

No. 68534-1-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

CURTIS WALKER,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce Hilyer

---

APPELLANT'S REPLY BRIEF

---

Susan F. Wilk  
Law Office of Michael Iaria, PLLC  
Special Counsel for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

5130  
COURT OF APPEALS  
DIVISION ONE  
2011 JUN 30 PM 4:57

**TABLE OF CONTENTS**

A. ARGUMENT IN REPLY ..... 1

    1. **The State has failed to show that the highly prejudicial evidence of gang affiliation was probative of the alleged motive for the shooting or relevant for any other purpose, save for the impermissible purpose of suggesting propensity to commit the crime**..... 1

        a. The cases cited by the State do not support its argument ..... 3

        b. The State did not establish a link between the gang’s purposes and values and the shooting, as was necessary for the evidence to be admissible ..... 4

        c. The State misrepresents the record and the defense theory ..... 5

        d. The error was prejudicial ..... 8

    2. **The court failed to conduct an adequate inquiry into Walker’s motion to substitute counsel**..... 9

B. CONCLUSION ..... 12

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court Decisions**

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011)..... 1

### **Washington Court of Appeals Decisions**

State v. Boot, 89 Wn. App. 780, 950 P.2d 964 (1998) ..... 3, 4

State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050, rev. denied, 128

Wn.2d 1004 (1995)..... 4

State v. Mee, 168 Wn. App. 144, 275 P.3d 1192 (2012)..... 2, 5, 9

State v. Rodriguez, 163 Wn. App. 215, 259 P.3d 1115 (2011), rev.denied,

173 Wn.2d 1009 (2012)..... 4

State v. Saenz, 156 Wn. App. 866, 234 P.3d 336 (2010), reversed on other

grounds, 175 Wn.2d 167 (2012) ..... 3

State v. Scott, 151 Wn. App. 520, 213 P.3d 71 (2009)..... 2, 5

### **United States Supreme Court Decisions**

Penon v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) .... 11

### **Federal Court of Appeals Decisions**

Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970)..... 11

Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005)..... 10

Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000)..... 11

### **United States Constitutional Provisions**

U.S. Const. amend. I..... 2

### **Other Authorities**

Merriam Webster Online Dictionary ..... 6

A. ARGUMENT IN REPLY<sup>1</sup>

1. **The State has failed to show that the highly prejudicial evidence of gang affiliation was probative of the alleged motive for the shooting or relevant for any other purpose, save for the impermissible purpose of suggesting propensity to commit the crime.**

It is uncontested that the person who shot Alajawan Brown, whether it was Dominic Rabun<sup>2</sup> or, as the State alleged, Curtis Walker, probably shot him because he mistakenly believed that Brown was “BK”, the man who shot and seriously wounded their friend, Johnathon Jackson, and then fled. The question is whether Walker’s affiliation with the Bloods Pirus gang (“Bloods”) bore any relevance to either theory. It did not. In claiming that evidence of Walker’s affiliation with the Bloods was properly admitted, the State can point to no evidence that was probative of the crucial nexus between the evidence and the crime: that Walker shot Brown because he believed that Brown was a “Crip”, or that there was

---

<sup>1</sup> Believing the State’s brief does not necessitate reply on the assignments of error pertaining to the comment on the evidence and the “to-convict” instruction, this reply is confined to the admission of evidence of gang affiliation and the denial of Walker’s motion to substitute counsel.

<sup>2</sup> The State repeatedly refers to witnesses and other individuals involved in the case by their “monikers” and not by their names. The appellate prosecutor asserts that “no disrespect is intended” by the use of monikers. Br. Resp. at 2 n. 3. Disrespect may not have been intended, but the effect of the State’s use of monikers is to degrade and dehumanize the defendant and the witnesses who have given first names and family names. Particularly since all but one of these individual human beings is identified in the record by his or her full names, there is really no good reason to reduce them to caricatures, even if no disrespect was intended. Cf. State v. Monday, 171 Wn.2d 667, 679, 257 P.3d 551 (2011).

some other aspect of the Bloods' purposes or values which was probative of motive, intent, res gestae, or premeditation.

