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COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ANTHONY DELEON,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The doctrine of transferred intent, as set out in Instruction 16, impermissibly shifted the State's burden of proof to Anthony Deleon and his co-defendants. (CP 609; Appendix "A".)

2. Mr. Deleon was denied his constitutional right to due process as to Counts 2 and 3 of the Second Amended Information when the State was allowed to employ the doctrine of transferred intent. (CP 124.)

3. Gang-related testimony and exhibits, along with the trial court's failure to bifurcate the aggravating factor relating to gang activity, deprived Mr. Deleon of his constitutional right to a fair trial, as well as his right to confront the witnesses against him.

4. The trial court abused its discretion when it denied bifurcation of the gang aggravator and/or Mr. Deleon's motion for a new trial.

5. Defense counsel's ineffectiveness as to the following matters deprived Mr. Deleon of his right to counsel under the Sixth Amendment to the United States Constitution and Const. art. I., § 22:

a. Failure to request a lesser included offense instruction on second degree assault under two (2) distinct alternatives;

b. Failure to recognize the venue problem on Count 4;

c. Failure to request a mistrial based on juror misconduct;

d. Failure to timely join in a motion for new trial;

e. Failure to properly challenge Mr. Deleon's exceptional sentence; and

f. Failure to recall and conduct cross-examination of Monica Mendoza.

6. A juror's use of Twitter during the course of the trial and deliberations constitutes misconduct and is indicative of juror bias. (Appendix "B").

7. The trial court's imposition of an exceptional sentence on the gang aggravator and its doubling of the firearm enhancement is not supported by the record.

8. The gang-related prohibitions in the Judgment and Sentence, relating to clothing and tattoos, were improperly imposed. (CP 695).

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. A. Does the doctrine of transferred intent, as set out in Instruction 16, impermissibly shift the burden of proof as to Counts 2 and 3 of the Second Amended Information?

B. Did the use of Instruction 16 amount to a mandatory presumption?

2. Is the reasoning of *State v. Elmi,* 166 Wn. 2d 209, 207 P. 3d 439 (2009), contrary to the constitutional principles of proof beyond a reasonable doubt and/or due process of law?

3. A. Did gang-related testimony and exhibits exceed the scope of the trial court's pre-trial rulings and, if so, did it deprive Mr. Deleon of his constitutional right to a fair trial?

B. Did use of the co-defendants booking forms violate Mr. Deleon's constitutional right to confront the witnesses against him?

C. Did the trial court's failure to bifurcate the trial and the aggravating gang factor deprive Mr. Deleon of a fair trial?

4. Was defense counsel ineffective when he failed to recognize that, even though drive-by shooting is not a lesser included offense of first degree assault, second degree assault with intent to commit drive-by shooting under RCW 9A.36.021(1)(e) is?

5. Was defense counsel ineffective in failing to request a lesser included instruction on second degree assault under RCW 9A.36.020(1)(c)?

6. Was defense counsel ineffective when he reserved the right to cross-examine Monica Mendoza and then failed to recall her?

7. Was defense counsel ineffective in not investigating and/or recognizing the issue of venue as it relates to Count 4 of the Second Amended Information, *i.e.,* attempting to elude a pursuing police vehicle?

8. Was defense counsel ineffective when he did not request a mistrial based on juror misconduct?

9. Was defense counsel ineffective in not joining in a co-defendant's motion for a new trial in a timely manner?

10. Did the trial court abuse its discretion when it denied Mr. Deleon's motion for a new trial based upon untimely joinder?

11. Was defense counsel ineffective at the sentencing hearing when the State sought a doubling provision on the firearm enhancement?

12. Does juror misconduct (*i.e.* use of Twitter to comment on day to day trial progress and/or during deliberations) require reversal of Mr. Deleon's convictions and remand for a new trial?

13. Did the State establish, beyond a reasonable doubt, the gang aggravating factor used to impose the exceptional sentence?

14. Did the State provide sufficient evidence to the sentencing court that Mr. Deleon had a prior conviction which involved a firearm enhancement?

15. Did the trial court improperly impose a condition prohibiting gang clothing and tattoos?

STATEMENT OF CASE

Ignacio Cardenas was with Miguel Acevedo and Angelo Lopez on May 9, 2009. Mr. Cardenas and Mr. Acevedo were standing on the sidewalk outside the fenced yard at 1111 Tacoma in Sunnyside, Washington. Mr. Lopez was coming out the front door. Two cars were parked in front

of the residence. (10/08/10 RP 1231, ll. 12-15; ll. 19-22; RP 1247, ll. 2-19; RP 1248, ll. 24-25; 10/11/10 RP 1348, ll. 7-8; ll. 13-20; RP 1349, ll. 15-21; RP 51, ll. 5-6; RP 1352, ll. 17-24; 10/15/10 RP 1770, ll. 16-21; RP 1771, ll. 18-25).

Mr. Cardenas and Mr. Acevedo are members of the Lower Valley Lokotes (LVL). LVL is a local gang in Sunnyside. Mr. Cardenas is known as "Vollay." Mr. Acevedo's alias is "Little Slow Pain". The gang claims the color blue. (10/11/10 RP 1358, ll. 2-12; ll. 24-25; RP 1438, l. 25 to RP 1439, l. 5; RP 1474, ll. 13-14; 10/12/10 RP 1608, ll. 6-14; 10/15/10 RP 1801, ll. 6-8)

Mr. Acevedo saw a car driving by the house. He described the car as a silver Taurus. He believed it was someone he knew and flashed a gang sign at it. The car made a u-turn and one of the passengers yelled at him. The car did a second u-turn and as it passed the house shots were fired from the passenger side. (10/15/10 RP 1772, l. 18 to RP 1773, l. 6; RP 1774, ll. 1-23; RP 1776, ll. 18-21; RP 1777, ll. 10-11).

Mr. Cardenas almost died from his injuries after being shot. He could not identify who shot him. Mr. Acevedo did not recognize anyone in the car. He could not see who was shooting because he ducked down behind one of the parked cars. Mr. Lopez neither saw the car nor who was shooting. Mr. Lopez was afraid of being hit when he heard the shots. (10/06/10 RP 755, ll. 18-19; 10/11/10 RP 1353, ll. 21-24; RP 1356, ll. 21-

24; 10/14/10 RP 1643, ll. 4-9; 10/15/10 RP 1777, ll. 14-16; RP 1778, ll. 8-11; ll. 18-19; RP 1787, ll. 11-12).

Jose Barajas, Monica Mendoza and Griselda Mendoza were arriving at 1111 Tacoma as the shooting occurred. Monica Mendoza saw the people inside the Taurus wearing red bandanas over their mouths. She could not identify them when she first saw them. They described the car as a silver Taurus and followed it as it left the area. They lost sight of it on at least one occasion; but recontacted it near the intersection of Allen Road and the Mabton-Sunnyside Highway. (10/11/10 RP 1379, ll. 1-3; ll. 18-25; RP 1383, ll. 14-17; RP 1385, ll. 3-17l; RP 1386, ll. 2-3; ll. 18-23; RP 1387, ll. 4-11; RP 1388, ll. 2-3; RP 1396, l. 14 to RP 1403, l. 8; RP 1439, l. 18; RP 1447, ll. 1-6; 10/12/10 RP 1564, ll. 8-13; RP 1570, ll. 20-25; RP 1574, ll. 20-23).

Upon recontacting the car, Monica Mendoza believed that a passenger pointed a gun at them. She did not see the red bandanas this time. She identified two of the people in the Taurus. She knew Anthony Deleon as "Monkey." He is a friend of her baby's father. She also recognized Octavio Robledo. She knew him from school. (10/11/10 RP 1403, ll. 23-25; RP 1404, l. 19 to RP 1405, l. 1; RP 1405, ll. 4-10; RP 1407, ll. 18-19; RP 1408, ll. 2-9; RP 1409, ll. 8-9; RP 1453, ll. 3-10; RP 1576, l. 23 to RP 1577, l. 1).

Mr. Barajas stopped his pickup. After the Taurus drove away Mr. Barajas again followed it. He called 911. Mr. Barajas advised that the

passengers were wearing red. He continued to follow the Taurus as it entered I-82. He again lost sight of it as he followed it on I-82. (10/06/10 RP 746, ll. 12-24; RP 747, ll. 1-6; ll. 11-21; RP 748, ll. 16-19; RP 750, ll. 12-15;10/11/12 RP 1412, ll. 19-25; RP 1424, ll. 16-21).

Officer Lemmon of the Sunnyside Police Department responded to the call from dispatch of a "drive-by shooting on Tacoma Avenue." Dispatch advised him of what was occurring as it continued to monitor the 911 call. He entered I-82 (Westbound). Approximately 8 minutes elapsed between the initial 911 call and Officer Lemmon's contact with a silver Taurus on I-82. He did not see any other Tauruses as he headed toward Grandview. (10/06/10 RP 711, ll. 18-19; RP 712, ll. 10-16; RP 716, l. 14 to RP 717, l . 8; RP 743, ll. 12-23; RP 812, ll. 16-22; RP 836, ll. 11-25).

There are two exits between MP 69 and MP 75 on I-82. Officer Barnett of the Grandview Police Department was parked at Exit 73. He did not see a Taurus exit I-82. Officer Barnett and Officer Martin eventually saw a Taurus and followed it. Officer Chilson, who had not seen any other Tauruses, was also in pursuit. When Officer Lemmon arrived all units activated their lights. The Taurus took off at a high rate of speed. (10/06/10 RP 719, l. 4 to RP 720, l. 3; RP 841, ll. 9-14; RP 847, ll. 10-11; RP 849, ll. 19-23; RP 859, ll. 22-23; RP 862, l. 13 to RP 863, l. 2; RP 864, ll. 13-16; RP 865, l. 22 to RP 866, l. 5; 10/07/10 RP 941, ll. 11-12; RP 946, ll. 3-5; RP 947, ll. 5-7; ll. 16-25; RP 957, ll. 3-12; RP 970, ll. 6-7; RP 977, ll. 6-9; RP 988, ll. 4-6).

The chase commenced near MP 75.5 and continued to an area near MP 82. The Taurus then exited I-82 at Exit 82. It re-entered I-82 Eastbound. The Taurus was stopped near MP 80 by using spike strips. (10/07/10 RP 958, ll. 15-21; RP 959, ll. 10-13; RP 960, ll. 3-7; RP 961, ll. 13-25).

