

NO. 35019-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RYNA RA,

Appellant.

FILED  
COURT OF APPEALS  
07  
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STATE OF WASHINGTON  
BY 

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

The Honorable Frederick Fleming

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BRIEF OF APPELLANT

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#### A. SUMMARY OF APPEAL

Appellant Ryna Ra was tried for attempted first-degree murder for shooting a man on Tacoma's Ruston Way waterfront. The State's evidence of premeditation and intent was non-existent. Instead, the prosecutor injected his case with irrelevant and inflammatory suggestions of gang affiliation, gang culture, and gang motivation.

In closing argument, the prosecutor, relying on the same gang material, portrayed Mr. Ra as violent by nature, who by virtue of this nature, actively sought out people to kill. The prosecutor then invited the jury, as citizens of Pierce County and members of a "civilized society," to convict Mr. Ra - in order to combat gang-related gun violence.

Before trial, and numerous times throughout trial, the court appropriately ruled that gang evidence was to be excluded – reasoning that gang activity had nothing to do with Mr. Ra's case. Unfortunately, the trial court disregarded its own rulings, giving the prosecutor free reign to taint Mr. Ra's trial with irrelevant gang insinuations and argument.

Accordingly, although the State failed to present adequate competent evidence to support a verdict on premeditated intent, the jury convicted Mr. Ra anyway – relying on the State's misconduct.

Throughout trial and sentencing, the trial court failed to maintain the appearance of impartiality - engaging in argument with defense

counsel, vilifying and chastising the defendant, and pontificating on gang violence in America. The trial court consummated these actions by sentencing Mr. Ra to the maximum sentence of 351 months in prison.

On appeal, Mr. Ra argues that the above issues, and their combined effect, denied him his right to due process and to a fair trial. Mr. Ra seeks reversal of his convictions and remand for a new trial.

#### B. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error when it disregarded its own rulings and allowed irrelevant gang material and improper gang argument before the jury.
2. The prosecutor committed reversible misconduct when eliciting irrelevant gang testimony from witnesses and arguing gang theory in closing argument - despite consistent court rulings excluding gang evidence.
3. The State failed to present sufficient competent evidence of premeditation and intent for the charge of Attempted Murder in the First Degree.
4. The trial judge failed to display the appearance of impartiality.
5. Cumulative error denied appellant a fair trial.

#### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of prior bad acts is inadmissible under ER 404(b) where it is solely relevant to prove a defendant's propensity to commit the charged offense. Even where the evidence is admissible for some non-propensity purpose, it must be excluded if its prejudicial effect outweighs

its relevance. Where gang evidence was not relevant except to impermissibly imply that as an alleged associate of an Asian gang, appellant was likely to seek out opportunities to commit acts of violence – including murder, and the prosecutor relied on this improper purpose, did the trial court err in disregarding its own rulings excluding gang evidence?  
(Assignments of Error 1 and 2)

2. Arguments which appeal to jurors' general fear and repudiation of certain criminal groups as a reason to convict constitute reversible misconduct. Did the prosecutor's exhortation to the jury to convict the appellant in order to combat America's culture of violence improperly appeal to the jurors' fears, requiring reversal of the conviction?  
(Assignments of Error 1 and 2)

3. It is improper for a prosecutor to urge the jury to act as the conscience of the community or appeal to the community interest in ending a societal evil. Did the prosecutor's argument urging the jury, as citizens of Pierce County and members of a civilized society, to combat gangs and gun violence by convicting appellant deny appellant a fair trial?  
(Assignments of Error 1 and 2)

4. The State bears the burden of proving every element of the crime charged. Premeditation is an element of the crime of attempted first-degree murder and requires proof of "the deliberate formation of and

reflection upon the intent to take a human life,” and the “mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” Premeditation may be proved by circumstantial evidence only where the inferences drawn by the jury are reasonable and the evidence supporting the jury’s finding is substantial. The State’s evidence of appellant’s premeditated intent was non-existent. Should this Court hold the State failed to prove the element of premeditation, requiring reversal of the conviction? (Assignment of Error 3)

5. A judge must be and appear impartial. Where a judge disregards his own rulings to the detriment of the appellant, participates in argument against the appellant, chastises the appellant during evidentiary hearings, and contemplates collateral matters throughout trial and during the sentencing proceeding, does such impartiality deprive appellant of due process and require a new trial? (Assignment of Error 4)

6. Even where no single error standing alone merits reversal, the cumulative effect of multiple errors can be to create an enduring prejudice that deprives an accused a fair trial. Should this Court conclude cumulative error denied appellant a fair trial? (Assignment of Error 5)

#### D. STATEMENT OF THE CASE

##### 1. The charged incident

In the late evening of September 14, 2005, the appellant, Mr. Ryna

Ra, arrived in a Sport Utility Vehicle (SUV) at Tacoma's Ruston Way waterfront. RP 146:7-12. Mr. Ra was accompanied by three friends: Mr. Vuthy Chau; Mr. Samnang Bun (a juvenile); and, Mr. Dy Son. See RP 160:18 - 161:1. Mr. Chau was driving the SUV. RP 146:7-8. Mr. Ra occupied the front passenger seat. RP 146:23 - 147:1. Mr. Son occupied the left rear passenger seat behind Mr. Chau. RP 160:24 - 161:1. Mr. Bun occupied the right rear passenger seat behind Mr. Ra. RP 160:18-23. The four friends parked in a stall facing the waterfront. RP 151:20-21; RP 154:13-18.

Minutes later, Mr. James Huff, Ms. Vianna Cornatzer, Mr. Nick Serdar, and Ms. Ashley Suhovernik also arrived at the Ruston Way waterfront. RP 228:5-22. The four of them pulled up in two vehicles: Mr. Huff and Ms. Cornatzer in one car<sup>1</sup>; and, Mr. Serdar and Ms. Suhovernik in the other. RP 229:12-16. Their two vehicles parked next to each other. RP 229:17-24. It was approximately 10:00 p.m. RP 230:6-7.

Mr. Ra and his friends sat parked in the same lot. RP 230:21-24. One empty parking stall separated their SUV from the Huff/Cornatzer and Serdar/Suhovernik vehicles. RP 254:8-12. Neither Mr. Ra nor any of his friends had ever laid eyes upon Mr. Huff or any member of his group. See RP 589:20-23; RP 594:12-19.

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<sup>1</sup> Mr. Huff and Ms. Cornatzer were boyfriend and girlfriend. RP 226:8-15.

What happened next is best described through the trial testimony of the above eye-witnesses:

**a) State's Witness - Ms. Vianna Cornatzer:**

As Ms. Cornatzer's group exited their vehicles, she overheard some talking coming from the SUV. RP 230:21 - 231:1. Ms. Cornatzer believed the SUV occupants were commenting on her group. RP 231:4-6. However, Ms. Cornatzer heard nothing to cause her concern. RP 231:4-9.

After gathering on the waterfront, Mr. Huff and Mr. Serdar joined each other close to the water's edge, where Mr. Huff shined a flashlight. RP 231:13-16. As their boyfriends gazed out into the water, Ms. Cornatzer and Ms. Suhoversnik stood together and talked. RP 258:11-20.

The comments from the SUV continued, and Ms. Cornatzer heard someone make a comment about her rear-end ("nice ass"). RP 259:18-22. Ms. Cornatzer could not tell who in the SUV was making these comments. See RP 232:7-13.

Mr. Huff turned towards the SUV, exclaiming "What did you say?" RP 231:16-18; RP 262:17-24. Ms. Cornatzer could tell her boyfriend was angry. RP 232:15-16.

Mr. Huff began walking over to the SUV to confront its occupants. RP 233:18-25. Ms. Cornatzer tried to push him back. RP 233:18-25. Mr. Huff shoved his girlfriend to the side and continued his approach towards

the SUV. RP 234:1-7. Then, a shot rang out. See RP 234:15-24.

Ms. Cornatzer had her back to the SUV, and did not see who fired this shot – or where it came from. RP 232:19-22. However, as Ms. Cornatzer turned around towards the SUV, she saw the fire from a second shot, which shattered a window of Ms. Suhoversnik's parked car. RP 238:2-12.

When this second shot rang out, Mr. Huff was already up against the SUV, "right off to the left of the [front passenger] window." RP:239:2-5. In the same instant, Mr. Huff exclaimed "Oh, you're going to fucking shoot at me now?" RP 239:8-9. Mr. Huff then kicked the SUV. RP 239:8-12; RP 242:3-10. Then, a third shot was fired, and Mr. Huff walked away from the SUV, wounded. RP 239:25 - 240:1-5. Immediately after this last shot, the SUV drove off. RP 243:1-3.

According to Ms. Cornatzer, there was a total of three shots fired. RP 242:22-24. To Ms. Cornatzer, it seemed "like a split second" between the time Mr. Huff first started towards the SUV and the time the last shot was fired. RP 234:18-22.

**b) State's Witness - Mr. James Huff:**

When Mr. Huff's group arrived at the waterfront, he was the last one to exit the vehicles. RP 303:8-14. Mr. Huff lagged behind because he was putting batteries in his flashlight - so he could "shine it on the water."

RP 303:8-14. It took Mr. Huff between 20 and 30 seconds to complete this task. RP 303:23-25. After exiting the vehicle and rejoining his group, he heard "cat-calls" from the SUV - which he believed were directed towards his girlfriend (Ms. Cornatzer). RP 304:13-18.

Mr. Huff believed the cat-calls were coming from more than one person in the SUV. RP 304:22-24. Mr. Huff shined his flashlight into the water and grew aggravated by the cat-calls. RP 306:20-23. Mr. Huff then turned his flashlight on the SUV and its occupants. RP 334:7-18.

