

69925-3

69925-3

NO. 69925-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HAILU MANDEFERO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

2011 MAR 15 PM 3:10
COURT OF APPEALS DIV. I
STATE OF WASHINGTON

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
3. FACTS ALLEGED BY MANDEFERO THAT ARE NOT SUPPORTED BY THE RECORD	7
C. <u>ARGUMENT</u>	13
1. THE EVIDENCE SUPPORTED THE JURY'S VERDICT THAT MANDEFERO COMMITTED THESE CRIMES	13
a. Gary Twice Credibly Identified Mandefero As The Man Who Shot Him; That Was Sufficient To Prove Identity	16
b. Gary's Identification Of Mandefero Was Corroborated By The Cell Phone Tower Evidence	32
c. Gary's Immediate Identification of Mandefero As The Man Who Shot Gary Was Corroborated By Additional Strong Circumstantial Evidence	36
2. MATTERS OUTSIDE THE TRIAL RECORD SHOULD NOT BE CONSIDERED BY THIS COURT	44

3.	MANDEFERO'S FIRST ASSIGNMENT OF ERROR IS UNSUPPORTED BY ARGUMENT AND SHOULD BE REJECTED.....	46
4.	MANDEFERO'S CONCLUSION INACCURATELY CHARACTERIZES THE PROSECUTION OF THIS CASE.....	47
D.	<u>CONCLUSION</u>	48

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Brown v. Keane, 355 F.3d 82
(2nd Cir. 2004) 31

Juan H. v. Allen, 408 F.3d 1262
(9th Cir.2005) 31

Ticey v. Peters, 8 F.3d 498
(7th Cir. 1993) 20, 23, 31

United States v. Badger, 983 F.2d 1443
(7th Cir. 1993) 31, 32

United States v. Ezzell, 644 F.2d 1304
(9th Cir. 1981) 42

United States v. Johnson, 427 F.2d 957
(5th Cir. 1970) 41, 42

United States v. Musquiz, 445 F.2d 963
(5th Cir. 1971) 41, 42

United States v. Renville, 779 F.2d 430
(8th Cir. 1985) 20, 23, 26, 29

United States v. Woods, 613 F.2d 629
(6th Cir. 1980) 20

Washington State:

Brown v. Vail, 169 Wn.2d 318,
237 P.3d 263 (2010)..... 46

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801,
828 P.2d 549 (1992)..... 46

<u>State v. Asaeli</u> , 150 Wn. App. 543, 208 P.3d 1136 (2009).....	31
<u>State v. Bencivenga</u> , 137 Wn.2d 703, 974 P.2d 832 (1999).....	15
<u>State v. Briscoeray</u> , 95 Wn. App. 167, 974 P.2d 912 (1999).....	23
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	14, 43
<u>State v. Carver</u> , 113 Wn.2d 591, 781 P.2d 1308 (1989).....	14, 43
<u>State v. Gosby</u> , 85 Wn.2d 758, 539 P.2d 680 (1975).....	14
<u>State v. Hendrix</u> , 50 Wn. App. 510, 749 P.2d 210 (1988).....	18, 22, 42
<u>State v. Huber</u> , 129 Wn. App. 499, 119 P.3d 388 (2005).....	45
<u>State v. Knapstad</u> , 107 Wn.2d 346, 729 P.2d 48 (1986).....	46
<u>State v. Longuskie</u> , 59 Wn. App. 838, 801 P.2d 1004 (1990).....	15
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	45
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	14
<u>State v. Simmons</u> , 63 Wn.2d 17, 385 P.2d 389 (1963).....	18
<u>State v. Vasquez</u> , 178 Wn.2d 1, 209 P.3d 318 (2013).....	40

<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	15
<u>State v. Willis</u> , 153 Wn.2d 366, 103 P.3d 1213 (2005).....	15
<u>State v. Young</u> , 160 Wn.2d 799, 161 P.3d 967 (2007).....	23, 31
 <u>Other Jurisdictions:</u>	
<u>Brown v. State</u> , 182 Md. App. 138, 957 A.2d 654 (2008).....	43
<u>Commonwealth v. Brown</u> , 617 Pa. 107, 52 A.3d 1139 (2012).....	20, 21, 41
<u>Commonwealth v. Clements</u> , 51 Mass. App. Ct. 508, 747 N.E.2d 682 (2001), <u>aff'd</u> , 763 N.E.2d 55 (2002)	21
<u>Gibbs v. State</u> , 7 Md. App. 35, 253 A.2d 446 (1969).....	42, 43
<u>People v. Chavies</u> , 234 Mich. App. 274, 593 N.W.2d 655 (1999)	21
<u>People v. Cuevas</u> , 12 Cal. 4th 252, 48 Cal. Rptr. 135, 906 P.2d 1290 (1995).....	19, 21, 22
<u>People v. Williams</u> , 716 N.W.2d 208 (2006).....	21
<u>State v. Espinal</u> , 943 A.2d 1052 (R.I. 2008)	22, 40
<u>State v. Newsome</u> , 128 Conn. 588, 682 A.2d 972 (1996).....	19, 22

Statutes

Washington State:

RCW 9.41.040..... 2, 15
RCW 9.94A.533 2
RCW 9A.36.011 2, 15
RCW 9A.36.021 2, 15

Rules and Regulations

Federal:

FRE 803..... 20

Washington State:

ER 803 23
RAP 10.3..... 7, 44

A. ISSUES PRESENTED

1. The victim of this shooting twice positively identified defendant Hailu Mandefero as the man who shot him, shortly after the shooting. That identification was corroborated by cell phone tower evidence and other compelling circumstantial evidence. The victim then refused to cooperate with the prosecution. When arrested on a material witness warrant, he said he was afraid to testify and would “fuck the case up” if forced to do so, and that the State had enough without him. At trial, the victim admitted he had identified Mandefero twice before, but recanted that identification. The jury convicted. Was the evidence sufficient for a reasonable juror to find Mandefero guilty beyond a reasonable doubt?

2. On appeal, Mandefero relies on facts outside the trial record, including alleged facts related to another shooting, months earlier. Should this court refuse to consider those facts?

3. Mandefero's first assignment of error is unsupported by argument or citation to authority. Should this assignment of error be rejected on that basis?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Hailu Mandefero, was charged with assault in the first degree of JaeBrione¹ Gary contrary to RCW 9A.36.011(1)(a), assault in the second degree of Sandra Torres contrary to RCW 9A.36.021(1)(c), and unlawful possession of a firearm in the second degree by a convicted felon, contrary to RCW 9.41.040(2), all occurring on May 1, 2012. CP 91-92. The first two charges included firearm enhancements pursuant to RCW 9.94A.533(3). CP 91-92. The Honorable Catherine Shaffer presided over a jury trial that began on October 10, 2012. 1RP 1, 4.² On November 13, 2012, the jury found Mandefero guilty as charged, including the firearm enhancements. CP 169-72.

On November 26, 2012, Mandefero brought a motion for arrest of judgment and for a new trial, alleging there was insufficient evidence to support the convictions. CP 205-15. The trial court denied both motions. 15RP 26-27. Mandefero sought an

¹ This spelling of Gary's first name appears on his driver's license and is reflected in his signature on that license, so it will be used in this brief. Ex. 57, p. 40.

² The Report of Proceedings is referred to in this brief as follows: 1RP (10/10/12); 2RP (10/11/12); 3RP (10/15/12); 4RP (10/16/12); 5RP (10/19/12); 6RP (10/22/12); 7RP (10/24/12); 8RP (10/25/12); 9RP (10/29/12); 10RP (10/30/12); 11RP (10/31/12); 12RP (11/1/12); 13RP (11/5/12); 14RP (11/6/12); 15RP (volume containing 11/8/12, 1/31/13, and 2/1/13); and 16RP (11/13/12).

exceptional sentence downward. CP 257. On February 1, 2013, the court imposed a standard range sentence. CP 270-78; 15RP 77-82.

