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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JORGE ARIEL SAENZ

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Jorge Ariel Saenz (Mr. Saenz) asks this Court to review the Court of Appeals' decision designated in Part B of this Petition.

B. COURT OF APPEALS DECISION

Mr. Saenz seeks review of the Court of Appeals' decision filed on July 13, 2010. The published opinion reversed the trial court's finding that a prior juvenile conviction did not qualify as a most serious offense and remanded the case for re-sentencing under the Persistent Offender Accountability Act (POAA). A copy of the published decision is in the Appendix at pages A- 1 through A- 16.

C. ISSUE PRESENTED FOR REVIEW

In order for a trial court to sentence a defendant as a persistent offender, the State must prove, by a preponderance of the evidence, the defendant was convicted as an offender on two prior and separate occasions.

An [o]ffender is defined as a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction or has been transferred by the appropriate juvenile court to a criminal court. In other words, a person under the age of 18 years is an offender only if the juvenile court has declined jurisdiction over that person or if the charged crime falls automatically under the jurisdiction of the superior court.

The reason being, when a juvenile court obtains jurisdiction, the case remains in that court unless and until it is transferred to superior court after a

declination hearing. And if an otherwise juvenile case is transferred to superior court, the transfer must be based upon a finding that the declination would be in the best interest of the juvenile or the public. Therefore, the juvenile court must put in writing such findings which must be supported by relevant facts and opinions produced at the hearing. Furthermore, the juvenile court record must contain written evidence the juvenile was fully informed of all rights waived.

Here, the defendant was convicted of two counts first degree assault and one count unlawful possession of a firearm. At sentencing, the State moved the court to sentence the defendant as a persistent offender because he had prior convictions that included a second degree assault conviction he committed at age 15.

In an effort to prove the juvenile conviction qualified as a serious offense, the State presented an agreed stipulation that declined juvenile court jurisdiction and that transferred the case to superior court. The State also claimed defense counsel confirmed the defendant understood all implications of waiving the declination hearing.

Because there were no written findings that explained why the juvenile court declined jurisdiction and because there was no express waiver to prove the defendant was fully informed of the rights he was waiving before he signed the stipulation agreement, the trial court declined to sentence the defendant as a persistent offender.

The Court of Appeals reversed the trial court's decision and remanded the case for re-sentencing. The Court of Appeals found the juvenile court did not err when it failed to enter written findings regarding the declination hearing because the record contained the stipulation and the agreed order. The Court of Appeals further found the defendant knowingly and intelligently waived juvenile court jurisdiction because a checked box on the guilty plea form confirmed the defendant's lawyer had read him the entire guilty plea and that he had understood it in full.

Without written findings regarding the declination hearing and without the defendant's express waiver of juvenile court jurisdiction, was the record sufficient to prove the second degree juvenile assault conviction qualified as a most serious offense?

D. STATEMENT OF THE CASE

Mr. Saenz was convicted of two counts first degree assault and one count unlawful possession of a firearm. CP at 277-279; CP at 275-276. At sentencing, the State moved the trial court to sentence Mr. Saenz as a persistent offender under the POAA, commonly known as the "three strikes and you're out law". According to the State, Mr. Saenz's latest conviction qualified as the third strike because he had multiple prior convictions.

In 2003, Mr. Saenz was convicted of two counts second degree assault with a deadly weapon. And in 2001, at 15 years old, Mr. Saenz was charged with three counts second degree assault in Lewis County Juvenile Court. CP at 49-57; CP at 40-48.

In an effort to prove the 2001 second degree assault conviction qualified as a serious offense, the State presented an agreed stipulation, signed by Mr. Saenz, that declined juvenile jurisdiction and that waived the declination hearing. CP at 363. A juvenile court commissioner approved the stipulation and transfer but had failed to make any written findings regarding why the juvenile court declined jurisdiction. CP at 363.

Because there were no written findings as to why the juvenile court declined jurisdiction and because there was not an express waiver to prove Mr. Saenz was fully informed of rights waived before he signed the stipulation and agreed order, the trial court found the 2001 second degree assault juvenile conviction did not qualify as a strike. CP at 23-25.

The trial court denied the State's motion and sentenced Mr. Saenz to 47 years in prison. Mr. Saenz appealed the first degree assault conviction. CP at 49-57; CP at 69-73. On cross appeal, the State challenged the trial court's persistent offender decision. CP 6-18.

