

30709-3-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

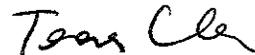
RAMIRO FARIAS-GALLEGOS,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Is the conviction supported by sufficient evidence?
2. Did the prosecution's disclosure of gang-related discovery misrepresent an intention to seek an aggravating factor where not statutorily required notice was filed?
3. Did the court abuse its discretion in admitting statements which were not offered for the truth of the matter asserted but to demonstrate why police focused on the Defendant?
4. Does "to-wit" language in the charging information constructively add the caliber of the weapon as an element of the crime where it is not included in the "to-convict" instructions?
5. Is there any basis to require the court to instruct the jury on

accomplice liability where the State's evidence and argument was that the Defendant was the shooter?

6. Was counsel's decision not to challenge the show-up identification ineffective assistance, or was it strategic and without prejudice?
7. Is there cumulative error sufficient for reversal?
8. Does the record demonstrate the Defendant's future ability to pay legal financial obligations? Should this challenge be reviewed when raised for the first time on appeal?
9. Where the Defendant expressed his gang membership and claimed the neighborhood as his turf before shooting at the victim, are gang-related prohibitions crime-related?

IV. STATEMENT OF THE CASE

The Defendant Ramiro Farias-Gallegos has been convicted by a jury of assault in the first degree with a firearm enhancement. CP 8, 10, 22, 23.

On August 30, 2011 at about 2:30 in the afternoon, J.A.F.M.¹ was driving to his restaurant job. 2RP² 6; 3RP 100, 115. In pulling

¹ Lay witness information is provided as initials due to safety concerns in this case.
² 1RP refers to the voir dire transcript from Feb. 15, 2012; 2RP refers to the trial

away from a stop sign, he nearly ran into one of two pedestrians. 3RP 116-17. J.A.F.M. yelled at the pedestrian for "going through the intersection like that." 3RP 123. The pedestrians were angry and one of them said, "this is my gang, this is my hood and my street." 3RP 116. The Defendant (the pedestrian wearing a grey shirt) then came to J.A.F.M.'s window, pulling up his shirt to display a gun. 3RP 116-17, 124. J.A.F.M. rolled down his window, and the Defendant pointed the gun at him. 3RP 116, 124. J.A.F.M. said, "go for it, there are no witnesses around." 3RP 116, 124. The pedestrians walked away and J.A.F.M. began to drive off, when he heard three gun shots, one of which contacted his car. 3RP 116-17. J.A.F.M. got out of his car, watched the two young men run away, and inspected the bullet hole. 3RP 117, 125. The bullet entered next to the driver's door. 3RP 127-28. If it had been a little higher, it could have struck J.A.F.M.. 3RP 128. J.A.F.M. was angry, and he went home immediately to call police to report that he had been shot at. 3RP 119, 126-27. He then walked back to the scene to speak with police in person. 3RP 126.

M.O. was on the porch when she observed two young Hispanic men walk toward a car and one of them open fire on the car. 2RP 6-

transcript from Feb. 15, 2012; 3RP refers to the trial transcript from Feb. 16, 2012.

7, 9. She heard five or six shots, grabbed her twelve year old son J.O. and went into her house. 2RP 7, 10. J.O. also saw the men approach the car and start an argument which culminated in one of them shooting four or five times at the car with a small handgun before the pedestrians took off running. 2RP 30-33. E.M. was unloading groceries from her car when she heard the shots. 2RP 15. She saw the two young men run away and “the one they were shooting at” park his car beside hers. *Id.* E.M.’s thirteen year old son R.C. was helping his mother unload groceries, saw the shooting, heard the gunshots, and saw the two run off, one holding the gun. 2RP 17, 43, 48, 53. Like his mother, he also saw J.A.F.M. pull over, get out to examine the car, and then drive away. 2RP 44-45, 52-53. L.V. was in her house when she heard the shots ring out. 2RP 22-23. She observed the two running and J.A.F.M. exiting his car to check the damage. 2RP 21, 23.

