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Division III
State of Washington

No. 33595-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Luis Anguiano,

Appellant.

Yakima County Superior Court Cause No. 14-1-00150-4

The Honorable Judge Michael McCarthy

Appellant's AMENDED Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Anguiano's conviction was based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process.
2. The trial court erred by overruling Mr. Anguiano's objection to evidence of uncharged misconduct.
3. The court erred by admitting testimony suggesting that Mr. Anguiano was somehow connected to a prior burglary at the gun club.
4. The court erred by admitting evidence of uncharged misconduct without evaluating Hueso's credibility.
5. The court erred by admitting evidence of prior misconduct without finding by a preponderance that the misconduct occurred.
6. The court erred by failing to explicitly balance the probative value of the prior misconduct against the danger of unfair prejudice.
7. The trial judge erred by admitting a receipt from BiMart without adequate foundation.

ISSUE 1: A criminal conviction may not be based on propensity evidence. Did Mr. Anguiano's conviction violate his Fourteenth Amendment right to due process because it was based in part on propensity evidence?

ISSUE 2: ER 403 and ER 404(b) prohibit introduction of evidence of uncharged misconduct, except in limited circumstances. Did the trial court erroneously allow the state to imply that Mr. Anguiano was connected to a prior burglary at the gun club?

8. Mr. Anguiano's conviction for murder by extreme indifference violated his Fourteenth Amendment right to due process because it was based on insufficient evidence.
9. The state failed to prove that Mr. Anguiano or an accomplice acted under circumstances manifesting an extreme indifference to human life and engaged in conduct creating a grave risk of death to any person.

ISSUE 3: Evidence is insufficient to prove murder by extreme indifference where the act causing death was specifically aimed at and inflicted upon one particular person. Did the state fail to

prove murder by extreme indifference where Mr. Anguiano and his companions specifically targeted and killed Burkybile?

10. The addition of six consecutive firearm enhancements violated Mr. Anguiano's double jeopardy rights.
11. The trial court erred by imposing a separate firearm enhancement for each firearm.

ISSUE 4: Whether multiple violations of a single statute may be separately punished depends on the unit of prosecution. Did the trial court violate Mr. Anguiano's double jeopardy rights by adding three firearm enhancements to the murder sentence and three firearm enhancements to the assault sentence?

12. The trial court failed to properly determine Mr. Anguiano's criminal history, offender score, and standard range.
13. The prosecution failed to prove that Mr. Anguiano had prior felony convictions.
14. The trial court erred by including in Mr. Anguiano's criminal history offenses that were not admitted, acknowledged, or proved.
15. The trial court erred by sentencing Mr. Anguiano with an offender score of two.
16. The trial court erred by adopting Finding of Fact No. 2.3, CP 327.
17. The trial court erred by adopting Finding of Fact No. 2.5, CP 357.

ISSUE 5: At sentencing, the state bears the burden of proving prior convictions. Did the court err by sentencing Mr. Anguiano with an offender score of two, absent any evidence that he had prior convictions?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Luis Anguiano lost his mother after a long illness when he was a teenager. RP (6/2/15) 840-842. He used marijuana to deal with his loss and didn't finish high school. RP (6/2/15) 841. By the time he was 26, he'd decided to become a professional boxer, and had his first match in January of 2014. RP (6/2/15) 839-840. He stopped using to train, but after he lost his bout, he went back to pot. RP (6/2/15) 839-843.

Charles Burkybile was Mr. Anguiano's dealer. RP (6/2/15) 844. Burkybile sold from his home, which was a house on a duck-hunting club property. RP (5/27/15) 270, 300-301; RP (6/2/15) 835. Burkybile lived there with his wife and two small children. RP (5/27/15) 270-271. In the house, the family had a room of drying marijuana, a significant amount of high-potency oil, some marijuana candy, and even some pot stored in the baby's room. RP (5/28/15) 442-443, 447-450, 454-455, 457. A detective would later describe the amount of marijuana in the home as far exceeding any amount a person would use for medicinal purposes. RP (5/28/15) 454-455.

On January 25, 2014, Luis Anguiano and his brother Martin Alvarez, along with new acquaintances Carlos Hernandez and Jose Davila went to get some pot from Burkybile. RP (6/1/15) 649-651, 670; RP

(6/2/15) 840, 845. But this time Burkybile came outside and told the group to leave, that he would not sell from his home. RP (5/27/15) 278; RP (6/2/15) 850-851. Burkybile went inside, locked the door, retrieved his gun¹ and started shooting. RP (5/217/15) 295-296; RP (6/1/15) 659; RP (6/2/15) 851-853, 875. The occupants of the car shot back multiple times, as the car turned around and the group left. RP (5/27/15) 279; RP (6/1/15) 659-662, 678. Each of the three passengers had a gun and fired shots. RP (5/28/15) 431; RP (6/1/15) 654-655, 661; RP (6/2/15) 853-857. Burkybile was hit and died. RP (5/27/15) 281, 312-314.

