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Dec 16, 2016
Court of Appeals
Division III
State of Washington

NO. 33595-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

LUIS ANGUIANO,

Appellant.

BRIEF OF RESPONDENT

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

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii-iv

I. ASSIGNMENTS OF ERROR 1

 A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR..... 1

 B. ANSWERS TO ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF THE CASE..... 2

III. ARGUMENT 24

Response to allegation I – Admission of prior bad acts information. 24

Response to allegation II – Insufficient evidence- Murder by extreme indifference 37

Response to allegation III-Firearm enhancements..... 40

IV. CONCLUSION 44

APPENDIX A 46

APPENDIX B 48

TABLE OF AUTHORITIES

PAGE

Cases

State v. Adams, 138 Wn.App. 36, 155 P.3d 989 (Div.3 2007)..... 38

State v. Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999)..... 34

State v. Brooks, 45 Wn.App. 824, 727 P.2d 988 (1986) 32

State v. Bucknell, 183 P.3d 1078, 1080 (WA 2008)..... 32

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990)..... 32

State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001)..... 30

State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1952)..... 26

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980)..... 32

State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003) 40, 42-43

State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009) 35

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) 44

State v. Gogolin, 45 Wn.App. 640, 727 P.2d 683 (1986)..... 28

State v. Graham, 153 Wn.2d 400, 103 P.3d 1238 (2005)..... 42

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 31-32

State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012) 28,30

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985)..... 31

State v. Henderson, 182 Wn.2d 734, 344 P.3d 1207 (2015)..... 37

State v. Hill, 83 Wn.2d 558, 520 P.2d 618 (1974)..... 32

TABLE OF AUTHORITIES (continued)

PAGE

<u>State v. Hunley</u> , 175 Wn.2d 901, 287 P.3d 584 (2012)	43
<u>State v. Jacobs</u> , 154 Wn.2d 596, 115 P.3d 281 (Wash. 2005)	43
<u>State v. Johnson</u> , 147 Wn.App. 276, 194 P.3d 1009 (2008)	34
<u>State v. Kirkham</u> , 159 Wn.2d 918, 155 P.3d 125 (2007)	26
<u>State v. Mandamas</u> , 168 Wn.2d 84, 228 P.3d 13 (2010)	42
<u>State v. McChristian</u> , 158 Wn.App. 392, 241 P.3d 468 (2010)	33
<u>State v. McDaniel</u> , 155 Wn.App. 829, 230 P.3d 245 (2010)	33
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.3d 1251 (1995)	27
<u>State v. O’Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009)	27
<u>State v. Ose</u> , 156 Wn.2d 140, 124 P.3d 635 (Wash. 2005)	42-43
<u>State v. Pastrana</u> , 94 Wn.App. 463, 972 P.2d 557 (1999)	38
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	31
<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994)	34-36
Supreme Court	
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct.2781, 61 L.Ed.2d 560 (1979)	31

TABLE OF AUTHORITIES (continued)

PAGE

Rules and Statutes

ER 103	.....	30
ER 103(a)	.....	26
ER 403	.....	1
ER 404(b)	.....	1, 28
RAP 2.5	.....	26, 30
RAP 2.5(a)	.....	26
RAP 2.5(a)(3)	.....	26
RCW 9A.04.110(4)(c)	.....	35
RCW 9A.08.020	.....	33
RCW 9A.32.030(1)(b)	.....	38
RCW 94A.533(3)	.....	43
RCW 94A.533(4)	.....	43

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant sets forth four assignments of error. These can be summarized as follows;

- 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 court improperly admitted propensity evidence in violation of ER 403, ER 404(b), and Mr. Anguiano's Fourteenth Amendment right to due process. The trial court improperly allowed the state to bolster its propensity evidence with hearsay records admitted without proper foundation
- II. The evidence was insufficient to convict Mr. Anguiano of Murder by Extreme Indifference.
- 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
- IV. The trial court erred by finding that Mr. Anguiano had two prior felony convictions.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

Anguiano has listed four assignments of error but included eight areas of the law in the body of his brief which appear to be inclusive of the four specific assignments the State will address each of the eight areas set forth by Roman numeral in the body of his brief.

- I. The alleged ER 404(b) information was not improperly admitted and even if admission had been improper the

overwhelming untainted evidence supports all of the convictions.

- II. The evidence was sufficient to convict Anguiano of murder by extreme indifference.
- III. The imposition of all six firearm enhancements was proper.
- IV. Anguiano acknowledge his criminal history on the record therefore there was no error in this point score used to determine his sentence.

II. STATEMENT OF THE CASE

About two weeks' prior the crime charged there had been a break-in at her home. RP 273. The family dog had been injured, a storage box full of DVD's was "ready to go" a PS3 Play Station was missing, a canister full of change that she had collected, a lever action rifle and the bullets for that gun were also missing. RP 273-4. She stated there was also some medical marijuana medicine that was stolen. RP 274.

On the day of this crime, Ms. Hueso, was home at a residence that is part of a private duck hunting club. RP 271. Ms. Hueso, one of the victims and the wife of the decedent, Mr. Burkybile was home recovering from an injury when she heard the family guard dog, a German Shepard barking like crazy and a car racing down her driveway. RP 272, 295. From her position she was able to look out and she observed a small green car driving by her window. She observed that there were four people in the car, two in front and two in back and that all of the occupants were male. RP 272, 296-8. She was concerned because she and her family

lived in the country and no one came out there without contacting them first. RP 273.

At the time of this crime there were four people in the home, Ms. Hueso, Mr. Burkybile and their two sons, Colby age 15 months and Tyler age three. RP 275. Burkybile was in the back room with his two sons and came out to the front door to see who it was in the car. RP 275. Burkybile opened the back door where the car had pulled up RP 276-7. Ms. Hueso testified that she heard the end of a conversation and peek around the refrigerator. Before Mr. Burkybile closed the door she observed the back of the green car and one person sitting in the back, passenger side back window, looking back. RP 277, 296-8. Mr. Burkybile's conversation, according to Ms. Hueso was "...this is a gun club. We don't do that here." Burkybile closed the door and locked it. RP 296 He then stated to her "I don't know who they are. They're just a bunch of Mexican gangster (sic)" RP 278. She then heard gun shots and the dog yelp as it was shot. She heard cars doors open and running to the house. She then saw one shot through the door. RP 278. Ms. Hueso testified that Burkybile was holding shut the locked door as the intruders started kicking the door trying to break it down. RP 279. She observed another shot through the door and she called 911 RP 279. She told 911 that there was a green car at her house with four guys and they were

shooting and had shot their dog. She testified that “they were shooting throughout at us.” RP 280. One of the bullets came through about three feet above her three-year-old son’s head and at that time she got the children to the floor and covered them. RP 280.

Ms. Hueso testified that there “[a] lot” of gun shots. That when the intruders came to the front door she heard at least six or seven and when they started to drive off she heard at least another six or so. RP 281. She stated 14 or 15 shots in total. RP 281.

After the shots had ended Ms. Hueso went out and saw Mr. Burkybile on the ground and that he had been shot, she informed 911 that he had been shot. RP 281. When she first saw Mr. Burkybile he was still breathing and his eyes were open. She testified that there was a rifle next to him and that he lifted his shirt and showed her that he had been shot. She testified that he did not speak to her. She testified that she did CPR and tried to keep him alive and put pressure on the wound. RP 282. Soon police and paramedics came and Mr. Burkybile was taken away in an ambulance. RP 283. She testified that her dog was lying shot just outside the home and that police officers shot him the dog because he was not going to make it. RP 283, 293.

