COA NO. 43480-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

MASON FILITAULA,

Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

CORRECTED BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court violated appellant's constitutional right to a public trial during the jury selection process.

2. The court erred in admitting gang evidence.

Issues Pertaining to Assignments of Error

1. Whether the court violated appellant's constitutional right to a public trial when it conducted the peremptory challenge stage of jury selection in a private, off the record proceeding without analyzing the requisite factors to justify the closure?

2. Whether the court erred in admitting gang evidence due to a lack of necessary nexus with the crime, resulting in the admission of irrelevant or unduly prejudicial evidence in violation of ER 402, ER 403 and ER 404(b)?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Mason Filitaula with first degree assault under count I and first degree unlawful possession of a firearm under count II. CP 118-19. A jury acquitted Filitaula of first degree assault on count I but convicted him of second degree assault as a lesser offense and returned a special verdict that he was armed with a firearm. CP 42, 44. Filitaula waived a jury trial for count II and the court found him guilty on that

count. 4RP[1] 22, 59-62, 1047. The court sentenced Filitaula to a total of 72 months confinement. CP 124. This timely appeal follows. CP 235-50.

2. Trial

Joshue Tamblin lived with his mother Cindy Tamblin and his 15 year old brother T. 4RP 257-58, 503-04. Tamblin had been convicted of prior crimes of dishonesty, including first degree theft and second degree burglary. 4RP 486-87. He has three children. 4RP 258. Michelle Webb is the mother of one of those children. 4RP 258. Webb was Tamblin's ex-girlfriend. 4RP 408-09. Webb's boyfriend at the time of the incident was a man named "Jeremy." 4RP 263.

On July 23, 2011, Tamblin argued all day with Webb about her stealing some of his father's things, including his father's lingerie. 4RP 259-62, 265, 409-10. Tamblin's father had recently died. 4RP 261-62. Tamblin and Webb's boyfriend, Jeremy, started arguing over the phone via text message. 4RP 263-64, 414-15. Jeremy told Tamblin "you ain't going to talk to my girl like that." 4RP 264, 415. Tamblin told Webb to bring his dad's things back by 5 p.m. or he would come and take everything she

[1] The verbatim report of proceedings is referenced as follows: 1RP - 9/23/11; 2RP 11/15/11; 3RP - 2/13/12; 4RP - six consecutively paginated volumes consisting of 2/29/12, 3/5/12, 3/7/12 (vol. I), 3/8/12 (vol. II), 3/12/12 (vol. III), 3/13/12 (vol. IV); 3/14/12 (vol. V); 3/15/12, 3/19/12, 3/20/12 (vol. 6); 5RP - 3/5/12, 3/6/12 (voir dire); 6RP - 3/7/12 (opening statement); 7RP - 4/20/12.

owned. 4RP 262-63, 411, 419. Tamblin told Jeremy to come over to the house. 4RP 264, 415. Jeremy said he would. 4RP 264-65, 415, 419-20. Both threatened to beat the other up. 4RP 420. At the end of the text argument, Tamblin called Jeremy's cousin "Vance" a snitch. 4RP 379-80, 416, 422.

People present at the Tamblin house that day, in addition to Tamblin, Tamblin's mother Cindy,[2] and Tamblin's brother T., were Tamblin's girlfriend Crystal Rogers,[3] Cindy's friend Patricia Ignacio, and some children.[4] 4RP 600-01, 605, 714-15, 727-28.

Following Tamblin's text message argument, T. noticed a brownish-red car drive slowly past the house and park right in front of the house. 4RP 508. Men got out of the car and approached the house. 4RP 509. Cindy said she saw a gold colored car drive by and four people get out: Jeremy and three others she had not seen before. 4RP 730-32.

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[2] For clarity, this brief refers to Cindy Tamblin as "Cindy" and Joshue Tamblin as "Tamblin."

[3] Rogers had prior convictions for crimes of dishonesty, including forgery, first degree theft, second degree theft and residential burglary. 4RP 619, 704-05. She used methamphetamine that day and had abused the drug since she was 12 years old. 4RP 643-44. She complained of memory loss and acknowledged methamphetamine affected her ability to perceive and relate information. 4RP 643-44, 679-80. She testified she was still feeling the effect of the drug when interviewed by police after the incident. 4RP 709-10. She admitted lying on the stand in regard to certain points of her testimony. 4RP 660, 667.

According to T., a man in braids knocked on the door and asked for Tamblin.[5] 4RP 510, 513. Cindy asked his name. 4RP 741. The man identified himself as "KB" and said "I'm here for Michelle's boyfriend" or "I'm here for my homey." 4RP 511, 541-43, 550, 552, 741. Cindy let Tamblin know that someone was outside the house. 4RP 421. Tamblin came out of the house yelling, thinking it was Jeremy. 4RP 298, 421-22. Tamblin had never met or seen KB before.[6] 4RP 269, 305-06.

According to Tamblin, KB was outside the fence in front of the house. 4RP 267, 296, 423. Tamblin said something like "this is on Hilltop" or "cuz it's on 23rd Block in Hilltop." 4RP 299-300, 422-23. "Cuz" is a friendly term for Crips. 4RP 300. "Hilltop" referred to the Hilltop Crips. 4RP 300. Tamblin is not a Hilltop Crip. 4RP 300. He said he associated with them, which meant he had Hilltop Crip friends and his brother-in-law was a member. 4RP 300. When asked his purpose for making the Hilltop reference to KB, Tamblin answered "I'm stating where I'm from." 4RP 301. When asked why he would say this, Tamblin replied, "I don't know." 4RP 301.

KB said something in response to Tamblin's Hilltop reference, but Tamblin could not recall what. 4RP 423. According to Tamblin, KB

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[5] Cindy testified a man came to the fence and asked for Tamblin. 4RP 732-33.

[6] Rogers had seen KB twice before. 4RP 606, 624-28.

"didn't say no gang talk" or anything gang-related: "It was like bitch and shit and stuff like that." 4RP 301. 4RP 301. Tamblin and KB started yelling and swearing at one another. 4RP 269-70, 298-99, 426-27, 431. According to Rogers and Cindy, Tamblin and KB were calling each other all sorts of names, like punks and bitches, and threatening to beat the other up. 4RP 629, 662-63, 742-43.[7]

Tamblin testified that he saw a gun in KB's hand a few minutes after exiting the house.[8] 4RP 297-98, 427. Tamblin noticed Jeremy and two other men he identified as Vance and Luta in the vicinity. 4RP 298-99, 305. Vance and Luta came up to the fence. 4RP 371, 378-79, 458-59. Tamblin was inconsistent on whether Jeremy came up to the fence or stayed out on the street.[9] 4RP 305, 458-59. He was also inconsistent on whether on whether Vance and Luta had guns. 4RP 375-76, 378, 387.

Tamblin said "We can fight." 4RP 553. According to T., KB pulled out a gun after back and forth argument and said "whoop whoop."

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[7] Cindy described the words as "gang words," by which she meant cuss words. 4RP 753-54, 766-67.

