14 P.3d 713 (2000). Our Supreme Court has made clear, however, that an accomplice need not have knowledge of each element of the principal's crime to be convicted under RCW 9A.08.020; general knowledge of "the crime" is sufficient. Roberts, 142 Wash.2d at 513, 14 P.3d 713 (citing State v. Rice, 102 Wash.2d 120, 683 P.2d 199 (1984); State v. Davis, 101 Wash.2d 654, 682 P.2d 883 (1984)). "[A]n accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." Davis, 101 Wash.2d at 658, 682 P.2d 883. In other words, "an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor level assault, and need

not have known that the principal was going to use deadly force or that the principal was armed." In re Pers. Restraint of Sarausad, 109 Wash.App. 824, 836, 39 P.3d 308 (2001).

The main error in the allegation set forth by Appellant is that he has narrowed the risk to specific individuals in the home as they are named. It is very hard to conceive a fact pattern even closely related to the one before this court, a case where the defendant's shot a gun, from a car, in the city of Yakima, in a residential area, that would not satisfy the requirements of "substantial risk of death or serious physical injury to other persons."

Once a trigger is pulled that projectile does not stop until it has expended the incredible energy that propelled it from the gun. There is no dispute that this act occurred, the claim is that because they were "only" aiming at a car not directly at the people in the house that this charge can not stand. The analysis must start at the more basic level as set forth in State v. Perez, 137 Wn.App. 97, 103, 151 P.3d 249 (Wash.App. Div. 3 2007):

"A person is guilty of reckless endangerment when he or she recklessly ... creates a substantial risk of death or serious physical injury to another person." RCW 9A.36.050(1).

Mr. Perez challenges the evidence of recklessness. He concedes he was shooting pellets with S. in the room and that S. was hit. But he contends this was not reckless because S. had on

safety goggles. Therefore, there was no substantial risk of death or serious injury, the definition of recklessness. Moreover, S.'s actual injuries were slight or nonexistent.

The test for sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wash.2d 1, 8, 133 P.3d 936 (2006); State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980).

Mr. Perez does not dispute the jury instruction defining "recklessly." It means disregarding a known substantial risk in a gross deviation from conduct a reasonable person would exercise in a similar situation. Mr. Perez's own version of this incident easily supports the finding of recklessness.

Further in, In re Bowman, 162 Wn.2d 325, 332, 172 P.3d 681 (2007) the Washington State Supreme Court addressed whether drive-by shooting could be used as a bases for a felony murder conviction. The court stated the following analysis which is applicable to this case and the claim that the State did not show that the risk need not be to a specific person. There can be proof of this crime and that “does not require a victim.”

It is plain to see that the drive-by shooting statute does not criminalize conduct that causes bodily injury or fear of such injury. Rather, the statute criminalizes specific reckless conduct that is inherently dangerous and creates the risk of causing injury or death. Although a drive-by shooting may cause fear of bodily injury, bodily injury, or even death, such a result is not required for conviction. Drive-by shooting does not require a victim; it only requires

that reckless conduct creates a risk that a person might be injured.

There were three charges filed even though there were four people in the house at the time of the shooting. The three people who were “named” were the three family members who were sleeping in the front of the home. Mr. Fidel Gonzalez Moreno and his wife and their sixteen year old son “F.G.” who was sleeping in the living room was in the front of the house. The two vehicles that were struck were parked in the front of the house. (RP 118-19, 123-4, 125, 128, 136)

It is extremely important to note that Sgt. Hopp states that the one bullet ricocheted and was found several feet from the impact site and the other was not found. (RP 104,109-11)

It is incorrect to state, as appellant has, that all the States witnesses agree that the trajectory of the bullets was only at the vehicle. Sgt. Hopp states on cross examination:

Q. Is there any way to determine the angle that that bullet would have hit the truck based on that impact point?

A. Based on my training, no. A forensic person may be able to do that. There is marks on to the right side like I mentioned earlier. It's hard to say.
(RP 111)

The Det. Abarca did not testify to that either. Defense attorney Linn asked on cross examination:

Q. Okay. Right. So if it was fired from in front of that fence, it would have been fired at an angle away from the house; is that fair?

The detective then responded;

A. **You can say it's fair.** There is another residence, as you can see the structure there. That residence could have been struck easily. That structure that you see immediately to the right of that, that's the residence right next door, 630. That was in direct sight of the shots fired.