Ms. Hueso testified that she had a prescription for marijuana and that Mr. Burkybile may have delivered some marijuana. RP 284. She

testified she, Mr. Burkybile and their two children were all enrolled members of the Yakama tribe and had received a check for each member in about \$17,000. RP 284.

During her testimony Ms. Hueso was shown items that had been seized from the defendant. She was able to identify two items, a jar that had had “herb” in it and some bullets. She was presented with a printout that showed items that were purchased at Bi-Mart and asked to identify if that was her transaction. She was able to identify that the record reflected what she had purchase, a “30-30 rifle, to packs of 50 ammo...some PJ pants and sweat pants. RP 285-9, 291, 301. On cross-examination she was able to further identify the ammo and the jar that had been stolen. She testified that that jar was;

A. An eighth of Girl Scout Cookies flower herbal.

Q. How do you know that that's the jar?

A. Because I know this is my jar because only specific dispensaries, specific stores, only sell it only in Seattle, yeah. I would buy it all the time.

Q. Okay. Did you have multiple jars like that?

A. Yes. I still have jars at home of this. RP 302

Ms. Hueso testified that she had never seen or met the defendant, Mr. Anguiano before. RP 292.

Ms. Hueso testified they had a .22 caliber rifle that was above a cabinet in the kitchen and when she went to check on her mortally wounded husband that gun was beside him. RP 297-8. She testified that she moved the gun back above the cabinet, she stated that she had put the gun back because her husband was a felon and she believed that he could not have possession of a guns. RP 298-9. She stated that he was alive and breathing when he was still in the home. RP 299 Ms. Hueso testified that Mr. Burkybile did sell marijuana from inside their house to friends who had their medical marijuana papers. RP 300.

She testified that “[t]he last words” to her from her husband “I don’t know who they are.” RP 307.

Dr. Wilson, the emergency room physician who was present when Mr. Burkybile arrived at the hospital testified that the victim had a wound in the left shoulder area and a big bruise that suggested that the bullet had traversed across his body. RP 313. The doctor further testified that “[h]is eyes were fixed and dilated. He was cold he didn’t have any color. So he was pretty much dead on arrival.” He also stated that Burkybile had arrested in the field and that your chances of survival are pretty much none when that happens. RP 314. Dr. Wilson pronounce him dead. RP 314.

Dep. McIlrath testified that he was dispatched to the residence after a report that there had been a shooting. When he arrived at the house

he observed the Ms. Hueso waving to him from the residence and that was a dog shot in the front yard. When he went to the home the victim was up against the door and the deputy had to push the body to get the door open. Burkybile had no pulse and was not breathing at that time. RP 317-8. He testified that he had to squeeze through the opening of the door. RP 327. After medical help arrived this deputy began to investigate the scene. He observed bullet holes in the house and shell casing outside the home. The casings were from “a lot of different types of caliber firearms.” RP 319. He also observed what he described as “peel-out marks” from a car that went around the house. RP 319, 322, 349. He also identified as accurate a photograph that was admitted as evidence that depicted bullet holes in the door where the victim was found. RP 322

Det. Gray testified as to what he observed and photographed at the scene. Found at the scene outside the home were .40 caliber, 9 mm, .45 caliber shell casings. RP 350-61. He took pictures of the door where the victim was found and testified that the door had been penetrated by several bullets as well as the adjacent screen door had also been struck. RP 362-65. He testified that the door has been struck four times. RP 363-8. He also testified regarding other bullet strikes to the home including a window RP 369 and trim on the outside of the home. RP 370. He also identified bullet strikes to the interior of the home. RP 375. He testified

that there were additional bullet strikes even to side walls inside the residence. RP 376.

Det. Gray testified that as a portion of the investigation the used rods to allow them to ascertain the angle and direction of travel of the bullets that made the holes in this home. RP 381-96. His testimony regarding defects and strike marks in this home covers PR 381-??? and details damage caused by bullets to shelves, flashlights, laundry detergent bottles, closets, walls, windows, doors and these were found in bedrooms, laundry rooms closets, the living room. and other rooms throughout this home. RP 381-403

Det. Gray testified regarding several items, shell casings from 9 mm weapon and a .45 caliber gun were seized from the scene was identified by Det. Gray. RP 405-410, 413-14. These items were submitted to the Washington State Patrol Crime Laboratory for additional testing. RP 407,411, 413-14.

Det. Gray testified that on the day of the shooting he observed a rifle that was on a shelf in the laundry room. RP 429. There was also a .22 caliber shell casing found in this laundry room. RP 430. Det. Tucker also observed this weapon and ammunition when he entered the residence as a portion of the investigation. RP 441-2. Det. Tucker seized the .22 rifle and ammunition. When he seized the weapon he ejected on spent

round from the chamber and he believed that there were five additional live rounds in the weapon. RP 443, 458-60

Det. Gray was involved in a search of an area of Progressive Road looking for weapons. A CZ 9 mm semiautomatic pistol was found. RP 433-45. This gun was seized, packaged and sent to the Washington State Patrol Crime Lab. RP 435-6

Det. Tucker was examined by counsel for the defendant extensively regarding the amount and types of marijuana, marijuana products and other material related to marijuana that was found in the residence. RP 446-51.

Det. Russell testified that it appeared that there were two persons firing two different weapons from two separate positions on the outside of the door. RP 470. He further testified that he counted the number of bullet holes in the residence that were readily observable. The detective counted 10 bullet holes on the east side of this home, this was the side where the door behind which Mr. Burkybile was found. There were also bullet holes found on the south side of this residence. RP 470. This detective testified that there were bullet holes through interior walls as well. RP 470. This detective also participated in a search for firearms and he was present when two guns were found along Progressive Road. RP 473-4.

Officer Enriquez testified that he was responding to a call for assistance from the Yakima County Sheriff's Office. Information had been sent out to be on the watch for a green car possibly a Honda with four Hispanic males riding in it. This officer observed a vehicle matching this description, turned and followed it and took down the license number, 048 WBO. RP 481-2. This officer noticed certain things that he found odd, a window that was broken or down, the day was very cold, one of the passengers kept turning to watch the officer. RP 481. The vehicle turned eastbound onto Progressive Road, the officer attempted to initiate a stop, turning on his overhead lights and his siren. The vehicle accelerated at a high rate of speed, the officer testified that his vehicle "maxed out at 98 miles an hour, and (he) was losing distance. RP 482-3. The fleeing vehicle continued down Progressive Road at a speed that the officer estimated was in excess of 100 miles per hour. RP 483-4. Officer Enriquez was able to keep this car in view and the car eventually crashed into a fence at a residence on 107 North Harding Ave. RP 484. He observed the four male occupants flee the car after the crash. RP 485. Office Graybeal arrived shortly thereafter and took one person found in the area into custody. RP 486.

Officer Graybeal testified that he was going to assist Officer Enriquez and when he arrived he observed a green Honda that had

wrecked out there was no one in the car when he arrived. He and Officer Enriquez searched the immediate area and found no one. But just after Officer Graybeal returned to the crash scene he observed a male who was walking away from the scene and was only about 20 yards from the scene. Officer Graybeal testified that he found it unusual that this person was wearing only a T-shirt, it was January, and he was avoiding any contact, specifically he was not looking in the direction of the two officers. Office Graybeal took this person into custody, he was identified as Jose Davilla. RP 513-4.

