

FILED
COURT OF APPEALS
DIVISION II

07 APR 06 PM 1:55

STATE OF WASHINGTON
BY 

NO. 35269-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN ASAELI,

Appellant.

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

The Honorable Katherine Stolz, Judge

BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue pertaining to assignments of error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. <u>Procedural History</u>	3
2. <u>Substantive Facts</u>	4
C. <u>ARGUMENTS</u>	20
1. THE PROSECUTOR'S POWERPOINT SLIDES USED IN CLOSING ARGUMENT CONSTITUTED MISCONDUCT BECAUSE THE STATEMENTS ON THE SLIDES MISSTATED THE LAW DENYING ASaeli'S RIGHT TO A FAIR TRIAL.	20
2. THE ADMISSION OF IRRELEVANT GANG EVIDENCE DENIED ASaeli HIS RIGHT TO A FAIR TRIAL.	28
a. <u>Evidence regarding Kushman Blok</u>	29
b. <u>Expert Testimony</u>	32
3. THE COURT'S FAILURE TO SEVER ASaeli'S TRIAL FROM THE CO-DEFENDANTS' TRIALS DENIED ASaeli THE RIGHT TO A FAIR TRIAL.	35

TABLE OF CONTENTS (CONT'D)

	Page
4. IRRELEVANT TELEPHONE CALL EVIDENCE DENIED ASAELI HIS RIGHT TO A FAIR TRIAL.	39
5. CUMULATIVE ERROR DENIED ASAELI HIS RIGHT TO A FAIR TRIAL.	41
D. <u>CONCLUSION</u>	42

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Allery</u> , 101 Wn.2d 591, 682 P.2d 312 (1984)	24, 26
<u>State v. Alsup</u> , 75 Wn. App. 128, 876 P.2d 935 (1994)	36
<u>State v. Boot</u> , 89 Wn. App. 780, 950 P.2d 964 (1998)	29
<u>State v. Bythrow</u> , 114 W.2d 713, 790 P.2d 154 (1990)	39
<u>State v. Campbell</u> , 78 Wn. App. 813, 901 P.2d 1050, <u>rev. denied</u> , 128 Wn.2d 1004 (1995)	29, 33
<u>State v. Canedo-Astorga</u> , 79 Wn. App. 518, 903 P.2d 500 (1995), <u>rev. denied</u> , 128 Wn.2d 1025 (1996)	37
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984)	41
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984)	21, 22, 26
<u>State v. Estill</u> , 80 Wn.2d 196, 492 P.2d 1037 (1972)	21
<u>State v. Everybodytalksabout</u> , 145 Wn.2d 456, 39 P.3d 294 (2002)	41

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Farr-Lenzini</u> , 93 Wn. App. 453, 970 P.2d 313 (1999)	33
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999)	21
<u>State v. Gotcher</u> , 52 Wn. App. 350, 759 P.2d 1216 (1988)	22, 26
<u>State v. Greene</u> , 139 Wn.2d 64, 984 P.2d 1024 (1999)	33
<u>State v. Grisby</u> , 97 Wn.2d 493, 647 P.2d 6 (1982), cert. denied sub nom., <u>Frazier v. Washington</u> , 459 U.S. 1211 (1983)	36
<u>State v. Hanson</u> , 46 Wn. App. 656, 731 P.2d 1140 (1987), rev. denied, 108 Wn.2d 1003 (1987)	29
<u>State v. Hiatt</u> , 187 Wash. 226, 60 P.2d 71 (1936)	24
<u>State v. Hutchins</u> , 73 Wn. App. 211, 868 P.2d 196 (1994)	40
<u>State v. Jackson</u> , 102 Wn.2d 689, 689 P.2d 76 (1984)	30

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Johnson</u> , 90 Wn. App. 54, 950 P.2d 981 (1998)	41
<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996)	26
<u>State v. Maule</u> , 35 Wn. App. 287, 667 P.2d 96 (1983)	34
<u>State v. Monschke</u> , 133 Wn. App. 313, 135 P.3d 966 (2006)	29
<u>State v. Penn</u> , 89 Wn.2d 63, 568 P.2d 797 (1977)	22
<u>State v. Perrett</u> , 86 Wn. App. 312, 936 P.2d 426, <u>rev. denied</u> , 133 Wn.2d 1019 (1997)	41
<u>State v. Peterson</u> , 35 Wn. App. 481, 667 P.2d 645, <u>rev. denied</u> , 100 Wn.2d 1028 (1983)	39
<u>State v. Phillips</u> , 108 Wn.2d 627, 741 P.2d 24 (1987)	36
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995), <u>cert. denied</u> , 518 U.S. 1026 (1996)	21

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Powell,
126 Wn.2d 244, 893 P.2d 615 (1995) 31

State v. Reed,
102 Wn.2d 140, 684 P.2d 699 (1984) 21, 25

State v. Rice,
48 Wn. App. 7, 723 P.2d 726 (1987) 29

State v. Rodriguez,
121 Wn. App. 180, 87 P.3d 1201 (2004) 25

State v. Smith,
106 Wn.2d 772, 725 P.2d 951 (1986) 29

State v. Vreen,
143 Wn.2d 923, 26 P.3d 236 (2001) 40

FEDERAL CASES

Berger v. United States,
295 U.S. 78, 79 L. Ed. 2d 1314,
55 S. Ct. 629 (1934) 21

United States v. Oglesby,
764 F.2d 1273 (7th Cir. 1985) 37

United States v. Roark,
924 F.2d 1426 (8th Cir. 1991) 31

TABLE OF AUTHORITIES (CONT'D)

Page

OTHER JURISDICTIONS

People v. Perez,
170 C.R. 619 (Cal. App. 1987) 31

State v. Stone,
802 P.2d 668 (Ore. 1990) 31

RULES, STATUTES AND OTHERS

5A K. Tegland, Wash Prac.,
Evidence 289 (3d ed. 1989) 34

CrR 4.4(c)(2) 36

ER 401 29, 39

ER 403 29, 39

ER 404 38

ER 702 33, 34

ER 703 33

McCormick, Evidence, § 212 (2d. ed. 1972) 25

U.S. Const. amend. 1 25

U.S. Const. amend. 6 20

U.S. Const. amend. 14 20

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS (CONT'D)</u>	
Wash. Const. art. 1, § 22	20
Wolk, <u>You Won't Know It When You See It: An Essay on Subliminal Communication and First Amendment Theory,</u> 23 Colum. J. L. & Soc. Probs. 523 (1990)	25
WPIC 6.31	22

A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct in closing argument denied appellant his right to a fair trial.

2. The court erred in admitting gang evidence where there was no evidence appellant was a member of a gang or associated with a gang.

3. The court erred in admitting expert testimony on gangs where the State's expert knew nothing about Samoan gangs or the alleged gang the co-defendant's belonged to.

4. The court erred in denying appellant's severance motion where the evidence admitted only against the co-defendants was voluminous and prejudicial.

5. The court erred in admitting irrelevant evidence that unfairly prejudiced appellant.

6. Cumulative error denied appellant his right to a fair trial.

Issue pertaining to assignments of error

1. This was a hotly contested self-defense/defense of another case. During his closing argument the prosecutor showed the jury PowerPoint slides to illustrate his argument. Some of the slides contained misstatements of the law pertaining to self-defense and contradicted some of the court's self-defense instructions. The court overruled appellant's

objection to the slides. Was showing the slides to the jury misconduct depriving appellant of his right to a fair trial?

2. There was no evidence that appellant was a member of a gang. The State was allowed to present evidence that the co-defendants were members of a group the State characterized as a gang. Did the admission of the gang evidence deny appellant his right to a fair trial?

