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

STATE OF WASHINGTON,	)	No. 29692-0-III
Respondent,	)	
v.	)	
	)	ORDER GRANTING COURT'S
JESSE ANTONIO MORENO,	)	MOTION TO PUBLISH
	)	
Appellant.	)	
	)	
	)	

THE COURT on its own motion has concluded that the opinion of September 18, 2012 should be published. Therefore,

IT IS ORDERED, the opinion filed by the court on September 18, 2012, shall be modified on page 1 to designate it is a published opinion and on page 28 by deletion of the following language:

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

PANEL: Judges Sweeney, Korsmo, Brown

DATED:

FOR THE COURT:

_____

KEVIN M. KORSMO
Chief Judge

FILED

SEPT 18, 2012

**In the Office of the Clerk of Court
WA State Court of Appeals, Division III**

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

STATE OF WASHINGTON,	)	No. 29692-0-III
	)	
Respondent,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
JESSE ANTONIO MORENO,	)	
	)	
Appellant.	)	

Sweeney, J. — The trial court denied Jesse Antonio Moreno's motion to suppress guns and other evidence found in the trunk of a car. Police had responded to reports of gunfire in an alley and found Mr. Moreno there inside a car. Mr. Moreno cooperated with the police, but was handcuffed and put in a patrol car while police got a search warrant for the trunk. We conclude that Mr. Moreno was unlawfully arrested, but that this unlawful arrest did not affect the validity of the search warrant. We also conclude that there was insufficient evidence to support a sentence above the standard range, Mr.

Moreno's convictions for first degree assault and unlawful possession of a firearm do not merge, and a domestic violence penalty and jury fee were incorrectly imposed. We therefore affirm Mr. Moreno's convictions but remand for resentencing.

FACTS

On October 15, 2009, Yakima Police Sergeant Joe Salinas heard some reports of gunfire. The reports came between 9:49 and 9:51 p.m. from several 911 calls and an officer. Sergeant Salinas learned from dispatch that the shots came from the 1500 block of McKinley Avenue and that a "male wearing white jacket with dark jacket" was seen in a nearby alley. Report of Proceedings (RP) at 50. He drove to the area. He knew that the area has a history of violent crime. He also knew that many Sureño gang members live there and that the Sureños "claim blue." RP at 47-48.

He saw a car driving out of the alley behind the 1500 block of McKinley Avenue. He thought that the car was "moving hurriedly," considering the unpaved and rutted state of most alleys. RP at 52. Sergeant Salinas shined a spotlight into the car and "[t]he first thing that strikes [him] as odd is the driver's wearing a red shirt." RP at 57. The Norteño gang uses the color red. Sergeant Salinas explained that "[n]obody wears a red shirt in that neighborhood unless they're asking for trouble, in my experience." RP at 57. Based on the area, the type of crime, and the shirt, Sergeant Salinas thought that "this car is somehow involved or . . . they can tell me more about what's happened." RP at 57. He

blocked the car's path with his police car and turned on his emergency lights. The occupants sat in the car with their hands up. The stop occurred around just before 10:00 p.m.

Sergeant Salinas became more suspicious about the occupants' Norteño ties once he questioned them. He noticed that Jesse Moreno, the front passenger, had a distinctive haircut associated with the Norteño gang. The style is known as a "Mongolian" cut. RP at 63-64. It involves a tuft of hair on the top of the head. He also suspected that the driver, Joshua Bojorquez, had Norteño ties. This was because Chris Bojorquez is a known Norteño gang member. Joshua Bojorquez denied being related to Chris Bojorquez. Sergeant Salinas thought that this was incredible because Bojorquez is an uncommon last name.

Sergeant Salinas asked the occupants if they heard any gunshots or were shot at. Although their windows were rolled down, they said that they did not hear anything. Sergeant Salinas thought that this was suspicious. He explained that a police officer and several 911 callers reported gunshots in the area "yet these individuals hadn't heard anything, which leads me to believe there's more to the story." RP at 65-66. They said that they were in the alley smoking marijuana.

He separated Mr. Bojorquez, Mr. Moreno, and a juvenile passenger to "freeze the scene." RP at 68. He explained that this was "so that they don't have time to

communicate with each other and get their stories straight." RP at 68. Mr. Moreno gave proof of identification. He was frisked and handcuffed. And then he was put in the back of a patrol car.

