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No. 63056-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN PRICE,

Appellant.

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

The Honorable Sharon Armstrong, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to be present at a critical stage of trial when he was absent for a portion of jury voir dire.

2. Appellant was denied his constitutional right to be present at a critical stage of trial when he was absent for the replay of recorded statements during jury deliberation.

3. The improper admission of evidence concerning appellant's membership in a motorcycle gang denied him a fair trial

4. Defense counsel's failure to limit the jury's consideration of the gang evidence to the narrow purpose for which it was admitted denied appellant his constitutional right to effective representation and a fair trial.

Issues Pertaining to Assignments of Error

1. Jury selection is a critical stage of trial, and appellant had a constitutional right to attend and participate. The court conducted a portion of jury selection in appellant's absence after defense counsel told appellant it was not a critical stage. Did this violate appellant's constitutional rights?

2. Defense counsel also "waived" appellant's presence during jury deliberations where recorded evidence was replayed for

jurors at their request. Where appellant had a constitutional right to be present at this hearing, and his attorney could not unilaterally waive his right, did this also violate his constitutional right to be present at all critical stages of his trial?

3. Evidence that an individual belongs to a gang is inherently prejudicial. Where the trial court overstated the probative value of appellant's membership in a motorcycle gang, and did not properly appreciate the significant resulting prejudice, did the court err under ER 404(b) when it permitted evidence of appellant's gang membership?

4. The State argued that neither of its two key witnesses initially came forward in the case because they feared appellant and other members of his motorcycle gang would harm them. The trial court admitted evidence of appellant's membership in a motorcycle gang for a limited purpose: to demonstrate the state of mind of these two witnesses. Although defense counsel recognized the need for an instruction limiting the jury's consideration of the gang evidence to this narrow purpose, counsel failed to ensure jurors actually received such an instruction. Consequently, jurors were free to use the gang evidence however

they saw fit, including evidence of criminal propensity. Did this deny appellant his right to effective representation and a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged John Price with murder in the first degree and two counts of witness tampering. CP 175-182. A jury convicted Price and answered "yes" on a special verdict form asking whether he was armed with a firearm at the time of the murder. CP 236, 238-240. The court imposed a composite sentence of 420 months, and Price timely filed his Notice of Appeal. CP 294, 300-301.

2. Voir Dire

On October 1, 2008, in Price's presence, the parties and Judge Sharon Armstrong discussed the process of selecting Price's jury. They agreed on language to be included in a juror questionnaire. 5RP¹ 5-11. They also discussed the mechanics of

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – April 18, 2008; 2RP – June 6, 2008; 3RP – August 21, 2008; 4RP – September 5, 2008; 5RP – October 1-2, 2008; 6RP – October 6 and November 2, 2008; 7RP – October 9, 2008; 8RP – October 13, 2008; 9RP – October 14, 2008; 10RP – October 15, 2008; 11RP – October 16, 2008; 12RP – October 20, 2008 (a.m.); 13RP – October 20, 2008 (p.m.); 14RP – October 21, 2008; 15RP – October 22, 2008; 16RP – October 23, 2008; 17RP –

jury selection, including how many jurors would be questioned at a time and when they would fill out the questionnaire. 5RP 11. Judge Armstrong indicated she expected about 200 jurors, which was too many to fit in the courtroom at one time. Therefore, they would divide jurors into four groups of 50 and question each group separately. 5RP 11.

Judge Armstrong also indicated jurors would not be given the questionnaire until after she decided hardship challenges. 5RP 11-12. She noted that “this is a critical stage of the proceedings and the defendant needs to be present, even though we’re just calling for hardship.” 5RP 13. Defense counsel, Julie Gaisford, responded that she has been involved in cases where “none of us are present” for hardship challenges. 5RP 13. Judge Armstrong indicated that if Price did not want to attend hardship challenges, it might be possible to address all 200 jurors together elsewhere in the courthouse, dispensing with the need to divide them into smaller groups. 5RP 14. Gaisford responded that she would speak with Price. 5RP 14.

October 27, 2008; 18RP – October 28, 2008; 19RP – October 29, 2008 (a.m.); 20RP – October 29, 2008 (p.m.); 21RP – October 30, 2008; 22RP – November 4-5, 2008; 23RP – January 28, 2009.

Later, during the same hearing, the subject arose again:

MR. O'TOOLE: Your honor, do you anticipate an extraordinarily active role for the lawyers during the hardship portion? I mean, I don't think that's normally your practice.

THE COURT: Right.

MR. O'TOOLE: If that helps Ms. Gaisford's client make a decision.

MS. GAISFORD: If we could inquire if there will be no detective and Mr. O'Toole will have an empty chair, I've conferred with Mr. Price, and since it's just a hardship part, I certainly don't think it's a critical stage in the proceedings. . . .

5RP 46-47. Mr. O'Toole agreed not to have a detective present for the hardship challenges and, in return, Ms. Gaisford indicated that Price would not attend. 5RP 47-48.

Hardship challenges were addressed in Price's absence the following day, October 2, 2008. 5RP 49. The clerk's minutes indicate that after administering the oath to prospective jurors, Judge Armstrong dismissed 80 out of 200 individuals for hardship.² Supp. CP ____ (sub no. 283A, Clerk's Minutes, at 7-8).

² Trial counsel did not seek authorization for a transcript of voir dire in Price's Order of Indigency. Given the issue now raised on appeal, and to ensure a complete record, undersigned counsel

This would not be the only hearing conducted in Price's absence. Near the end of trial, while jurors deliberated Price's fate, they asked to have certain recordings that had been admitted at trial replayed. 22RP 285; CP 234-235. As before, Ms. Gaisford expressed her belief that this was not a critical stage of trial requiring Price's presence. She then said, "I am specifically waiving his absence, to the extent it might be interpreted to be required." 22RP 286. The recordings were then played. 22RP 291.

3. Trial Evidence

On January 13, 2005, King County Sheriff's Detectives opened a missing persons investigation into the disappearance of Donald Jessup. 8RP 9; 19RP 23. The following day, detectives went to the Enumclaw property where Jessup lived in a "camper trailer-type structure" next to a large outbuilding. 8RP 11. There was no sign of Jessup. The door to his trailer was ajar, and inside detectives found a newspaper dated December 15, 2004, and

is seeking authorization for a transcript of the October 2, 2008 hearing. The transcript of that hearing should be available before the State files its response brief in this matter.

notes people had left asking Jessup to call them. A dog was wandering the property. 8RP 17, 19-20.

Several detectives were tasked with interviewing individuals who knew Jessup. 8RP 21. Detectives learned that Jessup stored vehicles at a storage facility in Orting. On January 18, 2005, while detectives were at the facility, an individual who would later become important in the case – Judy Mahler – arrived. 8RP 22-23; 18RP 112-113, 135. Mahler indicated she had last seen Jessup in early November and that she had heard he might be missing, but she gave no indication that she possessed any other information on the matter. 8RP 23-24; 18RP 113-114.