The Court of Appeals affirmed the first degree assault and the unlawful firearm possession convictions. The Court of appeals reversed the trial court's persistent offender decision and remanded the case for re-sentencing under the POAA. A-16. It found the juvenile court did not err when it failed to enter findings regarding the declination hearing because Mr. Saenz waived the hearing. A-16. The Court of Appeals also found a checked box on a plea agreement that claimed Mr. Saenz's lawyer read to him the entire guilty plea and that he understood it in full was sufficient to prove Mr.

Saenz's waiver was both knowing and intelligent. A-14. This Petition for Review timely followed.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern this Court's decision to grant review are set forth in RAP 13.4 (b). Mr. Saenz believes this Court should accept review because the Court of Appeals' decision here is in conflict with this Court's State v. Knippling, 166 Wash.2d 102, 206 P.3d 332 (2009) decision and also the Court of Appeals' State v. Ramos, 152 Wash.App. 693, 217 P.3d 384 (2009) decision.

Furthermore, the Court of Appeals' decision involves an issue of substantial public interest. RAP 13.4 (b) (4). In fact, articles regarding the Court of Appeals' decision were reported in the Yakima Herald and in the Seattle Weekly. Copies of which are also attached.

A PRIOR JUVENILE CONVICTION CAN NOT COUNT
AS A STRIKE WITHOUT WRITTEN FINDINGS TO PROVE
WHY THE JUVENILE COURT DECLINED JURISDICTION
AND TO PROVE THE JUVENILE WAS FULLY INFORMED
OF ALL RIGHTS BEING WAIVED BEFORE HE SIGNED A
STIPULATION AND AGREED ORDER THAT DECLINED
JUVENILE COURT JURISDICTION AND THAT TRANSFERRED
THE CASE TO SUPERIOR COURT.

1. The Court of Appeals misinterpreted that which is statutorily required to support a prior serious offense conviction that originated in juvenile court. Statutory interpretation is a question of law, which this Court reviews *de novo*. RCW 9.94A.010 et seq., 9.94A.570; Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc., 159 Wash.2d 298, 149 P.3d 666 (2006); State v. Keller, 143 Wash.2d 276, 19 P.3d 1030 (2001). Courts

should assume the Legislature means exactly what it says. Western Telepage, Inc. v. City of Tacoma Department of Financing 140 Wash.2d 609, 998 P.2d 884 (2000) (citing State v. McCraw, 127 Wash.2d 288, 898 P.2d 838 (1995) (quoting Sidis v. Brodie/Dohrmann, Inc. 117 Wash.2d 329, 815 P.2d 781 (1991))); State v. Smith, 117 Wash.2d 271, 814 P.2d 652 (1991). Plain words do not require construction. Id. The courts do not engage in statutory interpretation of a statute that is not ambiguous. Davis v. Dep't of Licensing, 137 Wash.2d 963, 977 P.2d 554 (1999) (citing Whatcom County v. City of Bellingham, 128 Wash.2d 546, 909 P.2d 1303 (1996)).

If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself. State v. Tili, 139 Wash.2d 115, 985 P.2d 365 (1999). A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable. Id. The courts are not "obliged to discern any ambiguity by imagining a variety of alternative interpretations." W. Telepage, 140 Wash.2d at 608.

a. The State did not prove Mr. Saenz was convicted as an offender in 2001. In order for a trial court sentence a defendant as a persistent offender, the State must prove, by a preponderance of the evidence, the defendant was convicted three separate times as an offender. RCW 9.94A.030 (37) (a) (ii); In re Pers. Restraint of Cadwallader, 155 Wash.2d 876, 123 P.3d 456 (2005). The Sentencing Reform Act places this burden on the State because it is inconsistent with the principles underlying our system of justice

to sentence a person on the basis of crimes that the State either could not or chose not to prove. State v. Knippling, 166 Wash.2d 102, 206 P.3d 332 (2009) (citing State v. Ford, 137 Wash.2d 480, 973 P.2d 452 (1999) (quoting In re Pers. Restraint of Williams, 111 Wash.2d 357, 759 P.2d 436 (1988)); In re Pers. Restraint of Cadwallader, 155 Wn.2d 876, 123 P.3d 456 (2005).

An “[o]ffender” is defined as a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. RCW 9.94A.030 (34); State v. Knippling, 166 Wash.2d at 100. Pursuant to that statute, a person under the age of 18 years is an offender if the juvenile court has declined jurisdiction over that person pursuant to RCW 13.40.110 or if the charged crime falls automatically under the jurisdiction of the superior court pursuant to RCW 13.04.030. Id. citing, In re Pers. Restraint of Dalluge, 152 Wash.2d 783-84, 100 P.3d 279 (2004).