Mr. Huff became "fed up," and began walking towards the SUV, exclaiming, "What the fuck is your problem?" RP 307:10-13; RP 308:6-8. When Mr. Huff was five to ten feet from the SUV, a gun shot was fired from the SUV. RP 308:9-12. Mr. Huff did not see how the gun was being held when this shot was fired. RP 310:5-9. Mr. Huff continued his approach, and two more shots were fired. RP 308:12-14. Mr. Huff was two to three feet away from the gun at the time these shots were fired. RP 312:24 - 313:2. Mr. Huff then "ducked to the side" and "kick[ed] the gun." RP 308:14-16. Mr. Huff was struck by a single gun shot as he attempted to kick the gun. RP 352:10-15.

According to Mr. Huff, the sequence of events, "[H]appened so fast. It happened really fast. Like I just started walking up to them, and it was like, pow, pow." RP 310:1-4. Mr. Huff never saw who fired the gun

during the incident. RP 310:14-23.

**c) State's Witness - Mr. Nick Serdar:**

After everyone exited their vehicles and the cat-calls began, Mr. Serdar noticed Mr. Huff become angry. RP 448:18-23. Mr. Huff was so angry that Mr. Serdar, Ms. Cornitzer and Ms. Suhoversnik all tried to calm him down - placing their hands on him and pushing him away from the SUV. RP 448:18-23. Mr. Huff called out to the SUV "Let's get out and fight," or words to that effect. RP 453:16-19. Mr. Huff then "stormed" the SUV, and a shot rang out. RP 469:19-23. Mr. Huff was 20 feet away from the SUV when the first shot was fired. RP 468:3-6. At this, Mr. Huff started running towards the SUV. RP 469:17-19. More shots were fired. RP 452:16-17. According to Mr. Serdar, a total of three shots were fired, all in "semi-rapid succession" as Mr. Huff ran towards the SUV. RP 452:3-23. Mr. Huff was struck when he was a "leg-length" away from the SUV. RP 455:12-16. Mr. Huff kicked wildly at the vehicle. RP 455:1-7.

Mr. Serdar saw a handgun pointed up and outwards from the rear passenger window during the incident. RP 464:2 - 465:6. Mr. Serdar was certain that the gun shots came from the back seat passenger side of the SUV. RP 451:2-14. Mr. Serdar was certain he could clearly see Mr. Ra seated in the rear passenger's seat. RP 470:24 - 471:2.

Mr. Serdar testified that during the incident all the gun shots were fired in "less than a couple of seconds." RP 452:18-23.

**d) State's Witness - Ms. Ashley Sohovernik:**

Ms. Sohovernik also heard the cat-calls as her group assembled on the waterfront. RP 386:1-4. However, Ms. Sohovernik did not see any guns or see anyone fire any shots. RP 390:11-13. Ms. Sohovernik had her back turned to the SUV during the incident. RP 390:10-18. Ms. Sohovernik did hear three gun shots. RP 392:11. Ms. Sohovernik at first believed she was hearing fireworks. RP 391:25 - 392:2. Ms. Sohovernik testified that the incident happened "quickly." RP 392:15-18.

**e) State's Witness - Mr. Dy Son:**

When Mr. Huff's group arrived at the waterfront, Mr. Bun's cat-calling began. RP 589:24 - 590:11; RP 594:20-25. Mr. Huff, in response to the cat-calling, shined a flashlight at the SUV. RP 595:12-16. In response, Mr. Ra fired a shot up into the air. RP 599:1-5; 622:20 - 623:6.

Mr. Huff began "sprinting" towards the SUV. RP 599:6-10. Mr. Huff held his flashlight as he ran. RP 621:8-12. Mr. Huff reached the SUV and tried to yank open the front passenger door (Mr. Ra's door). RP 599:12-20. As he did this, Mr. Huff also kicked at the SUV door. RP 602:15-19. It appeared to Mr. Son as if Mr. Huff was trying to attack Mr.

Ra. RP 600:1-11. Mr. Son had his head down in fear when the other shots were fired. RP 602:20-24.

Mr. Son testified that no one in the SUV ever encouraged Mr. Ra to fire the gun, nor was there ever any discussion about using a gun prior to any shots being fired. RP 610:6-11.

**f) State's Witness - Mr. Samnang Bun:**

Mr. Bun was the only one making cat-calls to Mr. Huff's group. RP 779:3-11. In response, Mr. Huff yelled back towards the SUV and shined the flashlight on the SUV. RP 769:19 – 770:23. Mr. Bun laughed at Mr. Huff. 773:16-18. Mr. Bun enjoyed aggravating Mr. Huff. RP 773:21-25. Mr. Huff began running towards the SUV and Mr. Ra fired a single shot up into the air. RP 780:2-16. Mr. Huff kept running towards the SUV, and Mr. Ra fired more shots. RP 781:2-24. According to Mr. Bun, three shots in total were fired, the third one hitting Mr. Huff. RP 782:1-5. Mr. Huff was grabbing at Mr. Ra through the open SUV window and kicking the SUV door when he was struck. RP 782:9-25.

**g) State's Witness - Mr. Vuthy Chau:**

Mr. Chau observed Mr. Ra shoot his gun three times during the incident. RP 161:10-11. Mr. Ra pointed his gun into the air on the first shot. RP 169:5-10. Mr. Chau testified that Mr. Huff was kicking at the

SUV when the remaining shots were fired. RP 174:9-15; 187:3-23. Mr. Huff was struck after he began kicking the SUV. RP 171:19-24.

**h) Defense Witness – Mr. Ryna Ra:**

Earlier in the evening, Mr. Ra and his friends had abandoned their plans to go out for a late dinner, and instead drove to the Ruston Way waterfront. RP 807:13-25. Mr. Ra and his friends had been parked about ten minutes when Mr. Huff's group pulled up. RP 808:2-10.

After Mr. Huff's group exited their vehicles, Mr. Bun began cat-calling the girls in the group. RP 808:23 - 809:1. Mr. Ra did not participate in the cat-calling, and it appeared as though Mr. Huff's group was ignoring Mr. Bun and walking off along the waterfront. RP 809:5-10.

However, the group stopped and the males began yelling back towards the SUV. RP 809:10-22. Mr. Huff began shining a flashlight on the SUV, and Mr. Ra yelled at him to stop. RP 810:13-23. The two groups were about 30 to 40 feet away. RP 811:5-8. Mr. Bun continued his taunting, and the yelling increased from the other group. RP 811:18-25.

Mr. Ra observed the two women in Mr. Huff's group holding him back from the SUV. RP 812:10-13. Mr. Huff shoved the girls away and rushed the SUV. RP 812:13-15. Mr. Ra fired a "warning shot in the air" to scare off Mr. Huff, but Mr. Huff kept running towards the SUV. RP 812:13-17. Mr. Huff jump-kicked the SUV, and Mr. Ra fired two more

shots - aiming away from Mr. Huff. RP 812:19-22. Mr. Ra did this to demonstrate that he had a real gun. RP 812:21-22. Mr. Ra did not intend to shoot Mr. Huff, but was trying to scare him away. RP 813:6-11.

Mr. Huff next tried to open Mr. Ra's door. RP 813:1-3. As Mr. Huff tried to open the door, he also grabbed Mr. Ra's arm. RP 860:17-25. Mr. Ra fired a fourth time, striking Mr. Huff. RP 813:16-17.

Mr. Ra testified that he never, at any point, intended to kill Mr. Huff. RP 813:25-814:3. Mr. Ra testified that he thought the first shot would scare Mr. Huff off, and was frightened when it did not. RP 861:13-14. Mr. Ra testified he did not know what to do to defend himself when Mr. Huff reached the SUV. RP 861:13-14.

2. Procedural History.

On September 16, 2005, the State of Washington charged Mr. Ra with one count of Assault in the First Degree with a firearm enhancement (see RCW 9A.36.011(1)(a); RCW 9.94A.310/9.94A.510), one count of Drive-by Shooting (RCW 9A.36.045(1)), and two counts of Unlawful Possession of a Firearm (RCW 9.41.040(2)(a)(i)). CP 1-4<sup>2</sup>.

On the same day, the State charged every other occupant of the SUV (Mr. Chau, Mr. Son and Mr. Bun) with Assault in the First Degree

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<sup>2</sup> There were two guns connected to the SUV that evening – one belonged to Mr. Bun. See RP 579:13-22; RP 736:14-25. The second unlawful possession of a firearm count charged against Mr. Ra was dismissed for insufficient evidence after the close of the State's case. See RP 872:5 – 874:20.

with a firearm enhancement and with Drive-by Shooting. Mr. Son and Mr. Bun were also each charged with two counts of unlawful possession of a firearm in the second degree. See Appendix A.

On March 8, 2006, Mr. Bun pled guilty to a single charge of unlawful possession of a firearm in the second degree. See Appendix B. This was in exchange for his testimony in Mr. Ra's trial. See Id.

On the same day, Mr. Son also pled guilty to a single charge of unlawful possession of a firearm in the second degree. See Appendix C. This was in exchange for Mr. Son's testimony. See Id.

On March 13, 2006, the State dismissed all charges against Mr. Chau without prejudice. Appendix D. The dismissal order, submitted and signed by the State read "[T]he State will not be able to prove that [Mr. Chau] acted as an accomplice to Mr. Ra[.] [Mr. Chau] is cooperative and has agreed to testify in the case of Rina Ra [sic]." Id.