Did the admission of expert testimony about gangs in the Tacoma area deprive appellant of his right to a fair trial where the expert admitted he was unfamiliar with Samoan gangs, had never heard of the alleged gang the co-defendants belonged to, and there was no evidence appellant was a member of any gang?

3. Did the court err when it denied appellant's motion to sever his trial from the trials of his co-defendants?

4. The court allowed the State to present evidence that unknown and unidentified persons made telephone calls to the victim's home a few weeks before the shooting threatening the victim. Was that evidence irrelevant and unfairly prejudicial where there was no nexus between appellant or the co-defendants and the telephone calls?

5. Did cumulative error deny appellant his right to a fair trial?

B. STATEMENT OF THE CASE¹

1. Procedural History

The Pierce County Prosecutor charged Benjamin Asaeli by amended information with one count of first degree murder (Count I), one count of first degree assault (Count II), one count of second degree murder (Count III) and one count of possession of a stolen firearm (Count IV). CP 5-8. Count I alleged Asaeli caused the death of Faalata Fola by premeditated intent and in the alternative under circumstances exhibiting extreme indifference to human life. Count III alleged Asaeli caused Fola's death under the felony murder rule with assault as the underlying felony. Id. Count II alleged Asaeli assaulted Tirae-Ann Misionare. Id. Counts I, II and III also contained a firearm allegation. Id. Asaeli's case was joined for trial with the cases against Darius Vaielua and Eroni Williams.

A jury found Asaeli guilty as charged in Counts II and III and IV and guilty of the extreme indifference to human life first degree murder

¹ The verbatim report of proceedings are designated as follows: 1RP-the verbatim report of proceedings transcribed by reporter Diane Farning, designated Volumes I through XI and sequentially numbered; 2RP-the verbatim report of proceedings transcribed by reporter Kimberly O'Neill, designated Volumes I through XV and sequentially numbered. The other volumes of the verbatim report of proceedings are designated RP followed by the date of the proceeding.

charge in Count I. CP 109, 110, 111, 112, 113, 114, 115, 116. The jury was unable to agree on the premeditated intent murder charge. CP 110.

Asaeli had no criminal history. He was sentenced to a standard range sentence of 333 months on Count I, 123 months on Count II and 12 months and a day on Count IV. CP 117-128. He was also sentenced to 60 months for each of the firearm verdicts in Counts I and II. Id. Count III was merged with Count I. Id.

2. Substantive Facts

Sometime after midnight, on October 30, 2004, Faalata Fola², and his cousins, James Fola and Taiulu Gago³, decided to go to a Tacoma waterfront park to "hang out." 1RP 264, 275, 278-79. The park is a common place for young Samoans to party on Friday and Saturday nights.⁴ 1RP 253, 284, 377, 395, 1259. Gago drove them to the park. 1RP 279.

When they got to the park there was nobody else there. 1RP 288. A short time later, however, Blacc's girlfriend, Breanne Ramaley, arrived.

² Fola's street name was Blacc. 1RP 264. Because Fola is the last name of a number of witnesses, Faalata Fola will be referred to as Blacc, as he was at trial.

³ Gago's nickname is "Psycho T." 2RP 298. Gago said he is a member of a gang called West Side USO. 2RP 297-298.

⁴ Asaeli, the co-defendants and most of the witnesses at trial were Pacific Islanders.

1RP 288, 1897. Tiare Misionare, her sister, Tami Misionare, and another friend, Angeline Paulo, were with Ramaley. 1RP 1694. Tiare and Tami⁵ both testified they considered Blacc like a brother. 1RP 592, 1343.

The two groups briefly greeted each other and Blacc got into Ramaley's car and drove it next to where Gago's car was parked. 1RP 632, 1358, 1701. Ramaley sat in the front passenger seat and rolled a "blunt."⁶ 1RP 1701; 2RP 63. Tiare got into the back seat and Tami walked towards the water. 1RP 632, 1382. Blacc's group and Ramaley's group also drank alcohol before they arrived at the park. 1RP 299, 628, 697-98; 2RP 240.

About 20 minutes later three other cars arrived, a white sedan, green Explorer and a green Jetta. 1RP 300-304, 630, 1362-1365; 2RP 61, 250. Eugene Van Camp and Feleti Asi came in Van Camp's green Jetta. 1RP 835-36, 897. Asaeli and his friend, Rosette Flores, were in Flores' white Lumina sedan. 1RP 1167. Van Camp told police he met up with the Explorer and the sedan on the freeway and all three followed each other to the park. 1RP 904.

⁵ To avoid confusion Tami and Tiare Misionare will be referred to by their first names.

⁶ A "blunt" is marijuana rolled into a Swisher Sweet cigar. 1RP 1701.

Fola testified that Vaielua⁷ got out of the Explorer⁸, wanted to know what "was up", and asked for Blacc. 1RP 307-308. Fola said that Williams stood nearby but he was uncertain if Williams⁹ arrived in the Explorer or another car. 1RP 311. Gago, on the other hand, said it was not Vaielua but another person who got out of the Explorer and who asked for Blacc. 2RP 291-292. Gago and Ramaley testified the man who asked for Blacc was wearing a brown bandana over his face.¹⁰ 2RP 66, 294. Tami, however, testified the driver of the Explorer was wearing a red bandana and another man, who got out of the white car, was wearing a dark colored bandana. 1RP 1369, 1379, 1544. Tiare testified Vaielua was wearing a blue bandana around his neck. 1RP 676-677.

Tiare and Fola said that three men then walked over to the Ramaley's car. Blacc was still sitting in the driver's seat with the window rolled down. 1RP 312, 640. Flora identified the three men as Williams, someone named Shaak¹¹, and a man wearing a black hoody. 1RP 313.

⁷ Vaielua's nickname is "Skills." 1RP 307.

⁸ Vaielua's girlfriend owns the Explorer. 2RP 917.

⁹ Williams' nickname is "Twix." 1RP 311, 641.

¹⁰ Ramaley did not know who was wearing the bandana. 2RP 68.

¹¹ "Shaake" is Verdel Malo. 2RP 878.

Shortly after the other cars arrived, Ramaley finished rolling her "blunt", got out of her car, and started walking towards where Tami had gone. 2RP 67. Tiare, who was still sitting in the back seat of the car, testified that one of the men who walked up the Ramaley's car said to Blacc, "this be Twix, let's go heads-up", which Tiare explained meant come and fight. 1RP 634. According to Tiare, Blacc started to reach towards the car's glove box when she heard the same man in a shocked voice say, "this nigga got a gun." 1RP 649, 710, 771. Tiare then heard gunshots and ducked down behind the front seat. She said the first shot went through the car's front window. 1RP 650-51.

Van Camp said he too heard someone in a shocked voice say, "he's reaching for a gun" just before shots were fired. 1RP 1011-1013, 1043, 1064. Van Camp told police that Asaeli was the person who fired the shots. 1RP 1052. Taire told police that after the shooting someone yelled "k", which she took to mean "Kushman Blok¹²." 1RP 686.

Blacc was shot. He suffered ten bullet wounds caused by seven to ten separate bullets. 1RP 1561, 1629. The wounds were to his torso and left arm. 1RP 1579-1593, 1654. At least one of the wounds was consistent with Blacc leaning towards the right when he was shot, however, an impact

¹² In the transcripts the term is referred to as either "Kushman Blok" or "Kushman Blokk." 1RP 271; 2RP 295.

from one of the bullets could have caused him to lean in that direction. 1RP 1634, 1643. The angles of the wounds were consistent with Blacc holding a gun in his left hand. 1RP 1654.