Here, the trial court was not satisfied Mr. Saenz was convicted as an “offender” in 2001 because there was no evidence in the record to prove the superior court had jurisdiction over him. When a juvenile court obtains jurisdiction, the case remains in that court unless and until it is transferred to superior court following an automatic decline based on the nature of the crime or following a declination hearing where the juvenile court waived its jurisdiction. Dalluge, 152 Wash.2d at 780.

Moreover, juvenile proceedings are required to be transcribed to ensure an accurate record. State v. Knippling, 166 Wash.2d at 102 (citing RCW 13.40.140 (5)). And all juvenile court declination decisions must be in writing. RCW 13.40.110 (3). In fact, RCW 13.40.110 specifically requires that any transfer to superior court, under RCW 13.40.110 (2), must be based “upon a finding that the declination would be in the best interest of the juvenile or the public” and the juvenile court must “set forth in writing its finding which shall be supported by relevant facts and opinions produced at the hearing.” RCW 13.40.110.

Here, because Mr. Saenz signed a stipulation and an agreed order that declined juvenile court jurisdiction and that transferred the case to superior court, the Court of Appeals found written findings were not required. A-16. But as this Court reinforced in State v. Knippling, only written findings disclose how or why the case was before the superior court instead of the juvenile court. Furthermore, only written findings provide a sufficient factual basis in the record. State v. Knippling, 166 Wash.2d at 102; State v. Ford, 137 Wash.2d 481, 973 P.2d 452 (1999), review denied, 11 P.3d 824 (2000) (quoting State v. Bresolin, 13 Wash.App. 396, 534 P.2d 1394 (1975)). Therefore, without written findings regarding why the juvenile court declined jurisdiction in 2001, Mr. Saenz could not have been convicted as an offender. Consequently, the 2001 conviction could not have been considered a serious offense or strike under the POAA.

b. Assertions by defense counsel and a guilty plea form did not prove Mr. Saenz was fully informed of all rights being waived before he signed the stipulation and agreed order. RCW 13.40.140 (1) requires a juvenile shall be advised of his or her rights when appearing before the court. RCW 13.40.140 (1). And RCW 13.40.140 (9) provides that a juvenile can waive any right, but only if he is properly informed of the rights being waived, and there is no exclusion for the right to a declination hearing. RCW 13.40.140 (9); State v. Ramos 152 Wash.App. 693, 217 P.3d 384 (2009).

Here, the Court of Appeals relied on mere assertions by defense counsel that s/he had extrajudicial conversations with Mr. Saenz and that s/he *believed* Mr. Saenz understood the implications to decline juvenile jurisdiction. The problem with the Court of Appeals' reliance on extrajudicial conversations between Mr. Saenz and his attorney is the exact nature of those conversations were not in the record to provide a sufficient basis to determine whether Mr. Saenz had been fully informed of the rights he was waiving. When RCW 13.40.140 is read as a whole, it becomes clear that the "express waiver" language contained in subsection 9 does not apply to extrajudicial statements. State v. Blair, 56 Wash.App. 213, 783 P.2d 102 (1989). In fact, the determination of whether a knowing and intelligent waiver has been made is the responsibility of the juvenile judge, who is presumably experienced in handling juvenile cases and who has the child and other witnesses before him, as well as the facts pertaining to the child's age, intelligence, education and experience. Dutil v. State, 93 Wash.2d 84, 606 P.2d 269 (1980).

Furthermore, the Court of Appeals relied upon a checked box on a plea agreement that claimed Mr. Saenz's lawyer read to him the entire guilty plea and that he understood it in full. A-14. The waiver of rights at issue concern those rights associated with waving juvenile court jurisdiction, while the guilty plea form focuses on waiver of a defendant's constitutional rights associated with trial and the consequences of the guilty plea.

Here, the factual support the Court of Appeals relied upon to support waiver of juvenile rights is inconsistent with the substantial factual support it relied upon in State v. Ramos, 152 Wash.App. 684, 217 P.3d 384, (2009). In that case, the juvenile court relied upon a waiver form and an explanation of all efforts the defendant made to prepare for the declination hearing. The juvenile court also considered the waiver and questioned the defendant about the waiver at some length, wherein the defendant confirmed he worked with his attorney and consulted his mother on the decision. The juvenile court reviewed the stipulation and considered the factors set forth in Kent v. United States, 383 U.S. 541, 86 S.Ct.1045 (1966), before it accepted the waiver and declined jurisdiction to the superior court. State v. Ramos, 152 Wash.App. at 688.

This case was decided within a year of State v. Ramos. With these cases, the Court of Appeals has created great disparity for what a juvenile court record must contain in order to prove a juvenile was fully informed of all rights waived before he waived a declination hearing.

