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Court of Appeals
Division III
State of Washington

No. 30340-3-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

JOSE LUIS NIEVES,

APPELLANT.

BRIEF OF RESPONDENT

**D. ANGUS LEE
PROSECUTING ATTORNEY**

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A. IDENTITY OF RESPONDENT

The State of Washington was the Plaintiff in the Superior Court, and is Respondent herein. The State is represented by the Grant County Prosecutor's Office.

B. RELIEF SOUGHT

The State is asking this Court to affirm the decisions of the Superior Court and uphold the conviction of the Appellant.

C. STATEMENT OF FACTS

Just after midnight on November 1, 2010 (Halloween night), Officer Dustin Slabach of the Soap Lake Police Department attempted to make a traffic stop on a vehicle with a defective taillight. Officer Slabach was scheduled to work until 4AM. He was in uniform, displaying a badge and Soap Lake Police Department (SLPD) patch. He was driving a marked patrol vehicle, marked with the SLPD patch and the word "Police" on each side, and equipped with overhead light bar. RP Trial, 207 – 208¹.

¹ There are multiple days of trial, all in one transcript, so they will be referred to by page number. Other proceedings will be referred to in such manner as necessary.

Officer Slabach was at Daisy Street and Sixth Avenue Southeast in Soap Lake, and saw that vehicle on Cannon Street, about one block from his location. He caught up to the vehicle on Highway 28 at Division Street. The vehicle turned south on Division. Soon after, the vehicle made an unlawful U-turn and nearly struck Slabach's patrol vehicle, causing him to make an evasive maneuver to the right. Slabach caught up to the vehicle. He gave the license plate information to dispatch preparing to stop the vehicle. The license plate was from Washington, "363VKS", and returned to a burgundy colored Honda, matching the vehicle Officer Slabach was following. At that time, Officer Slabach believed that there were two people in the car. RP Trial, 208 – 210.

Officer Slabach activated the red and blue lights of the overhead light bar to no avail. After about ten seconds he turned on the siren. Instead of stopping, the vehicle continued east on State Route 28. At about Road "A", the vehicle began to speed up. Slabach notified dispatch of the increasing speeds, and that the vehicle was failing to yield. Slabach looked down to his dash and saw that his speed was now about 80 miles per hour, in a posted limit of 60. As he looked down at the dash, Officer Slabach heard what he believed to be eight to ten gunshots in rapid succession. He did not see

anything from the Honda, and did not see any other vehicles in the area at the time. He slowed down to create more distance between the Honda and his patrol car. RP Trial, 211 – 218. Based on his experience with firearms, he thought the shots were coming from a handgun. RP Trial, 213 – 217, 230. Slabach created more distance because he did not want to get shot. RP Trial, 227.

Officer Slabach pulled over due to an unknown malfunction with his patrol car. From there, he kept watching the Honda. He eventually saw the vehicle slow down, turn into a dead end road, and then saw the headlights as if the vehicle was coming back toward him. Since the patrol car was still running, Officer Slabach went to the nearest road back to the west, drove down it a short distance, and found some cover or concealment from which to observe or take action. The vehicle did not return as far as his location. RP Trial, 218 – 219. Backup officers began arriving, and eventually a search for the Honda was commenced. It was not found during Officer Slabach's shift. RP Trial, 219.

Luis Enrique Flores Martinez was driving the Honda that early morning. He had gone to a party in Othello on that evening. He encountered Appellant, whom he knew from attending school with him in Royal City, at

the party. Mr. Flores is not a member of the South Side Locos (SSL), but did hang out with members. Appellant had admitted to Mr. Flores his membership in the SSL. RP Trial, 232 – 237.

Mr. Flores stayed at the party for a while, leaving about 10:30 or 11 that evening. He left with “Jose, Eduardo, and Salvador”. RP Trial, 238. Mr. Flores identified “Jose” as the Defendant (Appellant). Mr. Flores drove his mother’s red Honda Accord four door to Soap Lake to pick up some female companions. After finding them, Mr. Flores inadvertently took the road toward Ephrata instead of using back roads to Moses Lake. Once he realized the error, Mr. Flores took steps to change his route. He turned onto a cross street, turned around, and headed back toward his intended route. He noticed that there was a police officer following him. After a minute or so, the officer turned on his red and blue lights and Mr. Flores started slowing down to try to pull over. RP Trial, 238 – 241. Appellant was sitting in the front passenger seat. RP Trial, 250.

Mr. Flores was not able to pull over because Appellant pulled out a gun, started shooting, and told him not to stop. Mr. Flores heard about seven shots, which were fired out of the partially lowered passenger window. He estimated his speed at the time to be about seventy-five or eighty miles per

hour. Mr. Flores turned into a road, drove to the end, parked the car, took the keys, and all of the occupants took off running. They ended up walking toward Ephrata. During the walk, Appellant gathered the group, and told them that if anyone “snitched him out” he would kill them after he got out. He seemed to be specifically focused on Vanessa Barajas, and told her “especially you”. Before getting to Ephrata, Appellant separated from the rest of the group and was not seen again. RP Trial, 241 – 247. Mr. Flores identified “Salvador” and “Eduardo” by their street names as “Chavez” and “Little Villain”, respectively. There were eight occupants of the car; the four young men, including Appellant who had come from Othello, and the four young women they had picked up in Soap Lake. RP Trial, 250.

Later on November 1, Mr. Flores went to the Adams County Sheriff’s Office (ACSO) and reported that the car had been stolen while he was at the party in Othello. He returned to the ACSO on November 2 and reported what had actually happened. While there, Mr. Flores was shown photographs and identified Appellant from among the photos shown. RP Trial, 251 – 253; 790 – 793. Mr. Flores also testified that he did not know about the pistol until Appellant started shooting, and was afraid to stop because Appellant was already firing the pistol. RP Trial, 259 – 262.

Vanessa Barajas was in the car that night, sitting in the middle of the front seat. “Luis” was driving, and “Jose”, whom she identified as the Defendant (Appellant), was in the front passenger seat. There were other people in the car, but she only knew the other girls she had been with when they were all picked up. She described seeing a police car behind them. She knew it was a police car because it had its overhead lights on. She knew they should have pulled over, but the car did not. She was surprised to hear shooting, and saw that “Jose” was doing the shooting. They kept driving and abandoned the car, going “out in the middle of nowhere”. RP Trial, 270 – 274. The car was later discovered by the owner of the property on which it was abandoned. After he reported it, it was secured by law enforcement officers and watched until the scene could be examined. RP Trial, 292 – 306.

As they were walking, at one point the group stopped. Appellant did most of the talking. He told Ms. Barajas that he did not trust her, because she hangs around with her cousin, a member of another gang. Appellant referred to Ms. Barajas’ cousin as a “Buster”, a derogatory term used by “Sureños” for a member of the “Norteño” street gang. Appellant told Ms. Barajas that because he did not trust her, he would shoot her or could have her shot if she said anything. RP Trial, 274 – 277.