[8] In an earlier statement during a defense interview, Tamblin said he saw gun in KB's hand right after leaving house. 4RP 363-64.

[9] According to T., three people came inside the fenced area. 4RP 515. According to Rogers, KB and the others were outside the fence. 4RP 609, 660.

[10] 4RP 513, 553. Tamblin's mother Cindy said to KB "why don't you fight like a real man." 4RP 431, 512, 555. According to T., KB handed the gun off to another. 4RP 512, 555. T. stepped in and blocked KB from coming though the gate. 4RP 743. According to T. and Cindy, KB hit T. in the face, but T. stood his ground.[11] 4RP 512-13, 744, 780.

Cindy told them to take it somewhere else because kids were there. 4RP 744. Objects were thrown back and forth over the fence. 4RP 380, 382-83, 431, 516, 639-40, 665-66. Rogers testified that she was in the middle of KB and Tamblin, telling them children were there and they should stop and calm down.[12] 4RP 608, 629, 668.

Tamblin denied arguing with KB about Vance being a snitch, but later acknowledged KB said something related to the snitch issue. 4RP 305, 369, 379. In an earlier statement, Tamblin said he called Vance a snitch during the argument. 4RP 364-69. The prosecutor elicited

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[10] T. did not hear Tamblin claim to be Hilltop or use language associated with "that type of thing." 4RP 580. He never heard anyone talking about the Hilltop Crips or the 23rd Street block. 4RP 580. T. thought "whoop whoop" was "part of a gang," but no foundation was laid for that asserted belief. 4RP 580.

[11] T. is 6 foot four or five inches tall. 4RP 786. Tamblin thought Vance punched T. 4RP 381.

[12] Cindy testified that she never left the front porch, and did not see Rogers until after Tamblin was shot. 4RP 749, 751.

Tamblin's agreement that a "rule of the street" is crime victims do not snitch. 4RP 370.[13]

Eventually, Jeremy said something like "Let's go." 4RP 386. Tamblin said "Slob, this is on Hilltop." 4RP 434. The prosecutor elicited from Tamblin that "slob" is a disrespectful term for Bloods.[14] 4RP 301-02, 386. Tamblin testified that he called KB a "slob" because Vance, Jeremy and Luta were dressed in red. 4RP 302-04, 457. KB was not dressed in red; he had on a white tank top and blue jeans.[15] 4RP 302, 456-57.

KB responded with "you don't know no one from Hilltop" or "You ain't from Hilltop." 4RP 386, 434. Tamblin was inconsistent on when KB pointed the gun at him, at one point testifying KB did so after making the Hilltop reference.[16] 4RP 435. Tamblin also testified that KB pointed the gun first, at which point Tamblin said "fuck slobs." 4RP 437. Then KB said "You don't know no one from the Hill" and fired a shot. 4RP 437.

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[13] Rogers did not remember any talk about a snitch. 4RP 673.

[14] Tamblin denied telling Officer Martin that KB was a member of the Bloods street gang. 4RP 385-86.

[15] In an earlier statement, Tamblin said Luta had on a white shirt, without saying anything about him wearing a red shirt and/or sweater. 4RP 458. No evidence connected the wearing of red clothes with the Bloods or any other gang.

[16] Tamblin testified that he never saw Luta and Vance pointing or shooting their guns. 4RP 392. But he acknowledged saying in a pre-trial interview that Vance and Luta also pulled out pistols and all three of them had him at gunpoint. 4RP 482.

Tamblin said he was walking towards the door of the house when the first shot was fired. 4RP 486. KB fired shots toward the ground but with Tamblin in the line of fire. 4RP 386, 388-89, 391-92, 434. Tamblin believed KB was just trying to scare him by shooting into the ground. 4RP 392. Tamblin maintained that he pushed Crystal and T. into the house.[17] 4RP 389-90, 437, 439-40. He then turned around and was shot in the ankle. 4RP 390-93, 437, 441-42. Tamblin believed there were four or five shots total. 4RP 439.

According to T., Tamblin ran behind or into the garage. 4RP 517. KB told him to come out. 4RP 517. Tamblin tried to run into the house. 4RP 517. KB shot towards the direction of Tamblin as he ran to the back door. 4RP 518-19, 562-64. T. heard seven shots. 4RP 519.

According to Rogers, all of the other men had a gun or there was more than one gun. 4RP 609-11. A gun was moved from person to person, including KB. 4RP 610, 669. She testified that KB pointed a gun at her while she was in the middle of KB and Tamblin, but also claimed not to remember who was holding the gun. 4RP 683-84, 705-06.

In Rogers's version of events, Tamblin said something like "Oh homey, you're going to shoot me? Then shoot me." 4RP 669. Rogers

[17] T. denied that happened. 4RP 568. Rogers said Tamblin pushed her and T. into the house. 4RP 612-13.

turned and ran to the house, trying to get Tamblin to go with her. 4RP 611-12, 669. Tamblin ran for the house. 4RP 612. She heard two to five gunshots. 4RP 612, 630, 671. She did not see who fired the shots. 4RP 670.

In Cindy's version of events, one of the other men handed KB something. 4RP 747, 769. Then KB started waiving a gun, saying he would shoot. 4RP 747-48. There was more yelling back and forth for a few minutes. 4RP 748, 771. Tamblin said "Bring it on." 4RP 771. KB fired what Cindy called a warning shot because the gun was pointed away from Tamblin. 4RP 748, 774. Tamblin leaped toward the garage as KB shot four more times, hitting Tamblin in the ankle. 4RP 749-50.

KB and the others ran across the street toward their car after the shooting. 4RP 393, 521. Police responded to the 911 call. 4RP 116.

When asked if he saw KB in the courtroom, Tamblin replied, "They don't look the same, but you never know." 4RP 269. Tamblin described KB as having a tattoo going down his shoulder like a dragon or snake. 4RP 269, 297. Tamblin said KB "looks more Mexican" and his hair was straight. 4RP 269, 297. On another day of testimony, Tamblin again denied seeing the person who shot him in the courtroom. 4RP 406, 422-23.

Tamblin said KB, Luta and Vance all looked Mexican. 4RP 304. He also described Vance as "Guamanian" or "Islander." 4RP 304, 416. Jeremy is white. 4RP 302-03.

Tamblin denied remembering that police asked him if he could identify KB from pictures or that he described KB as a Pacific Islander-looking person with a long braided ponytail. 4RP 384-85. He acknowledged that he wrote his signature over the photo in the montage associated with Filitaula. 4RP 406-08. Tamblin, however, denied the person in the montage was Filitaula. 4RP 407-08. Officer Martin testified that Tamblin had identified KB as the shooter and that he picked Filitaula's photo out of the montage. 4RP 801-04, 807.

At trial, Rogers said she had no idea what race KB was, but he was possibly Caucasian or Asian. 4RP 607. She identified Filitaula in court as KB. 4RP 607. She told police at the scene that she saw the person who shot Tamblin, but at trial said it was only an assumption. 4RP 620-21. She described KB as of mixed race, "maybe Guamanian, black with long ponytail." 4RP 167-68. In a second statement at the police station, Rogers identified KB as the shooter from a single photo that was shown to her. 4RP 228-29, 234-36, 252, 623, 630-33, 795-96, 800, 804, 827-28. Rogers remembered KB and the other men all wearing primary colors like gray, black and white. 4RP 609, 661.

