

No. 37348-3-II  
(consolidated case)

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

vs.

PO CHHUOY and ANDY OEUNG,

Appellants.

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On Appeal from the Pierce County Superior Court  
Cause Nos. 07-1-02901-1 and 07-1-02902-0  
The Honorable Brian Tollefson, Judge

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JOINT OPENING BRIEF OF APPELLANTS

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## I. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court erred by denying Po Chhuoy and Andy Oeung's motions to dismiss for because of insufficient evidence.
2. The State failed to present sufficient evidence to prove beyond a reasonable doubt that Po Chhuoy and Andy Oeung knowingly possessed the firearms found by police during a search of their parents' home.
3. The State failed to present sufficient evidence to prove beyond a reasonable doubt that Po Chhuoy and Andy Oeung had dominion and control over their parents' home or over the firearms within the home.
4. Po Chhuoy and Andy Oeung's constitutional right to a unanimous jury verdict was violated when the State failed to elect which act of possession of a firearm connected to which charged count of unlawful possession of a firearm, and when the trial court failed to give the jury a unanimity instruction.
5. The jury's finding that Po Chhuoy and Andy Oeung committed the crimes of unlawful possession of a firearm to

maintain or advance gang status or membership is not supported by substantial evidence and is clearly erroneous.

6. The trial court erred by imposing an exceptional sentence based on the aggravating factor in RCW 9.94A.535(3)(s).
7. The trial court erred by entering findings that there were aggravating circumstances justifying exceptional sentences above the standard range, and by entering a finding that substantial and compelling reasons support the imposition of exceptional sentences on each of Po Chhuoy and Andy Oeung's convictions for unlawful possession of a firearm.

**B. Issues Pertaining to the Assignments of Error**

1. Did the State fail to present sufficient evidence to establish two counts of unlawful possession of a firearm where the firearms were not in plain view when police arrived to conduct a search; where Po Chhuoy and Andy Oeung do not live in the home where the firearms were found; where none of Po Chhuoy or Andy Oeung's personal possessions were located inside the home where firearms were found; and where none of the witnesses testified regarding the extent of Po Chhuoy and Andy Oeung's access to and use of the home where firearms were found? (Assignments of Error 1,

2 & 3)

2. Were Po Chhuoy and Andy Oeung denied their constitutional right to a unanimous jury verdict where the State charged four counts of unlawful possession of a firearm but did not specify a particular firearm for each particular count; where the jury was not instructed that it must unanimously agree on the particular act of possession Po Chhuoy and Andy Oeung committed; and where there is insufficient evidence to support a finding beyond a reasonable doubt that any of the four acts of possession were actually committed? (Assignment of Error 4)
3. Did the trial court err by imposing an exceptional sentence based on gang purpose where there is not sufficient evidence in the record to support the jury's finding that the crimes of unlawful possession of a firearm were committed to advance or maintain gang status? (Assignments of Error 5, 6, & 7)

## II. STATEMENT OF THE CASE

### A. Substantive Facts

Po Chhuoy, Andy Oeung, Srouch Chhouy, Tony Oeung, and Pao Chhouy are brothers. CP 5. Srouch, Tony and Pao lived with

their parents in a house in East Tacoma.<sup>1</sup> 01/28/08 RP 125; 01/30/08 RP 392, 399, 405.<sup>2</sup> Po and Andy lived together in a mobile home trailer located on the same property as their parents' home. 01/28/2008 RP 180; 01/30/08 RP 392, 399. Po's girlfriend, Chanthorn Soeurng, and their baby also lived in the trailer. 01/30/08 RP 392, 405.

Detectives in the Tacoma Police Department's gang unit believe that all five brothers are members of a local street gang, the Loco Boyz (LBs). 01/28/08 RP 119-20, 122, 123. LBs congregate in the 44th Street and 38th Street area of East Tacoma. 01/28/08 RP 119-20. LB members show their affiliation by wearing red clothing. 01/28/08 RP 94, 116, 119. According to Detective Tom Davidson, LBs are involved in criminal activities, including robberies, assaults, car thefts, and drug dealing. 01/28/08 RP 120-21.