Police officers arrived soon after the shooting and took witness and victim statements. 2RP 10-11, 17-18, 33-34, 45; 3RP 5, 38-42, 54-55, 119.

Officer Ryan Flanagan observed the Defendant in blue jeans and a grey shirt running through a field. 3RP 24-25, 47. Officer Dean

Perry observed the two men near a known gang house. 3RP 55. One was wearing a white shirt, and the Defendant was wearing a gray shirt. *Id.* They took off running when they saw the officer. *Id.* Sergeant Ruben Marquez saw the Defendant running while holding his cell phone to his ear, possibly calling someone. 3RP 7-8, 47. As the sergeant yelled at him, the Defendant looked up (3RP 11), then tried to scale a fence, ran down an alley, and finally ducked under an enormous tree together with the man in a white T-shirt. RP 8, 12-13. About an hour after the shooting, other officers located the Defendant in the same area – hiding underneath a car. 3RP 9-10, 26, 56, 68-69, 86, 104-105. However, they could not find his companion or the gun. 3RP 12-14, 35, 44-45, 113.

The Defendant claimed that he was not involved in the shooting and was only hiding from police, because he believed he had an outstanding warrant for an unpaid traffic ticket. 3RP 106-07. In fact, he had no warrant. 3RP 107. The Defendant fit the description provided by witnesses. 3RP 6, 43-44. Police brought the victim J.A.F.M. to the scene of the arrest to identify the Defendant. 3RP 77-78, 119-20.

J.A.F.M. identified the weapon as a semi-automatic, not a

revolver, such that casings would be expelled at the scene. 3RP 118-19. Police recovered four shell casings at the scene and removed a bullet lodged in the victim's car. 3RP 19-22, 26-27, 33-34, 102. The casings were for a .32 caliber. 3RP 30-31, 58, 65.

Although neighborhood witnesses had identified the suspects to police at the time of the shooting, when they testified at trial less than six months later, their memories had become vague – specifically for identification details. 2RP 8-9, 12, 16, 26, 33-35, 44-48. The defense investigator reported that a witness did not want to testify and was concerned for her safety. 3RP 140-41. M.O. admitted that she had not wanted her child to testify and did not inform him about the subpoena until an hour before they arrived in court. 2RP 13-14. In a sidebar, the prosecutor argued that neighborhood gangbangers had intimidated the witnesses resulting in a sudden loss of memory regarding the identification of the Defendant. 2RP 48.

The victim J.A.F.M. had been refusing to cooperate in the prosecution. 3RP 88-89. He arrived to testify at the last minute after the detective located him. 3RP 114. In the courtroom, J.A.F.M. twice identified the Defendant as the person who had been holding the gun inches from his car door. 3RP 117, 128.

Re. jury instructions as to elements: The information charged the Defendant with assaulting J.A.F.M. with a firearm, “to wit, a .32 caliber handgun” and specially alleged that either the Defendant “or an accomplice” was armed with a firearm. CP 64. At the very beginning of the jury selection process, the court informed the venire (the pool of potential jurors) of the charge. 1RP 3.

However, the actual to-convict instructions provided to the actual chosen jury neither alleges a specific firearm nor alleges accomplice liability. CP 39.

Re. Gang evidence/aggravator: When Officer Perry testified that the two runners were “dressed like typical gang members in that area,” the defense objection regarding foundation was sustained. 3RP 55-56. After Officer Perry’s testimony and outside of the presence of the jury, the prosecutor explained that, while the State could have pursued an aggravating factor of gang involvement (RCW 9.94A.535(3)(aa)), the prosecutor had chosen not to. 3RP 66. The prosecutor suggested that defense could offer a curative instruction and advised that the remaining state’s witnesses had been instructed not to reference gang involvement. *Id.*

Defense counsel complained that, based on discovery, he had

anticipated testimony on gang and discussed the matter in jury selection. *Id.* While defense counsel suggested that the prosecutor “elected at the last minute to not seek an exceptional sentence for gang enhancement” (3RP 66), the record shows that the prosecutor never filed any notice of intent to seek an exceptional sentence under RCW 9.94A.535(3)(aa). CP 64-65, 67-68, 75.