2. SUBSTANTIVE FACTS.

JaeBrione Gary was parked outside the Ezell's Chicken in Skyway in his aunt's Cadillac on the night of May 1, 2012, when a truck pulled up behind his car and Gary was shot five times. 7RP 14, 25-36, 46; 11RP 8. One shot broke his right scapula. 7RP 41; 11RP 7. Two of the shots fired at Gary's car went through the windows of the Ezell's Chicken³ where Sandra Torres was working. 8RP 5, 18-22.

Ezell's employees called 911. 8RP 23-24, 45-46; Ex. 20. Gary's passenger, his cousin Andrelle, helped him get to a nearby business that was open, Skyway Bowl, and when police responded a few minutes later, they found Gary there. 7RP 38-40, 137-38. Deputy Glasgow administered first aid and asked Gary who shot him. 7RP 138-40. Gary would not answer; he appeared nervous

³ There are other Ezell's Chicken stores in King County, however the Skyway store is the only one involved in this case. All references to Ezell's in this brief refer to that store.

about other people in the area who could hear what he was saying. 7RP 140, 143-44, 183.

An aid crew and paramedics arrived; Glasgow stood a few feet away and collected evidence as medics treated Gary. 7RP 140-41. Then the medics loaded Gary into an ambulance and Glasgow got in with him. 7RP 140-41. Inside, Gary said Hailu had shot him; Deputy Glasgow remembered Gary saying it was “Hailu and some niggers.” 7RP 51, 119, 146. Gary said that Hailu was with “Money Gang.” 7RP 54, 148. At trial, Gary identified Hailu Mandefero as the person he was identifying as Hailu. 7RP 51-53; Ex. 4. Mandefero has “Money” tattooed on one hand and “Gang” tattooed on the other. 9RP 134; Ex. 41. Statements Mandefero posted on his Facebook page claim that he is affiliated with Money Gang, also referred to as Money Gang Mob. 9RP 130-35; Ex. 40.

Gary was administered a sedative in the ambulance and taken to Harborview Medical Center, where he was admitted. 10RP 34-36.⁴ The next day when Gary awoke, his mother and other family and friends were there. 7RP 56-57. Gary told his

⁴ The transcript of the proceedings on October 30, 2012, was originally filed without the testimony of Richard Arnone, due to an apparent oversight by the court reporter, which has since been corrected. All references in this brief are to the corrected transcript. Mandefero’s opening brief did not include any citation to this day of trial, so the correction should not create confusion.

mother that Mandefero shot him. 7RP 58. He told those present that Kevin Hubbard also was involved and that if they saw either one of them, they should exact revenge. 7RP 58.

At the scene of the shooting outside Ezell's, the police found fired shell casings; five .40 caliber casings were found near the left rear bumper of the car; nine 9mm shell casings were found near the right bumper and further back from the car. 8RP 74-75, 140-54, 158. Because there were two different size casings, more than one gun was used. 9RP 62.

Gary refused to talk to a detective who contacted him at the hospital, telling the detective that he had not been shot, and avoided the police until he was arrested on a material witness warrant after the trial began. 7RP 62-66; 12RP 23-24, 55. As Seattle Police Officer Beseler drove Gary to jail, Gary pleaded to be let go, saying that he was afraid to testify. 7RP 68-69; 10RP 63-68. The first thing Gary said was that if he was forced to testify, "I'm going to fuck the case up. They have got everything they need without me." 10RP 63-64.

At trial, Gary recanted his identification of Mandefero and said he actually saw only one person, Kevin Hubbard, and did not see who shot him. 7RP 31-35, 52, 120. Gary testified that he

intended to take care of this himself, on the streets. 7RP 63-65. He testified that he would not put anyone in jail, even if they shot him. 7RP 65.

Kevin Hubbard arrived at Valley Medical Center in Renton at 11:27 p.m. the night of the shooting, with two gunshot wounds. 10RP 54. Police were informed that a gunshot victim had appeared; Deputy Barden arrived at the hospital at 12:20 a.m. and found Mandefero in a treatment room with Hubbard. 8RP 76, 80. Barden intercepted Mandefero as he tried to leave. 8RP 80-81. Mandefero initially told Barden that he had picked up Hubbard on Renton Avenue in Skyway after Hubbard called saying that he had been shot, but then claimed he had picked up Hubbard at a restaurant in Kent. 8RP 90-97. Mandefero was arrested soon after. 12RP 20.

Hubbard called Mandefero at 8:24 p.m. and at 8:31 p.m. the night of the shooting. Ex. 67. Phone and cell tower records showed that at 8:43 p.m., both men were near Mandefero's residence. Ex. 65, 66. They both then drove south to Ezell's before the shooting and both drove away south afterward. Ex. 65, 66. This evidence is detailed in Section C.1.b. *infra*.

3. FACTS ALLEGED BY MANDEFERO THAT ARE NOT SUPPORTED BY THE RECORD.

Many of the statements of alleged fact in the Appellant's Brief are not supported by citations to the record, as required by RAP 10.3(a)(5) and (6). App. Br. at 1-24 (Statement of the Case). Some are supported by citation to documents that are not part of the record in this case. App. Br. at 23-24, nn.47-48. Some are supported only by citation to Mandefero's own closing argument. App. Br. at 8-9, nn.16-18; at 12-13, nn.27-29⁵; at 16, nn.34-35; at 18 n.36⁶. The State here responds to some of Mandefero's misstatements and mischaracterizations of the record; others will be addressed in the argument section of this brief.

Contents of Timeline. The assertion that at 8 p.m., Gary's cell phone used (pinged off) the cell tower near Ezell's⁷ is not supported by the record; there was no evidence relating to Gary's phone records. The assertion that at 8:43:46 p.m. Mandefero and

⁵ The citation in these footnotes is to November 26, 2012, but that date was after the verdict, which was returned on November 13. 16RP 2. There were no proceedings on October 26, 2012. The State has concluded that the pages cited correspond to the closing arguments, which occurred on November 6, 2012. 14RP 6-72.

⁶ See footnote 5.

⁷ App. Br. at 12, no citation to the record.

Hubbard tried to call one another⁸ is contradicted by the record. Hubbard called Mandefero twice, at 8:24 and at 8:31 p.m.; there were no further calls between the two that night or in the early morning of May 2. Ex. 62, 63, 67. The assertion that at 8:43 p.m., Hubbard's phone used the tower closest to Ezell's⁹ is incorrect; the tower used was miles north of Ezell's. Ex. 65, p. 4.

The assertion that the shooting could have occurred before 9:08 p.m. is inaccurate.¹⁰ As discussed more fully in Section C.1.b., *infra*, security video at Ezell's established that the shooting began at 9:08 p.m. Ex. 21. The assertion that at 9:09-9:10 p.m. Mandefero called someone but his phone used a different tower than one used by Hubbard's phone at the same time¹¹ is inaccurate; Mandefero's first call after the shooting was at 9:14 p.m. Ex. 63, p. 5. The assertion that Hubbard called his brother, Cody Wade, "five times in six minutes" between 9:10 and 9:20 p.m.¹² is inaccurate; it was Mandefero who tried to call Hubbard's brother

⁸ App. Br. at 12 & n.28, apparently citing the defense closing argument.

⁹ App. Br. at 13 & n.29, referring to the State's closing, but citing the defense closing.

¹⁰ App. Br. at 13, no citation to the record.

¹¹ App. Br. at 13, no citation to the record.

