Supreme Court No. (to be set)
Court of Appeals No. 33595-0-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Luis Anguiano
Appellant/Petitioner

Yakima County Superior Court Cause No. 14-1-00150-4
The Honorable Judge Michael G. McCarthy

PETITION FOR REVIEW

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant/Petitioner

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

DECISION BELOW AND ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 3

I. The Supreme Court should accept review to determine the unit of prosecution for firearm enhancements. 3

A. The unit of prosecution is one firearm enhancement per offense, regardless of the number of firearms carried. 3

B. The Court of Appeals erroneously applied this court's dicta in DeSantiago as "binding authority." 5

II. The Supreme Court should accept review and determine if the admission of prior "bad act" evidence can violate due process. 9

A. The Supreme Court should clarify that discretionary decisions violating constitutional rights are reviewed de novo. 9

B. The Supreme Court should reverse because jurors may have voted to convict Mr. Anguiano based on propensity evidence. 13

C. The Court of Appeals failed to apply the correct standards to Mr. Anguiano's argument. 18

III. The evidence was insufficient to convict Mr. Anguiano of Murder by Extreme Indifference. 19

CONCLUSION 20

Appendix: Court of Appeals Decision

TABLE OF AUTHORITIES

FEDERAL CASES

Alberni v. McDaniel, 458 F.3d 860 (9th Cir. 2006)..... 14

Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)13

Garceau v. Woodford, 275 F.3d 769 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003).... 13, 14, 17, 18

McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993)..... 13, 14

Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)..... 13

United States v. Alverson, 666 F.2d 341 (9th Cir.1982)..... 7

United States v. Canterbury, 2 F.3d 305 (8th Cir. 1993)..... 8

United States v. Cappas, 29 F.3d 1187 (7th Cir. 1994)..... 7

United States v. Correa-Ventura, 6 F.3d 1070 (5th Cir. 1993) 8

United States v. Freisinger, 937 F.2d 383 (8th Cir. 1991) 8

United States v. Hamilton, 953 F.2d 1344 (11th Cir. 1992)..... 8

United States v. Johnson, 25 F.3d 1335 (6th Cir. 1994)..... 7

United States v. LeMay, 260 F.3d 1018, 1026 (9th Cir. 2001)..... 14, 17

United States v. Lindsay, 985 F.2d 666 (2d Cir. 1993)..... 7, 8

United States v. Martinez, 7 F.3d 146 (9th Cir. 1993), *as amended* (Nov. 9, 1993)..... 7

United States v. Moore, 958 F.2d 310 (10th Cir. 1992)..... 8

Woodford v. Garceau, 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003)..... 14

WASHINGTON STATE CASES

Lenander v. Washington State Dep't of Ret. Sys., 186 Wn.2d 393, 377 P.3d 199 (2016) 9

State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998) 3, 4, 5

State v. Aguirre, 168 Wn.2d 350, 229 P.3d 669 (2010) 10

State v. Anderson, 94 Wn.2d 176, 616 P.2d 612 (1980) 19

State v. Armstrong, 188 Wn.2d 333, 394 P.3d 373 (2017) 12

State v. Berge, 25 Wn. App. 433, 607 P.2d 1247 (1980) 19

State v. Chenoweth, 185 Wn.2d 218, 370 P.3d 6 (2016) 6

State v. Clark, 187 Wn.2d 641, 389 P.3d 462 (2017) 10, 11, 12

State v. DeLeon, 185 Wn.2d 478, 374 P.3d 95 (2016) 17, 19

State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003) 6, 7, 8

State v. Dye, 178 Wn.2d 541, 309 P.3d 1192 (2013) 10, 11, 12

State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014) 15, 16, 18

State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009) 10, 11, 12, 13, 19

State v. Jensen, 164 Wn.2d 943, 195 P.3d 512 (2008) 4, 5

State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010) 10, 11, 12, 13, 19

State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002) 16

State v. McCreven, 170 Wn. App. 444, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013) 15, 16

State v. Mitchell, 29 Wn.2d 468, 188 P.2d 88 (1947) 19

State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009), as corrected (Jan 21, 2010) 17

State v. Perez-Valdez, 172 Wn.2d 808, 265 P.3d 853 (2011) 16

State v. Posey, 161 Wn.2d 638, 167 P.3d 560 (2007)..... 10

State v. Rodgers, 146 Wn.2d 55, 43 P.3d 1 (2002)..... 20

State v. Samalia, 186 Wn.2d 262, 375 P.3d 1082 (2016)..... 9

State v. Slocum, 183 Wn. App. 438, 333 P.3d 541 (2014) 15, 16, 18

State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009)..... 4, 5, 6

State v. Thang, 145 Wn.2d 630, 41 P.3d 1159 (2002)..... 15

State v. Villanueva-Gonzalez, 180 Wn.2d 975, 329 P.3d 78 (2014)..... 3

State v. Wilson, 144 Wn. App. 166, 181 P.3d 887 (2008)..... 15

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V 3

U.S. Const. Amend. XIV 3, 5, 9, 13, 17, 19

Wash. Const. art. I, § 9..... 3, 5

WASHINGTON STATE STATUTES

RCW 9.94A.533..... 4, 5

OTHER AUTHORITIES

18 U.S.C. § 924..... 7

28 U.S.C. § 2254..... 14

ER 403 ..... 9, 14, 15, 18

ER 404 ..... 9, 14, 15, 16, 17, 18

FRE 403 14

FRE 414 14

Grappin v. State, 450 So.2d 480 (Fla.1984) 7

People v. Haggart, 142 Mich. App. 330, 370 N.W.2d 345 (1985) 7

RAP 13.4..... 5, 9, 13

RAP 2.5..... 17

State v. Boykin, 78 N.C. App. 572, 337 S.E.2d 678 (1985)..... 7

State v. Nichols, 865 S.W.2d 435 (Mo.App.1993) 7

State v. Surrett, 217 N.C. App. 89, 719 S.E.2d 120 (2011)..... 7

Ursula Bentele, *The Not So Great Writ: Constitution Lite for State Prisoners*, 5 U. Denv. Crim. L. Rev. 34, 35 (2015)..... 14

Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 Lewis & Clark L. Rev. 741 (2010). 14

DECISION BELOW AND ISSUES PRESENTED

Petitioner Luis Anguiano, the appellant below, asks the Court to review the Court of Appeals opinion entered on August 3, 2017.[1] This case presents four issues:

1. What is the unit of prosecution for firearm enhancements?
2. What standard of review applies to discretionary decisions that violate an accused person's constitutional rights?
3. Does a conviction based in part on propensity evidence violate due process?
4. May a conviction for murder by extreme indifference rest on shots fired at an individual and the geographically isolated house he inhabits, absent proof the shooter knew others were likely present?

STATEMENT OF THE CASE

When he was a teenager, Luis Anguiano began using marijuana to deal with the loss of his mother. RP (6/2/15) 840-842. In January of 2014, he along with three acquaintances drove to buy pot from Charles Burkybile. RP (6/1/15) 649-651, 670; RP (6/2/15) 840, 844-845.

Burkybile's house was on the property of a duck-hunting club in rural Yakima County. RP (5/27/15) 270, 300-301; RP (6/2/15) 835. Mr. Anguiano had never seen anyone else at the house and did not know that Burkybile lived with others. RP (6/2/15) 872.

Burkybile told the group to leave and said he would not sell from his home. RP (5/27/15) 278; RP (6/2/15) 850-851.[2] What happened next is in dispute. Mr. Anguiano maintained that he and his companions fired toward the house after Burkybile retrieved a rifle and began shooting at

[1] A copy of the opinion is attached.

[2] According to his wife, who was inside the house, he referred to them as "a bunch of Mexican gangsters." RP (5/27/15) 278.

them. RP (5/27/15) 279, 295-296; RP (6/2/15) 844-857, 875. The driver of the car (who later pled guilty to reduced charges and testified for the State) claimed that Mr. Anguiano and his companions drew their weapons and shot first. RP (6/1/15) 659-662, 678. Burkybile died from gunshot wounds. RP (5/27/15) 281, 312-314.