Re. Show-up identification procedure. In cross-examination of law enforcement witnesses, the defense counsel emphasized that the identification procedure used by Pasco PD was to show the victim only a single individual suspect. 3RP 80. The victim observed the Defendant as police escorted him from a home onto the street. 3RP 129-30. The Defendant stood beside a patrol car, and after J.A.F.M. identified him, he was placed in the patrol car. 3RP 133-34. Under cross-examination, Detective Brad Gregory admitted that the show-up procedure probably has resulted in mistakes when used by Pasco PD. 3RP 112. He acknowledged that a photo lineup of six similar looking individuals would have been a less suggestive and more accurate identification procedure. 3RP 111-12.

J.A.F.M. testified that he had not been cowed by the Defendant’s threat to shoot, but had actually mocked him for the size

of the gun. 3RP 116, 124. "I didn't care because I've been around guns all my life." 3RP 116. He felt that getting shot "would have hurt a lot but wouldn't have killed me." 3RP 124. And immediately after the shooting he was angrier about the damage to his car. 3RP 118-19, 121. At the show-up, he took a good long minute to look at the Defendant before identifying him, because he wanted to be careful that somebody did not "go to jail for something they didn't do." 3RP 122. At the show-up, J.A.F.M. was two car lengths from the Defendant when he identified him as the person who had been holding the gun inches from his car door. 3RP 122, 128.

V. ARGUMENT

A. THERE IS SUFFICIENT EVIDENCE FOR THE CONVICTION.

The Defendant challenges the sufficiency of the evidence for the convictions.

The standard of review: After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Salinas*, 119

Wn.2d 192, 201, 829 P.2d 1068 (1992).

The Defendant challenges the evidence that he was the shooter. Appellant's Brief at 13. While neighborhood witnesses were hesitant to testify against the Defendant and were uncertain about the color of the suspects' clothing, the victim clearly identified the Defendant as the person who pointed a gun at him shortly before shots were fired. Under the standard, this identification evidence is more than sufficient.

The Defendant challenges the evidence that the gun used was a .32 caliber weapon. Appellant's Brief at 14. While this is not an element of the crime which the prosecution had to prove, *see infra* at §D, the evidence is sufficient on this point as well. Officer Flanagan testified that the shell casings were for a .32 caliber. 3RP 31. This is sufficient. The jury is entitled to find this witness more credible than another witness (who incredibly testified that it might be possible to fire a bullet through the barrel of weapon that was too small for round - 3RP 59-60). Officer Perry testified that at the scene he got down on his hands and knees and from the angle he was at, without picking them up, he believed the casings were .380 caliber which is what he wrote in his report. 3RP 57-58. When defense asked the officer to

look again at the evidence in the courtroom, the officer said it was hard to read them without better light, but the caliber could be .32 or .380. 3RP 58. The jury had the exhibit to view for itself. Defense counsel suggested that the bullet casings could have been fired from a mismatched weapon. 3RP 60. The jury was not persuaded. It is not reasonable to argue that the ammunition could have been placed in a weapon for which it was not suited. It also disregards the standard of review. This evidence is sufficient.

B. A DEFENSE ATTORNEY'S UNSUPPORTED ASSUMPTION DOES NOT EQUATE TO PROSECUTORIAL MISCONDUCT.

The Defendant complains that the prosecutor misrepresented that the State would be seeking to admit evidence that the crime was related to gang activity. That is not the record.

At trial, defense counsel complained that the prosecutor "has elected at the last minute to not seek an exceptional sentence for gang enhancement (sic)." 3RP 66. This was the misleading statement, and not any representation by the prosecutor.

Before trial, the state is required to give notice of intent to seek an exceptional sentence, specifically stating the aggravating factor upon which the sentence will be based. RCW 9.94A.537(1). This

notice is often included in the charging information. **The record in this case contains no such notice.** CP 64-65, 67-68, 75.