Davidson testified that gang members can maintain or improve their status within the gang by engaging or assisting in criminal activities, including drug dealing. 01/28/08 RP 111, 153-

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<sup>1</sup> Because several parties share a last name, first names will be used throughout this brief.

<sup>2</sup> Citations to the transcripts in this case will be to the date of the proceeding followed by the page number.

54. But he also noted that gang members also engage in drug dealing or other crimes for their own benefit and not for the benefit of the gang. 01/28/08 RP 167.

Davidson testified that gang members often carry firearms for protection, and that "firearm possession is a big component in gang life." 01/28/08 RP 115. When gang members are out together in a car or on the street, each member generally knows whether a fellow member is armed. 01/28/08 RP 115-16.

Davidson testified that he is familiar with all five Chhuoy and Oeung brothers through prior social and criminal contacts, and has seen them wearing red clothing while hanging around in the 44th Street/38th Street neighborhood. 01/28/08 RP 122-23, 126. He has also seen photographs of the brothers and other known gang members posing together wearing red clothing and displaying gang hand signs. 01/28/08 RP 126.

In March of 2007, Lakewood police conducted a controlled drug buy involving Pao. 01/29/08 RP 337, 341-42. During the operation police conducted surveillance of the Chhuoy and Oeung property. 01/29/08 RP 344. They observed Pao go from the main house to the trailer, then go to the controlled buy location where he sold a confidential informant crack cocaine. 01/29/08 RP 344-45.

Pao then returned to the trailer and later to the main house.

01/29/08 RP 344.

In May of 2007, Tacoma police obtained a warrant authorizing a search of the Chhuoy and Oeung property, including both the main house and the trailer. 01/28/08 RP 175, 188-89; CP 5. Police watched the property prior to executing the warrant, and observed a number of young Cambodian males in red clothing traveling back and forth between the house and trailer. 01/28/08 RP 180-81. Police were only able to identify Pao as one of the men. 01/28/08 RP 185-86.

Andy was in the trailer when police arrived to execute the search warrant. 01/29/08 RP 219, 289, 292. Po was also present, but police could not recall whether he was located in the main house or in the trailer. 01/29/08 RP 220-21, 293.

During the search of the main house, police found: numerous items of red clothing; an electronic scale and baggies of crack cocaine; \$1,436 in cash; notes listing credit card numbers; photographs of the brothers with known gang members; and various documents listing the names of Pao, Tony and Srouch. 01/29/08 RP 229-35, 238-39, 240-42, 244, 246, 249-50, 303, 305.

Police found Po's expired Washington State Identification Card in one of the bedrooms. 01/29/08 RP 240, 285.

In the trailer, police seized: a wallet containing Po's driver's license and \$1,621 in cash from Po's wallet; \$206 from the baby's piggy bank; various documents listing the names of Po and Andy; numerous items of red clothing and accessories; a digital scale; a baggie containing an unidentified white powder; a notebook containing "gang writing" and "crib notes"; letters written to Andy from incarcerated known gang members; and notes listing the cost of different amounts of drugs. 01/29/08 RP 213-14, 252-53, 255, 257, 258, 262-73, 275-76, 307; 01/30/08 RP 392-93. None of the cash found was the pre-recorded buy money. 01/29/08 RP 346.

Police found three rifles and one shotgun in the main house; one in a bedroom closet, one under a bed, and two were located behind an entertainment center in the garage. 01/29/08 RP 245-48, 1/29/08 RP 324. They did not find any firearms in the trailer. No fingerprints were found on any of the firearms.

#### **B. Procedural History**

The State charged both Po Chhuoy and Andy Oeung by Amended Information with: one count of unlawful possession of a controlled substance with intent to deliver while armed with a

firearm (RCW 69.50.401(1)(2)(a), RCW 9.94A.510 and .530); and one count of possessing stolen property in the first degree (RCW 9A.56.140(1) and .150(1)). CP 10-13, 184-89. The State also charged Po with four counts of unlawful possession of a firearm in the first degree (RCW 9.41.040(1)(a)), and Andy with four counts of unlawful possession of a firearm in the second degree (RCW 9.41.040(2)(a)(i)). CP 10-13, 185-87. The State further alleged that Po and Andy committed the crimes in order to obtain or maintain membership in, or advance their positions in, the hierarchy of an organization, association or identifiable group (RCW 9.94A.535(3)(s)). CP 10-13, 184-87.