Detectives spent January and February 2005 trying to establish when Jessup had last been seen, speaking to several individuals who knew him. 8RP 24. They could find no indication anyone had seen him since mid-December. 8RP 27. They discovered that a woman named Tammy Cavanaugh had been with Jessup on December 15. 18RP 114; 19RP 47-48. Cavanaugh, who also lived in Enumclaw, sometimes provided Jessup with transportation. On that particular day, she agreed to drive him to court to quash a warrant for his arrest. 6RP 18-19. On the way, however, Cavanaugh's car broke down. 6RP 17-18.

Jessup called Jason Rebman, whom Cavanaugh did not know at the time. Rebman picked them up and drove them to his house in White Center. 6RP 21-22; 18RP 114.

Rebman was a convicted felon and drug dealer, selling mainly methamphetamine. 14RP 49-50; 15RP 43-45, 48-50. Detectives confirmed with Rebman that he had been with Jessup on December 15, 2004. 20RP 87-88. Detectives met with Rebman in person on February 2, 2005. 8RP 25-26; 20RP 88-89. As Rebman left the meeting, he provided detectives with a business card bearing the name "John Price" and told them they "might want to pursue different avenues on this." 15RP 19-21; 18RP 117-118.

The next day, Seattle Police arrested Rebman in a drug sting. He was carrying more than a pound of meth, with a street value in excess of \$15,000.00. He also was in possession of marijuana and prescription medications. 15RP 22-23; 20RP 57-63. Seattle police asked Rebman if he was interested in helping with the arrest of other dealers in exchange for his release. Rebman initially declined and was booked. 15RP 23-24; 20RP 63-65, 69-70.

Within an hour, however, Rebman changed his mind and contacted a detective in the Seattle Police Narcotics Section. 6RP

77-78; 15RP 23. Rebman was offered a deal: in exchange for the arrest of three higher-level dealers, his drug case would be "inactivated" and he would avoid any criminal charges. Rebman agreed. 6RP 79-80.

Before Rebman was released from jail, however, King County Sheriff's Detectives visited him and asked for more information on Jessup. 15RP 27-28; 18RP 117-119. This time, Rebman told detectives he had heard that Channel Ridley (John Price's girlfriend) and Julie Mahler were present when Jessup was murdered. 15RP 27-29; 20RP 89-91. Rebman was released from jail and, with his assistance, detectives located Channel Ridley and took her into custody on February 11, 2005. 9RP 88-89; 15RP 29-30; 18RP 121-125.

A King County Sheriff's Detective would later claim that Rebman's information implicating Price was not part of any deal regarding the drug charges he faced. 18RP 120. Yet, despite the fact Rebman never fulfilled his obligation to assist Seattle Police with the arrest of three higher-level dealers, he was never prosecuted for his possession of the large quantities of methamphetamine, marijuana, and prescription drugs. 6RP 83, 92-93; 15RP 40.

Moreover, during the time Rebman was supposedly assisting Seattle Police with the arrest of other dealers, he was stopped for expired tabs on his car. Rebman was carrying 3.5 grams of methamphetamine, which he tried to swallow, and the case was forwarded to the prosecutor's office for prosecution as a felony for possession of that substance and a misdemeanor for driving on a suspended license. 6RP 60-68. This case was never prosecuted, either. 15RP 40.

In addition, a King County Sheriff's Detective intervened on Rebman's behalf in a third case, convincing prosecutors to dismiss charges of driving with a revoked license and providing false information to a police officer. 15RP 77-80, 212-213. The reason stated on the order of dismissal is: "The defendant provided authorities with information that ultimately resulted in the identification and arrest of a suspect in a homicide investigation." Exhibit 117.

Detectives interrogated Ridley, who repeatedly denied any information regarding Jessup's disappearance. 9RP 87, 91; 18RP 125-127. Detectives indicated that they knew, from Rebman, she had been present for Jessup's murder. 18RP 127. And after several hours of questioning, detectives also mentioned that they

knew two of her three young children – twin boys who would have been one year old at the time – had been present for the murder and that they were obligated to report child abuse to the proper authorities. They told Ridley she would no longer see her children and that she could be charged with murder. This caused Ridley to become quite scared and upset. 8RP 31; 9RP 90-91, 94; 18RP 129-130.

Detectives then mentioned that Rebman was present in the building, and Ridley asked to speak with him. 9RP 91-92; 18RP 128, 130. Although Ridley had a long-term relationship with Price, and Price was the father of her three children, Ridley was attracted to Rebman, had secretly slept with him, and the two had made a sex tape together. 8RP 30, 51; 14RP 78-80. Moreover, in the past, Rebman had helped Ridley get away from Price after Price assaulted her. 53-56. Detectives left the two alone. Ridley sat on Rebman's lap, the two talked, and Ridley then provided a new statement to detectives implicating Price in Jessup's murder. 9RP 92-94; 18RP 130-133.

Price was arrested the next day. 18RP 133-134. He indicated that he had met Jessup and heard many "campfire stories" about him, but he was unable to identify him from a photo.

18RP 56-57. He denied any recent contact with Jessup. 18RP 57-59. Price also denied recently firing a gun. According to the detective questioning Price, Price's demeanor changed when he denied use of a gun. He broke eye contact, looked down, and lowered his voice. 18RP 59-60. Price consented to a search of his van. 18RP 60-61.

Detectives had already met with Mahler again since the first meeting on January 18 at the Orting storage facility. During a second meeting, Mahler indicated that she last saw Jessup sometime in December, rather than what she initially indicated – that she had last seen Jessup in November. But, as with the first meeting, she provided no other information indicating she knew anything about a murder. 18RP 135-137. In light of what detectives had now been told, they visited Judy Mahler again on February 13. 18RP 137. They showed her a cassette tape containing Ridley's statement and indicated they knew what had happened. They also told her she could be charged with conspiracy to commit murder. Mahler became emotional and upset, and provided a new statement incriminating Price. 12RP 62-65, 75; 18RP 138-140.

Channel Ridley and Judy Mahler were the key prosecution witnesses at Price's trial. Ridley met Price when she was seventeen and he was thirty. 8RP 32. They were together three years. 8RP 30. The relationship was tumultuous. 11RP 61-62. Both were meth addicts. 8RP 33-38. According to Ridley, Price was "very abusive"; he hit Ridley, giving her black eyes, bruises, and swollen lips. 8RP 42-43. When Ridley would call the police, Price would pressure her not to testify against him and, once, sent her to Arizona so she was unavailable for trial. 8RP 43-47. By the fall of 2004, Ridley was in the process of ending the relationship. 8RP 48.

Price made money building motorcycles and manufacturing motorcycle parts. 8RP 39. But the couple's housing situation was unstable. They became homeless and were forced to live in Price's van. 8RP 40-41. Judy Mahler met Price through her son Rick, knew he was having a hard time, and offered Price the opportunity to stay at her Ravensdale trailer home. 8RP 48; 11RP 51-52, 57. Ridley chose not to live there. But Price retained custody of the children, and Ridley would sometimes stay the night there to spend time with them. 8RP 48-49, 59. Ridley felt that she could not fight for custody of her children because Price would

have assaulted her. She also felt the police would not be able to help her gain custody, since Price was the children's father. 8RP 49. At some point, Ridley learned that Price was having sex with another woman.³ 9RP 160.