Three days later, on March 16, the State filed an Amended Information against Mr. Ra, striking the charge of Assault in the First Degree, and replacing it with Attempted Murder in the First Degree with a firearm enhancement (See RCW 9A.32.030(1)(a); RCW 9.94A.310/9.94A.510). CP 39-41. No amended Statement of Probable Cause accompanied the amended information. See CP 39-41. There is

nothing else in the record indicating what inspired the state to file this amended information. See CP 1-242.

On May 8, 2006, the trial court heard motions in limine. The exclusion of “gang evidence” was addressed, and defense counsel confirmed that the State would not be seeking to introduce any such evidence at trial.<sup>3</sup> RP 22:19-25. On the same day, defense counsel filed a written motion in limine, moving to exclude any “bad act” evidence per ER 404(b). See CP 47-48.

3. Trial.

Opening statements commenced on May 9, 2006. See RP 59.

The State called Detective John Bair as a witness. Before asking detective Bair about his participation in Mr. Ra’s case, the prosecutor elicited the following:

Q: Are you presently in a specific unit of the Tacoma Police Department?

A: Yes.

Q: What unit are you in?

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<sup>3</sup> [Defense Counsel]: There’s one other issue. I just want to make sure the State and I are on the same page. There was also some additional discussion about gang evidence. I understand the State is not going to be seeking –  
The Court: He said that the other day.  
Defense Counsel: Okay.  
RP 22:19-25.

A: I'm in the gang unit.

...

Q: Now, in any type of unit that you're in, how is a case – how is your attention brought to a specific case?

A: The cases are assigned to our division based on whether they're a crime against person or a crime against property. Once they're assigned, then there's some divided [sic] into the specific unit that the crime that took place. Our sergeant reviews them and then assigns them to the detective, and then we review them and work them on probability factors.

Q: So, when you say a sergeant reviews them, is that before you are actually assigned a case?

A: That's correct.

RP 714:25 - 716:3.

The prosecutor continued with detective Bair:

Q: So, the patrol officers respond to the actual scene of the incident, once 911 is called?

A: Correct.

Q: And they generate reports?

A: Correct.

Q: Do you then get those reports through your sergeant?

A: Correct.

Q: Do you review those reports before deciding to take any action on the case?

A: Yes.

RP 717:16 -25.

The prosecutor next called Mr. Bun to the stand, eliciting that he and Mr. Ra both were carrying guns at the time of the incident. RP 737:3-

7. The prosecutor asked:

Q: What is the reason that you and Mr. Ra took firearms with you in that vehicle?

[Defense objection; overruled.]

A: I don't know. We – just to have it on us.

Q: Why?

A: Because – I don't know. Just to have it on us.

Q: Just to have loaded weapons on you; is that right?

A: I mean, you know –

Q: I can't hear you. I'm sorry?

[Defense objection - asked and answered, badgering; overruled.]

A: Because protection.

Q: Protection? Were you afraid of being hurt by somebody or killed by somebody before you left that evening?

A: No.

Q: So, protection. What do you mean then?

A: As in like someone might try to harm you or something.

Q: Might try and harm you with another gun?

A: [Yes].

Q: Okay. Did you believe that there's a possibility that evening that you might be shot?

A: No.

Q: Well, then I'm still trying to understand. You said protection from harm. And I asked, "Do you mean that somebody else would shoot you?" And you said "yes." Is that right?

A: No.

Q: Okay. Well, explain again then. Why did you have the guns that evening?

[Defense objection - asked and answered; overruled.]

Q: Mr. Bun, was it because that's what you do, carry guns?

[Defense objection - argumentative and leading.]

A: No, that's not what I do.

The Court: Wait a minute. I'm going to overrule the objection. I'm going to allow the question. There was an answer and it was – read it back. I will ask the court reporter to read it back.

Q: Isn't it true that when you carry a gun and you're with Mr. Ra and you know he has a gun, and with your other friends, you know that you're prepared and nobody messes with you; correct?

A: No.

Q: No? Then you need to explain why you had weapons in that car, loaded weapons.

A: Well, yeah, you could say it.

Q: Okay. You go out this evening and your mind is, if anything happens, you can handle it; right? Right? Why is it difficult to answer these questions? Are you afraid of getting in trouble?

A: No.

Q: Why is it difficult to answer these questions? Is there a loyalty involved?

A: (Shook head negatively.)

Q: No?

A: Can you say that question again?

Q: Okay. The original question was: Why are you carrying guns this evening, September 14, 2005, when you went to Ruston Way in that car? That's not a hard question, is it?

A: Shook head negatively).

Q: Is it difficult to answer, though?

A: Protection.

Q: Pardon me?

A: Protection. I mean, I said it earlier.

Q: Okay. And so then my follow-up question was, you had those guns and, thus, you and your friends were prepared for anything that might happen that evening, correct?

A: Yeah. Yes.

Q: Including, if you saw some people that might want to kill you or hurt you, you were ready for them; correct?

A: Yes.

Q: All right. Did you go out that evening with an intent to shoot anybody or anything?

A: Uh-uh (Indicate negatively).

Q: You didn't go –

Q: No.

Q: You didn't go out there with a plan to shoot someone or something?

A: No.

RP 743:12 - 747:12

The prosecutor then asked Mr. Bun why Mr. Ra shot Mr. Huff. RP 748:25. Not waiting for an answer, the prosecutor continued:

Q: Sam, isn't it true that this person made the mistake of responding to what you and your friends were doing?

A: Yes

RP 749:1-7.

The State continued this line of questioning:

Q: And you and your friends don't – at least on this evening, you don't have to take anything from anyone. You've got guns. You're in charge. Correct?

RP 750:5-7

[Defense objection to form; overruled.]

During cross-examination of Mr. Bun, defense counsel asked Mr. Bun if he had ever known of anyone who had been shot. RP 755:15. The State immediately suggested to the court that the door had been opened to gang evidence. RP 755:1-24. The court replied "he's answered," and

instructed defense counsel to ask the witness another question. RP 755:25. Defense counsel asked the witness about his knowledge of high school shootings. RP 756:2-4. The State objected, and the trial court excused the jury. RP 756:5-8.

During its proffer for the admission of gang evidence, the prosecutor questioned Mr. Bun about his gang affiliations. See RP 756:16 – 759:20. While Mr. Bun acknowledged having some gang ties, nothing was asked about Mr. Ra or any possible gang affiliations of his. Indeed, Mr. Ra was never mentioned during the exchange. See RP 756:16 – 759:20. After questioning Mr. Bun, the prosecutor argued:

[T]his person is armed because he is either affirmatively going to shoot or he has already shot against the Bloods and he needs to protect himself. And the State has strong evidence that it's the former[.] So, it's a reasonable inference that they were out to shoot again.

RP 761:17-25.

After hearing from defense counsel, the court opined:

[T]his is a highly prejudicial issue about gangs. The Court has already ordered that the issue of gangs not be part of this trial. This trial is against Mr. Ra that he allegedly shot somebody. And to the best of our ability, we're going to referee this thing so that it's fair to both sides. And you're treading, [Defense counsel], in my opinion, on very, very thin ice. I think you're potentially opening the door for some thing that is terribly prejudicial and unfair to the defendant, Mr. Ra, so we're going to stay away from that.

RP 764:1-12.

On May 17, 2005, prior to calling Mr. Ra to the stand, defense counsel again addressed the court regarding gang evidence:

Your honor, the gang evidence and mention of the gang is obviously a very touchy subject, and I don't want to open the door and my client doesn't want to open the door. We don't believe that there's any evidence that Mr. Ra is actually in a gang or even associated with a gang.

See RP 795:7 - 800:25.

Defense counsel explained that his concerns centered on the "protection" issue brought up by the State as to why Mr. Ra had a gun during the incident. Defense counsel posited that someone can carry a gun without being in a gang. See RP 795:23 – 796:14. After hearing argument from both sides, the court cautioned defense counsel about asking Mr. Ra on direct examination as to why he had a gun. See RP 800:3-24.

After Mr. Ra's direct examination, the State again argued for the admission of "gang" evidence. See RP 814:12-817:17. The court asked for briefing on the matter. RP 817:7-12. The next day, defense counsel submitted a "Memorandum in Support of Motion to Exclude Gang Evidence." See CP 136-148. On May 18<sup>th</sup>, the trial court reviewed briefing from both parties and heard oral argument:

Defense Counsel: The State has indicated that it wants to use the gang evidence for motive and premeditation and res gestae. That would mean there must be a logical

connection between the shooting and some type of gang activity. So, if we walk through those things analytically, we say, premeditation, Mr. Ra is loosely associated – has a friend that's loosely associated with a gang, and that shows he premeditated an attempted murder, the facts of which are catcalls by somebody other than Mr. Ra, there's an angry response by that girl's boyfriend, some words are exchanged by somebody other than Mr. Ra, that individual charges the car and is shot. There is no gang relationship there whatsoever... Res gestae? The same thing. Motive? What would the motive be in this case as regards gang membership? Mr. Ra is trying to shoot nobody [sic] in order to join a gang? No facts even remotely support that...The idea that this shooting is even remotely connected to a gang activity is preposterous.

See RP 828:4 – 829:5

The Court:           What about some distorted feeling or motivation that they're big men, that they're very important people and they want to show the rest of their friends that they can take a weapon that makes them ten feet tall and kill somebody or attempt to kill somebody; and we're showing off for those in our gang, in our group, just how big we are; and we live in a free country and we can get away with it because this country is based on fundamental rights and based on non-violent behavior and freedom, and everybody is free to be in the neighborhood and go for a walk on the pier and not be subjected to some distorted character who breeds and lives violently –

Defense counsel:    That's the type of 404(b) allegations –

The Court:           -- and gets away with it because we live in a free country that protects individual rights.