Chief Deputy (then detective) Ryan Rectenwald of the Grant County Sheriff's Office described his involvement in the investigation, starting on the morning of November 1, 2010. Detective Wagner of the ACSO informed him of the information provided by Mr. Flores. After having the events described to him by Officer Slabach, Detective Rectenwald walked a mile or more of the area in which the shooting had occurred along Route 28. During the course of that walk, he discovered fired cartridge casings², one on each side of the road. The casings bore a head stamp reading "FC" for "Federal Cartridge", and also indicating that the casings were from a 9mm round. After being photographed, the casings were taken as evidence. RP Trial, 308 – 313.

As he was taking the casings, Rectenwald heard police radio traffic about an abandoned vehicle that matched the information about the suspect vehicle. He went to 3163 Highway 28 East, and looked at the vehicle. He located a blue bandana on the ground on the left side of the vehicle. He located an unfired cartridge with the same markings as those found on the

² The correct nomenclature may not be known to the Court. A "bullet" is the projectile that is fired from a firearm. A loaded "cartridge" is comprised of the metal casing that holds powder and the bullet. The powder is ignited by the primer, which is in a pocket in the end of the cartridge opposite the bullet, being struck by the firing pin. A fired cartridge casing is empty except for the primer, which has been dented by the firing pin, and is ejected from a semi-automatic firearm such as the one admitted in this case as part of the firing cycle.

highway on the right hand side of the vehicle. Detective Rectenwald was provided with some street names of people who may have been with Mr. Flores. He passed those on to Officer Judkins of the Royal City Police Department in an effort to identify those persons. In addition, Detective Rectenwald provided a montage to Detective Wagner to show to Mr. Flores. Due to these investigative efforts, Rectenwald, Detective Messer, and several U.S. Marshals went to Appellant's residence in Royal City to arrest him. RP Trial, 321 – 332.

After Appellant was arrested, a search warrant was obtained and served on the residence. At the time of the arrest, Rectenwald was stationed outside the house, at the right rear corner. He heard footsteps inside the house come toward that location and then leave, as if running. When the warrant was served, in the room adjacent to where Rectenwald heard the running footsteps, a Ruger 9mm pistol was recovered, wrapped in a blue bandana. With the pistol was a magazine³ for it, which had unfired cartridges in it. These cartridges bore the same markings as those previously recovered near Soap Lake, as were those contained in a partial box of ammunition also recovered in the house. RP Trial 333 – 347.

³ Ammunition for a pistol such this Ruger is contained in a detachable metal device which is sometimes incorrectly referred to as a "clip"; the correct term is "magazine".

Angelica Martinez was Mr. Flores' girlfriend on that evening; they later broke up. She too had attended the party, riding with Mr. Flores. During the evening, she saw Mr. Flores leave the party with Appellant and 2 other young men in the red Honda. She left the party early in the morning with Appellant's sister to pick up Appellant in Ephrata or Soap Lake. She asked about the rest of the group, and his reply was "fuck all them, and if they snitch, we know what's up". Ms. Martinez then rode with Mr. Flores' mother and retrieved Mr. Flores and the other two young men. After returning to Royal City, she and Mr. Flores went to Othello to report the car stolen. They reported the car stolen due to fear of law enforcement and Appellant. They eventually reconsidered and returned to report what had actually happened to the car. RP Trial, 403 – 417.

Officer Korey Judkins of the Royal City Police Department (RCPD) is the gang intelligence officer of the RCPD, and the department's representative on the Columbia Basin Gang Task Force. As a result of his duties and training, he is familiar with gangs and their culture generally, especially the local gangs. In particular he expressed familiarity with the South Side Locos (SSL), a gang based in Royal City. He described observations of several known SSL members, including Appellant. Appellant

walked at the front of any group of SSL members, and he would tell other members not to talk to Officer Judkins if he attempted to engage them in conversation. RP Trial, 460 – 470. A large number of buildings in Royal City were damaged with SSL graffiti on August 10, 2010, and photographs showing that graffiti were introduced. RP Trial, 481 – 489.

Officer Judkins also testified about a fight at the high school on September 15, 2010. He had seen a video in which four known members of the SSL attacked a known Norteño gang member. Related charging and disposition documents were also admitted. Similarly, three SSL members attacked another Norteño on September 24, 2010, and the related charging and disposition documents were admitted. Another incident of graffiti damage occurred in the laundry room of an apartment complex on December 19, 2010. Several photos showing the graffiti were admitted. The photos showed multiple references to the SSL. Officer Judkins also testified about being provided with some street names by Detective Rectenwald, and giving the actual names of those persons to Rectenwald. RP Trial, 526 – 545.

Detective Matt Messer of the Grant County Sheriff's Office saw the red Honda at the scene at which it was found abandoned. He later observed the search of that car at the impound lot pursuant to a search warrant. Among

items recovered was another fired cartridge case. He also went to 423 Juniper Court in Royal City as part of the team that arrested Appellant and then assisted in searching the residence. He identified the photographs showing the bandana, pistol, and magazine recovered during that search. RP Trial, 546 – 556.

Detective Messer also testified about the interview of Sylvia Espino on November 4, 2010, after she got a message to the detectives that she wanted to speak to them again. Detective Messer prepared the *Smith* affidavit⁴ that would result and be admitted. Ms. Espino provided the information that went in to the affidavit, and made and initialed corrections to what Detective Messer had written down for her. RP Trial, 761 – 770. Tammy Roloff of the Juvenile Detention facility was also present at the interviews of both Sylvia Espino and Rosamaria Montano. She was the detention officer who brought them to the interviews in the juvenile facility and stayed through the interviews. She asked both Montano and Espino if they wanted to go into the interviews, told them that they could leave the interview at any time, and confirmed that neither of them was threatened in any way. RP Trial, 774 – 785.

Silvia Espino was in the car on the evening of the shooting, trying to go from Soap Lake to the party in Othello. She testified to seeing the police car, its emergency lights coming on, and the failure to stop. She then testified in a matter inconsistent with her statement to Detective Rectenwald, leading to the introduction of the “*Smith* affidavit”. She also testified about the occupants of the Honda, leaving out Appellant, and was impeached by her prior inconsistent statement based on her drawing of the occupants of the Honda that had included Appellant. RP Trial, 582 – 638.

Trevor Allen is a Washington State Patrol Laboratory Scientist and a member of their Crime Scene Response Team. He described the search of the Honda. He recovered a 9mm cartridge and a empty case from inside the car, and turned them over to Detective Messer. RP Trial, 647 – 656. These items, and the loaded cartridges, empty casings, pistol, magazine and other items recovered were admitted through Chief Deputy Rectenwald, Detective Messer, and Glenn Davis. RP Trial, 657 – 666; 678 – 680; 752 – 757; 795 – 799.

Glenn Davis is also a Washington State Patrol Laboratory Scientist, assigned to work in the examination of firearms and tool marks. He tested the Ruger pistol and found it to be in proper working order. He also examined the

4 Referred to as such based upon *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982).

fired cartridge cases and concluded that they had been fired from that pistol. Photographs that had been taken during the examination were admitted and shown to the jury, with descriptions of the markings that led to his conclusion. RP Trial, 668 – 708.