¹² App. Br. at 13 & n.32, citing State's closing, which does not refer to the calls at that page.

five times between 9:14 and 9:20 p.m. Ex. 67. The assertion that at 9:33 p.m. Mandefero and Hubbard “finally meet up on Renton Road” is not supported by any evidence in the record.¹³

Events at Valley Medical. Mandefero’s assertion that he had two separate conversations with Deputy Barden and changed his story only in the second conversation, after he had talked to Hubbard,¹⁴ is contradicted by the record. Barden testified to only one conversation, in which Mandefero first said that Hubbard called him, said that he had been shot, and that Mandefero’s sister drove him to Skyway to pick up Hubbard. 8RP 82-83, 90-95. After Barden asked for contact information for Mandefero’s sister, Mandefero changed his story, saying that Hubbard’s girlfriend had driven Mandefero to pick up Hubbard, who was in Kent. 8RP 95-97. There is no evidence that supports the assertion that in the middle of this conversation, Mandefero had a discussion with Hubbard, let alone the contents of any such conversation.¹⁵

The assertion that Mandefero stayed at Valley Medical with Hubbard for “several hours,” despite significant police presence, to

¹³ App. Br. at 14 & n.33, citing the defense closing argument.

¹⁴ App. Br. at 10-11 and 14, no citation to the record in either location.

¹⁵ E.g., that Hubbard told Mandefero to remove his sister from the story, App. Br. at 11-12; that Hubbard asked Mandefero to lie for him, App. Br. at 14.

make sure Hubbard was okay¹⁶ is contrary to the record. Hubbard arrived at the hospital at 11:27 p.m. 10RP 54. Deputy Barden arrived at the hospital at 12:20 a.m., about 50 minutes after Hubbard arrived, and intercepted Mandefero as he tried to leave. 8RP 78, 80-81. There was no testimony as to Mandefero's reason for staying the 50 minutes that elapsed before then.

The assertion that "the medical evidence established" that Hubbard's gunshot wound went in to the top of Hubbard's buttock and out the bottom and "was almost certainly a 'self-inflicted wound'"¹⁷ is not supported by the record. Dr. Davis, who treated Hubbard, concluded only that he had two gunshot wounds to his buttock, suggesting a through and through injury. 10RP 54-57. Dr. Davis stated that he could not determine which wound was the entry point. 10RP 57. He did not venture any opinion about how or when the wounds were inflicted. 10RP 54-58.

Nature of the Investigation. These assertions are without support in the record and include no citation to the record: that the investigation pointed to Hubbard as the sole shooter;¹⁸ that "serious

¹⁶ App. Br. at 9, no citation to the record.

¹⁷ App. Br. at 8-9 & nn.17-18, both citing the defense closing argument.

¹⁸ App. Br. at 3.

doubts began to arise about Gary's identification" and whether Mandefero was present when Gary was shot.¹⁹ The assertion that there was some negligence in failing to compare the gun found in the Cadillac glove compartment to the shell casings at the scene²⁰ is unsupported by the record; the gun was a .45 caliber handgun found locked in the glove compartment, loaded, and none of the casings at the scene were .45 caliber. 8RP 142-43, 152-53; 12RP 41-43. The assertion that "fake crack" was found in a backpack next to the Cadillac²¹ is without support in the record.

Jail Phone Calls. Mandefero inaccurately claims that during a jail phone call he "expresse[d] a great deal of concern about being convicted of a crime that he did not commit" and that the other man on the phone, "Hubbard's friend," said Mandefero "had nothing to hide."²² Two calls were admitted; during those calls, Mandefero never stated that he did not commit the shooting, or expressed concern about being convicted of a crime he did not

¹⁹ App. Br. at 15.

²⁰ App. Br. at 17.

²¹ App. Br. at 17, no citation to the record.

²² App. Br. at 17-18, citing to the defense closing argument.

commit. Ex. 43, 45, 46.²³ The person who conveyed Hubbard's message during the May 2, 2012, call was identified only as Danavian. Ex. 45 at 1. Assuming it was Danavian Hunter, Gary testified that Hunter, Mandefero and Hubbard all were close friends. 7RP 76-79. During the May 2 call, Danavian reported that Hubbard said he had not told the police anything and that it would be best if "we stay to the script." Ex. 45 at 3-4. No one said Mandefero had nothing to hide.

Citrus Nightclub Shooting. The claims made about the facts of a shooting at a nightclub in January 2012,²⁴ are not in the record in this case. The only citation in this section of the brief is to a document allegedly filed by the State in a different case. The only related testimony was Gary's, stating that he had heard that Hubbard might have been involved in a shooting at a nightclub, but he did not know if it was true. 7RP 121. The parties also stipulated that Hubbard had been charged with three counts of assault with a firearm stemming from an incident on January 28, 2012, but provided no more information. 12RP 71.

²³ Ex. 43 is the redacted recording of both calls. Ex. 45 and 46 are transcripts of the two calls used to assist the jury in understanding the recordings. 10RP 21-25.

²⁴ App. Br. at 22-24.

Speculation about Hubbard's and Mandefero's thoughts

and actions. Quotations from a phone call Hubbard allegedly made to Mandefero after the shooting²⁵ are without any support in the record.²⁶ Neither testified at the trial. The assertion that Hubbard was “looking to settle a score with some rival gang members” in early 2012²⁷ is entirely unsupported by the record.

C. ARGUMENT

1. THE EVIDENCE SUPPORTED THE JURY'S VERDICT THAT MANDEFERO COMMITTED THESE CRIMES.

Mandefero claims that the evidence at trial was not sufficient to support his convictions because although JaeBrione Gary initially identified Mandefero as the man who shot him, Gary recanted that identification at trial. Mandefero does not dispute the proof of any element except the identification of the defendant. This argument should be rejected. As the trial court noted when it denied Mandefero's motion for a new trial, in addition to identifying Mandefero immediately after the shooting, Gary told his mother the

²⁵ App. Br. at 2-3, with no citation to the record.

²⁶ The cell phone records establish that there were no phone calls between the two after the shooting. 13RP 94; Ex. 61, 63.

²⁷ App. Br. at 1, with no citation to the record.

next day that Mandefero shot him, and many categories of strong circumstantial evidence corroborated those statements of identification, pointing “very clearly” to Mandefero. 15RP 22-26.

When there is a claim that evidence is insufficient to support a conviction, the evidence is reviewed in a light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences that can be drawn from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id.

A conviction will be affirmed if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Salinas, 119 Wn.2d at 201. The trier of fact resolves conflicting testimony and weighs the persuasiveness of the evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). The trier of fact is the sole arbiter of credibility and credibility determinations cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trier of fact may rely on circumstantial evidence alone, and circumstantial evidence is as trustworthy as direct evidence. State v. Gosby, 85 Wn.2d 758, 765-67, 539 P.2d 680 (1975). Thus, the appellate courts defer to the trier of fact on issues of conflicting testimony,

credibility of witnesses, and persuasiveness of the evidence.²⁸

State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (citing State v. Longuskie, 59 Wn. App. 838, 801 P.2d 1004 (1990)).

A person commits the crime of assault in the first degree when with intent to inflict great bodily harm, he assaults another with a firearm or by any force or means likely to produce great bodily harm or death. RCW 9A.36.011(1)(a); CP 186-87. A person commits the crime of assault in the second degree when he assaults another with a deadly weapon. RCW 9A.36.021(1)(c); CP 191-92. A person commits the crime of unlawful possession of a firearm in the second degree when he has previously been convicted of a felony and knowingly has in his possession or control a firearm. RCW 9.41.040(2); CP 195-96. The State agrees that because the jury was not instructed that it could rely on accomplice liability, the convictions cannot be sustained based on accomplice liability. State v. Willis, 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005).