Defense counsel: He doesn't get away with it.

The Court: Well, they get away with it time and time again.

RP 829:9 – 830:2.

The trial court engaged defense counsel in lengthy argument regarding 404(b), with the court concluding that “People get away with this type of activity because we live in the United States of America; Sooner or later there's going to be a comeuppance for that type of activity.” See RP 825:5 – 836:10.

The court then heard from the prosecutor:

Your honor, defense counsel misses the entire point. The State did not offer the evidence initially because it was not, and the State contends to this day it is not, a gang-motivated crime.

...

The motivation, he says he didn't mean to hit him with the gun, he meant to scare him, and when he – the victim tried to open the door, he got shot. And I'm staying away from – what I briefed and I guess what I have decided in the meantime to stay away from, because, I don't want to just open it up to a longer trial and more and more stuff, but I think it is accurate that the reason he shot was to elevate his status among his peers.

The Court: Bravado, distorted importance.

The State: That's right, and that's elevating his status. And in a gang situation, there are no elected leaders. The leaders are those who are most violent. The most respected gang leaders are those that are feared the most, those that actually use the gun.

RP 836:12-15; RP 846:5-18.

The Court: But it still gets back, Mr. Greer, to whether this court under the law, can admit gang evidence, gang association evidence... The issue is his association, in my mind, his association with gangs. And a reasonable person hearing all this can have but one conclusion. The question is, is that admissible? And it's not....

The State: The part I just talked about is not.

The Court: Because we live in this country.

The State: And I agree with the court.

The Court: And it is abused by many people.

The State: Judge, if I can just finish and I will be done.

The Court: Don't shake your head up and down at me as if you are agreeing with me.

Mr. Ra: I'm just –

RP: 846:19 – 847:12.

The court again ruled that any gang material would be excluded.

See CP 136-156; see also RP 825-848.

At closing argument, the prosecutor argued that America's culture of violence motivated Mr. Ra to commit premeditated murder:

There's only one cultural issue involved in this case, and that's the culture of America. That's the culture of violence. That's the culture that says somebody who is a convicted felon, who is not yet 20 years old, doesn't care whether he's been convicted four times, he finds a way to get a weapon[.] And why does somebody like that, in our day and age, want a weapon? Probably because of

our culture. Probably because of the music, because of the attitudes, because of everything you can think of[.]

RP 908:24 - 909:11

The prosecutor told the jury that a desire to “elevate” his status and be the “baddest of the bad” amongst other “bad guys” prompted Mr. Ra to shoot Mr. Huff:

There were three people with the defendant. That also reflects on his state of mind because he’s buttressed. His status is elevated. When he acts as a bad guy in front of these other bad guys – and I say that because two other of those guys are felons[.]

And if one of those guys shoots and kills somebody or hurts somebody badly, the others don’t say, oh, my God, what did you do? No. It elevates the status of that person. He’s the baddest of the bad.

That’s the culture. It’s not a big deal somebody got shot. It’s all about protecting themselves. It’s all about now we’re in trouble. Now we’ve done something. Now I’ve been with somebody who did something, but I’m not gonna snitch, because that’s the culture, too.

RP 912:13-17; 912:24 - 913:2; 913:13-17

During his rebuttal, the prosecutor argued to the jury:

I mean, people actually do shoot to kill people. Happens all the time. People actually commit very serious, heinous crimes against other people for little or no reason. Happens all the time.

RP 931:5-9

Defense counsel objected, citing passion for unrelated incidents, and the court overruled the objection. RP 931:10-12. The State continued,

adding that it was defense counsel's job to "twist" and "turn" the evidence:

And thus you have to understand that this is our system where it's an adversary system and the defense does everything he can – it's his job – to minimize the impact of the evidence, to turn everything and twist it completely.

RP 931:13-17.

The prosecutor again told the jury that Mr. Ra's desire to be leader of his group motivated him to "shoot for no reason:"

And I would suggest that the evidence supports that [the defendant] is the instigator, he is the leader of this group by virtue of what he does, shooting for no reason.

RP 931:22-25

The prosecutor next told the jury that Mr. Ra and his friends were "violent people," and the jury, as civilized members of Pierce County, should not put up with it:

Words can be violent... When used in the manner that these people are using them, it suggests that these people are violent people. Nobody in civilized communities, and especially in Pierce County, should accept that what these people were saying and doing is normal activity for teenagers... They're violent and they're disruptive[.]

RP 932:19 - 933:1.

The State continued its commentary on civilized society. See RP 933:20 - 934:16. The State argued that Mr. Ra's case was about chivalry, protecting women, and fighting against intimidation and cowardice:

“That’s what our culture should be, but we’re too afraid if somebody flips you off in a car, don’t do anything honey, he might have a gun.” See RP 933:20 – 934:16.

4. Jury Verdict and Sentence.

On May 19, the jury convicted Mr. Ra of attempted first-degree murder and found by special verdict that he was armed with a firearm when the crime was committed. See RP 956-959; CP 189; 193. The jury also convicted Mr. Ra of drive-by shooting and the remaining count of unlawful possession of a firearm in the second degree. See RP 956-959; CP 191-92.

Sentencing was held on June 16, 2006. See RP 968. The prosecutor began:

Your honor, before I make the State’s recommendation, I know during the trial and outside the jury’s presence I made a pretty long statement pretty much as to what this crime represents in our society. And briefly I just want to repeat, because I am recommending the high end, why the high-end is appropriate in this case.

...

So, this has been a very emotional case both at trial and in all other aspects and I believe it does add to the overall picture of what’s happening in Pierce County and Tacoma and what’s happening nationwide[.]

So, the State is requesting the high end, which is 291 months, plus 60 months for the firearm, which is 351 months total[.]

And the last thing I want to say, Your Honor, is I just think that there should be some sort of public acknowledgement that Mr. Huff has survived both of these events, and the State appreciates at least his service, and the State also appreciates how respectful and how honest he's been throughout the proceedings.

He's too humble, he's too average and respectable to complain and tell the court really how serious this crime and Iraq has affected him. Thank you.

RP 972:1-6; RP 974:7-10; RP 974:19-21; RP 975:4-9; RP 975:13-17.

During the defense presentation, counsel noted:

Also, it's important to note that when we talked to the jury afterwards, they were speculating about gang evidence and Mr. Ra's gang affiliation, despite the Court's pretrial rulings and rulings during the middle of trial.

Also[,] in talking to the jury I talked to them about the intent, where did the jury find the intent that Mr. Ra has to kill? And both [the prosecutor] and I heard the jurors say that when he purchased the gun two weeks prior to the incident, that's where they found intent. That is the kind of evidence that the jury was relying on to convict Mr. Ra, and that's inappropriate.

RP 976:7-10; RP 976:13-19.

When defense counsel spoke about Mr. Ra's family history, including that Mr. Ra came from a hard-working and law-abiding background, the court interjected:

The father followed the American way and made a good life for himself. That's the same life and American way that Mr. Huff was trying to protect in Iraq, correct?

See RP 979:18 - 980:9.

After the conclusion of argument from both sides, the court reflected:

What occurred at Les Davis Pier [Ruston Way] in this city was reprehensible. There was no need for it other than some distorted, in my mind, belief regarding bravado that I'm a big man, that I'm very important, I'm gonna show off for my fellow compatriots, the other three in the car, the four of you. And, unfortunately, the victim of all this attention is a young man who I'm convinced did have the greatest motives to protect his country, got blown up in Iraq, his fellow soldiers, some of them died. He came back and gets shot and almost killed in this country he is trying to defend. It's reprehensible.

RP 992:25 – 993:10.

Not surprisingly, the Court followed the State's recommendation for Mr. Ra and ordered the high-end sentence of 351 months in prison. RP 993:15-17; CP 212-19. Mr. Ra timely filed a notice of appeal. CP 227-28.

#### E. ARGUMENT

1. THE TRIAL COURT ERRED IN DISREGARDING ITS OWN RULINGS AND ALLOWING IRRELEVANT AND UNDULY PREJUDICIAL GANG MATERIAL BEFORE THE JURY.

Prior acts evidence is admissible under ER 404(b)<sup>4</sup> only if it is offered for some purpose other than to prove the defendant's propensity to commit the charged crime and is relevant for that purpose. Therefore,

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<sup>4</sup> ER 404(b) provides,

**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, or absence of mistake or accident.

before a trial court may admit evidence of other crimes or misconduct, it must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant to prove an essential ingredient of the crime charged; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001); ER 403. Any doubt regarding admissibility must be resolved in favor of the defendant. State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). An error in the admission of prior acts evidence is reviewed for an abuse of discretion. Thang, 145 Wn.2d at 642. ER 404(b) applies to gang evidence See State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050, rev. denied, 128 Wn.2d 1004 (1995).

In Campbell, a prosecution for first-degree murder and conspiracy to commit first-degree murder, the Court of Appeals upheld the admission of evidence relating to gang culture, gang activity, gang affiliation, and gang-related narcotics trafficking. Campbell, at 822-23. The Court of Appeals determined that the evidence had established an extensive and escalating history of hostilities between the defendants, who were confirmed Los Angeles-affiliated “Crips” gang members and the victims,

who were confirmed Bremerton-area “Crips.” *Id.* at 815-17. The Court of Appeals held that the State presented sufficient evidence to warrant admission of the evidence since the State established the killings were “the result of rival gang activity; that the victims had shown disrespect for the defendants and had intruded on the defendants' drug selling turf [and] showed that in gang culture, these are grounds for retaliation and murder.” *See Id.*, at 822.