Sergeant Salinas did not smell marijuana in the car or on the car's occupants. Mr. Moreno contends that another officer smelled marijuana on the juvenile passenger, but there is no showing of this in the record. Br. of Appellant at 5. Mr. Bojorquez gave permission to search the car's interior, but not the trunk. This also raised Sergeant Salinas' suspicion because he has observed that many people involved in illegal activity know that a trunk cannot be searched without a warrant "and in five years of running the gang unit, that's exactly where they hid all their guns." RP at 71. He searched the car's passenger compartment and found no evidence that the occupants were involved in a shooting or smoking marijuana.

Meanwhile, a witness approached and told Sergeant Salinas that his house had been hit by gunfire. At this point in the investigation, Sergeant Salinas was trying to find out whether bullets came from the stopped car or whether they were directed at the car.

Sergeant Erik Hildebrand also responded to dispatch's report of shots fired. He was familiar with Mr. Bojorquez and immediately questioned him about why he was in the neighborhood. He explained: "[T]hese guys are all known and documented north side gang members or associates in a well-known south side gang neighborhood." RP at 177.

Mr. Bojorquez told Sergeant Hildebrand that they were driving around, smoking marijuana, got lost, and ended up in the alley. Mr. Moreno also said that they were driving around and got lost. The juvenile occupant said that he was in the area to spray-paint graffiti.

Sergeant Hildebrand then spoke to a witness, Edgar Ortiz. Mr. Ortiz told Sergeant Hildebrand that he heard shots, looked through his bedroom window, and saw a man shooting a gun near the corner of McKinley Avenue and Lewis Street. Mr. Ortiz said that the man ran south on Lewis toward the alley after firing. Sergeant Hildebrand drove Mr. Ortiz to where Mr. Moreno was being held for a "show up" identification. RP at 184. Mr. Ortiz said that Mr. Moreno had the same hair and build as the shooter he saw, but that he could not be sure because the shooter was wearing a hat and it was dark outside.

Officer Ileanna Salinas talked to several witnesses. They told her that they had looked in the alley after hearing gunshots and saw the car that police had stopped going east down the alley. She also found a black knit glove in the alley.

At some point, Sergeant Hildebrand asked Officer Chris Taylor to get a search warrant. Sergeant Hildebrand believed that the car's occupants were hiding guns in the trunk. Officer Chris Taylor called Judge Susan Woodard around 10:50 p.m. to get the warrant. He asked to search the trunk for firearms and firearm paraphernalia. Officer Taylor swore to the following facts:

- At 9:49 p.m., dispatch received a call regarding shots fired near the 1500

block of McKinley Avenue
- A witness saw a man running south down the alley and the man was wearing a dark jacket with a white jacket
- Officers saw a man running down the alley
- Officers observed a car in the McKinley Avenue's south alley
- The car contained two known Norteño members and a known Norteño associate
- Officers observed a black jacket with a white lining in the backseat of the car
- Officers saw bullet holes at 1507 and 1509 McKinley Avenue
- Officers found .22 caliber casings
- A victim said that the shooter ran south bound down the alley

Ex. J. Judge Woodard granted the request for a warrant and police searched. Officer Taylor found a sawed-off .12 gauge shotgun, a .357 Magnum revolver, and .38 casings inside the trunk. He later applied for and received a warrant to search the trunk for clothing. It was issued and he found a black knit glove and a dark sweatshirt with a white lining.

Around 11:00 p.m., Troy Caoile called the police to report that he was shot at. Detective Hildebrand spoke with him. Mr. Caoile said that he was walking north up Lincoln Avenue when somebody in a dark car yelled something about "south side." RP at 189. He said that he kept walking east on the 1500 block of McKinley Avenue when a man jumped out from around the corner at Lewis Street and McKinley Avenue and began shooting at him. He said that the shooter had some facial hair and was wearing a black hooded sweatshirt over a baseball cap.

The State charged Mr. Moreno with first degree assault and unlawful possession of a firearm. Mr. Moreno moved to suppress all of the evidence found in the trunk. The court concluded that the stop and detention of Mr. Moreno was lawful and that evidence in the trunk was obtained as a result of a valid search warrant rather than the arrest of Mr. Moreno.

At trial, Sergeant Salinas, Officer Salinas, and Sergeant Hildebrand testified about gangs and Mr. Moreno's involvement. Sergeant Salinas opined that the largest gangs in Yakima were the Norteños and Sureños. He explained that the Norteños and Sureños "claim allegiance" to the colors red and blue, respectively. RP at 985. According to Officer Salinas, the two gangs are rivals: "They see each other out on the street and it's a constant battle. It's violence anywhere within the city. They see each other, it's a fight, it's shots fired." RP at 1061-62.