The car was chased by police and soon crashed, and each occupant got out, ran away, and was eventually arrested. RP (5/28/15) 483-486; RP (6/1/15) 663. Each of the three guns used by the men in the car were recovered by police. RP (5/28/15) 472-473; RP (6/1/15) 654.

The state charged Mr. Anguiano with five felonies² stemming from the shots fired at Burkybile.³ CP 122-123. The five charges included first-degree murder,⁴ second-degree felony murder, two counts of first-degree

¹ As a felon, Burkybile was prohibited from owning firearms. RP (5/27/15) 299. Knowing this, after the shooting, his wife took the gun from her mortally wounded husband and hid it before police arrived. RP (5/27/15) 298-299; RP (5/28/15) 429.

² An additional charge of unlawful possession of a firearm was dismissed with prejudice. CP 125, 319.

³ Davila and Alvarez were similarly charged. CP 3-4. Their cases were severed for trial. RP (3/26/15) 187.

⁴ Felony murder and murder by extreme indifference. CP 122-123.

assault (one for the assault on Burkybile himself, and a second derived from that assault but based on a theory of transferred intent), and attempted first-degree burglary (alleging, *inter alia*, that Mr. Anguiano assaulted Burkybile during the attempted burglary). CP 122-126. To each charge, the state added three firearm enhancements⁵ for a total of 15 firearm enhancement allegations overall. CP 122-126.

At trial, the state sought to insinuate that Mr. Anguiano was involved in a prior burglary of Burkybile's house. RP (4/20/15) 18-19; RP (5/27/15) 251-253, 273. The defense objected, arguing that Mr. Anguiano had not been charged with the prior bad act. Counsel also argued that the state could not lay a proper foundation for any of the evidence purporting to link Mr. Anguiano to the alleged prior misconduct. RP (5/27/15) 252, 253.

Over these objections, the court allowed the prosecution to introduce evidence of the prior bad act and to argue that Mr. Anguiano was somehow involved. The court found the evidence relevant to prove "motivation." RP (5/27/15) 254. However, the court did not evaluate the credibility of Burkybile's wife (who provided the testimony),⁶ did not determine that the prior burglary actually occurred, did not find that Mr.

⁵ One for each of the three firearms used by the occupants of the car.

⁶ In fact, the officer who spoke with her about the incident opined that she was high when she made her statement. RP (5/28/15) 456.

Anguiano was involved, did not find the proffered evidence relevant to any element of the charged crimes, and did not weigh probative value against any potential for prejudice. RP (5/27/15) 254.

According to Burkybile's wife, someone broke in to their house about two weeks prior to the shooting.⁷ RP (5/27/15) 273-274. She claimed that items stolen during the burglary included a Nintendo PlayStation, a lever-action rifle, ammunition, medical marijuana, and a plastic canister containing \$500 in spare change and dollar bills. RP (5/27/15) 273-274, 304.

When police arrested Mr. Anguiano, they found a duffle bag containing an empty glass jar, a box of ammunition, and loose marijuana "shake." RP (6/1/15) 642-643, 698-706. Burkybile's wife claimed she could identify the empty jar as the one that had contained her marijuana. RP (5/27/15) 285. She admitted that she had purchased similar jars on multiple occasions, and testified that such jars were available from certain marijuana dispensaries.⁸ RP (5/27/15) 302-303. She also testified that the box of ammunition belonged to her (although there was apparently

⁷ There is no indication she or Burkybile reported the incident to police.

⁸ Defense counsel noted that the jar was identified because of its label, which was commercially available. RP (5/27/15) 253. Throughout the Burkybile property, police discovered numerous other jars containing marijuana and residue. RP 448, 452, 455.

nothing distinctive about it).⁹ RP (5/27/15) 253, 291, 301-302. The ammunition did not match any of the rounds fired during the shooting. RP (5/27/15) 252.

Over defense objection, the prosecution also submitted evidence through the manager of a local BiMart. The evidence purported to be a “business record” showing that Burkybile’s wife had recently purchased the rifle and ammunition she had described as missing. RP (5/27/15) 291; RP (6/1/15) 715-731; Ex. 216.

Mr. Anguiano acknowledged that he went to Burkybile’s house to buy marijuana from his dealer. RP (6/2/15) 844-847. He said that he only shot back in self-defense. RP (6/2/15) 875. The driver, who testified for the state, agreed that Mr. Anguiano did not shoot until after shots were fired from inside the house. RP (6/1/15) 686.