Blacc's wounds were not immediately fatal or incapacitating. 1RP 1646. After he was shot, Blacc got out of Ramaley's car and asked Gago to take him to the hospital. 1RP 319-321; 2RP 307. Gago and Fola put Blacc in Gago's car and drove him to the hospital, where Blacc eventually died. 1RP 321, 1634. Ramaley, Tiare and Tami followed Gago in Ramaley's car. 1RP 660.

After they all got to the hospital, the police arrived. 1RP 201. Gago told Tami, Tiare and Ramaley to tell police his name was Lucas and then he left because he had outstanding warrants and did not want to get arrested. 1RP 312-314. When police spoke with each woman they all three lied and identified Gago as Lucas. 1RP 663, 1472; 2RP 215.

Police seized Ramaley's car. 1RP 206-208. There were two bullet holes in the front windshield. 1RP 1075. In the car's glove box police found a .25 Raven handgun and two empty gun magazines. 1RP 523, 558. On the back floorboard was a box containing two boxes of 9-millimeter bullets, and empty box of .25 bullets and 12-gauge shotgun shells. 1RP 519. Two spent 9 millimeter bullets were also found in the car and were

the same make as two bullets found in Blacc's body. 2RP 46-65. Asaeli's palm print was found near the left front window. 1RP 508-509.

Ramaley admitted that when police initially interviewed her she did not tell them about the Raven handgun in the glove box of her car. 2RP 136. When police eventually confronted her about the gun, Ramaley lied and said she had found it in her car in the box with the 9-millimeter bullets the morning before the shooting. 2RP 120, 143, 198. At trial, however, she claimed the Raven belonged to Blacc and that the weekend before the shooting he asked her to keep it for him in the glove box of her car. 2RP 106-109. Ramaley said she did not know who put the box of ammunition in her car and that she did not know about the ammunition until a few days before the shooting when someone told her it was there. 2RP 116. Gago, however, testified Blacc put the ammunition in the car at least a week before the shooting. 2RP 393-394, 413.

Tami testified that she too knew about the Raven in Ramaley's car because Ramaley has shown her the gun and told Tami she had it because she was concerned for her safety. 1RP 1404-1405, 1530. Ramaley also told Tami the gun was stolen. 1RP 1486. Ramaley, however, denied she ever showed the gun to anyone and she denied she told Tami she had the gun for protection. 2RP 154, 199, 1472. Tami admitted that she too failed

to tell police about the gun when she was initially interviewed at the hospital even though she and Ramaley talked about the gun on the way to the hospital. 1RP 1424-1425, 1487. Later, Tami lied and told police she first saw the gun earlier that morning. 1RP 1503.

Tami's wallet was found in the glove box of Ramaley's car near the Raven. Tami claimed she did not know how her wallet found its way into the glove box because the last time she saw her wallet it was on the front seat of the car. 1RP 1426, 1474. Ramaley also testified she did not know how Tami's wallet got into the glove box because, according to Ramaley, the glove box was locked. 2RP 111, 114.

A week before the shooting, a group of Samoans were at the same park. 1RP 603-605. Tiara and Ramaley were there along with Blacc, Asi, Van Camp, Fola¹³ and Gago. *Id.*, 1RP 1003; 2RP 235, 391. While at the park, Gago testified that he and Blacc shot about 12 rounds out towards the water from the .25 caliber gun that Blacc kept in the glove box of Ramaley's car. 2RP 349, 392-395. Tiara said that while they were there a white car arrived and she heard some breaking beer bottles and some shooting. 1RP 609-610.

¹³ Fola admitted he was with Blacc at the park but did not remember if Blacc shot a gun. 1RP 285-286, 415.

Flores, Asaeli's friend, testified that in the summer of 2005, Asaeli introduced her to Gilbert Smith, a soldier. 1RP 1155-1158. She, Asaeli, Smith and others spent the day at American Lake and then went to Smith's house. 1RP 1159-1161. The next day Smith asked her about a gun he was missing. 1RP 1164. Smith said that when they all went to American Lake he brought his 9-millimeter Lugar and put it under the passenger seat of Flores' car. 1RP 571-580. The following day, he noticed his gun was gone. He also asked Asaeli about the gun and Asaeli said he had not seen it. 1RP 580.

Flores said that on the night of the shooting she went to Papayas, a nightclub. Asaeli, Williams, and Vaielua were there along with about 200 people. 1RP 1168-1172; 2RP 913. At about 2:00 a.m., when the club closed, Asaeli, asked her if she wanted to go the waterfront, which was commonplace, or go home. 1RP 1176, 1259, 1275, 1280. Asaeli indicated he wanted to go to the waterfront to see some of his cousins who he does not often get a chance to see. 1RP 1269. She decided to go to the waterfront so she and Asaeli drove to the park in her Lumina. Flores said several other cars leaving the club were going to the park as well and they followed an Explorer. 1RP 1214, 1289.

Flores testified that when they got to the park, there were lots of cars already there and about 30 people. 1RP 1178. Asaeli got out of the car and went to talk to some of the people standing around. 1RP 1180-1181.

A short time later, Flores heard popping sounds. 1RP 1183. Asaeli then came back to the car in a hurry and they left. 1RP 1266. From the Park they went to Asaeli's cousin's house where Flores used the bathroom. 1RP 1185-1186. Then, they went to Asaeli's house where Flores spent the night. 1RP 1188. The next day police came and arrested Asaeli. Id.

When police arrived, Asaeli consented to allow them to search his house. 1RP 466. In a clothes hamper police found Smith's Lugar. 1RP 457, 583. In a box in a closet police also found ammunition for the gun. 1RP 459-460. There were four bullets in the Lugar's magazine. 1RP 457; 2RP 30. Police did not find a bandana or any other clothing associated with gangs. 1RP 467.

Asaeli was 24 years old at the time of trial and a part-time student at Clover Park Technical College. 1RP 982-983. In addition he worked part-time as a machine operator. 2RP 983. He had also finished his paperwork to join the Marines. 2RP 984.

The day before the shooting Asaeli was at Flores' parent's house for a barbecue. 2RP 999. Flores asked him to do some work to her car so he drove it home. 2RP 1000. At about 8:00 p.m., he took his friend Richard Stevens to return some videos and later took Stevens to a bowling alley. 2RP 1001-1003. After dropping Stevens off at the bowling alley, Asaeli went to Papayas. 2RP 1003. At Papayas he saw Flores and Flores' friend Shamira, his cousin Ishmail Asaeli, Williams, Vaielua and others. 2RP 1003-1004. Flores had come with her friend Shamira. 2RP 1007. At the club, Asaeli spent his time dancing with women and talking to Ismail, who had returned from Iraq. 2RP 903-904, 1005.

Asaeli, who still had Flores' car, planned to have Flores drive him home after the club closed. 2RP 1007. After the club closed, Asaeli walked Shamira to her car. Id. She was drunk and tense because somebody was "messing with her at the bar." 2RP 1008-1009. Shamira showed Asaeli Smith's 9-millimeter gun and told him she was going to go back to the bar and "handle my business." 2RP 1337-1338. Asaeli did not think she should have the gun in the state she was in so he took the gun from her and told her he would return it to her the next day when she was sober. 2RP 1009-1010.

Asaeli tried to talk Shamira into riding home with Flores, but she declined. 2RP 1336. Asaeli put the gun in his pocket and walked to Flores' car. 2RP 1011. He and Flores then decided to go to the waterfront and hang out. 2RP 1011-1012. They eventually arrived at the park where Blacc and the others were. 2RP 1025.