Det. Michael testified that he was one of the detectives who was sent to look for firearms along Progressive Road. He testified that he found a .45 caliber 1911 Springfield handgun. RP 492-95. This weapon was then sent to the Washington State Patrol Crime Lab. RP 494-5.

Det. Johnson testified that he directed that several items seized at this crime scene be sent to the crime lab. He identified items 191-202 as items that had been sent to the crime lab. RP 500-2.

Det. Durand testified that his was sent to the location of the crashed out Honda. He took pictures of the vehicle to include photographs of the interior that show shell casings that were inside this Honda. RP 523-6.

Mr. Allen, a forensic scientist from the Washington State Patrol

Crime Lab assisted the Yakima County Sheriff's Office in this investigation. He was requested to assist in searching the Honda Civic that was the subject to chase, the crash and the subsequent seizure. Mr. Allen testified that he searched a 1997 Honda Civic, Washington license 048 WBO. He was tasked with sampling for DNA and looking for defects caused by bullets. RP 553. Mr. Allen testified that he recovered a .40 caliber S&W cartridge from the lid of the trunk. RP 556. He collected two more cartridges from the interior front passenger compartment as well as a black hat. RP 557. He found a bullet strike on the "B" pillar of the driver's side of the vehicle and was able to determine that the path of travel was from the passenger's side to the driver's side of the car. RP 558. The lab team also found a copper jacket portion from a bullet in the rear driver's side portion of the car. RP 560. They also found two bullet defects on the side "C" passenger pillar. RP 561. In total there were three cartridge cases that were collected from the interior as well as a black zip-up jacket, a wallet, an unspent cartridge, and an additional bullet jacket fragment. RP 561-62. The wallet was found in the rear driver's side footwell. RP 563. He testified that one of the bullet fragments that was recovered from inside the car was not a .22 caliber bullet, it was too large at its base to be a .22 caliber. RP 567-8.

The cartridges found inside the vehicle were four 40 caliber; one

from the trunk frame, one from the front driver's seat, one from under the front passenger seat and, one from the rear seat cushion and one unfired round found under the zip-up coat on the rear driver's side seat, Also; six 9 mm Luger casings from the parking brake pocket, two from the right floorboard, passenger side and one from the rear floorboard. RP 568-70. 9 mm Luger: one was in the parking brake pocket right underneath the park brake, item 13, item 14 from the front passenger seat, resting on top of the seat item 16 17 and 18 all from the same general area on the right floorboard, front passenger side between the door and the seat and item 25 from the rear floorboard. RP 583-4

Deputy Haley testified that after he had arrested the defendant, Anguiano asked him two questions. The first question was how the police found him and the second was what the typical prison time was for a murder 2 charge. RP 641

Mr. Carlos Hernandez was given a cooperation agreement by the State in return for his testimony against Mr. Anguiano, Mr. Davilla and Mr. Martinez. RP 665-6.

He testified that the green Honda was his car, but was registered in his father's name. He was the driver of the green Honda, the vehicle used in the commission of this crime. He testified that he knew the three other occupants of the car, to include Mr. Martin Alvarez, Mr. Luis Anguiano –

the defendant and, Mr. Jose Davilla. RP 648-51. He testified that the Alvarez had approached him regarding an individual who was “trying to buy some weed.” RP 651. He stated the defendant told him that they were going to go buy some weed. RP 652.

The others told Hernandez to drive towards Harrah but Hernandez did not know where that was so they had to direct him to where they were going. It was Martin, Jose and Luis in the car with Martin Alvarez in the front seat, the defendant/appellant was seated in the rear behind the driver, Mr. Hernandez and seated in the rear on the passenger side was Jose Davilla. RP 652-3. Mr. Hernandez testified that it was the defendant “Luis” who was directing him where to go. RP 653. He testified that he drove “pretty much in the middle of nowhere, like farmland type.”

He was told to turn up a driveway. He testified that about half-way up this 30-40-yard-long driveway the three men in his car started pulling out guns. RP 673-4. He was able to state what guns each person was carrying. He testified that Martin Alvarez had “a nine” and when asked what a nine was he further stated, “[a] 9mm.” He then testified that Davilla “had a Glock .40 but that it looked like the XD...XD .40” He then testified that he believed the defendant Anguiano had “a .45” then clarified that it was “a 1911 from the way it looked.” RP 654-5, 671-2.

Hernandez stated that at the house they tucked the guns back in their

clothes, trying to conceal them. RP 674-75.

Hernandez testified that he drove up to the house at the end of this driveway and parked his car in front of a tractor. RP 655-6. He testified that exhibit 215 was a drawing he had made for a detective and it accurately portrayed where he had parked on that day. RP 656.

(The State would strongly urge this court to read this section of the verbatim report of proceedings in totality. RP 657-90. These nearly eleven pages of direct examination RP 657-68 and twenty-two pages of cross examination by themselves present testimony sufficient for the jury to find the defendant guilty beyond a reasonable doubt and establish that even if information regarding a past burglary was admitted in error that error was harmless. RP 668-90)

Mr. Hernandez testified in detail about what happened after they arrived at the house. He stated that once they arrived at the actual house Appellant got out and spoke with the home owner, Mr. Burkybile. He testified that Appellant asked if the shooting range was open. Burkybile told them that they were on private property, that they should get out of there and that they had no reason to be there. The next thing he heard was when Appellant asked Burkybile if he knew anyone who sold weed, Burkybile told Appellant no and told them to get out of there Burkybile then reentered the home and closed the door. RP 657-8, 675-76.

It was then that Martin Alvarez exited the car and the dog that lived there began barking. Alvarez shot the dog. RP 676. He then went up to the door with Appellant and the two of them began to kick the door in an attempt to kick the door in. they were not successful in kicking the door although Hernandez testified that they were kicking it hard. RP 659, 685-86. As they were kicking the door they were screamed DEA trying to act like they were police. When Alvarez and Anguiano could not kick the door in they backed away and Hernandez testified it was at that time he observed a rifle barrel come out the door and “that’s when all the shooting happened.” RP 658-9, 676-7. On cross-examination Hernandez testified that when the barrel of the gun “came out that’s when they all started shooting.”

He heard a shot hit his window at this time all three others were out of the car. Hernandez was ducked down in the car but was able to and did see the shooting in his mirror. RP 660. Hernandez was trying to get out of there and eventually the three other men jumped back into the car. He testified that he did a U-turn and was heading out from the home. RP 660, 678-9. Even after the three entered the car they continued to shoot at the house and continued until they were part way down the driveway. RP 661.

Hernandez said that after the three entered into the car only the

Appellant was still shooting his gun. RP 679, 687. He testified that after they had done the U-turn in the field and came from behind a tractor Appellant started shooting again, “[h]e was the only one still shooting...it was the only handgun going off.” RP 687-9. Hernandez estimated that Appellant has shot twelve times that day. RP 689. He estimated that the other shooters had shot about six or seven times each. RP 679.