Rosamaria Montano is the sister of Silvia Espino. Ms. Montano was also in the car on the evening of the shooting, for the same reason. She also testified in a manner inconsistent with her prior *Smith* affidavit given to Chief Deputy Rectenwald, and the statement was then admitted. RP Trial, 719 – 751. The creation of the *Smith* affidavit during her interview was described by Chief Deputy Rectenwald. RP Trial, 803 – 808.

The general organization and structure of the Sureño and Norteño street gangs was explained by the testimony of Deputy Joseph Harris. He also explained the significance of the tattoos on Appellant and the graffiti. RP Trial, 827 – 831; 846 – 853.

Karina Godinez testified that she knew both Appellant and Mr. Flores; that she was at the party; that Mr. Flores had a handgun, and that Appellant was still at the party when she left about two AM. RP Trial, 862 – 879. Appellant's sister, Arcelia Sosa, also testified that she was present and that she drove herself and Appellant home from the party after two or three in

the morning, arriving home about four AM. RP Trial, 894 – 904.

D. RESPONSE TO APPELLANT’S ISSUES PRESENTED

1. The evidence at trial was sufficient to sustain the charges of Intimidating a Witness in Counts 5, 6, and 7, and the jury instructions were not erroneous.

Appellant challenges his convictions for Intimidating a Witness in Counts 5, 6, and 7 arguing the evidence was insufficient to prove beyond a reasonable doubt that he committed the crime. Br. of Appellant, 1; 14 - 23.

In order to determine whether there was sufficient evidence to support Appellant’s conviction, this Court will “view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. Mitchell*, 169 Wn.2d 437, 443-44, 237 P.3d 282 (2010) (citations omitted). A claim of insufficiency of the evidence not only requires that the Appellant admit the truth of the State’s evidence, but also grants the State the benefit of all inferences that can reasonably be drawn from it. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citation omitted). Additionally, appellate courts defer to the finder of fact on issues of witness

credibility. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010) (citation omitted).

Considering all evidence, including all reasonable inferences drawn from it, is reviewed in the light most favorable to the State, there is more than sufficient evidence to support the convictions for Intimidating a Witness in Counts 5, 6, and 7. The challenged jury instructions did not misstate the law, constitute a mandatory presumption or shift the burden of persuasion. The instructions in this case tracked the statute, and required the State to prove that Appellant did any of the actions prohibited by RCW 9A.72.110(1). In this case, a reasonable juror could have concluded that Ms. Barajas was supposed to be disinclined to cooperate due to those threats. The jury could also conclude that Ms. Montano and Ms. Espino were uncooperative and changed their statements as a result of the threats made by Appellant. Both Ms. Montano and Ms. Barajas were only brought to testify pursuant to material witness warrants. RP Trial, 581; 640 – 645; 714 – 715; 198 – 200. The testimony of Ms. Martinez is also consistent with Appellant not wanting anyone to cooperate with the investigation into the shooting.

Further, the statute is designed to protect the integrity of the entire process, from the initial reports of a possible crime, through the charging and

trial. Instructions 35, 36, 37, and 38⁵ are only a portion of the Court’s instructions to the jury. When considered as a whole, the instructions did tell the jury what the law is, what they must consider, and what had to be proved beyond a reasonable doubt to their satisfaction in order to return a verdict of “guilty.”

Appellant cites to *State v. Boiko*, 131 Wn. App. 595, 598 – 599, 128 P.3d 143 (2006). However, Appellant fails to note a substantial difference in the jury instructions in these two cases. In *Boiko*, the instructions provided that “...(i)f you find from the evidence that *each of elements* (1), (2), (3) and (4) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3) or (4), then it will be your duty to return a verdict of not guilty.” *Id.*, at 600 (emphasis added). In the current case, the instructions provided that “...(i)f you find from the evidence that element (2) and *any of (the) alternative elements ...* have been provided beyond a reasonable doubt, it will be your duty to return a verdict of guilty.” CP, 670 – 672 (emphasis added). The instructions as given adequately allowed the parties to argue their theory of

⁵ Instructions 36, 37, and 38 are identical but for the named victim and will be treated as such.

the case, and there is little question that based on the evidence, and as noted by Appellant, the argument of the State, the facts that justify conviction are those which show that Appellant was trying to ensure that potential witnesses would not cooperate with any investigation of the shooting. Br. of Appellant, 22, citing RP Trial, 986. Appellant also fails to consider WPIC 115.51.01, which WPIC 4.23 may, but need not, modify. In addition, the cited language from *State v. Ortega-Martinez*, 124 Wn.2d 702, 717 fn. 2, 881 P.2d 231 (1994), “We strongly urge counsel and trial courts to heed our notice that an instruction regarding jury unanimity on the alternative method is preferable” does not mandate the result Appellant seeks. The comment to WPIC 4.23 quoted by Appellant also does not mandate that result. “The new language instructs jurors that, while they need to be unanimous as to each of the elements of the charged offense in order to return a guilty verdict, they need not be unanimous as to each of the alternatives within a particular element.”

The jury was properly instructed as to its obligations. The jury was to consider what had been proven based on the testimony and admitted exhibits, and to consider all evidence without regard to which party introduced it. It was also instructed as to witnesses and their testimony, including direct and circumstantial evidence, and the jury’s role in considering the veracity and

accuracy of any witness. CP, 633 – 635. While the jury received testimony from defense witnesses that differed from that of the State’s witnesses, it was the role of the jury to determine what had been proven and to consider the credibility, biases, and opportunity to observe of all of the witnesses. The standard for determining whether a conviction rests on insufficient evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Further, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.*, at 201. This standard is deferential, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury. *State v. Walton*, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992). Applying the law to the facts of this case, the jury could have, believed the testimony and evidence put forward by the State. That testimony, evidence, and inferences from them, support the verdict.

2. Gang evidence admitted was necessary to prove the underlying case, as well as the aggravators and enhancements charged. All jury instructions were necessary and proper for, and the limiting instruction was an accurate and necessary statement of law.

During a preliminary CrR 8.3(c) hearing the court dismissed the gang aggravator (RCW 9.94A.535(3)(aa)) as it pertained to the counts related to shooting at Officer Slabach, but left the aggravator as it related to the witness intimidation counts. Those aggravators were then dismissed for insufficiency of evidence at the close of the State's evidence. RP Trial, 817. In addition the State proceeded on an enhancement of a Criminal Street Gang member in Possession of a Firearm. RCW 9.94A.829 and RCW 9.94A.701(3)(b).

The aggravator required the State to prove (1) the SSL were a criminal street gang as defined in RCW 9.94A.030 (2) Appellant was associated with the gang and (3) the crime was done to provide some benefit for the gang. The trial court ruled that the State fell short on the third prong after hearing all the evidence. RP Trial, 817. The enhancement requires the State to prove the Appellant (1) unlawfully possessed a firearm (2) that there was a gang, and (3) the defendant was a member or associate of that gang.

Thus the State has to establish that the SSL, Appellant's gang, is a Criminal Street Gang within the meaning of the statute, not simply that some officer said it was a gang, as the appellant suggests. "Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association." *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) This is a true statement, at least to some extent, if one defines a gang as a group of teenagers hanging out on the corner, wearing bandanas and wiggling their fingers at each other. Indeed, RCW 9.94A.829 and 701(3)(b) would be unconstitutional if this was the definition of a gang, as it provides additional punishment for protected association. *Scott* did not address the definition of a gang, as the prosecution did not introduce evidence of it.