Sergeant Salinas also explained that northeast Yakima is Norteño territory and north central Yakima in Sureño territory. He testified that gang members from the northeast "would load up in a car . . . and travel to the rival gang neighborhood to cause trouble." RP at 988. He said that gang members do not generally drive to rival territory "to say hi" or visit relatives. RP at 1007. Sergeant Hildebrand testified that "our flags are going to go up" when a Norteño is seen in a Sureño area and vice-versa. He and Officer Salinas both explained it often meant that they are "putting in work." RP at 1394,

1062. She defined "putting in work" as "to actively participa[te] in some act of violence on another gang member, or just a random citizen who's not affiliated with any gangs." RP at 1062. Sergeant Hildebrand explained the significance of putting in work:

> The gang itself and the members, they thrive on intimidation and fear, and by gang members going out and putting in work, they basically gain respect . . . , they gain rank . . . Essentially that's all they have to do, to look forward to. Most of them don't work. Most of them don't go to school. And they get basically recognition and support from going out and putting in work. The more . . . work they put in, the more recognized they are. . . . [T]hey have to go out and put in work if they want to be a part of the gang.

RP at 1394-95.

Sergeant Salinas testified that the area where Mr. Moreno was found was Sureño territory. He believed that Mr. Bojorquez was a Norteño because he wore a red shirt and his older brother belonged to the Norteños. He believed that Mr. Moreno was a Norteño because of his Mongolian haircut. Officer Salinas testified that she had contact with Mr. Moreno on a previous occasion and that Mr. Moreno told her that he was a member of a Norteño subset called Brown Pride. Mr. Caoile testified at trial that a person in the front passenger side of a blue car yelled "south side LVL" shortly before he was shot at. RP at 1346. "LVL" refers to the Little Valley Locos subset of the Sureños. RP at 1390.

A jury ultimately convicted Mr. Moreno of first degree assault and first degree unlawful possession of a firearm. It found that the crimes were committed "with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage

to or for a criminal street gang its reputation, influence, or membership." Clerk's Papers (CP) at 336, 251. Mr. Moreno appeals.

DISCUSSION

Fourth Amendment Issues

Mr. Moreno contends that the trial court should have excluded the evidence found in the trunk because that evidence was the result of Mr. Moreno's unlawful stop and arrest. He argues that the search warrant followed from the unlawful stop and arrest.

The Fourth Amendment prohibits unreasonable searches and seizures. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). "[W]arrantless searches and seizures are per se unreasonable" unless the search or seizure falls within an exception to the warrant requirement. *Id.* (citing *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). The defendant must show that a seizure occurred. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). A seizure occurs when, "due to an officer's use of physical force or display of authority, an individual's freedom of movement is restrained and the individual would not believe that he is free to leave or decline a request." *State v. Beito*, 147 Wn. App. 504, 508, 195 P.3d 1023 (2008). A driver may be seized when a police officer pulls behind his car and activates his emergency lights. *State v. DeArman*, 54 Wn. App. 621, 624, 774 P.2d 1247 (1989). Sergeant Salinas seized Mr. Moreno by blocking Mr. Bojorquez's car with his

patrol car and activating his emergency lights.

The State must show that a seizure falls within an exception to the warrant requirement. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). If the State fails to prove that the seizure was lawful, then any evidence obtained as a result of the seizure must be suppressed. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). We review findings of fact made in a ruling on a motion to suppress for substantial evidence. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Mr. Moreno assigns error to various findings, but does not support the assignments with argument. Those findings are then verities on appeal. *See State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). We review the court's conclusions of law de novo. *Id.*

Terry *Stop*

Mr. Moreno first contends that Sergeant Salinas conducted an unlawful *Terry*[1] stop because he stopped the car on nothing more than a hunch. According to Mr. Moreno, the innocuous facts identified by Sergeant Salinas—Mr. Moreno's location in the alley, the car moving "hurriedly," and one of the car's occupants wearing a red shirt in a Sureño neighborhood—were not enough to justify the stop. The State responds that the totality of the circumstances justified the stop. It points out that Sergeant Salinas' training and experiences meant that the red shirt in the Sureño neighborhood and Mr. Moreno being at

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

the exact location where shots were just fired were significant.