2. The Court of Appeals' decision may mislead other courts. Here, instead of what was statutorily required to prove Mr. Saenz was fully informed before he signed the stipulation and agreed order, the Court of Appeals relied upon standard court forms and mere assertions by defense counsel. By so doing, the Court of Appeals ultimately redefined what is necessary to support a prior serious offense conviction that originated in juvenile court.

F. CONCLUSION

For the reasons set forth above, Mr. Saenz respectfully asks this Court to review the Court of Appeals' decision.

Respectfully submitted this 12th day of August, 2010.



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Crime & Punishment

Jorge Saenz, Already Sentenced Once, Now Faces Life in Prison Following New Ruling on Crime He Committed At 15

By Nina Shapiro, Wed, Jul 14 2010 @ 1:45PM
Categories: Crime & Punishment

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Jorge Ariel Saenz got a stiff sentence of 37 years after shooting a rival gang member in the back outside a Yakima Valley hardware store in 2008. (The victim survived.) Yesterday, however, the state Court of Appeals said that sentence was not good enough. The court ruled that the 25-year-old should be subject to life imprisonment under the state's three-strikes law, in part because of a crime he committed when he was just 15.



Saenz was known as "Spooky" in the Yakima Valley gang scene (see picture of recent arrest above and this week's cover story on the valley), according to court documents. In 2001, he was charged with multiple crimes, including three counts of second degree assault, one of the lowest-level crimes that counts as a "strike." It does so, however, only if a defendant is an adult or treated as such by the justice system.

And herein lies the sticky point in the Saenz case. The young man agreed to have the 2001 charges heard by Lewis County Superior Court rather than the local juvenile court. He even declined to have a hearing on the matter. Why? His Bellingham public defender, Tanesha Canzater, tells *Seattle Weekly* she doesn't know. But she questions whether he knew what he was doing.

"You're talking about a child," she says. "Could he really have understood the severity of that?"

The Yakima Superior Court judge who heard Saenz' most recent case also expressed reservations in the face of a request from prosecutors to apply the three-strikes law. Judge Michael Schwab declined to do so, noting that there were insufficient court records establishing why Saenz's case was moved to an adult court.

But the appeals court cited remarks from Saenz's attorney at the time, who said that he had discussed the implications of the move with his client.

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YAKIMA, Wash. -- A Sunnyside man already serving 47 years in prison for a 2008 gang shooting should have been sentenced to life in prison as a three-strikes offender, an appeals court ruled Tuesday.

The ruling by the Division III Court of Appeals in Spokane was not only a huge blow for defendant Jorge Saenz, 24, but also set precedent on the crucial question of whether Saenz's first strike in 2001, when he was 15, properly counted against him.

Saenz's attorney, Tanesha Canzater of Bellingham, vowed to appeal. Canzater predicted the high court would step in for a closer look.

"The Court of Appeals missed the mark on this one," she said, adding of her client, "His life is pretty much over. We're not going to let this go."

Saenz was sentenced in 2008 to 47 years in prison for a drive-by shooting outside a Sunnyside Ace Hardware store that left a 14-year-old gang rival with a .40-caliber bullet permanently lodged in his back.

The attack was Saenz's third serious assault in seven years. He was previously convicted of a gang-related stabbing in Yakima in 2003 and of second-degree assault for instigating a riot while in custody in Lewis County in 2000.

Despite his record, Saenz escaped a three-strikes sentence after Yakima County Superior Court Judge Michael Schwab ruled that Saenz's Lewis County conviction -- he was 15 but entered a plea deal as an adult -- had troubling due process issues because of his age at the time.

But the appeals court said the record clearly reflected that Saenz had waived his rights to be tried as a juvenile in the Lewis County case and that he knew his conviction there counted as a strike offense.

Quoting transcripts in the case, the court noted that Saenz's defense attorney told a Lewis County judge that his client "understands what the implications are of having this moved to the adult court, but that is his desire at this time."

Saenz's decision to waive his rights as a juvenile apparently stemmed from a plea agreement. Court records show Lewis County prosecutors dismissed multiple charges for Saenz's guilty plea to a single charge of second-degree assault.

"He waived that process, and there's nothing else to indicate a constitutional dilemma," said Yakima County deputy prosecutor Kevin Eilmes, who appealed Schwab's decision.

But Canzater, Saenz's appeal attorney, questioned the appeals court's wisdom in overruling Schwab's misgivings about the Lewis County case and whether a 15-year-old can really understand the long-term effect of pleading to a strike offense.

"He was a child at the time," she said. "I really doubt he understood how his plea (in Lewis County) could come back to haunt him."

Statewide, more than 200 repeat offenders have been sentenced to life since Washington state voters passed the country's first three-strikes law in 1993.