However, it is a well accepted principle that criminal associations do not receive First Amendment protection. *See, e.g., People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1110-11 (1997); *United States v. International Bhd. of Teamsters*, 941 F.2d 1292, 1297 (2nd Cir. 1991); *Scales v. United States*, 367 U.S. 203, 224-230, 81 S. Ct. 1469 (1961); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722-31 (2010); *Helton v. State*, 624 N.E.2d 499, 509 (Ind. Ct. App. 1993). *Scales* lays out the test. In order to prosecute

someone for their associations the State must prove that a member of the organization is a willing advocate or participant in the illegal activity that is the goal of the group, not merely that the person is a member of that group, voluntarily on the membership roles. *Id.* at 225-31. In order to ensure that the State's gang allegations meet these constitutional requirements the State must prove that there is a Criminal Street Gang that is a criminal association, and that Appellant is more than a titular member, expressing sympathy with the group's goals. RCW 9.94A.030(12),(13),(14),(36).

The first definition that the State must prove is:

"Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity. This definition does not apply to employees engaged in concerted activities for their mutual aid and protection, or to the activities of labor and bona fide nonprofit organizations or their members or agents.

RCW 9.94A.030(12). The State established that the SSL was a group of three or more people by Officer Judkins' testimony regarding the members of the gang. This included Jose Nieves, Eric Haro, Jesus and Jonathan Torres and Eduardo Nejara Cruz. He also testified this was an ongoing organization

by describing several incidents over a period of time. Judkins testified that the group had a common identifying name, the South Side Locos, or SSL, and had common symbols including a blue bandana. According to Appellant, this would have been sufficient to establish that Appellant was a member of a Criminal Street Gang. This is incorrect. Officer Judkins' testimony to this point would have been sufficient to establish that Appellant was a member of a group called the South Side Locos. This would have violated the First Amendment as tests of *Scott* and *Scales*. The rest of the definitions are necessary.

Deputy Harris testified that the SSL is a Sureño Street gang, and described several more common identifying symbols, including the number 13, three dots, the word Sureño, and the symbol NK, with a line through the N, symbolizing Norteño Killer. In order to establish that the SSL has, as one of its primary activities the commission of criminal acts the State introduced evidence of several crimes committed by and for the SSL and resulting convictions. Finally, the State had to prove that the SSL individually or collectively engaged in a "pattern of criminal street gang activity."

"Pattern of criminal street gang activity" means:

(a) The commission, attempt, conspiracy, or solicitation of, or any prior juvenile adjudication of or adult conviction of, two or more of the following criminal street gang-related

offenses:

- (i) Any "serious violent" felony offense as defined in this section, excluding Homicide by Abuse (RCW 9A.32.055) and Assault of a Child 1 (RCW 9A.36.120);
- (ii) Any "violent" offense as defined by this section, excluding Assault of a Child 2 (RCW 9A.36.130);
- (iii) Deliver or Possession with Intent to Deliver a Controlled Substance (chapter 69.50 RCW);
- (iv) Any violation of the firearms and dangerous weapon act (chapter 9.41 RCW);
- (v) Theft of a Firearm (RCW 9A.56.300);
- (vi) Possession of a Stolen Firearm (RCW 9A.56.310);
- (vii) Malicious Harassment (RCW 9A.36.080);
- (viii) Harassment where a subsequent violation or deadly threat is made (RCW 9A.46.020(2)(b));
- (ix) Criminal Gang Intimidation (RCW 9A.46.120);
- (x) Any felony conviction by a person eighteen years of age or older with a special finding of involving a juvenile in a felony offense under RCW 9.94A.833;
- (xi) Residential Burglary (RCW 9A.52.025);
- (xii) Burglary 2 (RCW 9A.52.030);
- (xiii) Malicious Mischief 1 (RCW 9A.48.070);
- (xiv) Malicious Mischief 2 (RCW 9A.48.080);
- (xv) Theft of a Motor Vehicle (RCW 9A.56.065);
- (xvi) Possession of a Stolen Motor Vehicle (RCW 9A.56.068);
- (xvii) Taking a Motor Vehicle Without Permission 1 (RCW 9A.56.070);
- (xviii) Taking a Motor Vehicle Without Permission 2 (RCW 9A.56.075);
- (xix) Extortion 1 (RCW 9A.56.120);
- (xx) Extortion 2 (RCW 9A.56.130);
- (xxi) Intimidating a Witness (RCW 9A.72.110);
- (xxii) Tampering with a Witness (RCW 9A.72.120);
- (xxiii) Reckless Endangerment (RCW 9A.36.050);
- (xxiv) Coercion (RCW 9A.36.070);
- (xxv) Harassment (RCW 9A.46.020); or

(xxvi) Malicious Mischief 3 (RCW 9A.48.090);

(b) That at least one of the offenses listed in (a) of this subsection shall have occurred after July 1, 2008;

(c) That the most recent committed offense listed in (a) of this subsection occurred within three years of a prior offense listed in (a) of this subsection; and

(d) Of the offenses that were committed in (a) of this subsection, the offenses occurred on separate occasions or were committed by two or more persons.

RCW 9.94A.030(36). To meet this element the State introduced evidence of the current crimes: three assaults perpetrated by members of the SSL against a rival Norteño gang, two instances of graffiti (malicious mischief) and one instance of unlawful possession of a firearm. In addition to proving that these crimes were committed by SSL members, the State also had to prove that they were “criminal street gang related offenses.”

"Criminal street gang-related offense" means any felony or misdemeanor offense, whether in this state or elsewhere, that is committed for the benefit of, at the direction of, or in association with any criminal street gang, or is committed with the intent to promote, further, or assist in any criminal conduct by the gang, or is committed for one or more of the following reasons:

(a) To gain admission, prestige, or promotion within the gang;

(b) To increase or maintain the gang's size, membership, prestige, dominance, or control in any geographical area;

(c) To exact revenge or retribution for the gang or any member of the gang;

(d) To obstruct justice, or intimidate or eliminate any

witness against the gang or any member of the gang;

(e) To directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage for the gang, its reputation, influence, or membership; or

(f) To provide the gang with any advantage in, or any control or dominance over any criminal market sector, including, but not limited to, manufacturing, delivering, or selling any controlled substance (chapter 69.50 RCW); arson (chapter 9A.48 RCW); trafficking in stolen property (chapter 9A.82 RCW); promoting prostitution (chapter 9A.88 RCW); human trafficking (RCW 9A.40.100); or promoting pornography (chapter 9.68 RCW).

RCW 9.94A.030(14). To show that the graffiti was done to benefit to the gang, or increase or maintain the gang's dominance in a geographic area, an expert was necessary to first explain the meaning of the graffiti, and second how it benefited the gang. Without tying the symbolism of the graffiti to the SSL, the graffiti is not connected to the gang, and would not be a criminal street gang related offense within the meaning of the statute.