The *Terry* stop is an exception to the warrant requirement. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). The purpose of a *Terry* stop "'is to allow the police to make an intermediate response to a situation for which there is no probable cause to arrest but which calls for further investigation.'" *Armenta*, 134 Wn.2d at 16 (quoting *Kennedy*, 107 Wn.2d at 17 (Dolliver, J., dissenting) (citations omitted)). Law enforcement may make a *Terry* stop when an officer can "'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (quoting *Terry*, 392 U.S. at 21). In other words, "[t]he circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so." *State v. Martinez*, 135 Wn. App. 174, 180, 143 P.3d 855 (2006) (citing *State v. Garcia*, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994)).

We look at the totality of the circumstances. *Glover*, 116 Wn.2d at 514 (citing *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)). This includes the officer's training and experience. *Id.* A *Terry* stop should be minimally intrusive in that the seizure must be "'reasonably related in scope to the justification for [its] initiation.'" *Armenta*, 134 Wn.2d at 16 (quoting *Kennedy*, 107 Wn.2d at 17 (Dolliver, J., dissenting) (internal quotations marks omitted) (citations omitted)). A

hunch alone does not warrant police intrusion into people's everyday lives. *State v. Doughty*, 170 Wn.2d 57, 63, 239 P.3d 573 (2010). And innocuous facts alone do not justify a stop. *State v. Tijerina*, 61 Wn. App. 626, 629, 811 P.2d 241 (1991). Being in a high-crime area at night, for example, is not enough to justify a stop when there is no evidence that a particular crime had been committed. *See Glover*, 116 Wn.2d at 514; *State v. Thompson*, 93 Wn.2d 838, 842, 613 P.2d 525 (1980); *Martinez*, 135 Wn. App. at 180; *State v. Richardson*, 64 Wn. App. 693, 697, 825 P.2d 754 (1992).

But a police officer may rely on his experience to evaluate apparently innocuous facts. *Martinez*, 135 Wn. App. at 180 (citing *State v. Samsel*, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985) (stopping men getting into a cab was reasonable because a robbery had been committed, the cab was near the robbery's location, the men getting into the cab matched descriptions of the robbers, and the police had experience with suspects fleeing the scene of a crime in a cab)). Facts "which appear innocuous to the average person may appear incriminating to a police officer in light of past experience." *Samsel*, 39 Wn. App. at 570. Police officers are not required to set aside that experience. *Id.* at 570-71.

Mr. Moreno argues that the stop here was based on nothing more than a hunch. Like in *Thompson* and *Martinez*, Mr. Moreno was in a high-crime neighborhood at night. He argues that the fact that Mr. Bojorquez was wearing a red shirt is innocuous and does not suggest that the car's occupants were involved in a crime. But here there was a

particularized suspicion that an actual crime had been committed. *See Thompson*, 93 Wn.2d at 842; *Martinez*, 135 Wn. App. at 181-82.

There were multiple reports of gunfire moments before the stop and about a block from the stop. Sergeant Salinas had considerable experience not only with gangs but with gangs in this specific area. He knew that the shots were in a Sureño neighborhood. He saw that Mr. Bojorquez was wearing a red shirt. He knew that red was associated with the Norteño gang. He knew that people did not usually wear red in a Sureño neighborhood. He saw the car leaving the alley faster than usual given the poor state of the alleyway. Based on the time, location, speed of travel, and possibility of gang activity, Sergeant Salinas thought that "this car is somehow involved or . . . they can tell me more about what's happened." RP at 57. It was reasonable to stop the car considering the totality of the circumstances.

Arrest

Mr. Moreno next contends that he was unlawfully arrested when he was handcuffed and placed in the patrol car because: (1) there was only reason to believe that he had unlawfully discharged a firearm, a gross misdemeanor that must be committed in an officer's presence to justify arrest; and (2) witnesses to any felony did not come forward until after Mr. Moreno was already arrested.

The State counters that the police were entitled to detain Mr. Moreno when Mr.

Bojorquez said they were smoking marijuana. According to the State, probable cause developed to arrest Mr. Moreno for assault and unlawful possession of a firearm. Br. of Resp't at 7. The State presumes that the arrest of Mr. Moreno occurred at some point after he was detained in the police car. We disagree.