The State charged Mr. Anguiano with first-degree murder (by alternate means of felony murder and extreme indifference) and first-degree assault against Burkybile's wife (under a theory of transferred intent).[3] CP 122-126. To each charge, the State added three firearm enhancements, one for each of the three firearms used by the group in the car. CP 122-126.

Over defense objection, the prosecution suggested to jurors that Mr. Anguiano had participated in a prior burglary at the house. RP (4/20/15) 18-19; RP (5/27/15) 251-253, 273. Police had found items in Mr. Anguiano's possession that had allegedly been taken during the prior burglary; however, nothing suggested he'd personally participated in the crime. RP (6/1/15) 642-643, 698-706.

The court did not find by a preponderance the prior burglary had occurred, did not find Mr. Anguiano was involved, did not find the proffered evidence relevant to any element of the charged crimes, and did not weigh probative value against any potential for prejudice. RP (5/27/15) 254. Instead, the court indicated only that the evidence went to "motivation." RP (5/27/15) 254. In closing arguments, the State referred to the

[3] Mr. Anguiano was also charged with and convicted of additional offenses, which have since been dismissed by the trial court on double jeopardy grounds. CP 325-327, 357-358.

prior burglary multiple times. RP (6/3/15) 944-945, 948-949, 960, 961, 997-998.

The jury found Mr. Anguiano guilty of both charges[4] and the associated firearm enhancements. CP 295, 297-300, 305, 307-310. By special verdict, jurors found both felony murder and murder by extreme indifference. CP 300. At sentencing, the court imposed a total of 830 months, which included 30 years for the six consecutive firearm enhancements. CP 328-329; CP 357. Mr. Anguiano sought review, and the Court of Appeals affirmed. CP 335; Opinion.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE SUPREME COURT SHOULD ACCEPT REVIEW TO DETERMINE THE UNIT OF PROSECUTION FOR FIREARM ENHANCEMENTS.

No Washington court has addressed the double jeopardy issue raised by adding multiple firearm enhancements to a single offense. Because the unit of prosecution is one firearm enhancement per offense, regardless of the number of firearms involved, Mr. Anguiano's sentence must be reversed.

A. The unit of prosecution is one firearm enhancement per offense, regardless of the number of firearms carried.

Where multiple penalties are imposed for violation of a single statute, double jeopardy[5] requires a reviewing court to determine the "unit of prosecution." *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980-81, 329 P.3d 78 (2014); *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).

[4] Additional convictions have since been vacated. CP 325-327, 357-358.

[5] U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9.

The inquiry turns on legislative intent, as expressed in the statute's plain language. *State v. Sutherby*, 165 Wn.2d 870, 878, 204 P.3d 916 (2009). Courts apply the rule of lenity to any ambiguity in the unit of prosecution. *Id.* This avoids turning a single transaction into multiple offenses. *Id.* at 878-879 (citing *Adel*, 136 Wn.2d at 634-35); *see also State v. Jensen*, 164 Wn.2d 943, 949, 195 P.3d 512 (2008).

The firearm enhancement statute does not specify the unit of prosecution.[6] Instead, one provision refers to the "underlying offense" (singular) that is "subject to a firearm enhancement" (singular), suggesting that only one firearm enhancement can attach to each offense. RCW 9.94A.533 (3). Another provision refers to "firearm enhancements" (plural) applying to "the completed felony crime" (singular), implying that multiple enhancements could attach to a single offense. RCW 9.94A.533(3).

Nowhere does the statute require additional time for "each firearm" or otherwise clearly indicate how to treat offenses committed by offenders armed with multiple guns. RCW 9.94A.533(3). Although it refers to "firearm enhancements" (plural), it does not refer to "firearms" (plural). RCW 9.94A.533(3).

[6] Under the statute, additional time "shall be added to the standard sentence range… if the offender or an accomplice was armed with a firearm." RCW 9.94A.533(3). The "firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement." RCW 9.94A.533(3). In addition, "[n]otwithstanding any other provision of law, all firearm enhancements are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter." RCW 9.94A.533(3)(e).

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

Mr. Anguiano should have received two firearm enhancements—one for each conviction. The imposition of six consecutive firearm enhancements violated his state and federal double jeopardy rights. U.S. Const. Amend. XIV; Wash. Const. art. I, § 9; *Sutherby*, 165 Wn.2d at 878-879. The Supreme Court should accept review and hold that the unit of prosecution is one firearm enhancement per conviction, regardless of the number of firearms carried. The court should vacate four of Mr. Anguiano's firearm enhancements and remand for resentencing. This case presents a significant constitutional issue that is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

B. The Court of Appeals erroneously applied this court's *dicta* in *DeSantiago* as "binding authority."

The SRA contains separate provisions for firearm enhancements and deadly weapon enhancements. RCW 9.94A.533(3) and (4). A firearm enhancement may be combined with a deadly weapon enhancement when the State alleges and proves the offender was armed with both a firearm

and a knife. *State v. DeSantiago*, 149 Wn.2d 402, 407, 410, 68 P.3d 1065 (2003) (addressing former RCW 9.94A.510 (1999)).

DeSantiago did not involve multiple firearms. *DeSantiago*, 149 Wn.2d at 407, 410. The jury found the defendants in that case were armed with one firearm and one knife. *Id.* The issue presented was "Do both the firearm enhancement and the deadly weapon enhancement apply to a single offense committed with two weapons?" *Id.*, at 410.

The court in that case was not asked to determine whether a court may impose multiple firearm enhancements when an offender is armed with more than one firearm. *Id.* Despite this, the *DeSantiago* majority opined that "a sentencing judge [must] impose an enhancement *for each firearm* or other deadly weapon that a jury finds was carried during an offense." *Id.* at 421 (emphasis added).

The *DeSantiago* court's suggestion that multiple firearms could lead to multiple enhancements is unnecessary to its decision. It is therefore *dicta*. *See State v. Chenoweth*, 185 Wn.2d 218, 233, 370 P.3d 6 (2016) (Madsen, C.J., dissenting) (defining dicta as comments unnecessary to the outcome of the case.) Further, this *dicta* rests on a precarious foundation.

The parties' failure to brief a double jeopardy argument results in the first part of the precarious basis. *DeSantiago*, 149 Wn.2d at 420. In the absence of briefing, the court did not recognize the statute's ambiguity, and did not apply the rule of lenity, as required in unit of prosecution cases. *Sutherby*, 165 Wn.2d at 878-879.

The second precarious foundation facet is that the court relied on persuasive authority that "did not analyze the statutory scheme at issue." *DeSantiago*, 149 Wn.2d at 419.[7] In fact, the only cited authority that addressed a firearm enhancement reached the opposite result from the *DeSantiago* majority's *dicta*. *Id.*, at 419 (citing *People v. Haggart*, 142 Mich. App. 330, 370 N.W.2d 345 (1985)).[8] The *Haggart* court applied the rule of lenity to an ambiguous firearm enhancement statute. It held that the statute allowed only one enhancement per transaction, regardless of the number of firearms carried. *Haggart*, 142 Mich. App. at 348. Likewise, federal courts generally allow only one enhancement per underlying crime for the corresponding federal enhancement provision (18 U.S.C. § 924(c)), regardless of the number of firearms involved in a crime.[9] *See, e.g.*, *United States v. Cappas*, 29 F.3d 1187 (7th Cir. 1994); *United States v. Johnson*, 25 F.3d 1335 (6th Cir. 1994); *United States v. Lindsay*, 985 F.2d 666, 674 (2d Cir. 1993); *United States v. Martinez*, 7 F.3d 146, 148 (9th Cir. 1993), *as amended* (Nov. 9, 1993); *United States v. Correa-Ventura*, 6 F.3d 1070

[7] The persuasive authority examined by the court interpreted the phrase "a firearm," which the court characterized as "identical statutory language." *Id.*, at 419.