Mr. Anguiano did not know that others were in the house with Burkybile. He testified that he had never seen anyone else there, and did not see anyone else on the day of the shooting. RP (6/2/15) 872. No evidence contradicted this, or suggested that his companions knew that others were present.

⁹ The ammunition box bore the same UPC label as all other ammunition of that particular brand and type. RP (5/27/15) 253. An employee of BiMart could not say whether or not his store sold the particular box found in Mr. Anguiano’s possession. RP (6/1/15) 728-730.

During closing argument, the prosecutor reminded the jury about the prior burglary allegation. He referred to the previous burglary multiple times to support his theory that this incident was a failed home invasion. RP (6/3/15) 944-945, 948-949, 960, 961, 997-998.

The jury found Mr. Anguiano guilty of first degree murder,¹⁰ second degree murder, first-degree assault (against Burkybile), first-degree assault (against his wife, on a theory of transferred intent), and attempted first-degree burglary. CP 295, 301, 305, 310, 315. By special verdict, the jury also found the fifteen firearm enhancements. CP 297, 298, 299, 302, 303, 304, 307, 308, 309, 312, 313, 314, 316, 317, 318.

The trial judge ruled that the second-degree murder, first-degree assault on Burkybile, and attempted burglary convictions merged into the first-degree murder conviction.¹¹ CP 325. Ultimately, these convictions were vacated. CP 326-327.

Without evidence or agreement (or objection), the court found that Mr. Anguiano had two prior offenses. RP (7/1/15) 334-349; CP 325-334.

¹⁰ They answered “yes” to both interrogatories on that charge, finding that the murder occurred during an attempted first-degree burglary, and that the circumstances manifested an extreme indifference to human life. CP 300.

¹¹ The court also found that the assault on Burkybile’s wife was not the same criminal conduct as the murder. CP 325.

The court determined his offender score to be two on the murder.¹² CP 328. The court imposed six consecutive firearm enhancements—three on count one and three on count four. CP 328-329; CP 357. The court’s sentence totaled 830 months. CP 329, 358.

Mr. Anguiano timely appealed. CP 335.

ARGUMENT

I. THE TRIAL JUDGE SHOULD NOT HAVE ALLOWED THE STATE TO IMPLY THAT MR. ANGUIANO WAS CONNECTED WITH A PRIOR BURGLARY AT THE GUN CLUB.

The trial court improperly admitted evidence tenuously implying that Mr. Anguiano was connected to a prior burglary at the gun club residence. This error undermined Mr. Anguiano’s self-defense claim, because it supported the prosecution theory that he and his companions went to burglarize the residence a second time. The error violated ER 403, ER 404(b), and Mr. Anguiano’s Fourteenth Amendment right to due process. It permitted jurors to discount self-defense on the basis of an improper propensity inference.

¹² In addition, the trial judge specifically found there was no basis for an exceptional sentence. CP 328.

A. Standard of Review.

Ordinarily, evidentiary rulings are reviewed for abuse of discretion. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014).¹³ However, a court necessarily abuses its discretion by infringing an accused person's constitutional rights. *State v. Perez*, 137 Wn. App. 97, 105, 151 P.3d 249 (2007). Whether constitutional rights have been violated is a question of law, reviewed *de novo*. *Id.*

Manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). To raise a manifest error, an appellant need only make "a plausible showing that the error... had practical and identifiable consequences in the trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).¹⁴ An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

¹³ A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds such as the misconstruction of a rule. *Gunderson*, 181 Wn.2d at 922. A reviewing court considers whether a reasonable judge would have ruled as the trial judge did. *Id.*

¹⁴ The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Lamar*, 180 Wn.2d at 583.

- B. The court improperly admitted propensity evidence in violation of ER 403, ER 404(b), and Mr. Anguiano's Fourteenth Amendment right to due process.

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment.¹⁵ U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).¹⁶ A conviction based in part on propensity evidence is not the result of a fair trial.¹⁷ *Garceau*, 275 F.3d at 776, 777-778; *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

In addition to constitutional limitations, the rules of evidence prohibit the introduction of propensity evidence.¹⁸ Under ER 404(b),

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other

¹⁵ The U.S. Supreme Court has expressly reserved ruling on a similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

¹⁶ Although not binding, these federal cases are persuasive authority. *See Sanders v. City of Seattle*, 160 Wn.2d 198, 208, 156 P.3d 874 (2007).

¹⁷ A violation of due process that has practical and identifiable consequences is a manifest error affecting the accused person's constitutional right. RAP 2.5(a)(3). It may therefore be raised for the first time on review.