The detective was stating that was his answer to the question it is clearly an occasion where the officer was NOT agreeing with the attorney and was answering in a manner to indicate that the attorney had not asked a question but was in fact testifying to something and merely was asking for affirmation by the witness, something this witness obviously was not going to agree to. It is clearly a sarcastic response not in any form meant as an affirmation.

To claim that the actions of the appellant and his cohorts when the discharged a gun late at night in a residential area at the home of a rival gang member as not an indication that these actions could not have resulted in substantial risk of serious physical injury to another person is specious at best. The State's evidence did NOT show that the shooter "aimed" at the vehicles. There was no such testimony and no one could testify to that except someone with in the car at the time of the shooting or someone who was able to have the entire incident recorded from the

prospective of the shooter. The facts are the officers were able to state that the shell casing would land near where the shots were fired and that the bullets impacted the two vehicles in the driveway. One of those projectiles was found the other was not.

The circumstances of the shooting here provided sufficient evidence of the shooter's intent to assault F.B. "Intent to attempt a crime may be inferred from all the facts and circumstances." State v.

Bencivenga, 137 Wash.2d 703, 709, 974 P.2d 832 (1999).

The reasoning by the court for denying the motion to dismiss at the end of the State's case is very helpful;

This type of motion, as was indicated, requires that I look at the evidence in a light most favorable to the state. In doing so, I have to deny the motion because the angle of attack of the bullet, as was described by the defense, I don't know that it's particularly relevant.

The fact is that there is a house. I know that the vehicle is moving. How fast, I don't know. I know it was moving at some point.

Two shots are fired. The quality of the marksmanship is not something that I can address, but it was certainly in the vicinity of this home and the bedrooms where the alleged victims were. I think the firing of a bullet in that direction does create a risk of either death or serious physical injury.

There are inferences that are available here. The defense has pointed to lack of knowledge. One can't necessarily know what is going through the mind of the individuals in the car or what was going on. Certainly after the shooting occurred it does not

appear that the vehicle pulled over and attempted to resolve the situation. In fact, there was a rapid acceleration as was described by multiple witnesses, a loud acceleration.

I broke that down into two parts. One is the initial acceleration, which takes them to law enforcement officers who were so close to the vehicle that they had to jump off their bicycles to avoid the car.

The second part of the departure from the scene is that after the officers are encountered the car accelerates again. I think that clearly would be evidence of guilty knowledge or guilty conscience and allows an inference that, in fact, the defendant did know what was going on and was simply attempting to escape the area.

It's also clear that he had gone to this area with three other gang members and that he had a gang affiliation at a minimum. That would suggest or allow an inference that he knew what was going on.

State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990).

Deference must be given to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence.

The testimony of Manuel Campos supported the State's case. Throughout that testimony Campos describes the fact that he and the others in the car belonged to the gang or associated with the gang that was a rival to the gang to which victim, F.G. belonged. That there was an act by members of F.G.'s gang the day of the shooting which damaged the

vehicle driven by Campos, Angel was in the car at that time and that there was discussion of retaliation for that act. Further he testified that the group in the car was going to a location that would not necessarily entail driving past the victim's house. He testified that the Angel discharged the gun from inside the car at the house of the victim. (RP 370, 373)

Campos stated that the reason it happen, the shooting was because of the window getting broken out of his car. (RP 374)

There was testimony that Angel and his friend, the appellant, picked up Campos. (RP 353) Campos also specifically states that he saw Angel with the gun and that the gun was "flashed" by Angel before the shots were fired at the victims home. (RP 346, 354-57) He also stated in one interview that the appellant and Angel "they were the ones that had everything." (RP 367) He also stated that the reason the victim's house was shot at was because Angel was LVL and the house was BGL. (RP 368-9)

A very critical statement by Campos was that he also confirmed that he told officers that the appellant had slowed the car in front of the victim's home without being told to do so by Angel. (PR 395-96)

Appellant's own testimony was that he knew Angel was a LVL, that appellant thought that was "cool" and that the rival gang of Angel was the BGL's. (RP 436, 439-40)

RESPONSE TO ALLEGATION TWO

Appellant did object to this instruction. However Appellant's own brief correctly points out that the instruction given is the instruction set forth in the WPIC's. WPIC 35.30 Drive-By Shooting—Definition

A person commits the crime of drive-by shooting when he or she recklessly discharges a firearm in a manner that 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 to the scene of the discharge.