T. described the men as three Samoans and one white male. 4RP 509. When asked if he saw anyone with noticeable tattoos, T. said he was not really paying attention, but that nothing stood out. 4RP 573. One man had braids down both sides of his head. 4RP 509. At trial, T. said KB had on a red shirt, but in an earlier statement to police indicated KB had on a white shirt. 4RP 546, 575. When asked if he saw the man in the braids in the courtroom, T. said "it doesn't really look like him." 4RP 511-12. Filitaula had the same skin color. 4RP 523. T. remembered looking at a photomontage and picking someone out of the montage as the shooter KB. 4RP 524-25, 530-32. T. said the person in the photo and Filitaula "kind of" looked the same, but that the person in the photo was darker. 4RP 531-32.

Cindy described the man that identified himself as KB as a light skinned, mixed race man with braided ponytails. 4RP 732-33. When asked if she saw him in court, Cindy replied, "In one way, I do. In another -- in other ways, there's -- he's a lot older than what -- this kid was really young. This kid was like my son's age." 4RP 733. When later asked if she saw KB in the courtroom, Cindy answered "Not really." 4RP 761-62. According to Cindy, the person she called KB was "Indian with mixed white." 4RP 762. In a statement to police after the incident, Cindy described KB and the other men as Pacific Islanders. 4RP 141-42. Cindy

picked a photo out of a montage as the man who shot Tamblin. 4RP 734-39,

A bartender working nearby noticed a car parked in the bar's parking lot on the day at issue.[18] 4RP 177-80. According to the bartender, two "Islanders" and one Caucasian man were with the car. 4RP 181-82, 185. One of the Islanders had braids. 4RP 185. One or two of the Islanders may have had ponytails. 4RP 186. One wore a red shirt and shorts. 4RP 188. The bar manager noticed a light colored car in the bar parking area and saw a Caucasian and two others who may have been Asian (Pacific Islander) or Hispanic get out of the car. 4RP 920-11. One had long hair that was braided or in a ponytail. 4RP 921. The manager thought this man possibly wore a dark shirt. 4RP 921-22.

The men loitered near the car, at one point opening the trunk, and then walked off into the neighborhood. 4RP 181-82. The bartender later heard gunshots and saw the car drive off. 4RP 180.

Police recovered two 9 mm shell casing from the scene of the shooting. 4RP 173-74, 840-41. It matched another shell casing from a previous incident from a month earlier in which Filitaula fired a gun. 4RP

[18] The bartender could not recall the color of the car, but thought it might be a lighter color, like beige or white. 4RP 181.

336, 340-41, 882-83, 889-90. During a jail call, Filitaula placed himself at Tamblin's house on the day in question. Ex. 37; 4RP 879.

Defense counsel argued in closing the State had not proven Filitaula was the shooter because the State's eyewitness had credibility problems and gave inconsistent accounts. 4RP 1005-23.

C. ARGUMENT

1. THE COURT VIOLATED FILITAULA'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE.

The parties exercised peremptory challenges in a manner that was not open to the public. The court erred in conducting this portion of the jury selection process in private without justifying the closure under the standard established by Washington Supreme Court and United States Supreme Court precedent. This structural error requires reversal of the assault conviction.[19]

a. Peremptory Challenges Exercised

Jury selection took place on March 5 and 6, 2012. 5RP. The venire panel was publicly questioned on the record in the courtroom and excusals for cause were made. 5RP 3-204. The court then told the jury "As we have gone along, we have been exercising what we call challenges

[19] The charge of unlawful possession of a firearm was tried by the court rather than a jury and therefore is not implicated by the public trial error.

for cause, and so the benches are not quite as tight as they were this time yesterday. Now the lawyers are going to exercise what they call peremptory challenges, and while they're exercising their peremptory challenges, you all can be at ease and can even talk to each other, but I'm going to ask that, of course, you don't discuss the case and I'm going to ask that you remain right where you are and make sure that your numbers are visible on your clothing because they're going to still be operating by your pink tags." 5RP 204. The court carried on for a while about the greatness of the American system of juries and justice. 5RP 204-09. Then peremptory challenges were conducted off the record, designated by a "pause in proceedings" in the transcript. 5RP 209. The attorneys exercised peremptory challenges by listing names on a piece of paper. CP 260. When the process was finished, the court announced on the record who would serve as jurors for the trial. 5RP 209.

b. The Private Peremptory Challenge Conference Constitutes A Closure For Public Trial Purposes.

The federal and state constitutions guarantee the right to a public trial to every defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees to the public and press the right open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the

same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Whether a trial court has violated the defendant's right to a public trial is a question of law reviewed de novo. Easterling, 157 Wn.2d at 173–74.

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5-6.

Furthermore, "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

One type of "closure" is "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Physical closure of the courtroom, however, is not the only situation that

violates the public trial right. Another type of closure occurs where a proceeding takes place in a location inaccessible to the public, such as a judge's chambers or hallway. Lormor, 172 Wn.2d at 93 (chambers); State v. Leyerle, 158 Wn. App. 474, 477, 483, 484 n.9, 242 P.3d 921 (2010) (moving questioning of juror to hallway outside courtroom was a closure).

Here, the trial judge conducted a portion of the jury selection process in private. The trial court violated Filitaula's constitutional right to a public trial by directing peremptory challenges to be exercised during a private proceeding inaccessible to the public. The procedure in this case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Though the courtroom itself remained open to the public, the proceedings were not. Jurors were allowed to remain in the courtroom while the peremptory challenges were exercised off the record, which demonstrates they were done in a way that those in the courtroom would not be able to overhear.

Whether a closure — and hence a violation of the right to public trial — has occurred does not turn only on whether the courtroom has been physically closed. A closure occur even when the courtroom is not physically closed if the proceeding at issue takes place in a manner that renders it inaccessible to public scrutiny. See State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) ("if a side-bar conference was used to

dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview."), review granted, 176 Wn2d 1031, 299 P.3d 20 (2013). Members of the public are no more able to approach the bench and listen to an intentionally private jury selection process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical impact is the same — the public is denied the opportunity to scrutinize events.

Doubtless the public could *see* that something was going on, but the public could not *hear* what was happening. The public could not hear which potential jurors were peremptorily struck, who struck them, and in what order they were struck. See People v. Williams, 52 A.D.3d 94, 98, 858 N.Y.S.2d 147 (N.Y. App. Div. 2008) (sidebar conferences, by their very nature, are intended to be held in hushed tones).

When jury selection occurs at a private conference, the public is unable to observe what is taking place in any meaningful manner because the public cannot hear what is going on. There is no functional difference between conducting this aspect of the jury selection process at a private conference in the courtroom and doing the same in chambers or in a physically closed courtroom. In each instance, the proceeding takes place

in a location inaccessible to the public. As a practical matter, the judge might as well have conducted the peremptory challenge process in chambers or dismissed the public from the courtroom altogether because the public was not privy to what occurred.