¹⁸ Evidentiary errors such as a misapplication of ER 403 and ER 404(b) are not themselves constitutional errors. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986); *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The Washington Supreme Court has never determined whether a conviction based on propensity evidence violates due process. Neither *Smith* nor *Jackson* addressed the issue.

purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced against the danger of unfair prejudice.¹⁹ *Gunderson*, 181 Wn.2d at 923.

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448.

The court must conduct this inquiry on the record. *McCreven*, 170 Wn. App. at 458. Doubtful cases are resolved in favor of exclusion. *State*

¹⁹ ER 403 provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008). If the evidence is admitted, the court must give a limiting instruction to the jury. *See Gunderson*, 181 Wn.2d at 923.

Here, even though the defense did object to the evidence of prior bad acts, the trial court failed to conduct the necessary analysis on the record. RP (5/27/15) 252-253. First, the court did not determine if a prior burglary had actually occurred, or if Mr. Anguiano had any connection to it. RP (5/27/15) 254. Indeed, the court ruled the evidence admissible without having had an opportunity to assess the credibility of Burkybile's wife. RP (5/27/15) 254; *see State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002).

This was error. The court should not have admitted the evidence without first determining that a prior burglary had occurred. *Slocum*, 183 Wn. App. at 448. Furthermore, even if the court found that a prior burglary had occurred, the evidence tying Mr. Anguiano to the prior offense was too tenuous to establish his involvement by a preponderance. The items found in Mr. Anguiano's possession—marijuana "shake," ammunition, and a jar—were commonly available items. RP (5/27/15)

253-254.²⁰ The trial court’s failure to find that the prior bad act actually occurred requires reversal. *Slocum*, 183 Wn. App. at 448.

Second, the judge did not weigh the probative value of the evidence against the danger of unfair prejudice.²¹ RP (5/27/15) 254. This, too, requires reversal. *Id.* There is no indication the judge presumed the evidence inadmissible, tasked the state with the burden of proving admissibility, or resolved any doubts in favor of exclusion. *McCreven*, 170 Wn. App. at 458; *Slocum*, 333 P.3d at 546.

The trial court should not have admitted the evidence without explicitly finding that Burkybile’s wife was telling the truth and that Mr. Anguiano was involved in the prior burglary. *Slocum*, 183 Wn. App. at 448. The court should have presumed the evidence inadmissible and made an on-the-record determination regarding the probative value and potential for prejudice posed by the evidence. *Id.*

The error requires reversal of Mr. Anguiano’s convictions and remand for a new trial, as argued below.

1. The constitutional error requires reversal because the state cannot establish harmlessness beyond a reasonable doubt.

²⁰ In addition, evidence that Mr. Anguiano possessed ammunition unrelated to the offense may have implicated his right to keep and bear arms. U.S. Const. Amend. II; Wash. Const. art. I, § 24; see *State v. Rupe*, 101 Wn.2d 664, 706, 683 P.2d 571 (1984).

²¹ The court admitted the evidence to show “motivation.” RP (5/27/15) 254.

An erroneous evidentiary ruling that violates constitutional rights “is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt.” *State v. Franklin*, 180 Wn.2d 371, 377 n. 2, 325 P.3d 159 (2014). Here, the court’s error resulted in a conviction based in part on propensity evidence, in violation of Mr. Anguiano’s Fourteenth Amendment right to due process.²² *Garceau*, 275 F.3d at 775. The error is presumed prejudicial, unless the state can show harmlessness beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 377 n. 2.

The jury heard two conflicting versions of events. Evidence implying that Mr. Anguiano was connected to a prior burglary undermined his testimony that he went to buy marijuana and only drew his weapon when fired upon. Jurors who believed that Mr. Anguiano was connected to a prior burglary would not have credited his self-defense claim. Furthermore, the state relied heavily on the prior burglary allegation in closing argument. RP (6/3/15) 944-945, 948-949, 960, 961, 997-998.

The state cannot show beyond a reasonable doubt that jurors did not convict based on the forbidden propensity inference. This is especially

²² The violation of Mr. Anguiano’s due process right is a manifest error affecting that may be reviewed for the first time on appeal. RAP 2.5(a)(3). The error had practical and identifiable consequences, because the trial court “could have corrected the error,” given what it knew at the time. *O’Hara*, 167 Wn.2d at 100. Even though defense counsel’s objections were based on ER 404(b) and lack of foundation, the Court of Appeals should address Mr. Anguiano’s constitutional argument on its merits. RAP 2.5(a)(3).

true given the court's failure to provide a limiting instruction on the issue.
See Gunderson, 181 Wn.2d at 923.