At the close of the prosecution's case-in-chief, the State agreed to dismiss the possession of stolen property charges because a relevant witness failed to appear for trial. 01/30/08 RP 415-16. Po and Andy moved to dismiss the remaining counts, arguing that the State failed to show constructive possession or any connection to the drugs or firearms. 01/30/08 RP 418-421, 448-84. The trial court denied the motion. 01/30/08 RP 484.

During its deliberation, the jury asked for additional instruction on accomplice liability, but were instructed to refer to their instructions. 02/01/08 RP 1, CP 50, 52, 188, 190. Later that

day, the jury sent a note that it was deadlocked on most counts. CP 54, 192; 02/01/08 RP 10. Because one of the jurors would be unavailable to deliberate the next day, the parties agreed with the court to destroy the verdict forms, dismiss the juror with a conflict and re-empanel the jury the following Monday to begin anew. 02/01/08 RP 15.

After two days, the newly formed jury again notified the court that it was deadlocked on all but two counts. 02/05/08 RP 1. The court instructed the jury to continue deliberations, but the next day the jury informed the court that further deliberations could not change the situation and that they were deadlocked on the remaining counts. 02/06/08 RP 1; CP 56, 194.

The jury found Po guilty of two counts of unlawful possession of a firearm in the first degree and Andy guilty of two counts of unlawful possession of a firearm in the second degree. CP 96-97, 234-35; 02/06/08 RP 6-8. On all other counts, the court declared a mistrial. 02/06/08 RP 12. The jury also returned special verdicts on the two firearm charges, finding that both Po and Andy committed the offenses "in order to obtain or maintain his membership or to advance his position in the hierarchy of an organization, association or identifiable group." CP 102-03, 238-39.

At sentencing, the parties agreed that Po's standard range for each of his first degree unlawful possession of a firearm convictions was 31 to 41 months. 02/08/08 RP 5; CP 259. Based on the jury's finding of a gang motive for the crimes, the court imposed an exceptional sentence of 82 months concurrent on each count. 02/08/08 RP 6, CP 268-271, 259, 262.

Andy stipulated to a standard range of 9 to 12 months for each of his second degree unlawful possession of a firearm convictions. 02/08/08 RP 11, CP 254-55. Again, based on the jury's finding, the court imposed an exceptional sentence of 60 months concurrent on each count. 02/08/08 RP 11-12, CP 111, 114, 125-28. Po and Andy both timely appealed, and their cases were consolidated for review. CP 129, 240.

### III. ARGUMENT & AUTHORITIES

**A. The State failed to present sufficient evidence to establish that Po and Andy had knowledge of the presence of firearms in the main house, or that Po and Andy had dominion and control over the main house and over the firearms.**

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90

S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

To convict Po and Andy of unlawful possession of a firearm as charged and instructed in this case, the State had to prove beyond a reasonable doubt that they knowingly had firearms within their possession or control. RCW 9.41.040; CP 10-13, 81-84, 86-89, 184-87.

Possession may be actual or constructive. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). A jury can find a defendant constructively possessed a firearm if the defendant had dominion and control over the firearm or over the premises where the firearm was found. *Echeverria*, 85 Wn. App. at 783. No single factor is dispositive when determining dominion and control; the totality of the circumstances must be considered. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000).

For example, in *State v. Partin*, police searched a house and found photographs and articles featuring Partin, a payment book for the purchase of the house with Partin's paycheck stubs inside, three letters addressed to Partin, and Partin's unemployment documents. 88 Wn.2d 899, 907-08, 567 P.2d 1136 (1977). Partin's motorcycle was parked outside, and a number of items of clothing were located in the bedroom. In addition, Partin gave out the address as his own and acted as if he were the owner during a previous police visit. While police were present, the phone rang repeatedly with callers asking to speak to Partin. 88 Wn.2d at 907-08. This evidence was sufficient to establish occupancy, and therefore dominion and control. 88 Wn.2d at 905, 908.