Gang affiliation is protected by the First Amendment. At the same time, courts have universally recognized that the introduction of such evidence against an accused person has a high likelihood of prejudicing the jury. Thus, in order for evidence of gang affiliation to be admissible, the State must be able to present: "(1) evidence showing adherence by the defendant or the defendant's alleged gang to [gang] behaviors, and (2) that the evidence relating to gangs is relevant to prove the elements of the charged crime." State v. Mee, 168 Wn. App. 144, 159, 275 P.3d 1192 (2012). Stated differently, the State must show that there was "a connection between the gang's purposes or values and the offense committed." State v. Scott, 151 Wn. App. 520, 527, 213 P.3d 71 (2009).

The State made no effort, either below or on appeal, to meet any of these predicates for admissibility. No evidence was introduced regarding the purposes or values of either gang.<sup>3</sup> No evidence was introduced to explain why Walker's affiliation with the Bloods would have made him more likely to have killed Brown.

---

<sup>3</sup> As is argued extensively in Walker's opening brief, the State's failure to present evidence of the gang's purposes or values, or indeed, any evidence whatsoever to explain why Walker's affiliation with the Bloods would have made him more likely to have killed Brown, permitted the jurors to inject their own preconceptions into their consideration of the evidence. See Br. App. at 24-31.

On appeal, the State nevertheless claims that the evidence was relevant. See Br. Resp. at 21-24. But the cases cited by the State in support of its claims do not support its argument. And the State does not explain how the jury was to use the evidence absent some further explanation of how the gang affiliation was correlated to behaviors that were probative of Walker’s alleged motive to commit the offense. Last, the State makes numerous misstatements about the record and the defense theory in an evident attempt to bolster its failed claim of relevance. The State’s faulty claims should be rejected, and Walker’s murder conviction reversed.

a. The cases cited by the State do not support its argument.

The State cites two principal cases in support of its contention that the evidence of Walker’s gang affiliation was relevant.<sup>4</sup> Neither case helps the State. In State v. Boot, 89 Wn. App. 780, 950 P.2d 964 (1998), the trial court admitted evidence of gang affiliation to prove motive and premeditation. Id. at 789. The Court upheld admission of the evidence because “[t]he evidence reflected that killing someone increased a gang member’s status and Mr. Boot was a gang member.” Id. at 789-90.

---

<sup>4</sup> In a footnote, the State also cites State v. Saenz, 156 Wn. App. 866, 234 P.3d 336 (2010), reversed on other grounds, 175 Wn.2d 167 (2012). In Saenz, the defense did not object to the admission of gang evidence, so that case is of little help to the State.

In State v. Rodriguez, 163 Wn. App. 215, 259 P.3d 1115 (2011), rev.denied, 173 Wn.2d 1009 (2012), similarly, the State introduced evidence from a detective and a lay witness that a gang member's status will be elevated by killing someone from a rival gang. Id. at 231. This evidence, along with other evidence from the detective regarding gang culture and structure, was held to be outside the knowledge and experience of a lay juror and relevant to the issues in the case. Id. In so holding, the Court analogized the case to State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050, rev. denied, 128 Wn.2d 1004 (1995), in which the Court

found that the testimony of three police officers as to such matters as the meaning of gang terminology, the types of criminal activities in which gangs were involved, gang codes of conduct and discipline, organizational structure, and interactions with other gangs was relevant, assisted the trier of fact, and was properly admitted.

Id. at 232 (citing Campbell, 78 Wn. App. at 823).

- b. The State did not establish a link between the gang's purposes and values and the shooting, as was necessary for the evidence to be admissible.

Both Boot and Rodriguez are substantially different from this case.

Here, there was no evidence introduced to explain why Walker's affiliation with the Bloods would have made it more likely that he committed the shooting. The State presented no evidence of gang culture

or structure, no explanation of gang behaviors, and no discussion of codes of conduct or rivalries with other gangs.

Again: for evidence of the defendant's membership in or affiliation with a gang to be admissible, the State must be able to present: "(1) evidence showing adherence by the defendant or the defendant's alleged gang to [gang] behaviors, and (2) that the evidence relating to gangs is relevant to prove the elements of the charged crime." Mee, 168 Wn. App. at 159. The State must prove a connection between the gang's "purposes or values" and the crime. Scott, 151 Wn. App. at 527. Without such evidence, the evidence of gang membership becomes simply a way for the State to disparage the defendant's character and prejudice him before the jury. This is precisely what occurred here. Because the evidence of Walker's guilt of the charged murder was otherwise controverted, his conviction must be reversed.

c. The State misrepresents the record and the defense theory.