Therefore, defense counsel had no justifiable reason to believe that the state would be seeking an exceptional sentence of any kind and cannot reasonably complain that he was led on.

The Defendant argues that he was led to believe that the State would seek to admit evidence of the Defendant's gang involvement, because the State named crime analyst Dave Reardon on its witness list. Appellant's Brief at 7. First, Dave Reardon was on the witness list because he would actually testify at trial as a crime analyst and would be necessary for the admission of certain plaintiff's exhibits. 3RP 94-114. Second, providing more evidence, rather than less, cannot be misconduct. The rules of criminal discovery are construed liberally, resolving doubts regarding disclosure in favor of sharing the evidence with defense. *State v. Dunivin*, 65 Wn. App. 728, 733, 829 P.2d 799 (1992). Indeed, the state may have a duty to disclose potential rebuttal evidence where there is a reasonable probability that a witness will open a door to that testimony. *State v. Dunivin*, 65 Wn. App. at 733-34.

In this case, there was evidence of gang involvement admitted

at trial. The Defendant told J.A.F.M. that “this is my gang, this is my hood and my street.” 3RP 116. The defense challenged the identification evidence. If the Defendant intended to argue that he could not be the suspect, because he was not gang affiliated, the State had rebuttal evidence at the ready and provided in advance in discovery.

The prosecutor’s statement at trial was that while he could have pursued an exceptional sentence, he was not. 3RP 33. Therefore, the Defendant could have objected to Officer Perry’s testimony (that the suspects were “dressed like typical gang members in that area” – 3RP 55) on ER 403 grounds, rather than on foundational grounds as he had. Because the evidence was not relevant to an aggravating factor, it could be more prejudicial than probative. The prosecutor advised that he had no objection to a curative instruction and that the state’s witnesses had been instructed to avoid the topic of gang involvement. 3RP 66.

The record shows prosecutorial conduct of the highest caliber and an unjustified interpretation of the record by Defendant’s trial counsel. Defense counsel complained that because of his belief that an aggravating factor had been alleged, he interviewed potential

jurors about their prejudices about gangs. 3RP 66. On appeal, he argues that this voir dire “impermissibly tainted the jury pool with the implication that Mr. Farias-Gallegos is or was a gang member.” Appellant’s Brief at 16. But evidence was admitted at trial suggesting the Defendant’s gang involvement, namely the suspects’ statement to J.A.F.M. (3RP 116) and the thuggish behavior that followed. [The Defendant pulled up his shirt to display a weapon after being challenged for charging into an intersection in front of an oncoming vehicle. When his threat did not produce the desired result, the Defendant fired at J.A.F.M. and fled down alleys, through fields, over fences, under tree branches, and finally under a car. When arrested, he excused his flight as related to some other non-existent warrant.] Therefore, if counsel’s performance was deficient for interpreting an intent on the prosecutor’s part to seek an exceptional sentence where none was expressed and where notice was required, **there was no prejudice**. Gang evidence was admitted at trial, and defense counsel’s voir dire discussion was helpful in weeding out undue bias among potential jurors. See 4RP³ 55-61.

³ 4RP refers to the transcript for February 15, 2012 with jury voir dire and opening statements.

C. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TESTIMONY THAT THE DEFENDANT MATCHED THE DESCRIPTION OF THE SUSPECT.

The Defendant complains that evidence that police arrested him because he matched the suspect description is inadmissible hearsay. It is not.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). An abuse of discretion is an exercise that is without tenable reason or a view that no reasonable person would take. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004); *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

Hearsay is a statement offered to prove the truth of the matter asserted. ER 801(c). When out-of-court assertions are **not** introduced to prove the truth of the matter asserted, they are **not** hearsay and no Confrontation Clause concerns arise. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1369 n.9, 158 L.Ed.2d 177 (2004) (citing *Tennessee v. Street*, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)). The "matter asserted" is the matter set forth in the writing or speech on its face, not the matter broadly argued by the proponent of the evidence. *In re Theders*, 130 Wn.

