NO. 68534-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CURTIS WALKER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE BRUCE HILYER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court properly admit evidence that the defendant was a member of the Bloods street gang, where the evidence showed that he shot and killed an innocent bystander because he believed that person was a member of the Crips street gang, whom he had just been involved in a shootout with?

2. Did the trial court abuse its discretion when, after hearing the defendant's complaints about his counsel, the court added a second attorney to help with the defendant's case, but denied the defendant's motions to substitute counsel?

3. Did the trial court impermissibly comment on the evidence in instructing the jury on the legal definition of what constitutes a firearm for purposes of the charge of unlawful possession of a firearm?

4. The defendant asserts that every WPIC "to convict" jury instruction is unconstitutional because each instruction informs the jury that it has a duty to return a guilty verdict if it finds that each element of a crime has been proven beyond a reasonable doubt. Has the defendant shown that State v. Meggyesy,[1] a case that

[1] 90 Wn. App. 693, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

rejected this same argument, is "incorrect and harmful" as required by In re Stranger Creek,[2] to overturn prior precedent?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was convicted of Murder in the First Degree and Unlawful Possession of a Firearm in the First Degree. CP 68-69. With seven prior felony convictions, the defendant's offender score is a 10. CP 229-44. The defendant received a standard range sentence of 548 months confinement, plus a 60 month firearm enhancement. CP 109-17.

2. SUBSTANTIVE FACTS

Twenty-five year old Rodriquez Rabun, aka D-Ro, was born in Texas and lives in Louisiana.[3] RP[4] 427-28. On occasion, D-Ro would visit Seattle, staying with his father, Billy Ray Bradshaw, aka "OG," at the Summit Hills Apartments where his father lived.

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[2] 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

[3] Some witnesses are referred to by their moniker. This is for clarity's sake because some of the witnesses did not know the participant's real names, and thus, the verbatim report of proceedings only refers to the person's moniker. No disrespect is intended.

[4] To be consistent with the defense brief, the verbatim report of proceedings, contained in consecutively paginated volumes, is cited as "RP," followed by the page number referenced. The two exceptions are for two pretrial hearing dates (March 25, 2011 and October 17, 2011), contained in a single volume that is cited as "RP Pretrial," and voir dire and opening statements that are cited as "RP Voir Dire" and RP Opening Statement."

RP 430-31, 1371, 1395. D-Ro met the defendant, Curtis Walker, aka C-Dub, and his wife, Shaleese Walker, aka Miss C-Dub, through his father. RP 432-34, 867-68. They all lived in the same apartment complex. Id.

According to the defendant's testimony, Billy Ray Bradshaw, "OG," is an "old gangster," a member of the Bloods from Arkansas. RP 868, 1333, 1404. The defendant testified that he too is an "OG," and that he is also a member of the Bloods street gang. RP 1400. An OG, the defendant testified, assumes the role of a counselor or teacher to the younger members of the gang. RP 1401. There is a certain amount of respect due to an OG, according to the defendant, a title to which he was proud. RP 1400-01.

According to the defendant, he spent the afternoon of April 29, 2010, at a local studio working on his rap music. RP 1327. Later, while driving home, he received a phone call from Jonathan Jackson, aka PC. RP 438, 524, 1327. PC told the defendant that someone wanted to fight him but that he was "going to knock this nigga out." RP 1328. When the defendant arrived back at his apartment, PC was waiting for him. RP 1329.

The defendant agreed to drive PC to the fight to make sure it was a "fair fight." RP 1331. Shaleese Walker was angry that the defendant was leaving to go to a fight. RP 438. She would later tell the police that she thought it was going to be a fight between gangs, the Crips versus the Bloods. RP 1183-84.

As the defendant was about to leave with PC, D-Ro pulled up. RP 1332. The three of them, all wearing at least some item of red clothing, the color of the Bloods, drove off in Shaleese's black Cadillac. RP 439, 441, 1183. Angry, Shaleese jumped into her red Cadillac and gave chase. RP 439, 1183-84. Shortly thereafter, they all arrived at the Cedar Village Apartments in Skyway, known Crips territory, where there were 25 to 30 people standing around. RP 1183, 1336-38. All of the people gathered around were wearing blue, the color of the Crips. RP 1183, 1186, 1339-40.

The defendant left his car running as he, PC, and D-Ro jumped out. RP 1337. PC immediately started arguing back and forth with one of the Crips, a person who went by the moniker BK. RP 443, 1133, 1339. BK was holding a gun during the argument. RP 445, 1340. PC was also armed, he had a gun that the defendant testified he "assumed" was his (the defendant's) .22 semiautomatic that he claimed PC must have taken from his

car. RP 1340. No evidence was introduced confirming what kind of gun PC actually possessed.[5]

A reference was made to BK and PC being cousins. RP 444, 1344. When the defendant heard this, he responded "you got me here on some family feud shit?" RP 1344. The defendant told D-Ro to get PC into the car. RP 1345. However, BK then opened fire, hitting PC at least once. RP 445-46, 1345. In what he testified was self-defense, D-Ro pulled out a black 9mm semiautomatic, a gun legally registered to him, and fired back. RP 447-48. D-Ro did not hit anyone. RP 449.

While this was happening, the defendant ran and jumped into the back seat of the red Cadillac driven by Shaleese. RP 1347. D-Ro also tried to get into the car but the defendant told him no. Id. Through continuous gunfire, Shaleese raced out of the apartment complex with the defendant, followed by D-Ro, who had jumped into and was driving the black Cadillac. RP 452, 1349-50. D-Ro, Shaleese and the defendant each testified and confirmed that Shaleese was driving the red Cadillac with the defendant, and that D-Ro was driving the black Cadillac, when they left the Cedar Village Aparments. RP 452, 457, 1135, 1138, 1347-48.

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[5] The defendant would testify that his .22 was inoperable. RP 1342, 1419. However, when recovered, ballistics testing showed that the gun was fireable, but that the gun had difficulty ejecting the shell casing. RP 1003-04.

Just down the street from the Cedar Village Apartments is a 7-11 store. It sits on the corner of South 129th Street and Martin Luther King Junior Way (MLK). This is where the charged shooting occurred, the murder of Alajawan Brown. The Cedar Village Apartments and the 7-11 store are separated by only about 200 yards. RP 727-29.

The first 911 call related to the Cedar Village Apartments shooting came in at 5:57. RP 725-26. The first 911 call related to the 7-11 shooting came in at 6:01. RP 727.

Eleven year old Alajawan Brown was a seventh grader and avid football player. RP 535-36. On this particular day, Alajawan just happen to be wearing all blue, a blue jacket and blue jeans. RP 381, 541. He was returning home by bus from the local Walmart store, where he had just purchased a pair of new athletic shoes. RP 541. He exited the bus in front of the 7-11. RP 404. Multiple witnesses testified about what happened next.

Stacy Sparks was driving home with her children when she stopped at the light on the corner of MLK and 129th ready to take a left turn. RP 563-64. A woman in a red sedan pulled up directly behind her and loudly uttered "there he goes, there he goes," as Sparks observed Alajawan walking on the sidewalk in front of the

7-11. RP 568-70. She then heard a "pow-pow-pow" as Alajawan was shot. RP 569. She watched as the shooter, who she described as 5' 10" and wearing a Muslim type cap, blue jeans, black leather coat and carrying a silver revolver, climbed into the front passenger door of a black sedan that had pulled up. RP 569, 572, 574-75. Asked if she could identify the shooter, Sparks said yes. RP 580-81. She positively identified the defendant in court as the shooter, while saying that she had also seen a picture of him on television a few days prior. RP 580-81. Asked if she had any doubts about her identification of the defendant as being the shooter, Sparks responded that she did not. RP 581.

Austin Cassell was in the 7-11 parking lot when the shooting happened. RP 590. While he could not positively identify the shooter, he testified that it was the passenger in the burgundy car, a heavy set, older male with a silver gun. RP 598, 603. He was not sure if the person fired from in the car or after the person had gotten out of the car. RP 598. He could not say where the shooter went after shooting Alajawan other than to testify that both the burgundy and black cars sped off at a high rate of speed. RP 599, 603.