The improper admission of propensity evidence violated Mr. Anguiano's due process right to a fair trial by an impartial jury. The error requires reversal. *Garceau*, 275 F.3d at 775.

2. The evidentiary error requires reversal because there is a reasonable probability that it affected the outcome of the trial.

The improper admission of evidence under ER 404(b) requires reversal if there is a reasonable probability that it affected the outcome of the trial. *Slocum*, 183 Wn. App. at 456. Where the prior acts are similar to the charged crime, the potential for prejudice is magnified. *See State v. Saunders*, 91 Wn. App. 575, 580, 958 P.2d 364 (1998) (addressing ER 609) (citing *State v. Hardy*, 133 Wn.2d 701, 711, 946 P.2d 1175 (1997)). Here, there is a reasonable probability that the improperly admitted evidence affected the outcome of trial. *Slocum*, 183 Wn. App. at 456.

The state claimed that Mr. Anguiano and his companions planned to burglarize the gun club residence, and implied that he'd done so before. RP (6/3/15) 943-972, 992-998. Mr. Anguiano argued that he went to buy marijuana, and only drew his gun after being shot at. RP (6/3/15) 973-991.

There is a reasonable probability that jurors considered the evidence implying a link to the prior burglary as proof that Mr. Anguiano had a propensity to commit the crime charged. As a result, jurors would have discredited his self-defense testimony and voted to convict. The error was especially prejudicial, given the similarity between the prior act (burglary) and the underlying charged crime here (attempted burglary).

Mr. Anguiano's convictions must be reversed and the case remanded for a new trial. *Slocum*, 183 Wn. App. at 456.

C. The trial court improperly allowed the state to bolster its propensity evidence with hearsay records admitted without proper foundation.

The business records exception to the rule against hearsay is set forth at RCW 5.45.020. The statute allows the proponent to introduce a business record if “the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.” RCW 5.45.020.

Here, the state failed to lay a proper foundation for the admission of Ex. 216, a receipt from BiMart showing a sale of ammunition of the type found in Mr. Anguiano's possession. The manager at the local BiMart testified that he had worked there for only three months, that

receipts are kept on a hard drive at BiMart's corporate office in Eugene, that his store doesn't keep such records, that he'd never accessed the records, that Ex. 216 had apparently been printed by his predecessor (and provided to the police or the prosecutor), and that he had never verified Ex. 216 against company records. RP (6/1/15) 715-727. He did not claim that the record was made in the regular course of business or that it was made at or near the time of the transaction. RP (6/1/15) 715-727.

Despite the absence of an adequate foundation, the trial court overruled Mr. Anguiano's objection and admitted the evidence. RP (6/1/15) 726. The state used the receipt to bolster Burkybile's wife's testimony that she'd purchased rifle ammunition of the kind found in Mr. Anguiano's possession. RP (6/3/15) 948. This lent some credibility to her claim that their house had been burglarized and similar ammunition had been stolen.

The trial court should have excluded the evidence under ER 802 and RCW 5.45.020. Its improper admission provided some support for her claim regarding the prior burglary, and thus undermined Mr. Anguiano's testimony that he had no connection to the prior burglary and that he went to the gun club to buy marijuana, as he'd done in the past. As a result, the improper admission of this "business record" undermined Mr. Anguiano's self-defense claim.

There is a reasonable probability that the error affected the verdict. *Slocum*, 183 Wn. App. at 456. Mr. Anguiano's convictions must be reversed, and the case remanded for a new trial. *Id.*

II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. ANGUIANO OF MURDER BY EXTREME INDIFFERENCE.

A person is not guilty of murder by extreme indifference if “the act causing a person’s death was specifically aimed at and inflicted upon that particular person and none other.” *State v. Anderson*, 94 Wn.2d 176, 187-192, 616 P.2d 612 (1980) (quoting *State v. Mitchell*, 29 Wn.2d 468, 484, 188 P.2d 88 (1947)); *see also State v. Berge*, 25 Wn. App. 433, 437, 607 P.2d 1247 (1980). An exception exists where the offender’s attack necessarily endangers many others. *See, e.g., State v. Pastrana*, 94 Wn. App. 463, 473, 972 P.2d 557 (1999), *as amended* (May 21, 1999) (defendant fired from a moving car on a major freeway ramp in heavy traffic); *State v. Pettus*, 89 Wn. App. 688, 951 P.2d 284 (1998) (defendant shot numerous times from a moving car in a residential neighborhood near a school).

In this case, Mr. Anguiano and his companions directed their fire at Burkybile (who returned fire). RP (6/1/15) 659-662. They did not see his wife or children, and had no way of knowing that she or anyone else was in the vicinity. RP (6/2/15) 872. Furthermore, the shooting occurred

in a rural area, with no other businesses or residences nearby. RP (5/27/15) 270-271; RP (6/1/15) 652-653; RP (6/2/15) 866-868.