App. 422, 432, 123 P.3d 489 (2005).

In this case, the officers were explaining why they chased or arrested the Defendant. They did so, because he matched the description they had received for one of the suspects. This is exactly like the case cited by the Defendant. Appellant's Brief at 20, (quoting *State v. Johnson*, 61 Wn. App. 539, 547, 811 P.2d 687 (1991) (holding that is proper for an officer to testify that he acted upon information received).

Consider the murder prosecution in *State v. Moses*, 129 Wn. App. 718, 732, 119 P.3d 906 (2005). There the hospital social worker explained that she called CPS because one of the children reported violence in the home. *State v. Moses*, 129 Wn. App. at 732. This was held properly admitted, because it was not offered for the truth of the matter asserted (that the defendant had kicked his wife), but to explain why the social worker called CPS. *Id.*

In another murder prosecution, it was found proper for police to testify that the victim was afraid of the defendant and had been threatened by him. *State v. Mason*, 127 Wn. App. 554, 126 P.3d 34 (2005), *aff'd on other grounds*, 160 Wn. 2d 910, 162 P.3d 396 (2007). Again, this was proper because the statement was not offered to

prove that the defendant had made a threat or that the victim had been afraid. It was offered to explain why the police seized duct tape and a loaded firearm from the defendant's home.

It is the same in the instant case. Where police were not witnesses to the crime, but focused their attention on the Defendant or his companion and eventually arrested the Defendant as he lay under a car, the question put to them was: why did they focus on these individuals? In answer, they were not asserting that these were the perpetrators of the assault, but only that their focus was due to the fact that these individuals matched the description provided.

While a different trial judge would have discretion to rule differently, whichever way a trial judge rules is accorded respect. The court's ruling is tenable and reasonable.

D. SURPLUS LANGUAGE NOT INCLUDED IN THE TO-CONVICT INSTRUCTIONS ARE NOT ELEMENTS WHICH NEED TO BE FOUND BY A JURY.

The Defendant argues that the State added an element by including "to wit" language describing the firearm as a .32 caliber in the charging document. Appellant's Brief at 24. This is not so. At jury trial, the surplus allegations only become an additional element of the case when they are included in the jury's *to-convict* instructions.

State v. Hickman, 135 Wn.2d 97, 102–03, 954 P.2d 900 (1998).

The law of the case is an established doctrine with roots reaching back to the earliest days of statehood. Under the doctrine jury instructions not objected to become the law of the case. ***In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the “to convict” instruction.***

State v. Hickman, 135 Wn.2d at 101-02 (emphasis added) (citations omitted). And here, the to-convict instructions do not include this surplusage. CP 39.

The Defendant is arguing that the introduction that the court gave the venire is equivalent to and has the effect of the to-convict instructions. There is no authority for this proposition and it is not reasonable to extend the law of the case in this way.

The State notes that, even if the surplusage had been added to the to-convict instructions, there would be sufficient evidence, see *supra* at §A.

E. BECAUSE THE STATE'S THEORY AND PROOF WERE THAT THE DEFENDANT ALONE WAS THE SHOOTER, THE COURT HAD NO REASON TO INCLUDE A UNANIMITY INSTRUCTION.

The Defendant claims that the trial court should have included instructions on accomplice liability and unanimity based on surplus

language in the information. Appellant's Brief at 28. Because this surplusage was neither the evidence nor the State's theory, there was no reason to instruct the jury in this way.

The victim J.A.F.M. testified that it was the Defendant who was in possession of the gun at the time of the shooting. 3RP 117. At the end of the presentation of the evidence, the court instructed the jury that to find the Defendant guilty of assault in the first *or* fourth degree, it had to find that *the Defendant* assaulted the victim. 3RP 148, 150. In closing argument, the prosecutor repeated this instruction. 3RP 154 ("the State has to prove to you beyond a reasonable doubt that on August 30th 2011, the defendant assaulted the victim"). The prosecutor argued that "the defendant took a firearm and fired at least one bullet up to three or four at [J.A.F.M.]." 3RP 155. The prosecutor did not argue that the Defendant's companion was the shooter, but only that the companion may have disposed of the weapon before the Defendant was arrested. 3RP 155-56 ("There was another person with him that was never armed that could have easily taken the gun."). Defense counsel did not argue that the Defendant's companion was the shooter; he argued that the Defendant wasn't either of the two people who approached J.A.F.M.. 3RP 158-71.