What took place in private should have taken place in open court so that the public could observe the peremptory challenge process as it was taking place. The ultimate composition of the jury was announced in open court. But the selection process was actually closed to the public because which party exercised which peremptory challenge and the order in which the peremptory challenges were made were not subject to public scrutiny. The sequence of events through which the eventual constituency of the jury "unfolded" was kept private. People v. Harris, 10 Cal. App.4th 672, 683 n.6, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992), review denied, (Feb 02, 1993).

c. The Right To Public Trial Attaches To The Peremptory Challenge Process Because It Is An Integral Part Of Jury Selection.

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 288 P.3d at 1118 (citing State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). "The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a

part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends." Harris, 10 Cal. App.4th at 684 (peremptory challenges conducted in chambers violate public trial right, even where such proceedings are reported). This Court recognizes the right to a public trial attaches to the portion of jury selection involving peremptory challenges. State v. Wilson, 174 Wn. App. 328, 342-43, 346, 298 P.3d 148 (2013); State v. Jones, __Wn. App.__, 303 P.3d 1084, 1090-92 (2013).

In Wilson, this Court held the public trial right was not implicated when the bailiff excused the two jurors solely for illness-related reasons before voir dire began. Wilson, 174 Wn. App. at 347. In reaching that holding, the Court distinguished the administrative removal of jurors before the voir dire process began to later portions of the jury selection process that implicated the public trial right, including the peremptory challenge process. Id. at 342-43.

This Court recognized "both the Legislature and our Supreme Court have acknowledged that a trial court has discretion to excuse jurors outside the public courtroom for statutorily-defined reasons, *provided such juror excusals do not amount to* for-cause excusals or *peremptory challenges traditionally exercised during voir dire in the courtroom.*" Id. at 344 (emphasis added). A trial court is allowed "to delegate hardship and other administrative juror excusals to clerks and other court agents,

provided that the excusals are not the equivalent of peremptory or for cause juror challenges." Id. (emphasis added). Wilson's public trial argument failed because he could not show "the public trial right attaches to any component of jury selection that does not involve 'voir dire' or a similar jury selection proceeding involving the exercise of 'peremptory' challenges and 'for cause' juror excusals." Id. at 342.

In Jones, this Court held the court violated the right to public trial when, during a court recess off the record, the trial court clerk drew four juror names to determine which jurors would serve as alternates. Jones, 303 P.3d at 1087. It recognized "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at 1092. The Court likened the selection of alternate jurors to the phases of jury selection involving for cause *and peremptory challenges.* Id. at 1091 ("Washington's first enactment regarding alternate jurors not only specified a particular procedure for the alternate juror selection, but it specifically instructed that alternate jurors be called in the same manner as deliberating jurors and subject to for-cause and peremptory challenges in open court.").

Both Jones and Wilson applied the experience and logic test set forth in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). Jones, 303

P.3d at 1089-92; Wilson, 174 Wn. App. at 335-47. In Jones, there was a public trial violation because alternate juror selection was akin to the jury selection process involving regular jurors, including the peremptory challenge process. In Wilson, there was no public trial violation because the administrative removal of jurors for hardship was not akin to other portions of the jury selection process, including the peremptory challenge process. Both cases support Filitaula's argument that the public trial right attaches to the peremptory challenge process because it is an integral part of the jury selection process.

The "experience" component of the Sublett test is satisfied here. Historical evidence reveals, "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The criminal rules of procedure show our courts have historically treated the peremptory challenge process as part of voir dire on par with for cause challenges. Wilson, 174 Wn. App. at 342. CrR 6.4(b) contemplates juror voir dire as involving peremptory and for cause juror challenges. Id. CrR 6.4(b) describes "voir dire" as a process where the trial court and counsel ask prospective jurors questions to assess their ability to serve on the defendant's particular case and to enable counsel to

exercise intelligent "for cause" and "peremptory" juror challenges. Id. at 343.

This stands in sharp contrast with CrR 6.3, which contemplates administrative excusal of some jurors appearing for service before voir dire begins in the public courtroom. Id. at 342-43. In further contrast, a trial court has discretion to excuse jurors outside the public courtroom under RCW 2.36.100(1), but only so long as "such juror excusals do not amount to for-cause excusals or *peremptory challenges* traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added).

The "logic" component of the Sublett test is satisfied as well. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." State v. Saintcalle, __Wn.2d__, __P.3d__, 2013 WL 3946038 at *21 (slip op. filed Aug. 1, 2013) (Gonzalez, J., concurring). "The peremptory challenge is an important 'state-created means to the constitutional end of an impartial jury and a fair trial.'" Id. at *14 (Madsen, C.J. concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. Georgia v. McCollum, 505

U.S. 42, 48-50, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). A prosecutor is forbidden from using peremptory challenges based on race, ethnicity, or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992).

The peremptory challenge component of jury selection matters. It is not so inconsequential to the fairness of the trial that it is appropriate to shield it from public scrutiny. Discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

The public trial right encompasses circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny. Brightman, 155 Wn.2d at 514; Leyerle, 158 Wn. App. at 479. An open peremptory process of jury selection acts as a safeguard against discriminatory removal of jurors. Public scrutiny discourages discriminatory challenges

from taking place in the first instance and discourages the discriminatory removal of jurors that have been improperly challenged.

The Supreme Court recently issued an opinion that was fractured on how to deal with the persistence of racial discrimination in the peremptory challenge process, but all nine justices united in the recognition that the problem exists. See Saintcalle, 2013 WL 3946038 at *9 (Wiggins, J., lead opinion) (overwhelming evidence that peremptory challenges often facilitate racially discriminatory jury selection), at *13 (Madsen, C.J., concurring) ("Like my colleagues, I am concerned about racial discrimination during jury selection."); at *16 (Stephens, J., concurring) (writing separately "to sound a note of restraint amidst the enthusiasm to craft a new solution to the problem of the discriminatory use of peremptory challenges during jury selection."); at *18 (Gonzalez, J., concurring) ("This splintered court is unanimous about one thing: Racial bias in jury selection is still a problem."); at *46 (Chambers, J., dissenting) ("I am skeptical — given that we have never reversed a verdict on a Batson challenge — that [Batson] does much to police discriminatory purpose itself.").

Justice Wiggins bemoaned the fact that in 42 cases decided since Batson, Washington appellate courts never reversed a conviction based on a trial court's erroneous denial of a Batson challenge. Saintcalle, 2013 WL

3946038 at *7. If discrimination during the peremptory process is not prevented at the trial level, the error will rarely be remedied on appeal. That is what history has taught us.

In light of these justified concerns, it cannot be plausibly maintained that the peremptory challenge process, as it unfolds in real time at the trial level, gains nothing from being open to the public. The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'" Id. at 17 (quoting Waller, 467 U.S. at 46 n.4). The peremptory challenge process squarely implicates those values.

d. The Conviction Must Be Reversed Because The Court Did Not Justify The Closure Under The Bone-Club Factors.

