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DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

VERRICK YARBROUGH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 06-1-03109-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that the trial court abused its discretion in allowing the State to adduce gang evidence when the facts of the crime revealed it to be a gang involved crime and the evidence was relevant to prove mens rea and motive?
2. Has defendant failed to meet his burden in proving ineffective assistance of counsel when he has shown neither deficient performance nor resulting prejudice?
3. Has defendant failed to show that his exceptional sentence on the murder violates double jeopardy by imposing multiple punishments for the same offense when the determination of an aggravating factor is not the equivalent of an "offense" and when the legislature has authorized increased punishment when the jury finds the existence of an aggravating factor?
4. Was there sufficient evidence in the record to support the jury determination on the aggravating factor that the defendant committed his crime to obtain or maintain his membership or to advance his position in the hierarchy of an organization, association, or identifiable group?

5. Has defendant has failed to show any legal bar to the trial court relying upon the two aggravating factors found by the jury, should this court affirm the imposition of the exceptional sentence?

6. Has defendant failed to show that he is entitled to relief under a theory of cumulative error when he has failed to demonstrate any error much less an accumulation of prejudicial error?

B. STATEMENT OF THE CASE.

1. Procedure

On July 10, 2006, the Pierce County Prosecutor's Office charged appellant, VERRICK VERE YARBROUGH ("defendant") with one count of murder in the first degree (extreme indifference), assault in the first degree, and unlawful possession of a firearm in the second degree in Pierce County cause no. 06-1-03109-3. CP 1-3, 4-5. The State also alleged firearm enhancements on the murder and assault counts. *Id.* Finally the state alleged the existence of two aggravating factors on the murder and assault counts. The State filed an amended information but it did not affect the number or nature of the charges. CP 6-8.

The State filed a motion to admit evidence of defendant's gang membership under ER 404(b). CP 17-25. Defendant filed a motion to exclude such evidence. CP 9-16. These motions came on for hearing before the Honorable Bryan Chushcoff on December 13, 2006. 12/13 RP

1-29. After hearing argument the court granted the State's motion and denied the defense motion to exclude. *Id.* The court entered a written order on this ruling. CP 38-40; *see* Appendix A.

The matter came to trial before the Honorable Vicki Hogan. RP 1-3. After hearing the evidence, the jury convicted defendant as charged. CP 226, 230, 234. The jury returned special verdicts finding that defendant was armed with a firearm during the commission of the murder and the assault. CP 227, 231. The jury also found that two aggravating factors applied to defendant's crimes of murder and the assault in the first degree. The jury found that defendant committed these crimes to "obtain or maintain his membership or to advance his position in the hierarchy of an organization, association, or identifiable group. CP 228, 232. The jury also found that the offense involved a destructive and foreseeable impact on persons other than the victim. CP 229, 233.

The matter came on for sentencing on June 1, 2007. CP 257-268. The court imposed an exceptional sentence of 120 months above the standard range on the homicide for a total period of confinement of 481 months, the court imposed a high end standard range of 123 months to run consecutively to the sentence on the homicide and 16 months on the firearms charge to run concurrently. RP 1198-1199. The court further imposed a total of 120 months flat time for the two firearm enhancements to run consecutively to the base sentence. *Id.* The court imposed

\$2,300.00 in legal financial obligations and an additional \$6,730.82 for restitution. CP 257-268; RP 1199.

Defendant filed a timely notice of appeal from entry of this judgment. CP 275.