In other words, the Campbell court held that gang evidence was relevant to show the defendant’s premeditation, motive, and intent. In so holding, however, the Court of Appeals noted that the trial court carefully limited the admission of gang evidence, excluding matters it considered more prejudicial than probative. For example, the trial court excluded expert opinion evidence that gang members ordinarily carry and use guns. *See Id.*, at 818.

In State v. Boot, 89 Wn. App. 780, 950 P.2d 964, rev. denied, 135 Wn.2d 1015 (1998), the defendant shot a young woman in the face and was prosecuted for aggravated first-degree murder. The defendant acknowledged that he was a gang member. Boot, 89 Wn.App. at 789. Furthermore, evidence established that two days prior to the killing, the defendant had put a gun up against another woman’s head, as his associates teased that he was “too much of a baby” to shoot someone. *Id.*,

at 789. The Court of Appeals held that evidence of the defendant's gang membership, the prior gun incident, and expert testimony that killing someone elevated a gang member's status was relevant to prove premeditation. *Id.* at 789-90; accord United States v. Santiago, 46 F.3d 885, 889 (9th Cir. 1995) (gang evidence admissible to establish motive because defendant was told he would need to kill someone to become a member of the "Mexican Mafia"), cert. denied, 515 U.S. 1162 (1995). The Court of Appeals discussed the relevance of the gang evidence as applied to the facts presented at trial:

[K]illing someone increased a gang member's status and the defendant was a gang member. This shows premeditation since it suggests he had a deliberate intent to kill Ms. Reese to gain higher gang status. Mr. Boot's prior acts involving a gun demonstrated his escalating gun use in the context of his quest for higher gang status and was also evidence of premeditation.

The evidence was sufficient to establish premeditation. Mr. Boot's motive was shown by his prior use and possession of the murder weapon in the two days before the killing, his gang membership, and the high status accorded to a gang member who kills. The evidence established Mr. Boot, as well as Jerry, had used the gun in the several days before the shooting. The Boots abducted Ms. Reese, forced her back into the car, and took her to a remote location before committing the murder. These acts showed stealth. The shooter was in the front-either in the driver's or passenger's seat-and fired point blank at Ms. Reese, who was sitting in the back directly behind the driver. Ms. Reese was shot three times in the face. Conscious reflection and deliberation were shown by the method of killing. The evidence was sufficient for the jury to find premeditation.

*Id.*, at 789-90; 791-92 (see also, argument, section 3).

In the instant case, in contrast to Campbell and Boot, there was no competent evidence admitted that Mr. Ra was either in a gang or affiliated with a gang. Furthermore, there was no competent evidence that gang activity motivated the shooting.

Therefore, the trial court appropriately ruled – before and throughout trial – to exclude any so-called gang evidence. However, the court nonetheless allowed the prosecutor, through his direct examination of detective Bair<sup>5</sup> and Mr. Bun, to present this as a gang shooting to the jury. First, the prosecutor eagerly elicited detective Bair’s “gang unit” expertise and his hearsay testimony that various gang unit professionals determined Mr. Ra’s was a gang case. See RP 714:25 – 717:25. Second, the prosecutor’s testimonial questioning of Mr. Bun – i.e. - “[W]as it because that’s what you do, carry guns?... Isn’t it true that when you carry guns and you’re with Mr. Ra and you know he has a gun, and with your other friends[,] nobody messes with you; correct? Why is it difficult to answer these questions? Is there a loyalty involved?” See RP 743:12-750:7 - was designed to create an inference that Mr. Ra, along with Mr. Bun and everybody else in the SUV, were gang members prone to

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<sup>5</sup> Washington courts have uniformly recognized that the opinion of a government official, especially a police officer, may unduly influence the jury. State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518 (2004); State v. Jones, 117 Wn. App. 89, 92, 68 P.3d 1153 (2003).

unprovoked acts of gun violence.

Of course, this material became the theme of the prosecutor's "baddest of the bad" closing argument. (See argument, section 2).

In the remarkably similar case of United States v. Roark, 924 F.2d 1426 (7th Cir. 1991), the trial court allowed the prosecutor to improperly inject Hells Angels gang material into evidence. Realizing its mistake, the trial court commented:

The testimony of Mr. Tait and Mr. Heald was very damaging testimony; but frankly, it did not go really to the guilt or innocence really of the defendant in this lawsuit. It went to the general reputation - I will put it this way - of the Hells Angels Motorcycle Club. And you had all sorts of evidence concerning the association of the co-defendants in this case, and the fact that they were all members of this club, all but Bredel, that could have come out without any problem. But when you start getting into evidence that all members are involved in criminal activity and that they deal in methamphetamine and cocaine distribution and manufacture, that sort of thing is extremely damaging and was not needed in this lawsuit... I'm wanting to kick myself for letting it come in because certainly I could have kept it out under rule 403.

Roark, 924 F.2d at 1433.

The 8<sup>th</sup> Circuit Court of Appeals responded:

One statement, damaging but isolated, is easily remedied through a limiting instruction. The government cannot, however, in its case-in-chief, introduce evidence of Appellant's unsavory character merely to show that he is a bad person and thus more likely to have committed the crime. In this case, the jury could not disregard the entire theme of the trial: guilty by association...

[T]he trial judge still faced the issue of the government improperly injecting the Hells Angels Motorcycle Club into the case, virtually

as an uncharged defendant. [T]he government ignored the correct instruction given by the court and continued to harangue the jury about the alleged institutional criminality of the Hells Angels Club. We find these actions on the part of the government to be reversible error.

Id, at 1434.

As in Roark, in the instant case, the trial court's error in allowing prejudicial gang material infringed Mr. Ra's right to due process and a fundamentally fair trial. U.S. Const. amends. 5; 14. This Court must reverse the conviction unless the Court is persuaded, beyond a reasonable doubt, that the error was harmless. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The State cannot prove the error was harmless. Because the trial court allowed the jury to hear detective Bair's and Mr. Bun's irrelevant "gang" testimony, the theme of "guilt by association" dominated the trial. Just as in Roark, in Mr. Ra's case, the trial court realized the irrelevant and prejudicial nature of gang evidence, yet failed to thwart the prosecutor's continued efforts to inject a gang theme into the case. See Id. This Court should conclude the error denied Mr. Ra a fair trial and reverse the conviction. See Id.

The same result is required even under the more lenient standard of review of an evidentiary error. Under this standard, an error in the admission of evidence merits reversal if there is a reasonable probability

that the error affected the jury's verdict. State v. Floreck, 111 Wn. App. 135, 140, 43 P.3d 1264 (2002).

With the admission of the gang-related material, the prosecutor was able to compensate for the lack of premeditation and intent evidence with unsavory inferences about Mr. Ra's character based solely on Mr. Bun's alleged gang membership and detective Bair's gang unit expertise. The evidence thus caused the precise harm which ER 404(b) is intended to prevent - a conviction based on the theory of "Give a dog an ill name and hang him." United States v. Boyd, 446 F.2d 1267, 1273 (5th Cir. 1973) (citation omitted). This Court should hold that admission of the irrelevant testimony was likely to have affected the verdict and reverse the conviction.

2. THE PROSECUTOR'S RELIANCE ON GANG THEORY DURING CLOSING ARGUMENT DENIED MR. RA A FAIR TRIAL.

Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor's obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. 5; 14; Const. art. I, § 3.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

An accused alleging prosecutorial misconduct during closing argument has the burden of showing both improper conduct and prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). On review, an appellate court considers the allegedly improper remarks “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions (if any) given the jury.” Brown, 132 Wn.2d at 561. Here, the misconduct was properly preserved for review by defense counsel’s motions in limine, briefing and numerous objections<sup>6</sup>. Thus, the question on review is whether there is a “substantial likelihood” the

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<sup>6</sup> Defense counsel maintained a standing objection to improper gang argument. See State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995) (“Because the purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial, the losing party is deemed to have a standing objection[.]” (citations omitted)).

prosecutor's comments affected the verdict. State v. Reed, 102 Wn.2d 140, 147-48, 684 P.2d 699 (1984).

In the present case, the prosecutor's entire closing argument was based on insinuations that Mr. Ra was a gang-member, who, violent by nature, sought to elevate his status by killing complete strangers. See RP 912:13-17; 912:24 – 913:2; 913:13-17. Ironically, the prosecutor even argued that Mr. Ra's desire for elevated gang status provided a motive to "shoot for no reason." See RP 931:22-25.

The prosecutor personified Mr. Ra as all that is dangerous in society, "the baddest of the bad." See RP 912:13-17; 912:24-913:2; 913:3-17. Moreover, the prosecutor added that people shoot to kill other people for no reason – "happens all the time." See RP 931:5-9.<sup>7</sup> "It is error for a prosecutor to direct the jurors' desires to end a social problem toward convicting a particular defendant." United States v. Solivan, 937 F.2d 1146, 1153 (6th Cir. 1991) (reversing based on prosecutor's call to send a message to drug dealers, notwithstanding curative instruction given by trial court). Courts have agreed that appeals to the community interest in

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<sup>7</sup> Defense counsel objected, on grounds of unrelated incidents, and the court overruled the objection. See RP 931:10-12; See also State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (court's ruling lent "aura of legitimacy" to prosecutor's misconduct); accord Mahorney v. Wallman, 917 F.2d 469, 473 (10th Cir. 1990) (finding that where defense counsel's "vigorous[] object[ion]" to the prosecutor's misconduct was "immediately and categorically overruled in the presence of the jury... [t]he official imprimatur. . . placed upon the prosecution's misstatements of law obviously amplified their potential prejudicial effect on the jury.").

ending a societal evil are reversible error. See, e.g., United States v. Hernandez, 865 F.2d 925, 928 (7<sup>th</sup> Cir. 1989); United States v. Monaghan, 741 F.2d 1434 (D.C. Cir. 1984), cert. denied, 470 U.S. 1085 (1985); United States v. Johnson, 968 F.2d 768, 771 (8th Cir. 1992):

A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

Monaghan, 741 F.2d at 1441.