Ryan Harper, who was with Cassell, identified the defendant and testified that he watched as the defendant got out of the "burgundy, maroon" "Cadillac," "pulled out a gun and started shooting." RP 611-13, 617. Harper said that the defendant then got into a black car that was behind the burgundy car and drove off. RP 615. He described the gun as chrome-colored. RP 618. Asked how he could identify the defendant in court, Harper said that it was mostly his face. RP 626.

Paul Dekker, another witness who was with Cassell, testified that when he heard the shots, he looked up to see a Black male place an object into his belt and climb into the passenger side of a black car. RP 640, 644. He then saw the red car in front, and the black car, both drive away very fast. RP 645-46.

The fourth person with Harper, Taylor Cassell, testified that he heard the gun shots and turned his head but that he did not actually see who fired the shots. RP 657, 660. He testified that he had told the police he was 95% certain that the shooter was outside standing in front of one of the two cars. RP 660, 667.

Jason Payne, an environmental hazardous materials technician, was working outside right next to the 7-11. RP 389. Payne heard a series of shots coming from the direction of the

Cedar Village Apartments, but when he looked up, he did not see anything. RP 399. Then, moments later, he heard a second set of shots, turned and saw Alajawan running towards the front of the 7-11, grasping his chest. RP 400-01. Payne did not see who fired the shots fired. Id.

Alajawan was shot once in the upper back, the bullet passing through his aorta and perforating his heart. RP 1091-92. The bullet was recovered intact. RP 1091.[6] Two bystanders tried to administer CPR, but Alajawan died in their arms. RP 378-81.

D-Ro testified that when he pulled up behind Shaleese and the defendant at the stoplight at the 7-11, the defendant jumped out of Shaleese's car and starting firing at Alajawan with a chrome-colored revolver. RP 457, 460. As the defendant was standing outside the car firing at Alajawan, Shaleese gunned it, driving through a red light and leaving the defendant behind. RP 458, 462. The defendant then ran back and jumped into the car with D-Ro. Id. He instructed D-Ro to "mash it," so D-Ro raced from the scene. RP 463.

A few blocks away, D-Ro and the defendant were involved in a car accident on Grady Way near Monster Road. RP 704.

[6] A second bullet was recovered from a sign post at the 7-11, with the trajectory indicating the bullet was fired from the street towards the 7-11. RP 738-39, 750.

Responding officers found the woman driver of the other vehicle, injured, still in the driver's seat, and being attended to by aid units. RP 772.[7] D-Ro and the defendant continued to flee. RP 751.

At one point, D-Ro and Shaleese were able to pull up next to each other in a parking lot. RP 468. "Freaking out," Shaleese asked the defendant "why did you kill that little boy? Why did you kill him?" RP 469. The defendant responded, "because he killed my homeboy." RP 470. Shaleese then sped off. RP 471. Shaleese also spoke with a friend on her cell phone and hysterically told her that the defendant had done something crazy. RP 878. She said nothing about D-Ro having shot anyone. 881.

The defendant then had D-Ro drive to a remote cul-de-sac in a business district in Renton. RP 751. However, a civilian witness who had observed the car accident, followed them to the cul-de-sac and obtained their license number. RP 784-85. A security video from a business in the cul-de-sac would show the black Cadillac with what appears to be two people inside. RP 754. D-Ro is clearly seen--wearing white shoes, white colored shorts, and a dark

[7] In contrast to this testimony, when Shaleese testified for the defense, she claimed that she stopped at the scene of the accident, that the other driver was outside her vehicle sitting on the curb, and that she checked to make sure the woman was okay before driving off. RP 1154-55.

top with patterns on the front and back, exiting the vehicle. RP 756.[8]

Parking in the cul-de-sac, D-Ro took three guns from the car, a .22, a .38 and the 9mm, and dumped them in a field next to the cul-de-sac. RP 794, 797-98. All three guns were recovered by the police and found to be loaded. RP 821. The black 9mm semiautomatic had bullets in the clip and one in the chamber. RP 821, 857. The chrome-colored .22 semiautomatic had bullets in the clip and a casing in the chamber. RP 821, 833. The chrome-colored .38 Smith & Wesson revolver had two empty shell casings and two live rounds in the wheel. RP 822, 858-59. The officer recovering the weapons wore a single pair of rubber gloves as he carefully unloaded each gun, and then packaged each gun and the ammunition separately. RP 820, 824, 826, 839. Ballistics testing showed that the bullet recovered from Alajawan's body, and the bullet recovered from the sign post at the 7-11, were both fired from the chrome-colored .38 Smith & Wesson revolver. RP 980, 1002.

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[8] Security video from the Cedar Village Apartments shows that the defendant was wearing a black or dark jacket, black or dark pants and a red hat. RP 498. The defendant is 5' 6" and weighs 255 pounds. RP 1394. D-Ro is 6' 2" and goes a slender 190 pounds. RP 514. Nobody witnessing the 7-11 shooting described the shooter as having a body type like D-Ro or that the shooter was wearing white.

No prints of comparison value were obtained from the guns. RP 949-50.

A DNA sample was obtained from the grip of the .38. RP 1062. The profile was a mixture, with the defendant, D-Ro and Shaleese as possible contributors. A DNA sample was also obtained from the spent casings and live rounds of the .38, and from the inside of the trigger guard and on the trigger itself. RP 1060-63, 1081. The DNA from the trigger was a mixture, with the defendant's DNA profile consistent with the major component, and D-Ro *excluded* as a contributor. RP 1063. The DNA obtained from the .38 ammunition was consistent with a single male, the defendant. RP 1060-61.

After ditching the guns, the defendant had D-Ro drive the black Cadillac to "Speedy's" house, one of his "homeboys," and a person he knew could get rid of cars. RP 476, 1161, 1368-70. Shortly thereafter, Shaleese arrived, followed by Billy Ray Bradshaw. RP 477-78. Bradshaw drove D-Ro back to his apartment and had him fly home the next morning. RP 479-80.

The black Cadillac was then stripped, cleaned of prints and identifying information and bumped. RP 919, 922-23, 1161. It was located in Renton a few days later. RP 906.

On the evening of April 30, morning of May 1, the defendant and Shaleese were detained at a hotel in Yelm and questioned about the shooting. RP 1171, 1186. On May 2, the defendant and Shaleese were questioned again by detectives. RP 1186.

Shaleese initially told the police she knew nothing about anything that had happened at the 7-11. RP 1224. She later confessed that she had been at the 7-11 but claimed that it was D-Ro, not her husband, who fired the gun. RP 1140-44. She told the police multiple times that the gun D-Ro fired at the 7-11 was a black semiautomatic. RP 1140-44. As stated above, forensic testing revealed that it was a .38 that was used to kill Alajawan, the chrome-colored .38 that was recovered from the field where the defendant had D-Ro bump it -- the 9mm registered to D-Ro is a black semiautomatic. RP 821-22, 857-59. At trial, Shaleese would change her story and testify that she had been unable to tell anything about the gun she saw D-Ro fire at the 7-11. RP 1142.

Shaleese testified that when she got to the stoplight at the 7-11, there were a number of cars between her and D-Ro, but despite this fact, she was able to see D-Ro in her rearview mirror with one hand on the steering wheel and the other hand shooting through the passenger side window of the black Cadillac towards

the sidewalk. RP 1141. Shaleese claimed that she then drove through the light, and that after she "made it all the way through the light," she told the defendant, "you know, you need to get your car, get out and get your car." RP 1146.[9] Shaleese then claims the defendant got out of the red Cadillac and climbed into the black Cadillac with D-Ro. RP 1147. On cross, Shaleese was forced to admit that in her earlier statements to the police, she had claimed that D-Ro's car was in a different place in relation to her car when the shooting occurred, and that she had said that D-Ro's arm was out the window when he fired. RP 1253-54. In addition, Shaleese had previously told the police that the defendant had changed cars at a different location on 129th, a distance away from the 7-11. RP 1542-43.