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

[9] It does not appear that other state courts have addressed the issue. However, at least one state prohibits multiple convictions where an offender steals multiple firearm or possesses multiple stolen firearms. *State v. Surrett*, 217 N.C. App. 89, 99, 719 S.E.2d 120 (2011); *State v. Boykin*, 78 N.C. App. 572, 575, 337 S.E.2d 678 (1985).

(5th Cir. 1993); *United States v. Moore*, 958 F.2d 310 (10th Cir. 1992); *United States v. Hamilton*, 953 F.2d 1344, 1346 (11th Cir. 1992).[10]

Third, the *DeSantiago* court erroneously reasoned that imposing an enhancement for each firearm "would not absurdly extend sentences" because the statutory maximum provides a cap on the total sentence. *DeSantiago*, 149 Wn.2d at 421. In fact, as this case illustrates, the "suggested absurdity" is NOT "dissolved by a plain reading of the statute" when the statutory maximum is life in prison. *Id.* The trial court here imposed 30 years in firearm enhancements—more than it imposed for either the murder of Burkybile or the assault on his wife.[11] CP 328.

For all these reasons, the *dicta* in *DeSantiago* should not control here. Mr. Anguiano was eligible for two firearm enhancements—one for each underlying offense. The court should have imposed 120 months in enhancements (5 years for each offense), rather than the 30 years it added to Mr. Anguiano's sentence. The excess enhancements must be vacated and the case remanded for sentencing. The Supreme Court should accept review and clarify that only one firearm enhancement may be imposed for each conviction committed while armed. This case presents a significant

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

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

constitutional issue that is of substantial public interest. RAP 13.4(b)(3) and (4).

II. THE SUPREME COURT SHOULD ACCEPT REVIEW AND DETERMINE IF THE ADMISSION OF PRIOR "BAD ACT" EVIDENCE CAN VIOLATE DUE PROCESS.

Over defense objection, the State introduced evidence connecting Mr. Anguiano to property previously stolen from the gun club residence and argued that he'd participated in the prior burglary. This undermined Mr. Anguiano's self-defense claim and bolstered the State's theory. The trial judge failed to instruct jurors to consider the evidence only for a limited purpose.[12] Besides violating ER 403 and ER 404 (b), the error infringed Mr. Anguiano's Fourteenth Amendment right to due process, by permitting jurors to convict based on an improper propensity inference.

A. The Supreme Court should clarify that discretionary decisions violating constitutional rights are reviewed *de novo.*

Appellate courts review constitutional issues *de novo. Lenander v. Washington State Dep't of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016); *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016). However, the Supreme Court has issued conflicting opinions on the proper standard of review of discretionary decisions violating an accused person's constitutional rights. The better approach is to review *de novo* a trial court's discretionary decisions that infringe constitutional rights.

The Supreme Court has applied the *de novo* standard to discretionary decisions that would otherwise be reviewed for abuse of discretion.

[12] Although defense counsel objected to the admission of the evidence, he did not request a limiting instruction. RP (5/26/15) 252-254.

State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576, 579 (2010); *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009). In *Jones*, for example, the court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones*, 168 Wn.2d at 719.[13] Similarly, the *Iniguez* court reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. The *Iniguez* court specifically pointed out that review would have been for abuse of discretion had the defendant not argued a constitutional violation. *Id.*

However, the court has not applied this rule consistently. For example, one month prior to its decision in *Jones* , the court apparently applied an abuse-of-discretion standard to questions of admissibility under the rape shield law, even though—as in *Jones*— the defendant alleged a violation of his right to present a defense. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010).

This inconsistency should not be taken as a repudiation of *Jones* and *Iniguez.* Cases applying the abuse-of-discretion standard have not grappled with the rationale supporting the *Jones* and *Iniguez* decisions. *See, e.g.*, *State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013); *State v. Clark*, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017).

[13] Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

For example, in *Dye,* the court indicated that "[a]lleging that a ruling violated the defendant's right to a fair trial does not change the standard of review." *Id.,* at 548. However, the *Dye* court did not cite *Iniguez* or *Jones. Id.,* at 548. Nor did it address the rationale underlying application of the *de novo* standard for constitutional violations. Furthermore, the petitioners in *Dye* did not ask the court to apply a *de novo* standard. *See* Petition for Review[14] and Supplemental Brief.[15] As the *Dye* court noted, the petitioner "present[ed] no reason for us to depart from [an abuse-of-discretion standard]." *Id.*[16] There is no indication that the *Dye* court intended to overrule *Iniguez* and *Jones*. *Id.*

In *Clark,* the court announced it would "review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless no reasonable person would take the view adopted by the trial court." *Id.* (internal quotation marks and citations omitted). Upon finding that the lower court had excluded "relevant defense evidence," the reviewing court would then "determine as a matter of law whether the exclusion violated the constitutional right to present a defense." *Id.*

Although the *Clark* court cited *Jones,* it did not suggest that *Jones*

[14] Available at http://www.courts.wa.gov/content/Briefs/A08/879290%20prv.pdf (last accessed 7/11/17).

[15] Available at http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf (last accessed 7/11/17).

[16] By contrast, the Respondent did argue for application of an abuse-of-discretion standard. *See Dye,* Respondent's Supplemental Brief, pp 8-9, 17-18, available at http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%20brief.pdf (last accessed 7/11/17).

was incorrect, harmful, or problematic, and did not overrule it. *See, e.g.*, *State v. Armstrong*, 188 Wn.2d 333, 340 n. 2, 394 P.3d 373 (2017) ("For this court to reject our previous holdings, the party seeking that rejection must show that the established rule is incorrect and harmful or a prior decision is so problematic that we must reject it.")

The *Clark* court did not even acknowledge its deviation from the standard applied by the *Jones* court. *Id.* Nor does the *Clark* opinion mention *Iniguez.* Furthermore, as in *Dye*, the Respondent in *Clark* argued for the abuse-of-discretion standard, and Petitioner did not ask the court to apply a different standard. *See* Respondent's Supplemental Brief, p. 16;[17] Petitioner's Supplemental Brief.[18]

Constitutional errors should be reviewed *de novo. Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. This rule encompasses discretionary decisions that violate constitutional rights. Review of constitutional violations for abuse of discretion puts the constitutional rights of an accused person in the hands of the individual judge presiding over that person's trial.

Furthermore, the standard set forth in *Clark* makes the *de novo* standard meaningless: an abuse of discretion resulting in the exclusion of relevant and admissible defense evidence will always violate the right to present a defense. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281.

[17] Available at http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf (last accessed 2/10/17).

[18] Available at http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf (last accessed 2/10/17).

Such cases will turn on harmless error analysis, not on *de novo* review of the error's constitutional import.

The Supreme Court should accept review and adhere to the *de novo* standard as applied in *Iniguez* and *Jones*. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. This case raises constitutional issues that are of substantial public interest. RAP 13.4(b)(3) and (4).

B. The Supreme Court should reverse because jurors may have voted to convict Mr. Anguiano based on propensity evidence.

In a criminal case, the use of propensity evidence may violate due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Garceau v. Woodford* 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).[19] This type of evidencecan render a trial "so fundamentally unfair as to constitute a violation of the Due Process Clause." *Id.*, at 776. In *Garceau,* the Ninth Circuit addressed an instruction permitting jurors to draw an inference of criminal propensity from a prior conviction.[20] *Id.* The court found that the instruction violated due process and reversed the defendant's conviction. *Id.*, at 778;[21] *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

[19] The U.S. Supreme Court has expressly reserved ruling on the issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[W]e express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime.")

[20] The instruction also permitted jurors to use the evidence for other purposes. *Id.*, at 773.

[21] Although the Supreme Court reversed the *Garceau* decision, it did not reach the merits of the argument. Instead, it found that the Ninth Circuit had failed to correctly apply newly-enacted standards applicable to *habeas corpus* petitions. *Woodford v. Garceau*, 538 U.S.