When Flores and Asaeli got to the park, Asaeli saw the Explorer, which he recognized, and Verdel Malo and Vaielua standing outside. 2RP 1033-1035. Williams was standing by Ramaley's car talking to Blacc who was sitting in the driver's seat of the car. 2RP 1124, 1036. Asaeli walked up to Malo and Vaielua, exchanged a few words, and then heard someone yell, "I'm going to cap your ass motherfucker." 2RP 1036. Asaeli turned, saw Williams throw his hands up and say, "He's got a gun." 2RP 1036.

Asaeli saw Blacc's left arm out the driver side window. He had a gun in his hand and Blacc fired a shot.¹⁴ 2RP 1037. Asaeli pulled out the gun he had taken from Sharmira and started shooting at the gun in Blacc's hand. 2RP 1038. Asaeli fired the gun until it was empty. 2RP 1190. He then saw Blacc get out of the car so he walked back to Flores' car and told her to drive. 2RP 1040. They drove to his cousin Tito's

¹⁴ Gago testified Blacc did not have a gun and said "I wish we did. Then it would have been a whole different subject." 2RP 308. He explained that if he had a gun he would have shot back. 2RP 381.

house, where Flores used the bathroom, and then back to his house. 2RP 1042.

Flores went to bed but Asaeli stayed up and prayed. 2RP 1042. He decided to call his family members together the next morning and tell them what happened. Id. He was also going to take the gun to police the next day. 2RP 1043. Asaeli lived his parents so he put the gun in the laundry hamper so his mother would not find it. 2RP 1065.

The following day, Asaeli told Flores he shot Blacc because Blacc took a shot at his cousin, Williams, and he just reacted. 2RP 1060. Police arrived before Asaeli had the opportunity to talk to his family. 2RP 1064. Asaeli gave them permission to search his room and told them where he put the gun. 2RP 1062. Asaeli said he took the magazine out of the gun and it was empty. 2RP 1062-1063. He did not know how the four bullets got into the magazine when police found it. Id., 2RP 1192. Asaeli said that the box of bullets police found in his closet was given to him by a friend a few years earlier. 2RP 993, 1063.

Asaeli was also at the park the previous weekend with his sisters. 2RP 1025-1027. He too saw Blacc shooting a gun so he told his sisters to leave. 2RP 1027-1028. A short time later, some Asians arrived in a white car and people started throwing beer bottles at the car. 2RP 1029.

When one of the Asians got out of the car and asked what was going on, Blacc shot at the car. 2RP 1030, 1325.

Richard Logo, a security guard at Western State Hospital and a pastor at the Church of Bread of Life, has known Asaeli for years. 2RP 969-970. Asaeli is a member of Logo's church and Logo said Asaeli had a reputation for being non-violent and a good kid. 2RP 971-972, 977. Asaeli's commitment to the church is beyond "reproach" and Logo had never heard anything negative about Asaeli. 2RP 979-980.

Kristy Devault, Asaeli's friend, said she never discussed the shooting with Asaeli. 2RP 1417, 1565. The State was allowed to impeach Devault with a statement she made to police where she said Asaeli told her that Blacc was trying to instigate some problems with other people and one of the boys gave him a warning to let him know how things were done in Tacoma. 2RP 1570. Blacc needed to prove himself so he starting shooting and someone shot back at him in self-defense. 2RP 1571-1572. She said Asaeli also told her the witnesses' description of the shooter did not fit him. 2RP 1572. Devault testified what she told police did not come from Asaeli but from other people she talked to and her own research. 2RP 1574, 1666-1667, 1673-1674, 1677.

Fola testified that Blacc was a member of a subgroup of the Crip gang called Everybody Killer (EBK). 1RP 264, 406-407. Gago said he was also a member of the EBK. 2RP 374. Fola said it is not uncommon for members of his group to fire guns in public. 1RP 423. Tiara testified that Blacc had CGD, which stood for Connect Gang, tattooed on his arm. 1RP 747.

Blacc's sister, Roseann Fola, testified that about 2 weeks before the shooting a man called and asked for Blacc. 1RP 1122-1125. The man started giggling and told her to tell Blacc he was a marked man. 1RP 1125-1126. A week before the shooting another man and woman called and said they were going to "drop" Blacc. 1RP 1127-1128. They were giggling as well. 1RP 1131. Blacc told his sister he believed the calls were from his friends and he did not take them seriously. 1RP 1132, 1145.

Blacc's mother said that the Thursday night before the shooting she heard Blacc yelling to someone on the "donut." 1RP 1137-1140. The "donut" is a telephone party line used primarily by Samoans. 1RP 395, 863-864. Fola denied Blacc talked "shit" on the "donut" but he told police he thought that was why Blacc was shot. 1RP 444-445.

The State was allowed to present evidence Williams and Vaielua were members of a group called Kushman Blokk, which the State

characterized as a gang. Fola, Blacc's cousin, testified that a group of people who grew up together were members of a group calling themselves the Kushman Blokk.¹⁵ 1RP 271-272. Although Fola testified that all he knows about Kushman Blokk is what he heard from others, he said Williams and Vaielua were members and members wore the color brown.¹⁶ 1RP 271-273, 391. Gago, Blacc's other friend, said that the brown bandana worn by one of the men at the park meant he was a member of the Kushman Blokk. 2RP 295. Gago described the Kushman Blokk is clique of "homeys" from the same neighborhood. 2RP 297. Devault told police that Kushman Blokk was a group of boys who grew up near Cushman Street in Tacoma and who went to church together. 2RP 1007.

The State also presented evidence that in Williams' jail cell someone had written "Loco Boy" on the doorframe, Kushman Blokk, 73, "Brown Flag" gangsta, ESOLBZ, and the name Twix. 2RP 472, 477, 684-691; Ex. 138, 149, 150, 153, 158, 161. Tacoma Police Department Detective John Ringer testified graffiti, similar to the graffiti in Williams' cell, was

¹⁵ Asi was impeached with evidence that he told police he was a member of Kushman Blokk, that Blacc would "trash" talk Kushman Blokk on the "donut" and that Asaeli wanted to be a member of Kushman Blokk. 1RP 1328, 1335; 2RP 458, 467, 469, 494.

¹⁶ Fola and Gago did not know Asaeli. 1RP 413; 2RP 365. Flores heard from others that Asaeli's cousins were members of Kushman Blokk. 1RP 1268, 1314, 1321.

recently found in the area of 73rd and Cushman in Tacoma. 2RP 677. The jury was instructed the evidence of the graffiti in Williams' cell was limited to the State's case against Williams. 2RP 681.

Ringer was also allowed to testify as a gang expert. 2RP 655-660. Ringer gave a history of two gangs; the Crips and the Bloods. He said the two gangs were formed in the late 1960's and early 1970's and their respective members were from rival Los Angeles high schools. 2RP 662-663. The two gangs are associated with Tacoma gangs and that a gang's primary goal is to control the criminal activity in a neighborhood. 2RP 665-666. Graffiti in a neighborhood indicates which gang operates in that neighborhood. 2RP 671. According to Ringer, in Tacoma, the Crips control the Hilltop area and the Bloods control the Eastside. 2RP 666-668. Gangs adopt colors and sometimes wear bandanas of the color adopted by the gang. The Bloods associate with the color red and Crips with the color blue. 2RP 661, 669. Subsets of the gangs are sometimes referred to as cliques. 2RP 661. Gangs will tend to avoid using the letters in the name of a rival gang. For example, Bloods will substitute the letter "c" with the letter "k". 2RP 672.