At trial, Shaleese asserted that she had been unaware that anyone had actually been shot at the 7-11. RP 1167. She claimed they dumped the Cadillac because it had been involved in the hit and run, not a shooting. RP 1161. Her plan was to report the car as stolen. RP 1161. Further, initially Shaleese told the police that D-Ro wiped down the car, but after the police interviewed the defendant and then questioned her again, she admitted that she

[9] No witness put the defendant anywhere but out of the car before Shaleese entered the intersection.

had lied and that she was the one who had wiped down the car. RP 1550-51. Then at trial, Shaleese reversed courses yet again, claiming she had not wiped down the car and professing that she had never said she had. RP 1267.

On cross, Shaleese admitted that she had been convicted of felony and misdemeanor offenses, after she had earlier testified that she was not the criminal type. RP 1221-23. She also admitted that she had lied to the police during a prior criminal investigation. RP 1223. In a recorded jail phone call with the defendant, Shaleese was heard telling the defendant that she "told the police whatever the fuck she had to." RP 1273.

In regards to the shooting at the 7-11, the defendant testified he was down behind the seat of the red Cadillac after they left the Cedar Village Apartments, that Shaleese then stopped the car, he heard four or five shots, and that Shaleese then told him to get out and get their other car. RP 1349-51. The defendant then looked up and saw that D-Ro was behind them in the black Cadillac. RP 1351. He then got out of the red Cadillac and climbed into the front passenger seat of the black Cadillac. RP 1355-56. When he climbed into the car, the defendant claims there were three guns on

the seat, that he put the guns on his lap and then put them in the back seat. RP 1357.

The defendant professed that he did not see anyone get shot at the 7-11. RP 1359. He testified that D-Ro told him "I think I hit him," but the defendant professed not to know what D-Ro was talking about. RP 1361. Like Shaleese, the defendant had previously told the police (nine times) that he changed cars a distance away from the 7-11 on MLK. RP 1430-31, 1433, 1545-47. In fact, he admitted saying to the police that he would not have gotten out of the car anywhere near the apartment shooting. RP 1439.

On cross, the defendant admitted that when he described to police what he had been wearing on the day of the shooting, he did not know that his image had been caught on a surveillance video and that the image showed him wearing different clothing than he described. RP 1396. For purposes of the unlawful possession of a firearm charge, the defendant stipulated that he had previously been convicted of a "serious offense." RP 1106. He also admitted that he had eight prior assault convictions. RP 1507.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. EVIDENCE THAT THE DEFENDANT WAS A MEMBER OF THE BLOODS STREET GANG WAS ADMISSIBLE AS *RES GESTAE* EVIDENCE AND TO PROVE MOTIVE, INTENT, AND PREMEDITATION.

The defendant contends that the trial court abused its discretion in allowing testimony regarding his membership in the Bloods street gang. This argument has no merit. The State's theory of the case, supported by the evidence, was that the defendant, an admitted member of the Bloods street gang, shot and killed an innocent bystander, Alajawan Brown, because the defendant believed Alajawan was a member of the Crips street gang that just minutes before had been in a shootout with the defendant and other members of the Bloods. The trial court properly found that the gang evidence was admissible as *res gestae* evidence, and to prove motive, intent, and premeditation under ER 404(b).

Under ER 404(b), evidence of other crimes, wrongs, or acts is inadmissible to show that a person acted in conformity with a character trait. ER 404(b); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). In other words, one cannot introduce prior bad act evidence simply to show that a person is of a "criminal

type." State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). At the same time, prior bad act evidence is admissible to show such things as "motive,[10] opportunity, intent,[11] preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); Powell, 126 Wn.2d at 258. The enumerated list of purposes allowing for the admission of prior bad act evidence is not exclusive. State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). For example, prior bad act evidence is also admissible to prove premeditation in murder cases.[12] Powell, 126 Wn.2d at 262.

The Supreme Court has also recognized the "*res gestae*" or "same transaction" exception for admissibility of prior bad act evidence. Under this exception, "evidence of other crimes is admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (citations omitted). Where another offense constitutes a "link in the chain" of an

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[10] Motive is the impulse, desire, or another moving power which causes an individual to act. State v. Mee, 168 Wn. App. 144, 157, 275 P.3d 1192, rev denied, 175 Wn.2d 1011 (2012). Although motive is not an element of the crime, ER 404(b) evidence is admissible in murder cases to prove motive. Powell, 126 Wn.2d at 260.

[11] Intent means acting with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010(1)(a).

[12] Premeditation involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982).

unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible "in order that a complete picture be depicted for the jury." Brown, 132 Wn.2d at 571.[13]

The decision to admit ER 404(b) and *res gestae* evidence lies within the sound discretion of the trial court. Brown, 132 Wn.2d at 572-73. While reasonable minds might disagree with a trial court's ruling, that is not the standard of review. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, a defendant must convince the reviewing court that "no reasonable judge would have reached the same conclusion" as the trial court; i.e., that no reasonable judge would have admitted the evidence. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

As with any evidence, to be admissible the evidence must be relevant to a particular purpose. Brown, 132 Wn.2d at 571. Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence. ER 401; State v. Thomas, 150 Wn.2d 821, 858, 83 P.3d 970 (2004).

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[13] In Lane, the Supreme Court upheld the admission of other crimes committed up to three days prior to the charged murder, stating that "[e]ach offense was a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury." Lane, 125 Wn.2d at 833 (citing State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)).

In regards to gang evidence, this means there must be a connection or nexus between the gang evidence and a fact to be proven at trial. State v. Scott, 151 Wn. App. 520, 526-27, 213 P.3d 71 (2009), rev denied, 168 wn.2d 1004 (2010). Gang affiliation evidence has been regularly admitted by courts to establish a motive for the charged crime or for other legitimate purposes, such as *res gestae* or intent. Scott, 151 Wn. App. at 527. State v. Boot[14] provides a good example.

Boot was charged with murder after he and a co-defendant, in attempting to steal a car, confronted a woman getting out of a car at a hotel and shot her multiple times, killing her. Evidence was admitted under ER 404(b) and *res gestae* as to Boot's gang affiliation and as to the multiple assaultive acts he committed leading up to the day of the murder. This evidence included the fact that Boot was a gang member, that killing someone increased a gang member's status, and that two days prior Boot had fired at an individual who had flashed gang signs at him. The trial court's admission of the gang evidence under the *res gestae* exception and the 404(b) exception was upheld as a proper exercise of discretion; the court properly finding that the probative value of the evidence was not outweighed by the potential for prejudice. Boot, 89 Wn. App. at 787-

[14] 89 Wn. App. 780, 950 P.2d 964, rev. denied, 135 Wn.2d 1015 (1998).

91; see also United States v. Flores, 572 F.3d 1254, 1259 (2009) (the throwing of gang signs by rival gang members may be admitted as it shows an attempt to create a violent confrontation).

Here, the State's theory of the case was that the defendant's shooting of Alajawan Brown was gang motivated. This theory was supported by the evidence. Not only did the defendant admit that he was a member of the Bloods street gang, he admitted to being an "OG" or Old Gangster. This, according to the defendant's own testimony, meant that he acted as a mentor or teacher to the younger gang members.

When the defendant drove over to the Cedar Village Apartments with D-Ro and PC, he did so under the belief that he was going to a gang related fight. He, and all the persons he was with, wore some red clothing item—the color of the Bloods. The 15 to 20 people waiting outside the Cedar Village Apartments all wore blue items of clothing, the color of the Crips. When PC and BK began arguing back and forth, according to the defendant's own testimony, he, as an OG of the Bloods, and another man, an OG of the Crips, tried to calm the situation down. If this confrontation was not gang related as the defendant suggests on appeal, one must

wonder why it took OG's from different gangs to try and calm the situation.