Updated figures were not immediately available, but at least 10 of those cases originated in Yakima County.

* Chris Bristol can be reached at 509-577-7748 or cbristol@yakimaherald.com.

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COMMENTS

Posted by [Hayoc88](#) at 07/14/10 12:17AM Post ID#: [#37672](#)

A riot, stabbing, and a shooting.... Life seems a very just reward for this young man. Maybe he can help his "bro's" see the error of their ways, nah just wishfull thinking.

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Posted by [otraves](#) at 07/14/10 02:05AM Post ID#: [#37674](#)

Wow, this guy is bad news all around... three strikes at such a young age ...wonder how many other crimes he committed they're not telling us about? A good candidate for the needle, or rope.

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Posted by [Quixotic Pursuit](#) at 07/14/10 03:01AM Post ID#: [#37676](#)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 27683-0-III

**Respondent and
Cross-Appellant,**

)
)
) **Division Three**
)

v.

)
) **PUBLISHED OPINION**
)

JORGE ARIEL SAENZ,

Appellant.

)
)
)
)
)

Kulik, C.J. — A jury found Jorge Saenz guilty of two counts of first degree assault and one count of unlawful possession of a firearm. Mr. Saenz appeals, asserting that evidence of gang affiliation and witness intimidation should not have been allowed under ER 404(b). He also asserts the State presented insufficient evidence to support his convictions. The State cross-appeals, contending the trial court erred by not sentencing Mr. Saenz under the Persistent Offender Accountability Act (POAA), RCW 9.94A.555. We conclude sufficient evidence supports the convictions, and we affirm the convictions. We reverse the trial court's conclusion that the POAA did not apply. Here, unlike *State*

v. Knippling, 166 Wn.2d 93, 206 P.3d 332 (2009), Mr. Saenz agreed to declination and waived in writing his right to a hearing. We, thus, accord his prior conviction the same status as any other prior conviction for a most serious offense.

FACTS

During the evening of January 10, 2008, Jorge Saenz and Pedro Godinez began arguing in the Walmart in Sunnyside, Washington. Brandon Gonyier observed the interaction. Mr. Godinez is Mr. Gonyier's nephew. Both were 15 years old at the time of the altercation. Mr. Godinez and Mr. Gonyier belonged to a gang known as the Lower Valley Locos. Mr. Saenz was a known member of the rival gang, the Bell Garden Locos (BGLs). Mr. Gonyier testified that Mr. Saenz threatened Mr. Gonyier and Mr. Godinez and told them they better watch their backs.

Mr. Godinez and Mr. Gonyier left Walmart and headed toward Mr. Gonyier's house. They drove through a parking lot. When Mr. Godinez and Mr. Gonyier were in front of Ace Hardware, a Dodge Dakota pickup truck pulled into the parking lot. A man, later identified as Mr. Saenz, got out of the front passenger side of the pickup. Mr. Gonyier testified that he heard a voice yell "BGL," and that he recognized the voice as Mr. Saenz's voice. Report of Proceedings (RP) at 86. Mr. Saenz started firing a gun at Mr. Godinez and Mr. Gonyier. Mr. Saenz shot Mr. Godinez in the back. Mr. Gonyier

tried to enter the Ace Hardware store, but he fell and hit his head on the glass door, shattering the glass. Mr. Gonyier and Mr. Godinez entered the Ace Hardware to avoid getting shot. Mr. Gonyier identified Mr. Saenz as the man from the Walmart altercation as well as the shooter in the Ace Hardware parking lot.

A few days later, a Sunnyside police officer received a telephone call from a woman who stated that when she went to visit her son at her sister's house, she overheard David Guillen bragging about the shooting. This caller stated that she had the gun used in the shooting. She delivered the gun to the police.

Mr. Guillen accepted a deal in exchange for his testimony against Mr. Saenz. Mr. Guillen testified that Mr. Saenz called him for a ride. Mr. Guillen picked up Mr. Saenz in the Walmart parking lot in his Dodge Dakota pickup truck. Mr. Guillen stated that Mr. Saenz saw two people walking, and he told Mr. Guillen to go toward them so Mr. Saenz could hit them up.¹ Mr. Guillen drove into the parking lot by Ace Hardware, and Mr. Saenz got out of the vehicle and started shooting at the two people—Mr. Godinez and Mr. Gonyier.

The State charged Mr. Saenz with two counts of first degree assault and one count of unlawful possession of a firearm. During pretrial motions, the State sought the

¹ "Hit them up" is street language "to ask them who are you or where are you from." RP at 487.

admission of evidence of Mr. Saenz's gang affiliation under ER 404(b). The court found that three detectives had specific knowledge of language, formation, affiliation, and overall gang structure. The trial court allowed the detectives to testify regarding gangs and gang activity to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident.