Office Lemmon described an object flying by his car near MP 78. He was unable to identify it. Neither Officer Chilson nor Officer Martin saw anything thrown from the Taurus. Officer Hellyer of the Prosser Police Department, who joined the pursuit at Exit 80, observed a passenger throw something from the car. It sparked when it hit the bridge railing over the Yakima River. Officers searched the areas near MP 78 and the Yakima River. They did not recover any evidence. (10/06/10 RP 720, ll. 6-8; ll. 18-23; RP 722, ll. 20-21; RP 723, ll. 18-19; RP 766, l. 2 to RP 768, l. 25; 10/07/10 RP 969, ll. 22-25; RP 1002, l. 12; 10/08/10 RP 1092, ll. 21-22; RP 1096, ll. 12-14; RP 1097, ll. 6-11).

Mr. Deleon was driving the Taurus. His brother Ricardo Deleon, was the backseat passenger. Mr. Robledo was the front seat passenger. (10/18/10 RP 1905, ll. 7-8; 10/7/10 RP 1009, ll. 9-13; 10/06/10 RP 728, ll. 16-21; RP 730, ll. 6-10; ll. 15-19; RP 731, ll. 7-11; RP 760, l. 25 to RP 761, l. 2).

While the pursuit of the Taurus was occurring Sgt. Kelley of the Sunnyside Police Department responded to Sunnyside Hospital. He spoke with Mr. Cardenas. Mr. Cardenas could not identify who was in the car.

Sgt. Kelley then went to 1111 Tacoma. He met with Mr. Barajas and the Mendoza sisters. Monica Mendoza told him Anthony Deleon and Mr. Robledo were involved. (10/07/10 RP 1028, ll. 15-16; RP 1031, ll. 7-11; RP 1032, ll. 12-13; RP 1033, ll. 17-20; RP 1034, ll. 1-11; RP 1054, ll. 12-15; 10/11/10 RP 1418, ll. 19-25).

Sgt. Kelley and Sgt. Cunningham collected evidence from the area at 1111 Tacoma. Nine (9) .22 casings were located in the street. A red car parked in front of the house had bullet holes in it. At least one bullet hit the house. (10/07/10 RP 1055, ll. 2-4; 10/14/10 RP 1612, ll. 9-10; RP 1628, ll. 1-7; RP 1634, ll. 9-13; Exhibit 38 I).

Sgt. Cunningham conducted a search of the Taurus after it was towed to the Sunnyside Police Department. He found the following items in the car:

A red bandana and two beer cans – front passenger side;

A pair of red dice;

A red bandana and red cooler – driver's side rear;

A digital scale;

A bong;

A package of marijuana inside a beer can; and

A cellphone with Anthony Deleon's name on the wallpaper.

(10/14/10 RP 1663, ll. 6-12; ll. 19-20; RP 1663, l. 21 to RP 1664, l. 2; RP 1687, ll. 1-7; RP 1692, ll. 12-22; RP 1693, ll. 3-6; RP 1708, ll. 14-19;

10/20/10 RP 2106, ll. 2-9; RP 2107, ll. 6-7; RP 2106, ll. 18-26; RP 2109, ll. 7-8).

A search warrant was obtained for Mr. Deleon's cellphone. Information was downloaded from it. The information included photos and recordings. The photos consisted of a person pissing on "scraps" (Surenos); the word "Familia"; a Huelga bird; and "Norte SK X-4." (10/12/10 RP 1671, l. 20 to RP 1672, l. 19; RP 1673, ll. 7-12; ll. 18-21; RP 1677, ll. 17-23; RP 1677, l. 24 to RP 1678, l. 6; RP 1678, ll. 7-22; Exhibits 37 A; 37 B; 37 C; 37 D; 49).

Photos were taken of the clothing that was worn by the people in the Taurus. Evidence of the color red was observed on many of the clothing items. Anthony Deleon's belt buckle had a capital "N" on it. (10/14/10 RP 1671, ll. 8-12; Exhibits 2 A; 2 B; 2 C; 2 D; 2 E; 2 F; 3 A; 3 B; 3C; 3 D;4 A; 4 B; 4 C; 4 D).

An Information was filed on May 15, 2009 charging Mr. Deleon with one count of first degree assault and one count of second degree assault. (CP 1).

Defense counsel filed a Motion to Change Venue on October 9, 2009. (CP 3).

An Amended Information was filed on October 13, 2009 charging three counts of first degree assault with a firearm enhancement and a gang aggravator. (CP 94).

A second Amended Information was filed on May 7, 2010. It added a count of attempting to elude a pursuing police vehicle as to Anthony Deleon.

Numerous continuances occurred due to the fact that the cases had been joined for trial and defense counsel availability was an issue. (CP 706; CP 707; CP 708; CP 709; CP 710; CP 711; CP 712; CP 713; CP 715; CP 716; CP 717; CP 718; CP 719; CP 721; CP 724; CP 725; CP 727; CP 728; CP 729; CP 730).

Defense counsel requested a firm trial date at a pre-trial hearing on May 7, 2010. A discussion occurred as to case backlog, lack of funding, and the court administrator declining to pre-assign cases. The matter was again discussed on June 16, 2010. Defense counsel filed a motion for a firm trial date on July 1, 2010. (CP 126; 05/07/10 RP 13, l. 16 to RP 15, l. 8; RP 17, ll. 3-23; RP 18, l. 24 to RP 19, l. 8; 06/16/10 RP 27, ll. 17-24; RP 28, ll. 5-7; RP 30, ll. 10-22).

A pre-trial hearing involving expert testimony on eyewitness perception was held on August 4, 2010. (08/04/10 RP 5, ll. 10-14; RP 6, l. 24 to RP 7, l. 9; RP 8, ll. 13-21; RP 11, ll. 1-12; RP 13, l. 21 to RP 14, l. 1; RP 112, ll. 9-11; RP 115, ll. 13-20).

Defense counsel again raised the issue of time-for-trial on September 2, 2010. The trial court ruled that trial had commenced with a motion to exclude witnesses. (09/02/10 RP 10, ll. 2-7; RP 12, l. 17 to RP 13, l. 21; RP 14, l. 25 to RP 15, l. 4).

On September 7, 2010 the trial court ruled that it would not bifurcate the trial and the gang aggravator. (09/07/10 RP 139, ll. 14-25; RP 148, ll. 16-24).

A motion to sever the trials of the defendants was filed on September 23, 2010. The motion was denied. (CP 274).

The booking forms used for each of the defendants were the subject of a Motion in Limine. The trial court ruled that they were admissible. The trial court also ruled that gang evidence was admissible (subject to a hearsay limitation) pursuant to *State v. Scott,* 151 Wn. App. 520, 213 P. 3d 71 (2009). (09/27/10 RP 329, ll. 19-20; RP 333, ll. 24-25; 10/05/10 RP 576, ll. 1-25; 10/08/10 RP 1134, l. 19 to RP 1135, l. 4; RP 1139, ll. 14-25; Exhibit 13; 14; 15).

Officer Saenz, a corrections officer at the Sunnyside Jail, noted that Anthony Deleon had the following tattoos:

4 dots on his left forearm;

The number 1 on his left leg;

The number 4 on his right leg. (10/08/10 RP 1149, ll. 11-24).

The Deleon brothers and Mr. Robledo all claimed NSV-14 as their gang. The Deleon brothers indicated they were no longer active. NSV is a Norteno gang claiming the color red. ((09/27/10 RP 38, l. 24 to RP 39, l. 12; 10/08/10 RP 1140, ll. 17-21; RP 1143, ll. 6-14; RP 1146, ll. 5-10; RP 1150, ll. 7-22; RP 1157, ll. 12-21; 10/08/10 RP 1185, ll. 9-10)

Officer Ortiz of the Sunnyside Police Department testified as a gang expert. (10/18/10 RP 1860, l. 23 to RP 1861, l. 6). His testimony consisted of the following:

1. Gangs are a unique culture with their own habits, trends, customs, language, values and morals; (10/10/10 RP 1917, ll. 10-13);
2. Gang hand signals are a form of American Sign Language; (10/18/10 RP 1922, ll. 6-15);
3. Throwing a gang sign is an attempt to incite a reaction and/or a showing that the individual will not back down; (10/18/10 RP 1922, ll. 16-22;
4. Once a person is in a gang he/she is in it for life and must "put in work"; (10/18/10 RP 1926, ll. 16-24);
5. "Putting in work" equates to "gaining respect" *(i.e.* a fear factor); (10/18/10 RP 1922, l. 23 to RP 1923, l. 8; RP 1931, l. 21 to RP 1932, l. 6);
6. If one gang member disrespects a rival gang member the disrespect will not go unanswered; (10/18/10 RP 1932, l. 20 to RP 1933, l. 14);
7. The word "scraps" is a derogatory term used by rival gang members; (10/18/10 RP 1953, ll. 14-19);
8. Gang members do certain things in order not to be caught. (10/20/12 RP 2053, l. 6 to RP 2054, l. 13).

9. The crime was a gang motivated crime [over objection];

(10/18/10 RP 1956, l. 23 to RP 1957, l. 14).

The cellphone photos, along with the song titles, were submitted to the jury over objection. The song titles and/or groups were:

Los Tigres Del Norte;	Northern Warriorz;
Northern Expozure;	Woodie;
Still Mob Livin';	Darkroom;
Big Tone;	Familia;
Northern Pride;	Nortenos.

(10/14/10 RP 1675, l. 25 to RP 1676, l. 2; RP 1679, ll. 3-7; RP 1679, l. 10 to RP 1680, l. 20). (Appendices "C"; "D"; "E").

Defense counsel's motion to dismiss the attempting to elude a pursuing police vehicle on the basis of improper venue was denied as dilatory. (10/18/10 RP 1850, l. 19 to RP 1859, l. 5)

Defense counsel again raised the venue issue and requested that the court provide an instruction to the jury. No instruction was provided. (10/18/10 RP 1879, l. 7 to RP 1885, l. 3; RP 1979, ll. 1-25).

Defense counsel's motion to dismiss Count 3 (relating to Mr. Lopez) for insufficient evidence was denied. Defense counsel's motion to dismiss the gang aggravator was also denied. (10/20/10 RP 2078, l. 7 to RP 2091, l. 18).