²⁸ Mandefero cites four cases that address whether a permissive inference jury instruction was justified. App. Br. at 30 nn.61-62. The propriety of a permissive inference instruction is a separate issue and those cases do not alter the standards of review regarding sufficiency of the evidence. State v. Bencivenga, 137 Wn.2d 703, 708-09, 974 P.2d 832 (1999).

Mandefero does not challenge the sufficiency of the State's proof that the crimes of assault in the first and second degree occurred, but challenges the State's proof that Mandefero was one of the people shooting at Gary that night. The identifications made by Gary immediately after the shooting and the next day at the hospital, along with the strong circumstantial evidence corroborating those identifications, were sufficient to support these convictions.

- a. Gary Twice Credibly Identified Mandefero As The Man Who Shot Him; That Was Sufficient To Prove Identity.

Gary twice identified Mandefero as having shot him, and on both occasions the circumstances demonstrated the reliability of the identification. Gary's identification of Mandefero to Deputy Glasgow was within minutes of the shooting and included identifying details. Gary's identification of Mandefero to Gary's mother also was close in time to the event and included a request for revenge. A reasonable juror could conclude that these identifications were credible.

The evidence established that within minutes after Gary was shot, he identified Hailu Mandefero as the person who shot him.

Gary testified that he told Deputy Glasgow that "Hailu" was the person who shot him, and that he was referring to Hailu Mandefero.²⁹ 7RP 51, 53, 119; Ex. 4.

Gary told Glasgow that Hailu was "with Money Gang," that is, that he was a member of a group with that name. 7RP 54, 148-49. Mandefero had "Money" tattooed on one hand and "Gang" tattooed on the other, surrounded by dollar signs. 9RP 134; Ex. 41. In his statements (postings) on his Facebook page, Mandefero claimed membership in that group.³⁰ 9RP 130-35; Ex. 40.

In the ambulance, Glasgow asked Gary if the shooter, Hailu, was Samoan, whether he was black, white, or Hispanic. Ex. 9, 10.³¹ Gary responded that Hailu was African and 19 years old, an accurate description. Ex. 9, Ex. 10 at 4, Ex. 49; 15RP 89.³²

²⁹ Deputy Glasgow's memory was that Gary had said that "Hailu and some niggers" had done it. 7RP 146. To Glasgow, it sounded as if more than one person was involved. 7RP 147.

³⁰ Examples in Ex. 40 include: "I repp that Money Gang Mob South End" (p.2); "I'm bout to get that tatted right now MONEY GANG" (p. 4); "HAPPY NEW YEARS EVERYBODY LET'S KEEP IT GOIN MGM 'MONEY GANG MOB'" (p. 6); and "MGM thats all I know" (p. 9).

³¹ Ex. 9 is part of a recording of the interview. Ex. 10 is a transcript used to assist the jury in understanding the recording. 7RP 152.

³² On appeal, Mandefero affirms that his ethnicity is African. App. Br. at 8. See also CP 258 (Defense Sentence Recommendation, noting Mandefero is the son of Ethiopian immigrants). Mandefero gives some import to Glasgow's guess that the name might be Samoan, as opposed to African, but Gary was not confused.

Gary testified that, when he woke up in the hospital, he also told his mother that Mandefero was the man who shot him. 7RP 58. Gary testified that he told his family and friends at the hospital that they should take revenge on Mandefero and Kevin Hubbard if they could catch them, "to serve them how I had been served." 7RP 58, 64-65.

Gary's pretrial statements of identification were substantive evidence that Mandefero shot at Gary outside Ezell's Chicken. A pretrial identification is substantive evidence of identity. State v. Simmons, 63 Wn.2d 17, 19, 385 P.2d 389 (1963); State v. Hendrix, 50 Wn. App. 510, 515-16, 749 P.2d 210 (1988).

At trial, Gary recanted his identification of Mandefero. He testified that he was purposely misleading Deputy Glasgow when he said that Hailu shot him. 7RP 51-52, 119-20. Gary testified that it actually was Kevin Hubbard who he saw in a truck outside Ezell's just before the shooting began. Ex. 2; 7RP 31-34. He offered no explanation for why he would have lied to his mother about who shot him.

Other courts that have considered the issue have upheld convictions based on a pretrial identification that is recanted at trial in circumstances similar to the case at bar. In a very similar case,

the California Supreme Court held that a reasonable jury could have concluded that a witness was telling the truth when he identified the defendant immediately after a shooting and again three days later, despite his recantation at trial, where the jury heard that he had a motive to falsely recant – believing it was wrong to accuse a rival gang member of a crime. People v. Cuevas, 12 Cal. 4th 252, 48 Cal. Rptr. 135, 906 P.2d 1290, 1305 (1995).

In another case involving a witness who feared retaliation, the Connecticut Supreme Court held that the prior out-of-court identification was sufficient to support the conviction, even if there was no corroboration of the identification. State v. Newsome, 128 Conn. 588, 682 A.2d 972, 983-88 (1996). The court noted that the sufficiency of the prior statement depends on its reliability in light of all the circumstances. Id. at 987. It found ample indicia of reliability where the witness admitted that he had made the sworn, written statement to the police the day after the shooting, identifying the defendant as the shooter, and the witness had expressed fear of retaliation to the police, an obvious motive for recanting at trial. Id. at 988. The court concluded that the jury reasonably could have

rejected his testimony that he could not identify the shooter, and credited his original identification. Id. at 987-88.

Federal courts that have addressed the issue also have affirmed convictions based upon a pretrial identification that was recanted at trial. Ticey v. Peters, 8 F.3d 498, 503-04 (7th Cir. 1993); United States v. Woods, 613 F.2d 629, 636-37 (6th Cir. 1980). Cf. United States v. Renville, 779 F.2d 430, 440-41 (8th Cir. 1985)(victim's out-of-court identification of defendant was admissible under Federal Evidence Rule 803(24) based on significant indicia of reliability, although the victim testified that it was a lie).

The Pennsylvania Supreme Court conducted a thorough review of state cases addressing the issue in Commonwealth v. Brown, 617 Pa. 107, 52 A.3d 1139, 1161-71 (2012). The court considered cases in which a prior inconsistent statement of a witness was the basis of a conviction, and the witness testified at trial, so the fact-finder could hear the explanation for the original statement and the recantation. The court concluded that the majority of its sister states treat the prior inconsistent statements as sufficient evidence to convict, if the fact-finder could reasonably credit the out-of-court statements over the in-court recantation. Id.

at 1158. See also People v. Chavies, 234 Mich. App. 274, 593 N.W.2d 655, 660-62 (1999), overruled on other grounds, People v. Williams, 716 N.W.2d 208 (2006) (“[W]ith minor variations, most jurisdictions allow an uncorroborated prior inconsistent statement to provide the sole support for a conviction.”(citations omitted)).

The court in Brown found that eleven states uphold convictions based on an out-of-court statement that has been admitted as substantive evidence, even if the witness disavows the statement at trial and there is no corroboration. 52 A.3d at 1166-67. See Cuevas, 906 P.2d at 1294-1306 (after thorough analysis, rejecting corroboration requirement previously applied in California). Three more states uphold such convictions, but carefully scrutinize the evidence as to the reliability of the prior statement, examining its content and the circumstances surrounding its making. Brown, 52 A.3d at 1167-68. In the minority of states to address the issue (five),³³ courts have held that out-of-court statements are sufficient to convict only if there is additional

³³ The holding of the Massachusetts case that the Brown opinion includes in this group appears narrower; it considered the admissibility of grand jury testimony as substantive evidence and held that an out-of-court identification was sufficient corroboration to support admission of the grand jury testimony. Commonwealth v. Clements, 51 Mass. App. Ct. 508, 747 N.E.2d 682, 686-92 (2001), aff'd, 763 N.E.2d 55 (2002) (emphasizing reliability of photographic identification close in time to event).

corroborating evidence.³⁴ Id. at 1166. The only Washington case to address the issue upheld a conviction where the only identification was a prior out-of-court statement, based on the court's conclusion that the witness "did not completely dissipate the value of her earlier identification" when she testified that she thought she selected the defendant's photograph from a montage because of a difference in the picture format. Hendrix, 50 Wn. App. at 515. Under either the majority rule, or a rule requiring corroboration, the evidence in this case was sufficient to support Mandefero's convictions.