The first question is whether handcuffing and detaining Mr. Moreno in a police car was part of a reasonable *Terry* stop or whether it amounted to an arrest. An officer who lacks probable cause to arrest a suspect may temporarily detain the suspect until the officer dispels his reasonable suspicions. *State v. Lyons*, 85 Wn. App. 268, 270, 932 P.2d 188 (1997) (citing *State v. Belanger*, 36 Wn. App. 818, 677 P.2d 781 (1984)). "'A brief but complete restriction of liberty, if not excessive under the circumstances, is permissible during a *Terry* stop and does not necessarily convert the stop into an arrest.'" *State v. Thornton*, 41 Wn. App. 506, 515, 705 P.2d 271 (1985) (citing *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982)). Three factors determine whether the restriction in a *Terry* stop was excessive under the circumstances: "[(1)] the purpose of the stop, [(2)] the amount of physical intrusion upon the suspect's liberty, and [(3)] the length of time the suspect is detained." *Williams*, 102 Wn.2d at 740.

While the purpose and length of the stop may have been reasonable, the physical seizure of Mr. Moreno was not. Handcuffing and seclusion are only appropriate when officers have a "reasonable fear of danger." *State v. Mitchell*, 80 Wn. App. 143, 145-46,

906 P.2d 1013 (1995). This includes situations where police believe a suspect is armed or is a flight risk. *Id.* at 146. It might also include an emergency, where police must "act quickly to protect person or property." *Williams*, 102 Wn.2d at 741 n.3.

But none of those circumstances were present here. There was no reason to believe that Mr. Moreno was a flight risk; the car stopped when Sergeant Salinas turned on his emergency lights and Mr. Moreno sat in the car with his hands up for several minutes before Sergeant Salinas questioned him. There was also no reason to believe that Mr. Moreno was armed; police found no weapons on Mr. Moreno or inside the passenger compartment of the car. Finally, there was no emergency. Sergeant Salinas' only reason for handcuffing and secluding Mr. Moreno was so that he could not speak to the other passengers. The police understandably wanted Mr. Moreno to remain at the scene while they investigated, but placing him handcuffed in a police car was excessive under the circumstances and amounted to more than a simple *Terry* stop. *See Mitchell*, 80 Wn. App. at 145-46; *Williams*, 102 Wn.2d at 740-41.

Handcuffing Mr. Moreno and placing him in the patrol car is a custodial arrest not an investigative detention. "'An arrest takes place when a duly authorized officer of the law manifests an intent to take a person into custody and actually seizes or detains such person. The existence of an arrest depends in each case upon an objective evaluation of all the surrounding circumstances.'" *State v. Patton*, 167 Wn.2d 379, 387, 219 P.3d 651

(2009) (quoting 12 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 3104, at 741 (3d ed. 2004)). In other words, an arrest takes place when "a reasonable detainee under these circumstances would consider himself or herself under a custodial arrest." *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). Here, Mr. Moreno was removed from the car he rode in, frisked, handcuffed, and then placed in the back of a patrol car.

An arrest is lawful if it is supported by probable cause. *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996). There is probable cause to make a felony arrest "where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

At the time Mr. Moreno was arrested, Sergeant Salinas knew shots had been fired, Mr. Moreno was in the vicinity of the shots fired, he was in a car leaving the alley at a speed faster than usual given the road condition, he looked like he was a Norteño member in a Sureño neighborhood, and he may have been smoking marijuana. These facts are insufficient to support probable cause for first degree assault. Probable cause to arrest for first degree assault certainly developed once Mr. Ortiz identified Mr. Moreno and Mr. Caoile reported that he was shot at. But this did not occur until after Mr. Moreno was

arrested. Mr. Moreno's arrest was therefore unlawful.

Suppression of Evidence

The next question is whether the evidence found in the trunk should have been suppressed as "fruit" of Mr. Moreno's unlawful arrest. *See Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Mr. Moreno says that the search warrant for the trunk arose from his unlawful arrest and therefore the evidence found in the trunk should have been suppressed. Br. of Appellant at 17-18. The State responds that there is no connection between the evidence found in the trunk and Mr. Moreno's unlawful arrest. Br. of Resp't at 7.

Evidence derived from unlawful police conduct may be suppressed under the exclusionary rule. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). Under the "fruit of the poisonous tree doctrine," this rule applies to evidence obtained directly or indirectly from police conduct. *State v. Le*, 103 Wn. App. 354, 361, 12 P.3d 653 (2000). This requires a causal link between the unlawful police conduct and the evidence obtained. *State v. Rothenberger*, 73 Wn.2d 596, 600-01, 440 P.2d 184 (1968).