Defense counsel objected to Instructions 14, 15, 18, 19, 20, 24, 29, and to the last paragraph of the special verdict form. (10/21/10 RP 2190,

l. 13 to RP 2208, l. 9; RP 2212, l. 4 to RP 2213, l. 10; RP 2217, ll. 16-23; RP 2250, ll. 6-13).

After the trial court renumbered the Instructions objections were again made as to Instructions 14, 15, 16, 20, 21 and 29. (10/22/10 RP 2301, l. 24 to RP 2302, l. 22; RP 2303, l. 23 to RP 2305, l. 4; RP 2309, l. 24 to RP 2310, l. 11). (Appendices "F"; "G"; "H"; "I"; "J").

Prior to receiving the verdict the trial court and counsel discussed the fact that a juror had been using Twitter to comment upon the progress of the trial. There was a question of whether or not there was any indication of the jury's vote. The Twitter printout was made part of the record. (CP 644; 10/22/10 RP 2407, l. 3 to RP 2410, l. 13).

The jury found Mr. Deleon guilty on all counts. Special verdict forms were answered yes as to the firearm enhancement and gang aggravator. (CP 648; CP 649; CP 650; CP 561; CP 652; CP 653; CP 654; CP 655; CP 656; CP 657).

The jury was polled. Jurors 3 and 5 answered that the verdict was "based on the evidence given." Juror 5 was shaking her head "no" and appeared emotional. (10/25/10 RP 2416, ll. 18-21; RP 2417, ll. 4-5; RP 2419, ll. 16-22).

On November 23, 2010 Mr. Deleon filed a motion to join in a co-defendant's motion for a new trial. (CP 668).

A motion to reconsider the trial court's denial of a new trial was filed on January 26, 2011. The trial court ruled that Mr. Deleon's joinder

in his co-defendant's motion was too late. The trial court further ruled that good cause did not exist to extend the time for filing the motion . Reconsideration was denied. (02/04/10 RP 2421, l. 18 to RP 2422, l. 21; RP 2427, ll. 8-11; RP 2435, ll. 13-25; RP 2437, ll. 13-22).

Judgment and Sentence was entered on February 4, 2011. The trial court imposed an exceptional sentence of 1002 months. Findings of Fact and Conclusions of Law supporting the exceptional sentence were entered the same date. The Judgment and Sentence also contained a prohibition against gang clothing and tattoos at paragraph 4.C.2. (CP 689; CP 691; CP 695).

Mr. Deleon filed his Notice of Appeal on February 4, 2011. (CP 700).

SUMMARY OF ARGUMENT

The doctrine of transferred intent is inapplicable under the facts and circumstances of this case. Instruction 16 impermissibly shifted the State's burden of proof to Mr. Deleon. Due process requires the State to prove each and every element of an offense beyond a reasonable doubt. Instruction 16 amounted to a mandatory presumption on intent for Counts 2 and 3.

Cases involving gang-related evidence and gang aggravators are fraught with danger of unfair prejudice. When the evidence exceeds the bounds necessary to establish either an element of an offense, or an aggra-

vating factor, a criminal defendant is denied a fair trial. Bifurcation should be granted to avoid the predicament which occurred in Mr. Deleon's trial.

The Sixth Amendment and Const. art. I, § 22 guarantee a person who is charged with a crime, the right to effective assistance of counsel. In Mr. Deleon's case defense counsel's multiple errors denied him effective assistance as well as a fair trial.

Juror misconduct requires a mistrial.

The trial court's Judgment and Sentence contains a number of errors not supported by the record.

ARGUMENT

I. TRANSFERRED INTENT

Instruction 16, pertaining to transferred intent, is the only basis by which the State was able to go forward with the offenses charged in Counts 2 and 3. The State and the trial court relied upon *State v. Elmi, supra,* to support giving the transferred intent instruction. However, the *Elmi* Court, even though it accepted review on the issue of transferred intent, determined that it did not have to reach that issue. The Court ruled at 218: "Because RCW 9A.36.011 encompasses transferred intent...we do not need to reach the doctrine of transferred intent...and proceed, instead, under RCW 9A.36.011."

The particular quote from the decision is a prime example of circular reasoning with no underlying basis in fact. Justice Madsen's dissent in *Elmi* attacks that reasoning at 221:

> ...[T]here is nothing in RCW 9A.36.011 to suggest that the legislature intended to codify a concept broader then **the common law doctrine** that would allow multiple first degree assault convictions to stand **where there is proof that the person the defendant intended to assault was in fact assaulted and no unintended victim received actual injury.**

(Emphasis supplied.)

The facts and circumstances of Mr. Deleon's case directly match Justice Madsen's analysis of RCW 9A.36.011. As she stated at 222:

> ...[T]he doctrine of transferred intent, whether at common law or as codified, is not and never has been intended to apply in circumstances where no unintended victim is injured.

Justice Madsen relied upon *State v. Krup,* 36 Wn. App. 454, 458-59, 676 P. 2d 507 (1984) which quoted **WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 611 (1972).** The particular language is set forth at 223: "'There must be an *actual intention to cause apprehension,* unless there exists the morally worse intention to cause bodily harm'".

As to Mr. Lopez, there is no indication that the shooter even knew that he was present. He was coming out of the house at the time. It is true

that one bullet hit the house. It is true that Mr. Lopez was scared. Nevertheless, those truths do not equate to an assault.

Mr. Acevedo saw the gun and ducked down behind a parked car. The State did not present any evidence of where the bullets hit in relation to Mr. Acevedo.

As Justice Madsen pointed out in *Elmi*, at 228:

> In cases where no victims suffer actual injury but the defendant "creates a substantial risk of death or serious physical injury to another person [(s)]" the legislature has created the crimes of drive-by shooting or reckless endangerment.

Mr. Deleon contends that the State's use of transferred intent as defined in Instruction 16 amounts to a mandatory presumption in violation of the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3.

> It is reversible error to instruct the jury in a manner that relieves the State of its burden to prove beyond a reasonable doubt every essential element of a criminal offense. We analyze a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. We review an alleged error in jury instructions de novo.
>
> ...
>
> "A mandatory presumption is one that requires the jury "to find a presumed fact from a proven fact."" To determine whether a jury instruction creates a mandatory presumption, we examine whether a reasonable juror would interpret the presumption as mandatory.

> Mandatory presumptions violate a defendant's right to due process if they relieve the State of its obligation to prove all of the elements of the crime charged beyond a reasonable doubt.
>
> Even if a jury instruction includes an unconstitutional mandatory presumption, it does not necessarily require reversal. Such an erroneous instruction is subject to harmless error analysis. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless beyond a reasonable doubt.

State v. Atkins, 156 Wn. App. 799, 236 P. 3d 897 (2010), quoting *State v. Hayward,* 152 Wn. App. 632, 642, 217 P. 3d 354 (2009) (quoting *State v. Deal,* 128 Wn. 2d 693, 699, 911 P. 2d 966 (1996)).

II. GANG RELATED EVIDENCE

It is Mr. Deleon's position that gang-related evidence was improperly admitted and adversely impacted his right to a fair and constitutional trial. The gang-related evidence poisoned the minds of the jury and had little or nothing to do with the underlying offenses.

ER 404(b) requires a balancing of probative value versus undue prejudice. The probative value of the gang-related evidence in Mr. Deleon's case pertained, almost exclusively, to the gang aggravator. The trial court ruled that it was admissible for establishing motive. Motive is not an element of the charged offenses.

> 'ER 404(b) is not designed "to deprive the State of relevant evidence necessary to es-

> tablish an essential element of its case," but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.' *State v. Foxhoven,* 161 Wn. 2d 168, 175, 163 P. 3d 786 (2007) (quoting *State v. Lough,* 125 Wn. 2d 847, 859, 889 P. 2d 487 (1995)).

State v. Yarbrough, 151 Wn. App. 66, 82, 210 P. 3d 1029 (2009).

The State established that Mr. Deleon, at one time, had been a member of NSV-14. The State established Ricardo Deleon and Mr. Robeldo were also NSV-14 members.

The color red was apparent on various clothing items worn by the three individuals on the evening of May 9, 2009. According to Officer Ortiz, the clothing worn by the Deleon brothers and Mr. Robledo is indicative of gang membership. (10/18/10 RP 1903, ll. 7-23; RP 1948, l. 14 to RP 1949, l. 11; RP 1951, ll. 1-9; ll. 16-24; RP 1952, ll. 3-23).

"We have consistently held that the admissibility of photographs is discretionary." *State v. Rowe,* 77 Wn. 2d 955, 957, 468 P. 2d 1000 (1970).

Nevertheless, the introduction of the cellphone photos and the music song titles, along with testimony that they had gang implications, acted to unduly influence the jury's emotions.

Officer Ortiz created standardized booking forms for the Sunnyside jail in connection with gang membership. The forms ask specific questions that are incriminating in nature.

> Statements made in the course of a police investigation are non-testimonial if the pri-

> mary purpose of the questioning is to allow police to assist in an ongoing emergency...."Statements taken by officers in the course of investigations are almost always testimonial. So are statements that are the product of police-initiated contact." *State v. Tyler,* 138 Wn. App. 120, 127, 155 P. 3d 1002 (2007) (citation omitted).

State v. McDaniel, 155 Wn. App. 829, 847, 230 P. 3d 245 (2010).

The questions on the booking form constitute police-initiated contact. They also constitute requests for incriminating statements that are testimonial in nature.

The fact that Mr. Deleon had two co-defendants further impacts the adverse consequences of admitting the booking forms into evidence.

State v. St. Pierre, 111 Wn. 2d 105, 112, 759 P. 2d 383 (1988) is instructive as far as this issue is concerned:

> The Court [referring to the United States Supreme Court] has expressed particular concern about the use of codefendant statements in criminal trials where the statements are not made under oath and the witness is not subjected to cross examination. In *Douglas v. Alabama,* 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965), the Court declared hearsay statements of an accomplice's confession to be inheretantly suspect. As the Court stated in *Lee v. Illinois,* 476 U.S. 530, 541, 90 L. Ed. 2d 514, 106 S. Ct. 2056 (1986), the
>
> > truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defend-

> ant without the benefit of cross-examination.
>
> Such statements are presumptively unreliable and cannot be admitted unless they bear "sufficient' indicia of reliability' to rebut the presumption..." *Lee*, at 543 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980)).