Price, Ridley, and Mahler each knew Donald Jessup, also known as "Dealer Don" based on his reputation for dealing, scheming, and manipulating people to make money. 8RP 59; 11RP 70-71; 19RP 80-81. According to Ridley, on the evening of the murder, December 16, 2004, she arrived at Mahler's home with Price to spend time with the children. 8RP 60-61; 12RP 31. Mahler and Jessup were already at the house, and Price prepared dinner for the group. 8RP 61, 66-67. Everyone enjoyed dinner and seemed to be getting along fine. 8RP 70-71.

Ridley testified that she was sitting with Mahler and Jessup in the main area, but then got up to use the bathroom. 8RP 72. According to Ridley, Price walked into the bathroom and showed her an ax and a handgun. He said he was angry with Jessup and going to kill him. But Ridley did not take him seriously, and simply reminded him that the kids were in the main area in their playpen.

³ Ridley later discovered that this woman was pregnant with Price's child. 9RP 159-161.

8RP 70, 72-75. Ridley heard yelling – something about Jessup treating Mahler’s son Rick like a punk – a scuffle, a gunshot, and then silence. 8RP 73; 9RP 22. She testified Price would later claim that after he hit Jessup with the ax, Jessup tried to get up off the floor, and Price shot him in the mouth. 10RP 13-15. Price and Mahler came running into the bathroom, with Mahler crying and Price apologizing. 8RP 73; 9RP 22-23.

Mahler,⁴ who has criminal convictions for theft and arson, testified to the same event. 11RP 48. According to Mahler, Price indicated he was going for a short walk after dinner. 11RP 80-81. Mahler was in the process of moving out of the home and there was not much furniture. 11RP 63-64. In the living room, Mahler sat in a chair and Jessup sat on the floor. 11RP 78, 82. Mahler saw Price come back in the trailer and head down the hall to the bathroom, where Ridley was. 11RP 82. According to Mahler, Price then entered the living room and started hitting Jessup in the head with an object. Jessup fell backward and asked why Price was hitting him. Price responded, “so you’ll never did this to Rick and I

⁴ By the time of trial, Mahler used the last name Johnson. 11RP 43-44.

again.” 11RP 83. Mahler ran toward the bathroom and, a few seconds later, heard a loud bang. 11RP 84. Mahler never saw a gun and never saw Jessup’s body. 12RP 20-21.

Ridley testified that she went back to the living room and saw Jessup’s body on the floor. His face was covered with a sheet and she saw a small spot of blood near the forehead. 9RP 24, 31. Price yelled at the body, saying “you’re not gonna treat my friend like a punk.” 9RP 24-25. According to Mahler, Price made a phone call and said something to the effect of “you need to come and pick the garbage up.” 11RP 86. Price told Ridley and Mahler they had to leave the house for a few hours and they took the children to a Denny’s restaurant. 9RP 32; 11RP 87-88. When they returned to Mahler’s home, two of Price’s friends – “Wick” (William Renner) and “Karl” (Karl Twilleaguer) – were just arriving. 9RP 33-39; 11RP 90; 12RP 26; 15RP 203. Price then gave Ridley and Mahler some money and the two found a motel room for the night. 9RP 38-41, 45-47; 11RP 91-92; 12RP 27-29.

According to Ridley and Mahler, when they returned to Mahler’s home sometime around noon the next day, no one was inside, there was no body, and some carpet had been removed from the living room and replaced with carpet from a bedroom.

Moreover, some tiles had been removed from the living room area. Others appeared to have blood on them, and Mahler removed them. 9RP 49-52; 12RP 32-35. That night, the evening of December 17, Price and Karl returned to Mahler's home with items Price said they had taken from Jessup's trailer. 9RP 61-63; 12RP 38-42.

According to Mahler, Price later told her that he and Wick took the body into the Cascade Mountains and buried it. 12RP 35-36. According to Ridley, however, Price said he buried the body in the woods by himself. 9RP 60-61.

Mahler later told a friend she had met in prison, Karen Baker, that she witnessed Jessup's murder, was afraid she could be next, but was too scared to go to police. 14RP 5, 17-20. According to Baker, in a subsequent conversation Baker had with Price, she mentioned Jessup's name and Price responded by saying that people who know too much get hurt. 14RP 26, 31.

As to Price's supposed motive for killing Jessup, according to Ridley, Price gave several reasons. First, Price said Jessup had once tried to burn the house down while the twins were inside.⁵

⁵ There is no evidence Jessup ever tried to burn down Mahler's home. Mahler did testify to one occasion where Jessup

9RP 64-65. Second, referring to Ridley, Jessup had been bragging about “pimping her out.”⁶ 9RP 65. Third, Price said he and Jessup had longstanding issues. 9RP 65.

At trial, the State suggested another motive. Before Price had moved in to Mahler’s home, he had stored a motorcycle in Mahler’s garage. That motorcycle was stolen in a burglary, along with several items belonging to Rick Mahler. 11RP 54-58; 12RP 16. According to one of Mahler’s neighbors – Ron Funk – about a week before Jessup disappeared, Price told him that Jessup had located his stolen motorcycle and wanted an \$800.00 “finder’s fee” for its return. According to Funk, Price did not seem happy about the situation. 19RP 96-99. On this same subject, Price had told Mahler it wasn’t right for Jessup to sell his own motorcycle back to him and that Jessup had been playing “mind games” with him. 12RP 36.

tried to start a fire in the wood stove and apparently forgot to open the vent, causing smoke to accumulate in the trailer. But Price merely opened the vent and remedied the situation. 12RP 13. Price mentioned this same event to Ridley. 9RP 107.

⁶ Mahler recalled one occasion where Jessup was kidding around with Price and said he was going to “turn Ridley out,” meaning turn her into a prostitute. But Price just snickered and there did not appear to be any anger on his part. 12RP 17.

The prosecution also called Channel Ridley's mother as a witness, Deniece Weemes. 10RP 131-132. On December 18, 2004, Ridley left Mahler's Ravensdale home after Price hit her again. She went to stay with her mother. 9RP 66, 69-70. According to Weemes, who did not get along with Price, her daughter confided in her and told her about the murder. 10RP 140-141, 155-157. Contrary to Ridley's trial testimony, however, Ridley told her mother that Price beat Jessup first, entered the bathroom and said "the mother fucker won't die," and then returned to the living room and shot Jessup. 10RP 158. Moreover, according to Weemes, Ridley said the murder took place in Marysville rather than Ravensdale.⁷ 15RP 8, 84.