As in Cuevas and Newsome, there was significant evidence in this case that Gary had a motive to recant. His unwillingness to cooperate with the police was clear on May 2, when he told a detective that he would not cooperate and that he had not even been shot. 12RP 23-24. He avoided contact with the detective until he was arrested on a material witness warrant. 7RP 62-66; 12RP 55. After that arrest, Gary told the officer who drove him to jail that he was afraid to testify and asked to be let go. 7RP 68-69;

³⁴ The Rhode Island Supreme Court was not included in either list. It has held that an out-of-court identification was sufficient to support conviction where there was some corroboration, without reaching the issue of whether it would be sufficient without any corroboration. State v. Espinal, 943 A.2d 1052, 1060-62 (R.I. 2008).

10RP 63-68. Gary testified that he would never send a man to prison by testifying against him, even if the man shot him. 7RP 65.

There was persuasive evidence that Gary's identification of Mandefero as the shooter was reliable and that his recantation of that identification at trial was not credible. First, Gary identified Mandefero as the shooter to both the police and to his family. Gary's repetition of his identification to his mother lent reliability to the earlier identification. Ticey, 8 F.3d at 503; Renville, 779 F.2d at 440-41.

Second, both identifications were credible. One indication of their reliability is that these statements of identification were made shortly after the shooting. Closeness in time to the event minimizes the opportunity for fabrication. Ticey, 8 F.3d at 503. That is one of the premises upon which the excited utterance exception to the hearsay rule is based. ER 803(a)(2); State v. Young, 160 Wn.2d 799, 807-08, 161 P.3d 967 (2007)(holding that recantation of the substance of an excited utterance does not preclude a finding that the out-of-court statement is reliable and admissible); State v. Briscoeray, 95 Wn. App. 167, 974 P.2d 912 (1999)(affirming admissibility of the victim's statements shortly after assault, although the victim later said that she lied at that time).

When Gary identified Mandefero to the police, he had just been shot and was angry. 7RP 41. When Deputy Glasgow first talked to Gary, they were in front of Skyway Bowl, with other people in the area. 7RP 137-38. Glasgow could see that Gary was nervous about talking. 7RP 143-44. Once Mandefero was in the ambulance with the doors closed, he began to talk. 7RP 49-51, 141, 146. Gary did then identify Mandefero as the shooter, and provided the accurate information that Mandefero was associated with the Money Gang, was African and was 19 years old. 7RP 51, 54, 119, 146-48; Ex. 9, Ex. 10 at 4.

Mandefero claims that this identification was unreliable because “life-saving” treatment was withheld at police request. Whether or not sedation was delayed, it was the responsibility of the jury to determine the effect of the circumstances on the reliability of the identification. Gary did not testify that he believed that critical medical care was being delayed by the police – he testified that he did not even know if the medics were in the ambulance when Glasgow talked to him there.³⁵ 7RP 49. Thus, any police request to delay sedation is irrelevant. Moreover,

³⁵ Gary’s testimony thus contradicts Mandefero’s assertion that Gary was worried that he might die because Glasgow was denying him medical care. App. Br. at 22.

Richard Arnone, one of the medics, testified that they did not delay any treatment; he did not even recall the police making such an unusual request. 10RP 35-38. Glasgow testified that the medics were sedating Gary while Glasgow and Gary were talking. 7RP 147. It appears that any delay in sedating Gary was in the normal course of treatment and not a result of Glasgow's request.

While Mandefero describes Glasgow as bullying, that characterization is simply based on his repeating the critical question – “who shot you?” There is no impropriety in an officer employing such a tactic when he believed it was necessary to persuade an obviously reluctant shooting victim to provide information. There is nothing improper about Glasgow's inferring that the shooting was gang-related and that the victim would be reluctant to identify the shooter; in fact these inferences apparently were accurate. Moreover, the jury was aware of all of the details of Glasgow's interaction with Gary, so it could evaluate the effect of those efforts on the credibility of the identification.³⁶

³⁶ The claim that Glasgow questioned Gary for 30 minutes is not supported by the record. Glasgow questioned Gary briefly as he administered first aid. 7RP 138-40. Medics soon arrived, and Glasgow did not talk to Gary as the medics administered aid at the scene. 7RP 141; 10RP 33. It was only after Gary was loaded into the ambulance that Glasgow resumed asking Gary who shot him. 7RP 141.

When Gary told his mother that Mandefero had shot him, he had just awakened after being sedated for medical treatment. 7RP 56-58. He had no opportunity to fabricate. Gary testified that he told his family to take revenge on both Mandefero and Hubbard. 7RP 58, 64-65. It makes no sense that Gary would tell his family that Mandefero was the shooter and to take revenge on Mandefero if he saw only Hubbard. If Gary also identified Hubbard to his family as “involved,” as he testified, this exchange with his family indicated that Gary was not trying to shield Hubbard from responsibility.

The third reason that evidence of Gary’s identification of Mandefero was reliable was that he first made the identification to an appropriate person, a police officer. See Renville, 779 F.2d at 440 (that statement relating abuse was to an appropriate individual, a deputy sheriff, added to its reliability). The context of reporting an identification to an official increases the likelihood that the witness would attempt to be accurate, given that the significance of making the identification would be apparent; it tends to mitigate the risk of insincerity. Id. at 441.

The fourth reason that Gary’s identification of Mandefero was reliable is that his explanation at trial for offering that particular,

unusual name as a subterfuge was not credible. Gary said that he lied about "Hailu" being involved because he did not know that was Hailu's name, as opposed to a nickname, and he did not think the police could track "Hailu" down. 7RP 52-54. But Gary testified that he had known Hailu Mandefero for years and had a "decent relationship" with him. 7RP 106, 114.

Gary also gave the police details about Mandefero in addition to the name Hailu that were accurate and that would assist the police in identifying him. He accurately described Mandefero as African and 19 years old. Ex. 10 at 4, Ex. 49. He also told the police that Hailu was associated with the Money Gang. 7RP 54, 148. It was true that Hailu was associated with the Money Gang, most clearly established by having those words tattooed on his hands, and displayed in his Facebook postings and photographs. 9RP 130-35; Ex. 40, 41. Gary's testimony that it was just coincidence that Mandefero did belong to the Money Gang was unbelievable, especially because Gary was involved in an ongoing conflict with Mandefero and was familiar with the people with whom Mandefero associated. 7RP 76-81.

Fifth, the reliability of the initial statements identifying Mandefero as the shooter is enhanced by Gary's familiarity with

both Mandefero and Hubbard. He had grown up with Hubbard and had known Mandefero for years. 7RP 77-79, 106-07, 114. He would not have confused the two, who do not look similar. Ex. 2, 4.

Gary testified that he looked back and saw the truck parked behind him, perpendicular, with the passenger side facing Gary's Cadillac. 7RP 29-32, 117-18. Gary saw the person in the passenger seat. 7RP 32, 123. Further, Gary said that he ducked because he had a problem with the man he saw and thought he might be shot. 7RP 31-32, 118. As shots were fired into the car from both sides, Gary also may have been able to see one or more of the shooters through the side-view mirrors – because the front passenger window had been shattered, no tint would have impaired that view. 7RP 28. The pattern of casings suggests that shooters were on both sides of the car. 8RP 74-75, 140-54, 158. The Ezell's employee who was mopping in the front of the store heard yelling right before the shooting began,³⁷ indicating that Gary had time and opportunity to recognize the person who confronted him that night and shot him.