Presumably to bolster its claim that the evidence of gang affiliation was relevant, the State overstates, and at times outright misrepresents, the record. The State claims, for example, that Walker told his wife that he shot Brown because Brown had just shot his "homie." Br. Resp. at 23. The State then asserts that "homie" is a term that means a "fellow member of a youth gang", Br. Resp. at 23 n. 16, and claims, therefore, that "the



defendant's own statement provided the nexus between the defendant's gang ties and the killing of [Brown]." *Id.* The definition supplied by the State is incomplete, and thus incorrect, and the State is mistaken about Walker's alleged statement. Merriam-Webster supplies two other definitions of the word "homeboy": "a boy or man from one's neighborhood, hometown, or region," and "an inner-city youth."<sup>5</sup> The dictionary also indicates that the first known use of the word "homeboy" was in 1927. And, according to Rabun, who is the only person who testified about the alleged statement, Walker did not actually use the word "homie" or "homeboy." RP 470. Rabun said that Walker used "the 'N' word." *Id.* The use of this word, while offensive to some, does not carry the connotations the State wishes the court to draw.

The State also claims that "BK," the person that Jackson was arguing with at the Cedar Village apartments was "one of the Crips." Br. Resp. at 4. But not one of the page cites supplied by the State supports this assertion. In fact, the testimony was quite different: both Rabun and Shaleese Walker testified that BK was a cousin of Jackson, and the dispute concerned family matters. RP 443, 1143.

More troublingly, the State extrapolates from these misstatements in its brief to falsely bolster its claim of relevancy with regard to the gang

---

<sup>5</sup> Merriam Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary/homeboy?show=0&t=1377634487>, last visited August 27, 2013.

evidence. The State claims that Walker shot Brown “[w]ith absolutely no motive other than the fact that Alajawan was suspected of being the shooter at the Cedar Village Apartments or another Crips gang member.” Br. Resp. at 22; see also Br. Resp. at 24. But the State’s key witness testified that Walker said he shot Brown because he believed Brown was the person who had shot Jackson. RP 469-70. The State simply has no evidence that the shooter shot Brown because he thought Brown was a “Crip.”

For this reason, perhaps, the State commits a related “error” with regard to its characterization of Walker’s defense theory. See Br. Resp. at 22 n. 15. The State correctly notes that Walker argued Rabun was the shooter. The State is incorrect in claiming, however, that Walker argued Rabun shot Brown because he believed Brown was a “Crip.” In fact, Walker’s counsel made the **opposite** argument. He argued,

I told you at the outset that the gang aspect of this, that the prosecutors are making so much of, is a red herring. It’s a fake. It’s a sideshow ... This is not gang warfare. Curtis Walker had no reason to want to reap revenge for a gang situation.

RP 1643-44.

In sum, the State’s case boiled down to a claim of mistaken identity. The shooter fired on Brown because he believed Brown was “BK,” the man who had just shot and seriously wounded Jackson. The

only question to be decided by the jury was whether the shooter was in fact Walker, and not Rabun. The evidence that Walker was a member of the Bloods and an “OG” had no relevance towards enhancing the truth of the State’s allegations. Although the earlier altercation at the Cedar Village Apartments provided the context for the shooting that followed, the evidence of gang affiliation did not make it more likely that Walker was the shooter. Barring some link between the gang’s purposes and values and the shooting, the evidence’s sole use to the State was to predispose the jury against Walker, and to encourage a conviction based on their preconceptions about gangs, rather than the evidence.

d. The error was prejudicial.

After devoting substantial energy to arguing that the gang evidence was relevant and necessary to argue its theory of the case, the State contends that even if the admission of the gang affiliation evidence was erroneous, any error was harmless. Br. Resp. at 26-27. The State is wrong.

Rabun had already demonstrated that he was a young man with an aptitude for violence when he shot at BK in Jackson’s defense at the Cedar Village Apartments. Rabun stashed the guns, including his own gun. RP 509, 522, 524-25. Rabun was deemed to be a possible contributor to DNA found on the grip and a .38 millimeter round fired from the murder

weapon. RP 1061-62. Two witnesses provided a description of the shooter that was consistent with Rabun's clothing. RP 618, 663.