It has since clarified that the use of propensity evidence "can amount to a constitutional violation only if its prejudicial effect far outweighs its probative value." *United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001) (addressing FRE 403 and FRE 414). This court should accept review and take this opportunity to clarify the use of propensity evidence may violate due process. *Id.*

1. The trial court should have excluded the evidence.

In Mr. Anguiano's case, the evidence of the prior burglary should not have been admitted. Because the court gave no limiting instruction, the jury was permitted to use the prior burglary as propensity evidence.[22] The potential for prejudice far outweighs what little relevance the evidence might have. *Id.*

Applying a *de novo* standard (rather than the more deferential abuse-of-discretion standard used by the Court of Appeals), the trial court erred by overruling Mr. Anguiano's objection. The evidence should have been excluded under ER 404 (b) and ER 403.[23] ER 404(b) provides that

---

202, 204, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003) , (discussing the Anti-terrorism and Effective Death Penalty Act of 1996; *see* 28 U.S.C. § 2254). The AEDPA (and the absence of "clearly established" federal law as determined by the Supreme Court effectively put an end to federal review the issue. *See, e.g.*, *Alberni v. McDaniel*, 458 F.3d 860, 864 (9th Cir. 2006); *see also* Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 Lewis & Clark L. Rev. 741 (2010) *and* Ursula Bentele, *The Not So Great Writ: Constitution Lite for State Prisoners*, 5 U. Denv. Crim. L. Rev. 34, 35 (2015).

[22] Mr. Anguiano does not directly challenge the court's failure to give a limiting instruction, since defense counsel failed to request one. RP (5/26/15) 252-254. Instead, the absence of a limiting instruction is what permits the claim that the admission of the evidence violated due process.

[23] In *Garceau*, the Ninth Circuit applied a three-part test derived from its earlier decision in *McKinney*. The test has apparently been abandoned. *LeMay*, 260 F.3d at 1026.

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404 (b) must be read in conjunction with ER 403, which requires that probative value be balanced against the danger of unfair prejudice.[24] *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

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

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448. The court must conduct this inquiry on the record. *McCreven*, 170 Wn. App. at 458. Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008). If the evidence is admitted,

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

the court must give a limiting instruction to the jury. *See Gunderson*, 181 Wn.2d at 923.

Although the defense objected under ER 404(b), the trial court failed to conduct the necessary analysis on the record. RP (5/27/15) 252-253. First, the court did not determine if a prior burglary occurred or if Mr. Anguiano had any connection to it. RP (5/27/15) 254. Indeed, the court ruled the evidence admissible without having had an opportunity to assess the credibility of Burkybile's wife. RP (5/27/15) 254; *see State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002).

Second, the judge did not weigh the probative value of the evidence against the danger of unfair prejudice.[25] RP (5/27/15) 254. Nothing indicates the judge presumed the evidence inadmissible, tasked the State with the burden of proving admissibility, or resolved any doubts in favor of exclusion. *McCreven*, 170 Wn. App. at 458; *Slocum*, 333 P.3d at 546.

The Court of Appeals erroneously applied the deferential abuse-of-discretion standard and excused the trial court's errors. Opinion, pp. 10-12. In addition, the court undertook the task of balancing probative value and prejudicial effect based on the appellate record. Opinion, pp. 11-13. It made credibility determinations, ignored the presumption against admission and made the required findings itself. Opinion, pp. 11-13. Appellate courts are not able to make such determinations "from a cold, printed record." *State v. Perez-Valdez*, 172 Wn.2d 808, 819, 265 P.3d 853 (2011) (internal quotation marks and citation omitted).

[25] The court admitted the evidence to show "motivation." RP (5/27/15) 254.

Evidence of the prior burglary was unfairly prejudicial. In addition to whatever proper purpose it may have served, the evidence suggested that Mr. Anguiano was a criminal type and permitted jurors to convict because he had a propensity to commit crimes like the ones charged. Its admission violated his constitutional right to due process. *Garceau*, 275 F.3d at 775; *see LeMay*, 260 F.3d at 1026. The Supreme Court should accept review, reverse the Court of Appeals, and remand with instructions to exclude evidence of the prior burglary.

2. The error was not harmless beyond a reasonable doubt.

When an evidentiary ruling violates constitutional rights, the State bears the burden of showing beyond a reasonable doubt that the error is harmless. *State v. DeLeon*, 185 Wn.2d 478, 487–88, 374 P.3d 95 (2016). The court must find "beyond a reasonable doubt—that *any reasonable jury* would have reached the same result, despite the error." *Id.* (internal quotation marks and citation omitted).

Here, the court's error resulted in a conviction based in part on propensity evidence, in violation of Mr. Anguiano's Fourteenth Amendment right to due process.[26] *Garceau*, 275 F.3d at 775. The error is presumed prejudicial, unless the State can show harmlessness beyond a reasonable doubt. *DeLeon*, 185 Wn.2d at 487–88.

[26] The violation of Mr. Anguiano's due process right is a manifest error affecting that may be reviewed for the first time on appeal. RAP 2.5 (a)(3). The error had practical and identifiable consequences, because the trial court "could have corrected the error," given what it knew at the time. *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan 21, 2010). Even though defense counsel's objections were based on ER 404 (b) and lack of foundation, the Court of Appeals should address Mr. Anguiano's constitutional argument on its merits. RAP 2.5(a)(3).

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

The State cannot show beyond a reasonable doubt that jurors did not convict based on the forbidden propensity inference. This is especially true given the court's failure to provide a limiting instruction on the issue. *See Gunderson*, 181 Wn.2d at 923. The improper admission of propensity evidence violated Mr. Anguiano's due process right to a fair trial by an impartial jury. The constitutional error requires reversal of Mr. Anguiano's convictions.[27] *Garceau*, 275 F.3d at 775.

C. The Court of Appeals failed to apply the correct standards to Mr. Anguiano's argument.

The Court of Appeals failed to grapple with the constitutional error Mr. Anguiano raised. Opinion, pp. 8-13. Instead, the court addressed the argument over propensity evidence as one involving mere evidentiary error. Opinion, pp. 9-12. The court's failure to address the constitutional error allowed it to apply the more deferential abuse-of-discretion standard applicable to non-constitutional evidentiary error. Opinion, p. 9. It also

[27] In addition, the convictions must be reversed for violation of ER 403 and ER 404(b). The erroneous admission of the evidence in violation of these rules requires reversal because there is a reasonable probability that it affected the outcome of the trial. *Slocum*, 183 Wn. App. at 456.

permitted the court to apply the less rigorous non-constitutional standard for harmless error. Opinion, p. 13.

Because Mr. Anguiano raises a due process violation, review should have been *de novo. Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. The strict harmless error standard for constitutional violations should have applied. *DeLeon*, 185 Wn.2d at 487–88. The court's failure to even acknowledge Mr. Anguiano's constitutional argument led it to apply the wrong standards and resulted in an erroneous decision. This court should accept review, reverse the court of appeals, and remand the case with instructions to exclude the propensity evidence upon retrial.

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

The shooting occurred in a rural area, with no other businesses or residences nearby. RP (5/27/15) 270-271; RP (6/1/15) 652-653; RP (6/2/15) 866-868. Mr. Anguiano and his companions shot at a one person and the house he inhabited. RP (6/1/15) 659-662. The State didn't prove that Mr. Anguiano or any of his companions knew Burkybile lived with others. RP (6/2/15) 872. The evidence was insufficient to prove murder by extreme indifference. *See State v. Anderson*, 94 Wn.2d 176, 187-192, 616 P.2d 612 (1980); *State v. Mitchell*, 29 Wn.2d 468, 484, 188 P.2d 88 (1947)); *State v. Berge*, 25 Wn. App. 433, 437, 607 P.2d 1247 (1980). The conviction for that crime violated Mr. Anguiano's Fourteenth Amendment

right to due process. U.S. Const. Amend. XIV.[28] It must be reversed and the charge dismissed with prejudice.[29] *See State v. Rodgers*, 146 Wn.2d 55, 60, 43 P.3d 1, 3 (2002).