2. Facts

Tiayrra Bradley is a cousin of Yunique Richardson and very good friends with Rhaczio “Rha Rha” Simms. RP 391-393. She knows the defendant as “V-Real.” RP 396-398. Ms. Bradley is friends with Brandon Batiste, Ardell Bradley, Darris Stokes and his brother Tyrrell Stokes. RP 394. All of these young men belong to a group or circle called the “96th” or 96 Murderville Folks. RP 394-395, 433. Ms. Bradley testified that Mr. Simms was in this circle because he grew up with these people, but was not part of the gang. RP 433. Ms. Richardson testified that she and Mr. Simms had an on again/off again romantic relationship but always remained friends. RP 467. Ms. Richardson testified that she knew Brandon Batiste, Ardell Bailey, Darris Stokes, and Tyrrell Stokes. RP 468-469. She indicated that they belonged to a gang but she would describe it as a mixture of Folks and Crips. RP 469. Ms. Richardson had heard of V-Real or Verrick prior to the shooting and had seen him around, at parties. RP 469-470. She identified the defendant as that person. RP 470.

On the Fourth of July, Ms. Bradley was on the Tacoma waterfront with a group of friends including Mr. Simms, Ms. Richardson, Tyrrell Stokes, and Darris Stokes. RP 399. The defendant was there with a group of his friends. RP 397, 398-399. The two groups became confrontational, arguing and yelling back and forth. RP 399-400. Ms. Bradley heard someone say “This is Hilltop” and someone else shout back “This is 96th.” RP 400. Concerned that something was going to happen, she pulled Tyrrell out of the group and Ms. Richardson pulled Simms out. RP 400-401. Ms. Bradley saw that defendant was in the other, Hilltop, group. RP 400. The Hilltop group was wearing blue. RP 401. Someone from that group said “If we weren’t in front of the police, we would bust right now,” which she took to mean “start shooting.” RP 400.

On Friday, July 7, 2006, Ms. Bradley went to Club Friday with Ms. Richardson. RP 401-402, 472. Simms, Batiste, Bailey, and the Stokes brothers were not at the club. RP 402-403, 473. Ms. Bradley saw the defendant there as well as Tiffany Walker and Kiara Singletary. RP 403. Ms. Richardson saw Ms. Walker and also the defendant, who was with a group of friends. RP 473, 489. Ms. Bradley saw some people throwing up gang signs inside the club but did not see any trouble. RP 404-405. Ms. Richardson saw defendant and his friends throwing up gang signs and heard them say “F—k Folk” and “F—k Bloods.” RP 474-475. Ms. Richardson testified that a security guard told them to stop or they would have to leave. RP 475. Ms. Bradley was not having fun and

decided to leave prior to closing. RP 405-406, 475. Ms. Richardson saw Mr. Bailey and Mr. Batiste outside the club as she was walking to the car. RP 477-478. As she and Ms. Richardson were walking to her car, Ms. Bradley saw Mr. Simms parking his car; she was not expecting to see him there; they went over to him. RP 407-409, 478. When Mr. Simms indicated that he was going to go to Club Friday, they indicated that they would go back with him. RP 409-410, 479.

Ms. Bradley testified that when the three of them reached the corner of Pacific and South 8th she heard someone shout “What is up? This is Hilltop Crip” and other voices talking about Hilltop Crips; she felt that there was going to be trouble. RP 410-411. Ms. Richardson testified that she heard them talking but could not make out what they were saying. RP 480-481. She recognized defendant and his friends in the group. RP 481-482. Ms. Bradley turned in the direction of the voices and saw a group of 7-8 people, one of whom was the defendant, standing on the sidewalk in front of the Rainier Contact business. RP 412-413. Mr. Simms had been walking in front of Ms. Bradley; he turned at the sound of the voices. RP 414. Ms. Bradley pushed him and told him not to say anything, but just to keep walking. RP 414. Someone in the group said “This is Hilltop Crip, cuz, what you know about that.” RP 439, 460-461. Ms. Bradley testified that Simms shouted back “we can go heads right now.” RP 439. Ms. Bradley heard defendant say “This is Hilltop Crip, cuz.” RP 441, 460. Ms. Bradley looked over at the group a couple of times; she saw the