To comply with the Constitution and statutory scheme to prove that Appellant is a member of a Criminal Street Gang, and committed the crimes of witness intimidation to benefit the criminal street gang, the State first had to prove the SSL is a Criminal Street Gang. In order to do that the State also had to prove the gang engaged in a pattern of criminal street gang activity. In order to prove that, the State had to prove they committed criminal street gang related offenses.

Once the State had proven that the SSL was a Criminal Street Gang, it then had to prove that Appellant was a member of that gang. "Criminal street gang associate or member" means any person who actively participates in any criminal street gang and who intentionally promotes, furthers, or assists in any criminal act by the criminal street gang." This definition is consistent with *Scales* requirement that the defendant is more than just a titular member. Thus Officer Judkins' testimony about Appellant's actions in relation to other gang members was relevant to his participation in the gang, as are his tattoos showing affiliation with the gang. Deputy Harris' testimony was necessary to establish the link between the symbolism of the tattoos and the gang. The State also introduced evidence of Appellant's Assault 2 conviction for assaulting a member of a rival gang, along with Eduardo Nejera Cruz, showing that he promoted, furthered or assisted criminal activity by the gang.

As has been demonstrated, the court could not have limited instruction 45 to the definitions of "criminal street gang" and "criminal street gang member or associate, because the additional terms are necessary to define "criminal street gang." Doing so would have required the jury to speculate on the definition of "pattern of criminal street gang activity" and would have given them no indication that the State had to prove the crimes

were “criminal street gang related offenses.” This would have been a misstatement of the law. The two are technical terms. [A] defendant is denied a fair trial if the jury must guess at the meaning of an essential element of the crime with which the defendant is charged, or if the jury might assume that an essential element need not be proven.” *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007). “In a criminal case...the trial court is required to define technical words and expressions, but not words and expressions which are of common understanding and self-explanatory.” *Id.* at 324. “A term is considered technical when its legal definition differs from the common understanding of the word. Whether a term is considered technical is left to the trial court's discretion.” *Id.* (Internal quotations omitted).

“Pattern of criminal street gang activity” is a technical term. For instance, a reasonable juror, upon hearing the term without the definition, may consider a street fight without weapons between two rival gangs of a dozen members each, as part of a pattern of criminal street gang activity. However, the crimes would be assault 4 and misdemeanor riot, which are not part of the statutory definition of “pattern of criminal street gang activity.” Criminal street gang related offense also contains technical elements that

were well within the court's discretion to define, if it is not a mandatory definition.

Properly understood, ER 404(b) only prohibits evidence introduced to prove that the defendant was acting in accordance with bad character. *State v. Gresham*, 173 Wn.2d 405, 420-422, 269 P.3d 207 (2012) All of the evidence introduced through Officer Judkins and Deputy Harris was introduced to prove elements of the crimes charged, and thus was admissible and not in error.

In addition to being an element of the enhancement and aggravators, Appellant's gang membership was relevant to prove the acts charged. The gun used in the crime was wrapped in a blue bandana, a common symbol of Appellant's gang, thus forming one link between the gun and Appellant. In addition the Appellant used language unique to Sureño gangs to threaten a witness. For the jury to understand the context of that threat Appellant's gang association was relevant and necessary to the State's case.

If evidence of a defendant's prior crimes, wrongs, or acts is admissible for a proper purpose, the defendant is entitled to a limiting instruction upon request. An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.

Gresham, 173 Wn.2d at 423-24. This is exactly what instruction 46 did. Appellant claims this somehow emphasized the gang definitions. However, by its terms it limits their application. “We presume that juries follow the instructions and consider only evidence that is properly before them.” *State v. Perez-Valdez*, 172 Wn.2d 808, 818-19, 265 P.3d 853 (2011).

Because the gang testimony was necessary to prove the gang crimes charged, as well as related to the shooting and witness intimidation, and the jury instructions and evidence relating to them was necessary and proper, the gang evidence was properly admitted.

3. Instruction twenty-six did not misstate the law and the evidence was sufficient to convict the Appellant.

Appellant pursues a strained reading of the Intimidating a Public Servant statute, ignores portions of it, and also relies on an incomplete analysis of *State v. Montano*, 169 Wn.2d 872, 239 P.3d 360 (2010). RCW 9A.76.180 provides:

- (1) A person is guilty of intimidating a public servant if, by use of a threat, he or she attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant.
- (2) For purposes of this section "public servant" shall not include jurors.
- (3) "Threat" as used in this section means:

- (a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
- (b) Threats as defined in RCW 9A.04.110.

There are two elements (other than jurisdiction) to the crime of Intimidating a Public Servant. The accused must be shown beyond a reasonable doubt to have 1) attempted to influence a public servant's vote, opinion, decision, or other official action as a public servant, 2) by use of a threat. RCW 9A.76.180. There is no indication that there was an effort to change Officer Slabach's vote, opinion, or decision. Br. of Appellant, 30. However, Appellant ignores the final phrase of the statute "... or other official action as a public servant". It is simply incredible to assert that the vehicle stop initiated by Officer Slabach was not an official action. Assuming that *Montano* was correctly decided, it and the cases upon which it relies are readily distinguishable. For example, in *State v. Burke*, 132 Wn. App. 415, 132 P.3d 1095 (2006), the court held that there must be a connection between the threats and any attempt to influence behavior, and that there was not in that case.

To the contrary, in this case, Officer Slabach was clearly engaged in his official duties, attempting to stop a vehicle for a perceived traffic

infraction. Appellant's threats were directly related to attempting to change the course of Slabach's decisions and actions. "(T)here must be some evidence suggesting an attempt to influence, aside from the threats themselves or the defendant's generalized anger at the circumstances." *State v. Montano*, 169 Wn.2d 872, 877, 239 P.3d 360 (2010). In *Montano*, the Court held that there was no evidence to show an attempt to influence the officers' official actions. *State v. Montano*, 169 Wn.2d 872, 879, 239 P.3d 360 (2010). That is not the case here.

It also requires an incredibly strained understanding of the concept of a "threat" to assert that the discharge of multiple shots from a firearm at a distance of mere car lengths, when the firearm is discharged from a car which the officer is attempting to stop and which seems to be fleeing from him, is not a threat. It is also inconsistent with the statute, which was the basis for the first sentence of instruction 26. One would have to be unaware and have no interest in self-preservation to have not concluded that action was a threat, and as conveyed by his testimony, Officer Slabach's thought processes were not flawed in any such manner.

Further, Appellant asserts that the above described acts are not communication. Even his own cited materials do not support his position.

The first definition is that communicate means “to impart knowledge of, to make known”. Br. of Appellant, 31. The discharge of a firearm in that manner “communicates” the “intent immediately to use force against any person who is present at the time”. RCW 9A.76.180(3)(a). “Communicate” is defined as

- 1 *archaic*: share
- 2 *a*: to convey knowledge of or information about: make known <*communicate* a story>
- b*: to reveal by clear signs <his fear *communicated* itself to his friends>
- 3: to cause to pass from one to another <some diseases are easily *communicated*>”

<http://www.merriam->

[webster.com/dictionary/communicate?show=0&t=1347846068](http://www.merriam-webster.com/dictionary/communicate?show=0&t=1347846068), last accessed September 16, 2012. Shooting in that manner certainly “reveals by clear signs”. For the same reasons, WPIC 2.24 is not flawed.