C. ARGUMENTS

1. THE PROSECUTOR'S POWERPOINT SLIDES USED IN CLOSING ARGUMENT CONSTITUTED MISCONDUCT BECAUSE THE STATEMENTS ON THE SLIDES MISSTATED THE LAW DENYING ASaeli'S RIGHT TO A FAIR TRIAL.

Asaeli's defense was self-defense/defense of another. The State requested a first-aggressor instruction, which would have told the jury if they believed Asaeli was the first aggressor, he was not entitled to act in self-defense. 2RP 1829, 1832-34. The court refused to give the State's requested instruction finding there was no factual support for the instruction. 2RP 1835, 1890.

During closing argument, however, the prosecutor showed the jury a PowerPoint presentation to illustrate his argument. CP 132-138 (attached as an appendix). Part of the presentation included a slide that read: "Self-defense: Killing after a challenge to a fight is not lawful defense, it's murder" and another that read: "When a challenge to a fight is used as an excuse to kill, it's murder." CP 133-134; 2RP 1969. The defendants' objected to the slides because they were a misstatement of the law. The court, however, overruled the objection. 2RP 1944, 1969.

The Sixth and Fourteenth Amendments to the United States Constitution and Wash. Const. art. 1, § 22 guarantee a criminal defendant

the right to a fair and impartial trial. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Statements by a prosecutor constitute reversible misconduct if the comments were improper and the defendant was prejudiced. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Prejudice is shown where there is a substantial likelihood the prosecutor's remarks affected the outcome of trial. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).

As a quasi-judicial officer, a prosecutor is duty bound to act impartially in the interest of justice. "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 v. United States, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1934). It is the rule in Washington that the prosecution's statements to the jury must be confined to the law stated in the court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). When the prosecutor's argument mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial.

Blacc in part to defend his cousin Williams. 2RP 1036. Based on the statement in the prosecutor's slides, the jury could have erroneously believed that because Williams challenged Blacc to a fight, Asaeli was not justified in defending Williams even though there was no evidence Asaeli knew of the challenge. The slides were a misstatement of the law as it pertained to the case and contrary to the court's instructions.

Another prosecution PowerPoint slide told the jury that:

Killing is not lawful when . . .
No provocative behavior by the victim
No verbal warning: "Stop or I'll shoot!"
No warning shot
No attempt to hold at gunpoint
No taking cover

. . .

CP 134. Asaeli objected to the slide arguing it too was a misstatement of the law. Specifically, the slide misstated the law because Asaeli had no duty to retreat. 2RP 1976-1977. The court nonetheless allowed this slide to be shown to the jury. 2RP 1978.

The court correctly instructed the jury that Asaeli had not duty to retreat.¹⁷ A defendant's right to stand his ground has been recognized

¹⁷ Instruction 15 told the jury:

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and
(continued...)

for at least 70 years as an important component of self-defense. See State v. Hiatt, 187 Wash. 226, 237, 60 P.2d 71 (1936) (the rule is that one who is where he has a lawful right to be is under no obligation to retreat when attacked); see also, State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984) (where the court held failure to give a no duty to retreat instruction when supported by the facts is error).

The prosecutor's slide flew in the face of the court's no duty to retreat instruction and misstated the law. It improperly told the jury, contrary to the law, that unless Asaeli gave a verbal warning, a warning shot, tried to hold Blacc at gunpoint or did not take cover, the killing was not justified.

Moreover, because the slides were prominently featured as a demonstrative exhibit, the impact on the jury and the potential for prejudice was high:

Since "seeing is believing," and demonstrative evidence appeals directly to the senses of the trier of fact, it is today universally felt that this kind of evidence possess an immediacy and reality which endow it with particularly persuasive effect.

¹⁷(...continued)

defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP 71.

McCormick, Evidence, § 212, p. 524-25 (2d. ed. 1972) (notes omitted).

Although the prosecutor did not dwell on the slides' statements, the messages they conveyed were clear and also subliminal. Subliminal communication conveys a message "in such a way that the recipient is unaware of having received it." Wolk, You Won't Know It When You See It: An Essay on Subliminal Communication and First Amendment Theory, 23 Colum. J. L. & Soc. Probs. 523, 524 (1990). Where a "message is one to which the mind is not highly attuned at the time of conveyance, the communication" may not register in the recipient's conscious thoughts. Id., at 526-27. Nonetheless, the message is received and it affects the recipient. The process of subliminal communication has been condemned as dangerous to informed and rational decision-making. Id., at 530.

When a defense objection to prosecutorial misconduct is overruled, reversal is required if there is a substantial likelihood that the misconduct affected the verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P. 2d 699 (1984). Here, there was a substantial likelihood the misconduct affected the verdict.

Courts have been particularly vigilant when reviewing self-defense instructions. See State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d

1201 (2004) (the courts subject self-defense instructions to more rigorous scrutiny). "Jury instructions must more than adequately convey the law of self-defense." State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). When read as a whole, the relevant legal test for self- defense must be readily apparent to the average juror. State v. Allery, 101 Wn.2d at 595.

The misstatements of the law in the prosecutor's Powerpoint slides contradicted and severely undercut the court's self-defense instructions making it difficult, if not impossible, for the juror to apply the correct law to the facts. Moreover the court's overruling the objection to the arguments in the slides, "lent an aura of legitimacy to what was otherwise improper argument." Davenport, 100 Wn.2d at 764; see also Gotcher, 52 Wn. App. at 355-56 (court failed to cure misstatement by overruling defense objection and by not clarifying the law).

Jurors could not agree on the State's theory that Asaeli premeditated the killing. CP 110. The jury found Asaeli guilty of first degree murder under the extreme indifference to human life theory and guilty of felony murder. It is likely juror's based those decisions on the erroneous belief, supported by the prosecution's slide, that because killing after a challenge to fight is not justified, Asaeli was not justified to defend Williams because

Williams challenged Blacc, even though Asaeli reasonably believed Williams was the innocent party.

Additionally, jurors could have erroneously believed that Asaeli had a duty to retreat despite the court's no duty to retreat instruction. Instruction 15 told jurors Asaeli had the right to stand his ground. The prosecutor's slide, however, told jurors that Asaeli was required to first fire a warning shot, give a verbal warning or take cover before acting in defense of Williams. Because it was Williams who Blacc attacked, the jurors could have concluded the no duty to retreat instruction did not apply to these facts and the prosecutor's slide was the correct statement of the law as it pertained to Asaeli's self-defense/defense of another claim.

Experienced trial prosecutors do not risk appellate reversal of hard-fought convictions by engaging in improper trial tactics unless those tactics bring some advantage. The prosecutor misstatement of the law through its use of the PowerPoint slides was an improper tactic. And, when it overruled the defense objection, the court sent the message to the jury that the misstatements on the slides were a correct statement of the law supported by the evidence.

The slides were prejudicial because they erroneously told the jury that Asaeli was not entitled to act in self defense/defense of another because

either he or a co-defendant challenged Blacc to a fight or because he did not first "retreat" by giving Blacc some kind of warning or by taking cover. Thus, when the slides are viewed either separately or together, there is a substantial likelihood they affected the verdicts. Asaeli's murder and assault convictions should be reversed.

2. THE ADMISSION OF IRRELEVANT GANG EVIDENCE DENIED ASAELI HIS RIGHT TO A FAIR TRIAL.

Over defense objections, the State was allowed to present evidence of what it characterized as a gang called Kushman Blokk along with expert testimony about gangs. Although there was some evidence that Williams and perhaps Vaielua were associated with a group called the Kushman Blok, there was no evidence that Asaeli had any association with the group. Furthermore, the State's theory was that for some unidentified reason the shooting was gang related. It appears that theory was based on the testimony that some people that night wore bandanas, someone said "k" after the shooting and the graffiti found on the walls of Williams' cell. The gang evidence and expert testimony were inadmissible and either singularly or when viewed together denied Asaeli the right to a fair trial.