defendant pulling on his pants at the waistband and then that he had something in his hand. RP 415-416, 442. She testified that she told the others that she thought one of them had a gun and that she hoped that they didn't start shooting. RP 416. She testified that Simms just laughed and said that "They are not about to do anything. Nothing." RP 416. She turned to look at the group one more time and then heard gunfire. RP 416. She testified that she pushed Simms to make him get down, but that he shoved her back and she fell first. RP 417. Once the gunfire started she did not look back over to where the defendant was standing. RP 419. She did not see anyone that she knew on her side of the street in the direction of the club. RP 419-420. Ms. Richardson testified that the shots came rapidly when they started. RP 483. She was going to try to make it back to the club but Simms fell in front of her, so she hid behind a car. RP 483, 486. She could feel bullets going by her head. RP 484-485. Ms. Richardson estimated that she heard 10-12 shots. RP 486. Ms. Richardson testified that while she was crouched she heard a collision between two cars and later saw a bumper in the street. RP 486-487. Ms. Bradley said that she moved closer to Ms. Richardson who was huddled next to a car. RP 420. When the gunfire stopped, after about seven or eight shots, Ms. Bradley testified that she and Ms. Richardson ran to their car and got in it and started to drive away; as she drove onto Pacific Avenue she saw Mr. Simms in the street. RP 420-421, 444. Just before she left the parking lot she saw a silver car collide with another vehicle on

Pacific. RP 445-446. She got out and ran to Simms, grabbed him and told him to get up. RP 424-425. A police officer was there and told her to move, but she wouldn't. RP 425. He told her to wait there until an ambulance arrived. RP 425. Ms. Bradley later identified the defendant's photograph from a photo montage as the person she thought had done the shooting. RP 426-427, 429-430, 449-450, 669-674. Ms. Richardson testified that she recalled seeing Mr. Simms' body in the street but that it was a few minutes before the police arrived. RP 487-488.

Chad Legg was working security for a bar called "On the Rocks" located at 728 Pacific Avenue on July 7-8, 2006. RP 521-522. Mr. Legg indicated that whenever Club Friday closed that there was usually a lot of shouting and frequent fights. RP 526-527, 535-536. This night there was a lot of yelling going on and there were a lot of people on the street. RP 527, 533. The shots started from the east sidewalk on Pacific near the Learning Sprout store, the bank, and Rainier Connect; he could see the muzzle flashes. RP 524, 538-539. He and another man started to get people, patrons of the bar, down on the ground for safety. RP 528-529. There was an initial volley of shots, then a pause; Mr. Legg lifted up to look and saw a young black male get shot and go down. RP 529-530. Shortly before the shooting, there was a maroon car parked in front of his bar and he asked a young black man who was talking to the occupants of the car for a light for his cigarette. RP 523-526. Mr. Legg was certain that the man killed was the same one who had given him a light. RP 530-

531. Mr. Legg thought initially that the patrons of his bar were the targets of the shooting. RP 531. It sounded to him that the shots started on the east side of the street, to the south of where he was, then moved to the west. RP 531, 532. Those shots sounded different to him. RP 531-532. Mr. Legg also recalls hearing the sound of a car wreck coming from the north, but he did not see a collision. RP 533. Mr. Legg testified that there were two bursts of gunfire; he estimated there were about 5-7 shots in the first burst and somewhere between two and ten in the second. RP 542-543.

Phillip Dutra was smoking a cigarette outside of On the Rocks when the shooting started. RP 563-564. He heard what he thought were fireworks coming from all around him. RP 564. After the “fireworks” started, he noticed a young man running down the street, away from Club Friday; when he was about 10 feet away the man dropped to the ground, but Mr. Dutra thought he might just be taking cover. RP 564-565. Mr. Dutra was standing about seven feet away from a maroon car parked in front of On the Rocks. RP 565. After the “fireworks” started someone, a black person based upon the color of the hand on the trunk lid, had the trunk open and was digging around in the trunk of the car. RP 565-566. The sound of the “fireworks” appeared to be coming from the south, closer to 9th Street. RP 566.