4. The Court did not err in admitting the “*Smith* affidavits”.

A trial court’s rulings regarding the admission of evidence may only be reversed if there is a manifest abuse of discretion. *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992) (citation omitted). “A trial court abuses its discretion if its decision ‘is manifestly unreasonable or based upon untenable grounds or reasons’.” “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts

and the applicable legal standard.” *State v. Lamb*, ___ Wn.2d ___, ___, ___ P.3d ____ (slip opinion, August 16, 2012, at 6)(citations omitted). Such is not the case here.

Admission of the affidavits required consideration of the *Smith* factors. Those factors are: (1) whether the witness voluntarily made the statement, (2) whether there were minimal guaranties of truthfulness, (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause, and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement. *State v. Thach*, 126 Wn. App. 297, 308, 106 P.3d 782 (2005) (citations omitted).

Such affidavits are not always admitted or excluded. The purpose of the rule and facts of the case must be analyzed, and reliability is the key. *State v. Smith*, 97 Wn.2d 856, 861, 651 P.2d 207 (1982). There are also important policy considerations supporting admissibility; in many cases the original statement is more likely to be true. *Id.* In *Smith*, the court found that there was no question that the statement was made because the witness testified to doing so; minimal assurances of truthfulness were satisfied since it was under oath and subject to penalties for perjury; and the statement was written by the

witness. *Id.*, at 862. These are all means of assessing the reliability of the statement. Contrary to Appellant's assertion, it is not necessary that the witness complete it in his or her own handwriting. *State v. Thach*, 126 Wn. App. 297, 304, 106 P.3d 782 (2005). It appears that the only truly mandatory factor in that assessment would have been the attestation under penalty of perjury; the statement would not be admitted as an exception to the hearsay rule if not sworn. *State v. Sua*, 115 Wn. App. 29, 60 P.3d 1234 (2003). The statements in question are acknowledged by Appellant to have been subscribed pursuant to RCW 9A.72.085. Br. of Appellant, 39. Following the mandates of that statute is legally sufficient if an oath would otherwise be required. RCW 9A.72.085.

The process used to admit those two exhibits involved testimony from both Ms. Espino and Ms. Montano; Detectives Messer and Rectenwald, and Tammy Roloff. There was substantial evidence that the court gave full consideration to the objections and ruled upon them based on the evidence before it. RP Trial, 591 – 594; 597 – 614; 761 – 764; 770; 808. Ms. Roloff testified that she was present; that both young women were present at the interviews of their own free will; that she advised them that they could stop the interviews at any time; and that they reviewed the statements with the

Detectives before signing them. RP Trial, 629 – 632; 724 – 726; 778 – 785. These witnesses had initiated the second contact, the interview at which they gave the statements that would become *Smith* affidavits. RP Trial, 761.

5. The charge of “drive-by shooting” was valid, and Appellant was properly convicted of it.

The current crime of Drive by Shooting is a descendant of the crime of Reckless Endangerment in the First Degree, as enacted by Laws of 1989, ch. 271. Appellant attempts to add a new element to the crime of drive-by shooting, by pointing out that the crime was originally passed by a bill entitled “AN ACT Relating to alcohol and controlled substances abuse” Laws of 1989, ch. 271, and is saying the law is unconstitutional as applied to Appellant because his crime did not involve drugs or alcohol. However, alcohol and substance abuse legislation has long been tied into public safety, and a crime described under such statute does not gain an additional element simply because that crime can be committed without alcohol or drugs being involved.

In *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642; 278 P.3d 632 (2012) the court reviewed the subject in title and single subject rules as regards initiative 1183 (1183). “Article II, section

19 provides, No bill shall embrace more than one subject, and that shall be expressed in the title. This provision is to be liberally construed in favor of the legislation.” *Id.* at 654. Like 1183, Laws of 1989, ch. 271’s title was general. “Where a title is general, all that is required by the constitution is that there be some “rational unity” between the general subject and the incidental subdivisions.” *Id.* at 656. “There is no violation of article II, section 19 even if a general subject contains several incidental subjects or subdivisions.” *Id.* In reviewing initiative 1183 the court held there is a rational unity between a public safety earmark from liquor taxes, even if the earmark is not restricted to liquor related safety issues. *Id.* Here the additional coverage of Drive by shooting to cover non alcohol and drug related drive by shootings is an incidental subject that was properly contained in the legislation. There is a rational unity between alcohol and drug laws and the crime of Drive by shooting, and the rational basis review is satisfied, even if the issue might feasible have been addressed by a more limited crime definition.

The crime of Drive by Shooting has been amended over the years, and even if it was originally limited to drug and alcohol crimes, later amendments have broadened its scope. Even if Reckless Endangerment 1, as passed in

1989, only relates to drug and alcohol related crimes, that does not mean that it continued to strictly relate to those crimes. The relevant inquiry is “did the statute as it existed on November 1, 2010 relate to Appellant’s conduct as it was proved at trial.” Since 1989 RCW 9A.36.045 has been amended by Laws of 1994, 1st Spec. Sess. ch. 7 § 511, Laws of 1995, ch. 129 § 8 (initiative 159) and Laws of 1997, ch. 338 § 44. Whenever the legislature passes a session law updating a particular RCW, the entire text of the statute is included in the law, and the statute is reaffirmed.

Laws of 1994, 1st Spec. Sess. ch. 7 § 511 amended the crime of Reckless Endangerment 1 from a class C to a Class B felony. Laws of 1995, ch. 129, aka initiative 159, repealed Laws of 1994, 1st Spec. Sess. ch. 7 § 511, but then again reclassified Reckless Endangerment 1 as a class B felony, as well as adding a definition and language about transporting the shooter, the firearm, or both. Ch 129 is entitled “An act relating to increasing penalties for armed crimes.” Laws of 1997, ch. 388 is entitled “An act relating to offenders” and changes the name of the crime to “Drive by Shooting”. As can be seen by the later titles amending and reenacting RCW 9A.36.045, the legislature considers this crime to be one of violence. Even if the crime did have an element of being related to drugs and alcohol in 1989 that

element was removed by initiative 159 in 1995.

Our courts have already ruled that adding substantive provisions to armed crimes falls within the scope of the title of initiative 159. In *State v. Burke*, 90 Wn. App. 378, 381, 952 P.2d 619 (1998) the court ruled the expansion of 1st degree Burglary was encompassed within the initiative's legislative title. Similarly, by definition, drive by shooting is an armed crime, and falls within initiative 159's definitions. It also falls into the scope of the title of "An Act Relating to Offenders" that changed the name of the crime from Reckless Endangerment 1 to Drive by Shooting. Thus the crime of Drive by Shooting does not require a link to drugs and alcohol.

6. The evidence was sufficient to convict Appellant of First Degree Assault.

Appellant correctly notes that Assault in the First Degree is a specific intent crime. *State v. Thomas*, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004). However, the context of *Thomas* is ignored, as the discussion of intent is about a defense of diminished capacity. *Id.* In addition, Appellant misapprehends the law as to assault.