Note on Use

....WPIC 2.03 (Bodily Injury—Physical Injury—Definition). Also use WPIC 35.30.01, Inference of Reckless Conduct—Drive-By Shooting, if it is alleged that the defendant discharged a firearm from a moving vehicle.

The Appellant quotes a portion of the WPIC 2.03.01 Substantial Bodily Harm—Definition. The totality of that WPIC and the comment are as follows:

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

Note on Use

Use this instruction when another instruction refers to substantial bodily harm. See, e.g., WPIC 35.12 (Assault—Second Degree (Alternative Means)—Inflict Substantial Bodily Harm or With Deadly Weapon—Elements), WPIC 35.13 (Assault—Second Degree—Substantial Bodily Harm—Elements), WPIC 35.17 (Assault—Second

Degree—Unborn Quick Child—Elements), and WPIC 91.02 (Vehicular Assault—Elements).

Do not use this instruction to define “bodily harm,” “bodily injury,” “great bodily harm,” or “great personal injury.” These other terms have distinct statutory definitions. See WPIC 2.03 (for bodily harm and bodily injury), WPIC 2.04 (for great bodily harm), and WPIC 2.04.01 (for great personal injury).

Comment

RCW 9A.04.110(4)(b).

The statute defines three levels of bodily harm: bodily injury (or harm); substantial bodily harm; and great bodily harm. RCW 9A.04.110(4). Substantial bodily harm involves greater injury or harm than the first term, but less injury or harm than the third. Fine and Ende, 13A *Washington Practice: Criminal Law With Sentencing Forms* § 303 (2d ed.).

It is not clear how far courts will go in applying the definition of “substantial bodily harm” to similar terms that are otherwise undefined. For example, in one case the court used the definition of “substantial bodily harm” to define “serious bodily harm,” finding “no meaningful difference” between the two terms. Born v. Thompson, 117 Wn.App. 57, 73, 69 P.3d 343 (2003) (a case involving mental illness commitment), review granted 150 Wn.2d 1025, 82 P.3d 242 (2004), reversed on other grounds, 154 Wn.2d 749, 117 P.3d 1098 (2005). Using this approach, one could also apply the definition of “substantial bodily harm” to “serious physical injury,” given that the statute essentially equates bodily harm and physical injury. See RCW 9A.04.110(4)(a). **In two cases, however, courts held that jurors should not be specifically instructed with a definition for “serious physical injury.” State v. Taitt, 93 Wn.App. 783, 970 P.2d 785 (1999); State v. Welker, 37 Wn.App. 628, 683 P.2d 1110 (1984). Because there is no statutory definition of this precise term, the courts held that jurors should be instructed only on the definition for “physical injury,” leaving jurors to use their common sense in determining whether a physical injury is**

serious. State v. Taitt, 93 Wn.App. at 791–92, 970 P.2d 785; State v. Welker, 37 Wn.App. at 638 n.2, 683 P.2d 1110. It does not appear, however, that either of these two courts considered *Born's* approach of using the definition for “substantial bodily harm.”

“Substantial bodily harm” does not include mental illnesses, such as post-traumatic stress syndrome. *State v. Van Woerden*, 93 Wn.App. 110, 967 P.2d 14 (1998).

The instruction's definition uses the word “disfigurement.” The jury may be further instructed on the meaning of “disfigurement” using the definition from *Black's Law Dictionary. State v. Atkinson*, 113 Wn.App. 661, 667–68, 54 P.3d 702 (2002), review denied 149 Wn.2d 1013, 69 P.3d 874 (2004).

[Current as of 2005 Update.](Emphasis mine.)

It is clear from this comment that the actions of the trial court in using the definition was proper. There may be other methods which are “preferred” however the cases cited above clearly agree that the jury instruction need not include the use of the word “serious” for the very reasons stated by the trial court in this case;

MR. LINN: As I said, my objection is that the word serious is in the statute. It's in the information but it's not in the instruction.