The booking forms were improperly admitted and adversely impacted Mr. Deleon's right to a fair and constitutional trial. The continued validity of *Ohio v. Roberts, supra,* is now questionable based upon *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Crawford, in the context of a criminal defendant's own statement, was analyzed in *Personal Restraint of Theders,* 130 Wn. App. 422, 433, 123 P. 3d 489 (2005):

> The *Crawford* Court specifically retained the preexisting rule of *Tennessee v. Street* [471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)] that "[t]he [Confrontation] Clause...does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." There is no doubt that Washington decisions following *Crawford* recognize that "[w]hen out- of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no Confrontation Clause concerns arise." "[E]ven testimonial statements may be admitted if offered for purposes other than to prove the truth of the matter asserted." Similarly, the *Crawford* Court expressly excluded certain types of statements from its holding "that by their nature [are] not testimonial – for example,

> business records or statements in furtherance of a conspiracy."

See: State v. Mason, 127 Wn. App. 554, 566, n. 26, 110 P. 3d 245 (2005); *State v. Moses,* 129 Wn. App. 718, 119 P. 3d 906 (2005); *State v. Davis,* 154 Wn. 2d 291, 301, 111 P. 3d 844 (2005).

The booking forms are, for the most part, testimonial in nature. Even though they may be a business record maintained by a law enforcement agency, they should not be included under the business records exception. This is particularly true in a case involving co-defendants.

As the *St. Pierre* Court noted over 20 years ago:

> ...[I]n a recent opinion authored by Justice Scalia, the Court extended *Bruton [Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)] to exclude a codefendant's confession that corroborates the defendant's admissible confession. *Cruz v. New York,* 481 U.S. 186, 95 L. Ed. 2d 162, 109 S. Ct. 1714 (1987). ...
>
> ...[T]he defendant's own confession may be considered at trial to determine whether his codefendant's statements are supported by sufficient "indicia of reliability" to be directly admissible against him despite the lack of opportunity for cross examination... .
>
> ...
>
> To determine if the presumption of unreliability is overcome, we must examine the circumstances surrounding the statement and its maker as well as the content.

State v. St. Pierre, supra, 112-14.

Taking into consideration all aspects of the booking forms, the testimony concerning the booking forms, and the purposes behind them, Mr. Deleon maintains that they constitute inadmissible hearsay evidence. He was denied his confrontation rights under both the Sixth Amendment and Const. art. I, § 22.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Washington has adopted the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) for determining whether or not a criminal defendant has received effective assistance of counsel. The two prongs of *Strickland* are deficient performance and prejudice.

> The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo,* 166 Wn. 2d 856, 862, 215 P. 3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance.

State v. Grier, 171 Wn. 2d 17, 33 (2011).

Even though the Court in *State v. Grier* determined that it was not ineffective assistance of counsel to request a lesser included offense instruction, it appears that this was based upon the fact Ms. Grier acquiesced in the decision to exclude that instruction following consultation with her attorney.

In Mr. Deleon's situation, it does not appear that any further discussion was conducted after the trial court denied the lesser included instruction on drive-by shooting.

Mr. Deleon contends that he has established that his attorney was deficient at trial in several respects: 1). Failure to request a lesser included offense instruction in an appropriate format; 2). Proposing a lesser included instruction which was obviously not a lesser included offense; 3). Failure to recognize the venue issue; 4). Failure to request a mistrial for juror misconduct; 5). Failure to timely join in a motion for a new trial; 6). Failure to properly challenge the exceptional sentence; and 7). Failure to recall Monica Mendoza for cross-examination.

A. Lesser Included Offense(s)

> When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record. *State v. McFarland,* 127 Wn. 2d 322, 335, 899 P. 2d 1251 (1995). ...
>
> Part tactic, part objective, the decision to request or forego lesser included offense instructions does not fall squarely within the defendant's sphere. Instead, **the relative responsibility of the defendant and ...counsel in this decision making process are not clearly delineated.** However, both American Bar Association (ABA) standards and Washington's RPCs provide useful guidance as to the allocation of decision making power in this arena.

State v. Grier, supra., 29-30. (Emphasis supplied.)

The ABA standards and the RPCs both require that defense counsel fully consult with his/her client about lesser included offenses. It would appear that defense counsel may have had that type of consultation with Mr. Deleon insofar as drive-by shooting is concerned.

Nevertheless, case law is clear that drive-by shooting is not a lesser included offense of first degree assault. *See: State v. Rivera,* 85 Wn. App. 296, 932 P. 2d 701, *reviewed denied* 133 Wn. 2d 1002, 943 P.2d 662 (1997).

Mr. Deleon asserts that defense counsel was not engaging in any type of trial strategy or tactics insofar as lesser included offenses are concerned. Defense counsel apparently recognized that a drive-by shooting occurred. However, what defense counsel failed to recognize was the method by which he could get lesser included instructions before the jury. This is indisputably deficient performance.

> ...[A] criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach,* 153 Wn. 2d 126, 130, 101 P. 3d 80 (2004); *State v. Aho,* 137 Wn. 2d 737, 745-46, 975 P. 2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega,* 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)... .

State v. Grier, supra., 33-34.

Defense counsel missed the fact that second degree assault, under RCW 9A.36.021(1)(e), would allow for a lesser included offense instruction based upon the felony of drive-by shooting.

RCW 9A.36.045(3) declares drive-by shooting a class B felony.

RCW 9A.36.045(1) defines the offense, in part, as follows:

> A person is guilty of drive-by shooting when he...recklessly discharges a firearm...in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is...from a motor vehicle... .

RCW 9A.36.021(1) states, in part:

> A person is guilty of assault in the second degree if he...under circumstances not amounting to assault in the first degree:
> ...(c) Assaults another with a deadly weapon; or
> ...
> ...(e) With intent to commit a felony, assaults another... .

There is no dispute that an assault occurred. There is no dispute that a drive-by shooting occurred. There is no dispute that a firearm was involved.

> Washington recognizes three forms of assault: (1) assault by actual battery; (2) assault by attempting to inflict bodily injury on another while having apparent present ability to inflict such injury; and (3) assault by placing the victim in reasonable apprehension of bodily harm. *State v. Byrd,* 125 Wn. 2d 707, 712-13, 887 P. 2d 396 (1995); *see also: State v. Wilson,* 125 Wn. 2d 212, 218, 883 P. 2d 320 (1994). Assault by battery does not require specific intent to inflict harm or cause apprehension; rather, **battery requires intent to do the physical act constituting assault.** *Daniels [State v. Dan-*

> *iels*, 87 Wn. App. 149, 940 P. 2d 690 (1997)] at 155. **The other two forms of assault**, however, **require specific intent** that the defendant intended to inflict harm or cause reasonable apprehension of bodily harm. *State v. Eastmond*, 129 Wn. 2d 497, 500, 919 P. 2d 577 (1996).

State v. Hall, 104 Wn. App. 56, 62, 14 P. 3d 884 (2000). (Emphasis supplied.)

Count 1 of the Second Amended Information charged Mr. Deleon with first degree assault involving Ignacio Cardenas. The assault of Mr. Cardenas constituted an actual battery. The shooting of Mr. Cardenas resulted from the physical act of pulling the trigger on a gun.

The two counts of first degree assault relating to Miguel Acevedo and Angelo Lopez fall within the other two definitions of assault. As such, the State was required to prove, beyond a reasonable doubt, a specific intent to inflict harm or to cause reasonable apprehension as to each individual.

There can be no dispute that Mr. Cardenas suffered great bodily harm. RCW 9A.36.011 defines first degree assault as follows:

> (1) A person is guilty of assault in the first degree if he...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...; or
> ...
> (c) Assaults another and inflicts great bodily harm.

(Emphasis supplied.)

The State elected to proceed under RCW 9A.36.011(1)(a) instead of subparagraph (c). Thus, the statutory language of RCW9A.36.011(1)(a) would allow for a reasonable interpretation that second degree assault under RCW 9A.36.021(1)(c) is a lesser included offense.

The two statutes parallel each other insofar as the "deadly weapon" language is concerned. The first degree assault statute specifies a "firearm", as well as "any force or means likely to produce great bodily harm or death." The statute is worded in the disjunctive.

The State, in the Seconded Amended Information, specified that a "firearm" was the deadly weapon used as to each count. RCW 9A.04.110(6) defines "deadly weapon" as meaning "any...loaded or unloaded firearm... ."

Mr. Deleon concedes that the prosecuting attorney has the discretionary authority to select an appropriate charge. *See: State v. Meacham,* 154 Wn. App. 467, 671, 225 P. 3d 472 (2010).

If a prosecuting attorney knows that he/she has discretion to charge an offense as either a greater offense or a less included/lesser degree offense, then, it logically follows that a competent defense attorney should also be aware of that fact and request a lesser included/less degree instruction at trial.

> ...The assault statute since 1909 has always been divided into degrees and the operative language of first and second degree assault

> was not changed when the criminal code was revised in 1975. The legislature clearly provided in both first and second degree assault that the use of a firearm may be an alternate method of assault. Thus, the presence of a firearm does not elevate the crime of second degree assault to first degree assault as a firearm is not a necessary element for any degree of assault. Instead, the two degrees of assault are distinguished on the basis of *intent*. First degree assault may be accomplished by use of a firearm or other deadly weapon...force, or any means likely to produce death. Second degree assault may also be accomplished in a number of ways. However, the distinction is that assault in the first degree involves an "intent to kill" a human being or to commit a felony upon the person... of the one assaulted, by means likely to produce death. In second degree assault, the intent is to "injure"...another, with or without a weapon, or thing likely to produce bodily harm, or with intent to commit a felony.

State v. Adlington-Kelly, 95 Wn. 2d 917, 924, 631 P. 2d 954 (1981).

Even though the Legislature has amended both statutes since the *Adlington-Kelly* decision, the reasoning underlying that decision has equal or greater force as the offenses are now described. This is particularly true with regard to the requirement of specific intent as it pertains to Counts 2 and 3 of the Second Amended Information.

"...[A]lthough specific intent cannot be presumed, 'it can be inferred as a logical probability from all the facts and circumstances.'" *State v. Yarbrough, supra* 87, quoting *State v. Wilson,* 125 Wn. 2d 212, 217, 883 P. 2d 320 (1994).