Because assault is not defined in the criminal code, courts have turned to the common law for its definition. Three definitions of assault are recognized in Washington: (1) an unlawful touching (actual battery); (2) an attempt with

unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.”

State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2008). The evidence is considered in the same manner as discussed in #1, above. Here, the jury could have found either of the last two alternatives, and the instruction correctly states the law. *Id.*, at 216. At a minimum, Officer Slabach had a reasonable apprehension of harm and testified in a manner that would support any reasonable juror’s verdict. In addition, the *Smith* affidavit of Rosamaria Montano admitted as exhibit 84, described Appellant putting the gun out the window, and shooting approximately twice to the side, “... he then pointed back towards the cop and fired about five more times.” CP, _____ (designated by Appellant without numeration). There was no error.

7. None of the judicial statements alleged by Appellant were comments on the evidence. Even if they were, they were harmless. This argument was insufficiently raised.

Appellant places several pages of transcripts in an appendix, cites to the State Constitution and cases saying judge’s comments on the evidence are bad, and says those pages reflect statements on the evidence without explanation. He fails to tie the facts to the law. This leaves the State and the

Court to guess why Appellant believes these statements are comments on the evidence. To respond the State must guess as to the issues actually raised by Appellant, who can then respond in its response brief, giving the State no opportunity to address the Appellant's actual contentions. "[T]he defendant has the burden of establishing that the constitutional mandate has been violated." *State v. Trickel*, 16 Wn. App. 18, 26, 553 P.2d 139 (1976). "[The defendant] does not explain how this instruction had the potential effect of suggesting to the jury that his defense was not credible. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *State v. Soper*, 135 Wn. App. 89, 103, 143 P.3d 335 (2006). Appellant has failed in his burden to raise this issue and the court should reject this issue as insufficiently raised.

Article IV, section 16 of the Washington State Constitution provides "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision is violated when a judge conveys to the jury the "judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question." *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999) (citations omitted).

The majority of “commenting on the evidence” cases involve erroneous jury instructions. *See, e.g., State v. Boss*, 167 Wn.2d 710, 223 P.3d 506 (2009); *State v. Thomas*, 166 Wn.2d 380, 208 P.3d 1107 (2009). Other cases deal with “[t]he touchstone of error” in comment cases where a judge discusses the “truth value of the testimony of a witness...” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

None of the statements listed by Appellant show what the court thought of the evidence. “To fall within the ban of Const. art 4, § 16, the jury in a given case must be able to infer from the actions or expressions of the trial judge that he personally believes or disbelieves the evidence relative to a disputed issue.” *State v. Louie*, 68 Wn.2d 304, 313-14, 413 P.2d 7 (1966) “[I]t is necessary, to bring such an inference within the constitutional ban, that the omission be surrounded by such circumstances as will fairly import to the jury an expression of judicial opinion relative to the credibility of some significant evidence.” *Id.* at 314. “A trial court, in passing upon objections to testimony, has the right to give its reasons therefor and the same will not be treated as a comment on the evidence.” *State v. Cerny*, 78 Wn.2d 845, 855-56, 480 P.2d 199 (1971), modified on other grounds, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972); “This court has many times held

that the trial court, in expressing its reason for its rulings such as above indicated, does not violate the constitutional prohibition.” *State v. Weeks*, 70 Wn.2d 951, 954, 425 P.2d 885 (1967) (collecting cases).

Even if these exchanges between the judge and counsel could be considered comments on the evidence, the errors were clearly harmless. In a case where it is determined that a trial judge has commented on the evidence, courts will presume the comments were prejudicial. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (citation omitted). The burden is then on the state to overcome this presumption by showing no prejudice resulted to the defendant “unless it affirmatively appears in the record that no prejudice could have resulted from the comment.” *Id.* at 838-39 (citation omitted).

All of the alleged comments on the evidence are contained in appendix J of Appellant’s brief. They simply give the reason for the court’s ruling on the issue. None contain evidence of belief on the truthfulness of the testimony or other evidence. If any were to be considered a comment on the evidence, it was harmless.

In addition to his statement during the testimony that he was only a gate keeper, not assigning weight to evidence the trial judge gave the standard

jury instruction stating essentially the same thing. RP Trial, 938. “We presume that juries follow the instructions and consider only evidence that is properly before them.” *State v. Perez-Valdez*, 172 Wn.2d 808, 818-19, 265 P.3d 853 (2011).

Essentially Appellant takes the trial judge’s actions as the evidence gatekeeper, where he explains his decisions, and attempts to turn them into comments on the evidence. However, those explanations are necessary so the parties can understand the judge’s rulings and present their theory of the case while complying with those ruling. *Cerny* and *Weeks*, *supra*, explicitly exempt these types of rulings from being “comments on the evidence.” In addition a review of the statements reveals that they were only holdings on admissibility, and explanations therefore. There is no indication of what weight the evidence should be given. Finally, the judge, both during testimony and in the jury instructions, admonished the jury that any impression given of what opinion he had of the weight of the evidence should be disregarded. Any potential error regarding the comments on the evidence was harmless.

8. There was sufficient evidence to connect the firearm, Appellant and 423 Juniper Circle to establish a basis for the search warrant.

A court reviews a magistrate's decision to issue a warrant for an abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). This decision should be given great deference. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). The legal conclusion as to whether an affidavit establishes probable cause is reviewed de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Further, the court's review is limited to the four corners of the affidavit. *Id.* “[T]he information [the court] consider[s] is the information that was available to the issuing magistrate.” *State v. Olson*, 73 Wn. App. 348, 354, 869 P.2d 110 (1994).

A judge properly issues a search warrant only upon a determination of probable cause. *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). “Probable cause exists where the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.” *Id.* Thus, “‘probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.’” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citation omitted). Courts evaluate the existence of probable cause on a case-by-case basis. *Id.* at 149.

Further, “[t]he magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit.” *Maddox*, 152 Wn.2d at 505. Probable cause is far short of certainty—it “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity,” *Illinois v. Gates*, 462 U.S. 213, 244 n. 13 (1983), and not a probability that exceeds 50 percent (“more likely than not”), either. *Hanson v. Dane County*, 608 F.3d 335, 338 (7th Cir. 2010).

Appellant relies on *Thien* for the conclusion that the house in which Appellant resided lacked sufficient nexus to the crime to support probable cause for the search warrant. However, a thorough reading of *Thien* shows that it is inapplicable to this case. In *Thien* the police searched a residence on Brandon Street in Seattle. There they found a marijuana grow operation, copies of money orders made out to Thien as rent, and an informant who stated Thien was supplying marijuana to the tenant at the residence to sell. The officer, in his affidavit to search Thien’s home on Austin Street, stated that drug dealers will normally store their drugs and records relating to them in their home. The Supreme Court rejected this logic, stating that “this case involves nothing more than generalizations regarding the common habits of drug dealers and lacks any specific facts linking such illegal activity to the

residence searched.” *Id.* at 148.