After they exited the driveway onto the main road Hernandez became aware that there was a police car following them. He then eluded the officer who was following. While he was eluding this officer the other three men were throwing their guns out of the car along Progressive Road. RP 662-63, 667-8, 679-81. He testified that he continued to drive way from the officer. There was discussion about stopping but Appellant told him no because they had the guns in the car. PR 663.

At trial Hernandez was able to identify the different weapons that where shown to him and describe for the jury who was carrying which gun on the day of the murder. He testified that identification 206 was carried by Jose and identification 204, a silver gun, had been carried by the Appellant, Luis. RP 666, 671-3. These two guns were eventually admitted as exhibits. RP 760-61.

Hernandez testified that they eventually crashed the car and all of them ran away. He testified that he ran until he made it to Union Gap and

there he called his father and eventually confessed to his father what he had done. RP 663-64

On cross-examination Hernandez affirmed his testimony set forth above and gave in many instance more detail. This include testimony that Appellant apparently emptied the clip in his gun, expending all of his bullets, expressly stating on cross-examination "...I heard the gun lock when its' empty." RP 677-8.

Det. Dave Johnson and Det. Michael testified that they served a search warrant a bag that was seized from Appellant. Within that bad was a box of 30-30 ammunition, specifically Hornaday ammunition, 20 cartridges, 30-30 caliber. RP 702, 707-8. The box had a UPC number, a universal product code of 090255827309. He also removed a "green leaf jar" from this bag. RP 704. On cross-examination the detective testified that he had taken these items out of evidence to show them to victim/witness Yolauni Hueso. She identified them as having come from her house. RP 705-6. Det. Michael clarified that the empty jar was a jar of "high-grade cannabis, Gold Label" the label "says Girl Scout Cookies on the bottom." RP 709. Det. Michael also testified that found within the bag seized when the Appellant was arrested was a jar with a partial label on it that contained some change. Also found within this bag was Appellant's birth certificate. RP 711. There was also some marijuana

“shake” found in this bag. RP 712.

Mr. Schroeder, a store manager from Bi-Mart was called to testify regarding the ammunition. He was called as the custodian of records for that company. The receipt that noted the purchase of ammunition from Bi-Mart was admitted into evidence as 216.

Dr. Reynolds, a forensic pathologist, testified regarding the autopsy performed on Mr. Burkybile. RP 732. The deceased had received a bullet wound to the left side of his chest, nipple level, back of the armpit. RP 766-7, 748. The bullet travelled downward and was able to felt under the skin just above the hip. RP 736-7. Dr. Reynolds removed the slug from inside of Mr. Burkybile’s body, it was a “9 mm fully jacketed slug.” RP 738. He was also to opine that this slug had gone through something else before I had entered Mr. Burkybile. RP 740. The doctor ascertained that the bullet had severed the abdominal aorta and that this laceration would have caused him to bleed internally and was the immediate cause of death. He further testified that this type of injury was not survivable. RP 744.

Ms. Heather Pyles of the Washington State Patrol Crime Lab testified that she was able to obtain a substantial amount of DNA from the .45 caliber handgun that was recovered. The match for the DNA was to the defendant/appellant Luis Anguiano. The chance of that sample

occurring on unrelated individual at random from the U.S. population was 1 in 440 quadrillion. RP 786-88.

Mr. Johan Schoeman of the Washington State Patrol Crime Lab testified that he did analysis on several items. This testing that was done was to compare that slugs found at the crime scene and/or in the green Honda to test fired bullets. He was able to opine that the bullets that were evidence from this crime scene came from a gun that was the same make and model as the 9 mm Luger CZ model 75 seized, it was an operating firearm. RP 799, 805. But he was not able, due to damage to the evidentiary bullet, to state definitively that the bullet was fired from the found weapon. He next test fired the gun and compared shell casings and the markings on the test fired casings with those from the crime scene and the Honda and he was able to definitively testify that they came from the same gun, which was seized as evidence. RP 800-4. He also did test firings from the .45 model 1911 Springfield Armory semiautomatic pistol. RP 807. He determined it was an operable firearm. RP 804-5. He also determined that the casings found at the crime scene were fired from this weapon. RP 805-6.

The Defendant testified. He testified that he went to Mr. Burkybile's home to purchase "weed" and that he had been there numerous times before. RP 843-4. On this occasion he decided to take it

gun to protect himself. He was totally unaware that anyone else in the car was carrying a gun. RP 846-47 He testified that he and Martin got out of the car and only the defendant went up to the house. Mr. Burkybile came out and it appeared to the defendant that he was angry or mad. RP 850-1. Appellant stated that the victim told him that he was not doing business out of the gun club anymore and that Appellant and his “friend have to get the fuck out of here.” RP 851. The victim slammed the door in his face and Appellant “reacted. (he) kicked the door...three times” RP 852. He stated that after the third time he heard a shot.

He testified that he did not know who shot but it sounded like it came from the house. He stated that he then ran and jumped back into the car and he and the others took cover. RP 852. After he got in the car he could not see where Martin was and he heard more shots going on. Throughout this time he did not shoot his gun. He then looked out and saw a barrel sticking out of the door. He stated that the shooter in the house shot two more times then the defendant rolled out of the car and pulled his gun and “loaded it” indicating that he took action to put a round into the chamber. PR 853.

It was only after he was hiding behind the car and loaded his gun that he started shooting at the house. RP 853. After he shout about 4 times he then reentered the car. He stated that Martin was not in the car at

the time and had actually fallen down when Mr. Hernandez was driving away. Appellant told Hernandez to wait for Martin. As they were driving away Anguiano then stuck his hand out the window and shot two times. RP 854-5. Then again as the car was driving away Appellant heard another shot, but he was not sure where it came from, and yet he again shot at the house. RP 855. "I heard another shot. I didn't know where it was coming, if it was coming from the house or what. I know I heard another shot. At this point I shot again out the window when we were leaving. I shot again out the window. That's when we left." RP 856.

Anguiano stated that when they got onto the road there was already a cop and that cop followed them. Mr. Hernandez was speeding and appellant told him to slow down. He also testified that he still had his gun and that he had run out of ammo. RP 857. He testified that they ran because they had just been in a shootout and they were scared. He stated that he threw his gun out while they were running from the police officer. RP 858.

Soon after the car wrecked and he got out and ran. He called for a ride and eventually on the same night fled to Seattle. He stated that he did not know that the police were looking for him. RP 859. The reasons that he fled were: because he was scared, he didn't know what was going to happen, he just wanted to let things cool off, he just wanted to see what

would happen. RP 859

Appellant stated that the jar that he had in his possession in Seattle with marijuana in it was purchased from the deceased, Mr. Burkybile. RP 859. He stated the bullets that were found were also his and that he had purchased them so he and a friend with a 30-06 could go shooting but they were the wrong caliber. However, he had given a couple of these wrong bullets to this friend. RP 860.

On cross examination Appellant admitted that most of his actions made him look guilty. RP 865-8. He admitted on the day that Mr. Burkybile died he was carrying a .45 caliber handgun. RP 868-9. He testified that he did not see any of the other occupants of the car shooting either while outside or inside the car. And further, he had no idea how all the 9 mm and .40 caliber casings got inside the car. RP 668-9. He also never saw anyone throwing a gun out of the car as they were fleeing the scene of the crime. RP 870

Appellant did not believe that anyone would have been hit by all the shots or that anyone would die. He had also never seen anyone else at the residence and he had never been inside the home before. RP 871-2

He testified that he did not know how many times he shot nor how many rounds of ammunition that he had in his .45 caliber handgun. RP 872-3. He also could not explain how his weapon that ejected from

the right could leave shell casings in the locations that they were found in. Locations that were not in an area that he testified he was shooting from. RP 873-4.