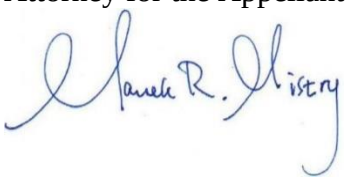
CONCLUSION

The Supreme Court should accept review and hold that the unit of prosecution for firearm enhancements is one enhancement per conviction, regardless of the number of firearms carried. The court should also clarify that *de novo* review applies to any trial court decision alleged to violate a constitutional right. The court should hold that a conviction based in part on propensity evidence violates due process.

Respectfully submitted August 30, 2017.

BACKLUND AND MISTRY

Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

[28] The Court of Appeals erroneously inverted the burden of proof, noting that "[t]here was no evidence that Mr. Anguiano had a basis for believing that only Mr. Burkybile was in the home." Opinion, p. 19. Mr. Anguiano had no burden to prove his lack of knowledge.

[29] The felony murder need not be reversed for insufficiency. *See* CP 300.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Luis Anguiano, DOC #344284
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

and I sent an electronic copy to

appeals@co.yakima.wa.us
david.trefry@co.yakima.wa.us
joseph.brusic@co.yakima.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

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

Signed at Olympia, Washington on August 30, 2017.

_____
Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX:

Court of Appeals Unpublished Opinion, filed on August 3, 2017.

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

August 3, 2017

E-mail
Jodi R. Backlund
Manek R. Mistry
Backlund & Mistry
PO Box 6490
Olympia, WA 98507-6490

E-mail
Joseph Anthony Brusic
David Brian Trefry
Yakima County Prosecutors Office
PO Box 4846
Spokane, WA 99220-0846

CASE # 335950
State of Washington v. Luis Alberto Anguiano
YAKIMA COUNTY SUPERIOR COURT No. 141001504

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Enc.

c: **E-mail**—Hon. Michael G. McCarthy

c: Luis Alberto Anguiano
#344284
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

FILED
AUGUST 3, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent,	)	No. 33595-0-III
v.	)	
LUIS ALBERTO ANGUIANO, Appellant.	)	UNPUBLISHED OPINION

SIDDOWAY, J. — Luis Anguiano was sentenced to almost 70 years' incarceration upon conviction for first degree murder with extreme indifference and first degree assault, with findings that three firearms were used in connection with each crime. On

appeal, he argues that the trial court erred when it (1) admitted prior bad acts evidence, (2) found sufficient evidence of extreme indifference, (3) imposed multiple firearm enhancements on each conviction, (4) calculated his offender score without requiring the State to prove prior convictions, and (5) imposed legal financial obligations (LFOs) without inquiring into Mr. Anguiano's ability to pay. We decline to address the unpreserved LFO issue and finding no error or abuse of discretion, affirm.

FACTS AND PROCEDURAL BACKGROUND

On a Saturday morning in January 2014, Charles Burkybile, the caretaker of a private gun club near Harrah in Yakima County, died after being shot through the door of his home as he attempted to hold it closed against Luis Anguiano and three others. Yolauni Hueso, Mr. Burkybile's significant other, who lived with him and their two young children at the caretaker's residence, would later testify that Mr. Anguiano and the three others arrived at her and Mr. Burkybile's isolated home unexpectedly, and in a car they did not recognize. Mr. Burkybile opened the door to speak to the men and she heard him say, "[T]his is a gun club. We don't do that here," before closing the door and locking it. He then looked at her and stated, "I don't know who they are. They're just a bunch of Mexican gangster[s]." Report of Proceedings (RP)[1] at 278.

[1] Unless otherwise noted, citations to the report of proceedings are to the April 20, 2015, 1011-page report of trial proceedings.

Ms. Hueso then heard a shot and the family's German shepherd, which had been barking at the men outside, yelped. She heard car doors open, someone running toward the house, and then the sounds of one or more of the men trying to kick in the door. She retreated with the children to a bedroom, where she called 911 and reported that four men in a green car were shooting at the home. The 911 operator told her to stay in the room until the gunfire stopped. When it did, she returned to where her husband had been barring the door and saw him on the ground, their .22 rifle next to him. He was conscious but pointed to his chest, where he had been shot. He died from internal bleeding en route to the hospital.

Seventeen-year-old Carlos Hernandez, the driver of the green car, testified as a witness for the State in the trial below. He told jurors he had agreed to drive his friend Martin Alvarez and brothers Jose Davilla and Luis Anguiano to a place where Mr. Anguiano was going to buy marijuana. He was not familiar with Harrah but followed directions. As they approached the caretaker's home, which Mr. Hernandez described as "in the middle of nowhere," he was alarmed to see his three passengers pulling out handguns. RP at 654-55.

According to Mr. Hernandez, upon arrival, Mr. Anguiano approached the home but Mr. Burkybile stepped outside before he reached the door. He heard Mr. Anguiano ask Mr. Burkybile "if he knew anyone that sold weed" and Mr. Burkybile said no and to "get out of here," and went back in the home, shutting the door. RP at 658. At that point,

Mr. Hernandez said Mr. Alvarez got out of the car and shot the dog, which had started barking. Mr. Alvarez and Mr. Anguiano then "tried kicking down the door" but backed up when Mr. Burkybile pointed a rifle out the door and "all the shooting happened." RP at 658-59. Mr. Anguiano, Mr. Alvarez and Mr. Davilla all fired at the home. Mr. Hernandez ducked, at the same time trying to drive away, and Mr. Anguiano, Mr. Alvarez and Mr. Davilla retreated into Mr. Hernandez's car. Ms. Hueso later estimated that she heard as many as 14 or 15 shots fired and that the shooting toward the house continued as the men drove away. Mr. Hernandez testified that Mr. Anguiano fired his entire clip and that Mr. Alvarez and Mr. Davilla each fired six or seven shots. He agreed that even as he drove away, his passengers continued shooting.

Officer Raymond Enriquez was driving toward the gun club in response to Ms. Hueso's 911 call when he saw a green car with Hispanic passengers that met her description of the shooters. He turned and followed it. Mr. Hernandez was encouraged by his passengers to "step on it," and attempted to elude the officer but eventually hit a curb and crashed. RP at 662. Officer Enriquez saw four men flee the scene of the accident.

Mr. Davilla was later found in the vicinity and on the Monday following the Saturday shooting, Mr. Hernandez appeared at the Yakima County Sheriff's Department with a lawyer and turned himself in. He told a detective what had happened and led detectives to the area where his passengers had thrown their handguns from the car

during the chase. Officers found two of the firearms. Mr. Hernandez was referred to juvenile court, agreed to testify against Mr. Anguiano and Mr. Alvarez, and was charged with eluding the police and criminal assistance.

The State ultimately charged Mr. Anguiano with two alternative counts of first degree murder (committed in furtherance of a felony, and by extreme indifference), second degree felony murder, the first degree assault of both Mr. Burkybile and Ms. Hueso, and attempted first degree burglary.[2] The State asserted that each crime was committed while armed with three firearms.

Mr. Anguiano's version of events was that he had purchased marijuana from Mr. Burkybile many times in the past and traveled to the gun club for the sole purpose of buying marijuana. After Mr. Burkybile closed the door on him, he claimed to have kicked it only three times, out of anger at Mr. Burkybile's abrupt treatment. He claimed he shot his gun only in self-defense after Mr. Burkybile fired his rifle at the men from inside the home.