Conversely, in *State v. Alvarez*, police searched a shared apartment and found a firearm hidden in a closet in one of the bedrooms. 105 Wn. App. 215, 218, 19 P.3d 485 (2001). Also in that bedroom, police found a savings account deposit book in Alvarez's name, pictures and newspaper articles featuring Alvarez and/or his friends, and Alvarez's book bag. 105 Wn. App. at 218-19. Alvarez was present in the apartment but asleep in a different bedroom when police arrived. 105 Wn. App. at 219. There was also testimony at trial that Alvarez resided elsewhere. 105 Wn.

App. at 223. On appeal, the court found that the evidence did not establish dominion and control over the bedroom where the firearm was found, and therefore did not "meet the threshold requirement for constructive possession." 105 Wn. App. at 217, 223.

In *State v. Callahan*, the evidence linking Callahan to drugs found on a houseboat included: two books and two guns belonging to Callahan; he had stayed two to three days on the houseboat but paid no rent; most of the drugs were found near Callahan; and he admitted having handled the drugs. 77 Wn.2d 27, 31, 459 P.2d 400 (1969). In finding the evidence insufficient evidence to prove dominion and control over the houseboat or constructive possession of the drugs, the court noted:

Although there was evidence that the defendant had been staying on the houseboat for a few days there was no evidence that he participated in paying the rent or maintained it as his residence. Further, there was no showing that the defendant had dominion or control over the houseboat. The single fact that he had personal possessions, not of the clothing or personal toilet article type, on the premises is insufficient to support such a conclusion.

77 Wn. App. at 31.

And in *State v. Gutierrez*, the evidence the State produced to show Gutierrez's constructive possession of drugs found inside a storage unit included: pre-recorded drug money from an earlier

controlled buy found on Gutierrez's person; and Gutierrez accompanied the renter of the storage unit to the unit, and stayed inside for 40 minutes. 50 Wn. App. 583, 585-86, 749 P.2d 213 (1988). This was found to be insufficient to establish dominion and control over the drugs or the storage unit. 50 Wn. App. at 594.

In this case, police found all the firearms in the main house: one under bedding in an upstairs bedroom, one in an upstairs bedroom closet, and two behind an entertainment center in the garage. 01/29/08 RP 245, 246-47, 248. But neither Po nor Andy lived in the main house. 01/30/08 RP 392, 399. Neither Po nor Andy kept personal belongings in the main house. All of Po and Andy's belongings, including clothing, cellular phones, wallets, and personal letters and documents, were found in the trailer where they lived. 01/29/08 RP 250-83.

The prosecution argued below that dominion and control were established because Po and Andy had unfettered access to the main house, and because several letters written to Andy were addressed to the main house. 01/31/08 RP 524, 556. But the prosecution's argument is not supported by the facts or the law.

First, not a single witness testified that they observed Po or Andy going into or out of the main house. Police observed several

Cambodian males going back-and-forth between the house and trailer, but none of the police witnesses could identify Po or Andy as one of those men. 01/28/08 RP 180-81, 185-86. None of the State's witnesses testified regarding the extent of Po and Andy's access to or use of the main house. There was simply no evidence to establish what, if any, access Po and Andy had to the main house.

Second, although police found letters sent to Andy using the address of the main house, all of those letters were found in the trailer. 01/29/08 RP 263-64, 276. Regardless, even evidence that a person has received some mail at a residence is not sufficient to show dominion and control over that residence. *State v. Hagen*, 55 Wn. App. 494, 500, 781 P.2d 892 (1989); *Alvarez*, 105 Wn. App. at 223.

The only item connecting Po to the main house was an expired identification card. 01/29/08 RP 240, 285. But as the cases cited above show, the mere presence of personal documents does not conclusively establish dominion and control over the premises. See *Alvarez*, 105 Wn. App. at 217, 223; *Hagen*, 55 Wn. App. at 500; *Callahan*, 77 Wn. App. at 31.