To be admissible evidence must be relevant. ER 402. To be relevant, evidence must meet two requirements: (1) it must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of

consequence in the context of the other facts and the applicable substantive law (materiality). State v. Rice, 48 Wn. App. 7, 12, 723 P.2d 726 (1987); ER 401. Even if relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice ER 403; State v. Hanson, 46 Wn. App. 656, 661, 731 P.2d 1140 (1987), rev. denied, 108 Wn.2d 1003 (1987). In doubtful cases, the issue should be resolved in favor of the defendant and excluded. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

a. Evidence regarding Kushman Blok

Because of the grave danger of unfair prejudice, evidence of gang affiliation is inadmissible unless the State establishes a sufficient nexus between the defendant's gang affiliation and the crime charged. State v. Campbell, 78 Wn. App. 813, 823, 901 P.2d 1050, rev. denied, 128 Wn.2d 1004 (1995); see State v. Boot, 89 Wn. App. 780, 950 P.2d 964 (1998) (gang affiliation evidence admissible to prove motive for murder where evidence established that killing someone heightened a gang member's status); see also State v. Monschke, 133 Wn. App. 313, 335, 135 P.3d 966 (2006) (evidence of white supremacist beliefs admissible to prove motive, premeditation, and to show the context of the crime where the State's theory

was that defendant killed victim out of hatred for anyone deemed inferior and to enhance his status among white supremacists).

Here, the Kushman Blokk evidence was irrelevant because there was not a sufficient nexus between the crime and gangs. First, there was no evidence Asaeli was a member of the Kushman Blokk. Second, even if Williams or Vaielua were members, the evidence does not show a connection between their membership and the shooting. Third, there was no evidence the group calling itself Kushman Blokk was associated with a gang. Fourth, there was no evidence Blacc was shot because he was infringing on Kushman Blokk territory (assuming there was such a thing a Kushman Blokk territory), threatened another Kushman Blokk member or that Asaeli shot Blacc to heighten his status with the members of the Kushman Blokk.

Furthermore, the court did not explain the relevance of the evidence or balance its probative value and prejudicial impact. See State v. Jackson, 102 Wn.2d 689, 693, 689 P.2d 76 (1984) (balancing of probative value versus prejudice should be done on the record). In its ruling, the court only noted that any gang is a violent entity and therefore the State carried its burden to admit the evidence. 1RP 81-82. It is likely the court failed to specifically identify the relevancy of the evidence because identity was

not an issue and there was no evidence Williams' or Vaielua's purported membership in the Kushman Blokk had anything to do with Asaeli's intent or motive.

The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). Evidence that the defendant is a member of a group considered disreputable by the public has virtually no probative value and carries a high potential for prejudice because it allows the jury to infer guilt by association. United States v. Roark, 924 F.2d 1426 (8th Cir. 1991) (in narcotics prosecution, government attempted to tie the defendant's guilt to his membership in Hells Angels motorcycle club; reversed); People v. Perez, 170 C.R. 619 (Cal. App. 1987) (error to admit irrelevant evidence of gang affiliation); see State v. Stone, 802 P.2d 668 (Ore. 1990) (error to allow evidence of likely gang affiliation for unlawful use of a car, where it was not relevant to the issue of knowledge that the car was stolen).

The gang evidence was irrelevant and unfairly prejudicial. The evidence allowed the jury to speculate that Asaeli was a member or associated with a gang called the Kushman Blokk and that he shot Blacc for some unspecified gang related reason instead of the real issue---whether

Asaeli acted in self-defense/defense of another. Because the general public associates gangs with violence, just as the court did, the evidence impermissibly allowed the jury to infer that because Asaeli's cousin, Williams, was a member of the Kushman Blokk that Asaeli did not act in defense of Williams. And, it allowed the jury to infer guilt by Asaeli's association with his relatives who were members of a "gang" called Kushman Blokk. In sum, the erroneous admission of the evidence allowed the jury to base its verdict on its emotional response to gangs and gang violence instead of the law and the facts.

Because the gang evidence was irrelevant and unfairly prejudicial, Asaeli was denied his right to a fair trial. Thus, his murder and assault convictions should be reversed.

b. Expert Testimony

In addition to the Kushman Blokk evidence, the State was allowed to present Ringer's expert testimony on the history and general characteristics of gangs and how gangs operate in the Tacoma area. 2RP 655-672. Ringer's testimony about gangs violated Asaeli's right to a fair trial.

The court held an evidentiary hearing prior to Ringer's testimony. At the hearing Ringer said that with any gang, the culture of its members had to be considered when determining its structure, rules and activities.

2RP 517-518. He then admitted he knew very little about Samoan culture and has never testified as an expert on Samoan gangs. 2RP 516. During his testimony Ringer admitted he had never heard of the group Kushman Blokk until he was asked to review this case. 2RP 698-699. He also admitted he spoke with his informants who are gang members and none of them had ever heard of the Kushman Blokk. 2RP 704.

In general, ER 702 and 703 govern the admissibility of an expert witness' testimony. Under these rules, (1) the witness must be qualified as an expert, and (2) the expert's testimony must be helpful to the trier of fact. State v. Farr-Lenzini, 93 Wn. App. 453, 460, 970 P.2d 313 (1999). Expert opinion is helpful to the trier of fact when it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. Farr-Lenzini, 93 Wn. App. at 461. Under certain circumstances, expert testimony about gangs is admissible for limited purposes. See State v. Campbell, 78 Wn. App. at 823 (upholding the admission of expert testimony on the meaning of gang symbols). The trial court's admission of evidence under ER 702 is reviewed under the abuse of discretion standard. State v. Greene, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999).

Expert opinion is inadmissible over objection "unless the witness has first been qualified by a showing that he has sufficient expertise to state a helpful and meaningful opinion." 5A K. Tegland, Wash Prac., Evidence 289, at 381 (3d ed. 1989). To qualify as an expert, a witness must have sufficient specialized knowledge to assist the jurors in the case. State v. Maule, 35 Wn. App. 287, 294, 667 P.2d 96 (1983).

Although Ringer may be an expert on gangs like the Crips or the Bloods, by his own admission he knows nothing about Samoan gangs and knew nothing about a group called Kushman Blokk. On this basis alone Ringer's expert opinion testimony should not have been admitted under ER 702 because he had no expertise on the subject of the Kushman Blokk or whether it was even a gang.

Even if Ringer was qualified to testify, his testimony did not help the jury reach the ultimate decision whether Asaeli acted in self-defense/defense of another and it unfairly prejudiced Asaeli. Ringer's testimony described the history of the modern urban gangs the Crips and Bloods and the general characteristics common to those gangs in Tacoma, such as turf, signs and symbols and their general purpose to control criminal activity in a particular neighborhood. 2RP 661-674. There was no evidence, however, that Asaeli or any of the co-defendants were members of the Crips

or Blood gangs, and there was no evidence Asaeli was a member of the Kushman Blokk. Additionally, there was no substantive evidence that the motive for the shooting was in anyway related to gang activity.

Ringer's testimony was simply irrelevant and not helpful. The evidence was not probative to the central issue of whether Asaeli acted in self-defense or with intent. The affect of Ringer's gang testimony was to plant in the minds of the jurors a visceral prejudice against Asaeli, stimulate the jurors' biases against gangs and gang members and instill the fear that the Tacoma area is a hotbed of violent gang activity and the defendants, including Asaeli, were part of that activity. Furthermore, the evidence carried a high potential for prejudice because it allowed the jury to impermissibly infer guilt by Asaeli's association with his family members who may have belonged to the Kushman Blokk.