The State also sought the admission of evidence of witness intimidation within the jail under ER 404(b). The trial court found that both Mr. Saenz and Mr. Guillen were arrested and placed in the Yakima County jail. Sometime between January 2008 and July 2008, Mr. Saenz sent messages to Mr. Guillen telling Mr. Guillen to take the blame for the alleged crimes because he would serve less time than Mr. Saenz. Mr. Saenz also indicated that Mr. Guillen and his family would be harmed if Mr. Guillen did not take the blame for the alleged crimes.

In June 2008, Mr. Guillen was assaulted by a group of inmates who indicated they were sending a message to him. Mr. Saenz did not directly participate in the assault, and his name was not mentioned in connection with the message. Mr. Guillen testified that he assumed Mr. Saenz sent the message. The trial court allowed the evidence regarding witness intimidation to show guilty knowledge by Mr. Saenz of the alleged crimes and participation in those crimes.

A jury convicted Mr. Saenz of two counts of first degree assault and one count of unlawful possession of a firearm. The State asserted that Mr. Saenz was a persistent offender and should be sentenced to life in prison without the possibility of parole. The trial court disagreed, entering the following findings of fact: Mr. Saenz was convicted of two counts of second degree assault with a deadly weapon on December 3, 2003. Mr. Saenz was 18 years old at the time he committed the assaults. Mr. Saenz was charged with multiple crimes, including three counts of second degree assault in the Lewis County Juvenile Court on February 3, 2001, when Mr. Saenz was 15 years old.

Mr. Saenz signed an agreed stipulation declining juvenile jurisdiction and specifically waived the requirement of a declination hearing. He also expressly waived his right to a hearing within 14 days in a colloquy with the court. Mr. Saenz was represented by counsel at all times and discussed declination with his counsel. A Lewis County commissioner approved the stipulation, but did not make any findings regarding declination of juvenile court jurisdiction or the waiver of juvenile jurisdiction signed by Mr. Saenz. Mr. Saenz pleaded guilty to second degree assault and custodial assault in Lewis County Superior Court.

The trial court concluded that Mr. Saenz's Lewis County conviction did not qualify as a most serious offense for purposes of the POAA because there was no express

waiver of juvenile court jurisdiction by Mr. Saenz, and there were no express findings by the juvenile court regarding waiver of the juvenile court's jurisdiction. Because the trial court concluded that the Lewis County conviction did not qualify under the POAA, Mr. Saenz was sentenced to a total of 441 months' confinement.

Mr. Saenz appeals, asserting the trial court erred by allowing the State to present evidence of gang affiliation and witness intimidation. The State cross-appeals, asserting the trial court erred by denying its motion to sentence Mr. Saenz as a persistent offender.

ANALYSIS

ER 404(b). Mr. Saenz asserts that the trial court erred by admitting evidence of gang affiliation and witness intimidation. Washington courts have repeatedly held that gang affiliation evidence is admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See State v. Yarbrough*, 151 Wn. App. 66, 210 P.3d 1029 (2009); *State v. Boot*, 89 Wn. App. 780, 950 P.2d 964 (1998); *State v. Campbell*, 78 Wn. App. 813, 901 P.2d 1050 (1995).

The decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. *State v. Stein*, 140 Wn. App. 43, 65, 165 P.3d 16 (2007).

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Relevant evidence is admissible; irrelevant evidence is not admissible. ER 402.

Relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. ER 403. Evidence of prior bad acts is not admissible to show that the person acted in conformity on a particular occasion, but is admissible for other purposes such as “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). Before a court admits such evidence it must

- (1) find by a preponderance of the evidence that the misconduct occurred,
- (2) identify the purpose for which the evidence is sought to be introduced,
- (3) determine whether the evidence is relevant to prove an element of the crime charged, and
- (4) weigh the probative value against the prejudicial effect.

Yarbrough, 151 Wn. App. at 81-82.

Here, the State sought to admit evidence that Mr. Saenz was a gang member to show motive, intent, opportunity, and *res gestae*. At trial, defense counsel did not object to admission of gang evidence for these purposes. Instead, counsel expressed concern that he did not want the evidence presented to turn into bad character evidence based on

Mr. Saenz's gang membership. The prosecutor agreed, stating that he did not plan to elicit character evidence to show conformity therewith, and that he actually believed that kind of evidence would weaken its case against Mr. Saenz.