Mr. Moreno suggests that the search warrant "derives directly" from Mr. Moreno's unlawful arrest. However, he does not argue, nor do we see, any causal connection between the unlawful arrest and the search warrant. *See id.* Nor does Mr. Moreno challenge the sufficiency of the search warrant application. Indeed, a review of the

search warrant application shows that Mr. Moreno's unlawful arrest did not lead to the search warrant. Again, the warrant application contained the following facts:

- At 9:49 p.m., dispatch received a call regarding shots fired near the 1500 block of McKinley Avenue
- A witness saw a man running south down the alley and the man was wearing a dark jacket with a white jacket
- Officers saw a man running down the alley
- Officers observed a car in the McKinley Avenue's south alley
- The car contained two known Norteño members and a known Norteño associate
- Officers observed a black jacket with a white lining in the backseat of the car
- Officers saw bullet holes at 1507 and 1509 McKinley Avenue
- Officers found .22 caliber casings
- A victim said that the shooter ran south bound down the alley

Ex. J. The police obtained most of this evidence from sources other than Mr. Moreno. The only evidence obtained from Mr. Moreno was that of his Norteño ties. And that evidence was gathered, not during the unlawful arrest, but during the valid *Terry* stop. We therefore conclude that the evidence gathered from the trunk was not the fruit of Mr. Moreno's unlawful arrest and the court correctly admitted the evidence.

Criminal Street Gang Finding

Mr. Moreno next contends that there was insufficient evidence to support the jury's finding that he committed these crimes to advance his position in a criminal street gang. He argues that (1) evidence presented on the issue is profile evidence, which this court has condemned; (2) there was no nexus between the offense committed and gang

membership; and (3) the random act of violence and police testimony here was too speculative because cases upholding a similar aggravating factor involved clear cases of gang-related retaliation. The State responds that the standard of review is substantial evidence and that the evidence showed that Mr. Moreno was a Norteño member who yelled "south side LVL" as he shot at Mr. Caoile. The State argues that this is consistent with police testimony that gang members enter rival territory to commit random acts of violence.

A finding of fact supporting an exceptional sentence will be reversed only when there is "no substantial evidence." *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997) (citing *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991)).

The court can impose a sentence higher than the standard range if a jury finds that "[t]he defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership." RCW 9.94A.535(3)(aa). "Criminal street gang" is defined as

> 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.

RCW 9.94A.030(12). There is no case law addressing the criminal street gang sentencing

enhancement.

Mr. Moreno relies on *State v. Suarez-Bravo* and *State v. Scott* to argue that the evidence is insufficient to support the street gang sentence enhancement. *State v. Suarez-Bravo*, 72 Wn. App. 359, 864 P.2d 426 (1994); *State v. Scott*, 151 Wn. App. 520, 213 P.3d 71 (2009). Specifically, he argues that the evidence of gang membership was inherently prejudicial criminal profile evidence used to make a random act of violence appear gang related. Br. of Appellant at 21 (citing *Suarez-Bravo*, 72 Wn. App. at 365). He also argues that the State showed no nexus between the first degree assault and gang membership. Br. of Appellant at 22 (citing *Scott*, 151 Wn. App. at 526-27). *Suarez-Bravo* and *Scott* are not helpful. Both address the admissibility of evidence, not the sufficiency of evidence. *See Scott*, 151 Wn. App. at 526 (stating that evidence of gang membership is not relevant unless there is evidence to show a nexus between the crime and gang membership); *Suarez-Bravo*, 72 Wn. App. at 364-65 (concluding evidence that defendant lived in a high-crime area was too prejudicial and that it "smacks of profile evidence" because it merely suggested that the defendant was a criminal type).

No case law addresses the criminal street gang sentencing enhancement. But several cases address whether evidence was sufficient to support a similar aggravating factor. This similar factor applies if the "defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an

organization, association, or identifiable group." RCW 9.94A.535(3)(s). Cases addressing that statute have required a nexus between the crime charged and the defendant's actual gang-related motivations. *State v. Bluehorse*, 159 Wn. App. 410, 431, 248 P.3d 537 (2011); *see State v. Yarbrough*, 151 Wn. App. 66, 210 P.3d 1029 (2009); *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006).