According to the defendant's testimony, almost all the Crips were fully armed. When the shooting started, the defendant's friend and fellow gang member, PC, was shot down. As he fled in his car under a hail of gunfire, the defendant was unaware whether his friend was dead or not. Then, moments later and less than two blocks away, the defendant saw Alajawan Brown dressed in blue approaching the intersection the defendant was stopped at. With absolutely no other apparent motive other than the fact that Alajawan was suspected of being the shooter at the Cedar Village Apartments or another Crips gang member, the defendant opened fire.[15]

Additionally, the State's theory of the case was supported by more than just the actions of the defendant and the circumstances of the crime; the State's theory of the case was also supported by statements attributed to the defendant himself. According to the

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[15] It should not be overlooked that the defendant's theory of the case was that D-Ro was the shooter. Just as with the defendant, D-Ro would have had no motive in shooting Alajawan other than the fact that he thought Alajawan was either the shooter from the Cedar Village Apartments or another member of the Crips. It is difficult to reconcile the defendant's claim on appeal that gang evidence should not have been admitted, when that very same evidence also supported the defendant's theory of the case.

testimony, when asked by his wife why he had shot Alajawan, the defendant stated that he shot Alajawan because he had just shot his "homie."[16] Thus, the defendant's own statement provided the nexus between the defendant's gang ties and the killing of Alajawan.

This case is similar to the situation that existed in State v. Rodriguez, 163 Wn. App. 215, 259 P.3d 1145 (2011), rev. denied, 173 Wn.2d 1009 (2012). Rodriquez and a co-defendant were driving around when they confronted a man on foot who they believed was from a rival gang. The man was shot and killed for the sole reason that the defendants believed he belonged to the rival gang. There was no evidence that Rodriquez or his co-defendant actually knew their victim was from a rival gang. On appeal, the Court noted that Rodriquez "does not seriously argue that there was no nexus between the crime and gang membership in this case, nor could he. It would have been impossible to recount the events leading up to the homicide or an articulable

[16] "Homie" or "homey" is short for "homeboy," a term that refers to "a fellow member of a youth gang." Merriam-Webster's Collegiate Dictionary, 11th Edition at 594-95 (2003).

motive for the homicide without discussing gang membership." State v. Rodriguez, 163 Wn. App. at 215, 233 n.3.[17]

The same situation exists here. The motive for the shooting of what turned out to be a completely innocent civilian was the fact that the defendant believed Alajawan Brown was from a rival gang; a gang that he had just been involved in a shootout with and a gang that had just shot one of his "homies." While the defendant argues that it is plausible that his motive could have been that he and the victim at the Cedar Village apartments were friends, the defendant's theory is irrelevant. The defendant must prove that "no reasonable judge" would have found that the defendant shot Alajawan because he believed he was either the actual shooter or from the rival gang that just shot his friend. Hopson, 113 Wn.2d at 284.

The defendant also focuses on the prejudice that gang evidence can instill. To be admissible under ER 404(b), the probative value of the evidence must outweigh the danger of unfair prejudice. Mee, 168 Wn. App. at 157. Of course, as courts have

[17] See also State v. Saenz, 156 Wn. App. 866, 874, 234 P.3d 336 (2010), sentence reversed, 175 Wn.2d 167 (2012). Saenz was seen arguing with a rival gang member. A short time later, he drove past the same rival gang member and opened fire. The Court of Appeals upheld the trial court's ruling admitting evidence of gang membership to show motive, intent, opportunity, and *res gestae*.

recognized, all evidence will prejudice one side or the other. Carson v. Fine, 123 Wn.2d 206, 224-25, 867 P.2d 610 (1994). But evidence is not rendered inadmissible just because it may be prejudicial. Id. For example, a graphic photograph in a homicide case may be admissible even when repulsive or gruesome where the probative value outweighs the prejudicial effect of the evidence. See, e.g., State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). The rule is concerned with "unfair prejudice." ER 404(b); see State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987) (in regards to prejudice, the linchpin word whether the prejudice is "unfair"). Because relevant evidence admitted by a party is almost always "prejudicial" or hurtful to the opposing party, "Washington cases are in agreement" that evidence is unfairly prejudicial if the evidence likely "arouse[s] an emotional response rather than a rational decision among the jurors." Fine, 123 Wn.2d at 224 (citing Lockwood v. AC & S, Inc., 109 Wn.2d 235, 257, 744 P.2d 605 (1987); State v. Cameron, 100 Wn.2d 520, 529, 674 P.2d 650 (1983)); see also Powell, at 264 (the danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response).

In the cases admitting gang evidence cited above, once the clear nexus between the gang evidence and the crime was established, the evidence was deemed admissible despite the prejudice that might inure from its admission. Without resorting to hyperbole, it is difficult to imagine how a defendant could argue that a trial court must exclude the actual motive for committing the crime charged. Here, the evidence provided the jury with a complete picture of the events that unfolded over a very short period of time. The evidence went directly to the defendant's motive, his intent and his premedication in shooting Alajawan. The defendant cannot show that no reasonable judge would have so ruled.[18]

In any event, any error was harmless. Error in the admission of prior bad act evidence is harmless unless the defendant can show that, within reasonable probabilities, the outcome of trial would have been different but for the error. State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204, rev. denied, 107 Wn.2d 1014 (1986). To determine the probable outcome, the appellate court

[18] The trial court has considerable discretion in balancing the relevancy or probativeness of evidence against its prejudicial effect. State v. Reay, 61 Wn. App. 141, 148, 810 P.2d 512, rev. denied, 117 Wn.2d 1012 (1991). This is because the trial court is in the best position to evaluate any prejudice. State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 690 (1995).

must focus on the evidence that remains after excluding the tainted evidence. Thamert, 45 Wn. App. at 151.

As stated above, the defendant's claim at trial was that D-Ro was the actual shooter. The same gang evidence provided D-Ro's motive and intent and explained the circumstances of the crime to the jury. In other words, there was no evidence that D-Ro had any other motive in shooting Alajawan other than the mistaken belief he was a Crip. According to the defense at trial, this case was a "who done it," the defendant or D-Ro. Thus, the introduction of the evidence did not make it any more likely that the defendant committed the murder than D-Ro having committed the murder. Under these facts and considering the defendant's theory of the case, he cannot show that within reasonable probabilities, the outcome of trial would have been different but for the admission of the gang evidence.

2. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUESTS TO SUBSTITUTE COUNSEL.

The defendant contends that the trial court abused its discretion in denying his requests to substitute counsel. The defendant's claim fails. The record shows that the defendant never provided a sufficient reason requiring the substitution of counsel;

the defendant's complaints pertained mainly to practical communication issues that the court offered to and did address the defendant's concerns. Thus, the trial court properly exercised its discretion in denying the defendant's requests.

a. The Relevant Facts.

On July 1, 2010, the defendant was arraigned on the charge of murder in the first degree. CP 1-9; CP 183. On October 5, 2010, the Office of Public Defense appointed attorney Jerry Stimmel to represent the defendant.[19] CP 166; CP 190. On November 29, 2010, the case was preassigned to Judge Richard Eadie. CP 201-02.

On December 7, 2010, the parties appeared before the court for a status conference. RP 2. The court asked if there were any legal matters that needed to be addressed. RP 5. Neither the defendant nor defense counsel raised any issue related to counsel's representation of the defendant. Id.

On January 26, 2011, the parties appeared again before the court for a status conference. Defense counsel informed the court that an investigator and a forensic expert had been retained by the defense, but that there were some outstanding discovery issues

[19] Stimmel is a criminal defense attorney with over 25 years of trial experience. See http://www.mywsba.org; http://www.jerrystimmel.com.

that needed to be resolved with the State. RP 3-4. A trial date was set for September 6, 2011. CP 203-04.

At a subsequent status conference held on March 25, 2011, defense counsel informed the court that he still had not received a redacted copy of the discovery from the State, the copy that the court rules allow to be provided to the defendant. RP 13; CrR 4.7(h)(3). Apparently, the paralegal with the prosecutor's office was still working on completing the redactions. Id. The parties responded to the court's inquiry that there were no other matters that needed to be addressed by the court. RP 17.