In support of Ridley and Mahler's testimony that they stayed in a motel the night of the murder, the State introduced a receipt from the Kent Valley Motel for the night of December 16, 2004. 9RP 46-47. The State also introduced phone records indicating contact between someone at the Ravensdale home and someone

⁷ This was not the only inconsistency between Ridley's trial testimony and what she told others prior to trial. Although Ridley testified that Price had said he shot Jessup in the mouth, Ridley told Rebman that Jessup had been shot in the back of the head once or twice execution style. 10RP 14; 15RP 87; 20RP 83; 21RP 11-13.

using Karl Twilleaguer's cell phone at 1:11 a.m. on the morning of December 17, 2004. 16RP 138-144.

The State introduced several letters and recorded phone calls from Price – after his arrest – to Ridley and Mahler trying to persuade them not to testify against him. 9RP 98-165; 10RP 7-13; 12RP 65-86; exhibits 101-102. The State also introduced a letter from Price to Ronald Funk indicating that he did not harm anybody and suggesting that Funk's testimony would complicate his trial. 19RP 102-106; 20RP 3-15.

By the time crime scene analysts examined the interior of Mahler's Ravensdale trailer, a new owner lived there and had removed the carpet and tiles, put up new sheet rock on the walls, and used Kilz – a primer – on the floors and walls. 16RP 95, 97-101. The new owner had seen no evidence of a shooting and Mahler did not mention one to him. 16RP 103-104. Crime scene analysts from the Washington State Patrol Crime Laboratory found no physical evidence inside the trailer home, Price's van, or anywhere else connecting him to Jessup's disappearance. 16RP 35, 43, 73, 76-77; 19RP 16. They did not find the ax he

supposedly used or a gun. Nor did they ever find a body. 18RP 83-85, 89; 19RP 14-16, 38-39.

One of Jessup's neighbors, Richard Hagstrom, told police he believed he had last seen Jessup a day or two before January 3, 2005, and recalled hearing gunshots on Jessup's property on January 3. 18RP 35-36.

Another of Jessup's neighbors – Betty Birdwell – testified that Jessup had a distinct, low voice, and based on the direction of the wind, she could hear his voice even when he was speaking relatively quietly on his own property. 21RP 152-155, 158, 180. Birdwell recalled an incident right around December 16, 2004 – perhaps a day or so before or even *after* that date – when a voice coming from Jessup's property startled one of her horses, which reared up on its hind legs. 21RP 164-166. Birdwell testified that although she did not see Jessup at that moment, she believed this was Jessup's voice. She heard him say to one or more individuals, "hurry up, we've gotta get out of here." 21RP 166-167, 187.

In early January, Birdwell heard multiple gunshots coming from the property at around 2:00 a.m. She then saw two vehicles leaving the property, one of which was going "really fast" and had its lights out. 21RP 162-164. Birdwell also testified that she

thought she saw Jessup driving his truck sometime in January 2005, although she could not be certain whether it was him or another man who looked like him. 21RP 167-168, 183-184. A detective on the case believed that Birdwell may have seen another individual who looked like Jessup and had been on the property looking for Jessup. 21RP 37-40.

4. Gang Evidence

Price, Jessup, and others connected to the case were affiliated with local motorcycle gangs, including the Ghost Riders and Gypsy Jokers. The prosecution contended that members of these gangs engaged in criminal activity. 3RP 99. The defense moved to preclude any evidence of Price's gang affiliation, arguing it was not admissible for any proper purpose and the resulting unfair prejudice would be extreme. 3RP 100-106, 115-116; CP 147-150, 168-174. The State argued for admission of the gang evidence, including the testimony of a gang expert, on the theory it demonstrated why Ridley and Mahler initially denied knowledge of the murder; i.e., they feared gang retaliation. 3RP 99-100, 107-109, 113-115; Supp. CP ____ (sub no. 299, State's Memorandum In Support of Motion To Admit Evidence of Defendant's Membership in Ghost Riders Motorcycle Gang).

Judge Armstrong found that because both women knew about Price's membership in the Ghost Riders, that evidence was relevant to demonstrate "[t]hey had an expectation of what their cooperation with the police would mean[.]" 3RP 118. The court limited expert testimony to the two main gangs at issue: the Ghost Riders and the Gypsy Jokers. 3RP 109, 117-118. She felt that with use of the label "gang," the "immediate impression is criminal activity." 3RP 110-111. Therefore, she required the juror questionnaires and trial witnesses to refer to the gangs as "motorcycle groups." 3RP 117; 4RP 40-42.

Price's membership in the Ghost Riders was a frequent topic at his trial. Ridley testified that Price, Wick, and Karl were all Ghost Riders. 8RP 39-40; 9RP 33. Price always wore a vest with the group's colors, and "bragged about it constantly." 8RP 39. He even had "Ghost Riders" decals on his van. 9RP 78. Ridley was permitted to relate the content of a letter she sent Price, in which she indicated she was trying to find "the Hell's Angel book" for him. 10RP 82. She testified she did not go to police earlier because she was afraid of Price's "club friends," who knew where she lived, and she lied to Price about her loyalty because she feared he would "send somebody over to my house." 10RP 121, 125.

Judy Mahler also testified that Price was a Ghost Rider, that her son Rick was a member of the "Iron Lords," and that Jessup was a retired member of the Gypsy Jokers. 11RP 60-61, 78. According to Mahler, shortly after Jessup's murder, Price was "summoned to go to Portland . . . to meet with the president of the Ghost Riders and explain what happened." 12RP 49. She also testified that following the murder, she was concerned for the safety of her family because, temporarily dispensing with the label "group," "these were two opposing motorcycle gangs." 12RP 55.

Elaborating, she testified:

I had just witnessed something that was very violent and, umm, and with motorcycle groups, I knew that, umm, they could retaliate, and so I was afraid for my son and my grandson more so than for myself.

12RP 57. Similarly, testifying why she did not come forward with what she knew, Mahler testified:

I was fearful for my family's life and, umm, I knew because of the situation that I was a primary witness, and many times motorcycle clubs are somewhat violent and they don't leave witnesses, and I felt that maybe something was going to happen.

12RP 61. Still later, she added, "I know with motorcycle clubs, that they can become very violent and they don't – they take care of snitches." 12RP 77. Mahler also testified she had told a detective

that Jessup's death was no big deal "[b]ecause bikers kill each other." 13RP 78.

Jason Rebman also testified that Price was a Ghost Rider. 14RP 57. He related an incident where Price, "and about six other of his guys" came to Rebman's house looking for some of Price's property that had been stolen from Judy Mahler's garage. 14RP 66-67. Rebman testified that all the men with Price were either Ghost Riders or affiliated with the Ghost Riders, the situation was tense, and "a bunch of guys [were] about to throw down." 14RP 67-69.

The prosecution also called King County Sheriff's Detective Michael Brown, testifying as an expert on "large groups that ride motorcycles." 15RP 197. Brown confirmed that Price is a Ghost Rider. The local group, consisting of seven or eight members, is primarily out of Soap Lake and Ephrata, but the Ghost Riders have chapters elsewhere in the United States. 15RP 200-202. Brown also confirmed that Wick (William Renner) and Karl Twilleaguer are members of the Ghost Riders. 15RP 203. Moreover, he confirmed that Jessup was a longtime member, and former president, of the Gypsy Jokers, a group with a much larger presence in Washington. 15RP 205-205. All of these groups have a code of silence.