THE COURT: I'm alert to that. I see that. I think it's a word that, although it's not defined, something the jury is going to have to consider. We don't have a definition for it and I'm not going to draft one.
(RP 472)

State v. Taitt, 93 Wn.App. 783, 970 P.2d 785 (1999); *State v. Welker*, 37 Wn.App. 628, 683 P.2d 1110 (1984) both directly address the use of the term “serious” the exact term that appellant was requesting be

inserted into WPIC 2.03 and the determination by both of those courts was it was error to insert that very word. This court should follow these two cases, not “Born’s approach – or something similar” as requested by Appellant. Born v. Thompson, 117 Wn.App. 57, 73, 69 P.3d 343 (2003) (a case involving mental illness commitment), review granted 150 Wn.2d 1025, 82 P.3d 242 (2004), reversed on other grounds, 154 Wn.2d 749, 117 P.3d 1098 (2005) was discussing the use of “substantial bodily harm” to define “serious bodily harm,” while the two cases above directly address the question put to the trial court regarding this insertion of the word “serious.”

RESPONSE TO ALLEGATION THREE

The court conducted a second “3.5” hearing regarding this issue and determined that these statements were admissible under the State v. Denney, 152 Wn.App. 665, 218 P.3d 633 (2009). The parties were allowed to examine and cross examine the personnel who actually took this information from Appellant. As can be seen below the trial court did rule that this information was admissible under the theory set forth in Denney and also that the appellant had only recently been advised of his rights per *Miranda* and that recitation of those rights was not “stale.” The trial court clearly indicates that while Denney’s methodology is applicable to this case, the facts and circumstances in Denney were unique in

allowing the court of appeals to determine that there was a violation in that specific factual situation. The court in Denney applied the “clearly erroneous” standard when it reviewed the actions of the lower court. Denney at 671. The court in Denney stated the law allows use of this type of information “The State is correct that Washington courts recognize that "routine booking procedures ... rarely elicit an incriminating response" and, thus, may be exempt from *Miranda* requirements. State v. Wheeler, 108 Wash.2d 230, 238, 737 P.2d 1005 (1987).” Denney at 670.

The section of Denney which sets it apart from this case is as follows;

The State is correct that Washington courts recognize that " routine booking procedures ... rarely elicit an incriminating response" and, thus, may be exempt from *Miranda* requirements. State v. Wheeler, 108 Wash.2d 230, 238, 737 P.2d 1005 (1987). However, the State is incorrect in presuming that the standard nature of the booking and bail questions shielded the questions from *Miranda* requirements. The State's arguments fail because, 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 Denney's custodial statements and we reverse. (Emphasis mine.)

The trial court in this case ruled as follows:

Well, I think it is perhaps accurate to say that this seems to be increasingly on a case-by-case basis. I thought, frankly, State vs. Denny provided a good understanding of that case-by-case approach.

It starts certainly with are the questions reasonably likely to produce an incriminating response. Here the testimony seems very clear to me that the officers ask these questions routinely. I know that doesn't carry the day in every issue. They certainly ask the questions routinely. It's a standardized form. There was no contact before or after with any investigating authority by the DOC officers with regard to the questions asked or any of the facts of this case.

...

The defendant's perception of whether it is an interrogation, the Denny case says, is determinative. I can't find that this is an interrogation. I think the testimony was very clear that this is, to their knowledge, a first degree assault and drive-by shooting. The concept of a gang affiliation or aggravator, I think, is a fairly nuanced concept and it was not added. It was not a part of this, as I understand it, until the information was filed on June 21, four days after the questions were asked.

Lastly, I think the Miranda warnings were not stale. They had been given within 24 hours. There's nothing to indicate that they were stale. The defendant, Mr. Hernandez Garcia, acknowledges and recalls having received them and that he understood them. Therefore, they are not stale.

He indicated that there was a question asked about if he had been told that these would have been used in a court of law. His response was equivocal. I don't know; probably not. I think he's honest. It's a guess. I'm not going to suggest or believe by that response he would not have responded to the inquiry. So I think the statements made to law enforcement are admissible.

(RP 228-30)

The court in Denney noted that the relationship between the questions asked and the crime suspected is highly relevant. Denney, 152 Wn.App. at 671-72.