The trial court found that the State established by a preponderance of the evidence that Mr. Saenz was a gang member, his street name was Spooky, he associated with other gang members who displayed certain colors and signs of their membership in a gang, and that the State sought to introduce this evidence to establish motive, intent, opportunity, and *res gestae* for the charged crimes. The trial court carefully weighed whether the evidence was relevant to prove an element of the crime charged and determined that the gang evidence was relevant to show whether the shooting was intentional or accidental. The trial court weighed the probative value against the prejudicial effect of admitting gang evidence and concluded that the probative value was much greater than the prejudicial impact. The trial court did not abuse its discretion by admitting the gang evidence.

Similarly, the trial court did not err by admitting evidence of witness intimidation. The trial court heard testimony from five people regarding jailhouse communication and the assault on Mr. Guillen. The communication challenged involved Mr. Saenz using sign language between tanks to threaten Mr. Guillen into taking the blame for the crime.

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Subsequently, Mr. Guillen was assaulted and told that “word was sent over.”

RP at 592. Mr. Guillen testified that he assumed the word was sent over by Mr. Saenz.

The trial court found that both the communication and the assault occurred. The trial court admitted the evidence to show Mr. Saenz’s knowledge. The court found the evidence was an admission relevant to prove the crime charged. The trial court again weighed the probative value against the prejudicial effect of admitting this evidence, and ultimately concluded that the evidence had “extreme probative value” which outweighed the potential prejudice. RP at 566.

The trial court properly admitted both the gang evidence and the evidence of witness intimidation.

Sufficient Evidence. The test for sufficiency of the evidence is whether, when all reasonable inferences are drawn in favor of the State, any rational trier of fact could find guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When an appellant asserts insufficient evidence, he or she admits the truth of the State’s evidence, as well as all reasonable inferences that can be drawn from that evidence. *Id.* 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).

Mr. Saenz was convicted of two counts of first degree assault with a deadly

weapon and one count of unlawful possession of a firearm. Mr. Saenz asserts the State presented insufficient evidence to support his convictions. Defense counsel asserts insufficient evidence for all three of Mr. Saenz's convictions but fails to provide any argument regarding the unlawful possession of a firearm conviction. Therefore, we do not address the unlawful possession of a firearm conviction.

To prove first degree assault, the State must prove beyond a reasonable doubt that the defendant, "with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1). "Great bodily harm" is defined as "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).

Here, Mr. Gonyier testified that he was with Mr. Godinez, and that he observed the interaction between Mr. Godinez and Mr. Saenz in the Walmart. Mr. Gonyier testified that Mr. Saenz shot at him. Mr. Gonyier identified Mr. Saenz as the person who spoke with Mr. Godinez, as well as the person who shot at him. Mr. Gonyier testified that Mr. Saenz got out of the front passenger side of the vehicle.

Mr. Guillen testified that he entered into a plea agreement in exchange for

testifying against Mr. Saenz. Mr. Guillen picked up Mr. Saenz at the Walmart parking lot. Mr. Guillen testified that Mr. Saenz saw two people walking and told Mr. Guillen to drive toward the people so Mr. Saenz could hit them up. Mr. Guillen pulled into the parking lot, and Mr. Saenz got out of the truck before Mr. Guillen could park it. Mr. Guillen remembered hearing gunshots from beside his truck. When asked if there was any doubt in his mind that Mr. Saenz was the shooter, Mr. Guillen replied, “No.” RP at 490.

Credibility determinations are for the trier of fact. Based on the testimony of Mr. Godinez, Mr. Gonyier, and Mr. Guillen, a rational juror could find that Mr. Saenz intended to inflict great bodily harm and that he assaulted another with a firearm. The State presented sufficient evidence to convict Mr. Saenz of two counts of first degree assault with a deadly weapon.

Persistent Offender. The State asserts the trial court erred by not sentencing Mr. Saenz under the POAA. The trial court declined to sentence Mr. Saenz under the POAA because the court was not satisfied that his criminal history contained two prior convictions of most serious offenses.

“[A] persistent offender shall be sentenced to a term of total confinement for life without the possibility of release.” RCW 9.94A.570. A “persistent offender” is defined

as an offender who:

(a)(i) Has been convicted in this state of any felony considered a most serious offense; and

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions . . . of felonies . . . considered most serious offenses.

Former RCW 9.94A.030(32) (2006).

“Most serious offense” is defined as any class A felony, as well as second degree assault. Former RCW 9.94A.030(28). Mr. Saenz was convicted of second degree assault, a most serious offense, committed on August 30, 2003. Neither party contests that this conviction is considered one strike under the POAA.

An “offender” is

a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110.

Former RCW 9.94A.030(30).