Discipline is handled internally, and no one goes to the police – not even to report a member of another group. 15RP 205-208.

C. ARGUMENT

1. PRICE'S ABSENCE FROM A PORTION OF JURY VOIR DIRE VIOLATED HIS RIGHT TO BE PRESENT FOR TRIAL.

Due Process guarantees any person accused of a crime the right to be present for all critical stages of the prosecution. U.S. Const. amends. 5, 6, 14; Const. art. 1, §§ 3, 22; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The Washington Constitution specifically provides for the right to "appear and defend in person." Const. art. 1, § 22.

There is no constitutional right when the defendant's "presence would be useless, or the benefit but a shadow[.]" Stincer, 482 U.S. at 745. However, the defendant has the right to be present whenever "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" In re Personal Restraint of Lord, 123 Wn.2d 296,

306, 868 P.2d 835 (quoting Gagnon, 470 U.S. at 526), cert. denied, 513 U.S. 849 (1994).

The constitutional right to be present for the selection of one's jury is well recognized. See Lewis v. United States, 146 U.S. 370, 373-374, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501 (2007). Consistent with this constitutional guarantee, CrR 3.4(a) explicitly requires the defendant's presence "at every stage of the trial including the empanelling of the jury" [F]or purposes of CrR 3.4 the beginning of trial occurs, at the latest, when the jury panel is sworn for voir dire and before any questioning begins." State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993) (emphasis added), aff'd, 123 Wn.2d 877, 872 P.2d 1097 (1994).

Far from being "useless" or its benefit "but a shadow," "[j]ury selection is the primary means by which [to] enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability[.]" Gomez, 490 U.S. 858 at 873 (citations omitted). The defendant's presence "is substantially related to the defense and allows the defendant 'to give advice or suggestion or even to supersede his

lawyers.” Wilson, 141 Wn. App. at 604 (quoting Snyder v. Massachusetts, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)); see also United States v. Gordon, 829 F.2d 119, 124 (D.C. Cir. 1987) (Fifth Amendment requires opportunity to give advice or suggestions to lawyer when assessing potential jurors).

Similar to CrR 3.4, the constitutional right to be present and participate in the selection of one’s jury attaches at the very outset of the process – “at least from the time when the work of empanelling the jury begins.” Gomez, 490 U.S. at 873 (quoting Lewis, 146 U.S. at 374). In Price’s case, “the work of empanelling the jury” began on October 2, 2008, when jurors were sworn and examined to determine who should be excused for hardship.

Judge Armstrong initially recognized that Price had a constitutional right to be present for every stage of jury selection, including hardship challenges. 5RP 13 (“this is a critical stage of the proceedings and the defendant needs to be present, even though we’re just calling for hardship.”). This is correct. Although there do not appear to be any decisions in Washington on the right

to be present for hardship challenges, the Ninth Circuit Court of Appeals has provided guidance in this area.

In United States v. Bordallo, 857 F.2d 519 (9th Cir.), cert. denied, 493 U.S. 818 (1989), the defendant – the former Governor of Guam – challenged the release of several jurors in his absence before “formal proceedings began” for the day. The Ninth Circuit Court of Appeals noted that on the one hand, a defendant has no right to be present for a purely ministerial act; for example, where a court commissioner draws the names of potential jurors for a particular case before that case is called for trial. Id. at 522. On the other hand, a defendant does have the right to be present where “prospective jurors are questioned about their knowledge of a particular case” and “jurors know what case they will hear if selected and know which parties are involved.” Id.

In Bordallo, the court found the facts more analogous to the latter situation because jurors already knew which specific case they would hear if selected and some jurors were excused due to factors related to that specific case. Id. at 522, 523. Addressing the dangers associated with the defendant’s absence, the court said:

circumstances could arise in which a judge, either consciously or inadvertently, excused a disproportionate percentage of a juror population, such as women or minorities, see, e.g., *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), or otherwise adversely affected the neutrality of the juror pool. Requiring the defendant's presence before excusing prospective jurors for a specific case protects against such risks. . . .

Id. at 523. Therefore, Bordallo had the right to be present for release of the potential jurors.⁸ Id.; compare United States v. Greer, 285 F.3d 158 (2nd Cir. 2002) (distinguishing Bordallo because trial court released jurors prior to announcing specific case).

Price had this same right. This was not some ministerial act of drawing names for a courtroom or releasing jurors prior to administration of an oath or the calling of a specific case. The jurors released in Price's absence had been assigned to his specific trial, sworn in his specific case, and released based on their inability to serve in his case.

⁸ More precisely, the court held that "either the defendant or his counsel should have been present." Id. at 523. But where a defendant has the right to participate in the voir dire process, his attorney is not an acceptable substitute. Rather, as previously discussed, for the selection of one's jury, due process requires the opportunity to give advice to counsel and even supercede counsel's judgment. Gordon, 829 F.2d at 124; Wilson,

The situation in this case bears little resemblance to the purely legal proceedings criminal defendants have no right to attend. See In re Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998) (no right to attend hearing on wording of jury instructions or issue of jury sequestration, but presence may have been required for conference on alleged juror misconduct); In re Lord, 123 Wn.2d at 306 (legal rulings on evidentiary and discovery motions; determining wording of instructions and jury questionnaire); State v. Bremer, 98 Wn. App. 832, 834-35, 991 P.2d 118 (2000) (discussion of jury instructions purely a legal matter; defendant could not have contributed); State v. Berrysmith, 87 Wn. App. 268, 273-276, 944 P.2d 397 (1997), review denied, 134 Wn.2d 1008 (1998) (required withdrawal of attorney purely a legal matter).

Of course, like any constitutional right, the right to be present can be waived. But any waiver of constitutional trial rights must be knowing, intelligent, and voluntary. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (waiver must be affirmative and unequivocal). Courts “must indulge every reasonable

141 Wn. App. at 604 (citing Snyder v. Massachusetts, 291 U.S. at 106).

presumption against waiver of fundamental rights.” Acrey, 103 Wn.2d at 207 (citing Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942)).

“The right to be present at trial may be waived so long as the waiver is voluntary and involves an intentional relinquishment of a known right.” State v. Thomson, 70 Wn. App. at 206 (emphasis added; citing State v. Washington, 34 Wn. App. 410, 413, 661 P.2d 605 (1983)); see also City of Seattle v. Klein, 161 Wn.2d 554, 559, 166 P.3d 1149 (2007) (citing Webster’s Dictionary and defining “waiver” as the “act of waiving or intentionally relinquishing or abandoning a known right . . .”).