There was no error from the admission of these statements. The testimony of the corrections officers clearly indicates that this was a very routine set of questions. That there was no motive on their part to elicit any information from Appellant that would or could be used against him at a later date. Further, as the trial court stated, the use of this information was for the purpose of an “aggravator” and the concept of that is “fairly nuanced” clearly indicating that this was once again distinguishable from Denney because in Denney the questions asked were or could have been seen by the law enforcement staff at the jail as having the possibility of some use or bearing on the charges filed. Here the charges that were apparent to the corrections officers were drive-by shooting and assault in the first degree. Neither of which, to most persons, would have anything to do with a gang related aggravator.

Once again the standard of review is set forth by the court in Denney, and it is clear that the court herein was not “clearly erroneous.” Unlike Denney, the question here did not “invite[] an answer that would be a direct admission of guilt.” Denney, 152 Wn.App. at 673.

RESPONSE TO ALLEGATION FOUR.

The admission of the evidence of gang involvement was not just for the purpose of proof of the aggravator but was one of the main theories of the State's case. The State throughout this trial made it clear that the reason for the shooting at the victim's house was that one of the victim's, the juvenile, F.G. was a known gang member from a gang that was a rival to the gang to which Angel, the shooter, belonged. The State had consistently argued that this information was needed for the jury to understand the reason for this shooting;

In terms of argument, this falls under 404(b) and goes to motive. It's essential to the state's case. The reason for this was basically because this guy was a BGL gang member. One of his associates had disrespected them by throwing a rock at the windshield of Mr. Campos, and Mr. Campos was very upset with that. They went back and retaliated because of that the very next day. The defendant was driving the vehicle to that scene. (RP 38)

...

MS. HANLON: Certainly the state wants to be able to argue that this was a motive because this was a rival house. They're in a neighborhood where they have rival -- heavily populated with rival gang members, and they go there for a specific purpose.

THE COURT: That's a separate argument from the aggravator. Now you're arguing 404(b).

MS. HANLON: I think they're kind of intertwined.

THE COURT: They are.

MS. HANLON: We've given notice of intent to call a gang expert. (RP 42)

The court clarified that there were two issues that must be addressed with regard to the admission of gang information. “Let me back up for just a minute. This is something that has come up in other cases. There is the aggravator and then there is the 404(b), the motive and intent and whatnot.” RP 38.

Appellant has not challenged the States ability to present this evidence under 404(b).

RCW 9.94A.535 is as follows;

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of [RCW 9.94A.537](#).

...

(3) Aggravating Circumstances - **Considered by a Jury** –Imposed by the Court (Emphasis mine.)

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in [RCW 9.94A.537](#).

...

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

Appellant argues that because RCW 9.94A.537 (4) does not specifically set forth subsection (aa) that the court did not have the right to allow the information regarding gangs into this trial. Once again as the court and the State argued there were two bases for this information to be admitted. Further, the statute is couched in mandatory terms for those enumerated in that section of the statute. If RCW 9.94A.537 is read in totality it is clear that the court may allow this aggravator to be presented to a jury. Specifically subsection (2) would be in part rendered meaningless if this allegation of appellant were to be true. That section states;

In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

The intent of the legislature here is clear. They would not have authorized a trial court to impanel a separate jury if this very aggravator were to need to be reconsidered on remand if the court was re not also capable of impaneling a jury during the trial phase itself. If this court were to agree with appellant that because the subsection listed in this case, (aa) is not listed in the section of RCW 9.94A.535 as an allegation that “shall” be submitted to a jury then the section (2) that permits the court to

empanel a separate jury to determine this very aggravator would be unenforceable as written. State v. Williams, 94 Wn.2d 531, 617 P.2d 1012 (1980) sets out;

...the principle of "expressio unius est exclusio alterius", which declares that when a statute specifically designates the things or classes of things upon which it operates, it can be inferred that the legislature intended to exclude any omitted matters. See, e.g., Washington Natural Gas Co. v. Public Util. Dist. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

This principle, however, is not applicable in the present case because federal agents are, in fact, included within one of the general classes listed in the statute. The privacy act provides that it is applicable to "any individual." RCW 9.73.030(1). Interpreting this phrase, as we must, in accordance with its ordinary meaning (see In re Lehman, 93 Wn.2d 25, 27, 604 P.2d 948 (1980)), we conclude the legislature intended the statute to apply to all individuals, including federal agents.