Before trial, there was discussion of the fact that the State wanted to offer evidence suggesting that Mr. Anguiano had been involved in a burglary of the Burkybile/Hueso home two weeks before the shooting, as a result of which he knew that there was a large amount of marijuana and cash there. Ms. Hueso had a prescription for

---

[2] One count of first degree unlawful possession of a firearm was also charged, but was dismissed.

marijuana and it was undisputed that the couple maintained a supply large enough for her use and to sell to friends. It was the State's theory that knowing this, Mr. Anguiano had returned with his armed companions to steal drugs and money. The evidence and theory came up in a pretrial hearing, when motions in limine were being reviewed and defense counsel stated that for "[a]ny 404(b) evidence that the [S]tate intends to elicit, I'd like to have the opportunity to voir dire whatever witness they're trying to get it in through and object outside the presence of the jury." RP at 17.

On the second day of trial the matter of the prior burglary-related evidence was raised again, outside the presence of the jury. This time, the trial court stated it would allow the State to offer the evidence to show the motivation for the crimes charged. Over defense counsel's objection, it allowed the State to present evidence that when apprehended, Mr. Anguiano had two items in his possession that Ms. Hueso testified had been stolen from her home two weeks earlier: a cannabis jar labeled "Girl Scout Cookies"[3] and a box of Hornady Lever Revolution 30-30 Winchester 160-grain ammunition that she claimed to have purchased at a Bi-Mart store shortly before Christmas 2013.

---

[3] Evidently a popular, high potency strain of marijuana. *See Girl Scout Cookies*, ALLBUD, https://www.allbud.com/marijuana-strains/hybrid/girl-scout-cookies [https://perma.cc/LAP5-DSYE].

Also over defense counsel's objection, the trial court admitted as a business record a retail receipt showing a purchase from Bi-Mart of two boxes of the Hornady 30-30 ammunition on December 23, 2013—several weeks before the first burglary. The Universal Product Code (UPC) on the receipt confirmed that the ammunition found in Mr. Anguiano's bag was the same type as that purchased from Bi-Mart in December, although it did not prove that the box found in Mr. Anguiano's possession was the box stolen from the Burkybile/Hueso home.

The jury found Mr. Anguiano guilty on all counts, found by special verdict that the murder of Mr. Burkybile occurred during an attempted first degree robbery and under circumstances manifesting extreme indifference to human life, and found that Mr. Anguiano and his accomplices had been armed with three firearms in connection with each count.

The trial court ruled that the second degree murder, first degree assault on Mr. Burkybile, and attempted burglary counts merged into the first degree murder count. In sentencing Mr. Anguiano for the two convictions that remained, it calculated his offender score as two for the murder conviction and imposed a base sentence of 347 months, with an additional 180 months in firearm enhancements. It calculated the offender score as zero for the first degree assault conviction and imposed a base sentence of 123 months, with another 180 months in firearm enhancements. With the sentences on both counts and the firearm enhancements running consecutively, the total term of confinement

imposed was 830 months. The court found Mr. Anguiano able to pay costs and imposed $1,400 in legal financial obligations. Mr. Anguiano did not object.

Mr. Anguiano appeals.

ANALYSIS

Evidentiary rulings

Mr. Anguiano assigns error to two of the trial court's evidentiary rulings. We first address his contention that the court admitted evidence that he had burglarized the Birkybile/Hueso home a couple of weeks before Mr. Birkybile was killed, without complying with the procedure required before admitting evidence under ER 404(b).

ER 404(b) prohibits the use of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." The same evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," however. ER 404(b).

The proponent of prior bad act evidence bears the burden of establishing that the act is offered for a proper purpose. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Before a trial court can admit the 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.'" *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

Appellate courts "review the trial court's interpretation of ER 404(b) de novo as a matter of law." *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Where the trial court correctly interprets the rule, its decision to admit evidence of misconduct is reviewed for abuse of discretion. *Id.* "A trial court abuses its discretion where it fails to abide by the rule's requirements." *Id.*

The State incorrectly asserts that Mr. Anguiano did not object to the evidence on ER 404(b) grounds. He identified ER 404(b) as a basis for his objection twice, and the court ruled outside the presence of the jury that it would admit the evidence on the issue of motive. Mr. Anguiano is deemed to have a standing objection. *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995).

In most cases involving evidence of prior bad acts, the proponent offers equally strong evidence that (1) the bad act occurred and (2) the person against whom the evidence is offered did it. But ER 404(b) can also apply to cases such as this one where the stronger evidence is that the bad act occurred, but the identity of who did it is less clear. *State v. Norlin* is one such case—a prosecution for assault of an infant, in which the State offered medical evidence that the infant had suffered earlier, intentionally inflicted injuries but there was no direct evidence that the defendant, Norlin, inflicted them. 134 Wn.2d 570, 951 P.3d 1131 (1998). In such a case, our Supreme Court held,

the bad acts evidence was admissible to show absence of accident pursuant to ER 404(b) "only if the State connects the defendant to the prior injuries by a preponderance of the evidence." *Id.* at 581. Similarly here, the State had the burden of showing that the prior burglary occurred connecting Mr. Anguiano to it by a preponderance of the evidence.

A trial court may determine that the State has met its burden of showing the prior misconduct occurred "based solely on the State's offer of proof." *State v. Stein*, 140 Wn. App. 43, 66, 165 P.3d 16 (2007) (citing *State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002), *aff'd*, 167 Wn.2d 28, 216 P.3d 393 (2009)). "[W]here a trial court rules on the admissibility of ER 404(b) evidence immediately after both parties have argued the matter and the court clearly agrees with one side, an appellate court can excuse the trial court's lack of explicit findings." *Stein*, 140 Wn. App. at 66 (citing *State v. Pirtle*, 127 Wn.2d 628, 650, 904 P.2d 245 (1995)).

Mr. Anguiano is correct that the trial court made no explicit finding that the State established the prior burglary occurred and connected him to it by a preponderance of the evidence. However, the trial court found the evidence was admissible immediately after the State's offer of proof that when arrested, Mr. Anguiano had in his possession the Girl Scout Cookies cannabis jar and the box of 30-30 Hornady bullets that Ms. Hueso would identify as stolen from her home only two weeks before. We can excuse the lack of explicit findings.

Mr. Anguiano argues that both the Girl Scout Cookies cannabis and the Hornady bullets are commercially sold and cannot be established as the same items stolen from the Burkybile/Hueso home. But in *Norlin*, the State could only prove that the defendant babysat the injured infant between 40 and 70 hours a week (of the 168 total hours in a week) during the period the earlier injuries occurred, and that the infant's mother had seen evidence of injuries from other "accidents" reported by the defendant when the child was in his care. 134 Wn.2d at 583. Although the evidence could "only be described as circumstantial, it was sufficient to connect Norlin to [the] injuries by a preponderance of the evidence." *Id.* Here, we are not presented with evidence of items in Mr. Anguiano's possession so common that they would be found in the possession of many people. Ms. Hueso testified that the Girl Scout Cookies cannabis was a type she had purchased only from a small dispensary in Seattle. The items were sufficiently unusual that evidence Mr. Anguiano possessed them was circumstantial evidence connecting him to the prior burglary by a preponderance of the evidence.

The trial court also did not weigh the probative value of the evidence against the risk of unfair prejudice, but the record is sufficient to permit meaningful review of this basis for exclusion under ER 403. *See State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2000); *State v. Donald*, 68 Wn. App. 543, 547, 844 P.2d 447 (1993); 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 404.32 (6th ed. 2016) (noting that some courts require the trial court to balance probative and prejudicial

effect on the record, but others do not insist on strict compliance and have even performed the balancing for the first time on appeal); *State v. Hepton*, 113 Wn. App. 673, 688, 54 P.3d 233 (2002) ("When the trial court identifies the purpose for which the evidence is believed to be relevant, the reviewing court can determine whether the probative value of the evidence outweighs its prejudicial effect.").

Mr. Anguiano argues that admission of the evidence of the earlier burglary unfairly prejudiced him by undermining his credibility, particularly because the prior act was similar to the charged crime. Reply Br. at 6. While this may be true, the State did not rely on the evidence of the earlier burglary to argue to the jury that Mr. Anguiano was a criminal type or a burglar—it relied on the evidence for the purpose identified to the court: to explain that Mr. Anguiano traveled with the others to the remote gun club not to buy marijuana, but because he was aware from the earlier burglary of drugs and cash likely to be found in the caretaker's home.