Price did not knowingly, intelligently, or voluntarily waive his right to be present for all of voir dire. He never even knew he had the right to attend. His own attorney misinformed him that the questioning and removal of potential jurors for hardship was not a critical stage of trial. See 5RP 47 (“I certainly don’t think it’s a critical stage in the proceedings”). By telling Price he would not be missing a critical stage of trial, counsel affirmatively misinformed him that he had no right to be there. A valid waiver cannot be based on invalid information. See Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (a defendant

must be aware “of the relevant circumstances and likely consequences” of waiving a constitutional right for it to be valid); see also State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006) (right to jury trial not validly waived when defendant affirmatively misinformed regarding sentencing consequences of pleading guilty).

Having established a violation of Price’s right to be present at a critical stage, the remaining issue is whether reversal is required. This Court should find the improper denial of a defendant’s right to be present for selection of his jury is structural error, requiring reversal. An error is structural, and therefore never harmless, when it “affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). A trial error subject to harmless error analysis is one “which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” Id. at 307-08. Structural errors, however, are “defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’

standards.” Id. at 309. They affect “[t]he entire conduct of the trial from beginning to end[.]” Id.

In cases *not* involving jury selection, this Court and the Washington Supreme Court have applied a harmless error standard in assessing the denial of a defendant’s right to be present. See In re Personal Restraint of Benn, 134 Wn.2d 868, 920-21, 952 P.2d 116 (1998) (hearing on motion to continue trial); State v. Pruitt, 145 Wn. App. 784, 798-801, 187 P.3d 326 (2008) (bench trial in drug court; error not harmless beyond a reasonable doubt); see also Rushen v. Spain, 464 U.S. 114, 117-18, 104 S. Ct. 453 78 L. Ed. 2d 267 (1983) (*after* jury selected, *ex parte* communications between juror and judge in defendant’s absence subject to harmless error review).

But in determining whether structural error has occurred, courts should “consider the nature of a ‘presence error’ in the context of the specific proceeding from which the defendant was excluded.” Hegler v. Borg, 50 F.3d 1472, 1476 (9th Cir.), cert. denied, 516 U.S. 1029 (1995). Neither this Court nor the Washington Supreme Court has ever determined whether, in the defendant’s absence, the exclusion of potential jurors during the jury selection process can be harmless.

Far from being an error during the presentation of the case, which is quantifiable in light of the evidence presented, the improper removal of jurors outside the defendant's presence impacts the structure of the trial. It affects the conduct of the trial from beginning to end by changing the make up of those individuals available to determine the defendant's guilt. Like other structural errors, there is no way to accurately assess the impact other than to recognize there may have been one.

In this regard, the error in Price's case is similar to other structural errors involving jury selection. In State v. Vreen, 143 Wn.2d 923, 927, 26 P.3d 236 (2001), the Supreme Court held that the erroneous denial of a peremptory challenge, resulting in the juror sitting on the panel, is structural error. In doing so, the Court recognized that, short of taping jury deliberations, there was no way to determine the impact of improperly seating the juror. Nevertheless, the only appropriate remedy was a new trial. Vreen, 143 Wn.2d at 930-31; see also United States v. Martinez-Salazar, 528 U.S. 304, 316-17, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (seating any juror who should have been dismissed for cause structural error); Gray v. Mississippi, 481 U.S. 648, 668, 107 S. Ct.

2045, 95 L. Ed. 2d 622 (1987) (improper “for cause” removal of juror in death penalty cases structural error).

Moreover, the Supreme Court has held that denial of a defendant’s right to public trial, where the court has closed even a portion of the jury selection process to the public, is not subject to harmless error analysis. Reversal is required. State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005); In re Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). This ensures preservation of both the defendant’s and the public’s right to open proceedings. See State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006) (recognizing individual and public rights).

Similarly, not only does the right to be present for all of jury selection protect the individual defendant’s right to fair trial, it “also rests upon society’s interest in due process. . . .” Sturgis v. Goldsmith, 796 F.2d 1103, 1108-09 (9th Cir. 1986) (quoting Bustamante v. Eyman, 456 F.2d 269, 274-75 (9th Cir. 1972)). “The defendant’s right to be present at all proceedings of the tribunal which may take his life or liberty is designed to safeguard the public’s interest in a fair and orderly judicial system.” Id. Just as reversal is automatic when the public is excluded from a portion of jury selection, the rule should be the same where the defendant is

improperly excluded from that process. There is no other satisfactory manner in which to ensure the individual's and the public's rights.

Courts in several other jurisdictions have determined that the defendant's exclusion from the process of selecting his jury requires reversal without an affirmative showing of prejudice. See United States v. Crutcher, 405 F.2d 239 (2nd Cir. 1968) ("there is no way to assess the extent of the prejudice, if any, a defendant might suffer by not being able to advise his attorney during the impaneling of the jury"; reversal required), cert. denied, 394 U.S. 908 (1969); State v. Carver, 94 Idaho 677, 496 P.2d 676, 679-680 (1972) (if the right to be present for jury selection "is to be upheld the only alternative is a retrial"); State v. Bird, 308 Mont. 75, 43 P.3d 266, 272 (2002) (errors involving selection of jurors "indelibly affect the fairness of the trial" and are not amenable to harmless error review); Williams, 52 A.D.3d at 96 (exclusion of defendant "constitutes per se reversible error where the prospective juror is either seated on the jury, excused on consent, or peremptorily challenged by the defense").

Even if this Court holds that the error in Price's case is not structural, reversal is still required unless the State can

demonstrate the constitutional violation of his right to be present was harmless beyond any reasonable doubt. See State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988) (requiring State to prove error in replaying testimony without defendant harmless beyond a reasonable doubt), cert. denied, 491 U.S. 910 (1989); Pruitt, 145 Wn. App. at 798-799 (applying same standard). Presumably, the only way in which the State could make this showing would be to demonstrate that none of the dismissed jurors could have served on Price's jury, which is not possible given the number of jurors released.

Price was looking at a maximum sentence of life in prison if convicted of murder. He should have been present during all of voir dire, as was his right, before potential jurors were removed from his panel. He was denied his constitutional right to be present at a critical stage of trial.

2. PRICE'S ABSENCE DURING THE REPLAY OF RECORDINGS FOR THE DELIBERATING JURY ALSO VIOLATED HIS RIGHT TO BE PRESENT FOR TRIAL.

"It is settled in this state that there should be no communication between the court and the jury in the absence of the defendant." State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d

466 (1983). “[I]t is improper for a trial court, without prior notice to the defendant, to replay a tape for a deliberating jury in the defendant’s absence.” Rice, 110 Wn.2d at 613 (citing Caliguri, 99 Wn.2d at 508). “[T]his error is one of constitutional dimensions, violating the defendant’s right to appear and defend himself in person and by counsel.” Rice, 110 Wn.2d at 613. Where, as here, a third party was present during the communication, reversal is not automatic. But the State must prove the error was harmless beyond a reasonable doubt. Rice, 110 Wn.2d at 614; Caliguri, 99 Wn.2d at 509.

There is nothing on the record indicating that Price knowingly, intelligently, and voluntarily waived his right to be present in the courtroom with jurors as they heard the evidence against him. Although defense counsel indicated she was waiving Price’s right to attend, she had no authority to do so. This was his right to waive, not hers.