Conducting peremptory challenges in a private manner that excluded the public from observing that process violated Filitaula's right to a public trial. *Before* a trial judge closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the

proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.[20]

There is no indication the court considered the Bone-Club factors before conducting the private jury selection process at issue here. The trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The court here erred in failing to articulate a compelling interest to be served by the

[20] The Bone-Club components are comparable to the requirements set forth by the United States Supreme Court in Waller. In re Pers. Restraint of Orange, 152 Wn.2d 795, 806, 100 P.3d 291 (2004); see Waller, 467 U.S. at 48 ("[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."); Presley, 558 U.S. at 214 ("trial courts are required to consider alternatives to closure even when they are not offered by the parties.").

closure, give those present an opportunity to object, weigh alternatives to the proposed closure, narrowly tailor the closure order to protect the identified threatened interest, and enter findings that specifically supported the closure. In re Pers. Restraint of Orange, 152 Wn.2d 795, 812, 821-22, 100 P.3d 291 (2004). Appellate courts do not comb through the record or attempt to infer the trial court's balancing of competing interests where it is not apparent in the record. Wise, 176 Wn.2d at 12-13.

Because a portion of jury selection was not open to the public, Filitaula's constitutional right to a public trial under the state and federal constitutions was violated. The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 16. Filitaula's assault conviction must be reversed due to the public trial violation. Id. at 19.

The State may try to argue the issue is waived because defense counsel did not object to conducting the peremptory challenge process in private. That argument fails. A defendant does not waive his right to challenge an improper closure by failing to object to it. Id. at 15. The issue may be raised for the first time on appeal. Id. at 9. Indeed, a defendant must have knowledge of the public trial right before it can be

waived. In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). Here, there was no discussion of Filitaula's public trial right before the peremptory challenges were exercised in secret. There is no waiver. Reversal of the assault conviction is required.

2. IMPROPER ADMISSION OF GANG EVIDENCE REQUIRES REVERSAL OF THE ASSAULT CONVICTION.

The State did not establish Filitaula was a member of the Bloods or any other gang. Yet the court permitted the jury to hear gang evidence in the form of Tamblin's gang references, a gang-styled insult directed towards KB, and KB's response. This was error because there is no nexus between the crime and gang membership. The gang-related references were irrelevant and unduly prejudicial. Reversal is required because there is a reasonable probability that the error affected the outcome.

a. The Court Allowed Gang Evidence Over Defense Objection.

The defense moved in limine to exclude all gang evidence under ER 404(b) and any expert testimony on gangs under ER 702. CP 35-41. Defense counsel argued the case had nothing to do with gangs, but rather was about an argument about lingerie between an old boyfriend and his friends and a new boyfriend. 4RP 37-39.

The court replied that one of the parties (Joshue Tamblin) called the other party (the shooter) a "slob," and then the shooter said "you don't know me. You're not from Hilltop." 4RP 39. The court took "judicial notice" that "calling somebody a slob in this community can be in certain circumstances a derogatory term or for a particular street gang." 4RP 39. According to the court, a person saying "you don't know me. You're not from Hilltop," could implicate "taunting or a motive that involves gang affiliation." 4RP 39. Defense counsel argued the State still could not show the necessary nexus that the crime was gang related. 4RP 39-41.

The prosecutor referenced prior law enforcement reports regarding Filitaula's "association and perhaps membership with the 'East Side Pirus.'" 4RP 41. The prosecutor also made an oblique reference to "a Native Gangster Crip" being involved in a different case involving Filitaula, which was believed to be in "proximity to Loc'd Out Crips, an Asian gang." 4RP 41. In this case, according to the prosecutor, Joshue Tamblin "says he knows the defendant to be a [B]lood." 4RP 41.

The prosecutor summarized witness reports that Tamblin claimed to be a Hilltop, which was "one of the primary reasons that the defendant and his group come over because he challenges them." 4RP 42. After Filitaula and the others came over to the residence, Tamblin called Filitaula a "slob." 4RP 42. Then, according to the prosecutor, Filitaula

said "you're not even from Hilltop, homey. I'll shoot you. I'll show you Hilltop," and then shot Tamblin. 4RP 42. The prosecutor claimed that this evidence showed Filitaula's motive in shooting Tamblin was gang-related. 4RP 42. The prosecutor did not intend to call an expert witness on gangs, but rather intended to get an explanation of what "slob" meant through eyewitnesses. 4RP 42-43.

As a fair way to resolve the evidentiary dispute, defense counsel proposed the witness could testify an insult was made. 4RP 43-44. If the court allowed the specific insult, then the witness could explain that "slob" is a derogatory term without explaining what the insult meant in relation to gangs. 4RP 43-44. The fact that an insult was made was relevant, but the gang connotation was irrelevant or unnecessary to the State's case. 4RP 43.

The court ruled lay witnesses could testify that slob is a derogatory term for a Blood gang member because it went to motive. 4RP 44. The court continued "Nobody is saying -- there's no testimony saying that Mr. Filitaula is a Blood or is a Piru or is -- I don't know whatever he may or may not be, and so there's no argument here, and there is nothing in the pleadings or in the charging documents to suggest that Mr. Filitaula was attempting to raise his prestige in the gang or anything like that, and so there aren't gang aggravators that are charged, but I think to understand

what happened at Tamblin's house, what was said is within bounds and I don't think that it even goes so far as to implicate Mr. Filitaula as being a Blood or Native Gangster whatever, or anything, so what the parties said there, I think to the extent it's not hearsay, is admissible" to show motive. 4RP 44-45.

The prosecutor returned to various pieces of information he had from other cases from which he concluded "I've got the defendant in situations with known gang members all along, and I'm not -- in my mind, I've never seen the defendant or heard his name until this case. My logical assumption, as I think law enforcement, is something to do with Samoan which are the Pirus, but *I don't have evidence of that.*" 4RP 45-47 (emphasis added). With reference to a jail call made by Filitaula in which he said he came over because Jeremy needed him there, the prosecutor maintained "that's consistent with gang activity, but again, *I don't have any solid evidence.*" 4RP 47 (emphasis added). The prosecutor did not intend to argue anything "beyond what the phone call says, that he needed help, so we came over." 4RP 48.

The court said the only problem it had was that Tamblin could be a poser — someone who claimed to be a Hilltop but really wasn't: "there's no proof that he is involved either." 4RP 48. In response to defense counsel's concerns about the scope of evidence being introduced through

the phone call, the court summarized his understanding that the prosecutor only intended "to talk about the phone call on its face and whatever inferences arise from that, and the fact that while this may have started about lingerie, and it looks like it was going to be a person-to-person or man-to-man fight, that once the derogatory gang terms or terms start to fly, that then the gun comes in it and so I think that's within the bounds of my order." 4RP 49.

In opening statement, the prosecutor described Tamblin as follows: "He has this apparent persona of a gangster where he likes to pretend he's a Hilltop Crip, which, frankly, he doesn't qualify, but he's pretending." 6RP 6.