There must be some evidence that gang involvement actually motivated the defendant to commit a crime to support RCW 9.94A.535(3)(s)'s gang aggravating factor. *See Yarbrough*, 151 Wn. App. 66; *Monschke*, 133 Wn. App. 313. In *Yarbrough*, Mr. Yarbrough yelled gang-related insults and challenges before shooting two people. 151 Wn. App. at 97. The evidence showed that Mr. Yarbrough's gang had a run-in with a rival gang a few days prior to the shooting and that Mr. Yarbrough believed that the victims were members of that rival gang. *Id.* In *Monschke*, Mr. Monschke and three other white supremacists beat a homeless man to death. 133 Wn. App. at 318. One witness testified that Mr. Monschke was a member of the Volksfront white supremacist group and attended meetings of a more violent white gang called National Alliance. *Id.* at 325. That witness said that Mr. Monschke wanted to move up in one of the organizations and start a local chapter. *Id.* Another said that Mr. Monschke advocated beating the homeless man so that another member of the group could "earn her 'red [shoe]laces'"—a symbol that the wearer had assaulted a minority or was willing to shed blood. *Id.* at 323-

24. In both cases, there was some evidence that the defendants committed their crimes because of their gang membership.

Testimony from police or other gang experts is insufficient, standing alone, to support the aggravating factor. *Bluehorse*, 159 Wn. App. at 431. In *Bluehorse*, Mr. Bluehorse, a Crips gang member, shot into the front yard barbecue of several Bloods gang members. *Id.* at 416. Somebody yelled a Crips-related phrase before the shooting began. *Id.* at 417. Mr. Bluehorse shot a nongang member bystander. *Id.* at 416. The State presented evidence that Mr. Bluehorse belonged to a gang, but no evidence of Mr. Bluehorse's actual motivation behind the shooting. *Id.* at 431. For example, nobody testified that Mr. Bluehorse generally wanted to advance his position in the gang or had ever committed drive-by shootings to advance or maintain his gang status before. *Id.* Rather, a police officer testified that the Crips and Bloods are traditionally rivals and that people may commit crimes to gain gang membership or advance their status in a gang. *Id.* at 418. The court concluded that the evidence was so broad that it effectively relieved the State of its burden of proof:

> [w]ithout evidence relating to Bluehorse's motivation, the gang sentencing aggravator would be intolerably broadened by allowing it to attach automatically whenever an aspiring or full gang member is involved in a drive-by shooting based on the detectives' generalized gang testimony; thus relieving the State of its burden to prove beyond a reasonable doubt that the specific defendant charged with a drive-by shooting sought to obtain, maintain, or advance his gang membership.

Id. at 431. The court ultimately concluded that evidence was insufficient to support the aggravating factor. *Id.*

Bluehorse addresses a different aggravating factor. But the reasoning applies equally to the aggravating factor here. We then conclude that there was insufficient evidence that Mr. Moreno "committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang . . . , its reputation, influence, or membership." RCW 9.94A.535(3)(aa). Only police generalizations about gang behavior tie Mr. Moreno's crimes to any intent to cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang, its reputation, influence, or membership. Police expert testimony showed that: (1) the Norteños rivaled the Sureños, (2) Norteños sometimes came to Sureño territory to "put in work," (3) putting in work was a way of maintaining or improving one's status in a gang, and (4) putting in work could involve committing random crimes in rival territory. This is not evidence of Mr. Moreno's intent in and of itself. *See Yarbrough*, 151 Wn. App. at 97 (stating that expert testimony that gang members "gain status within the gang by being willing to engage in gunplay to defend the gang's honor," when combined with evidence of Mr. Yarbrough's intent, supported the aggravating factor); *Monschke*, 133 Wn. App. at 333-34 (stating that expert testimony that white supremacists can gain status in the National Alliance by murdering an "inferior" person

supported the aggravating factor when combined with direct evidence). Moreover, to uphold the aggravating factor on the evidence here would allow the aggravating factor to attach whenever a gang member commits a crime. *See Bluehorse*, 159 Wn. App. at 431. We conclude the exceptional sentence is not supported and remand for resentencing.

Offender Score

Mr. Moreno next contends that the trial court incorrectly calculated his offender score. He argues that, because gun possession elevated second degree assault to first degree assault, first degree assault and unlawful possession of a firearm should have merged for purposes of calculating his offender score. The State responds that the crimes do not merge because unlawful possession of a firearm is not necessarily committed every time a person commits first degree assault.

Whether two crimes merge is a question of law that we review de novo. *See State v. Freeman*, 153 Wn.2d 765, 770, 772-73, 108 P.3d 753 (2005). The merger doctrine is a rule of statutory construction. *State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). The goal of the merger doctrine, as with any rule of statutory construction, is to determine the legislature's intent. *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999).