Stephen Burnett was inside of On the Rocks when the shots began, standing at the end of the bar. RP 555-557. Since it was near in time to

the Fourth of July, he thought the shots were fireworks initially. RP 557-558. He then felt something like a wasp sting on his buttocks and realized that he had been shot. RP 558. He indicated that he was in pain for a week from this injury. RP 559, 561.

Johnnie Dudley was walking along Pacific Avenue when the shots began. He said that a man with a gun on the east side of Pacific Avenue starting shooting and that a young black man tried to run away from the shots, was hit, and dropped to the ground. RP 544-554.

Michael Vaughn was driving southbound on Pacific Avenue in the early morning hours of July 8, 2006, when he suddenly felt a tremendous impact on his vehicle and heard the sound of crunching metal. RP 573-578, 587. He was uncertain what had happened until he looked in his rear view mirror and saw that a large four door dark red car had pulled out of a parking space and hit his car. RP 577-578. Mr. Vaughn tried to find a place to pull over, but it was several feet before he found a spot. RP 578-579. When he got out he could see that his car had taken the bumper off the other car. RP 579. The front right portion of Mr. Vaughn's vehicle had collided with the left rear portion of the other vehicle. RP 585. Mr. Vaughn began to walk down the street looking at the debris in the roadway when he came across a body in the street. RP 579. Lots of people were running and screaming in the vicinity. RP 580. He saw a black female come running up to the body trying to prop the body up; Mr. Vaughn told her that she shouldn't move him. RP 579-580. It was

eventually determined that the other car involved in the collision with Mr. Vaughn's car belonged to Brian Batiste. RP 681-682. Detective Miller examined the car on July 12, 2006; while there was evidence that the car had been involved in an accident, there was no evidence of any guns or ammunition inside the car or that the car had been hit by any gunfire. RP 681-682.

On Friday, July 7, Tiffany Walker drove her two best friends, Kiara Moore¹ and Channeka Voeuk, to Club Friday in her mom's car. RP 252-254. Ms. Walker had met the defendant prior to that night but had no problems with him and was unaware of any problems between defendant and her family, friends or Rhaczio "Rha Rha" Simms. RP 250-252, 363. Ms. Walker indicated that sometimes when she went to Club Friday she was patted down at the door, but not that night. RP 255-256. Ms. Walker stayed at the club from approximately 11:00 p.m. to 1:00 a.m., which was closing time. RP 256-258. She does not recall seeing defendant inside the club. RP 257, 289. More than one person was throwing gang signs inside the club, but she does not recall hearing any fights or harsh words inside the club. RP 257-258. Kiara Moore testified that she knew of the

¹ At the time of the incident she used the name Kiara Singletary and at the time of the trial she went by the last name of Moore. RP 253, 360.

defendant prior to the shooting. RP 361-362. She did not notice any fighting, gang signs, or trouble inside the club, but did see that defendant was there that night. RP 365-367. Ms. Voeuk did not notice any problems inside the club that night either. RP 385. Ms. Moore and Ms. Voeuk both know Mr. Simms; neither recall seeing him at the club that night or outside on the street. RP 367, 385-386. Ms. Moore knows that Mr. Simms is friends with Tyrell and Darris Stokes, Brandon Batiste, and Ardell Bailey. RP 367-369. She has heard that the Stokeses, Batiste, and Bailey are connected to a gang called the Murderville 9600 Block or Murderville Folks. RP 368-369. She has heard that Simms was “associated” with the gang without necessarily being in it. RP 368-369. She did not see any of these people at the club that night or out on the street. RP 369.