In State v. Perez-Mejia, 134 Wn.App. 907, 143 P.3d 838 (2006), the defendant appealed his conviction for premeditated first degree murder via accomplice theory. The defendant was convicted for his involvement in a shooting where a bystander was killed while trying to make peace between two rival gangs. See Perez-Mejia, 134 Wn.App. 907.

During closing argument, the prosecutor told the jury:

[W]e as citizens of the State of Washington and the United States of America, we have the right to life, liberty and the pursuit of happiness and we will no longer allow those who choose to dwell in the underworld of gangs to stifle our rights. And that message begins now.

Id., at \*844.

In reversing the defendant's conviction, the Court of Appeals observed:

[A]lthough gang-related evidence was central to the State's theory of culpability, this evidence was, by its nature, highly prejudicial. The trial court carefully circumscribed the admissibility of this prejudicial evidence and based its evidentiary rulings on proper considerations of the State's need to present probative evidence balanced against [the defendant's] right to a trial free from unfair prejudice. Unfortunately, the prosecutor's closing argument put before the jurors several of the most problematic types of prejudice that the law essays to exclude from juror consideration, including nationality, ethnicity, patriotism, and fear of crime, and invited a verdict based on passion or prejudice, rather than on proper evidence. This misconduct upset the balance struck by the trial court's principled evidentiary rulings. Accordingly, in view of the issues in the case, the misconduct likely affected the jury's verdict.

Id., at \*845.

In the instant case, the prosecutor again and again substituted the jurors' duty to decide Mr. Ra's case on its own merits with a call to fight back against America's culture of gang and gun violence. The prosecutor's entire closing argument<sup>8</sup> urged the jury to defend civilized society by convicting Mr. Ra. Coming on the heels of the incendiary gang testimony (See argument, section 1), the prosecutor's thematic closing argument destroyed Mr. Ra's ability to receive a fair verdict.

The argument's devastating effect was only increased by the court's inexplicable refusal to sustain Mr. Ra's objections. One such ruling inspired the prosecutor to add that it was defense counsel's role to

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<sup>8</sup> Improper arguments are especially harmful when made during rebuttal argument, as defense counsel has no opportunity to respond. See United States v. Rodriguez, 159 F.3d 439 (9<sup>th</sup> Cir. 1998)

twist and turn the evidence. See RP 931:13-17; see also United States v. Holmes, 413 F.3d 770, 775-76 (8<sup>th</sup> Cir. 2005) (“These types of statements are highly improper because they improperly encourage the jury to focus on the conduct and role of [defense counsel] rather than on the evidence of [defendant’s] guilt.”).

This Court should conclude the prosecutor’s argument was patently offensive to fundamental principles of fairness, reverse Mr. Ra’s conviction and grant him a new trial. See Brown, 132 Wn.2d at 561; see also State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); Echevarria, 71 Wn. App. at 598.

3. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MR. RA’S  
CONVICTION FOR ATTEMPTED PREMEDITATED MURDER.

A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

RCW 9A.32.030, defining first-degree murder, provides, “(1) A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.” RCW 9A.32.030(1)(a); CP 110. The State bears the burden of proving each element of a charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970).

Premeditation is a distinct element of the crime of first-degree murder. State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 review denied, 103 Wn.2d 1005 (1984). Premeditation, in contrast to the intent to kill, requires “the deliberate formation of and reflection upon the intent to take a human life,” and must involve the “mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” State v. Hoffman, 116 Wn.2d 51, 82, 804 P.2d 577 (1991); State v. Ollens, 107 Wn.2d 848, 850, 733 P.2d 984 (1987); State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982).

“[P]remeditation cannot simply be inferred from the intent to kill.” Commodore, 38 Wn. App. at 247. Nor can premeditation be inferred from the fact that the defendant merely had an opportunity to deliberate. As held by the Washington Supreme Court in State v. Bingham, 105 Wn.2d 820, 827, 719 P.2d 109 (1986):

We agree with the Court of Appeals majority that to allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the distinction between first and second degree murder. Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation.

Bingham, 105 Wn.2d at 826.

Premeditation may be proved by circumstantial evidence only where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial. State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999). Indeed, Washington case law requires that premeditation be proven through competent evidence – e.g. - through statements of intent made by a defendant prior to a killing, through establishing a relationship between the defendant and victim that inspires the killing, etc. See Finch, 137 Wn.2d 792 (Wherein the court enumerates facts demonstrating premeditation).

In State v. Rehak, 67 Wn.App. 157, 834 P.2d 651 (1992), the defendant was convicted by a jury of the first degree murder of her husband. See Rehak, 67 Wn.App. 157. The defendant appealed on several grounds, including the trial court's failure to grant a motion to dismiss for insufficient evidence. See *Id.*

The evidence at trial included the following: The victim was shot three times in the head by a .22 caliber pistol while seated in his home;

One shot entered the back of his head, a second entered his right temple, and the third entered his right cheek; The day after the shooting police officers discovered the .22 pistol in the defendant's travel trailer – under a mattress; The defendant's children testified that this weapon was similar to the one they had seen in the defendant's purse in the past; Along with the gun, officers discovered an unpaid utility bill under the defendant's mattress; Testimony revealed an abusive marriage, and defendant had previously threatened to leave the victim; In the months prior to the shooting, the defendant had claimed that she “didn't know if she could take it any more;” and, testimony revealed that the defendant commonly hid items from the victim, including bills. See *Id.* Based on the evidence before it, the Rehak court affirmed the premeditated murder conviction.

In State v. Townsend, 97 Wn.App. 25, 979 P.2d 453 (1999), the defendant also argued insufficient evidence for his premeditated murder conviction. The evidence at trial established the following: Earlier in the evening of the killing, the defendant had offered to “deal with” a problem an acquaintance was having with the victim; The defendant procured a gun and took it into the woods with the victim; The defendant shot the victim once in the head; While the defendant claimed the first shot was accidental, and it caused only a grazing scalp wound to the victim, the defendant did not take the victim to the hospital; instead, while asking for

God's forgiveness, the defendant shot the victim a second time in the head at close range. See Townsend, 97 Wn.App. 25. The Court of Appeals found that this second shot was clearly premeditated and affirmed the verdict. See *Id.*

In the present case, there was no evidence of Mr. Ra's premeditated intent to kill Mr. Huff. No statements were made prior to the incident indicating either a desire to go out and kill someone or a desire to kill Mr. Huff in particular. There was clearly no prior relationship between the parties which might have motivated the shooting. And, there was no competent evidence that Mr. Ra sought to achieve higher gang status or otherwise reflected on killing someone for gang-related reasons. The evidence established only that Mr. Huff was struck by one bullet after he had rushed Mr. Ra's vehicle.

Fortunately, Mr. Huff was neither killed nor permanently maimed by the bullet wound. However, this meant the prosecutor could not utilize the felony murder laws. Instead, the prosecutor twisted and turned an assault with a firearm case into a premeditated attempted murder case. (See argument section 2); see also Berger, 295 U.S. at 88.

The State relied on insinuations of gang activity and improper gang argument, instead of evidence, to convict Mr. Ra of attempted first-degree murder. The remedy is to reverse Mr. Ra's conviction.

4. THE TRIAL JUDGE DID NOT DISPLAY THE APPEARANCE OF IMPARTIALITY DURING TRIAL AND SENTENCING AND THEREFORE DENIED MR. RA DUE PROCESS AND THE RIGHT TO A FAIR TRIAL.

Criminal defendants have a due process right to a fair trial by an impartial judge. Wash. Const. art. I, sec. 22; U.S. Const. amends. VI, XIV. “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172, (1992) (quoting State v. Madry, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972)). Impartial means the absence of bias, either actual or apparent. State v. Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). Public confidence in the administration of justice requires the appearance of fairness just as much as actual fairness. State v. Dugan, 96 Wn.App. 346, 354, 979 P.2d 885 (1999).

“A trial judge should not enter into the ‘fray of combat’ nor assume the role of counsel.” Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 141, 606 P.2d 1214 (1980) (quoting Judicial Intervention in Trials, Wash. U.L.Q. 843 (1973)). Colloquies between the court and counsel can become the basis for a fair trial challenge. See State v. Ingle, 64 Wn.2d 491, 499, 393 P.2d 422 (1964).

In the instant case, the trial court, during a crucial evidentiary hearing, suggested Mr. Ra was a “distorted character who breeds and lives

violently[.]” See RP 829:9 – 830:2. This characterization was surrounded by lengthy court-induced argument with defense counsel about people getting away with violent crime because of America’s justice system and the freedoms it protects. The trial court warned of a “comeuppance” for this situation. See RP 825:5 – 836:10. At the end of this colloquy, the judge scolded Mr. Ra for moving his head up and down in apparent agreement with the judge’s lecture. See RP 846:19 – 847:12.

Despite ruling to exclude gang evidence, the court nonetheless gave the prosecutor a green light to elicit gang-inference testimony and argue blatantly improper gang theory to the jury. In fact, the court even recommended much of the prosecutor’s improper argument See RP 825:5 – 836:10. (See also, argument sections 1 and 2). This activity paved the way for Mr. Ra’s premeditated attempted murder conviction.