When asked by the State if he had seen the second gun before he denied ever seeing it and denied again that he did not notice others shooting from inside the car and did not hear any other gun fire from inside the car, nor did he know about the other gun that was found. RP 878-9. And again on redirect Appellant stated that he did not think anyone else had a gun out at Mr. Burkybile's home nor did he have any idea where all the other shell casings came from. RP 881-2.

III. ARGUMENT

Response to Allegation I – Admission of prior bad acts information.

The first allegation is based on the admission of a very limited amount of information pertaining to a prior burglary that occurred at the victim's residence. In that crime there some very specific items stolen. The surviving victim, Yolauni Hueso was able to identify the "girl scout" "herb" jar and a specific caliber and brand of ammunition that was found in the bag that was seized from the defendant when he was arrested in Everett at his girlfriend's house. RP 864

No objection to the admission of this information was ever made in the trial court. Anguiano would have this court overturn his convictions

arguing that this limited information so tainted the jury's mind that he could not have gotten a fair trial, that they would not believe his claim of self-defense because of the allegation that he had participated in a prior burglary.

This information was discussed in the trial court and the State made an offer of proof to include that the burglary had occurred, that it was the intent of the State to offer it to show that Anguiano knew of this home and what it contained, that this was needed to both demonstrate why and how the defendant was there as well as to demonstrate why Mr. Burkybile would have been in a heightened state of concern with people coming to his home and that it was probative of those facts. RP 253. The court's ruling was brief and did not cover those factors which this court has stated should be covered when ruling about the admissibility of ER 404(b) information the brevity was due, once again, to the fact that there was no objection to the admission.

Even with the lack of objection it is clear that the offer of proof and the courts method of addressing the issue comported with the standard for admission. RP 251-54. While under oath Ms. Hueso testified that she was the owner of the two items found, while perhaps these items are available to the general public this witness stated that these were her items and did so with specificity. RP 23-4. She also identified a transaction list

from Bi-Mart that showed the purchase of the 30-30 ammo as well as other personal items she had purchased. RP 23.

This court need not and should not address this issue. RAP 2.5 and ER 103(a) (See Appendix A) are the cornerstones of this type of challenge and Anguiano has not presented anything which would necessitate this court overturning these convictions.

Generally, an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is truly constitutional, and manifest. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). "Failure to object deprives the trial court of [its] opportunity to prevent or cure the error." State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The defendant must show both a constitutional error and actual prejudice to his rights. Id. at 926-27. To demonstrate actual prejudice, there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." Id. at 935. The failure to raise this issue is in essence a default on the part of the defendant. He must therefore prove to this court that this alleged error was a "manifest error affecting a constitutional right, " which he may raise for the first time on appeal. RAP 2.5(a). To fall within this exception, however, not only must the claimed error "implicate[] a constitutional interest as compared to another form of trial error, " but also

it must be "manifest." The trial record must be sufficiently complete so that this court can determine whether the asserted error "actual[ly] prejudice[d]" Anguiano by having "practical and identifiable consequences [at] trial." State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009) But, as is the case here, "[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.3d 1251 (1995) (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993))

It is true that information regarding the prior burglary was admitted. Trial counsel discussed this information as a preliminary matter and it was addressed again in trial. Anguiano admits that there was no actual objection noted on the record. Trial counsel does state; "The only relevance it would have would be to try and say he was somehow involved in that prior burglary, which he's not charged with, which is a prior bad act, which should not come in." RP 252.

Even after the court made its ruling there is no objection, nor did trial counsel "voir dire" the witness outside the presence of the jury as he requested, a request that was agreed to by the state and the court. RP 273-4 (Prelim Hearings RP 17, Trial RP 251.) In fact, the defendant used the "girl scout cookie" herb jar in his case in chief arguing that the reason that

he had this was because he had been to “Weed Man’s” home before and Weed Man had sold him that jar. And, that was why they were there, that it was Weed Man’s actions that escalated this entire situation to the point where Anguiano had to fire back in order to save himself. RP 844, 859-60.

The was no error on the part of the trial court in allowing the admission of the information from the prior break-in at the Burkybile home. Granted the ruling could have been more in-depth and comported more with the multiple step analysis set forth above, however stated above; The standard test before admitting 404(b) evidence is, the court **should** determine on the record that (a) the prior misconduct occurred by a preponderance of the evidence, (b) a lawful purpose exists to admit the evidence, (c) the evidence is relevant to prove the offense charged, and (d) its probative value outweighs its prejudicial effect. State v. Gresham, 173 Wn.2d 405,421,269 P.3d 207 (2012). The absence of a record may be harmless if the record as a whole is sufficient to permit appellate review. State v. Gogolin, 45 Wn. App. 640, 645, 727 P.2d 683 (1986).

Here it is clear there was never a challenge by Anguiano that this prior burglary occurred, and for that matter there was never any statement that he did not commit the crime, just that he had not been charged. There was no challenge that the evidence, the jar and the ammunition was

admissible, it was only challenged as to relevancy. The record that was made, the State's offer of proof and the testimony of Ms. Hueso met the test and defendant failed to object at the time of admission, this alleged error was also waived.

Further, there is a flaw in this argument Anguiano's theory of the case, his defense, was based on acts and actions specific to the day of the murder. His self-defense claim was based on his apparent legal entry of the close of the Burkybile property and the legality of his contacting Burkybile at his home, no matter that the act that he was intending to happen, the purchase of marijuana was illegal. It would not have mattered if he admitted that he had burglarized the home before, in fact that may have benefited him in that it would place Burkybile into a defensive posture by Anguiano's mere appearance at the home. His defense of self was to the very specific acts during a very short and chaotic moment when Burkybile stuck the gun barrel out the door and the exchange of gunfire ensued. The jury was also given the "first aggressor" instruction and that and that alone could well have negated the claim of self-defense given the fact that State's two main witnesses, Ms. Hueso and Mr. Hernandez both testified that they heard and/or saw two people aggressively kicking at the door of this residence. An act Mr. Burkybile that could have been "reasonably likely to provoke a belligerent response" as well as an act

that, in this state, would allow a homeowner to “defend their castle” CP
284

Even if Anguiano were to convince this court that the edicts of RAP 2.5 and ER 103 had been met he must then provide proof that the trial court had completely failed to meet the standard test before admitting 404(b) evidence; the court should determine on the record that (a) the prior misconduct occurred by a preponderance of the evidence, (b) a lawful purpose exists to admit the evidence, (c) the evidence is relevant to prove the offense charged, and (d) its probative value outweighs its prejudicial effect. State v. Gresham, 173 Wn.2d 405,421,269 P.3d 207 (2012). The absence of a record may be harmless if the record as a whole is sufficient to permit appellate review. State v. Gogolin, 45 Wn. App. 640, 645, 727 P.2d 683 (1986).