Rabun fled the jurisdiction on a 4:00 a.m. flight the day after the shooting. RP 480. After detectives tracked him down in the small town in Louisiana where he went in a likely attempt to evade apprehension, the State induced him to testify against Walker, presumably in exchange for an agreement not to prosecute him for any crimes arising from the incident.

Barring admission of the gang affiliation evidence, the jury had little reason to convict Walker. But, with this evidence, the jury could be persuaded to overlook the deficiencies in the State's case based on the perception that Walker was a "criminal-type person." Mee, 168 Wn. App. at 159. The admission of the highly prejudicial evidence of gang affiliation therefore prejudiced Walker's ability to receive a fair trial. His conviction should be reversed.

**2. The court failed to conduct an adequate inquiry into Walker's motion to substitute counsel.**

Walker argues that the trial court's denial of his motion to substitute counsel constructively denied him his Sixth Amendment right to the assistance of counsel. In response, the State contends that Walker never provided a "sufficient reason" to warrant substitution of counsel.

Br. Resp. at 26. In its discussion of the facts, however, the State elides over the fact that Walker's counsel twice indicated that he was not comfortable discussing Walker's reasons in the prosecutor's presence. The court, rather than excuse the prosecutor to conduct a further inquiry into these circumstances, improperly ruled without permitting Walker to make a complete record regarding his motion to substitute counsel.

The State does not reference the relevant standard of review, or, rather, the State broadly asserts the standard of review is for an abuse of discretion, without citing or trying to apply the factors to be considered by an appellate court presented with a trial court's denial of a motion to discharge counsel. Those factors are:

(1) the extent of the conflict; (2) whether the trial judge made an appropriate inquiry into the extent of the conflict; and (3) the timeliness of the motion to substitute counsel.

Daniels v. Woodford, 428 F.3d 1181, 1197-98 (9th Cir. 2005).

Walker had significant and ongoing communication issues with his counsel, none of which were his fault.<sup>6</sup> Walker's counsel specifically advised the court that issues had arisen, which he believed should be discussed outside of the presence of the State, which had caused an irretrievable breakdown in communications. RP (Pretrial) 80-81. The

---

<sup>6</sup> The State employs a sarcastic and, frankly, unpleasant tone in discussing these issues which is neither necessary to its arguments nor professional. See Br. Resp. at 40 ("Despite the defendant's unrealistic sweeping desire to have unfettered direct contact with his attorney whenever he desired ...").

Court did not inquire further into these issues. The State does not explain how the trial court can be said to have reasonably exercised its discretion when it was not in full possession of the facts.

Nor does the State's opinion of defense counsel's trial performance, see Br. Resp. at 46, mitigate a conflict if one exists. "[T]o compel one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000) (quoting Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970)). Further, if there is a conflict between an attorney and his client, prejudice is presumed, and the defendant is deemed to have been constructively denied his right to counsel. Penson v. Ohio, 488 U.S. 75, 88, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).


This Court should reject the State's unpersuasive claims and conclude that the trial court's failure to inquire into an irreconcilable conflict, the existence of which was vouchsafed by Walker's counsel, constructively denied Walker his right to the assistance of counsel. Walker's convictions should be reversed.

B. CONCLUSION

For the foregoing reasons, and for the reasons articulated in Walker's opening brief, this Court should reverse Walker's convictions.

DATED this 30<sup>th</sup> day of August, 2013.

Respectfully submitted:

  
38394 for  
SUSAN F. WILK (WSBA 28250)  
Law Office of Michael Iaria, PLLC  
Special Counsel for Appellant

Washington Appellate Project (91052)  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68534-1-I
v.	)	
	)	
CURTIS WALKER,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DENNIS MCCURDY, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	( )	HAND DELIVERY
APPELLATE UNIT	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] CURTIS WALKER	(X)	U.S. MAIL
754152	( )	HAND DELIVERY
WASHINGTON CORRECTIONS CENTER	( )	_____
PO BOX 900		
SHELTON, WA 98584		

2013 AUG 30 PM 4:57  
COURT OF APPEALS  
STATE OF WASHINGTON

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF AUGUST, 2013.

X \_\_\_\_\_ *Jane*

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710