The evidence is highly probative. Absent some prior knowledge of the home, why would Mr. Anguiano have traveled so far, and enlisted others, to burglarize it? Absent evidence that Mr. Anguiano knew that there was ample marijuana and cash to be found in the Burkybile/Hueso home, Mr. Anguiano could easily have argued to jurors that a plan

to travel all the way to Harrah to attempt a burglary or home invasion robbery in broad daylight made no sense.[4]

We would also find any error to be harmless. There was overwhelming untainted evidence against Mr. Anguiano in the form of Ms. Hueso's and Mr. Hernandez's consistent testimony; the evidence of Mr. Anguiano's and his accomplices' flight; and the implausibility of his testimony that the shootout was prompted by his three frustrated kicks to the door, Mr. Burkybile's overreaction, and the regrettable coincidence that he, his brother, and Mr. Alvarez all brought handguns to the marijuana buy. We are satisfied that the result of the trial would have been the same had the trial court sustained Mr. Anguiano's ER 404(b) objection.

Mr. Anguiano also contends the court erred when it admitted as a business record a retail receipt reflecting a purchase from Bi-Mart on December 23, 2015, of a box of ammunition identical to that found in Mr. Anguiano's possession at the time of his arrest. Hearsay, such as a store receipt offered to prove that a purchase occurred, is inadmissible under ER 802 unless it falls within an exception. The Uniform Business Records as

[4] The State also contends that the earlier burglary helps explain Mr. Burkybile's hypervigilant behavior on the day he was killed. But for that purpose, only evidence that the burglary had occurred would be needed; there would have been no need to offer evidence that Mr. Anguiano was connected with it.

Evidence Act (UBRA), chapter 5.45.020 RCW,[5] provides such an exception for business records because they "are presumptively reliable if made in the regular course of business and there was no apparent motive to falsify." *State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990). A trial court's decision "in admitting or excluding such records is given much weight and will not be reversed unless there has been a manifest abuse of discretion." *Cantrill v. Am. Mail Line*, 42 Wn.2d 590, 608, 257 P.2d 179 (1953).

The State offered the exhibit through Brian Schroeder, who was manager of the Sunnyside Bi-Mart store at the time of trial but had not been the manager in December 2013. He testified that such receipts are kept in the regular course of business:

> Q. . . . is this document, state's Identification 216, an accurate document kept in the normal course of business by the Bi-Mart Corporation?
> A. On a computer it is. On paper, no.

RP at 726. Though he never testified that such receipts are created at or near the time of a transaction, his testimony establishes that they are:

> A. . . . [I]s this something that you keep similar records in your store?
> Q. My store, no.
> A. Okay. And what kind of records do you normally keep? Do you keep sales entrances?

---

[5] RCW 5.45.020 provides:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

> Q. We keep sales transactions of the current day, the previous day. Other transactions are kept in Eugene.

RP at 718. Records of a current day's transactions could not be kept at the store if they were not made on the day of the transaction.

Mr. Anguiano challenges whether Mr. Schroeder was a "custodian" or "other qualified witness," because at the time of trial he had only worked at the store for three months, receipts were kept on a hard drive at a store in a different city, and he did not personally procure the receipt nor verify its contents with company records. Under the business records statute, however, reviewing courts broadly interpret the statutory terms "custodian" and "other qualified witness." *State v. Smith*, 55 Wn.2d 482, 348 P.2d 417 (1960); *State v. Ben-Neth*, 34 Wn. App. 600, 603, 663 P.2d 156 (1983); *State v. Quincy*, 122 Wn. App. 395, 399, 95 P.3d 353 (2004). The statute does not require the person who created the record to identify it as long as one who has custody of the record as a regular part of his work can do so. *Cantrill*, 42 Wn.2d 590; *Ben-Neth*, 34 Wn. App. at 603; *Quincy*, 122 Wn. App. at 399. "Identification by a custodian may be sufficient even though the custodian was hired after the record was made." 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 803.41, at 111 (6th ed. 2016) (citing *Cantrill*, 42 Wn.2d 590). Admissibility hinges on the opinion of the court that the sources of information, method, and time of preparation were such as to justify its

admission. *Quincy*, 122 Wn. App. at 401; *Ben-Neth*, 34 Wn. App. at 603. Computerized records are treated the same as any other business records. *Quincy*, 122 Wn. App. at 399.

The store manager testified that he was the custodian of records, despite the fact that records over two days old are kept electronically in a different city:

> THE COURT: . . . Are you the custodian of that record . . . ? The person who's in charge of it, is that you or somebody in Eugene?
> THE WITNESS: I would believe me.
> THE COURT: Okay. So you have access to those records at your store?
> THE WITNESS: Yes, sir.
> THE COURT: And you're in charge of them?
> THE WITNESS: Yes, sir.
> THE COURT: But they're not kept at your store?
> THE WITNESS: They're not. They're kept in Eugene.

RP at 721. The manager further testified that he had received the receipt from Bi-Mart's corporate office, and that he assumed the previous store manager had accessed and printed it, though he could not be sure. The statute does not require more. The trial court clearly found the evidence sufficiently reliable.

And here again, any error in admitting the receipt was harmless. Because any error was evidentiary in nature, this court applies "the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Although it was established outside the presence of the jury that Mr. Schroeder was able to tie the receipt to a cash purchase by Ms. Hueso because she had purchased a firearm and completed a federal firearm document the same day, the trial

court excluded testimony about that tie-in because of the State's late receipt and disclosure of the firearm form. As a result, the Bi-Mart receipt was only evidence that *someone* purchased a box of the ammunition on the day in question. As such, it was cumulative to, and less important than, Ms. Hueso's testimony identifying the ammunition found in Mr. Anguiano's possession as ammunition she had purchased at Bi-Mart right before Christmas in December 2013.

Evidence sufficiency

Mr. Anguiano next contends that insufficient evidence supports his conviction for first degree murder manifesting extreme indifference as provided by RCW 9A.32.030(1)(b). The statute provides that a person is guilty of murder in the first degree when "[u]nder circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person."

To prove that the defendant acted with extreme indifference, "the State must show that the defendant acted recklessly and with extreme indifference to human life in 'general[ ],' as opposed to simply endangering the life of a 'particular' victim or victims." *State v. Pettus*, 89 Wn. App. 688, 694, 951 P.2d 284 (1998) (alteration in original) (quoting *State v. Berge*, 25 Wn. App. 433, 437, 607 P.2d 1247 (1980)), *abrogated in part on other grounds by State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005). For example, where a defendant fired 30 shots into and around the victim, who was sleeping

in the defendant's living room, the court found insufficient evidence of extreme indifference because the "attack was specifically directed at a particular victim." *Berge*, 25 Wn. App. at 437 (emphasis omitted). Similarly, there was no extreme indifference where a defendant placed a toddler into a bath of scalding hot water from which she eventually died because the indifference was directed only toward the murdered individual. *State v. Anderson*, 94 Wn.2d 176, 178-79, 186, 192, 616 P.2d 612 (1980). Mr. Anguiano argues that his conduct, and that of his accessories, was similar: they shot specifically at Mr. Burkybile, did not know or see anyone else in the area, and the shooting occurred in a rural area.

"'The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.'" *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). A criminal defendant's claim of insufficient evidence admits the truth of the State's evidence and "'all inferences that reasonably can be drawn [from it].'" *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015) (alteration in original) (quoting *Salinas*, 119 Wn.2d at 201).