Ms. Walker and her friends left the club from the most northerly door and began to cross the street in a diagonal manner, heading in a northeasterly direction toward her car. RP 259-260, 290, 369-371, 386-387. Prior to any shots, Ms. Voeuk noticed a group of boys on the other side of the street from the club. RP 387. Ms. Walker was about halfway across the street when she heard gunshots. RP 261, 292. Ms. Moore and Ms. Voeuk testified that when the shots started that each ran to the car and ducked down trying not to get shot. RP 371, 388. Ms. Voeuk could not tell where the shots were coming from and thought that there were about four or five shots fired. RP 388-389. Ms. Voeuk saw Ms. Walker fall and

thought she had tripped. RP 389. Ms. Moore heard a group of people running past her hit did not see who was firing the shots. RP 371.

When the shot rang out, Ms. Walker saw the defendant with a gun on the eastern sidewalk; his arm was extended outward and he was shooting across the street; he was not firing in their direction. RP 260-262, 291-292. He fired more than once, but Ms. Walker is uncertain as to how many times. RP 263. Ms. Walker did not notice anyone standing near the defendant and she is certain that he was the shooter. RP 263-264. After firing several shots, defendant ran down the sidewalk in their direction; Ms. Walker heard more shots coming from the opposite side of the street and felt something strike her in the back. RP 264-266. Ms. Walker fell to the ground, her legs would not work and she was having difficulty breathing. RP 267. Ms. Walker recalls police and medical aid being around her but does not recall being asked any questions other than her name, age, and address. RP 268-269. A detective came to interview during recovery; she recalls telling him what she saw but does not remember if she ever gave him the name of the shooter. RP 269. Ms. Walker had her lung re-inflated at the hospital but did not undergo surgery; the bullet remains in her body. RP 269. She was initially paralyzed and remained in the hospital for almost a month. RP 270. By the time of her testimony, on April 10, 2007, she had some mobility but still attended medical appointments once or twice a week; she had just turned 18 years old. RP 241-243.

Tiffany's mother testified that she received a call from her son that Tiffany had been shot and went straight to the hospital. RP 299-301. She was kept in the waiting room for an hour to an hour and a half before anyone was allowed in to see Tiffany. RP 301. She estimates that outside of immediate family it would have been between 9:00 and 10:00 a.m. before friends would have been allowed into Tiffany's room. RP 301. Mrs. Walker testified that Detective Miller came to the hospital around 8:00 in the morning and prior to anyone other than immediate family having seen Tiffany. RP 302. Mrs. Walker was present during Det. Miller's interview and heard her daughter tell the detective that Verrick Yarbrough had been shooting a gun on Pacific Avenue. RP 302-303, 318-319. Det. Miller testified that during this interview, Tiffany clarified that while Verrick had been shooting, that he was not the person who shot her; she had been hit by return fire by some unknown person. RP 319-320.

Candance Rhem went to Club Friday on July 7, 2006, with her friend Monica Johnson, Alex King and Tyke, whose real name is William Terry. RP 591-592, 629-630. Ms. Rhem did not notice any problems or gang activity inside the club. RP 592. At one point Ms. Rhem and Ms. Johnson left to go get something to eat; they went to a nearby Jack in the Box purchased some food then drove back to the vicinity of Club Friday to park and eat. RP 595-596, 630-631. Ms. Rhem parked her car, nose-in, in a parking spot in front of the Bank of America, on a street that runs parallel to Pacific and around the corner from the club. RP 596-597, 603,