The court erred in admitting Ringer's testimony and, like the gang evidence, its admission denied Asaeli a fair trial. Thus, Asaeli's murder and assault convictions should be reversed.

3. THE COURT'S FAILURE TO SEVER ASAELI'S TRIAL FROM THE CO-DEFENDANTS' TRIALS DENIED ASAELI THE RIGHT TO A FAIR TRIAL.

Asaeli moved to sever his case from the case against Williams and Vaielua before, during and at the end of the trial. 1RP 113, 121, 175,

1214; 2RP 447-448, 1409. A court should sever the trials of properly joined defendants where severance is necessary to promote a fair determination of guilt. Under CrR 4.4(c)(2):

The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

A trial court's denial of a motion to sever is reviewed under the abuse of discretion standard. State v. Phillips, 108 Wn.2d 627, 640, 741 P.2d 24 (1987). Where a defendant is prejudiced by a joint trial, it is an abuse of discretion to deny a severance motion. State v. Alsup, 75 Wn. App. 128, 131, 876 P.2d 935 (1994).

On appeal, an appellant must show manifest prejudice resulting from a joint trial outweighed concerns for judicial economy. The appellant must point specific prejudice. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982), cert. denied sub nom., Frazier v. Washington, 459 U.S. 1211 (1983). Specific prejudice may be demonstrated by:

(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible

for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995) (quoting United States v. Oglesby, 764 F.2d 1273, 1276 (7th Cir. 1985)), rev. denied, 128 Wn.2d 1025 (1996).

Here, the massive and complex quantity of gang evidence against the co-defendants made it impossible for the jury to properly allocate that evidence between the co-defendants and Asaeli. Specifically, the evidence of the co-defendants' association with Kushman Blokk, including the graffiti on Williams' cell walls, and the related evidence suggesting that Kushman Blokk was a gang made it impossible for the jury to fairly determine Asaeli's guilt or innocence.

From the beginning it was the State's theory that Blacc was shot for some gang related reason. See RP 20-29 (July, 13, 2006) (prosecutor's opening argument). Based on that theory, the court allowed the State to present evidence that Williams and Vaielua were members of Kushman Blokk, which the State characterized as a gang, and to present Ringer's testimony on gangs. There was no evidence, however, that Asaeli was a member of Kushman Blokk. Nonetheless, the gang evidence admitted only

against Williams and Vaielua was used by the State to infer Asaeli was connected with the Kushman Blokk and therefore this was the intentional killing of a rival gang member.¹⁸

Asaeli did not deny he shot Blacc. He claimed he shot Blacc because Blacc was shooting at his cousin, Williams. There was voluminous gang evidence admitted against Williams and Vaielua only and it would have been difficult, if not impossible, for the jury to separate that evidence from the properly admitted evidence related only to Asaeli's case. The evidence likely led the jury to impermissibly infer that Asaeli, like the co-defendants, was likewise a member of the Kushman Blokk, that Kushman Blokk was a violent gang that controlled criminal activity on the same order as the Crips and Bloods and therefore Asaeli, as a member or because he associated with its members, was a violent person with a criminal propensity who would likely murder a member of another gang. That inference made it likely the jury rejected Asaeli's evidence that he acted in self-defense/defense of another.

¹⁸ In its opening statement the State told the jury, "Benjamin Asaeli is not a member of the Kushman Blok, at least not a full-fledged member. He's related to a number of Kushman Blok members and he knows most of them very well." RP 23 (July 13, 2006). This is a classic impermissible guilt by association argument. See, ER 404.

Because in this case, the prejudice outweighed judicial economy, the severance motion should have been granted. The court therefore abused its discretion in denying the severance motion and Asaeli's murder and assault convictions should be reversed. State v. Bythrow, 114 W.2d 713, 717, 790 P.2d 154 (1990).

4. IRRELEVANT TELEPHONE CALL EVIDENCE DENIED
ASAELI HIS RIGHT TO A FAIR TRIAL.

Asaeli moved to exclude the testimony from Blacc's sister, Roseann Fola, that two weeks before the shooting a man called the Fola house and told her Blacc was "marked" and that a week before the shooting another man called and said he was going to "drop" Blacc. 1RP 173, 189-190. Asaeli argued that because there was no evidence that Asaeli or anyone connected with Asaeli made the telephone calls, the evidence was irrelevant and unfairly prejudicial. Id. The court denied the motion. 1RP 193-194.

Relevance means that a logical nexus exists between the evidence and the fact to be established. State v. Peterson, 35 Wn. App. 481, 484, 667 P.2d 645, rev. denied, 100 Wn.2d 1028 (1983). Relevant evidence, "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Under ER 403 admission of evidence, even if slightly relevant, is prohibited if it is unfairly

prejudicial, confuses the issues or misleads the jury. State v. Vreen, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). A trial court's ruling as to the relevance of evidence is reviewed for an abuse of discretion. State v. Hutchins, 73 Wn. App. 211, 214, 868 P.2d 196 (1994).

The alleged threatening telephone calls Blacc's sister received from the unknown callers were irrelevant to any issue at trial. The State argued the calls were relevant because they showed Blacc was not shot in self-defense, but that the shooting was pre-planned. 1RP 192. The State's argument would have some merit if there was evidence the calls were made by Asaeli, one of the co-defendants or even someone associated with Asaeli. There is no such evidence.

Because there is no nexus, however tenuous, between the calls and Asaeli, the evidence did not make it more or less probable that Asaeli shot Blacc in self-defense. Absent that nexus the threatening telephone calls from unknown and unidentified callers a few weeks before the shooting does not lead to the logical inference that Asaeli intended to kill Blacc.

The evidence of the calls, however, was unfairly prejudicial. Even though there was no evidence linking the calls to Asaeli or anyone associated with Asaeli, it allowed the jurors to make the same impermissible inference the State argued made the calls relevant--that Asaeli, or someone

telephone calls and the State's misconduct in closing argument. As a result of these combined errors, Asaeli's defense was gutted while the State's case was unfairly bolstered. This Court should reverse Asaeli's convictions.

D. CONCLUSION

For the above reasons, this Court should reverse Asaeli's convictions and order a new trial.

DATED this 25 day of April, 2007.

Respectfully submitted,

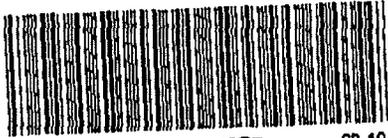
NIELSEN, BROMAN & KOCH, PLLC



ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051

Attorneys for Appellant

APPENDIX



04-1-05087-3 25943216 NOTE 08-10-06

FILED
IN COUNTY CLERK'S OFFICE

A.M. AUG - 8 2006 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-05087-3
04-1-05574-3
04-1-05575-1

vs.

BENJAMIN ASaeli, DARIUS VAIELUA,
and Eroni WILLIAMSEnter Defendant's
Name,

Defendant.

STATE'S POWERPOINT CLOSING
ARGUMENT SLIDES

Attached are true and correct handout copies of the Powerpoint slide used during the state's closing argument in this case on August 1, 2006.

DATED this 9th day of August, 2006.

GERALD A. HORNE
Prosecuting Attorney

By: J. Schacht
James S. Schacht
Deputy Prosecuting Attorney
WSB#

jss

ORIGINAL

When a challenge to a fight is used as an excuse to kill, it's murder!