During the sentencing proceeding, the court made repeated references to Iraq, and Mr. Huff’s protection of the American way of life. See RP 979:18 – 993:10. Objectively, the court’s speech gave the appearance that the judge’s sincere personal interest in collateral matters affected the sentencing proceeding’s outcome. The court’s personal feelings on the ills of American society were neither facts of Mr. Ra’s case nor facts regarding Mr. Ra’s personal history; but, they were feelings that

nevertheless appear to have driven the judge's decision to sentence Mr. Ra to the maximum sentence – 351 months.

This apparent impartiality denied Mr. Ra due process, and requires a new trial before a different judge.

#### 5. CUMULATIVE ERROR DENIED MR. RA A FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Although Mr. Ra contends that each of the errors set forth above, viewed on its own, engendered sufficient prejudice to merit reversal, he alternatively argues the errors together created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict.

The evidence of premeditation and intent to kill in Mr. Ra's case was nonexistent, and replaced with highly prejudicial philosophy on the ills of gangs and violence in the community. Repeated trial court error and prosecutorial misconduct destroyed Mr. Ra's chance of a fair verdict. Thus, even if this Court is not persuaded that the errors, standing alone,

require the conviction to be reversed, this Court should conclude the cumulative effect of the errors was to deprive Mr. Ra a fair trial.

F. CONCLUSION

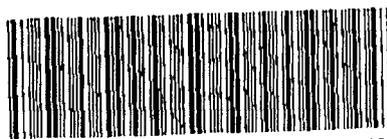
For the foregoing reasons, Mr. Ryna Ra respectfully requests this Court reverse his conviction for Attempted First-degree murder.

DATED this 4th day of January, 2007.

Respectfully submitted:

~~ROBERT C. FREEBY WSB# 18515  
Attorney for Appellant~~

APPENDIX "A"



05-1-04550-9 23726894 INFO 09-19-05

FILED  
IN COUNTY CLERK'S OFFICE

A.M. SEP 16 2005 P.M.

PIERCE COUNTY, WASHINGTON  
BY KEVIN STOCK, County Clerk  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-04550-9

vs.

VUTHY POUT CHAU,

INFORMATION

Defendant.

469 45406

DOB: 4/16/1981

SEX : MALE

RACE: ASIAN/PACIFIC ISLAND

PCN#: 538539538

SID#: UNKNOWN

DOL#: UNKNOWN

CO-DEF: RINA RA 05-1-04549-5

CO-DEF: DY HOANH SON 05-1-04551-7

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse VUTHY POUT CHAU of the crime of ASSAULT IN THE FIRST DEGREE, committed as follows:

That VUTHY POUT CHAU, acting as an accomplice, in the State of Washington, on or about the 14th day of September, 2005, did unlawfully and feloniously, with intent to inflict great bodily harm, intentionally assault J.Huff with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death, contrary to RCW 9A.36.011(1)(a), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a handgun or handguns, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310/9.94A.510, and adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse VUTHY POUT CHAU of the crime of DRIVE-BY SHOOTING, a crime of the same or similar character, and/or a crime based on the same conduct or on a INFORMATION- 1

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930 Tacoma Avenue South, Room 946  
Tacoma, WA 98402-2171  
Main Office (253) 798-7400

1 series of acts connected together or constituting parts of a single scheme or plan, and/or so closely  
2 connected in respect to time, place and occasion that it would be difficult to separate proof of one charge  
3 from proof of the others, committed as follows:

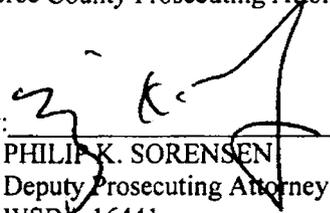
4 That VUTHY POUT CHAU, acting as an accomplice, in the State of Washington, on or about the  
5 14th day of September, 2005, did unlawfully, feloniously, and recklessly discharge a firearm, thereby  
6 creating a substantial risk of death or serious physical injury to a human being, and the firearm was  
7 discharged from a motor vehicle or from the immediate area of a motor vehicle that was used to transport  
8 the defendant or the firearm to the scene of the discharge, contrary to RCW 9A.36.045(1), and against the  
9 peace and dignity of the State of Washington.

10 DATED this 16th day of September, 2005.

11 TACOMA POLICE DEPARTMENT  
12 WA02703

GERALD A. HORNE  
Pierce County Prosecuting Attorney

13 pks

14 By:   
15 PHILIP K. SORENSEN  
16 Deputy Prosecuting Attorney  
17 WSB#: 16441



05-1-05950-0 24143911 INFO 12-05-05

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A.M. DEC - 2 2005 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY          DEPUTY

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-05950-0

vs.

SAMNANG DAVID BUN,

INFORMATION

Defendant.

854 349.45

DOB: 5/6/1989  
PCN#: 538610909

SEX : MALE  
SID#: 21461788

RACE: ASIAN/PACIFIC ISLAND  
DOL#: UNKNOWN

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse SAMNANG DAVID BUN of the crime of ASSAULT IN THE FIRST DEGREE, committed as follows:

That SAMNANG DAVID BUN, in the State of Washington, on or about the 14th day of September, 2005, did unlawfully and feloniously, with intent to inflict great bodily harm, intentionally assault J. Huff with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death, contrary to RCW 9A.36.011(1)(a), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a handgun or handguns, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310/9.94A.510, and adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse SAMNANG DAVID BUN of the crime of DRIVE-BY SHOOTING, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That SAMNANG DAVID BUN, in the State of Washington, on or about the 14th day of September, 2005, did unlawfully, feloniously, and recklessly discharge a firearm, thereby creating a substantial risk of death or serious physical injury to a human being, and the firearm was discharged from a motor vehicle or from the immediate area

INFORMATION- 1

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Tacoma, WA 98402-2171  
Main Office (253) 798-7400

1 of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge, contrary to  
2 RCW 9A.36.045(1), and against the peace and dignity of the State of Washington.

COUNT III

3 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of  
4 the State of Washington, do accuse SAMNANG DAVID BUN of the crime of UNLAWFUL POSSESSION OF A  
5 FIREARM IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based on the same  
6 conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely  
7 connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof  
8 of the others, committed as follows:

9 That SAMNANG DAVID BUN, in the State of Washington, on or about the 14th day of September, 2005,  
10 did unlawfully, feloniously, and knowingly own, have in his possession, or under his control a firearm, having been  
11 previously convicted in the State of Washington or elsewhere of a felony that is not a serious offense as defined in  
12 RCW 9.41.010(12)., contrary to RCW 9.41.040(2)(a)(i), and against the peace and dignity of the State of  
13 Washington.

COUNT IV

14 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of  
15 the State of Washington, do accuse SAMNANG DAVID BUN of the crime of UNLAWFUL POSSESSION OF A  
16 FIREARM IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based on the same  
17 conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely  
18 connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof  
19 of the others, committed as follows:

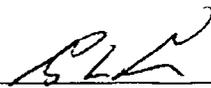
20 That SAMNANG DAVID BUN, in the State of Washington, on or about the 14th day of September, 2005,  
21 did unlawfully, feloniously, and knowingly own, have in his possession, or under his control a firearm, having been  
22 previously convicted in the State of Washington or elsewhere of a felony that is not a serious offense as defined in  
23 RCW 9.41.010(12)., contrary to RCW 9.41.040(2)(a)(i), and against the peace and dignity of the State of  
24 Washington.

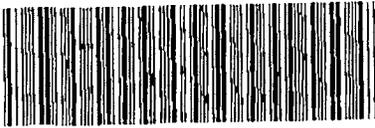
DATED this 2nd day of December, 2005.

TACOMA POLICE DEPARTMENT  
WA02703

GERALD A. HORNE  
Pierce County Prosecuting Attorney

kls

By:   
GREGORY L GREER  
Deputy Prosecuting Attorney  
WSB#: 22936



05-1-04551-7 23727003 INFO 09-19-05

FILED  
IN COUNTY CLERK'S OFFICE

A.M. SEP 16 2005 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-04551-7

vs.

DY HOANH SON,

INFORMATION

Defendant.

162 30398

DOB: 10/11/1983  
PCN#: 538539511

SEX : MALE  
SID#: 20273712

RACE: ASIAN/PACIFIC ISLAND  
DOL#: WA SON\*\*DH175PJ

CO-DEF: RINA RA 05-1-04549-5  
CO-DEF: VUTHY POUT CHAU 05-1-04550-9

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse DY HOANH SON of the crime of ASSAULT IN THE FIRST DEGREE, committed as follows:

That DY HOANH SON, acting as an accomplice, in the State of Washington, on or about the 14th day of September, 2005, did unlawfully and feloniously, with intent to inflict great bodily harm, intentionally assault J.Huff with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death, contrary to RCW 9A.36.011(1)(a), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a handgun or handguns, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310/9.94A.510, and adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse DY HOANH SON of the crime of DRIVE-BY INFORMATION- 1

ORIGINAL

Office of the Prosecuting Attorney  
930 Tacoma Avenue South, Room 946  
Tacoma, WA 98402-2171  
Main Office (253) 798-7400

1 SHOOTING, a crime of the same or similar character, and/or a crime based on the same conduct or on a  
 2 series of acts connected together or constituting parts of a single scheme or plan, and/or so closely  
 3 connected in respect to time, place and occasion that it would be difficult to separate proof of one charge  
 4 from proof of the others, committed as follows:

5 That DY HOANH SON, acting as an accomplice, in the State of Washington, on or about the  
 6 14th day of September, 2005, did unlawfully, feloniously, and recklessly discharge a firearm, thereby  
 7 creating a substantial risk of death or serious physical injury to a human being, and the firearm was  
 8 discharged from a motor vehicle or from the immediate area of a motor vehicle that was used to transport  
 9 the shooter or the firearm to the scene of the discharge, contrary to RCW 9A.36.045(1), and against the  
 10 peace and dignity of the State of Washington.