"Specific intent is 'an intent to produce a specific result, as opposed to an intent to do a physical act' that produces the result." *State v. Esters,* 84 Wn. App. 180, 184, 927 P. 2d 1140 (1996), quoting *State v. Davis,* 64 Wn. App. 511, 515, 827 P. 2d 298 (1992), *rev'd on other grounds,* 121 Wn. 2d 1 (1993)... .

Based upon the forgoing excerpts relating to specific intent, it follows that the State was required to prove, beyond a reasonable doubt, that the intent under Counts 2 and 3 was not the physical act of shooting, but rather the intent to either inflict great bodily harm (but failing to do so), or an attempt to create apprehension in the minds of Mr. Acevedo and Mr. Lopez.

Even though both individuals described their reactions and fear of being shot, there is no indication that the shooter's specific intent was to generate that specific result.

When the individual committing an offense has no knowledge that another person is present there can be no specific intent to assault that person.

> ...[P]roof of a greater charge necessarily establishes proof of all lesser included offenses. Likewise, a defendant may be convicted of an offense that is an inferior degree to the one charged, RCW 10.61.003, provided that the statutes as here, proscribe but one offense.

State v. Smith, 122 Wn. App. 294, 299, 93 P. 3d 206 (2004).

First degree assault and second degree proscribe but one offense-assault. Assault can also be committed in the third degree and the fourth degree.

First degree assault, as charged by the State, required proof that a firearm was used. A firearm is a deadly weapon. Second degree assault includes an alternative of assault with a deadly weapon. It also includes an alternative of intent to commit a felony on another person. Drive-by shooting is a felony. Drive-by shooting involves the use of a firearm.

The foregoing analysis clearly indicates that lesser included offenses were available to defense counsel and would be beneficial to Mr. Deleon's defense.

Mr. Deleon recognizes that

> ...as a threshold determination apart from the *Workman* [*State v. Workman,* 90 Wn. 2d 443, 584 P. 2d 382 (1978)] test, the included offense must arise from the same act or transaction supporting the greater offense that is charged. *State v. Porter,* 150 Wn. 2d 732, 738-40, 82 P. 3d 234 (2004).

State v. Huyen Bich Nguyen, 165 Wn. 2d 428, 434-35, 195 P. 673 (2008).

There can be no dispute that the lesser included offenses arose from the same act upon which the State charged the greater offense.

"An error in instructions is harmless only if it 'in no way affected the final outcome of the case.'" *State v. Caldwell,* 94 Wn. 2d 614, 618, 618 P. 2d 508 (1980) quoting *State v. Wanrow,* 88 Wn. 2d 221, 237, 559

P. 2d 548 (1977); *State v. Golladay,* 78 Wn. 2d 121, 139, 470 P. 2d 191 (1970).

Instruction 16 obviously impacted the outcome of the jury's decision. Transferred intent was critical to the State's case as it related to Counts 2 and 3.

As Mr. Deleon has otherwise argued, the inclusion of Instruction 16 runs contrary to the common law, as well as to the requirement that there be specific intent to commit the offense of assault under two of the respective alternatives of the assault definition.

The inclusion of Instruction 16 resulted in a shift of the burden of proof from the State to the defense. The shifting of the burden of proof adversely impacted his constitutional rights.

The shifting of the burden of proof also relieved the State of its responsibility to prove each and every element of Counts 2 and 3 beyond a reasonable doubt. *See:* RCW 9A.04.100(1) and (2).

> The clear import of recent United States Supreme Court cases is that instructional errors which tend to shift the burden of proof to a criminal defendant are of constitutional magnitude because they may implicate a defendant's right of due process. *See: Sandstrom v. Montana,* 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979); *Patterson v. New York,* 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977); *Mullaney v. Wilbur,* 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975); *In re Winship,* 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

State v. McCullum, 98 Wn. 2d 484, 488, 656 P. 2d 1064 (1983).

B. Venue

CrR 5.1(a) provides:

> All actions shall be commenced:
>
> (1) In the county where the offense was committed; or
> (2) In any county where an element of the offense was committed or occurred.

> Venue is not an element of a crime... Rather, venue is a constitutional right that is waived if not asserted in a timely fashion. *State v. McCorkell,* 63 Wn. App. 798, 822 P. 2d 795, *review denied,* 119 Wn. 2d 1004 (1992). Generally, the right must be asserted before jeopardy attaches, which is to say before the jury is sworn in a jury trial.

State v. Pejsa, 75 Wn. App. 139, 145, 876 P. 2d 963 (1994).

Defense counsel seems to have been unaware that there was a venue issue until testimony was received during the course of the trial. Once defense counsel became aware that venue was at issue an appropriate challenge was raised.

The trial court, relying upon *State v. Dent,* 123 Wn. 2d 467, 869 P. 2d 392 (1994), denied defense counsel's motion to dismiss Count 4. On the same basis the Court declined to give an instruction to the jury.

Mr. Deleon recognizes that a challenge to venue must be brought at the earliest opportunity or it is lost. In his case, the challenge was raised

as soon as it became apparent that the attempting to elude a pursuing police vehicle did not commence until after the car was in Benton County.

Alternatively, if defense counsel should have known that there was a question concerning venue, then his failure to raise the issue at an earlier time constitutes ineffective assistance of counsel. This failure denied Mr. Deleon his right to a trial by a jury in the county where the offense occurred. *See:* Const. art. I, § 22.

C. Juror Misconduct

> Washington...is committed to the proposition that the right to a trial by jury includes the right to an unbiased and unprejudiced jury, and that a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitutional trial.

State v. Parnell, 77 Wn. 2d 503, 507, 463 P. 2d 134 (1969).

Const. art. I, § 22 provides, in part:

> In criminal prosecutions the accused shall have the right...to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed... .

Mr. Deleon asserts that he was denied a fair and impartial jury as a result of a juror's use of Twitter. The full Twitter printout is attached as Appendix "B". The particular aspects of the Twitter which Mr. Deleon contends impacts the impartiality of the juror are:

1. "The list of usual suspects grows----the jury KNOWS the convict is innocent of knowing SELF."

2. "Metaphors as thick as a legal dictionary carried by an illiterate lawyer… ."
3. "…off to that horrible duty?-Yes, and hopefully today is the last of it."

All of the foregoing excerpts occurred on October 22, 2010. Prior to that the same juror had been twittering as follows:

1. "…oh I hate jury duty-I will NEVER do this again. I guarantee it."
2. "They force 14 ppl to sit in a small room for 3, 4, 5, 6 hours on end with no lunch or breaks. Why does stupid shit piss me off so much?"
3. "Two more hours of wasted time…this is pathetic beyond all comparison."

The above quotes all occurred on October 21, 2010.

On October 19th and 20th, 2010 the juror twittered the following:

1. "This is a professional waste of time. #Justice System".
2. "It's time to set the record straight that MJ was/is and always has been innocent. – I actually believe that now."
3. "I'm not against the police, I'm just afraid of them. –I'm not afraid of them, I'm just against the system they serve."

On October 18 the following tweets occurred:

1. "While it will get you shot in #Yakima for saying it, I will: If the Nortenos and Sorenos were smart…they'd unite."

2. "The largest known street gang in the world Police."

3. "I've never seen a circus so full of clowns. #court."

Earlier, during the trial, the juror tweeted:

1. "'I don't not recall'...as every liar on the stand says under oath."

2. "Liar, lawyer mirror for you...what's the difference?"

3. "Memories make bad eye witnesses."

Even though the juror's comments are ambiguous insofar as favoring one side or the other, they clearly provide an insight into the juror's mind. The juror is totally disgusted with the criminal justice system. The juror does not know who to believe. The juror just wants to get it over with.

> The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right of an accused in all criminal prosecutions to trial by an impartial jury. The Washington constitution provides a similar guaranty. Under the laws of Washington, the right to a jury trial includes the right to an unbiased and unprejudiced jury. "'The failure to accord an accused a fair hearing violates even the minimal standards of due process.'" "[M]ore important then speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. **Not only should there be a fair trial, but there should be no lingering doubt about it."**

State v. Davis, 141 Wn. 2d 798, 824-25, 10 P. 3d 977 (2000) quoting *State v. Parnell, supra (*quoting *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed. 2d 751 (1961)). (Emphasis supplied.)

The juror's Twitter certainly casts doubt on that particular juror's state-of-mind.

> The appellant must make a strong, affirmative showing of misconduct in order to overcome the policy favoring stable verdicts and the secret and frank discussion of the evidence by the jury. [Citation omitted.] If juror misconduct can be demonstrated with objective proof without probing the jury's mental processes, and if the trial court has any doubt about whether the misconduct affected the verdict, it is obliged to grant a new trial.

Chiappetta v. Bahr, 111 Wn. App. 536, 540-41, 46 P. 3d 797 (2002).

The issue of possible juror misconduct was raised. Defense counsel dropped the ball. Juror misconduct is a basis for a mistrial. *See: State v. Applegate,* 147 Wn. App. 166, 175-76, 194 P. 3d 1000 (2008).

> A party who asserts juror misconduct bears the burden of showing that it occurred. To bear that burden is to raise a presumption of prejudice, which the other party can overcome by showing that the misconduct was harmless beyond a reasonable doubt. (*i.e.*, that the misconduct did not affect the verdict).

State v. Kell, 101 Wn. App. 619, 621, 5 P. 3d 47 (2000).

The *Kell* case involved a juror who was using a cellphone during deliberations. The trial court's inquiry as to the use of the cellphone indi-

cated that any outside contacts were innocuous. The jurors all agreed that the use of the cellphone had not affected the jury's verdict.

The juror's Twitter was brought to the attention of counsel and the trial court. It was made part of the record. However, no further inquiry was made by either the Court or counsel. The lack of such an inquiry adversely impacted Mr. Deleon's constitutional right to a fair trial.

D. Monica Mendoza

Defense counsel, throughout his representation of Mr. Deleon, vacillated back and forth between various defenses. These included: misidentification; complete denial; lack of evidence; the lesser included offense of drive-by shooting; and as to the felony elude that drugs were involved as opposed to flight from the shooting incident.