On June 30, 2011, over a year after he was arraigned, and just nine weeks prior to the start of his scheduled murder trial, the defendant brought a motion to substitute counsel. RP 19. The basis of his motion was that he had "lost confidence" in his appointed counsel. RP 19. Counsel informed the court that there was a twofold basis for the defendant's discontent with him.

First, counsel indicated that the defendant was concerned because of the pace with which the discovery process was proceeding, and thus he was concerned with counsel's ability to be ready for trial. RP 20. Counsel indicated that part of the slow pace in which discovery was going was the fault of the prosecutor, and

that counsel hoped to be able to keep the September trial date. RP 20.

Second, counsel indicated that the defendant was concerned about his inability to be able to contact counsel by phone from the jail. RP 20. Counsel explained that he had put a prepaid amount of money into the defendant's jail phone account so that he could make phone calls to him, but that no one had informed him when the account had reached zero. RP 20-21. Counsel indicated that he had e-mailed the jail about the problem, the jail had forwarded his concern to the vendor who handles the jail phone system, but that to date, he had been brushed off by the vendor. RP 20. Counsel also indicated that part of the defendant's problem was that the phone system would not allow the defendant to leave a voice message. RP 27.

After defense counsel explained the reasons for the defendant wanting new counsel, the defendant was asked if he wanted to address the court directly. RP 21. The defendant agreed that counsel had accurately summarized his concerns, stating, "[y]es your Honor, I believe that Mr. Stimmel has addressed this issue pretty forward." Id. Still, the defendant told the court that he wanted a specific attorney appointed to represent him, a

Mr. Abe Hammerstein.[20] RP 22. He added that "I feel that I should have been able to contact and communicate with my lawyer whenever I needed to, whenever something came across my mind I could not reach my attorney." RP 23. The defendant also expressed his unhappiness with the timing of instructions given to the defense investigator by Stimmel. RP 23.[21]

The prosecutor responded that Stimmel was a highly competent and experienced attorney, that there were indeed some outstanding discovery issues caused in part by the State, and that there was currently in place an understanding with counsel regarding what discovery items would be provided to the defense within the upcoming week.[22] RP 24. Stimmel then explained to the court that it was a pleasure working with the defendant, that there was no hostility between them, that they did not personally have a

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[20] The Washington State Bar Association lists no attorney by that name licensed to practice law in the State of Washington. See http://www.mywsba.org.

[21] This issue arose, the defendant explained, because Stimmel was not the defendant's first attorney. He was initially represented by counsel Ali Pierson. The defense investigator was initially retained by Pierson. When Pierson withdrew from the case, the investigator stopped working on the case. When Stimmel took over the case, the investigator began work anew, but the defendant was apparently not happy with the delay. RP 23.

[22] Ballistic testing, DNA testing and forensic testing of certain evidence was being conducted by both the State and the defense. RP 11-16. Logistics had to be worked out in testing the same items of evidence. See e.g., RP 11-33, 48-49.

communication problem, but that if the defendant did not want him as counsel, "I don't really want to go where I'm not wanted." RP 26.

In denying the defendant's motion, the court noted that a substitution of counsel would undoubtedly result in a substantial delay of the trial. RP 32. The court stated that there was no basis to find counsel as not acting in a fully competent manner, and that the communication issues raised by the defendant could be dealt with by court order--if the problems with the vendor continued, and/or some other remedy if the court were provided additional information about the problems. RP 30-34. Finally, the court noted that if a defendant's comfort level were a basis to substitute counsel, then there would never be any certainty as to a trial date. RP 33. The court entered a written order denying the motion. CP 14.

In October, the defendant wrote a letter to the court renewing his request to substitute counsel. CP 18. The defendant did not allege that there was any actual conflict of interest between he and counsel, or that he had information that could only be provided to the court at a closed hearing. Instead, the only issue raised by the defendant was his continued dissatisfaction with his ability to have direct communication with his attorney.

He complained that he could still not call counsel directly, that he had to go through a third party to place a call, and that when he did call his attorney, counsel was not there to answer the phone. Id. He added that when he did communicate with counsel, via e-mail and in-person, the communications were not informative enough for his liking, that he felt he was being kept "in the dark." Id.

On October 14, 2011, the parties appeared in court and the matter was brought to the court's attention. Defense counsel indicated that the motion was based on the defendant's letter that had been sent to the court. RP 69. Defense counsel also informed the court that the defendant was claiming that he had filed a bar complaint against him. RP 71. The court declined to hear the matter at that time because the State had not yet been provided with a copy of the defendant's letter. RP 69.

On October 17, 2011, the court heard the defendant's motion. Defense counsel informed the court that he had not received any information about any bar complaint allegedly filed by the defendant, but nonetheless, he had contacted the Office of Public Defense and he was now affirmatively seeking to withdraw. RP 75. Stimmel told the court that attorney Julie Gaisford was present in court as a possible replacement for him, but that without

more information and without having spoken to the defendant, she was unable to confirm whether she could actually substitute in on the case and meet the current trial date. RP 75-76.

Stimmel again indicated that there had been practical communication difficulties between the defendant and himself but that it was neither the defendant nor counsel's fault. RP 77-78. Counsel had attempted to meet face-to-face with the defendant, had sent a "chain of e-mails" to the jail to set things up, but that the jail never brought the defendant down to the meeting room. RP 78. Counsel complimented the defendant, saying that he had been "extremely amiable, cooperative and honest" with him, although there were "some dynamics within the defense," some "irreconcilable communication difficulties" that counsel stated "I can't disclose." RP 81. Counsel provided no specifics and neither the defendant nor defense counsel indicated that they wished to address the court in private. See RP 75-86.

The court indicated that a substitution of counsel at this late a date would cause great prejudice to the case, including the possibility of faulty and stall testimony. RP 82. The court said that based on the information provided to the court, the issues appeared to be related to the system rather than defense counsel. RP 81.

The court indicated that it would do whatever was necessary to deal with the situation, including the appointment of Gaisford as co-counsel, and the holding of hearings on short notice to deal with jail and communication issues, if they persisted. RP 83-85. The court entered a written order denying the motion to substitute counsel while at the same time indicating that a second attorney should be appointed to assist Stimmel. CP 22.

At the next hearing, held on December 12, 2011, longtime defense counsel Ann Mahony[23] appeared with Stimmel as co-counsel. RP 18. Throughout the course of trial, the defendant never mentioned that there were any more communication issues with counsel, any conflict of interest, or that he wanted new counsel.

b. The Court's Proper Exercise Of Discretion.

A criminal defendant does not have absolute Sixth Amendment right to a choice of counsel. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Nor does the Sixth Amendment guarantee a "meaningful relationship" between a defendant and his attorney. Morris v. Slappy, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 75 L. Ed. 2d

[23] See http://www.mywsba.org.

610 (1983). And it is without question that a defendant's general loss of confidence or trust in counsel is not sufficient grounds to warrant the substitution of counsel. Stenson, 132 Wn.2d at 734; State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

A criminal defendant who is dissatisfied with appointed counsel "must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." Stenson, at 734. "Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." Id. Factors the trial court will consider in deciding to grant or deny a motion to substitute counsel are (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings. Id.

Whether an indigent defendant's dissatisfaction with appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the sound discretion of the trial court. Id. at 733. While reasonable minds may disagree with a trial court's ruling, that is not the standard on review. Willis, 151 Wn.2d

at 264. To prevail on appeal here, the defendant would have to prove that no reasonable judge would have taken the position adopted by the trial court. Robtoy, 98 Wn.2d at 42.

At trial and/or on appeal, the defendant's request for new counsel can be broken down into four categories: 1) the alleged filing of a bar complaint, 2) the defendant's practical difficulties in communicating directly with counsel (the defendant never alleged that there had been a complete breakdown in communication), 3) the pace of discovery and possible implications on the trial date, and 4) a general dissatisfaction with counsel. None of these reasons justified the substitution of counsel.