Sixth, the reliability of the prior statements was enhanced because Gary admitted that he had made the statements

³⁷ 8RP 40.

identifying Mandefero as the man who shot him. 7RP 51, 54, 59. Thus, there is no doubt that the statements were made and no concern that the evidence was manufactured. Renville, 779 F.2d at 440. Mandefero claims that Gary did not recall at trial if he had implicated others along with Mandefero in his conversation with Glasgow.³⁸ However, Gary did testify that he just identified Mandefero as the man who shot him. 7RP 51, 119. Mandefero had a full opportunity to cross-examine Gary about why he had previously identified Mandefero.

In contrast, there are a number of reasons that Gary's recantation was not credible.

Gary testified that he told the police Mandefero shot him because he did not want to identify Hubbard and he thought the police would not be able to identify Mandefero based on the information he gave. 7RP 52. As discussed supra, that explanation was incredible, because Gary gave both a name and identifying details about Mandefero. Moreover that explanation does not apply to Gary's statement to his family that Mandefero was the shooter and Hubbard also was involved.

³⁸ App. Br. at 19.

Gary's refusal to talk to the police, even when he was told he would be arrested on a material witness warrant if he did not, is inconsistent with his story at trial that Mandefero was not involved. If he had identified the wrong person, he could have told the police that, indicating there was some confusion or error. That would have eliminated the risk of being arrested to obtain his testimony at Mandefero's trial.

Gary's statements while he was being transported to jail after he was arrested also establish that his recantation was not reliable. Gary told the transporting officer that he was afraid to testify and asked to be let go. 7RP 68; 10RP 63-68. Equally significant, he did not tell the officer that the man charged was the wrong person. 10RP 64-65. Gary said they had everything they needed without him. 10RP 64. He said that if he was forced to testify he would "fuck the case up." 10RP 63-64. These statements, made days before the trial, provide a context that made the recantation on the stand incredible.

Finally, Gary testified that he would never send a man to prison by testifying against him, even if that person had shot him. 7RP 65. It could not be clearer that Gary would not identify Mandefero in court under any circumstances. His failure to identify

Mandefero in court was of little weight balanced against his identification of Mandefero immediately after the shooting, to both the police and his mother.

Mandefero argues that the identification evidence was speculation and so cannot support a conviction. However, he relies on Gary's testimony at trial to make this argument, repeating Gary's testimony that he did not see who shot him. App. Br. at 40-41. Gary told Glasgow and his mother that Mandefero shot him, and the shouts before the shooting and Gary's own testimony establish that he saw at least one of the people who shot him. The cases Mandefero cites are inapposite. E.g., State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136 (2009)(holding the evidence was insufficient to infer the specific intent required to establish accomplice liability); Juan H. v. Allen, 408 F.3d 1262 (9th Cir. 2005)(same); Brown v. Keane, 355 F.3d 82 (2nd Cir. 2004)(holding the trial court improperly admitted an anonymous 911 call describing a shooting, where there was no evidence the caller saw the shooting).

The judiciary is wary of recantations, recognizing that a recantation often occurs because the witness has been influenced by an interested party. Ticey, 8 F.3d at 503 (citing United States v. Badger, 983 F.2d 1443, 1456 (7th Cir. 1993)); Young, 160 Wn.2d at

808-09. Gary provided the reasons that he would falsely recant his out-of-court identifications of Mandefero as the shooter. The jury had the opportunity to evaluate the circumstances of the out-of-court statements, Gary's statements about his anticipated testimony at trial, and Gary's explanation at trial for his new story. Their decision to credit the out-of-court identifications was reasonable and supported by the evidence.

b. Gary's Identification Of Mandefero Was Corroborated By The Cell Phone Tower Evidence.

Mandefero's participation in the shooting was corroborated by several categories of strong circumstantial evidence. One category was cell phone tower evidence that indicated that Mandefero was north of Ezell's, then moving south toward Ezell's before the shooting, and rapidly moving south away from Ezell's after it, along the same route as Kevin Hubbard. 13RP 50-69; Ex. 65, 66.

Mandefero was in possession of his cell phone when he was arrested in the early morning hours of May 2, 2012. 12RP 20-22. He does not dispute that he was carrying that phone that evening. The record of his calls that night was admitted into evidence, along

with the call record of a phone belonging to Hubbard. 13RP 14-16, 22-23; Ex. 62 (Hubbard), Ex. 63 (Mandefero).

The phone records showed the cell phone towers that each phone was using to transmit calls before and after the shooting. 13RP 18. Identifying each tower allowed the witness to place the phone within a three mile radius of the tower or, in some cases, within a three mile arc in a particular direction. 13RP 21, 54. When a cell phone call is made, it normally uses the nearest tower of the phone's service provider (T-Mobile for both Mandefero and Hubbard), but may use the next nearest. 13RP 39. The tower used may differ based on the specific equipment (type of phone) or nearby physical obstructions. 13RP 38-40. The call may switch from one tower to another mid-call, particularly if the user of the cell phone moves. 13RP 20. The areas covered by the towers overlap, especially in a densely-populated city. 13RP 27, 40. The tower information cannot establish the phone's specific location when a call was made, but it can establish an area within which the caller would have been. 13RP 88-89. Two callers side-by-side probably would use the same tower, but might not. 13RP 44-45.

The call records establish that Hubbard called Mandefero on May 1, at 8:24 p.m. and at 8:31 p.m. 13RP 33-34, 94; Ex. 67. An

incoming call from a different number at 8:43:05 placed Mandefero north of Ezell's, in the area of his residence. 12RP 65; Ex. 58, Ex. 66, p. 2. At 8:43:46, when Hubbard received a call from another number, Hubbard's phone also used a tower near Mandefero's residence, north of Ezell's. Ex. 65, p. 2.

An incoming call received at 9:05 p.m. showed that Mandefero had moved south from his residence, in the direction of Ezell's. 13RP 65; Ex. 66.

The shooting occurred at 9:08 p.m., as shown in the Ezell's security video. Torres was in the office when she heard Sanders yell, looked up and then heard shots. 8RP 23, 30. The security video shows her working on the till at 9:08:16 p.m. Ex. 21, camera 1. Torres looked up at 9:08:36; the next second she dove for cover under the desk, as debris from the shot that was fired into the office appeared to move through the frame. 8RP 28, 30; Ex. 21. She then called 911; the video shows that at 9:09:27. 8RP 28; Ex. 21. The video recording of Sanders is consistent. He is seen mopping at 9:08:30 p.m.; he looked up and out the window at 9:08:32 and then dropped the mop and fled into the back. Ex. 21, camera 4. Still images from this video that show these critical actions are attached in Appendix 1, along with directions for

viewing the video exhibit. Deputy Glasgow confirmed that timing; he was called to the shooting at 9:09 p.m. 7RP 134.

Mandefero did not use his cell phone between 9:05 and 9:14 p.m. Ex. 61. Hubbard did not use his cell phone between 8:43 and 9:10 p.m. Ex. 62. There are no calls between the two men after 8:31 p.m., 37 minutes before the shooting. 13RP 94; Ex. 61, 63.

After the shooting, Hubbard started making calls at 9:10 p.m. and Mandefero started making calls at 9:14 p.m. The towers used by their phones showed that they were both moving south from Ezell's at that time. Ex. 65, 66.