Additionally, mere proximity to the items alleged to be

constructively possessed, without proof of dominion and control over the property or premises where they were found, is not sufficient proof of possession. *Callahan*, 77 Wn.2d at 31.

Accordingly, even if Po and Andy had unrestricted access to the main house, that alone cannot establish dominion and control over the firearms themselves.

Even if it can be shown that Po and Andy had dominion and control over the main house, this is not necessarily sufficient to establish possession of the firearms. The State must show that Po and Andy had dominion and control over the firearms, and dominion and control over the premises is just one factor to consider. *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007); *State v. Roberts*, 80 Wn. App. 342, 353-54, 908 P.2d 892 (1996). But in this case, the State's evidence did not even establish that Po and Andy had knowledge that the firearms were in the main house. The firearms were not kept in plain view, but rather were under bedding and in a closet in an upstairs bedroom, and behind an entertainment center in the garage. 01/29/08 RP 245-48. Not a single witness testified that they ever saw Po or Andy with the firearms, or that Po or Andy knew there were firearms inside the main house.

The fact that Po and Andy's brothers and parents live in the main house, and that Andy occasionally used that address as a mailing address, simply does not establish dominion and control over either the main house or the firearms within the house. The State failed to prove beyond a reasonable doubt that Po and Andy had knowledge and possession of the firearms, and each of their two unlawful possession of a firearm convictions must be reversed.

**B. Po and Andy's constitutional right to a unanimous jury verdict was violated when the State failed to elect which particular act of possession of a firearm connected to which particular count of unlawful possession of a firearm, and when the trial court failed to give the jury a unanimity instruction.**

A criminal defendant may be convicted only if a unanimous jury concludes he or she committed the criminal act charged in the information. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)). And if the State presents evidence of multiple acts that could form the basis of a particular charged count, the State must elect which of the acts is relied on, or the court must instruct the jury to agree on the specific act. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991) (citing *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)).

In this case, officers found four firearms in three different locations within the main house. 01/29/08 RP 254-48. The State charged Po and Andy each with four independent acts of unlawful possession of a firearm, one count for each firearm. CP 10-13, 184-87. But the State did not elect to connect a particular firearm to a particular count, and the trial court did not give the jury a unanimity instruction.<sup>3</sup> CP 60-94, 198-232.

If there is no election and no instruction, the resulting constitutional error is harmless only if no rational trier of fact could have had a reasonable doubt that each incident established the crime beyond a reasonable doubt. *Crane*, 116 Wn.2d at 325. The rationale for this protection in multiple acts cases stems from possible confusion as to which of the acts a jury has used to determine a defendant's guilt. *State v. King*, 75 Wn. App. 899, 902, 878 P.2d 466 (1994).

As argued in detail in Section III.A above, there is insufficient evidence to establish any of the four counts of unlawful possession of a firearm. And the jury was unable to agree that the State

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<sup>3</sup> This issue may be raised for the first time on appeal because failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error. RAP 2.5(a); *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); *State v. Holland*, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

established possession of all four firearms. 02/05/08 RP 1; 02/06/08 RP 1; CP 56, 194. Clearly, based on the evidence presented at trial, a reasonable trier of fact would and did have a reasonable doubt that each incident of possession was established beyond a reasonable doubt.

The jury convicted Po and Andy of two counts each, but there is no way to tell from the record which firearms the jury found Po and Andy possessed, or whether the jury agreed on which two firearms each possessed. Confusion therefore exists "as to which of the acts of possession the jury used to determine guilt." *King*, 75 Wn. App. at 902.

The instructional error is therefore not harmless in this case. The State's failure to elect which firearm connects to each count, and the trial court's failure to give a unanimity instruction, denied Po and Andy's constitutional right to a unanimous jury verdict. Their unlawful possession of a firearm convictions must be reversed.

**C. The trial court erred by imposing an exceptional sentence based on gang purpose because there is not sufficient evidence in the record to support the jury's finding that the crimes of unlawful possession of a firearm were committed to advance or maintain gang status.**

The trial court imposed two exceptional sentences each for Po and Andy based on the jury's finding that both Po and Andy unlawfully possessed firearms "in order to maintain his membership or to advance his position in the hierarchy of an organization, association, or identifiable group." CP 268-71, 259.