This being the case, the evidence, and the instruction to the jury, there was no possibility that the jury would be confused that the Defendant could be found guilty as an accomplice only. There was no basis for giving an accomplice or unanimity instruction.

The Defendant claims that case law requires that accomplice liability instructions must be given when alleged. Appellant's Brief at 29, citing *State v. Teaford*, 31 Wn. App. 496, 500, 644 P.2d 136 (1986). This is not the holding of the cited case. In *State v. Teaford*, the defendant and two other inmates broke out of jail, assaulting correctional officers and stealing a getaway vehicle in the process. *State v. Teaford*, 31 Wn. App. at 497-98. The defendant complained on appeal that the court failed to instruct that accomplice liability (which the jury had been instructed on) must be found beyond a reasonable doubt. *State v. Teaford*, 31 Wn. App. at 500. The court disagreed, finding that the instructions, considered as a whole, required that criminal liability must be found beyond a reasonable doubt. *Id.* No authority supports the Defendant's claim.

F. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The Defendant claims that his counsel was ineffective in failing

to seek to suppress the show-up identification.

In order to show ineffective assistance of counsel, the Defendant has the burden of showing both (1) that his attorney's performance was deficient and (2) that this deficiency prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). But the courts begin with a strong presumption that a counsel's conduct fell within the wide range of reasonable professional assistance. *In re Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). To satisfy the prejudice prong of the ineffective assistance of counsel claim, the Defendant must show that counsel's performance was so inadequate that there is a reasonable probability that the result would have differed, thereby undermining our confidence in the outcome. *Strickland*, 466 U.S. at 694.

The inferences in the record are that this assault occurred in a gang neighborhood where witnesses could identify the suspects but were afraid to testify against them. When neighbors are familiar with each other, the likelihood of misidentification due to a suggestive

procedure is highly unlikely. Under these circumstances, the better defense tactic is to push for trial and hope that witnesses do not show up, because a pretrial hearing could lock in testimony under cross-examination, which could then be used at trial even as witnesses become unavailable later. A pretrial hearing gives the State two opportunities to put the evidence on the record. Therefore, defense counsel's choice to not seek a pretrial hearing to suppress the identification is a solid strategy. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Officer Wright was not allowed to testify that J.A.F.M. identified the Defendant in the show-up procedure. 3RP 78-79. J.A.F.M. was the only witness who testified in the State's case that there was a positive identification made in the show-up. 3RP 119-20. He did so only after he identified the Defendant in court. 3RP 117. The victim testified that he had a conversation with the Defendant only inches away from his car door. 3RP 128. He testified that he was not scared by the gun. 3RP 124. He only became angry, because of the

damage to his car. 3RP 127. He made the identification close in time to the shooting. 3RP 104-05, 119 (before the witness left for work), 121 (at 3:30 in the afternoon), 131-34 (defendant was apprehended an hour after the 2:30 shooting). J.A.F.M. testified that he was two car lengths from the Defendant when he identified him and that he took his time, mindful of the consequences of a misidentification. 3RP 122.

If the Defendant had challenged the admissibility of the show-up testimony, rather than the effectiveness of counsel, the court would consider, not whether a procedure was impermissibly suggestive, but whether suggestiveness created a substantial likelihood of irreparable misidentification under the totality of the circumstances. *State v. Maupin*, 63 Wn. App. 887, 896, 822 P.2d 355 (1992).