Under these circumstances, the evidence was insufficient to prove murder by extreme indifference. *Anderson*, 94 Wn.2d at 187-192. Mr. Anguiano should not have been convicted of that crime. The conviction for murder by extreme indifference must be reversed, and the charge dismissed with prejudice.²³ See *State v. Rodgers*, 146 Wn.2d 55, 60, 43 P.3d 1, 3 (2002).

III. THE TRIAL COURT VIOLATED THE FIFTH AND FOURTEENTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY BY IMPOSING SIX CONSECUTIVE FIREARM ENHANCEMENTS, WHERE MR. ANGUIANO COMMITTED AT MOST TWO UNITS OF PROSECUTION.

The state and federal constitutions prohibit multiple punishments for a single offense. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9. Double jeopardy claims present manifest error affecting a constitutional right, and may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Whittaker*, 192 Wn. App. 395, 411, 367 P.3d 1092 (2016) (citing *State v. Ralph*, 175 Wn. App. 814, 823, 308 P.3d 729, 733 (2013)).

²³ By means of a special interrogatory, the jury found Mr. Anguiano guilty of both first-degree felony murder and murder by extreme indifference. CP 300. Accordingly, the conviction as a whole need not be reversed on grounds of insufficiency.

Where multiple penalties are imposed for violation of a single statute, courts must determine the applicable “unit of prosecution.” *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980-81, 329 P.3d 78 (2014); *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). As with other double jeopardy issues, “analyzing the unit of prosecution is an issue of statutory construction and legislative intent.” *State v. Sutherby*, 165 Wn.2d 870, 878, 204 P.3d 916 (2009).

To determine legislative intent, courts look to the plain meaning of the statute as expressed in its language. *Id.* When a statute fails to “clearly and unambiguously identify the unit of prosecution,” courts apply the rule of lenity to any ambiguity. *Id.* This avoids turning a single transaction into multiple offenses. *Id.* at 878-879 (citing *Adel*, 136 Wn.2d at 634-35); *see also State v. Jensen*, 164 Wn.2d 943, 949, 195 P.3d 512 (2008).

RCW 9.94A.533(3) provides that additional time “shall be added to the standard sentence range for felony crimes..., if the offender or an accomplice was armed with a firearm.” The statute also requires that “the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement.” RCW 9.94A.533(3). In addition,

“[n]otwithstanding any other provision of law, all firearm enhancements are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.” RCW 9.94A.533(3)(e).

The statute does not expressly set forth the unit of prosecution.

The Supreme Court has determined that an enhancement must be imposed for each armed “enhancement-eligible offense[].” *State v. Mandanas*, 168 Wn.2d 84, 88, 228 P.3d 13 (2010). The court has also held that both a firearm enhancement and a deadly weapon enhancement must be imposed when an offender is armed with one firearm and one knife. *State v. DeSantiago*, 149 Wn.2d 402, 407, 410, 68 P.3d 1065 (2003) (addressing former RCW 9.94A.510).²⁴

Although the statute refers to “firearm enhancements” (plural), it does not refer to “firearms” (plural).²⁵ RCW 9.94A.533(3). Nor does it specifically require additional time for “each firearm,” or otherwise clearly

²⁴ In *dicta*, the *DeSantiago* majority opined that “a sentencing judge [must] impose an enhancement for each firearm or other deadly weapon that a jury finds was carried during an offense.” *Id.* at 421. This *dicta* (suggesting that a separate enhancement attaches to *each* firearm) should not control here, as explained below.

²⁵ In one provision, the statute refers to the “underlying offense” (singular) that is “subject to a firearm enhancement” (singular), suggesting that only one firearm enhancement can attach to a particular offense. RCW 9.94A.533(3). In another, it refers to “firearm enhancements” (plural) applying to “the completed felony crime” (singular), implying that multiple enhancements could attach to a single offense. RCW 9.94A.533(3).

indicate how to treat offenses committed by an offender carrying more than one gun. RCW 9.94A.533(3).