This case is significantly different. First, the information in the warrant application placed a gun in Appellant’s hands approximately 35 hours prior to the search warrant. Second, Appellant had reloaded his gun and kept it after the shooting, as if he intended to keep it for the long term, not dispose of it. Third, the nature of this crime indicates that Appellant kept a gun on or near his person. Fourth, Nieves was arrested at his house immediately prior to the application for the search warrant. Fifth, the officers at the house heard pounding as if someone was running toward a specific location in the house immediately prior to Appellant emerging from the house.

Courts often use firearm possession and drug possession cases interchangeably when determining probable cause. This is reasonable in most scenarios, but like most analogies, falls apart in some instances. This is one of those instances. In *Thien* the officers were looking for Thien’s place of business, and the officers used a generalization to conclude that that place of business would be Thien’s home. But a drug dealer could have his place of business just about anywhere and still effectively carry out his business by going to retrieve his drugs from their storage area when he intended to

conduct a transaction, but keep them separate from himself at all other times.

In this case the primary object of the search warrant was a gun, not drugs. A gun can be used for offensive or defensive purposes. While it may be practical to hide a gun elsewhere if it is going to be used offensively in a planned manner, if an individual wants to use a gun defensively, or offensively in a spur of the moment manner, he must keep it near to his person. The crime being investigated was a spur of the moment crime. There was no way Appellant could have known he would be attempted to be stopped by the police. Yet he pulled out a gun and started shooting at the officer. A reasonable inference is that Appellant kept a gun on or near his person. He had just been arrested coming out of his residence, and no gun had been found on his person. A reasonable inference is that the gun was nearby, and the house was the logical place for it. Therefore, based on specific, articulable facts, not generalizations, it was reasonable to conclude there was probable cause to find the gun in the house where Appellant was arrested at.

In *United States v. Shomo*, 786 F.2d 981, 984 (10th Cir. 1986) an informant told police the defendant had a gun on his person. Ten days later the police applied for and received a search warrant, and found the gun at the

defendant's house. The defendant objected on the grounds of staleness and lack of connection to the home. The court ruled "Although appellant might have kept the revolver someplace other than in his home, there was at least a reasonable probability that he would keep it there. The magistrate was not required to rule out every other possible alternative. In the circumstances presented, the information set forth in the affidavit provided a substantial basis for the magistrate's finding of probable cause." *Id.*

In *State v. G.M.V.*, 135 Wn. App. 366, 144 P.3d 358 (2006) the court upheld a search warrant of a house after observing a drug dealer leave the house, make a sale, and return to the house. This was sufficient to conclude that there was evidence of drug dealing at the house. Similarly, Appellant in this case returned to his home sometime within the day or so of the shooting.

A gun is, in this context, is an item to be used and kept nearby, not sold or disposed of like drugs. There is a strong inference, from the circumstances of the crime, that Appellant kept the gun on or near his person. The house was where he came from immediately prior to being arrested. Therefore there is a strong likelihood the gun will be found in the house, and probable cause exists to search for it.

Appellant assigns error to findings of fact 16 and 17, which support conclusions of law 1.

On appeal, the court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.

State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). There is more than adequate evidence to support the court's conclusions.

Finding of fact 16 states "there was a thirty-five hour period from when Luis Martinez made it home after the shooting to the time of the search warrant." CP 757. The shooting incident occurred at approximately 0030 on November 1st. CP 111. Luis Flores was with at the Adams County Sheriff's office at approximately 0800 on November 1st reporting the car stolen. CP 112. The Search Warrant was requested at 1545 on November 2, 2010. Thus Luis Martinez was back from the incident and at the Sheriff's office approximately seven and a half hours after the shooting. The search warrant was served approximately 40 hours after the shooting, and approximately 32 hours after Luis Martinez walked into the Adams County Sherriff's Office for the first time. Luis Martinez reported walking for five miles until they

reached Ephrata, where his mother picked him up and took him back to Royal City. CP 115. Royal City is approximately 45 minutes by car from Ephrata. Thus the court's conclusion that it took Luis Martinez approximately 5 hours after the shooting to get home is reasonable. This number being off by an hour or two is not material to the facts of the case. Indeed, the State suggested 40 hours as a reasonable estimate in its brief. CP 106. The court then revised the estimate to 35 hours. RP 64-65. Either way the finding of fact is materially correct.

Finding of fact 17 states "based on the alleged conduct of the defendant, it could be believed the defendant would still have the firearm in his possession." Appellant, in order to commit this crime, had to have the gun on his person or nearby, indicating he kept a gun in such a manner. He took actions in such a manner as to indicate he intended to keep it, such as reloading it and keeping it in his possession as the group walked. CP 115. Thus there is a reasonable inference the gun would be with Appellant at his home.

There is more than adequate evidence to provide a nexus between the gun and the home searched. Conclusion of Law one is supported, and the trial court should be upheld on this issue.

9. A DNA sample is not required if a sample has already been submitted to the crime lab. However, there is no prohibition on a second sample, therefore it is within the trial court's discretion to require a second sample. RCW 43.43.754(2). In addition there was no objection to the sample being taken at sentencing, this is not a manifest error affecting a constitutional right, therefore the appellate court should decline to review this issue. RAP 2.5.

10. There can be no "cumulative error" where the condition precedent of "error" is not shown.

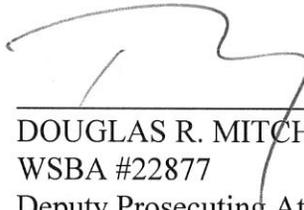
The evidence introduced in this case was properly considered by the trial Court, and properly introduced. The jury instructions correctly stated the law, and the gang evidence was necessary and properly admitted. There were no improper judicial comments on the evidence, and the ruling at the hearing pursuant to CrR 3.6 is supported by substantial evidence. The evidence was more than sufficient to support the convictions of the Appellant. There was no error, let alone cumulative error.

E. CONCLUSION

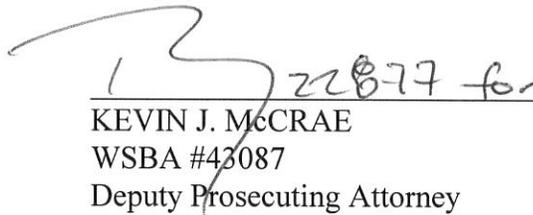
Appellant has not raised any supportable claims of error, and the evidence was sufficient to convict the Appellant. Accordingly, this Court

should uphold the decisions of the trial court and the conviction of the Appellant. The trial may not have been perfect, as there are no perfect trials. It was, however, fair, and that is what the Appellant was entitled to receive – a fair trial.

Respectfully submitted this 18th day of September, 2012.



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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent.)	No. 30340-3-III
)	
v.)	
)	
JOSE LUIS NIEVES,)	DECLARATION OF MAILING
)	
Appellant.)	
_____)	

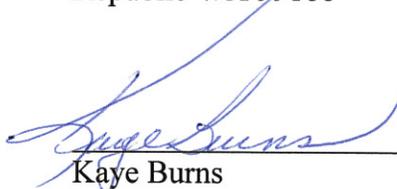
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant and to Dennis W. Morgan, attorney for Appellant, containing a copy of the Brief of Respondent in the above-entitled matter.

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Dated: September 18, 2012.



Kaye Burns

Declaration of Mailing.