This mishmash of potential defenses and strategies even confused defense counsel, as became apparent in his closing argument, when he admitted that the shooting was gang-related and then segued into an identification issue upon which there was no testimony whatsoever. (10/22/10 RP 2368, ll. 3-18).

Defense counsel's argument concerning identification was undermined due to the fact that Monica Mendoza was never recalled to the stand for cross-examination after her direct testimony was completed. Her testimony was interrupted by the fact that she needed to pick up her children from school and her sister Griselda Mendoza was present to testify. (10/11/10 RP 1424-1439).

> A decision not to cross examine a witness is often tactical because counsel may be concerned about opening the door to damaging rebuttal or because cross examination may not provide evidence useful to the defense.

Personal Restraint of Brown, 143 Wn. 2d 431, 21 P. 3d 687 (2001).

Defense counsel's confusion acted to undermine any confidence the jury may have had as to the presumption of innocence.

IV. ENHANCED EXCEPTIONAL SENTENCE

A. Criminal History

RCW 9.94A.533(3)(d) provides:

> If the offender is being sentenced for any firearm enhancement... and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995... all firearm enhancements under this subsection shall be twice the amount of the enhancement listed... .

Mr. Deleon contends that the State failed to provide sufficient proof of a prior firearm enhancement at the sentencing hearing in order to double this particular aggravator.

The record does not reflect that the State presented the Judgment and Sentence pertaining to Mr. Deleon's prior manslaughter conviction. The State merely asserted that it involved a firearm.

> The Washington rule that a defendant "acknowledges" any "unchallenged" facts and information applies only when there is sufficient support in the record that satisfies the minimum requirements of due process.

> *Ford* [*State v. Ford,* 137 Wn. 2d 472, 973 P. 2d 452 (1999)] at 483 ("Acknowledgement does not encompass bare assertions by the State unsupported by the evidence.").

State v. Blunt, 118 Wn. App. 1, 8, fn. 10, 71 P. 3d 657 (2003).

The *Ford* and *Blunt* cases are further strengthened by *State v. Mendoza,* 165 Wn. 2d 913, 928-29, 205 P. 3d 113 (2009):

> These cases provide a foundation for considering what suffices as an acknowledgment in the present context. Importantly, we have emphasized the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purpose of sentencing. [Citations omitted.] The mere failure to object to a prosecutor's assertions of criminal history does not constitute such an acknowledgment. [Citation omitted.] Nor is a defendant deemed to have affirmatively acknowledged the prosecutor's asserted criminal history based upon his agreement with the ultimate sentencing recommendation. ... It remains the State's obligation to establish the criminal history by a preponderance of the evidence. [Citations omitted.] "Bare assertions" as to criminal history do not substitute for the facts and information a sentencing court requires. *See: Ford,* 137 Wn. 2d at 483-84.

In the absence of the underlying Judgment and Sentence the State failed to establish that Mr. Deleon had a prior firearm enhancement in connection with another conviction.

The doubling enhancement on the firearm enhancement should be stricken from the Judgment and Sentence.

B. Gang Aggravator

RCW 9.94A.535(3) provides, in part:

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

Officer Ortiz's testimony and the admission of the photographs and the song titles, unduly prejudiced Mr. Deleon's right to a fair and constitutional trial. Moreover, a serious question exists as to whether or not the testimony, in and of itself, exceeded what has been authorized by Washington Courts. *See: State v. Bluehorse,* 159 Wn. App. 410, 248 P. 3d 537 (2011), (limiting testimony concerning gang-related aggravating factors); **CONVICTION, CONFRONTATION,** and **CRAWFORD**[1]: Gang Expert Testimony as Testimonial Hearsay, 34 Seattle University Law Review 857 (2011).

Mr. Deleon contends that the State introduced gang-related evidence in an attempt to support the foregoing aggravating factor.

None of the gang-related evidence indicated whatsoever that the shooting incident was for a gang's "benefit, aggrandizement, gain, profit, or other advantage." There was a complete absence of testimony as to any of those factors.

[1] *Crawford v. Washington,* 541 U.S. 36, _S.Ct. __, ___L.Ed. 2d (2004).

RCW 9.94A.030(12) defines the term "criminal street gang" as meaning:

> ...Any ongoing organization, association, or group of three or more persons, whether formal or informal having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity. ...

The State established that there are criminal street gangs in Sunnyside. They include the BGLs, LVLs and NSVs. There are various subsets of these criminal street gangs.

BGL and LVL are rival blue gangs. Nortenos are also LVL rivals. (10/08/10 RP 1140, ll. 5-14; RP 1205, ll. 14-16; 10/11/10 RP 1372, l. 11 to RP 1373, l. 1; 10/15/10 RP 1787, ll. 13-22).

RCW 9.94A.030(14) defines a "criminal street gang-related offense " as meaning:

> Any felony...offense ...that is committed for the benefit of, at the direction of, or in association with any criminal street gang, or is committed with the intent to promote, further, or assist in any criminal conduct by the gang, or is committed for one or more of the following reasons:
> ...(e) To directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage for the gang, its reputation, influence, or membership... .

Mr. Deleon incorporates into this section of his brief his prior argument concerning the gang-related evidence.

If the trial court had bifurcated the trial to allow the gang aggravating factor to be considered at a separate hearing following its verdict on the underlying offenses, then the issue would not be on appeal.

"A trial court's decision on bifurcation is generally reviewed for an abuse of discretion". *State v. Roswell,* 165 Wn. 2d 186, 192, 196 P. 3d 705 (2008).

A trial court abuses its discretion

> ...where the decision or order...is...a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn. 2d 12, 26, 482 P. 2d 775 (1971).

The trial court abused its discretion by not giving due consideration to the cases of *State v. Yarbrough, supra.* and *State v. Monschke,* 133 Wn. App. 313, 135 P. 3d 966 (2006).

The issue concerning the aggravating factor of "gang membership" was not bifurcated as requested by defense counsel.

> Gang evidence falls within the scope of ER 404(b) *See: State v. Boot,* 89 Wn. App. 780. 788-89, 950 P. 2d 964 (1998). It may be admissible for other purposes, such as proof of motive, intent, or res gestae, but before a trial court may admit 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 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. *State v. Vy Thang,* 145 Wn. 2d 630, 642, 41 P. 3d, 1159 (2002).

State v. Ryna Ra, 144 Wn. App. 688, 701, 175 P. 3d 609 (2008).

Defense counsel, in the joinder with co-counsel's motion for a new trial, cited *State v. Bluehorse, supra.* This case was decided after Mr. Deleon's trial, but prior to sentencing. The trial court did not consider it when it ruled that the joinder motion was not timely.

Mr. Deleon contends that *Bluehorse* is directly applicable to the facts and circumstances of his case.

"Gang membership alone is not a factor that justifies an exceptional sentence." *State v. Bluehorse, supra* 428.

The State merely proved gang membership during the course of the trial. It attempted to parlay that evidence into the aggravating factor. The attempt was made through Officer Ortiz's testimony. His testimony consisted of generalizations, impermissible inferences and questionable opinions.

The *Bluehorse* Court ruled at 429:

> ...[O]ur Supreme Court has disapproved of reliance on ...generalizations from law enforcement, even when such generalization relate to search warrants and not to the defendant's guilt during trial... .

The generalizations which the Court referred to are contained in the following quote from *Bluehorse, supra:*

> ...Bair's generalized characterization of gang motivation behind drive-by shootings to find the gang aggravator..." when...there's a shooting like this, [gang members are] walking the walk, their're doing the deeds. They're maintaining their status in the gang. They are active in maintaining that status by...doing what some gang members do, which is retaliate and shoot at and hit sometimes other people with firearms."

Officer Ortiz's testimony concerning "putting in work" and "disrespect" essentially parallels the testimony that was condemned in *Bluehorse.*

..."[G]eneralized statements alone...fail to satisfy the State's burden at trial to prove the gang aggravator beyond a reasonable doubt... ." *State v. Bluehorse, supra* 430.

As the *Bluehorse* Court concluded at 431:

> The evidence supports an inference that *Bluehorse* was involved in this drive-by shooting, but without evidence relating to *Bluehorse's* motivation, the gang sentencing aggravator would be intolerably broadened by allowing it to attach automatically whenever an aspiring or full gang member is involved in a drive-by shooting based on the detective's generalized gang testimony; thus relieving the State of its burden to prove beyond a reasonable doubt that the specific defendant charged with the drive-by shooting sought to obtain, maintain, or advance his gang membership under RCW9.94A.535 (3)(s) and RCW 9.94A.537(3).

Even though the particular aggravator in *Bluehorse* is not the same as the aggravator in Mr. Deleon's case, he argues that the reasoning is equally applicable.

C. Gang Clothing and Tattoos

Mr. Deleon asserts that the following conditions of his Judgment and Sentence are overly broad:

> Wear no clothing associated with or signifying membership in a criminal street gang.
>
> Do not obtain any new tattoos, brands, burns, piercings or any voluntary scarring related to gang membership or association.

The first condition prohibits him from wearing the color red or blue. Blue jeans and other denim products are worn every day by millions of Americans. The color red is found in many styles of flannel shirts and pajamas.

Tattoos, piercings, etc. are a matter of personal choice. The fact that artistic designs by tattoo artists and jewelry makers may be associated with a gang should not preclude an individual's freedom of choice as to his or her own body.

It is Mr. Deleon's position that the conditions, as set forth above, invade his First Amendment rights and should be stricken from the Judgment and Sentence.

"Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right

of association. *State v. Scott,* 151 Wn. App. 520, 526, 213 P. 3d 71 (2009).

The prohibition concerning clothing, tattoos or other markings impacts his First Amendment right to freedom of speech and freedom of expression.

Recently, in *State v. Bahl,* 164 Wn. 2d 739, 753, 193 P. 3d 678 (2008) the Court ruled as follows:

> In addition, when a statute or other legal standard, such as a condition of community placement, concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms. ... For this reason courts have held that a stricter standard of definiteness applies if material protected by the First Amendment falls within the prohibition. As the Eleventh Circuit observed, "Vagueness concerns are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded of criminal statues because their consequences are more severe." *United States v. Williams,* 444 F. 3d 1286, 1306 (11th Cir. 2006), *rev'd on other grounds,* ____ U.S. ___, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).
>
> While many courts apply to sentencing conditions the same vagueness doctrine that applies with respect to statutes and ordinances, there is one distinction. In the case of statutes and ordinances, the challenger bears a heavy burden of establishing that the law is unconstitutional. This burden exists because of the presumption of constitutionality afforded legislative enactments. A sentencing condition is not a law enacted by the legislature, however, and does not have the same

> presumption of validity. Instead, imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. *State v. Riley*, 121 Wn. 2d 22, 37, 846 P. 2d 1365 (1993). **Imposition of an unconstitutional condition would, of course, be manifestly unreasonable.**

(Emphasis supplied.)