Moreover, the evidence jurors wanted to hear again – the recordings of telephone conversations between Price and Mahler – was important. During one call, Price told Mahler he was “convinced that he’s [Jessup’s] hanging out somewhere” and Mahler did not challenge this assertion. 12RP 74; exhibit 102, at

02978. At another point, Price said he “didn’t do nothing” and that he had never even met Jessup. Again, Mahler did not challenge or correct him. 12RP 76; exhibit 102, at 02994.

The prejudice is that jurors were left to speculate that Price did not care enough about his trial to attend this portion of the proceedings or declined to attend based on his perception conviction was inevitable. “A jury may raise very damaging inferences from the bare fact that the defendant has somehow flown.” Commonwealth v. Kane, 19 Mass. App. Ct. 129, 472 N.E.2d 1343, 1348 (1984), review denied, 475 N.E.2d 401 (1985). Where a defendant has been present, but is then absent from the proceedings, the proper course is to instruct jurors “wholly to disregard the fact.” Id. (citing Taylor v. United States, 414 U.S. 17, 18, 94 S. Ct. 194, 38 L. Ed. 2d 174 (1973), aff’g United States v. Taylor, 478 F.2d 689, 690 (1st Cir. 1973); State v. Parham, 174 Conn. 500, 504, 391 A.2d 148 (1978)); see also People v. Brisbane, 205 A.D.2d 358, 613 N.Y.S.2d 368 (trial court properly instructed jurors not to draw any adverse inference from defendant’s absence), review denied, 645 N.E.2d 1230 (1994).

Price’s jury was never instructed to disregard his absence. Because the State cannot show his absence from the jury’s review

of evidence it deemed important was harmless beyond a reasonable doubt, his murder conviction must be reversed on this alternative ground.

3. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF PRICE'S GANG MEMBERSHIP.

It is well established that a defendant must only be tried for those offenses actually charged. Consistent with this rule, evidence of other bad acts must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982).

The prosecution's attempt to use evidence of bad acts must be evaluated under ER 404(b), which reads:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

The trial court must engage in a three-part analysis prior to admitting evidence under this rule. First, the court must identify the

purpose for which the evidence is being admitted. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Second, the court must determine that the proffered evidence is logically relevant to an issue. The test is "whether the evidence . . . is relevant and necessary to prove an essential ingredient of the crime charged." Saltarelli, 98 Wn.2d at 362. (quoting State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952)). Evidence is logically relevant if it is of consequence to the outcome of the action and tends to make the existence of the identified fact more or less probable. Saltarelli, 98 Wn.2d at 361-62.

Third, assuming the evidence is logically relevant, the court must determine whether its probative value outweighs any potential prejudice.⁹ Saltarelli, 98 Wn.2d at 362-63. In a doubtful case, "[t]he scale must tip in favor of the defendant and the exclusion of the evidence." State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987); State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983).

Admission of evidence under ER 404(b) is reviewed for an abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616

P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981). The trial court abused its discretion here.

As an initial matter, the gang evidence in this case is “bad acts” evidence under ER 404(b). The term includes “acts that are merely unpopular or disgraceful.” State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (quoting 5 K. Tegland, Wash. Prac., Evidence § 114, at 383-84 (3d ed. 1989)). Gang affiliation falls within this definition and is treated accordingly. See State v. Scott, 151 Wn. App. 520, 526-527, 213 P.3d 71 (2009) (admission of gang affiliation evidence “measured under the standards of ER 404(b)”); see also State v. Asaeli, 150 Wn. App. 543, 576-577, 208 P.3d 1136 (addressing issue under ER 404(b)), review denied, 167 Wn.2d 1001 (2009); State v. Campbell, 78 Wn. App. 813, 821, 901 P.2d 1050 (same), review denied, 128 Wn.2d 1004 (1995).

Because of the grave danger of unfair prejudice, evidence of gang affiliation is inadmissible under ER 404(b) unless the State establishes a sufficient nexus between the defendant's gang affiliation and the crime charged. Scott, 151 Wn. App. at 526; Campbell, 78 Wn. App. at 823.

⁹ Similarly, ER 403 provides, “Although relevant, evidence may be excluded if its probative value is substantially outweighed

Although Judge Armstrong's analysis under ER 404(b) is not a model of thoroughness, she found evidence of Price's membership in the Ghost Riders relevant for one purpose: to demonstrate that Ridley and Mahler initially failed to come forward with information on the murder out of fear members of the gang would retaliate against them. 3RP 118. Division Three has found that a witness's knowledge of a defendant's gang membership can be relevant to demonstrate why the witness did not initially come forward with information. See Scott, 151 Wn. App. at 528. But the probative value of Price's membership in the Ghost Riders was extremely slight. Even without any mention of gang membership, the State was able to portray Ridley and Mahler as reasonably fearful of the consequences of going to law enforcement with what they knew.

For example, Ridley testified that in the hours following the murder, Price warned her that if she said anything about what had happened, she would end up like Jessup. 9RP 29. She testified she did not go to police or turn over the letters for fear Price would find out and send one of his friends for her. 9RP 72; 10RP 121. She testified that Rebman arranged for her stay in Oregon for

by the danger of unfair prejudice”

about a month so that Price could not find her, and she briefly hid at Rebman's parents' home. 9RP 84-85, 95-97. She testified she feared for her safety even after Price's arrest and tried to stay on his good side so that he would not send someone to kidnap or hurt her. 9RP 102. She discussed the fact Price's friends would consider her a "rat" if they found out she talked to police, and her fear of the consequences. 10RP 9-10. She related an incident where Wick arranged a meeting with her under false pretenses, and pressured her not to say anything by indicating he had a gun and threatening to take her into the woods and shoot her. She lied to him and swore she had not told anyone, and he drove her to Marysville against her will to see Price. 9RP 82-83; 10RP 117-122. She also testified that she delayed revealing the letters Price had sent her from jail for fear one of his friends would come to her house and harm her. 10RP 121. All of this evidence was admissible without the need to tell jurors about Price's – and his friends – ties to the Ghost Riders Motorcycle gang.

As for Mahler, she conceded that neither Price, nor any other member of the Ghost Riders, ever threatened her concerning what she had seen. 13RP 39-40. Rather, all of her information concerning the Ghost Riders, and motorcycle gangs generally, had

come from her son – including the fact “they don’t leave witnesses.” 13RP 40. And, like Ridley, she could have testified to her fear of going to police – and fear of Price and his friends in particular – without any mention of gangs.

In short, the probative value of Price’s membership in the Ghost Riders – what it added to the jury’s consideration of the issues properly before them – was scant at best.

Judge Armstrong’s error occurred in weighing that slight probative value against the resulting prejudice. Judge Armstrong failed to properly appreciate the significant and inherent prejudice that results from admission of gang evidence. When defense counsel pointed out any juror who had read a book or been to a movie would know the significance of membership in a motorcycle gang, Judge Armstrong disagreed, responding that she did not believe everyone associated every motorcycle gang with the Hell’s Angels. 3RP 119. Moreover, Judge Armstrong believed that by calling the Ghost Riders and the other motorcycle gangs “motorcycle groups,” she could avoid the unfair prejudice resulting from the label “gangs.” 3RP 110-111, 117.