Because the statute does not clearly set forth the unit of prosecution, it is ambiguous. The rule of lenity requires an interpretation that favors the accused person, and avoids turning a single transaction into multiple offenses. *Sutherby*, 165 Wn.2d at 878-879; *Adel*, 136 Wn.2d at 634-35); *Jensen*, 164 Wn.2d at 949. Thus, a person who commits one or more crimes while armed with multiple firearms will receive one firearm enhancement for each enhancement-eligible offense. *See Sutherby*, 165 Wn.2d at 878-879

This is consistent with the statutory language. RCW 9.94A.533(3). It also comports with the “findings and intent” section of Initiative 159 (the “Hard Time for Armed Crime” Act). Laws of 1995 Ch. 129 §1, which does not include any language suggesting that multiple firearms should be punished separately.²⁶

²⁶ Section 1 of the Act provides as follows: “(1) The people of the state of Washington find and declare that: (a) Armed criminals pose an increasing and major threat to public safety and can turn any crime into serious injury or death. (b) Criminals carry deadly weapons for several key reasons including: Forcing the victim to comply with their demands; injuring or killing anyone who tries to stop the criminal acts; and aiding the criminal in escaping. (c) Current law does not sufficiently stigmatize the carrying and use of deadly weapons by criminals, and far too often there are no deadly weapon enhancements provided for many felonies, including murder, arson, manslaughter, and child molestation and many other sex offenses including child luring. (d) Current law also fails to distinguish between gun-carrying criminals and criminals carrying knives or clubs. (2) By increasing the penalties for carrying and using deadly weapons by criminals and closing loopholes involving armed criminals, the people intend to: (a) Stigmatize the carrying and use of any deadly weapons for all felonies

(Continued)

The *DeSantiago* court's broad statement that a sentencing court must impose a separate enhancement for "each firearm" is *dicta*, and should not control here. *DeSantiago* did not involve multiple firearms. *DeSantiago*, 149 Wn.2d at 407, 410. The jury found that the defendants in that case were armed with one firearm and one knife. *Id.* The issue presented was "Do both the firearm enhancement and the deadly weapon enhancement apply to a single offense committed with two weapons?" *Id.*, at 410.

The court in that case was not asked to determine whether a court may impose multiple firearm enhancements when an offender is armed with more than one firearm. *Id.* The *DeSantiago* court's suggestion that multiple firearms could lead to multiple enhancements is unnecessary to its decision. It is therefore *dicta*. See *State v. Chenoweth*, 185 Wn.2d 218, ___, 370 P.3d 6 (2016) (Madsen, C.J., dissenting) (defining *dicta* as comments unnecessary to the outcome of the case.)

In addition, the *DeSantiago dicta* rests on a precarious foundation.

First, the issue had not been briefed, because the defendant did not make a

with proper deadly weapon enhancements. (b) Reduce the number of armed offenders by making the carrying and use of the deadly weapon not worth the sentence received upon conviction. (c) Distinguish between the gun predators and criminals carrying other deadly weapons and provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms. (d) Bring accountability and certainty into the sentencing system by tracking individual judges and holding them accountable for their sentencing practices in relation to the state's sentencing guidelines for serious crimes." Laws of 1995 Ch. 129 §1.

double jeopardy argument. *DeSantiago*, 149 Wn.2d at 420. The court did not recognize the statute’s ambiguity, and did not apply the rule of lenity, as required in unit of prosecution cases. *Sutherby*, 165 Wn.2d at 878-879.

Second, the court relied on persuasive authority that “did not analyze the statutory scheme at issue here.” *DeSantiago*, 149 Wn.2d at 419.²⁷ In fact, the only cited authority that specifically addressed a firearm enhancement actually reached the opposite result from the *DeSantiago* majority’s *dicta*. *Id.*, at 419 (citing *People v. Haggart*, 142 Mich. App. 330, 370 N.W.2d 345 (1985)).²⁸ The *Haggart* court applied the rule of lenity to an ambiguous firearm enhancement statute. It held that the statute allowed only one enhancement per transaction, regardless of the number of firearms carried. *Haggart*, 142 Mich. App. at 348.

Likewise, federal courts generally allow only one enhancement per underlying crime for the corresponding federal enhancement provision (18 U.S.C. 924(c)), regardless of the number of firearms involved in a crime.²⁹

²⁷ The persuasive authority examined by the court interpreted the phrase “a firearm,” which the court characterized as “identical statutory language.” *Id.*, at 419.

²⁸ The other three cases dealt with substantive weapons crimes, not firearm enhancements. *Id.*, at 419 (citing *United States v. Alverson*, 666 F.2d 341 (9th Cir.1982) (allowing a separate conviction for each unregistered machine gun possessed); *Grappin v. State*, 450 So.2d 480 (Fla.1984) (allowing a separate conviction for each firearm unlawfully taken), and *State v. Nichols*, 865 S.W.2d 435 (Mo.App.1993) (allowing a separate conviction for each concealed weapon unlawfully carried).