The Alleged Bar Complaint: A defendant's filing of a formal bar complaint against his counsel does not by itself create a conflict sufficient to require substitution of counsel. State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986), rev. denied, 108 Wn.2d 1006 (1987). In fact, even the threat of a lawsuit or the threat to physically harm counsel by itself does not create an actual conflict requiring substitution of counsel. United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998). If it did, then any defendant could create a conflict requiring substitution of counsel at will simply by taking one of these actions. Id.

Here, it is unknown whether the defendant actually filed a bar complaint against Stimmel. On appeal, the defendant uses language indicating that a bar complaint was actually filed. Def. br. at 35. The record does not support this. Other than the fact that the defendant told counsel he had filed a bar complaint, there is nothing in the record that indicates he actually did so. Stimmel himself told the court that he had not received anything from the bar, and the WSBA website does not show any bar discipline ever having been taken against Stimmel. RP 75; http://www.mywsba.org. In any event, there is nothing in the record indicating what the alleged bar complaint was about, or that the subject matter of the alleged complaint somehow created a conflict requiring substitution of counsel.

Despite multiple hearings regarding his motion to substitute counsel, the defendant never provided the court with any information about the alleged bar complaint, nor did he argue that it created a conflict of interest. The defendant has failed to prove that the alleged bar complaint required the court to grant his motion to substitute counsel.

Communication Difficulties: When the "relationship between lawyer and client completely collapses, the refusal to

substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel." Stenson, at 722. However, there is a difference between a complete collapse and mere lack of accord. Slappy, 461 U.S. at 13-14; State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006). Only when there is a complete breakdown in communication between the attorney and the defendant is it required that the court appoint substitute counsel. Varga, at 200; Stenson, at 734. Counsel and defendant must be at such odds as to prevent presentation of an adequate defense. State v. Schaller, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007), rev denied, 164 Wn.2d 1015 (2008).

In State v. Fualaau, 155 Wn. App. 347, 365, 228 P.3d 771, rev. denied, 169 Wn.2d 1023 (2010), the defendant actually assaulted his counsel in open court. On appeal, Fualaau claimed that this showed that there was a complete breakdown in communication that required substitution of counsel. This Court rejected the defendant's argument, stating that despite the assault, nothing in the record supported the claim that there was a complete breakdown in communication, and noting that the defendant did not claim at trial that there was such a breakdown in communication. Such is the case here.

The defendant never asserted that there was a complete breakdown in communications between himself and counsel. Rather, the defendant's complaints pertained to practical impediments that hindered his desire to have direct communications with his attorney whenever he wanted, and a vague statement that he felt he was being kept in the dark. Despite the defendant's unrealistic sweeping desire to have unfettered direct contact with counsel whenever he desired, the court and counsel were aware that there were certain practical difficulties that were hindering the defendant's ability to communicate directly with counsel. Specifically, the parties discussed issues concerning having face-to-face visits in the jail, the defendant's belief that conversations with his counsel were being listened to by others (see RP 77-78), and the defendant's ability to place phone calls directly to counsel. Counsel indicated he was working on the issues and the court offered its help if the issues continued. Further, a second attorney was brought onboard as co-counsel to help with the communication issues. The defendant never complained of these issues again, an indication that the communications issues were likely resolved.

There is simply no showing here that there was a complete breakdown in communication. In fact, on more than one occasion, counsel indicated that he and the defendant got along well. The only actual discord noted by the defendant was his vague statement that he felt he was being left in the dark. However, while never explaining what he meant by this, he did not contend that counsel was not communicating with him or that there was some sort of conflict of interest. State v. Thompson 169 Wn. App. 436, 457-58, 290 P.3d 996 (2012) (substitution of counsel is required only where counsel and defendant are at such odds as to prevent presentation of an adequate defense) (citing Schaller, 143 Wn. App. at 268), rev denied, 176 Wn.2d 1023 (2013).

The Pace of Discovery: In a criminal case, most of the evidence, written materials and physical items, is in the hands of the State, either being held by the police or the prosecutor's office. The flow of discovery in a criminal case is governed by CrR 4.7. See State v. Hutchinson, 111 Wn.2d 872, 876, 766 P.2d 447 (1989). In many criminal cases, like here, the defense will seek to have items of evidence in the State's custody and control forensically tested by their own experts. E.g., State v. Norris, 157 Wn. App. 50, 236 P.3d 225 (2010), rev. denied, 170 Wn.2d 1017 (2001). If need be, the court

rules provide for court intervention in the discovery process. See CrR 4.7; State v. Youde, 2013 WL 2157687 (Wn. App. Div. 1, 2013).

There is nothing in the record that suggests defense counsel was deficient in pursuing discovery from the State or conducting a full and complete defense investigation—including forensic testing of the evidence items held by the State. The defendant appears to have abandoned this argument on appeal.

General Dissatisfaction: The defendant did express his general dissatisfaction with counsel. He never asserted anything more than this. The constitution does not require that the defendant and counsel have a "meaningful relationship." Slappy, 461 U.S. at 13-14. In fact, many times the relationship between counsel and his or her client can be quite acrimonious. See, e.g., Fualaau, supra; Thompson, supra. It is only where there is a "complete collapse" of the attorney client relationship that substitution of counsel is required. Stenson, at 722. A general loss of confidence or trust in counsel does not require substitution. Stenson, at 734; Varga, at 179. The defendant did not allege, and there is no evidence to support, that there was anything that came close to a complete collapse of the attorney client relationship.

On appeal, while citing a number of substitution of counsel cases, the defendant does not really identify any specific set of facts that would justify finding that the trial court abused its discretion in denying the defendant's motion to substitute counsel. Instead, the defendant suggests that the trial court was required to *sua sponte* conduct a closed-door hearing to hear the defendant's grievances, and because the court did not do so, his conviction must be reversed. This argument fails for multiple reasons.

In determining whether the trial court abused its discretion in denying the defendant's motion to substitute counsel, a reviewing court will look at the adequacy of the trial court's inquiry. Cross, 156 Wn.2d at 607. Consideration of a defendant's complaints must be made. See Varga, at 200-01; Stenson, at 737. There is no requirement that a trial court *sua sponte* conduct a closed hearing. While there may be cases where such an inquiry is necessary, the trial court's duty is to conduct an appropriate inquiry based on the facts before it so that the court is provided with a sufficient basis to reach an informed decision. Thompson, 169 Wn. App. at 462 (citing United States v. Adelzo–Gonzalez, 268 F.3d 772, 777 (9th Cir.2001)). Summarily denying a defendant's motion to substitute counsel without first informing itself of the facts is an

abuse of discretion. State v. Lopez, 79 Wn. App. 755, 766, 904 P.2d 1179 (1995), disapproved on other grounds, State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998).

Here, the defendant was twice asked directly, on the record, by the court, to explain or air his grievances--and he did. Multiple hearings were held on the matter. The defendant also aired his grievances in a letter he wrote addressed to the court. Not once did the defendant suggest, ask, or otherwise indicate that he sought a closed door hearing, that he had information that could only be disclosed at some type of closed door hearing, or that his grievances extended any farther than the information he directly provided to the court. Defense counsel also never asked the court to conduct any type of closed hearing. All that the defendant can rely on is defense counsel's vague, factless statement—made at the end of the presentation of grievances and two full hearings, that there were some other heretofore undisclosed communication problems counsel did not want to disclose.

The court did not summarily deny the defendant's motion. To the contrary, the court gave the defendant ample opportunity to express the reasons why he wanted new counsel. Neither he nor

his counsel sought a closed hearing and under the facts herein, the defendant cannot show that the trial court abused its discretion.

Additionally, if the relationship between counsel and client "completely collapses," the refusal to substitute new counsel violates a defendant's Sixth Amendment right to effective assistance of counsel. Stenson, at 722-23. When this happens, where the breakdown rises to such a level that it amounts to a "complete denial of counsel," no prejudice need be shown. Id. (citing Moore, 159 F.3d at 1158). But where the facts do not show a complete denial of counsel, prejudice will not be presumed. Stenson, at 732. Afterall, the purpose of providing counsel is to ensure defendants receive a fair trial, thus, the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer. Stenson, at 725 (citing Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)).