This is a strong record to demonstrate that the procedure was not suggestive and did not result in a misidentification. The victim had a good opportunity to view the shooter; he was not overly distracted by fear of a weapon; very little time passed between the shooting and the identification; and the witness was confident in the identification. See *State v. Barker*, 103 Wn. App. 893, 905, 14 P.3d 863 (2000) (providing these factors for weighing the likelihood of

misidentification). J.A.F.M. had no contact with law enforcement since the day of the offense. 3RP 88. He then came to court and positively identified the Defendant. None of the many neighborhood witnesses to the shooting testified that the Defendant was **not** the shooter.

Contrary to the Defendant's argument (Appellant's Brief at 33, citing 3RP 121, 127), the record does not demonstrate that the victim wanted to hold someone accountable regardless of whether or not that person was actually responsible. The victim testified that he took a "good minute" before identifying the Defendant to "make sure it was him," because "I don't want no one (sic) to go to jail for something they didn't do." 3RP 122.

Nor does the record bear out the Defendant's argument that the victim was unreliable. The Defendant complains that the victim could not identify all the neighborhood witnesses at the scene; falsely stated that the Defendant was brought from a house rather than a car for the show-up; and misidentified his grey shirt as blue. Appellant's Brief at 32-33. The State disagrees with this reading of the record.

The victim's laser focus on the suspects to the elimination of the various neighborhood witnesses only increased the reliability of

his identification of the Defendant. The victim's testimony that he first saw the Defendant coming from a house (3RP 129) is also not discredited on the record. As the detective testified, he was attending to the Defendant not the witness. 3RP 133-34. He could not say what the witness saw when. However, the witness arrived immediately after the arrest (3RP 119, 121), and the Defendant was actually brought from a house yard and out to the street to a patrol car before being placed in the car. 3RP 132. The detective cannot say at what point in this movement the witness made the identification. Therefore, the testimony of these two witnesses is not inconsistent. And people often disagree on (or change their minds about) the label of a color. Consider that the witness and defense counsel disagreed on the color of defense counsel's shirt during trial. 3RP 130.

It is unlikely that the show-up identification would have been suppressed. Even if it were, the witness' in-court identification is not challenged and, therefore, the admission of the show-up evidence cannot be prejudicial.

Because trial counsel's decision can be characterized as a legitimate trial strategy, because under the totality of the circumstances the show-up identification did not create a substantial

likelihood of irreparable misidentification, and because the evidence was not prejudicial in light of the other identification evidence (defendant was chased by various police officers immediately after the shooting, he matched the description that witnesses provided, his story to police for his flight was not credible, and the victim identified him in the courtroom) – the ineffective assistance claim must fail.

G. THERE IS NO CUMULATIVE ERROR.

The Defendant claims cumulative error requires reversal. Because the State denies any error, the State also rejects the claim of cumulative error. A review of the various challenges does not demonstrate a manifest miscarriage of justice materially affecting the outcome of trial. *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994); *State v. Newbern*, 95 Wn. App. 277, 297, 975 P.2d 1041, review denied, 138 Wn.2d 1018, 989 P.2d 1142 (1999).

H. THE COURT MADE NO ERROR IN IMPOSING LEGAL FINANCIAL OBLIGATIONS ON THE DEFENDANT.

The Defendant challenges the imposition of legal financial obligations (LFO's), claiming that the record does not demonstrate his future ability to pay.⁴

⁴ The State notes that an appellant making this claim should provide a fair

There was no objection to the imposition of LFO's at sentencing. A timely objection would have made the clearest record on this question. Therefore, the absence of an objection is good cause to refuse to review this question. RAP 2.5(a) (the appellate court may refuse to review any claim of error not raised in the trial court); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn.App. 814, 822, 826 P.2d 1015, *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (refusing to hear challenge to the restitution order when the defendant objected to the restitution amount for the first time on appeal).