The gang-related conditions imposed on Mr. Deleon are unconstitutional. They invade his First Amendment rights. The State did not justify the conditions to the trial court.

CONCLUSION

Mr. Deleon's constitutional right to due process was violated by Instruction 16. As worded, the Instruction constitutes a mandatory presumption that relieved the State of its burden of proof on Counts 2 and 3.

The trial court's failure to bifurcate the trial and the gang aggravating factor constitutes an abuse of discretion. The gang-related evidence had nothing to do with any element of the charged offenses. Mr. Deleon was denied a fair trial.

Defense counsel's performance was deficient in each of the particulars previously set forth. This deficient performance was prejudicial to the outcome of the trial. Mr. Deleon was denied the constitutional rights under the Sixth Amendment and Const. art. I, § 22.

Juror misconduct by means of Twitter requires a declaration of mistrial.

The foregoing errors whether viewed individually, or in combination, require that Mr. Deleon's convictions be reversed. He is entitled to a new trial. *See: State v. Lopez,* 95 Wn. App. 842, 857, 980 P. 2d 224 (1999).

Alternatively, error committed by the trial court at sentencing combined with lack of sufficient proof as to enhancements and improper conditions requires resentencing.

DATED this 5th day of June, 2012.

Respectfully submitted,

s/ Dennis W. Morgan
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APPENDIX "A"

ORIGINAL

INSTRUCTION NO. 16

If a person acts with intent to assault another, but assaults a third person, the actor is deemed to have acted with intent to assault the third person. The unintended victims do not need to be physically injured and the defendant need not know of their presence.

APPENDIX "B"

2

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SUPERIOR COURT
YAKIMA WASHINGTON

SUPERIOR COURT OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON Plaintiff / Petitioner (s) **VS.** **RICARDO DELEON** **ANTHONY DELEON** **OCTAVIO ROBLEDO** Defendant / Respondent (s)	**NO. 09-1-00976-2** **09-1-00977-1** **09-1-00978-9** JUROR INFORMATION RE: TWITTER ACCOUNT

(SEE ATTACHED)

Twitter.com/icpchad

RT @DeniseLescano: @icpchad looking forward to seeing them...jury cant reach a verdict?? - We just stared deliberation on Friday

Does anyone know where I can find (online) 'The Runaway Jury' to stream for free right now?
12:20 AM Oct 23rd via TweetDeck

Everything is fine here http://youtu.be/QzcmSxvgVJE the system is friendly, & we should be so grateful we get to pay for it.
11:35 PM Oct 22nd via TweetDeck

RT @SpiritRaintree: @icpchad You, good sir, are a wordsmith. I dig that. You are a powerful non-conformist. Respect & Gratitude.
8:52 PM Oct 22nd via TweetDeck

.The list of usual suspects grows-----the jury KNOWS the convict is innocent of knowing SELF.
8:48 PM Oct 22nd via TweetDeck

Metaphors as thick as a legal dictionary carried by an illiterate lawyer ... here, can you #follow this?
8:47 PM Oct 22nd via TweetDeck

RT @CourtneyRich: @icpchad you fighting the good fight my friend? Good for you! - There are 2 others as well. ;-) Score 3 : 9 ;-)
5:36 PM Oct 22nd via TweetDeck

RT @jenn_row: @icpchad to you as well.....off to that horrible duty? - Yes, and hopefully today is the last of it.
8:26 AM Oct 22nd via TweetDeck

RT @CarePathways: @icpchad jury duty how did it go? - SSSSSTTTTIIIILLLLLL GGGGGGOOOOOIIIIINNNNNGGGGGG. It's insanely ridiculous
11:48 PM Oct 21st via TweetDeck

RT @jenn_row: @icpchad oh I hate jury duty - I will NEVER do this again, I guarantee it.
1:10 PM Oct 21st via TweetDeck

They force 14 ppl to sit in a small room for 3,4,5,6 hours on end with no lunch or breaks. Why does stupid shit piss me off so much?
12:38 PM Oct 21st via txt

Two more hours of wasted time ... this is pathetic beyond all comparison.
10:49 AM Oct 21st via txt

RT @DeniseLescano: @icpchad omg YOUR STILL ON JURY DUTY??!! What the heck is it a murder trial? How long you gonna be? - 1 more day.
7:26 PM Oct 20th via TweetDeck

This is a professional waste of time. #JusticeSystem
9:51 AM Oct 20th via txt

RT @tajjackson3: It's time to set the record straight that MJ was/is and always has been innocent. - I actually believe that now.
10:00 PM Oct 19th via TweetDeck

We The People - A Day in the Mind - Chad Lilly http://on.fb.me/9RqetR #FB post via @marlenlife
9:53 PM Oct 19th via TweetDeck

.RT @slavis_show: I'm not against the police, I'm just afraid of them. - I'm not afraid of them, I'm just against the system they serve.
1:23 PM Oct 19th via TweetDeck

The Golden Ratio - Chad Lilly on Coast to Coast AM http://youtu.be/ZSZONOTSDs8
12:06 AM Oct 19th via TweetDeck

While it will get you shot in #Yakima for saying it, I will: If the Nortenos and Surenos were smart ... they'd unite.
10:24 PM Oct 18th via TweetDeck

If 'NO' was on their ballot ... then I'd register to vote.
9:00 PM Oct 18th via TweetDeck

In a legal dictionary: 'Human Being' is defined as: Monster. (and this why you need another to [re]present your fiction to the court.
8:24 PM Oct 18th via TweetDeck

The largest known street gang in the world: Police
8:17 PM Oct 18th via TweetDeck

@SayMichalSexy - It's been a long, strange day (Jury Duty) ... I'm happy to be home----swimming in the stream with you.
8:01 PM Oct 18th via TweetDeck in reply to SayMichalSexy

I've never seen a circus so full of clowns. #court
2:10 PM Oct 18th via txt

Only a few more days left of this Jury Duty ... going to get this over with ... see ya laterz.
8:34 AM Oct 18th via TweetDeck

Whetto" http://youtu.be/5J8sbTCOttE
11:33 PM Oct 14th via TweetDeck

."I don't not recall" ... as every liar on the stand says under oath.
9:15 PM Oct 14th via TweetDeck

Liar, lawyer mirror for you' ... what's the difference?" -Tool
3:01 PM Oct 13th via txt

.. the wheels on the bus of BS go 'round and 'round ... 'round and 'round. #Law
1:10 PM Oct 13th via txt

Memories make bad eye witnesses.
11:04 AM Oct 13th via txt

APPENDIX "C"

Los Tigres del Norte

From Wikipedia, the free encyclopedia
(Redirected from Los Tigres Del Norte)

Los Tigres del Norte (English: **The Tigers of the North**) is a norteño-band ensemble based out of San Jose, California, hailing from Rosa Morada, Sinaloa, Mexico.

Contents

- 1 History
- 2 Members
- 3 Former members
- 4 Discography
- 5 References
- 6 External links

Los Tigres del Norte

Los Tigres del Norte at the Chumash Casino Resort in Santa Ynez, California.

Background information

Origin	Sinaloa, Mexico
Genres	Norteño, narcocorridos
Years active	1968–present
Labels	Fonovisa
Associated acts	Zack de la Rocha
Website	lostigresdelnorte.com (http://www.lostigresdelnorte.com)

Members

Jorge Hernandez
Hernan Hernandez
Eduardo Hernández
Luis Hernández
Oscar Lara

Past members

Raúl Hernández
Guadalupe Olivo
Freddy Hernandez

History

The group was started by Jorge Hernández, his brothers, and his cousins. They began recording after moving to San Jose, California in the late 1960s, when all the members were still in their teens.[1] They were sponsored by a local record company, Discos Fama, owned by an Englishman named Art Walker, who took them under his wing and helped them find jobs and material, as well as recording all of their early albums.[1]

The Tigres were at first only locally popular, but took off after Jorge and Art Walker heard a Los Angeles mariachi singer perform a song in the early 1971 about a couple of drug runners, Emilio Varela and Camelia la Texana. There had been occasional ballads (corridos, in Mexican terminology) about the cross-border drug trade ever since Prohibition in the 1920s, but never a song as cinematic as this, featuring a woman smuggler who shoots the man and takes off with the money. After getting permission to record this song, Los Tigres del Norte released "Contrabando y Traición" ("Contraband and Betrayal") in 1974.[2] The song quickly hit on both sides of the border, inspired a series of movies, and kicked off one of the most remarkable careers in Spanish-language pop music.

In Norteño/conjunto form (a style featuring accordion that originated along the Texas border region), Los Tigres del Norte have been able to portray "real life" in a manner that strikes a chord with people across the Americas. Many of their most popular songs consist of tales or corridos about life, love, and the struggle to survive in an imperfect world. They regularly touch on the subject of narcotics and illegal immigration, but they have also shared stories of love and betrayal between a man and a woman. Together, the band and its public has turned norteño music into an international genre. The band has modernized the music, infusing it with bolero, cumbia, rock rhythms, waltzes, as well as effects of machine guns and sirens integrated with the music.

The band has won five Latin Grammy Awards and sold 32 million records.[3]

On January 9, 2007, Los Tigres del Norte was honored as a BMI Icon at the 14th annual BMI Latin Awards. Los Tigres, who were saluted that evening with an all-star musical tribute, were being honored as BMI Icons for their "unique and indelible influence on generations of music makers." They joined an elite list that includes such Latin music giants as Juan Luis Guerra and Carlos Santana.[4]

They have performed before the United States Armed Forces in Japan and South Korea.[5]

In 2010, the band made headlines by joining in a massive international boycott of the US State of Arizona, in response to the state's Support Our Law Enforcement and Safe Neighborhoods Act.[6]

Members

- Jorge Hernandez – director, lead vocals, accordion
- Hernan Hernandez – electric bass, vocals
- Eduardo Hernández – accordion, saxophone, bajo sexto, vocals
- Luis Hernández – bajo sexto, vocals
- Oscar Lara – drums

Former members

- Raúl Hernández – bajo sexto, vocals
- Guadalupe Olivo – saxophone, accordion
- Freddy Hernandez – percussion (Deceased)

Discography

This list excludes the many "Greatest Hits" compilations.