Once again even if for the sake of argument, the State were to agree that the admission of the prior burglary was error, there is no basis for this court to overturn the convictions. The facts presented are sufficient to uphold the convictions when examined in conjunction with the standard of review; would any reasonable jury have found Anguiano guilty of the murder, assault and attempted burglary despite the erroneous admission of this information. State v. Clark, 143 Wn.2d 731, 775-76, 24 P.3d 1006 (2001) “The test for harmless error is whether the state has

overcome the presumption of prejudice when a constitutional right of the defendant is violated when, from an examination of the record, it appears the error was harmless beyond a reasonable doubt or whether the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached.” (Citations omitted.) State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985) is applicable in this case “Under the "overwhelming untainted evidence" test, the appellate court; looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” 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)).

If this court accepts for argument sake that the 404(b) information should not have been allowed the review then becomes a question of sufficiency of the evidence and as such Anguiano must admit 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.

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 in this case 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)."

The State has set out an extremely long and detailed statement of facts in this case, far longer and more detail than most cases. This was

done because in this case the defendant was not only claiming self-defense but has further challenged the sufficiency of the State's case by this allegation regarding the information admitted about the prior burglary at the home.

While no specific instruction was given flight is another factor that the jury weighed. Anguiano fled the scene and continued to flee the jurisdiction, having to be brought back from King County, State v. McDaniel, 155 Wn.App. 829, 230 P.3d 245 (2010) " Analytically, flight is an admission by conduct. Evidence of flight is admissible if it creates '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.' (Citations omitted.)

The State's theory was that these three armed men acting in concert committed these crimes, as was addressed in, State v. McChristian, 158 Wn.App. 392, 400-01, 241 P.3d 468 (2010) "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... 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. " [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." (Citations omitted.)

State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

"Intent to attempt a crime may be inferred from all the facts and circumstances." The State's theory with regard to the assault on Ms. Hueso involves transferred intent. As stated by the court in State v. Johnson, 147 Wn.App. 276, 194 P.3d 1009 (2008);

As our Supreme Court explained in State v. Wilson, so far as first degree assault is concerned, the doctrine of transferred intent had been codified by RCW 9A.36.011:

Under a literal interpretation of RCW 9A.36.011, a person is guilty of assault in the first degree if he or she, with the intent to inflict great bodily harm, assaults another with a firearm, administers poison to another, or assaults another person and causes great bodily harm. The mens rea for this crime is the "intent to inflict great bodily harm" . Assault in the first degree requires a specific intent; but it does not, under all circumstances, require that the specific intent match a specific victim. Consequently, once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 to any unintended victim. 125 Wash.2d 212, 218, 883 P.2d 320 (1994).

Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances. State v. Wilson,

125 Wn.2d 212, 217, 883 P.2d 320 (1994). "Great bodily harm" means "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). An assault may be (1) an attempt to inflict bodily injury upon another, (2) an unlawful touching with criminal intent, (3) or putting another in apprehension of harm whether or not the actor intends to inflict harm. Wilson, 125 Wn.2d at 218. First degree assault does not, under all circumstances, require that the specific intent match a specific victim. Wilson, 125 Wn.2d at 218.

In State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009), our Supreme Court affirmed the defendant's convictions for first degree assault against three unintended victims. There, the defendant fired shots into a house where his estranged wife was staying with three children. Elmi, 166 Wn.2d at 212. The jury convicted him on four counts of first degree assault. Elmi argued that the State did not prove specific intent to assault the children. Elmi, 166 Wn.2d at 213-214. The court disagreed, holding that, where a defendant intends to shoot into and to hit someone occupying a house or a car, he bears the risk of multiple convictions when multiple victims are present, regardless of whether the defendant knows of their presence. Elmi, 166 Wn.2d at 218.

Here, Appellant does not dispute that shots were fired into the house but that there was any specific intent to inflict great bodily harm on anyone but the Mr. Burkybile and further that the actions of Anguiano were justified based on his need to defend himself from the alleged attack by Mr. Burkybile. An assault may be committed by putting another in apprehension of harm, even if the actor does not intend to inflict harm. *See Wilson*, 125 Wn.2d at 218. Therefore, under Elmi, Appellant—as a principle or through accomplice liability, bore the risk of assault convictions for any individuals who were in the home, whether he knew of their presence. As the trial court indicted this case is factually similar to Elmi.

The problem with Anguiano's defense, his theory of the case, is that it did not match the facts. He admitted that he was angry that Burkybile had closed the door on him and told him to leave and because of that he began kicking the door of this home, a home that was literally out in the middle of nowhere. Most glaringly, he testified that there were no other guns that he observed and that he heard no other shots on the day of this crime and yet there were numerous spent shell casings from three different guns, .45 and .40 calibers and a 9mm, as well as spent bullets. And, the officers actually recovered two handguns in the area where Mr. Hernandez said that they were thrown out of the car, an act that Anguiano

acknowledged occurred just not that anyone other than himself had thrown any gun or guns from the car. The totality of the discussion regarding this issue is contained in Appendix B.

Response to allegation II – Insufficient evidence – Murder by extreme indifference.

Once again this allegation was not raised in the trial court. The State will not set forth the standard for this court to address this for the first time on appeal, it has been set forth above. That analysis is applicable to this allegation also.

Appellant’s claim that the three shooters “directed their fire at Burkybile” is a specious at best. The facts set forth above make it clear that the shooting done at this home was random and even if they were actin in self-dense the amount and location of shots fired was extreme and indifferent. They were so careless with the shots that were fired that they even hit the interior of their own car. RP 560, 565-66, 567-68.

State v. Henderson, 182 Wn.2d 734, 344 P.3d 1207 (2015) addressed homicide by extreme indifference. Applying that case here [Anguiano] “was convicted of first degree murder by extreme indifference, which occurs when someone " [u]nder circumstances manifesting an extreme indifference to human life ... engages in conduct which *creates a grave risk of death* to any person, and thereby causes the

death of a person." RCW 9A.32.030(1)(b) (emphasis added)."

State v. Adams, 138 Wn.App. 36, 50, 155 P.3d 989 (Div. 3 2007)

"Extreme indifference to human life may be proved by evidence of "an aggravated form of recklessness which falls below a specific intent to kill." This element may be proved where the defendant engages in extremely reckless conduct that creates a grave risk of death." (Citations omitted.)

This case was charged and tried with the theories of accomplice liability being placed in the forefront. This was not the act of just one shooter, this was three people who over a very short period of time discharge as many as two-dozen rounds of .40, .45 and 9mm ammunition into a home, a home that this defendant testified he had been to numerous times before. If he had been there as often as he alleges Anguiano would have known that this home was not just occupied by one person. RP 844, 859-60.

The test set forth in State v. Pastrana, 94 Wn.App. 463, 972 P.2d 557 (1999) is directly applicable here, "Anderson and Berge are distinguishable because in each only the life of the victim was endangered. But here, as in Pettus, the bullet created a grave risk of death to others who were in the vicinity." The mere fact that this home was out in a rural area does not somehow negate the fact that it was a home.