During trial, Tamblin testified that he and KB had argued back and forth and "[t]here was a little bit of gang talk." 4RP 269-70. Defense counsel objected on grounds of ER 403 and ER 404(b). 4RP 270. A sidebar conference was held, during which the court stated the earlier court ruling on motive covered the testimony. 4RP 270, 279.

During that sidebar conference, the prosecutor expressed his concern that his eyewitnesses did not want to testify. 4RP 271. He complained Tamblin was reluctant to testify in a manner that identified Filitaula as the shooter, and that an upcoming witness, Cindy, had suggested that she would testify in a similar manner. 4RP 271-74. The

prosecutor believed his eyewitnesses perceived a threat to their own safety. 4RP 274. The prosecutor, however, did not accuse Filitaula or anyone associated with Filitaula of trying to intimidate any witness. Defense counsel offered an alternative explanation for why witnesses may be reluctant to identify Filitaula as the shooter: they did not want to make a wrong identification. 4RP 275-76.

Tamblin was questioned outside the presence of the jury. 4RP 281-95. He said he was able to identify KB, was not reluctant to talk about KB, and there was no reason why he would not tell the truth. 4RP 286-87. Tamblin identified "Vance" and "Luta" as being with Jeremy and KB that day. 4RP 282-83. Tamblin also said some of his family "deals with Hilltops." 4RP 285. Tamblin was not a member of the Hilltop gang. 4RP 285. He used to "hang with" Hilltop members about three years ago. 4RP 285. When he confronted KB that day, he put himself out as a Hilltop. 4RP 285-86. He was trying to give the impression that he was in a gang. 4RP 288. The altercation had noting to do with gang activity. 4RP 288. It was over his dad's lingerie, and then it segued into Tamblin accusing Vance of being a snitch while arguing with Jeremy over the phone. 4RP 283, 288-89.

Tamblin called KB a "slob" because "they were all in red." 4RP 292-93. This was part of Tamblin's posturing. 4RP 293. Tamblin did not know KB, Jeremy, Vance or Luta to be a gangster of any type. 4RP 293.

Defense counsel renewed his motion to exclude the gang evidence because the altercation was not gang-related. 4RP 295. The prosecutor disagreed, saying "the rest of the story . . . is the defendant KB says: You ain't no Hilltop. You know, this is Hilltop. I'll show you Hilltop. Boom. So that would suggest that the gang evidence still comes in." 4RP 295.

The court replied, "Actually I don't think anything changes. I mean, he comes downstairs. He says he calls him a slob and here we go." 4RP 295.

Deeper into trial, the prosecutor wanted to impeach Rogers with a videotaped statement she gave to police, which included reference to Tamblin calling KB a slob. 4RP 674-77. The court sustained the defense objection to the attempt, one reason being that "they've heard just enough gang stuff to -- from Joshue and other people to start to speculate on whether that's going to be an issue in this case. And so I don't want to go there[.]" 4RP 678. The prejudice outweighed the probative value of the evidence. 4RP 678-79. The prosecutor nonetheless attempted to elicit from Rogers that Tamblin called KB a slob, a derogatory term for a Blood. 4RP 687-88. The court sustained the defense objection. 4RP 688. A

sidebar conference was held, during which the prosecutor noted the court had allowed the State to elicit evidence of gang terms that were "thrown back and forth." 4RP 689. The prosecutor argued he should be allowed to admit the gang evidence through Rogers to corroborate Tamblin's testimony and to impeach her with a prior inconsistent statement to police. 4RP 688-89. The court agreed with the prosecutor's description of the scope of the pre-trial ruling, but questioned whether there was any inconsistency in relation to what she told police. 4RP 690-91. The prosecutor said there was, and the court invited the prosecutor to impeach Rogers with whether Tamblin called KB a slob. 4RP 691. When asked, Rogers said she did not remember telling police that Tamblin called KB a slob. 4RP 702.

Additional trial testimony related to gangs has already been set forth in the Statement of Facts, section B., supra, and its significance in relation to the court's ruling will be addressed in the argument below.

b. Evidence Must Not Be Admitted To Show Bad Character Or Propensity To Commit Crime, And Even Character Evidence Theoretically Admissible For A Permissible Purpose Should Be Excluded If Prejudice Outweighs Probative Value.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 402 prohibits admission of

irrelevant evidence. ER 403 prohibits admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. ER 404(b) prohibits admission of character evidence to prove the person acted in conformity with that character on a particular occasion.

"ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." Wade, 98 Wn. App. at 336. Prior misconduct is inadmissible to show the defendant is a "criminal type" and is likely to have committed a crime for which charged. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). ER 404(b) also prohibits admission of evidence to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

"ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403." State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). That is, ER 404(b) incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. Id. at 361-62.

The evidence must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." Id. at 362. Even relevant evidence is excludable if its probative value is substantially outweighed by the danger

of unfair prejudice. ER 403; Saltarelli, 98 Wn.2d at 361-62. Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

ER 404(b) evidence is presumptively inadmissible. State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). In considering whether evidence is admissible under ER 404(b), doubtful cases should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334.

"If the trial court properly analyzes the ER 404(b) issue, its ruling is reviewed for an abuse of discretion." State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). Failure to adhere to the requirements of an evidentiary rule is considered an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

c. The Gang Evidence Should Have Been Excluded Due To Lack Of Necessary Nexus Between Gang Affiliation And The Offense Committed.

Admission of gang affiliation evidence is measured under the standards of ER 404(b). State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71 (2009), review denied, 168 Wn.2d 1004, 226 P.3d 780 (2010). Evidence of a defendant's gang membership creates a risk that the jury will improperly infer that the defendant has criminal propensities, acted in accordance with such propensities, and is therefore guilty of the charged

offense. People v. Williams, 16 Cal.4th 153, 193, 66 Cal.Rptr.2d 123 (Cal. Ct. App. 1997). Evidence of gang affiliation is therefore considered prejudicial. Scott, 151 Wn. App. at 526 (citing State v. Asaeli, 150 Wn. App. 543, 579, 208 P.3d 1136, review denied, 167 Wash.2d 1001, 220 P.3d 207 (2009)). Simple association with gangs is enough to trigger propensity concerns. State v. Ra, 144 Wn. App. 688, 701-02, 175 P.3d 609 (2008).

Under proper circumstances, gang evidence may be admissible to show motive to commit a crime. State v. Embry, 171 Wn. App. 714, 732, 287 P.3d 648 (2012), review denied, 177 Wn.2d 1005, 300 P.3d 416 (2013). But "there must be a nexus between the crime and the gang before the trial court may find the evidence relevant." Embry, 171 Wn. App. at 732. The requisite nexus is what establishes the probative value of such evidence. Id. at 733.

Before the trial court may admit gang evidence under ER 404(b), it must (1) find by a preponderance of the evidence that misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect. Id. at 732 (citing State v. Yarbrough, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009)).