Po was convicted of two counts of unlawful possession of a firearm in the first degree, which carried a standard range sentence of 31 to 41 months. CP 258-59. He was sentenced to double that range, two concurrent sentences of 82 months. CP 262.

Andy's standard range was found to be 9 to 12 months. 2/8/08 RP 11, CP 254-55. Again, based on the jury's finding, the court imposed an exceptional sentence of 60 months concurrent on each count. 02/08/08 RP 11-12, CP 111, 114, 125-28.

Generally, a jury must determine facts supporting an exceptional sentence beyond a reasonable doubt. RCW 9.94A.537(3); *Blakely v. Washington*, 542 U.S. 296, 301-4, 124 S.

Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008). If the jury unanimously finds the alleged aggravating circumstance is proved beyond a reasonable doubt, then the trial court may sentence the defendant to an exceptional sentence under RCW 9.94A.535 "if it finds . . . that the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535.

A sentence outside the standard range may be reversed where the reviewing court finds:

Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4).

The reviewing court performs a three-pronged analysis in its review of an exceptional sentence: (1) whether the record supports the jury's special verdict on the aggravating circumstances; (2) whether the trial court's reasons for imposing an exceptional sentence are substantial and compelling; and (3) whether the

sentence was clearly excessive or clearly lenient. See RCW 9.94A.585; *State v. Hale*, 2008 Wn. App. LEXIS 2043 (2008).

This court has applied the “clearly erroneous” standard to review of the factual findings in support of an aggravating factor. *Hale*, 2008 Wn. App. LEXIS 2043 at 12. The jury’s special verdicts in this case were “clearly erroneous” because the evidence was not sufficient to support that conclusion. Substantial evidence exists where there is a “sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993).

RCW 9.94A.535(3)(s) provides that the court may give an exceptional sentence if the jury finds that: “[t]he defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association or identifiable group.” The jury in this case was given no further definition than the above. CP 232.

Merely showing gang membership, without more, is insufficient to support an exceptional sentence under RCW 9.94A.535(3)(s). Although the First Amendment does not protect criminal actions, it does protect a person who commits a crime from being punished twice merely because he happens to belong to a

gang. See *State v. Johnson*, 124 Wn.2d 57, 67, 873 P.2d 514 (1994); *State v. Smith*, 64 Wn. App. 620, 624-25, 825 P.2d 741 (1992). The First Amendment protects an individual's right to associate with others, even when the group or its purpose are unpopular. *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Smith*, 64 Wn. App. at 625. Furthermore, RCW 9.94A.340 prohibits consideration of factors at sentencing that do not relate to the crime or the previous record of the defendant.<sup>4</sup> To support an exceptional sentence, the evidence in this case must establish more than gang membership; it must establish that the crime was committed in furtherance of the gang or gang membership.

Assuming for the purpose of this argument that the State proved that Po and Andy possessed two firearms and that they were both gang members, these two facts do not amount to sufficient evidence that these crimes were committed "to obtain or maintain" their membership in a gang or to advance their position in a gang. The State's witnesses testified that they believed Po and

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<sup>4</sup> "The sentencing guidelines and prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant." RCW 9.94A.340.

Andy were members of the LBs,<sup>5</sup> that they had seen Po and Andy with other LBs,<sup>6</sup> that Po and Andy had worn red,<sup>7</sup> and that Po and Andy had been seen making gang hand signs.<sup>8</sup> Beyond this evidence of gang membership, the only evidence offered by the State to show a connection between the firearms and the gang was the general statement of Detective Davidson that gang members may carry firearms for protection. 01/28/08 RP 115. The firearms found in this case were rifles, which would be difficult to "carry around for protection."<sup>9</sup> Furthermore, there was no evidence offered that they had ever been carried for protection. The firearms were not found anywhere near Po and Andy.<sup>10</sup> The circumstances in which the rifles were found carried no indication of a gang purpose.

In closing argument, the prosecutor told the jury that the gang purpose was proven by the colors, crimes committed, and communication with gang members. 01/31/08 529. He went on to

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<sup>5</sup> 01/28/08 RP 119-20, 122, 123.