Mandefero asserts that cell tower evidence proves that he could not have been with Hubbard during the shooting. However, the trial court concluded that the cell tower evidence corroborated Gary's identification of Mandefero, noting that Mandefero's cell phone appeared to accompany Hubbard to the area of the shooting. 15RP 24. Mandefero's argument is based in part on two inaccurate premises. He relies upon calls between Mandefero and Hubbard at 8:43 p.m. as evidence that the two were not in the

same location at the time.³⁹ But those calls were not to one another; each man received a call from someone else and both calls used towers serving the area of Mandefero's residence. Ex. 57, 62, 63, 65, 66. Mandefero's second inaccurate premise is that the time of the shooting was as early as 9:00 p.m., and based on that error he asserts that the call he received at 9:05 exonerated him. The Ezell's security video established that the time of the shooting was 9:08 p.m., as discussed above. Ex. 21.

The cell tower evidence supported the State's theory that Hubbard saw Gary in the area of Ezell's, called Mandefero, drove toward Mandefero's home, then both drove down to Ezell's before the shooting, and both drove away south afterward.

c. Gary's Immediate Identification of Mandefero As The Man Who Shot Gary Was Corroborated By Additional Strong Circumstantial Evidence.

There was additional strong corroboration of Gary's identification of Mandefero: Mandefero being in the company of the wounded Hubbard immediately after the shooting, and giving contradictory statements about his movements; Mandefero's motive to attack Gary; Mandefero's jail phone call that tied that motive to

³⁹ App. Br. at 12, 35.

the shooting; Gary's statements during transport explaining his recantation; and factors previously cited as establishing reliability of the out-of-court identifications.

Mandefero's involvement with the shooting was corroborated by his appearance with Hubbard at the hospital two hours after the shooting, along with his explanation that Hubbard had called for help after being shot and Mandefero and his sister had picked up Hubbard, who had a gunshot wound, at the 76 next to the Ezell's Chicken. 8RP 82-83, 90-95. Mandefero changed his story after Deputy Barden asked for the phone number of his sister, to confirm the story. 8RP 95-96. At that point, he said that he picked up Hubbard in Kent, with Hubbard's girlfriend. 8RP 95-97. The cell phone call records also contradict these stories, as there was no call between Hubbard and Mandefero after 8:31 p.m., which was 37 minutes before the shooting. 13RP 94; Ex. 61, 63.

While the cell phone and Valley Medical evidence supports the inference that Hubbard also was involved in the shooting, the State was not required to prove there were two shooters in order to prove Mandefero guilty of these crimes. Mandefero's argument to that effect appears to be premised on his belief that the evidence established that Hubbard was the lone shooter. That conclusion is

not supported even by Gary's trial testimony. At trial Gary identified Hubbard as a passenger in the truck, which of necessity would mean there must have been at least one other person present – the driver. 7RP 32. Shell casings of two different calibers were found at the scene, five .40 caliber casings primarily to the left rear of Gary's car, nine 9mm casings primarily to the right rear, indicating that at least one person was on each side of the car. 8RP 74-75, 140-54, 158.⁴⁰ Gary testified that at the hospital, he told his mother that Mandefero shot him and told his family that both Mandefero and Hubbard were involved. 7RP 58.

Mandefero's motive to retaliate against Gary for a recent theft also corroborated Mandefero's identity as one of the shooters. Two weeks before this shooting, Gary had stolen a chain necklace from Mandefero in front of a crowd of people. 7RP 83, 86-92. He stole the chain from Mandefero's lap, as Mandefero sat in his car. 7RP 91-92. Gary took the chain because he believed that Mandefero had cheated Gary's cousin Jarod out of some money.

⁴⁰ Mandefero states that the State attempted to introduce evidence of a third gun at the scene, but it was excluded because "there was no evidence connecting the gun with the crime charged." App. Br. at 31. The State did not attempt to offer a third gun. 7RP 4-6. It did attempt to offer forensic ballistics evidence obtained as the trial began, which established that the shell casings found at the scene were fired from three different guns. 7RP 4-6. The jury did not hear this evidence because it was produced after opening statements, not because it was irrelevant. 7RP 7.

7RP 81. The recording of a jail phone call from Mandefero on August 12, 2012, confirmed that the chain theft was the motive for the shooting.⁴¹ Mandefero was discussing the pending charges when the other speaker commented, "Ain't nobody gonna snatch your chain ever again, promise you that." Ex. 43, Ex. 46 at 2. Mandefero agreed and laughed. Ex. 43, 46 at 2.

Gary's statements upon his arrest on the material witness warrant also corroborate Mandefero's identity as one of the shooters. When arrested on a material witness warrant, he said he was afraid to testify and would "fuck up" the case if forced to do so, and that the State had enough without him. 10RP 63-64.

The factors supporting the reliability of the out-of-court identification of Mandefero, discussed in section C.1.a., supra, also corroborate that identification. There is no question that Gary was present during the shooting and had the opportunity to see the shooters. There is no dispute about the circumstances of the shooting that he described, and his injuries were consistent with his statement. Corroboration includes the timing of the identification

⁴¹ Mandefero implies some subterfuge in the State's grant of immunity to Gary related to this theft. App. Br. at 18-19. However, the judge indicated that immunity must be granted in order to allow cross-examination as to the theft. 4RP 6-8; 7RP 82. Neither the judge nor Gary's counsel expressed any concern that any other facts relating to the shooting put Gary in legal jeopardy. 7RP 9-11.

(shortly after the incident), the persons to whom the statement is made (police), and that there is an explanation for the change in the witness's story. Espinal, 943 A.2d at 1061-62.

Mandefero asserts that the nature of Hubbard's involvement in another shooting in January 2012 is inconsistent with Mandefero's guilt, but that evidence was not before the jury; those asserted facts are not in the record.⁴² In any event, there is no reason that Mandefero's lack of participation in a shooting that occurred months earlier would tend to establish that he would or would not be involved in this shooting.

Mandefero asserts that equivocal evidence violates due process. The cases he relies upon⁴³ do not categorize any type of evidence as a violation of due process or alter the standards for evaluating the sufficiency of the evidence. His reliance on State v. Vasquez, 178 Wn.2d 1, 209 P.3d 318 (2013), is misplaced. Vasquez did not address a recanting witness; it addressed the sufficiency of evidence to support an inference of intent. 178 Wn.2d at 14-17 (holding jury could not infer intent to defraud based

⁴² In addition, the State has reviewed the document to which Mandefero refers and disagrees that the facts included in his brief are a fair representation of the facts of the January incident.

⁴³ App. Br. at 43 nn.89-90.

only on equivocal statements of the defendant about false documents in his possession). It did not draw into question the sufficiency of an out-of-court identification to support a conviction.

The Pennsylvania Supreme Court recently emphasized the importance of evidence of prior statements of witnesses, stating that it is “the practical reality that, for the trial process to function in the manner it was intended, i.e., as a vehicle for the discovery of truth, prior inconsistent statements of a testifying witness bearing on the matter in controversy are valid probative evidence that the finder-of-fact should not only be permitted to hear, but, also, vitally necessary for it to consider if it is to render a sound ultimate decision.” Commonwealth v. Brown, 52 A.3d at 1170.

As Mandefero concedes, the Fifth Circuit case upon which he relies stated only that if a witness is unsure of the identification of the defendant, and there are no facts or circumstances connecting a defendant to a crime, a conviction cannot be sustained. United States v. Musquiz, 445 F.2d 963, 965 (5th Cir. 1971)(citing United States v. Johnson, 427 F.2d 957 (5th Cir. 1970)). In Johnson, on which Musquiz relied, the sole witness did not positively identify the defendant in a photo montage, a line-up or in court. Johnson, 427 F.2d at 958. In Musquiz, a witness

definitely identified the defendant in one breath and then expressed a doubt in the next, but even there the court stated that its finding of insufficient evidence was not based only on insufficient identification. 445 F.2d at 965-66. The court relied on an additional defect – that guilty knowledge could not be inferred based on the evidence presented. Id. at 966. The Ninth Circuit has summarized these cases as “teach[ing] that in the absence of connecting or corroborating facts or circumstances, resemblance identification alone will not sustain the beyond a reasonable doubt standard essential for conviction.” United States v. Ezzell, 644 F.2d 1304, 1306 (9th Cir. 1981).