631. Ms. Rhem parked her car next to a car she later learned belonged to Terrance “T-Tall” Jackson. RP 598-599. Jackson’s car was empty when Ms. Rhem parked. RP 599. While eating their food, Ms. Rhem and Ms. Johnson heard some popping noises that Ms. Rhem thought were fireworks. RP 600-601, 631. Both of them thought it sounded as if the noise was coming from the Club Friday vicinity. RP 600, 632. Ms. Rhem saw a crowd of people running around the corner and Tyke, and another light skinned boy whom she had never seen before, jumped into her car. RP 601-602. Ms. Johnson described it as 8 black youths running around the corner, trying to find cars to get into and Tyke and another male she didn’t know jumping into the back of Ms. Rhem’s car. RP 632-633. Tyke was the only one in the group of eight males that Ms. Johnson recognized. RP 633. Ms. Rhem saw Terrance Jackson and the defendant, with whom she is acquainted, and several other people jumping into Terrance’s car. RP 593-594, 601-605. Ms. Rhem did not see a gun in anyone’s hand. RP 605. Ms. Johnson thought she saw a gun in the hand of one of the males that got into the car next to them. RP 634-639. Ms. Rhem asked Tyke what was going on and he said that somebody was shooting at them and told her to follow Terrance. RP 606. She followed Terrance’s car onto the freeway and then to 19th and MLK, where he pulled into a 76 gas station. RP 606-607, 640. She needed gas so she filled her car up at the pumps; Tyke and the other male got out of her car there. RP 607-609, 640. The defendant was with Terrance. RP 610.

By looking at security tapes from a Union 76 gas station at 19th and MLK Streets in Tacoma, police could see a video of Ms. Rhem's car and Terrance "T-Tall" Jackson's car pull into the station a few minutes after the shooting. RP 685-694. Detective Miller could identify Greg Hughes and William Terry getting out of Ms. Rhem's car. RP 695. He could also identify Tyrrell Jackson, D'Aron Warren, and the defendant getting out of Jackson's car along with a couple of other people whom the detective couldn't identify. RP 695-696. One of the security images showed defendant with something in his hand, which may or may not have been a handgun. RP 704, 723. Police later searched the four door Lexus belonging to Terrance Jackson, but nothing of any evidentiary value was recovered. RP 679-681.

Officer Hensley responded to the scene on Pacific and saw a female lying in the street with two other females standing next to her, waving him over. RP 164-167. He went to this group and learned that the woman lying in the street was Tiffany Walker and that she was injured. RP 167-170. He radioed for medical help and covered her with a blanket in an effort to prevent shock from setting in. RP 170. He spoke with her briefly but did not attempt to interrogate her due to her condition. RP 170-172. When the medics arrived and cut off Ms. Walker's shirt to render aid, Officer Hensley collected the shirt for evidence. RP 172-174. There was blood and damage to the shirt consistent with a bullet wound to the back. RP 174. After medics removed Ms. Walker, Officer Hensley

attempted to assist in questioning witnesses. RP 175. He asked the crowd of 15-20 people standing in front of Club Friday and asked if anyone had seen what had happened, but no one responded affirmatively. RP 175. At the request of his sergeant, he went to interview Tiayrra Bradley and Yunique Richardson. RP 175-176. He found the two women, sobbing, seated on the sidewalk a few feet from where the body of Simms lay in the street. RP 176-177. He obtained some information about the gunfight from Ms. Bradley as well as a description of the shooter and how the shooter had been behaving earlier in the evening. RP 177-180. Ms. Bradley indicated that she had seen the shooter during Fourth of July activities on Ruston Way where he had engaged in similar confrontational activities. RP 180.

Detective Terry Krause and identification specialist Donovan Velez arrived to process the crime scene. RP 67-70, 113-114. They documented and collected six bullet casings on the east sidewalk near Tiffany Walker's car. RP 95-98, 121-122. They documented bullet strikes in to the Johnson Cox Printing Company at 726 Pacific, On the Rocks Bar, and to a lawyer's office on the west side of Pacific. RP 83-106, 111. The officers could not locate any bullet strikes on the east side of Pacific. RP 106. They recovered four spent bullets recovered from the floor of On the Rocks, between On the Rocks front window and the window frame, a lawyer's office foyer, and the floor of Johnson's Print Shop on the west side of Pacific. RP 90-93, 124-125.