Moreover, as we have repeatedly cautioned, the maxim of express mention and implicit exclusion "is to be used only as a means of ascertaining the legislative intent where it is doubtful, and not as a means of defeating the apparent intent of the legislature." DeGrief v. Seattle, 50 Wn.2d 1, 12, 297 P.2d 940 (1956); State ex rel. Becker v. Wiley, 16 Wn.2d 340, 350-51, 133 P.2d 507 (1943); State ex rel. Spokane United Rys. v. Department of Pub. Serv., 191 Wash. 595, 598, 71 P.2d 661 (1937).

Appellant has not addressed the fact that he agreed to submit this allegation to the jury and therefore has waived this issue on appeal. (RP 472) Appellant did not ever question that the method used, submission to the jury, was incorrect. His only argument was

that there was insufficient evidence to support the aggravator to the jury. State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008):

In general, an error raised for the first time on appeal will not be reviewed. State v. Kirkman, 159 Wash.2d 918, 926, 155 P.3d 125 (2007). An exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). This is a "narrow" exception. Kirkman, 159 Wash.2d at 934, 155 P.3d 125 (quoting State v. Scott, 110 Wash.2d 682, 687, 757 P.2d 492 (1988)). A "manifest" error is an error that is "unmistakable, evident or indisputable." State v. Lynn, 67 Wash.App. 339, 345, 835 P.2d 251 (1992). An error is manifest if it results in actual prejudice to the defendant or the defendant makes a "plausible showing" "that the asserted error had practical and identifiable consequences in the trial of the case." State v. WWJ Corp., 138 Wash.2d 595, 602-03, 980 P.2d 1257 (1999) (quoting Lynn, 67 Wash.App. at 345, 835 P.2d 251). "The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wash.2d 1, 8, 17 P.3d 591 (2001) (citing WWJ Corp., 138 Wash.2d at 603, 980 P.2d 1257).

Because the court did not err when it submitting this aggravator to the jury the admission of the gang related information was proper. This information was also allowed for 404(b) purposes as clearly set forth on the record by the trial Deputy Prosecuting Attorney.

RESPONSE TO ALLEGATION FIVE.

This is once again a challenge to the sufficiency of the evidence. The State will not repeat the analysis set forth above. As was pointed out by the State at trial “

...to respond to counsel's argument, his argument is, one, his client wasn't in a gang or wasn't an associate of a gang. That's not even required by the language there, just that he had some sort of intent to indirectly cause any benefit to a gang.

I think his argument that his client wasn't a gang member doesn't really go to that factor. Anybody could do something to benefit the gang. The aggravator would still apply irregardless of whether they were a gang member or not.

He indicates that his client didn't indicate he was doing this to benefit the gang. We don't need an admission by the defendant to get the aggravator that he was doing this to benefit the gang. I think that's something that could be argued based on the facts of the case. (RP 473)

The question was addressed in the trial court and at that time the judge discussed the evidence and ruled that the aggravator was sufficiently proven by the State to go to the jury.

MS. HANLON: There is also testimony from the defense witness, Mr. Campos, that a drive-by may help the gang. He was kind of vague about it but he did say it --
THE COURT: He wasn't vague. He was very specific it would benefit, and then he tried to backtrack a little bit. That I was clear on. (RP 474)

...

THE COURT: Well, you know, it's a balance. I'm going to allow the instruction. In my mind there are enough facts presented. Bluehorse is the first case -- not the

first. It's the last big case in a line of cases that have come out, and it does describe some of the information that's necessary.

I don't know that that is an exclusive list. I do understand that there is an incentive for gang members to say we've heard or deny that they were involved and then in the next breath make admissions that they were involved. So I think there is sufficient information here for the jury to consider the aggravator. I'm going to allow that with the modifications as described.

The legislature clearly had a purpose in mind when it authorized two separate and distinct aggravators which were applicable in a gang related crime. The subsection of the statute that the State proceeded under is distinct from that used in Bluehorse. RCW 9.94A.535(3)(aa) does not require proof that the person charged is a member of "a" gang as does 535(3)(s). The court ruled that there was sufficient information to allow this aggravator to go to the jury. The State had conceded that the other aggravator, which was also listed in the information charging this appellant, could not be proven and removed that from the jury instructions.