Murder is not complicated

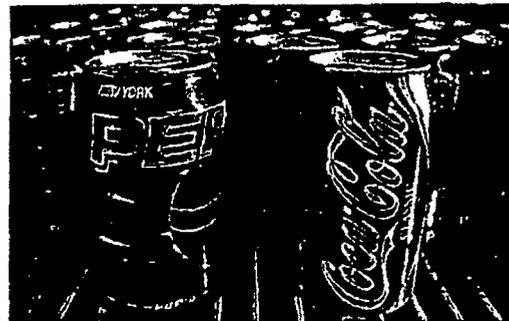
Five Forms Of Murder

- 1. Premeditated Murder – Murder, First Degree
- 2. Extreme Indifference Murder – Murder, First Degree
- 3. Intentional Murder – Murder, Second Degree
- 4. Felony Murder – Based on Assault, First Degree
- 5. Felony Murder – Based on Assault, Second Degree

Each Form Of Murder Requires

- ❖ An act: "shot Faalata Fola" OR "shot into a car" and "created a grave risk of death to any person"
- ❖ An effect: "Faalata Fola died as a result"
- ❖ A mental state: "intent to cause the death of Faalata Fola" and "the intent to cause the death was premeditated" OR "an extreme indifference to human life"
- ❖ Done alone or with accomplices

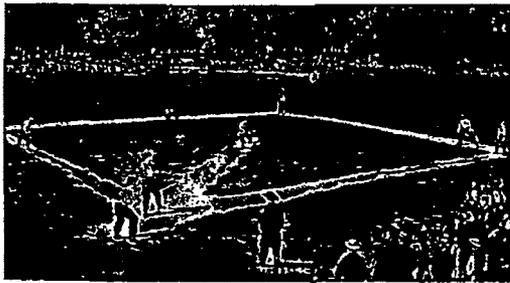
Premeditation: It's Like Pepsi vs. Coke



*Accomplices are there
to help if needed*

To Be An Accomplice Requires

- ✦ An act: "solicits, commands, encourages, or requests another person to commit the crime" OR "aids or agrees to aid another person in planning or committing the crime"
- ✦ An effect: the crime is committed
- ✦ A mental state: "knowledge that it will promote or facilitate the commission of the crime"



THE AMERICAN NATIONAL LEAGUE OF BASE BALL.

"Aid"

- ✦ The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

*Under the law
an accomplice is just as
guilty as the one who
pulled the trigger!*

*Self defense: Killing after a
challenge to a fight is not
lawful defense, it's murder.*

Four Required Elements

1. "... committed in the lawful defense..."
 2. "... reasonably [actually] believed..."
 3. "... imminent danger ..."
 4. "... such force and means as a reasonably prudent person would use..."
- State's burden is to disprove one of these elements.

Lawful Defense

"... lawful defense of the slayer or any person in the slayer's presence ..."

MEANS

One can't plan or threaten to do harm to a person then shoot him, that's not "lawful defense".

From An Attack

"... reasonably believes that the person slain intended to inflict death or great personal injury ..."

MEANS

An actual belief (not one made up for trial) that he WILL be (not just a possibility) killed or mortally wounded.

Imminent Danger

"... that there was imminent danger of [death or great personal injury] being accomplished ..."

MEANS

If a killing, it was the slayers life or the victim's.

Reasonable Amount Of Force

"... such force and means as a reasonably prudent person would use ..."

MEANS

Overreaction is not permitted. If there was a non-lethal alternative it *must* be used if reasonable.

Killing Is Not Lawful When. . .

- ↪ No provocative behavior by the victim
 - ↪ No verbal warning: "Stop or I'll shoot!"
 - ↪ No warning shot
 - ↪ No attempt to hold at gunpoint
 - ↪ No taking cover
 - ↪ Victim is shot seven times and had no means to shoot back
 - ↪ Putting other people at risk
- Killing is not lawful as the first, last and only action taken against a person sitting in his own car minding his own business!

Skills came up and asked for Blacc by name. Shake was also there. Three guys went up to Blacc in Breanne's car. Twix was on the right, someone he did not know in a hoodie with the hood pulled up was in the middle, and Shake was on the left.

He heard a ruckus . . . arguing.

He went toward the back of Tai's car to "go see what was wrong." The gunshots started as he got to the back of the car.

He ducked for cover. It sounded like a "whole clip."

- James Foley
New York Times 10/10/05

Credibility

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the *opportunity of the witness to observe* or know the things he or she testifies about; the *ability of the witness to observe accurately*; the *quality of a witness's memory* while testifying; the *manner of the witness while testifying*; any *personal interest* that the witness might have in the outcome or the issues; any *bias or prejudice* that the witness may have shown; the *reasonableness of the witness's statements in the context of all of the other evidence*; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

Coincidences

- ◊ Just happens to be present at the time and place that gun is stolen
- ◊ Just happens to go to waterfront from Parkland to protect sisters the week before
- ◊ Blacc just happens to be there
- ◊ Because of Blacc's actions, his sisters just happen to need his protection
- ◊ Just happens to go to Papeyys on 10/29
- ◊ Twix, Skills and Shake just happen to be there
- ◊ Just happens to leave Papeyys at roughly same time that Twix Skills and Shake leave
- ◊ Just happens to obtain gun from drunken friend just before shooting (a first for him)
- ◊ Gun just happens to be the stolen gun
- ◊ Just happens to go to the waterfront
- ◊ Just happens to try two places at the waterfront where Blacc wasn't
- ◊ A white vehicle just happens to go through the parking lot turn around and leave
- ◊ Moments later Twix, Skills, Shake and other associates of Kushmen Blokk happen to arrive
- ◊ Asaeli happens to arrive just behind them

Coincidences, Continued

- ◊ Blacc happens to be there
- ◊ Blacc happens to be in the same car from the week before
- ◊ Blacc just happens to be a Crip
- ◊ Twix, Skills, Shake and others just happen to be part of a group called Kushmen Blokk
- ◊ Kushmen Blokk just happens to have all the hallmarks of a Blood set
- ◊ Asaeli just happens to be "family" to Kushmen Blokk
- ◊ Blacc just happens to be the one they were looking for
- ◊ Happens to arrive too late to hear Twix call out Blacc
- ◊ Happens to arrive just in time to see Blacc fire a shot at Twix
- ◊ Just happens to have the gun at the one time in his life when he claims to need one in self defense
- ◊ Gun just happens to be loaded
- ◊ Gun just happens to be so similar to the gun that he used 10 years ago that he has no difficulty operating it quickly under stressful circumstances
- ◊ The shell casing from Blacc's gun just happens to be the one shell casing that Mary Lilly does not find
- ◊ Bullets from Asaeli's gun just happen to be the same type (FMJ) that Gilbert Smith had
- ◊ Police happen to arrive just before he calls a family meeting and arrange to turn himself in
- ◊ He just happens to have additional 9 mm ammo in his closet

Self Defense Is

A near death experience
Unforgettable
A him or me decision
Apparent to those around
Something that affects what happens afterward.
In short true self defense is known to the "slayer" and to those who saw what the "slayer" did!

When a challenge to a fight is used as an excuse to kill, it's murder!

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

FIVE
COURT OF APPEALS
DIVISION II
07 APR 26 PM 1:57

STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON)
)
 Respondent,)
)
 vs.) COA NO. 35269-9-II
)
 BENJAMIN ASaelI,)
)
 Appellant.)

DECLARATION OF SERVICE

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

THAT ON THE 25TH DAY OF APRIL 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402
- BENJAMIN ASaelI
DOC NO. 898293
WASHINGTON STATE REFORMATORY
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF APRIL 2007.

x Patrick Mayovsky