Similarly, where the claim is that there has been a "peremptory denial" of a motion for new counsel, the question is whether counsel's performance actually violated the defendant's Sixth Amendment right to effective assistance of counsel. Lopez,

79 Wn. App. 767 (citing United States v. Morrison, 946 F.2d 484, 499 (7th Cir. 1991)). Therefore, under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1964), a defendant "must demonstrate that the performance of the attorney he was saddled with was not within the range of competence demanded of attorneys in criminal cases, and that but for counsel's deficiencies, the result of the proceeding would have been different." Morrison, 946 F.2d at 499 (citing Strickland, 466 U.S. at 694); Lopez, at 767.

The defendant's two attorneys performed admirably in this case and the defendant does not argue otherwise. There is nothing in the record wherein the defendant can claim he was prejudiced by the trial court's decision to deny his motion to substitute counsel.

3. THE COURT DID NOT COMMENT ON THE EVIDENCE WHEN IT INSTRUCTED THE JURY ON THE LEGAL DEFINITION OF WHAT CONSTITUTES A FIREARM.

The defendant contends that when the trial court instructed the jury on the legal definition of what constitutes a firearm, the court impermissibly commented on the evidence by conveying to the jury that the issue about whether the gun he possessed was a

"firearm" as defined by law, had been proven by the State. The defendant is mistaken. The court's instruction, jury instruction number 19 (CP 93), provided the jury with nothing more than an accurate legal definition of what constitutes a firearm.

Under article IV, section 16, of the Washington State Constitution, judges "shall declare the law," but they are prohibited from commenting on the evidence presented at trial.[24] Article IV, section 16, contains two directives. First, the provision requires a trial judge to instruct the jury on the law. Second, the provision prevents a trial judge from influencing a jury by interjecting his or her personal opinion of the evidence. State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

An impermissible comment is one that conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said that the judge personally believed the testimony in question. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). A violation of article IV, section 16, may

[24] "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16.

occur where a jury instruction tells the jury that a fact in dispute has in point of fact been proven by the State.[25]

The touchstone of error is whether the feelings of the trial court as to the truth-value of the testimony of a witness has been communicated to the jury. State v. Lane, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995). A statement by the court will constitute an improper comment on the evidence only if the court's attitude toward the merits of the case or the court's evaluation relative to a disputed issue is inferable from the statement of the court. State v. Louis, 68 Wn.2d 304, 413 P.2d 7 (1966), cert. denied, 386 U.S. 1042 (1967).

The defendant was charged with unlawful possession of a firearm in the first degree. CP 23-24. As an element of that charge, the State was required to prove that the defendant

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[25] See, e.g., State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997). In Becker, the parties disputed whether the Youth Employment Education Program was a "school" for purposes of a school zone penalty enhancement to a drug offense. The court instructed the jury that to return a verdict that the penalty enhancement had been committed, it had to find that the defendant was "within 100 feet of the perimeter of school grounds, to-wit: Youth Education Program ***School*** at the time of the commission of the crime." Becker, 132 Wn.2d at 64 (emphasis added). By affirmatively calling the program a "school," in the jury instructions, the court improperly conveyed the belief that this fact had been proven by the State. Thus, the instruction was an improper comment on the evidence. See also State v. Jackman, 156 Wn.2d 736, 743-46, 132 P.3d 136 (2006) (by including a minor victim's age in the jury instructions for certain sex crimes against minors, the court impermissibly conveyed the belief that the age of the child had been proven by the State).

possessed a "firearm" as that term is defined by law. RCW 9.41.040(1).

By statute, a firearm is defined as a "weapon or device from which a projectile or projectiles ***may be fired*** by an explosive such as gunpowder." RCW 9.41.010(7) (emphasis added). The "may be fired" language has been interpreted to cover inoperable or disassembled firearms that "can be rendered operational with reasonable effort and within a reasonable time period." State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113, rev. denied, 139 Wn.2d 1003 (1999) (handgun recovered in three pieces that could be reassembled within five seconds qualified as a firearm).[26]

The trial court provided the jury with the following legal definition as to what constitutes a firearm:

> A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder. A temporarily inoperable firearm that can be rendered operational with reasonable effort and within a reasonable time period is a "firearm." A disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a "firearm."

[26] See also State v. Faust, 93 Wn. App. 373, 380, 967 P.2d 1284 (1998) (a gun that malfunctioned at the time of the crime qualified as a firearm as the definition of a firearm is not limited "to only those guns capable of being fired during the commission of the crime"); State v. Berrier, 110 Wn. App. 639, 645-46, 41 P.3d 1198 (2002) (unloaded gun qualified as firearm); State v. Releford, 148 Wn. App. 478, 489-92, 200 P.3d 729, rev. denied, 166 Wn.2d 1028 (2009) (antique pistol missing parts qualified as firearm); State v. Raleigh, 157 Wn. App. 728, 733-36, 238 P.3d 1211 (2010) (temporarily inoperable gun was firearm), rev. denied, 170 Wn.2d 1029 (2011).

CP 93 (Instruction 19). At trial, the defendant did not dispute that this was an accurate and complete statement of the law. On appeal, the defendant does not acknowledge or cite to any of the above cases defining what constitutes a firearm under the law.

The trial court properly instructed the jury in accordance with the law that a temporarily inoperable firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm. Padilla, supra. In finding that the defendant was in possession of a gun, the jury had to find beyond a reasonable doubt that the gun he possessed was a "firearm" as defined by law. The instruction did not tell the jury that the gun was a firearm as defined by law. Rather, the instruction properly informed the jury that in order to find that the gun was a firearm as defined by law, the jury had to find that the gun was "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." CP 93. Further, the instruction did not tell the jury that the gun was operable or that it could be made operable with reasonable effort and within a reasonable time. Rather, the instruction properly informed the jury that if the gun was inoperable, in order to find that the gun was a firearm as defined by law, the

jury had to find that the gun could be "rendered operational with reasonable effort and within a reasonable time period." CP 93.

In the cases cited by the defendant, the jury instructions expressly conveyed to the jury the resolution of a factual issue that the jury was required to find beyond a reasonable doubt. See Becker, supra (that an education program was in fact a "school"); Jackman, supra (that a victim of a sex crime was a "minor"). The instruction here did not convey to the jury that any factual dispute had been proven by the State. All factual determinations were left to the jury. The defendant's claim that the jury instruction was a comment on the evidence is without merit.

Even if the jury instruction were to be deemed a comment on the evidence, it was harmless in this case. If a judicial comment is found to be an improper comment on the evidence, it is presumed to be prejudicial and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. State v. Levy, 156 Wn.2d 709, 723-24, 132 P.3d 1076 (2006).

First, the jurors were specifically instructed that they were "the sole judges of the credibility of each witness" and "the value or weight to be given to the testimony," and that if the judge expressed

a "personal opinion about the value of testimony or the evidence" this was improper and they "must disregard this entirely." CP 74-75. A jury will be presumed to follow the instruction that it must disregard any remark by the court that can be considered a comment on the evidence. State v. Cerny, 78 Wn.2d 845, 856, 480 P.2d 199 (1971), overruled on other grounds by Cerny v. Washington, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d 761 (1972).

Second, the jury was instructed that to find the defendant guilty of murder in the first degree, it had to find, beyond a reasonable doubt, that the defendant caused the death of Alajawan Brown. CP 23-24, 86. The defendant was not charged, and the jury was not instructed, that he could be found guilty as an accomplice for another person's act of causing the death of Alajawan. In other words, the jury had to find that the defendant was the actual shooter, that he possessed the murder weapon and fired the shot that killed Alajawan.

The evidence showed that it was a .38 Smith & Wesson revolver that was used to kill Alajawan. RP 980, 1002. The defendant's argument pertains only to a .22 caliber handgun that he admitted he owned, but claimed was not functional. Def. br. at 45. However, under the facts of this case, in finding that the defendant

shot Alajawan with a .38, any "comment on the evidence" argument that pertained to the .22, was harmless.