The first part of this test — that "misconduct" occurred — is satisfied by a trial court's supported finding that a defendant belonged to a gang. Embry, 171 Wn. App. at 733 (State presented evidence of the defendants' gang affiliation, the victim's affiliation with a different gang, and a previous altercation between members of the victim's and defendants' gangs); see also State v. Saenz, 156 Wn. App. 866, 874, 234 P.3d 336 (2010) ("The trial court found that the State established by a preponderance of the evidence that Mr. Saenz was a gang member, his street name was Spooky, he associated with other gang members who displayed certain colors and signs of their membership in a gang[.]").

But this is where the trial court's ruling in Filitaula's case fails. The trial court did not find that Filitaula was a gang member. 4RP 44-45. Even the State acknowledged it had no real evidence that Filitaula was a gang member and it expressly decided not to put on expert testimony to explain the significance of the "slob" gang insult in relation to gang culture. 4RP 42-43, 47. Without a supported finding that Filitaula was a gang member, this Court has no basis to conclude the State's gang evidence was admissible under ER 404(b). Ra, 144 Wn. App. at 702.[21]

[21] In Ra, the State presented gang evidence in violation of the trial court's prior ruling excluding such evidence. Ra, 144 Wn. App. at 700-02. Before denying the State's pre-trial motion, the trial court discussed and the State agreed that Ra's possible motive to commit the crime was the

The court abused its discretion in admitting the gang evidence for this reason alone. It failed to adhere to the requirements of the evidentiary rule. Foxhoven, 161 Wn.2d at 174.

The third part of the ER 404(b) test — relevancy — requires a nexus between gang activity, the crime, and gang members. Embry, 171 Wn. App. at 734; Scott, 151 Wn. App. at 526. Evidence of gang affiliation may be admitted to establish the motive for a crime, but only if there is "a connection between the gang's purposes or values and the offense committed." Scott, 151 Wn. App. at 527. The trial court's ruling fails here as well.

The trial court ruled the gang references, including the explanation that "slob" is a derogatory term of Bloods, was admissible to show the motive for shooting Tamblin. 4RP 39, 44-45, 270, 279, 295. The gang references and explanation of "slob" as a derogatory gang term are irrelevant because the evidence did not establish KB was a gang member.

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desire to show off for his gang friends. Id. at 695-96. At trial, the State elicited a detective's testimony that he was a member of Tacoma Police Department's gang unit and was assigned to this case and questioned the detective in a manner suggesting that carrying guns is "what [they] do" and that there was "a loyalty involved" in Ra's delay in answering questions. Id. at 700. On appeal, this Court reversed conviction due to unfair prejudice, pointing out "the State never presented evidence that Ra was a gang member and, if so, what the gang mores were. Without such evidence, we have no basis to conclude that the State's gang evidence was admissible under ER 404(b)." Id. at 702.

As acknowledged by the prosecutor and Tamblin and shown by the evidence, the person who made gang references to Hilltop and uttered the "slob" insult was not a gang member either. 4RP 48, 285, 288, 300; 6RP 6. Tamblin was a poser — someone who liked to pretend he was a gangster as a form of posturing during confrontation.

Moreover, there is no evidentiary connection between a gang's purposes or values and the offense committed. No one testified about the importance of respect in gang culture and how an insult could escalate to extreme violence. The State did not connect a gang affiliation with Filitaula's alleged motive for committing the crime. Accordingly, the gang references were irrelevant, unfairly prejudicial and inadmissible. Scott, 151 Wn. App. at 527.

In its offer of proof, the State argued it would be presenting evidence that KB responded to Tamblin's gang insult by saying "you're not even from Hilltop, homey. I'll shoot you. I'll show you Hilltop." 4RP 42. When defense counsel renewed his objection to gang evidence during trial, the prosecutor similarly represented that after Tamblin called KB a "slob," KB responded by saying "You ain't no Hilltop. You know, this is Hilltop. I'll show you Hilltop. Boom." 4RP 295.

However, the prosecutor's offer of proof never fully materialized at trial. Evidence showed KB said something in response to Tamblin's initial

Hilltop reference, but Tamblin could not recall what. 4RP 423. According to Tamblin, KB "didn't say no gang talk" or anything gang-related: "It was like bitch and shit and stuff like that." 4RP 301. 4RP 301. KB only responded to the later "slob" insult by saying something like "you don't know no one from Hilltop," "You ain't from Hilltop," or "You don't know no one from the Hill." 4RP 386, 434, 437. The trial evidence did not show that KB additionally said something like "I'll show you Hilltop." If it did, then the evidence would at least be stronger in terms of associating KB with a gang. "I'll show you Hilltop" could be taken to mean that KB knew what it meant to be a Hilltop gang member because he was one. But that piece of evidence was not produced.

Furthermore, there was no testimony to explain the significance of the "slob" insult in connection with the gang culture, such as the importance of "respect" in the gang culture or that violence was a recognized response to "disrespect." As a result, there is no evidentiary nexus between gang affiliation and the shooting.

A comparable problem arose in Scott. In that case, the court admitted evidence of Scott's gang affiliation based on the State's offer that the evidence would establish Scott's assault on the victim was motivated by a display of disrespect toward the gang. Scott, 151 Wn. App. at 523-24. The State promised Detective Cantu, a gang expert, would testify to the

importance of "respect" in the gang culture and why gang members would respond to lack of respect with violence. Id. at 523-24.

The court admitted gang evidence subject to the prosecution providing evidence of the connection. That evidence was never produced, resulting in reversal on appeal. Id. at 521. The evidence did not connect to the expressed motive because there was no evidence presented about the importance of "respect" in the gang culture or that violence was a recognized response to "disrespect." Id. at 528 (noting expert testimony on those topics has been presented in other cases to establish a gang's interest in violent retaliation, citing State v. Campbell, 78 Wn. App. 813, 822, 901 P.2d 1050, review denied, 128 Wn.2d 1004, 907 P.2d 296 (1995); Yarbrough, 151 Wn. App. at 79-80). The trial court improperly admitted the gang affiliation evidence because the State failed to connect that evidence to the alleged motive for retaliating — disrespect shown to the gang. Scott, 151 Wn. App. at 528-29.

Scott teaches us that testimony on gang culture, the significance of respect, and gang violence as a response to perceived disrespect is important to establishing the relevancy of gang affiliation with motive. That kind of evidence is lacking in Filitaula's case. The State elected not to present such evidence. Further, the State told the court the evidence

would show KB said "I'll show you Hilltop" right before he shot Tamblin, but that evidence was not produced either.

Even if there were some relevancy to allowing the jury to hear the gang references lobbed by Tamblin and KB's response about Hilltop, that relevancy was outweighed by the prejudicial value of the gang evidence.

This Court has warned "trial courts should be particularly cautious when weighing the probative value of gang-related evidence against its inherently prejudicial effect." State v. Mee, 168 Wn. App. 144, 160-61, 275 P.3d 1192 (2012). The evidence did not show Filitaula belonged to a gang, but the gang-related statements admitted into evidence served to associate Filitaula with gang members. The explanation behind the slob slur served to associate KB with the Bloods, even though the trial court did not find by a preponderance of the evidence that KB was in fact a Blood gang member or member of any other gang.