Even after the three shooters entered the car they continued to shoot at the house and continued until they were part way down the driveway. RP 661. Mr. Hernandez testified after the three entered the car only the Anguiano was still shooting his gun. RP 679, 687. He testified that after they had done the U-turn in the field and came from behind a tractor Appellant started shooting again, “[h]e was the only one still shooting...it was the only handgun going off.” RP 687-9. Hernandez estimated that Appellant has shot twelve times that day. RP 689. He estimated that the other shooters had shot about six or seven times each. RP 679. Hernandez testified that Appellant apparently emptied the clip in his gun, expending all of his bullets, expressly stating on cross-examination “...I heard the gun lock when its’ empty.” RP 677-8. As they were driving away Anguiano stuck his hand out the window and shot two times. RP 854-5 and continued to shoot as the car was driving away Appellant stated he heard another shot, but he was not sure where it came from, and yet he again shot at the house. RP 855. “I heard another shot. I didn't know where it was coming, if it was coming from the house or what. I know I heard another shot. At this point I shot again out the window when we were leaving. I shot again out the window. That's when we left.” RP 856. Anguiano admitted that he still had his gun in the car and that he had run out of ammo. RP 857.

The trial court recognized this when it was addressing the issue of transferred intent and the assault charge;

First off, the target is a residence. It's a place where people live. There's more than one car in the driveway. Shots were fired not only towards where Mr. Burkybile was located but also other portions of the residence were targeted as well. It would seem reasonable that a person is going to -- a shooter is going to have strong suspicion or certainly some inherent knowledge that there are or may be other people in the residence besides Mr. Burkybile.

Like I said, shots were fired at other portions of the residence, not just at the door where Mr. Burkybile was located. RP 830.

As the State said in closing;

This house, they made Swiss cheese of this house...The very fact that all three of these people are taking out guns and firing away under these circumstances, what can be more extreme? What can create more indifference to human life than he and his accomplices did?

Response to allegation III – Firearm enhancements.

The State would strongly disagree with Anguiano that this portion of State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003) which addresses the imposition of a firearm enhancement for each firearm carried is dicta. One of the main issue in DeSantiago was the imposition of weapons enhancements for multiple weapons. Clearly that portion of the opinion is a continuation of the analysis regarding enhanced sentences.

Dicta is defined as “A statement of opinion or belief considered

authoritative because of the dignity of the person making it. The term is generally used to describe a court's discussion of points or questions not raised by the record or its suggestion of rules not applicable in the case at bar. Judicial dictum is an opinion by a court on a question that is not essential to its decision even though it may be directly involved.”

<https://www.law.cornell.edu/wex/dicta>

It is the State’s position that this portion of DeSantiago is directly on point and is dispositive:

Furthermore, imposition of an enhancement for each weapon carried during an offense cannot be said to contradict this purpose because a gun-toting criminal receives a much greater enhancement for each firearm than a knife-wielding criminal receives for each knife. Compare RCW 9.94A.510(3)(a) (adding five years for use of a gun in a class A felony) with RCW 9.94A.510(4)(a) (adding two years for use of a nonfirearm deadly weapon in a class A felony). Furthermore, the Spandel court correctly reasoned that imposition of multiple enhancements would combat the increased risk of injury that results from multiple weapons, complying with the other stated purposes of Initiative 159 to “[s]igmatize the carrying and use of any deadly weapons for all felonies” and “[r]educ[e] the number of armed offenders by making the carrying and use of the deadly weapon not worth the sentence received upon conviction.” LAWS OF 1995, ch. 129, § 1(2)(a), (b).

Finally, imposition of an enhancement for each firearm and each deadly weapon carried during an offense would not absurdly extend sentences as amicus and the defendants contend. Subsection (g) of each enhancement statute provides a presumption that the total sentence, including enhancements, cannot exceed that statutory maximum. RCW 9.94A.510(3)(g), (4)(g). Thus, the suggested absurdity is dissolved by a plain reading of the statute.

Therefore, the plain language of RCW 9.94A.510 requires a sentencing judge to impose an enhancement for each firearm or other deadly weapon that a jury finds was carried during an offense.
DeSantiago, 149 Wn.2d 421.

Even if this court were to determine that this portion of DeSantiago is dicta, this court can and should adopt this analysis and deny this allegation.

State v. Mandanas, 168 Wn.2d 84, 87-88, 228 P.3d 13 (2010) addresses the analysis in this type of inquiry;

Statutory interpretation is a question of law that this court reviews de novo." "When interpreting any statute, our primary objective is to 'ascertain and give effect to the intent of the Legislature.' 'In order to determine legislative intent, we begin with the statute's plain language and ordinary meaning.' If the plain language of a statute is subject to only one interpretation, then our inquiry ends. If a statute is subject to more than one reasonable interpretation, it is ambiguous. The rule of lenity requires us to interpret an ambiguous criminal statute in favor of the defendant absent legislative intent to the contrary. (Citations omitted.)

State v. Graham, 153 Wn.2d 400, 406, 103 P.3d 1238 (2005), "In State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003), we applied the *Westling* analysis to the use of "a," rather than "any," in weapon enhancement statutes to support our holding that the plain language of the statutes required a sentence enhancement for each weapon carried during offense. Id. at 419, 68 P.3d 1065." See also, State v. Ose, 156 Wn.2d 140,

124 P.3d 635 (Wash. 2005), “Likewise, in State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003), we interpreted RCW 9.94A.533(3) and (4), which allows sentence enhancement if a defendant or an accomplice was armed with " 'a' firearm" or " 'a' deadly weapon." Id. at 418, 68 P.3d 1065. We concluded that the statute allows a defendant to "be punished for 'each' weapon involved." Id. at 419, 68 P.3d 1065. See also State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (Wash. 2005)

The law is clear, the imposition of multiple enhancements for multiple weapons is what the legislature mandated. The trial court correctly sentenced Anguiano.

IV. Prior offenses.

Anguiano acknowledged that he had prior offenses at the time of sentencing;

“...we start with a base range on the First Degree Murder with— with his non-violent criminal history of two points, at 281 to 374...” RP 340.

State v. Hunley, 175 Wn.2d 901, 912, 287 P.3d 584 (2012), “Accordingly, the defendant's mere failure to object to State assertions of criminal history at sentencing does not result in an acknowledgment. *Id.* at 482-83. There must be some *affirmative* acknowledgment of the facts and information alleged at sentencing in order to relieve the State of its

evidentiary obligations. *Id.* " (Citing to State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). (Emphasis in the original.)

The standard set forth in the cited cases as to what level or nature of acknowledgment or agreement must occur for the “some affirmative acknowledgement” it is that State’s position that when counsel for the defendant states on the record “his non-violent criminal history of two points” is just that, an acknowledgment. This is not the standard sentencing situation; it is rare for the State to file a separate Sentencing Memorandum as was done here. CP 320-4. This statement, the discussion by the State in its sentencing memorandum, CP 322 and the actual listing of the two previous non-violent felonies, VUCSA’s under cause number 15-1-0-1506-5 from 10/15/2010 listed in the Judgment and Sentence are sufficient, nothing more needs to be placed on the record for proof in this case. CP 327

Clearly, certified judgment and sentence documents are the best practice but that is not what is required according to Hunley.

IV. CONCLUSION

For the reasons set forth above this court should deny this appeal.

Respectfully submitted this 16th day of December 2016,

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By: s/ David B. Trefry

DAVID B. TREFRY WSBA# 16050

Senior Deputy Prosecuting Attorney

P.O. Box 4846 Spokane, WA 99220

Telephone: 1-509-534-3505

E-mail: David.Trefry@co.yakima.wa.us

APPENDIX A

ER 103(a) provides:

(a) **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

APPENDIX B

MR. KIRKHAM: Thank you, Judge.

Any 404(b) evidence that the state intends to elicit, I'd like to have the opportunity to voir dire whatever witness they're trying to get it in through and object outside the presence of the jury.