4. THE DEFENDANT HAS FAILED TO SHOW THAT EVERY "TO CONVICT" WPIC JURY INSTRUCTION IS UNCONSTITUTIONAL.

The defendant contends that certain language in the "to convict" jury instructions given in his case rendered the instructions unconstitutional. Specifically, the defendant contends that the following language is a misstatement of the law:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, ***then it will be your duty to return a verdict of guilty***...
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty...

CP 86, 89, 94 (emphasis added). The language he complains is included in every "to convict" WPIC jury instruction. See e.g., WPIC 26.02, 26.04, 26.06. This same argument has been rejected in State v. Brown,[27] State v. Bonisisio,[28] and State v. Meggyesy.[29] The Supreme Court has repeatedly denied review. Under the

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[27] 130 Wn. App. 767, 124 P.3d 663 (2005).

[28] 92 Wn. App. 783, 964 P.2d 1222 (1998), rev. denied, 137 Wn.2d 1024 (1999).

[29] 90 Wn. App. 693, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

principles of *stare decisis*, a court cannot overturn a prior holding unless it is shown by clear evidence that it is incorrect or harmful. See In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The defendant has failed to make any new arguments sufficient to meet this burden.

In Meggyesy, the defendant made the same argument as made here--that the language that the jury had a duty to convict if they found beyond a reasonable doubt each element of the crime had been proven, violated the defendant's "right to trial" under the state and federal constitutions. This Court rejected this argument. In short, the defendant claims that this Court got it wrong. Specifically, he argues, like Meggyesy did, that under the state constitution, a different result is required.

In Meggyesy, this Court first noted that the challenged language appropriately directed the jury to consider the evidence and to determine whether the State had proven each element of the offenses beyond a reasonable doubt. Meggyesy, 90 Wn. App. at 699. The Court acknowledged that with general verdicts, juries do have the power to acquit against the evidence. Meggyesy, at 700 (citing United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972)). But the Court noted that under the federal constitution, the circuit

courts have clearly held that while jury nullification is always possible, no case has held that an accused is entitled to a jury nullification instruction. Meggyesy, at 700. The defendant does not cite contrary authority here.

Meggyesy then argued that under the state constitution, the result must be different. This Court rejected this argument, followed by Brown, supra; and Bonisisio, supra.

In determining whether the state constitution provides broader protection in a certain area, the court considers the Gunwall factors.[30] Under Gunwall, the court is guided in deciding whether to conduct an independent analysis under the state constitution based on six factors: (1) the language of the Washington Constitution, (2) differences between the state and federal language, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. Meggyesy, at 701.

As to the first Gunwall factor, there is nothing in the language of article I, section 21 that addresses the particular concern raised herein. See Meggyesy, at 701. In pertinent part,

[30] Referring to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

article I, section 21 simply provides that "[t]he right to trial by jury shall remain inviolate."

As to the second Gunwall factor, while the language of article I, section 21 and language in the Sixth Amendment is different, nothing in the language of either provision--or the difference in language--addresses the particular concern herein. See Meggyesy, at 701-02. In pertinent part, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." In State v. Brown, 132 Wn.2d 529, 595, 940 P.2d 546 (1997), the Supreme Court held that the language of the Sixth Amendment and article I, section 22 is substantially similar.

The third Gunwall factor, state constitutional history, also does not support an argument that the state constitution provides a broader right to trial by jury than does the federal right. Meggyesy, at 702. The Supreme Court has previously held that "the constitutional history shows there is no indication the framers intended the state constitutional right to a jury to be broader than the federal right." Brown, 132 Wn.2d at 596.

In Meggyesy, this Court found that the fourth factor, preexisting state law, "does not aid the appellants." Meggyesy, at 702. This Court noted that the Supreme Court has held that article I, section 21 preserved the scope of the right to trial by jury as it existed at the time the state constitution was adopted. Id. This Court found that Meggyesy had provided no pre-constitutional case establishing a rule prohibiting the challenged language used herein. The defendant here claims this is incorrect and cites to Leonard v. Territory, 2 Wash. Terr. 381, 7 P. 872 (1885). Def. br. at 52. This claim is of no moment.

Meggyesy cited to Leonard as well, and the Court properly considered the case for its limited value. Leonard was convicted of murder and sentenced to death. He challenged a great number of the jury instructions provided in his case on a number of grounds--none of which, the Meggyesy court noted, involved the legal challenge made by Meggyesy (or herein by the defendant).

However, the defendant argues that the point of citing Leonard is that the case shows the prevailing practice at the time the state constitution was ratified. Def. br. at 52. He makes this claim based on the fact that one of the instructions in Leonard contained the following language, "If you find the facts necessary to

establish the guilt of defendant proven to the certainty above stated, then you ***may*** find him guilty...". Leonard, at 399 (emphasis added). The defendant's conclusion that this reference in Leonard shows the prevailing practice at common law fails for a variety of reasons.

First, all five jury instructions challenged in Leonard were general instructions dealing with the burden of proof and defenses, and every single instruction was found to misstate the law. It is abundantly clear from the opinion, that the instructions were crafted by the trial court (or trial counsel) and were not a type of standard jury instruction used in other cases. In other words, the instructions do not show the existence of any prevailing practice. In fact, if the instructions in Leonard were standard instructions used in other cases, then every single case during this time period would have been reversed as the Court found that every instruction was flawed.

Second, there is nothing in the Leonard opinion, or any other case the defendant cites herein, that demonstrates the actual standard practice at the time in regards to the issue he raises herein.

And third, the defendant does not address State v. Wilson,[31] a case discussed in Meggyesy. Wilson complained of an instruction that stated that if the jury found the elements of the crime, it "must" find the defendant guilty. Wilson, 9 Wash. at 21. The Supreme Court stated that taking all the language in context, "it clearly appears that all the court intended to say was that, if they found from the evidence that all the acts necessary to constitute the crime had been committed by the defendant, ***the law made it their duty to find him guilty***." Wilson, at 21 (emphasis added). The Court held that there was no instructional error. Id. The defendant's argument that this Court erred in regards to the fourth factor is not persuasive.[32]

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[31] State v. Wilson, 9 Wash. 16, 36 P. 967 (1894).

[32] The defendant also cites to cases involving trial courts ordering directed verdicts that precluded juries for independently determining the facts. For example, in State v. Holmes, the court instructed the jury as follows:

> Gentlemen of the jury: You are instructed that there are no contested questions of fact in this case. The facts are stipulated and there is no controversy about the facts, and, by reason of the law, I instruct you that it is your duty to find the defendant guilty.

68 Wash. 7, 9-10, 122 P. 345 (1912). Similarly, in United States v. Garaway, a case wherein the evidence against the defendant "was undisputed," the court instructed the jury that "I am instructing you as a matter of law that it is your duty to return a verdict of guilty as charged in the indictment." 425 F.2d 185 (9th Cir. 1970). The WPIC "to convict" instructions used in Washington courts do not remove factual considerations from the purview of the jury and do not direct a verdict of guilt.

As to the fifth factor, the differences in the structures of the federal and state constitutions, the State conceded in Meggyesy that this factor always supports an independent analysis. Meggyesy, at 703.

As to the sixth, and final Gunwall factor, matters of particular state or local concern, while criminal law is a matter of state and local concern, there is nothing about this concern that would suggest that there is any different standard in regards to the issue at hand than any other area of the country or the federal court system--a jurisdiction that as already noted has rejected the argument the defendant makes here.

This argument has been made multiple times, in Meggyesy, Brown, and Bonisisio, if not other cases. The Supreme Court has denied review of this issue at least twice (Meggyesy, and Bonisisio). Under the principles of *stare decisis*, a court cannot overturn a prior holding unless it is shown by clear evidence that it is incorrect or harmful. See In re Stranger Creek, supra. The defendant has failed to make any new arguments sufficient to meet this burden.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 7 day of June, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. WALKER, Cause No. 68534-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Done in Seattle, Washington

06/07/13

Date