#### 11 COUNT III

12 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
 13 authority of the State of Washington, do accuse DY HOANH SON of the crime of UNLAWFUL  
 14 POSSESSION OF A FIREARM IN THE SECOND DEGREE, a crime of the same or similar character,  
 15 and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of  
 16 a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would  
 17 be difficult to separate proof of one charge from proof of the others, committed as follows:

18 That DY HOANH SON, acting as an accomplice, in the State of Washington, on or about the  
 19 14th day of September, 2005, did unlawfully, feloniously, and knowingly own, have in his possession, or  
 20 under his control a firearm, having been previously convicted in the State of Washington or elsewhere of  
 21 a felony that is not a serious offense as defined in RCW 9.41.010(12)., contrary to RCW  
 22 9.41.040(2)(a)(i), and against the peace and dignity of the State of Washington.

#### 23 COUNT IV

24 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
 authority of the State of Washington, do accuse DY HOANH SON of the crime of UNLAWFUL  
 POSSESSION OF A FIREARM IN THE SECOND DEGREE, a crime of the same or similar character,  
 and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of  
 a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would  
 be difficult to separate proof of one charge from proof of the others, committed as follows:

That DY HOANH SON, acting as an accomplice, in the State of Washington, on or about the  
 14th day of September, 2005, did unlawfully, feloniously, and knowingly own, have in his possession, or  
 under his control a firearm, having been previously convicted in the State of Washington or elsewhere of

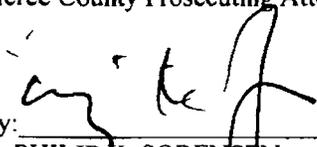
1 a felony that is not a serious offense as defined in RCW 9.41.010(12)., contrary to RCW  
2 9.41.040(2)(a)(i), and against the peace and dignity of the State of Washington.

3 DATED this 16th day of September, 2005.

4 TACOMA POLICE DEPARTMENT  
5 WA02703

GERALD A. HORNE  
Pierce County Prosecuting Attorney

6 pks

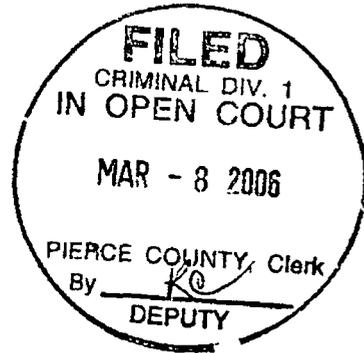
By: 

PHILIP K. SORENSEN  
Deputy Prosecuting Attorney  
WSB#. 16441

APPENDIX "B"



05-1-05950-0 25082600 STPATTY 03-08-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-05950-0

vs.

SAMNANG DAVID BUN,

PROSECUTOR'S STATEMENT  
REGARDING AMENDED  
INFORMATION

MAR 08 2006

Defendant.

The State requests the Court to consider accepting a plea to the filing of an Amended Information pursuant to RCW 9.94A.431 for the following reasons:

The defendant is pleading to unlawful possession of a firearm in the second degree in exchange for his truthful testimony in the trial(s) of codefendants. The State is offering this reduction as a reasonable means of settling the case and it accurately reflects this defendant's culpability

The victim has been notified of the reduction and agrees with it.

3-7-06  
Date

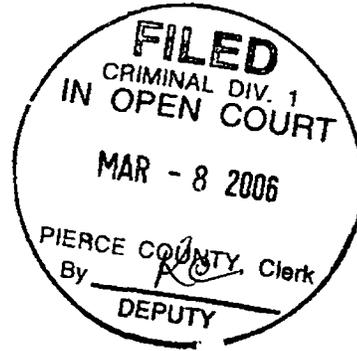
[Signature]  
GREGORY L. GREER  
Deputy Prosecuting Attorney  
WSB # 22936

ORIGINAL

APPENDIX "C"



05-1-04551-7 25088358 STPATTY 03-09-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-04551-7

MAR 09 2006

vs.

DY HOANH SON,

PROSECUTOR'S STATEMENT  
REGARDING AMENDED  
INFORMATION

Defendant.

The State requests the Court to consider accepting a plea to the filing of an Amended Information pursuant to RCW 9.94A.431 for the following reasons:

The State is offering this reduction in exchange for the defendant's plea and truthful testimony in the prosecution of the actual shooter in this case, which the State firmly believes to be codefendant, Rina Ra. The defendant has entered into a plea agreement in this regard.

The victim has been notified of the State's intent and agrees.

*3-3-06*

Date

GREGORY L. GREER  
Deputy Prosecuting Attorney  
WSB # 22936

ORIGINAL

APPENDIX "D"



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-04550-9

vs.

VUTHY POUT CHAU,

Defendant.

MOTION AND ORDER FOR  
DISMISSAL WITHOUT PREJUDICE

DOB: 4-16-81

SID #: N/A

MOTION

Comes now the plaintiff, herein, by its attorney, GERALD A. HORNE, Prosecuting Attorney for Pierce County, and moves the court for an order dismissing without prejudice the above entitled action, on the grounds and for the reason that the State will not be able to prove that the defendant acted as an accomplice to Rina Ra, the shooter. The defendant is cooperative and has agreed to testify in the case of Rina Ra.

DATED: this 13<sup>th</sup> day of March, 2006

GERALD A. HORNE  
Pierce County Prosecuting Attorney

by: [Signature]  
GREGORY L. GREER  
Deputy Prosecuting Attorney  
WSB#: 22936

05-1-04550-9

**ORDER**

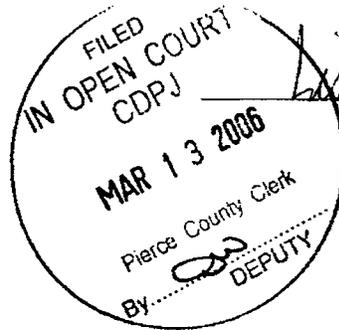
The above entitled matter having come on regularly for hearing on motion of GERALD

A. HORNE, Prosecuting Attorney, and the Court being fully advised in the premises, it is hereby;

ORDERED that the above entitled action be and same is hereby dismissed without prejudice, bail is hereby exonerated.

DATED the 13<sup>th</sup> day of March, 2006.

glg



*Liam Warwick*  
\_\_\_\_\_  
JUDGE

FILED  
COURT OF APPEALS  
DIVISION II

07 JAN 19 PM 2:00

STATE OF WASHINGTON  
BY                       
DEPUTY

NO. 35019-0-II

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

---

STATE OF WASHINGTON,

Respondent,

v.

RYNA RA,

Appellant.

---

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

The Honorable Frederick Fleming

---

CERTIFICATE OF SERVICE/MAIL

---

Robert C. Freeby  
Attorney for Appellant  
724 Yakima Avenue South, Suite 200  
Tacoma, Washington 98405  
(253) 383-3823

ORIGINAL

COMES NOW the attorney for the Defendant, PHILIP C. BOLLAND, and hereby declares as follows:

That on the 4<sup>th</sup> day of January, 2007, affiant hand delivered the original and one copy of Appellant's Opening Brief to the Court of Appeals, and a copy to the Pierce County Prosecutor's Office, Appellate Division.

A copy was also mailed on the same day to Appellant by first-class postage prepaid at:

RA, RYNA, DOC #894748 A4-07L  
MONROE CORRECTIONAL FACILITY  
P.O. BOX 777  
MONROE WA 98272

A conformed copy of the document is attached to this affidavit.

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

DATED this 16<sup>th</sup> day of January, 2007, at Tacoma, Washington



PHILIP C. BOLLAND, WSBA# 52422  
Attorneys for Appellant

ROOM 946  
COPY RECEIVED

JAN 04 2007

GERALD A. HORNE  
PIERCE COUNTY PROSECUTING ATTORNEY

NO. 35019-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

RYNA RA,

Appellant.

RECEIVED

JAN - 4 2007

CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

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

The Honorable Frederick Fleming

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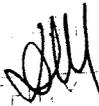
BRIEF OF APPELLANT

---

Robert C. Freeby  
Attorney for Appellant  
724 Yakima Avenue South, Suite 200  
Tacoma, Washington 98405  
(253) 383-3823

07 JAN 16 PM 1:51

STATE OF  
BY \_\_\_\_\_



NO. 35019-0-II

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

07 JAN 16 PM 1:51

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

---

STATE OF WASHINGTON,

Respondent,

v.

RYNA RA,

Appellant.

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

The Honorable Frederick Fleming

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CERTIFICATE OF SERVICE/MAIL

---

Robert C. Freeby  
Attorney for Appellant  
724 Yakima Avenue South, Suite 200  
Tacoma, Washington 98405  
(253) 383-3823

COMES NOW the attorney for the Defendant, PHILIP C. BOLLAND, and hereby declares as follows:

That on the 4<sup>th</sup> day of January, 2007, affiant hand delivered the original and one copy of Appellant's Opening Brief to the Court of Appeals, and a copy to the Pierce County Prosecutor's Office, Appellate Division.

A copy was also mailed on the same day to Appellant by first-class postage prepaid at:

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MONROE WA 98272

A conformed copy of the document is attached to this affidavit.

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

DATED this 16<sup>th</sup> day of January, 2007, at Tacoma, Washington

  
PHILIP C. BOLLAND, WSBA# 52422  
Attorneys for Appellant