- *Juana La Traicionera/Por el Amor a Mis Hijos* (1971)
- *Cuquita* (1971) (Official first album)
- *Sufro Porque te Quiero/La Cochicuina* (1972)
- "Mi Caballo Ensilado" (Single) (1973)
- *Si,Si,Si/Chayo Chaires* (1973)
- *El cheque* (1972)Mexican Release album compilation of Por Amor A Mis Hijos / Sufro Porque Te Quiero
- "No Llorare" (Single) (1974)
- *Contrabando Y traición* (1974)
- *La banda del carro rojo* (1975)

- *La tumba del mojado-Internacionalmente norteños* (1976)
- *Pueblo querido* (1976)
- *Vivan los mojados* (1977)
- *Numero Ocho* (1978)

El Que Tanto Te Amo (1978) Single Rio Magdalena (1978)

- "Hermosa Luna" (Single)(1979)
- *El Tahúr* (1979)
- *Plaza Garibaldi* (1980)
- *...un día a la vez!* (1981)
- *Éxitos para siempre...* (1982)
- *Carrera contra la muerte* (1983)
- *Jaula de oro* (1983)
- "Adolfo Mi Compadre" (Single) (1984)
- *A ti madrecita* (1985)
- *El Otro México* (1986)
- *Gracias América...Sin Fronteras* (1986)
- *Ídolos Del Pueblo* (1988)
- *Corridos Prohibidos* (1989)
- *Triunfo Sólido – Mi Buena Suerte* (1989)
- *Para adoloridos* (1990)
- *Incansables!* (1991)
- *Con Sentimiento y Sabor – Tan Bonita* (1992)
- *Una Noche Con Los Tigres Del Norte* (1992)
- *La garra de...* (1993)
- *Los Dos Plebes* (1994)
- *El Ejemplo* (1995)
- *Unidos Para Siempre* (1996)
- *Jefe de Jefes* (1997)
- *Así Como Tú* (1997)
- *Herencia De Familia* (1999)
- *De Paisano A Paisano* (2000)
- *Uniendo Fronteras* (2001)
- *La Reina del Sur* (2002)
- *Pacto de Sangre* (2004)
- *Directo al Corazón* (2005)
- *Historias que Contar* (2006)
- *Detalles y Emociones* (2007)
- *Raíces (album)* (2008)
- *Tu Noche con Los Tigres del Norte* (2008)
- *La Granja* (2009)
- *MTV Unplugged: Los Tigres del Norte and Friends* (2011)

Singles Collection, never included in any Long Play

Las Tres Mujeres Los Sufrimientos Polka Texas Ya Cambiara Mi Destino Juana Morena De San Francisco Mi Caballo Ensillado No Llorare Rio Magadalena El Que Tanto Te Amo Hermosa Luna Los Vigilantes

References

1. ^ a b Wilkinson, Alec. "Alec Wilkinson, "Immigration Blues," The New Yorker magazine, May 24, 2010" (http://www.newyorker.com/reporting/2010/05/24/100524fa_fact_wilkinson) . Newyorker.com. http://www.newyorker.com/reporting/2010/05/24/100524fa_fact_wilkinson. Retrieved May 14, 2012.
2. ^ Biography (http://www.univision.com/uv/music/1029452/Los_Tigres_del_Norte/biografia) at Univision.com
3. ^ article in (http://www.washingtonpost.com/wp-dyn/content/article/2007/02/17/AR2007021701673_pf.html) Washington Post, *February 18, 2007*
4. ^ "Los Tigres del Norte To Be Honored as BMI Icons at 14th Annual Latin Awards" (http://www.bmi.com/news/entry/534208) . bmi.com. http://www.bmi.com/news/entry/534208. Retrieved October 11, 2010.
5. ^ "Visión Hispana" (http://www.visionhispanausa.com/index.php?option=com_content&view=article&id=439:los-tigres-del-norte-with-raul-hernandez-&catid=29:historias-locales-empty&Itemid=4) . Visionhispanausa.com. April 15, 2010. http://www.visionhispanausa.com/index.php?option=com_content&view=article&id=439:los-tigres-del-norte-with-raul-hernandez-&catid=29:historias-locales-empty&Itemid=4. Retrieved May 14, 2012.
6. ^ El Correo de Guanajuato: "Tigres del Norte, participan en boicot contra Arizona" (http://correo-gto.com.mx/notas.asp?id=160749) (in Spanish)

External links

- Official website (http://www.lostigresdelnorte.com) (in Spanish & English)
- Los Tigres del Norte at MySpace.com (http://www.myspace.com/lostigresmusica)
- Los Tigres del Norte on YouTube.com (http://www.youtube.com/lostigresmusic)
- Los Tigres del Norte el Club (http://www.club-tigresdelnorte.com/) , fans' club website
- Interview with Acceso Total (http://soundcheck.walmart.com/acceso-total/los-tigres) , video (in Spanish)

Retrieved from "http://en.wikipedia.org/w/index.php?title=Los_Tigres_del_Norte&oldid=492461737"

Categories: Grammy Award winners | Latin Grammy Award winners | Musical groups established in 1968 | Mexican norteño musical groups

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APPENDIX "D"

Become an EX and re-learn life without cigarettes.

Big Tone

Biography

There are 2 artists with the name Big Tone:

(1) Reppin the X4 from Antioch, California, Norteno rapper Big Tone lays some slick beats and wicked rhymes. Oldies-influenced Rap with a little bit of fast rhymes and slow jams—thanks to his partner in crime Davina—they make the ultimate Bonnie & Clyde for that NorCal. A close friend of Woodie (RIP), Big Tone has always and always will rep that Norte.

(2) Big Tone is hip-hop. Big Tone is soul. Big Tone is an expression of music, fashion, lifestyle, and culture of Urban America, as seen through the eyes of Anthony Jackson. After years of rhyming and collaborating with some of music's most prominent talents including Jay Dilla, Dwele, Slum Village, Ta'raach, Blu, Amp Fiddler, The Juggaknots, Carl Craig, Waajeed, Tae Yang and more, Anthony Jackson is focused on pushing Big Tone to the forefront of today's music world.

Edited by bigdick69 on 15 May 2011, 11:11

Sources (view history)
http://www.savoutrecords.com/

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Factbox (?)
No facts about this artist

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APPENDIX "E"

Darkroom Familia

From Wikipedia, the free encyclopedia
(Redirected from DarkRoom Familia)

Darkroom Familia is a Chicano rap group with members from various parts of Northern California. They were originally formed in 1988. Like other burgeoning gangster rappers of the era, major labels weren't quick to sign such bands, so the band members had to sell their tapes by taking them personally to record stores in the area as word of mouth quickly began to spread. Darkroom Familia became one of rap's most prolific bands, issuing albums (whether it be by the band or solo releases by its members) at an extremely brisk rate.[1] They also released one of the first all Spanish rap albums *Los Traficantes - Matan Mi Gente*.[2] Most violent gangster rap group, banned in California

Albums

- *Temporary Insanity - Bitchez Never Learn*, 1993
- *From The Barrio With Love*, 1994
- *Playerz 4 Life - Major Game*, 1995
- *Temporary Insanity - Woke Up Hatin' Tha World*, 1995
- *Barrio Love*, 1996
- *Los Traficantes - Matan Mi Gente*, 1998
- *Gang Stories - The Darkroom Uncensored*, 1998
- *Apocalypse Brown*, 1998
- *Los Traficantes - No Pararemos Hasta La Muerte*, 1999
- *From The Barrio With Love*, 1999 (re-release)
- *Return Of The Living Vets*, 1999
- *Connected - Felony Consequences*, 1999
- *Homicide Kings*, 2000
- *Men Of Honor*, 2001
- *Family Reunion*, 2005
- *Northern Cali Finest*, 2006
- *Last Vets standing*, 2007
- *Connectionz*, 2008
- *Los Traficantes - Conecta Del Norte*, 2008
- *From The Barrio With Hate*, 2009
- *Norcal Narcotics*, 2010

Solo albums

Sir Dyno Duke Crooked D-Roll K.I.D. Oso Young D Dub A.L.G. Mr. Menti

References

- http://www.brownpowerrecords.com/

1. ^ http://www.billboard.com/artist/connected-of-darkroom-familia/176446#/artist/connected-of-darkroom-familia/176446
2. ^ http://www.darkroomstudiosonline.com/bio.htm

Retrieved from "http://en.wikipedia.org/w/index.php?title=Darkroom_Familia&oldid=481171262"

Categories: Chicano rap | Musical groups established in 1988

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APPENDIX "F"

ORIGINAL

INSTRUCTION NO. 14

An assault is an intentional shooting of another person that is harmful or offensive. A shooting is offensive if the shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

APPENDIX "G"

ORIGINAL

INSTRUCTION NO. 15

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

APPENDIX "H"

ORIGINAL

INSTRUCTION NO. 20

To convict the defendant of the crime of First Degree Assault in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 9, 2009, the defendant or an accomplice assaulted Miguel Acevedo;

(2) That the assault was committed with a firearm;

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "I"

INSTRUCTION NO. 21

To convict the defendant of the crime of First Degree Assault in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 9, 2009, the defendant or an accomplice assaulted Angelo Lopez;

(2) That the assault was committed with a firearm;

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "J"

ORIGINAL

INSTRUCTION NO. 29

If you find the defendant guilty of the crime of First Degree Assault in Count 1; or of the crime of First Degree Assault in Count 2; or of the crime of First Degree Assault in Count 3, then you must determine if the following aggravated circumstance exists as to that count:

Whether the defendant committed the crime of First Degree Assault with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang its reputation, influence, or membership.

When deliberating on this aggravating circumstance you may consider all the evidence presented during the trial without limitation.

NO. 29691-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. ANTHONY DELEON, Defendant, Appellant.	YAKIMA COUNTY NO. 09 1 00977 1 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 5th day of June, 2012, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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