²⁹ It does not appear that other state courts have addressed the issue. However, at least one state prohibits multiple convictions where an offender steals multiple firearm or possesses

(Continued)

See, e.g., United States v. Cappas, 29 F.3d 1187 (7th Cir. 1994); *United States v. Johnson*, 25 F.3d 1335 (6th Cir. 1994); *United States v. Lindsay*, 985 F.2d 666, 674 (2d Cir. 1993); *United States v. Martinez*, 7 F.3d 146, 148 (9th Cir. 1993), *as amended* (Nov. 9, 1993); *United States v. Correa-Ventura*, 6 F.3d 1070 (5th Cir. 1993); *United States v. Moore*, 958 F.2d 310 (10th Cir. 1992); *United States v. Hamilton*, 953 F.2d 1344, 1346 (11th Cir. 1992).³⁰

Third, the *DeSantiago* court erroneously reasoned that imposition of an enhancement for each firearm “would not absurdly extend sentences” because the statutory maximum provides a cap on the total sentence. *DeSantiago*, 149 Wn.2d at 421. In fact, as this case illustrates, the “suggested absurdity” is NOT “dissolved by a plain reading of the statute” when the statutory maximum is life in prison. *Id.* The trial court here imposed 30 years in firearm enhancements—more than it imposed for either the murder of Burkybile or the assault on his wife.³¹ CP 328.

multiple stolen firearms. *State v. Surratt*, 217 N.C. App. 89, 99, 719 S.E.2d 120 (2011); *State v. Boykin*, 78 N.C. App. 572, 575, 337 S.E.2d 678 (1985).

³⁰ The Eighth Circuit has taken a slightly different approach, allowing one “conviction” for each firearm possessed, but prohibiting multiple punishments. *See United States v. Freisinger*, 937 F.2d 383 (8th Cir. 1991). However, the Eighth Circuit also requires the government to prove that the defendant had a separate use for each gun. *United States v. Canterbury*, 2 F.3d 305, 306 (8th Cir. 1993). The Eighth Circuit’s approach has been criticized by other federal courts of appeal. *See, e.g., Lindsay*, 985 F.2d at 674-675.

³¹ The 30-year enhancement was also just 14 months less than the combined total for the two consecutive base sentences for murder and assault. CP 328

For all these reasons, the *DeSantiago dicta* should not control here. Mr. Anguiano was eligible for two firearm enhancements—one for each underlying offense. The court should have imposed 120 months in enhancements (5 years for each offense), rather than the 30 years it added to Mr. Anguiano’s sentence.

The imposition of six consecutive firearm enhancements violated the Fifth and Fourteenth Amendment prohibition against double jeopardy. RCW 9.94A.533(3); *Sutherby*, 165 Wn.2d at 878-879. Four of the enhancements must be stricken and the case must be remanded for correction of the judgment and sentence. *Id.*

IV. THE TRIAL COURT ERRED BY FINDING THAT MR. ANGUIANO HAD TWO PRIOR FELONY CONVICTIONS.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The sentencing court is required to determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). In determining the offender score, due process permits the court to rely only on what has been “admitted by the plea agreement, or admitted, acknowledged, or proved in

a trial or at the time of sentencing.” *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). The burden is on the prosecution to establish the accused’s criminal history by a preponderance of the evidence. *Id.*

The prosecutor’s written summary of the accused’s alleged criminal history does not prove that the prior convictions actually exist. *Id.*, at 910. Such “bare assertions, unsupported by evidence do not satisfy the state’s burden to prove the existence of a prior conviction.” *Id.* at 910. This is true even when defense counsel does not object. *Id.* at 915.

At sentencing, the state did not present evidence that Mr. Anguiano had any prior convictions. RP (7/1/15) 334-349. Nonetheless, the court found that Mr. Anguiano had an offender score of two, based on two prior felony convictions. CP 327, 357.

Because the state failed to prove that Mr. Anguiano had any criminal history, the court’s findings and offender score are not supported by the evidence. The findings regarding Mr. Anguiano’s criminal history, offender score, and standard range must be vacated. *Id.* His sentence must be reversed, and the case remanded for a new sentencing hearing. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Anguiano's convictions must be reversed. The murder by extreme indifference charge must be dismissed with prejudice, and the remaining charges remanded for a new trial.

In the alternative, double jeopardy requires dismissal of counts three and six (and the associated enhancements). Double jeopardy also requires dismissal of four of the firearm enhancements, because Mr. Anguiano committed (at most) two units of prosecution.

Even if no convictions or enhancements are vacated or dismissed, the sentence must be vacated and the case remanded for correction of a math error at sentencing. Furthermore, all discretionary LFOs must be vacated and the case remanded for an adequate hearing on Mr. Anguiano's present or future ability to pay.

Respectfully submitted on July 19, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 19, 2016.



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