The Washington case cited relating to identification of the perpetrator similarly noted that in Johnson and Musquiz all of the identifying witnesses were “unsure.” Hendrix, 50 Wn. App. at 515-16. In Hendrix, the court held that an unequivocal identification made pretrial was sufficient to support the conviction, although at trial the witness said the picture did not look like the perpetrator. Id. at 516-17. The court in Hendrix referred to a Maryland holding that when a witness testified at trial that he was mistaken in an earlier identification of the perpetrator, the earlier identification was insufficient to support the conviction. Id. at 515 (citing Gibbs v.

State, 7 Md. App. 35, 253 A.2d 446 (1969)). However, the Maryland courts have recognized that the rule in Gibbs is no longer good law, because it was premised on a former Maryland evidentiary rule that pretrial identification was not admissible as substantive evidence. Brown v. State, 182 Md. App. 138, 957 A.2d 654, 679-80 & n.24 (2008). In Brown v. State the court upheld a conviction based on a pretrial identification that was recanted at trial. Id. Its holding is made in light of the rule that a pretrial identification is substantive evidence, which is the Washington rule.

These cited cases regarding equivocal evidence are not relevant in this case. Conflicting evidence does not constitute equivocal evidence. Brown v. State, 957 A.2d at 679-80. A recantation of a pretrial identification renders the issue of identification a credibility question for the jury. Id. at 681. The trier of fact resolves conflicting testimony and weighs the persuasiveness of the evidence. Carver, 113 Wn.2d at 604. The trier of fact is the sole arbiter of credibility and credibility determinations cannot be reviewed on appeal. Camarillo, 115 Wn.2d at 71. Although there was conflicting evidence in this case, that is not unusual; it is the jury's role to weigh that conflicting evidence.

In sum, the jury had direct evidence that Mandefero shot at Gary on May 1, 2012 – evidence of two eyewitness identifications. Deputy Glasgow and Gary both testified that immediately after the shooting, Gary told Glasgow that Mandefero shot him. Gary testified that he also told his mother that Mandefero shot him and asked his family to take revenge. The jury heard circumstantial evidence that corroborated those statements of identification: cell phone tower data, Mandefero's motive, Mandefero's presence at a hospital shortly after the shooting with a gunshot victim (who Gary testified was involved) and contradictory statements about where he had been, and Gary's statement to Officer Beseler that the State had enough without his testimony (not that the wrong man was charged). There was sufficient evidence for a jury to conclude that the State had proven Mandefero guilty of these crimes beyond a reasonable doubt.

2. MATTERS OUTSIDE THE TRIAL RECORD SHOULD NOT BE CONSIDERED BY THIS COURT.

RAP 10.3(a)(5) and (6) provide that factual statements in a brief must include reference to the record. In a direct appeal, the reviewing court will not consider matters outside the trial record.

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

In determining the sufficiency of the evidence, matters not before the jury are irrelevant.

In section B.2, *supra*, the State has identified matters outside the record in this case that are included in Mandefero's Statement of the Case. Most prominent are facts allegedly related to a shooting in January 2012, which Mandefero refers to as the "Citrus Club shooting," and the assertion that Hubbard was settling gang scores in early 2012. These allegations should not be considered by this court.

As the jury was instructed in this case, defense counsel's statements during closing argument also are not evidence. CP 176; State v. Huber, 129 Wn. App. 499, 504, 119 P.3d 388 (2005). Her suggestions about what someone might have heard during one of the jail phone calls should not be considered by the court.

Mandefero has designated to this court an exhibit that is the complete recording of the jail calls, but that was not admitted or played for the jury: Ex. 42; CP 167. He has designated a related exhibit also not admitted. Ex. 44; CP 167. He does not refer to either exhibit in his brief. This court should not consider the content of those calls in determining the sufficiency of the evidence.

established a procedure for consideration of a motion to dismiss when the material facts are not genuinely in issue and the defense contends that the undisputed facts could not legally support a judgment of guilt. Id. at 356. It is inapplicable when facts are in dispute, as they were in this case.

Because Mandefero has made no argument in support of this assignment of error, it should be rejected.

4. MANDEFERO'S CONCLUSION INACCURATELY CHARACTERIZES THE PROSECUTION OF THIS CASE.

In his concluding summary, Mandefero asserts that the State prosecuted him knowing that he was innocent of the charges, ignored exculpatory cell tower evidence, and rested its case on perjured testimony. To the contrary, the State introduced the extensive cell tower evidence and relied on that cell tower evidence to corroborate Gary's two pretrial identifications of Mandefero as the man who shot him. The State's case rested on those reliable identifications, which occurred immediately after the shooting, and the evidence that corroborated them. It is Mandefero who asserts that Gary's testimony at trial must be believed, despite Gary's declarations that he was afraid to testify, that he would "fuck the

case up” if he was forced to testify, and that he intended to take care of this incident on the street.

The evidence supported the jury’s verdict that Mandefero was guilty of these charges beyond a reasonable doubt.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Mandefero’s convictions and sentence.

DATED this 5th day of November, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Donna L. Wise
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Appendix 1

Appendix 1



Ezell's Chicken – Camera 1 9:08:16 p.m.



Ezell's Chicken – Camera 4 9:08:32 p.m.



Ezell's Chicken – Camera 1 9:08:36 p.m.



Ezell's Chicken – Camera 1 9:08:37 p.m.



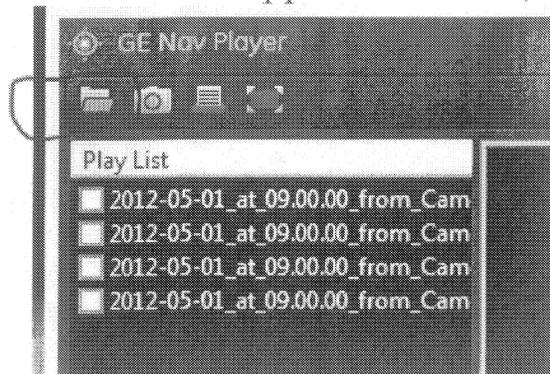
Ezell's Chicken – Camera 1 9:09:27 p.m.

Directions for viewing Ezell's Chicken security video, Ex. 21

Insert disk (Ex. 21) in computer DVD drive. Open disk.
(e.g., in Windows, from Start menu, select Computer, the disk will appear as a separate location).

Select "Ezells Skyway" folder (click on it).
A list of files appears. Select "GENavPlayer.exe"

A GE Nav Player window will appear. Select the folder icon at the far left in the upper left corner, circled here:



A new window appears, with a list of files. Each is the video of one of the security cameras. Select the file (camera number) you wish to see. Click on the "open" button at the lower right of this window.

You will now be back in the GE Nav Player window. Press play (the largest button at the bottom, a right arrow).

Enlarge the image to the full screen by clicking the rectangle in the upper right corner.

You may now switch to another camera by changing the file selected in the GE Nav Player window.

Certificate by Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Mitch Harrison, the attorney for the appellant, at Harrison Law Firm, 101 Warren Avenue North, Seattle, WA 98109, containing a copy of the Brief of Respondent, in STATE V. HAILU MANDEFERO, Cause No. 69925-3 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 5 day of November, 2014

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Name
Done in Seattle, Washington