The legislature intended to "punish both offenses through a greater sentence for the greater crime" when two crimes merge. *Freeman*, 153 Wn.2d at 773. Two crimes

merge when one crime is elevated to a higher degree by committing another act that the criminal statutes also define as a crime. *Vladovic*, 99 Wn.2d at 421. If one crime (unlawful possession of a firearm) need not be committed to elevate another crime (first degree assault) to a higher degree, the two crimes at issue do not merge. *See id.* at 421-22.

The crimes here are first degree assault and unlawful possession of a firearm. "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm . . . [a]ssaults another with a firearm." RCW 9A.36.011(1)(a); CP at 13. Assaulting a person with a "deadly weapon" is second degree assault. RCW 9A.36.021(1)(c). So assaulting another with a firearm, rather than any other deadly weapon, raises second degree assault to first degree assault. Unlawful possession of a firearm is when a "person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state . . . of any serious offense as defined by this chapter." RCW 9.41.040(1)(a).

Unlawful possession of a firearm does not elevate second degree assault to first degree assault. This is because one need not unlawfully possess a firearm to raise second degree assault to first degree assault. *See* RCW 9A.36.011(1)(a). An assault with a firearm is first degree assault regardless of whether the assaulter had previously been convicted of a serious offense. *See* RCW 9A.36.011(1)(a). The two crimes therefore do

not merge. First degree assault and unlawful possession of a firearm were properly counted as separate crimes.

Domestic Violence Assessment and Jury Fee

Mr. Moreno contends that the court improperly imposed a $100 domestic violence assessment and a $5,780.50 jury fee. The State concedes that the court incorrectly imposed these costs.

The statute controls whether a domestic violence assessment and a jury fee should be imposed. We review de novo a trial court's interpretation of the relevant statutes. *State v. Hathaway*, 161 Wn. App. 634, 652, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011).

Superior courts "may impose a penalty assessment not to exceed one hundred dollars on any person convicted of a crime involving domestic violence." RCW 10.99.080(1). "Domestic violence" includes first degree assault "committed by one family or household member against another." RCW 10.99.020(5)(a). The State concedes that there is no evidence that Mr. Moreno and Mr. Caoile were family or household members. Imposing the $100 domestic violence fee was therefore incorrect.

The jury fee here also surpassed a $250 statutory cap on jury fees. *See Hathaway*, 161 Wn. App. at 651-53. In *Hathaway*, Division Two of this court interpreted three

statutory provisions addressing jury fees and ultimately concluded that RCW 36.18.016(3)(b) caps a "jury demand fee" at $250 when a 12-person jury is called in a criminal trial. 161 Wn. App. at 653. The State here concedes that the analysis in *Hathaway* is correct and that the jury fee here should have been capped at $250.

We agree that the costs at issue were incorrectly imposed and therefore should be corrected on remand.

Statement of Additional Grounds (SAG)

Mr. Moreno makes two arguments in his statement of additional grounds. First, he argues that the trial court erred in denying his motion to suppress evidence found in the car trunk because the search warrant contained factual errors. Second, he argues that the evidence found in the trunk should have been suppressed because the evidence resulted from the illegal seizure of Mr. Moreno. Because we have adequately addressed the second argument above, we address only Mr. Moreno's first argument.

Mr. Moreno argues that the evidence found in the trunk should have been suppressed because Officer Taylor misrepresented that police found a .22 caliber bullet in the passenger compartment of the car and made other "multiple material misrepresentations." SAG at 1. A search warrant "must be voided and the fruits of the search excluded" when a search warrant contains a false statement made

knowingly, intelligently, or with reckless disregard for the truth, and that statement is necessary to establishing probable cause. *Franks v. Delaware*, 438 U.S. 154, 156, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). To raise such an argument, the defendant must make a "substantial preliminary showing" that the false statement was made knowingly, intelligently, or with reckless disregard for the truth, and that statement is necessary to establishing probable cause. *Franks*, 438 U.S. at 156.

Mr. Moreno suggests that Officer Taylor misrepresented that a .22 caliber bullet was found in the passenger compartment of the car. While it is possible that the police found a .38 caliber casing rather than a .22 caliber casing, the search warrant application does not state that the police found any casings in the car's passenger compartment. But even assuming that the search warrant contained such a statement, the trial court concluded that Mr. Moreno presented no evidence that such a misstatement was deliberate or reckless. CP at 140. The trial court properly denied Mr. Moreno's *Franks* motion.

We affirm the convictions and remand for resentencing.

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Sweeney, J.

WE CONCUR:

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Korsmo, C.J.

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Brown, J.