The decision to allow this to go to the jury was a discretionary ruling on the part of the court. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). The court will review a jury's verdict on an aggravating factor for substantial evidence just as we

do when evaluating the sufficiency of the evidence supporting the elements of a crime. State v. Webb, 162 Wn.App. 195, 205-06, 252 P.3d 424 (2011).

In order for the court to impose the aggravated sentence requested by the State on account of the gang aggravators charged, the State was required to show that Appellant committed each offense "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 51-2, 112-114, ; RCW 9.94A.535(3)(aa). The State could find no reported cases which address new aggravating factor, added by the legislature in 2008. However, there are several cases that have reviewed RCW 9.94A.535(3)(s), a similar aggravator frequently employed in gang cases, which requires a showing that the defendant committed a crime to "obtain or maintain his . . . membership or to advance his . . . position in the hierarchy of an organization, association, or identifiable group."

Cases addressing the sufficiency of the evidence to support the aggravating circumstance provided by RCW 9.94A.535(3)(s) require a nexus between the crime charged and a defendant's actual gang-related motivation. See State v. Yarbrough, 151 Wn.App. 66, 96-97, 210 P.3d 1029 (2009) (sustaining the gang aggravator where the evidence

established that the defendant made a gang reference before shooting, perceived the victim as a member of a rival gang, and a recent gang altercation had occurred prior to the shooting); State v. Monschke, 133 Wn.App. 313, 135 P.3d 966 (2006) (testimony established that the defendant wanted to advance in a white supremacist group and had advocated the assault so that another member of the group could earn recognition for it). The mere fact that the defendant and the victims belong to rival gangs, together with generalized testimony from law enforcement officers about gang behavior and motivation, does not prove the aggravating motive required beyond a reasonable doubt. See State v. Bluehorse, 159 Wn.App. 410, 432, 428-29, 248 P.3d 537 (2011) (vacating a gang aggravator in a drive-by shooting case involving rival gang members where the State presented only generalized evidence of territorial conflict between rival gangs). The evidence must instead establish that the specific criminal act was committed by the defendant for the reason alleged.

From the evidence presented here, the jury could reasonably have concluded that Mr. Hernandez Garcia while perhaps not a gang “member” he was a close associate and at the time of these criminal acts he was in a car with three other gang members. Further, he had spent the entire day with the shooter who the day before had been with the other two gang

members when a rock was thrown at the car of one of the Campo brothers by a member of a rival gang. This shooter apparently had the gun he used tucked into his pants. These two were seated in a small Honda car for “over three hours” according to the testimony of the defendant. Further the testimony was that one of the victims and the home fired upon had a direct associations with rival gangs. The State's evidence was enough to support gang motivation and sufficient enough for a rational juror to find gang motivation beyond a reasonable doubt. The evidence supports the jury's special verdict finding the aggravating circumstance provided by RCW 9.94A.535(3)(aa).

RESPONSE TO ALLEGATION SIX.

The State did agree at the close of the case and before submission to the jury that there was insufficient evidence to proceed to the jury with the additional aggravator and it was removed from the jury instructions. This would appear to be a clerical error that must be fixed. This can be done by order of this court requiring the Superior Court to enter and order indicating the Judgment and Sentence must be amended to remove the indication that Appellant was convicted of the additional aggravator under RCW 9.94A.535(3)(s)

V. CONCLUSION

For the reasons set forth above this court should deny allegations one through five of this appeal. The sixth allegation regarding the clerical error in the Judgment and Sentence is correct and must be returned to the Superior Court to be addressed.

Respectfully submitted this 15th day of November 2012,

By: s/ David B. Trefry
DAVID B. TREFRY
Special Deputy Prosecuting Attorney
Yakima County
WSBA# 16050
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
Fax: 1-509-534-3505
E-mail: TrefryLaw@wegowireless.com

DECLARATION OF SERVICE

I, David B. Trefry state that on November 15, 2012 emailed a copy, by agreement of the parties, of the Respondent's Brief , to Lila Silverstein at wapofficemail@washapp.org and by US Mail to Ely Hernandez Garcia DOC 355094, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326-9723.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15th day of November, 2012 at Spokane, Washington.

By: s/David B. Trefry
DAVID B. TREFRY
Special Deputy Prosecuting Attorney
Yakima County
WSBA# 16050
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
Fax: 1-509-534-3505
E-mail: TrefryLaw@wegowireless.com