But not all of the witnesses remembered to comply with the attempted charade. See 12RP 40, 55 (Mahler refers to “motorcycle

gangs”); 17RP 147-148 (another witness does the same). And jurors were smart enough to recognize that when Detective Brown identified himself as an expert on “large groups that ride motorcycles,” he was an expert on motorcycle gangs. 15RP 197. Jurors even heard that Ridley had been trying to find “the Hell’s Angel book” for Price, dispensing with Judge Armstrong’s notion that jurors would not equate the Ghost Riders with that well-known gang. 10RP 82. Jurors are presumed to be “sensible and intelligent.” State v. Smalls, 63 Wash. 172, 183, 115 P. 82 (1911). They would have understood exactly what it meant to be a Ghost Rider – a propensity for violence and crime. Consistent with this understanding, they heard things like “motorcycle groups . . . retaliate” against witnesses [12RP 57], “motorcycle clubs . . . can become very violent” [12RP 77], and “bikers kill each other” [13RP 78].

The improper admission of gang evidence can be harmless, but only if, within reasonable probabilities, it did not materially affect the verdict. Scott, 151 Wn. App. at 529. There was no physical evidence tying Price to Jessup’s disappearance. Nor was there even a body, and Jessup’s neighbors may have seen or heard him after December 16. Ridley had more than one

reason to lie – Price’s assaultive behavior toward her, his relationship with another woman, and her desire to regain custody of her children. Moreover, her story of how Price killed Jessup changed depending on whether she was speaking with her mother, Rebman, or police. And the State’s other key witness – Judy Mahler – had proved herself unreliable with her criminal past. Given the inherent prejudice from the gang evidence, there is a reasonable probability it affected the jury’s verdict on the murder charge.

4. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO DEMAND A LIMITING INSTRUCTION.

Even if this Court were to conclude that Judge Armstrong did not err under ER 404(b) in admitting the gang evidence, it should find that Price was denied his right to effective representation and a fair trial when his attorney failed to ensure the jury received an instruction limiting consideration of the evidence to the narrow purpose for which it was admitted.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of

reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

a. Counsel's Failure to Demand an Instruction was Deficient.

Although legitimate trial strategy cannot form the basis for an ineffective assistance claim, trial strategy must be just that -- legitimate. Whether strategic or not, a tactic that would be considered incompetent by lawyers of ordinary training and skill in criminal law may constitute deficient performance. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

Generally, if evidence is admitted under ER 404(b), "a limiting instruction must be given to the jury." State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). In certain cases, however, counsel's decision not to seek a limiting instruction may be legitimate trial strategy. For example, where the evidence may have passed unnoticed by the jury, a reasonable attorney could conclude that an instruction reminding the jury of this evidence

would be more harmful than helpful. See State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (ER 404(b)); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447, review denied, 121 Wn.2d 1024 (1993) (ER 404(b)); State v. King, 24 Wn. App. 495, 500, 601 P.2d 982 (1979) (failure to take the stand).

But in a case where the other bad acts evidence was mentioned so frequently and where it would have so affected the jurors emotionally, there is no legitimate justification for failing to ensure the inclusion of a limiting instruction. Under the circumstances of Price's trial, counsel's failure to demand a limiting instruction was ineffective.

In fact, it appears counsel's failure was due to oversight rather than strategy. In arguing against the admission of evidence that Price belonged to a motorcycle gang, defense counsel recognized that if the evidence came in, the court would be required to give a limiting instruction to protect Price's right to a fair trial. See 3RP 104 (recognizing jurors would have to be told they could not use evidence to determine whether Price committed charged crimes). And three of defense counsel's proposed instructions deal with use of evidence admitted for a limited purpose. See CP 197, 208, 225. Yet, counsel failed to ensure

jurors would limit consideration of the gang evidence to its narrow purpose, i.e., why the two women did not come forward initially. 6RP 96-102; CP 241-296 (court's instructions). Whether purposeful or neglectful, this was deficient.

b. Price Suffered Significant Prejudice.

To establish prejudice, Price must show a "reasonable probability" that but for counsel's error, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 693- 94).

There is a reasonable probability here. As this Court has recognized, "it is of vital importance that counsel have the benefit of [a limiting] instruction to stress to the jury that the testimony was admitted only for a limited purpose and may not be considered as evidence of the defendant's guilt." State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990); see also State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (limiting instructions are both proper and necessary).

Jurors were expressly instructed they could not consider evidence of Price's domestic violence against Ridley for any

purpose other than establishing Ridley's state of mind. CP 250. The absence of a similar instruction for the gang evidence indicated to jurors they were free to use that evidence for any purpose whatsoever. "Absent a request for a limiting instruction, evidence admitted for one purpose is considered relevant for others." Lockwood v. AC & S, Inc., 44 Wn. App. 330, 344, 722 P.2d 826 (1986) (citing ER 105 and comment), aff'd, 109 Wn.2d 235 (1987). Jurors were free to conclude that because Price was an active member of a motorcycle gang, he had a propensity for criminal activities and therefore committed murder. In other words, jurors were free to conclude that Price was guilty of murder because "bikers kill eachother." 13RP 78. This is the very circumstance ER 404(b) is designed to avoid.

When one or more jurors may have considered gang evidence for an improper purpose, several courts have recognized that a new trial is the only sufficient remedy. See United States v. Roark, 924 F.2d 1426, 1430-34 (8th Cir. 1991) (defendant's association with motorcycle club causes jurors "to prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged"; convictions reversed); Ex Parte Thomas, 625 So.2d 1156, 1157-58

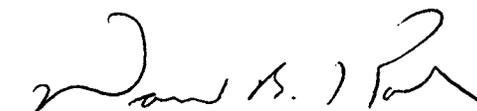
(Ala. 1993) (equating gang evidence with evidence of a collateral criminal act, which is presumptively prejudicial; murder conviction reversed); People v. Perez, 170 Cal. Rptr. 619, 622-23 (Cal. Ct. App. 1981) (gang evidence irrelevant and allowed guilt by association; convictions and life sentence vacated); State v. Stone, 104 Or. App. 534, 802 P.2d 668, 671-72 (Or. App. 1990) (purpose of gang evidence is to show that defendant is a bad person; conviction reversed). That is the only sufficient remedy here.

D. CONCLUSION

Price was denied his constitutional right to be present at every critical stage of trial. Evidence of his participation in a motorcycle gang, and his attorney's failure to ensure the jurors' limited use of this evidence, denied him effective representation and a fair trial. Price should receive a new trial.

DATED this 23rd day of December, 2009.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 63056-3-1
)	
JOHN PRICE,)	
)	
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 23RD DAY OF DECEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHN PRICE
 DOC NO. 716639
 WASHINGTON STATE PENITENTIARY
 1313 N. 13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF DECEMBER 2009.

x *Patrick Mayovsky*