<sup>6</sup> 01/28/08 RP 122-23, 126.

<sup>7</sup> 01/28/08 RP 122-23, 126.

<sup>8</sup> 01/28/08 RP 126.

<sup>9</sup> One was a Marlin .22 rifle; one was a Savage 30.06 rifle; one was a Remington rifle; and one was a Stevens 12-gauge shotgun. 01/29/08 RP 324.

<sup>10</sup> The four firearms were found in the main house: one in a bedroom closet, one under bedding, and two in the garage behind an entertainment center. 01/29/08 RP 245-48.

argue:

Delivering drugs is in furtherance of the gang. Whether they distribute the money around or not, they are known drug dealers. They are doing what you do in this particular gang. And their acts are in furtherance of that.

01/31/08 RP 558. In other words, the prosecutor told the jury that proof of gang membership, plus committing the crime, was sufficient to prove the gang purpose enhancement. This was legally incorrect. If mere gang membership were enough, in and of itself, then this aggravating factor would violate both the First Amendment and state law. See *Johnson*, 124 Wn.2d at 67; *Smith*, 64 Wn. App. at 624-25.

In *Smith*, the court held that the State had provided sufficient evidence that the defendant committed murder to further his position in a gang. 64 Wn. App. at 624-25. That evidence showed that Smith was a member of a gang that was involved in a "turf war," and at the time of the shooting, that Smith had taken an active part in defending the gang's turf in the months prior to the shooting, that Smith and his associates were cruising the area for rival gang members to shoot, and that they opened fire on the victim's car after construing the victim's wave as a gang sign of the rival gang, thus showing that the motive in committing the crime was to shoot

rivals in order to defend their turf—a gang purpose. *Smith*, 64 Wn. App. at 620-24.

In *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006), the defendant's crime was elevated when the jury found that the murder was committed to further the defendant's position in a white supremacist group. The evidence in that case was that Monschke talked about committing a violent crime to earn "red laces," an award within the group given when the wearer assaulted a member of a minority group. 133 Wn. App. at 323. Further, the crime scene was covered with graffiti relating to the group. 133 Wn. App. 323. Following the murder, Monschke and his co-defendants discussed the crime, referring to the victim as a minority and the credit they would earn in the supremacist group in return for committing the murder. 133 Wn. App. at 324. The appellate court held that based on this evidence, a rational trier of fact could find that Monschke murdered the victim to advance his position as a white supremacist. 133 Wn. App. at 334.

In *State v. Johnson*, the court held that the evidence showed that Johnson was a member of the BGD gang, that the victims were members of a rival gang, that the gangs were engaged in a turf war, that Johnson was taking an active roll in the turf war, and that

just before the shooting, the rival gangs had clashed and Johnson appeared with a handgun and shot the victims. 124 Wn.2d at 69. The court held that this evidence was sufficient to support the gang motivation finding. 124 Wn.2d at 70.

Unlike *Smith*, *Monschke*, and *Johnson*, there was no evidence in this case to connect the crime to the gang or gang membership. The State did not even attempt to show a connection between the crime and the gang, arguing to the jury that membership in a gang is sufficient. Consequently, the jury's finding that Po and Andy unlawfully possessed firearms to advance or maintain their gang position was not supported by substantial evidence and was clearly erroneous. And, therefore, the trial court erred in sentencing Po and Andy to exceptional sentences based on this erroneous finding.

#### IV. CONCLUSION

Because there was insufficient evidence to establish that Po and Andy had dominion and control over the main house or dominion and control over the firearms, there was no actual or constructive possession of the firearms. Their convictions for unlawful possession of a firearm must therefore be reversed and dismissed with prejudice. Additionally, the State failed to specify

which firearm corresponded with each count, and the court failed to provide a unanimity instruction. Po and Andy's right to a unanimous verdict was violated, which also requires reversal. Finally, there is insufficient evidence that the crimes were committed with a gang purpose. The trial court erred by sentencing Po and Andy to exceptional sentences, which requires the reversal of their sentences.

DATED: September 12, 2008

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