The *Anderson* and *Berge* decisions have been distinguished by later cases "because in each *only* the life of the victim was endangered." *State v. Pastrana*, 94 Wn. App. 463, 473, 972 P.2d 557 (1999) (emphasis added), *abrogated in part on other*

grounds by State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005). In *Anderson*, no one else was conceivably endangered by the defendant's actions in bathing the toddler. In *Berge*, because the shooting took place in the defendant's home and was held by the court to be "specifically directed at a particular victim," it can again be inferred that no one else was conceivably endangered. 25 Wn. App. at 437 (emphasis omitted).

Conversely, a defendant's claim following a road rage incident that he was "unaware that anyone other than the driver [of an offending vehicle] was in the 'line of fire'" did not take his crime outside of the operation of RCW 9A.32.030(1)(b). *Pastrana*, 94 Wn. App. at 471. And in *State v. Pettus*, the court distinguished *Berge* and *Anderson* on the basis that the defendant's shooting *in fact* placed others in the vicinity at grave risk of death, not that he "knowingly" did so. 89 Wn. App. at 694.[6]

There was no evidence that Mr. Anguiano had a basis for believing that only Mr. Burkybile was in the home. Ms. Hueso testified that her car and Mr. Burkybile's truck

---

[6] Mr. Anguiano claims *Pastrana* and *Pettus* were called into question and arguably lacked a full understanding of the elements of murder by extreme indifference. Reply Br. at 8. However, the portions of *Pastrana* and *Pettus* that have been abrogated relate to the definition of "reckless," which has since been narrowed. *See Gamble*, 154 Wn.2d at 469 (concluding that first degree manslaughter is not a lesser included offense of second degree felony murder where the predicate felony is second degree assault); *State v. Henderson*, 182 Wn.2d 734, 741-42, 344 P.3d 1207 (2015) (noting that *Pastrana* and *Pettus* applied a general definition of "reckless" when deciding whether first degree manslaughter was a lesser included offense of first degree murder by extreme indifference and that the definition was later narrowed in *Gamble*, 154 Wn.2d 457). There is no indication that either case misunderstood or misapplied the standards of murder by extreme indifference.

were both at the home that day. Between Mr. Anguiano, Mr. Alvarez, and Mr. Davilla, they fired at least 18 shots. An officer testified to four bullet holes in the door on the east side of the home, another six bullet holes on other portions of the east side of the home, and more than one bullet hole on the south side of the home. Officers found bullet strikes in the interior of the home as well, in the laundry room, kitchen, and in the closet and wall of a back bedroom. Mr. Anguiano and his companions clearly did not limit their fire to the doorway from which Mr. Burkybile fired. Their actions created a grave risk of death, in fact, to all four individuals in the home.

Viewed in the light most favorable to the State, this is sufficient evidence for the jury to have found Mr. Anguiano acted with extreme indifference toward human life in general.

Double jeopardy

Mr. Anguiano next argues that the trial court violated principles of double jeopardy when it imposed three firearm enhancements on each of his two convictions. "The Washington Supreme Court specifically addressed this argument in *State v. DeSantiago*, 149 Wn.2d 402, 415-21, 68 P.3d 1065 (2003), holding 'the plain language of [RCW 9.94A.533[7]] requires a sentencing judge to impose an enhancement for each firearm or other deadly weapon that a jury finds was carried during an offense.'" *State v.*

[7] The *DeSantiago* court analyzed RCW 9.94A.510. The language at issue there has now been recodified in RCW 9.94A.533.

Mancilla, 197 Wn. App. 631, 652, 391 P.3d 507 (2017) (emphasis omitted) (alteration in original); *see also State v. Ose*, 156 Wn.2d 140, 147, 124 P.3d 635 (2005) (noting the statute allows a defendant to be punished for each weapon involved). While Mr. Anguiano argues that the holding in *DeSantiago* was dicta and "rests on a precarious foundation," Br. of Appellant at 24, he will have to make that argument to the Supreme Court. We regard *DeSantiago* as binding authority. *Mancilla*, 197 Wn. App. at 652.

Offender score

At sentencing, the State asserted Mr. Anguiano had two prior felony offenses for delivery of controlled substances. Mr. Anguiano contends the State failed to prove the existence of the two convictions, resulting in a miscalculated offender score.

In order to establish a defendant's criminal history for sentencing purposes, the State must prove a defendant's prior convictions by a preponderance of the evidence. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). The best evidence of a prior conviction is a certified copy of the judgment, but the State may offer other comparable documents of record or transcripts of prior proceedings to establish criminal history. *In re Adolph*, 170 Wn.2d 556, 566, 243 P.3d 540 (2010) (citing *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). "[The] burden is 'not overly difficult to meet' and may be satisfied by evidence that bears some 'minimum indicia of reliability.'" *Id.* at 569 (quoting *Ford*, 137 Wn.2d at 480-81).

The need for the State to produce evidence is obviated where there is "an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing." *Mendoza*, 165 Wn.2d at 928. "The mere failure to object to a prosecutor's assertions of criminal history does not constitute such an acknowledgment." *Id.*

The parties dispute whether defense counsel, in arguing for a downward departure from the standard range, affirmatively acknowledged the criminal history information offered by the State. Mr. Anguiano emphasizes his lawyer's cautionary reference to "the State's calculation," while the State emphasizes the lawyer's reference to his client's "non-violent criminal history of two points":

> [DEFENSE COUNSEL:] When we—you know, *by the State's calculation*, we end up with—you know, a top end of a range that's 497 months . . . . And then 648 months in firearm enhancements. I think that this is a situation that the legislature simply hasn't dealt with yet with regards to what kind of merger doctrines we potentially should have when—when you're talking about multiple co-defendants, accomplice liability with regards to the firearm enhancements, and how to—to deal with that because, you know, *we start* with a base range on the First Degree Murder with—*with his non-violent criminal history of two points*, at 281 to 374, and then we jump—you know, we double that just in enhancements alone because of the multiple offenses. And . . . even though it's—it's really one event, we end up with consecutive, consecutive, consecutive sentences, consecutive enhancements. So, I don't think the Court has any discretion with regards to the enhancements at this point in time. I think the only discretion the Court has is with regards to the permissiveness of the anti-burglary statute as well as, you know, a potential downward departure to get him down to something that I think would be a—a fair and just sentence. I—I would ask the Court to consider that.

RP (Oct. 23, 2014) at 341-42 (emphasis added).

The State has the better argument. Counsel's unqualified reference to his client's "non-violent criminal history of two points" is a sufficient, affirmative acknowledgment.

LFOs

Finally, Mr. Anguiano argues the trial court did not adequately consider his current and likely future ability to pay LFOs and asks that we remand for the trial court to conduct the proper inquiry.

Mr. Anguiano made no objection to the finding that he had the present or future ability to pay the costs imposed and thereby failed to preserve a claim of error. RAP 2.5(a); *State v. Blazina*, 182 Wn.2d 827, 833, 344 P.3d 680 (2015) ("[u]npreserved LFO errors do not command review as a matter of right"). "[A] defendant has the obligation to properly preserve a claim of error" and "appellate courts normally decline to review issues raised for the first time on appeal." *Id.* at 830, 834. The rationale for refusing to review an issue raised for the first time on appeal is well settled—issue preservation helps promote judicial economy by ensuring "that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). A majority of the panel declines to exercise discretion to review the issue for the first time on appeal.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Fearing, C.J.

BACKLUND & MISTRY

August 30, 2017 - 2:50 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	33595-0
Appellate Court Case Title:	State of Washington v. Luis Alberto Anguiano
Superior Court Case Number:	14-1-00150-4

The following documents have been uploaded:

- 335950_Petition_for_Review_20170830144348D3921394_2722.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 335950 State v Anguiano Petition for Review w Appendix.pdf

A copy of the uploaded files will be sent to:

- David.Trefry@co.yakima.wa.us
- appeals@co.yakima.wa.us
- backlundmistry1@gmail.com
- joseph.brusic@co.yakima.wa.us

Comments:

Petition for Review

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com
Address:
PO BOX 6490
OLYMPIA, WA, 98507-6490
Phone: 360-339-4870

Note: The Filing Id is 20170830144348D3921394