The juvenile court has jurisdiction over all offenders under the age of 18, with a few exceptions. RCW 13.04.030. The juvenile court must hold a declination hearing if the respondent is 15, 16, or 17 years of age and is charged with a class A felony. A party can waive his or her right to a declination hearing. Former RCW 13.40.110(1)(a) (1997).

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Following a declination hearing, the court is required to make written findings supported by relevant facts and opinions produced at the hearing. Former RCW 13.40.110(3).

On December 29, 2000, Mr. Saenz committed second degree assault. At that time, he was 15 years old. The Lewis County Prosecutor's Office filed a motion for declination of juvenile court jurisdiction. Mr. Saenz signed an agreed stipulation transferring the case to the Lewis County Superior Court and declining juvenile court jurisdiction. A Lewis County commissioner approved the stipulation and transfer but did not make any findings regarding declination of the juvenile court's jurisdiction or the waiver by Mr. Saenz of juvenile court jurisdiction. Mr. Saenz pleaded guilty to second degree assault in Lewis County Superior Court.

RCW 13.40.140(9) states, "[w]aiver of any right which a juvenile has under this chapter must be an express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived."

The State bears the burden of showing the predicate offenses qualify as strikes under the POAA by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005).

The trial court concluded that the second degree assault conviction out of Lewis County did not qualify as a most serious offense under the POAA because there was no

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record of either a valid express waiver of juvenile court jurisdiction by Mr. Saenz or any express findings by the court regarding waiver of juvenile court jurisdiction and remand to adult court.

Relying on *Knippling*, the trial court concluded that Mr. Saenz's second degree assault conviction from Lewis County was not a most serious offense. In *Knippling*, Mr. Knippling, a juvenile, was originally charged with first degree robbery, for which the superior court had automatic jurisdiction. *Knippling*, 166 Wn.2d at 97. After plea negotiations, the first degree robbery charge was reduced to a second degree robbery charge. This meant that the juvenile court should have had jurisdiction over Mr. Knippling. However, the superior court did not remand the case to juvenile court. Mr. Knippling asserted that this conviction should not count as a strike because there was nothing in the court record showing that the juvenile court declined jurisdiction. Mr. Knippling's conviction was evidenced solely by a judgment and sentence which indicated he was a juvenile but did not explain why the superior court had jurisdiction such that the conviction should count as a strike under the POAA. *Id.* at 97-98.

The *Knippling* court concluded that in order to classify Mr. Knippling as an offender, the State was required to show that Mr. Knippling was convicted of an automatic decline charge or that the juvenile court declined jurisdiction. *Id.* at 101.

There was no record of the declination hearing; therefore, the trial court concluded that Mr. Knippling's conviction was not a strike for purposes of the POAA. *Id.* at 102.

Here, in contrast to *Knippling*, there is documentation beyond merely the judgment and sentence. The record contains a stipulation and agreed order declining jurisdiction and remanding to superior court. After consultation with counsel, Mr. Saenz stipulated to a waiver of the declination hearing required under RCW 13.40.110. Defense counsel stated, "Mr. Saenz and I had two conversations, one at length here, and two this afternoon. I believe that he understands what the implications are of having this moved to the adult court, but that is his desire at this time." Clerk's Papers at 116. Mr. Saenz also signed a guilty plea, which contained a paragraph stating that his offense was a most serious offense and if he committed two other most serious offenses, he would be sentenced to life in prison without the possibility of parole. Furthermore, in his guilty plea, Mr. Saenz checked the box that said his lawyer had read him the entire guilty plea and he understood it in full.

Here, the juvenile court did not err by failing to enter findings regarding the declination hearing because Mr. Saenz waived the hearing. The State has the burden to show that Mr. Saenz's waiver was express and intelligent after being fully informed of the right being waived. The record supports that the waiver was knowing and intelligent.

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We reverse the trial court's conclusion that the POAA did not apply and remand for resentencing consistent with our opinion. We affirm the assault and firearm convictions.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Korsmo, J.

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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DECLARATION OF SERVICE

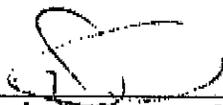
August 12, 2010

Superior Court Case No. 08-1-00151-8
Court of Appeals Case No. 276830
Case Name: *State of Washington v. Jorge Ariel Saenz*

I declare under penalty and perjury of the laws of the State of Washington that on **Thursday, August 12, 2010**, I filed by facsimile a PETITION FOR DISCRETIONARY REVIEW with the Division Three Court of Appeals and served copies of the same by depositing in the United States of America mails an addressed postage paid envelope to the following counsel of record and/or other interested parties:

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