THE COURT: Is that agreeable?

MR. HINTZE: Yeah. I don't know what he's referring to but, yes.

MR. KIRKHAM: There's some allegations of a prior robbery, a prior burglary with the victims and some, you know, tangential that maybe Mr. Anguiano was involved. I just don't want that to go to the jury without having the opportunity to object without them hearing any evidence with regards to him.

THE COURT: Mr. Hintze, do you intend to offer any evidence?

MR. HINTZE: Well, what he's referring to is something that I put in my briefing to the court before. One, there was a robbery. I have no idea if Mr. Anguiano one way or the other, won't even suggest it one way or the other. There was a robbery the day before at a relative's residence, a home invasion robbery, the place to which some of the marijuana from this house was transferred in the

PRETRIAL HEARING

17

past. So that was the house or the trailer of Gary Aggapeth

that had a trailer behind the grandmother's house. So that's part of -- that goes into the victim's state of mind at this stage.

There was a burglary of their residence about two weeks before, I believe, on January 13th, I want to say. That was -- when they get home during -- this appeared sometime during the middle of the day. They got home later in the afternoon, and they saw all this stuff piled up like it was about to be moved and a lot of things missing.

A number of things missing was, guess what, they had a bunch of marijuana there, probably more than they had at the date of when this happened. They had -- just to let you know, when this event happened, they had different jars of different labeled types of marijuana, scales, packaging material. Then in the upstairs area there had been evidence of various lines and marijuana shake on the ground in the upstairs area of the home, evidence that there was marijuana being hung to dry upstairs, which was no longer there by the 25th. So apparently a whole bunch of marijuana was stolen, including a new 30-30 rifle, their 30-30 ammunition newly bought. Of course, amongst the marijuana was this labeled jar. The labeled jar has been identified from the defendant's possession when he was arrested in a bag that

PRETRIAL HEARING

18

was with him. The bag was filled with marijuana shake on the bottom like there had been loose marijuana in there. There was a brand new box of Hornady 30-30 ammo that matched the exact same UPC number that we tied back to the recent purchase by Yolauni Hueso at Bi-Mart. I believe Yolauni Hueso has identified the picture of the specifically labeled jar of marijuana, no longer had marijuana by the time the defendant had it in his bag up in Everett.

That's been front and center of evidence that we've obtained and have been intending on introducing from day one. Well, not day one. We only recently connected the dots as to the items in that. We did that months ago.

That's part of my briefing as far as statements.

THE COURT: Well, I think Mr. Kirkham's request is simply that that be subject to voir dire examination of any witness that's going to talk about that before it's presented to the jury.

MR. HINTZE: Okay.

THE COURT: Yeah.

MR. HINTZE: Fair enough. We'll talk to Ms. Hueso about a couple things. She's our number one witness.

RP 17-19 VRP 4.20 and 5-26

NEXT REFERENCE 5-27-17 Trial Vol. I

MR. KIRKHAM: There is also the issue of bullets and other things found over in Snohomish that I wanted to be

able to voir dire the witness before that was brought out.

THE COURT: Yeah.

MR. KIRKHAM: Outside the presence of the jury. I don't think the foundation can be laid.

THE COURT: Mr. Hintze.

MR. HINTZE: We have a bag that was seized along with the defendant by the officers. That hasn't been suppressed. It was handed over to Detective Johnson by the Snohomish County deputies, which I will have here and fully expect. In that is evidence once containing loose marijuana within the greater bag. It also contains a jar which Ms. Hueso has identified as once belonging to her at their house and then a box of the same UPC code, 30-30 Hornady ammunition, the same UPC code that Ms. Hueso also bought that is now stolen with the rifle back when the jar was stolen, amongst other things.

So I understand it's totally different. We need to do a 3.5 on the defendant's couple brief statements, but I didn't know that that was a request. Unless otherwise directed, I would be bringing up what was found in the defendant's possession. Obviously I won't go into his gang

MOTIONS

251

photos that was found in the bag. The court made rulings regarding gang evidence, and I'm not going to bring that in.

Here was a bag. It was seized. It's not suppressed evidence. Certainly I've made my offer.

THE COURT: I haven't determined whether it's admissible or not. I don't know what the circumstances were of the actual seizure except for generally.

MR. KIRKHAM: Judge, I'm not arguing that it should have been suppressed due to any constitutional issues. The issue with regards to the jar and the bullets, Mr. Hintze would like, you know, to talk about how there was this prior burglary and suddenly he's got bullets in a jar. The bullets have no relevance to this case because they're not a caliber that was used in this case at all. The only relevance it would have would be to try and say he was somehow involved in that prior burglary, which he's not charged with, which is a prior bad act, which should not come in.

THE COURT: Mr. Hintze.

MR. HINTZE: Judge, I've been forward of me wanting to bring this in. I've talked to the court that, one, a prior burglary is independently relevant just for the fact of how they're on edge and how they're acting at this household.

Two, Mr. Aguilar, it's alleged that he's the one

MOTIONS

252

directing to this location with knowledge and making statements to his friends that marijuana can be obtained at this location. So it's my working theory that he knew -- he has a connection to that earlier burglary, whether or not he participated in it or connected to somebody else for that prior burglary, because he's found with a couple items coming out of that burglary in which marijuana was stolen. Loose marijuana, marijuana was stolen out of that burglary, cash, the 30-30 rifle, the 30-30 ammunition that was just purchased and that jar that once contained marijuana that's labeled.

THE COURT: What was the timeline as far as the theft?

MR. HINTZE: The burglary was January 14th, 2014.

THE COURT: So 10 days before?

MR. HINTZE: Yeah, 11 days before. So not only that but then follow it up with the day before their friend, relative getting home invasion burglary. They were on edge. They weren't going to deal with four random people that they didn't know rolling up to their house. That comes into play.

MR. KIRKHAM: Judge, just so you have all the information, the jar that was identified was identified because of a commercial label that's on the jar that is commercially sold.

MOTIONS

253

The ammunition, the UPC that they refer to is the UPC for all of that ammunition, that specific ammunition, that is produced. You can't tie that UPC to even what store it was sold to.

That's why I'm saying they can't lay the foundation that that was even her ammunition or her jar other than her saying, yeah, that's the same jar.

THE COURT: Well, under 404(b) the other bad acts are admissible to show motive and intent. Under the circumstances, that goes to the weight as opposed to the admissibility. I will allow the state to use this other incident to show motivation.

MR. HINTZE: Okay. Thank you.

MR. KIRKHAM: Judge, are you allowing the bullets to come in?

THE COURT: If they're properly offered, yes, I'll allow the bullets to come in, the same caliber as the kind that were purchased and stolen in the burglary.

All right. So we'll see everybody after lunch.

(Noon recess.)

RP 5-27-15 pgs. 251-54

DECLARATION OF SERVICE

I, David B. Trefry state that on December 16, 2016 emailed a copy, by agreement of the parties, of the Respondent's Brief, to Jodi R. Backlund and Manek R. Mistry at backlundmistry@gmail.com

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

DATED this 16th day of December, 2016 at Spokane, Washington.

By: s/David B. Trefry
DAVID B. TREFRY WSBA# 16050
Senior Deputy Prosecuting Attorney
Yakima County
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
E-mail: David.Trefry@co.yakima.wa.us