Moreover, because the determination that the defendant either has or will have the ability to pay during initial imposition of court costs at sentencing is clearly somewhat "speculative," the time to examine a defendant's ability to pay is when the government seeks to collect the

review of the record, i.e. the transcript of the hearing at which public counsel is appointed (at which time the court inquires into a defendant's employment and assets) and the financial declaration form, if any. The Defendant's first appearance was August 31, 2011 at which time counsel was appointed. This hearing has not been transcribed.

obligation. *State v. Crook* 146 Wn.App. 24, 27, 189 P.3d 811, *review denied* 165 Wn.2d 1044, 205 P.3d 133 (2008); *State v. Smits*, 152 Wn.App. 514, 523-24, 216 P.3d 1097 (2009). Another reason to refuse to review the issue at this time is that the superior courts often keep the financial declaration (reviewed at the time public counsel is appointed) under seal and not accessible to the prosecutor. If it was filled out and if it is consistent with the booking report, it would indicate the Defendant's employment packing apples on Ainsworth, and it would be information that the superior court could review in a collection action.

The Defendant relies on *State v. Bertrand*, 165 Wn. App. 353, 267 P.3d 511 (2011). In that case, the court of appeals found that there was no record to support the trial court's finding of present or future ability to pay. *State v. Bertrand*, 165 Wn. App. at 404. The court held that until such a future determination could be made, the Department of Corrections could not begin to collect on the LFO's. *State v. Bertrand*, 165 Wn. App. at 405. The court struck the finding, but not the imposition of LFO's. *Id.* In other words, the finding can (and probably will) be revisited at the time of collection, but should not affect the imposition of LFO's at the time of sentencing. The

Defendant agrees, but explains that his intent is to prevent collection from his DOC account while incarcerated. Appellant's Brief at 37-38. The goal is short-sighted. If by small garnishments of his account during his long incarceration, the Defendant can pay off or down his LFO's (\$3405 – CP 12), when he is released he will have fewer impediments to his reintegration and success in the community.

The record that is available on this appeal is that the Defendant is a young, fit (running through fields, climbing fences and under cars), competent man. He is twenty years old (18 on the date of the offense and 19 when sentenced). CP 8. He received a sentence of 168 month (14 years). What his ability to pay will be in fourteen years is indeed speculative. However, at this time, he is employable. Upon his release, he should be able earn \$100/mo (CP 13) toward any remaining LFO's. On this record, the court's finding is sufficiently supported.

I. THE COURT DID NOT ERR IN IMPOSING CRIME RELATED PROHIBITIONS.

The Defendant challenges gang-related prohibitions (that he not possess gang paraphernalia or have contact with known gang members), claiming that they are not related to the crime. Appellant's

Brief at 39.

The sentencing court has discretion to order the defendant to comply with crime-related prohibitions, i.e. an order prohibiting conduct directly relating to the circumstance of the crime of conviction. RCW 9.94A.030(1); RCW 9.94A.703(3)(f).

In this case, the Defendant's gang involvement was so well documented in discovery (3RP 66) that his attorney made a good effort to weed out jury bias on that topic (1RP 55-59). The neighborhood where the shooting occurred included what police knew to be a "gang house." 3RP 55. And most telling, during the altercation with J.A.F.M., the Defendant expressed the reason for his aggression: "this is my gang, this is my hood and my street." 3RP 116; see *also* Appellant's Brief at 9 (interpreting this statement as being attributed to the Defendant). This expresses a typical territorial concern of a gang. A gang will take pains to mark or tag its turf and enforce boundaries against other gangs.

The Defendant's behavior is hard to explain outside of the context of gang culture. He nearly killed a person for disrespecting him on his turf. This respect is only of paramount importance because criminal gang organizations, more than individual and

unorganized criminals, employ intimidation tactics to steal and to prevent the reporting of their crimes. If they fail to intimidate, they have no power.

The court did not abuse its discretion. The condition is well supported on the record as being crime-related. Compliance with this condition will give the Defendant the best chance at success upon his release.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: May 24, 2013.

Respectfully submitted:

SHAWN P. SANT
Prosecuting Attorney

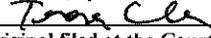


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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED May 24, 2013, Pasco, WA



Original filed at the Court of Appeals, 500 N.
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