KB's response to the slur — that Tamblin was not a member of the Hilltop gang — further conveyed a message to the jury that KB was affiliated with a gang. After all, how would KB know that Tamblin was not really a Hilltop gang member unless KB himself was so deeply involved in gang culture that he knew who was in which gang?

When the State sought to impeach Rogers with her earlier statement to police that Tamblin called KB a slob, the court initially did

not allow it because "they've heard just enough gang stuff to -- from Joshue and other people to start to speculate on whether that's going to be an issue in this case. And so I don't want to go there[.]" 4RP 678. The problem is that, as pointed out by the prosecutor, the court already "went there" by allowing the State to present gang evidence. 4RP 689. The gang references allowed into evidence encouraged the jury to speculate that KB was gang affiliated.

Defense counsel proposed before trial that the State could elicit testimony that an insult was made without specifying what that insult was. 4RP 43-44. In the alternative, if the court allowed the specific insult, then the witness could explain that "slob" is a derogatory term without explaining what the insult meant in relation to gangs. 4RP 43-44. Thus, the fact that an insult was made was relevant, but the gang connotation was irrelevant or unnecessary to the State's case. 4RP 43. Defense counsel's proposed solution was sensible. It would have allowed the State to show an insult was made as a motive for the crime but avoid the irrelevant and unfairly prejudice gang connotation that smeared KB. Unfortunately, the court did not take the defense up on its offer.

The insult evidence should have been handled in a less inflammatory manner. See State v. DeVincentis, 150 Wn.2d 11, 23, 74 P.3d 119 (2003) (the need for ER 404(b) evidence is a relevant factor in

balancing prejudice against probative value; affirming trial court's admission of ER 404(b) evidence in part because "[n]o less inflammatory documentation or corroboration that the crime occurred was available."); State v. Collier, 316 N.J. Super. 181, 195, 719 A.2d 1276 (N.J. Super. Ct. App. Div. 1998) ("a trial judge, in admitting other-crimes evidence that is inherently inflammatory must take appropriate steps to reduce the inherent prejudice of that evidence by considering whether it can reasonably be presented to the jury in a less prejudicial form, and, when necessary, requiring the evidence to be presented to the jury in a sanitized form.").

As noted, ER 404(b) incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. Saltarelli, 98 Wn.2d at 361-62. The gang evidence was irrelevant under ER 402 because, as set forth above, the evidence did not find KB was a gang member and there is no evidentiary nexus between the motive for the crime and gang membership. Moreover, gang evidence was unfairly prejudicial under ER 403 because, as set forth above, it painted KB as a gang member even though he was not a gang member. Whatever probative value of allowing the jury to hear the gang talk was outweighed by its prejudicial impact. It was not necessary for the jury to hear the gang references to fairly render a verdict in this case.

d. It Is Reasonably Probable Wrongful Admission Of The Gang Evidence Affected The Outcome.

Reversal of the conviction is required because there is a reasonable probability that juror consideration of gang-related evidence tainted deliberation on whether the State proved beyond a reasonable doubt that Filitaula committed the assault.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001); see also State v. Fuller, 169 Wn. App. 797, 831, 282 P.3d 126 (2012) (error in admitting evidence under ER 404(b) "is harmless if the improperly admitted evidence is of little significance in light of the evidence as a whole."), review denied, 176 Wn.2d 1006, 297 P.3d 68 (2013).

The State thought the gang evidence to be of great significance, as shown by the fact that it fought so hard to place that evidence before the jury. 4RP 41-43, 295, 689. Meanwhile, the State's effort to convince a jury beyond a reasonable doubt that it should convict Filitaula of assault was compromised by its cast of problematic eyewitnesses. In opening statement, the prosecutor candidly told the jury "in considering how to lay this case out, it's apparent that the characters, I'll call it, on Mr. Tamblin's side are going to be somewhat eye-opening to you. And I don't want to

disparage them whatsoever, but the show *Jerry Springer* comes to mind. There's no doubt about it." 6RP 3.

The prosecutor's words proved prescient. Their inconsistencies in identifying or not identifying Filitaula as the man who shot Tamblin were enough to lead a rational trier of fact down the road of reasonable doubt. Witnesses waffled and testimony differed in terms of what the shooter looked like and what he wore that day. 4RP (Tamblin: 269, 297, 304, 316, 384-85, 406-08, 422-23, 801-04, 807; Rogers: 167-68, 228-29, 234-36, 252, 607, 609, 620-23, 630-33, 661, 795-96, 800, 804, 827-28; Cindy: 141-42, 732-39, 761-62; T.: 509-13, 523-25, 530-32, 546, 573, 575).

Filitaula was placed at the scene by a jail call and casings recovered from the scene that matched a gun used by Filitaula in a previous incident. Ex. 37; 4RP 336, 340-41, 882-83, 879, 889-90. But mere presence would not necessarily lead to a finding that Filitaula was the shooter. The gang evidence that engulfed "KB" may have influenced the jury to return a finding of guilt.

Evidence of other misconduct is prejudicial because jurors may convict on the basis that they believe the defendant deserves to be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Such evidence "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the

forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Id. "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." Wade, 98 Wn. App. at 336.

Gang evidence is prejudicial due to its general "inflammatory nature." Asaeli, 150 Wn. App. at 579. "It is common knowledge that there is a deep, bitter, and widespread prejudice against street gangs in every large metropolitan area in America." People v. Rivera, 145 Ill. App.3d 609, 617-18, 495 N.E.2d 1088 (Ill. Ct. App. 1986) (quoting People v. Parrott, 40 Ill.App.3d 328, 331, 352 N.E.2d 299 (Ill Ct. App. 1976)).

In Scott, evidence of a defendant's gang membership was not harmless. Scott, 151 Wn. App. at 529. Without a connection of that status to the crimes, the only reasonable inference for the jury to draw from the testimony was that the defendant was a bad person. Id.

Associating Filitaula with a gang or gang activity was likewise prejudicial because, in the absence of a proper reason for admitting such evidence, juries naturally associate such groups with criminal activity and improperly convict on the basis of inferences as to the defendant's character. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the

accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The prejudicial effect of the evidentiary error was compounded by the court's failure to give a limiting instruction. State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990). The prejudicial effect of this evidence was in no way diminished by court instruction.

"A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). That same inclination naturally applies to gang members, who by definition are associated with criminal activity. The admission of the gang evidence unfairly prejudiced Filitaula because it allowed the jury to infer he had criminal propensities. Filitaula's assault conviction should be reversed because error in admitting the improper evidence was not harmless.

D. CONCLUSION

For the reasons set forth, Filitaula respectfully requests reversal of the assault conviction.

DATED this 4th day of September 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 43480-6-II
	)	
MASON FILITAULA,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF SEPTEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **CORRECTED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MASON FILITAULA
DOC NO. 872099
MONORE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF SEPTEMBER 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

September 18, 2013 - 4:53 PM

Transmittal Letter

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Court of Appeals Case Number: 43480-6

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