Dr. Eggenbroten testified that he attended Tiffany Walker when she was brought to the St. Joseph's emergency room on July 8, 2006. RP 332-335. He testified that she had a single gunshot wound to the chest, which was a life threatening injury. RP 336. After getting her stabilized, she was taken for a CT scan as that would show the path of the bullet. RP 336-337. He testified that the bullet entered her left chest from the side, struck the 8th rib, went through that rib into her chest, struck her lung, but stayed behind her diaphragm before striking her spine directly behind her aorta; the bullet lodged in her spine. RP 338. After consultation with other doctors, it was determined that surgery to remove the bullet posed a greater risk than leaving it where it was. RP 339-342. Although Ms. Walker was paralyzed, the doctors had some hope that she might walk again as the bullet had not transected the spinal cord. RP 339.

Terry Franklin, an expert in firearms comparisons from the Washington State Patrol Crime Laboratory, testified that he examined the six 380 caliber casings found on the east side of the street and concluded that they had all been fired from the same gun. RP 96, 121-122, 124-125, 200-213. He examined the four spent bullets recovered from the floor of On the Rocks, between On the Rocks front window and the window frame, a lawyer's office foyer, and the floor of Johnson's Print Shop and the one received from the medical examiner and determined that three of them had been fired from the same gun. RP 90-93, 124-125, 213-217. The fourth bullet recovered at the scene suffered more damage than the

other three; it had consistent markings but of an insufficient amount to make a positive comparison. RP 217-218. The bullet received from the medical examiner was a bullet fragment and did not contain any rifling information that would allow a comparison. RP 218. Based on the weight, it was consistent with a medium to large caliber cartridge. RP 218-219. Mr. Franklin explained that there is no scientific test that can be done to determine whether a fired bullet came from a cartridge case without out having the firearm used to fire the cartridges, but that common sense would indicate that when six casings were found at the crime scene and they were all shot from the same gun and three bullets were recovered at the crime scene and they were all fired from the same gun, that the same gun fired the bullets and casings. RP 219-220.

Dr. Ramoso, an associate medical examiner for Pierce County, testified that he conducted the autopsy on Mr. Simms body and determined that the cause of death was a gunshot wound to the head. RP 499-504. The bullet entered the back of the head, traveled through the cranium and caused injury to the cerebellum and the right occipital lobe of the cerebrum, before it lodged in the eye cavity. RP 506, 512-513. The face showed abrasions and blunt force trauma consistent with a forceful fall on asphalt pavement. RP 510-511. Dr. Ramoso recovered the bullet and placed it into evidence. RP 513. The doctor testified that these

injuries would have caused death within a few minutes, likely two to three.

RP 515.

Defendant was arrested in the early morning of July 9, 2006, and his clothes were taken into custody. He was wearing a jacket that matched the description given by witnesses of the one he was wearing the night of the shooting. RP 365-366, 403, 473-474, 657-662, 676-679. When he was arrested, defendant was wearing a ball cap that had gang writing on the bill. RP 679. The writing stated "The HTC No.1" for Hilltop Crips No. 1, "23rd street," "12th Street Craft and Crew," "Rival Gang," and "GC," which stands for Gangster Crip. RP 679.

A search of the defendant's residence also revealed that he had many items in his home consistent with him being a member of the Hilltop Crips, including furniture with gang graffiti, bandannas used as gang colors, and photographs of him throwing gang signs. RP 799-817. Defendant also had a "B" tattooed on his right forearm and a "K" tattooed on his left forearm, which stands for blood killer. RP 827.

Tavar Cook testified that on February 11, 2007 he was placed in the cell next to defendant in the Pierce County Jail. RP 733-737. Defendant told Cook to call him "V-real" as that was his hood name. RP 738-739. Defendant told him that he was in jail for the murder that happened at Club Friday. RP 740. Cook testified that defendant told him

that he had gotten into it with a dude and that later he had shot at him and the dude's girl, Tiffany. RP 741. Cook recalled the girl's name because that is his girlfriend's name. RP 741. Cook testified that defendant told him the "dude's" name; Cook indicated that it was a weird name, but that he could not recall it. RP 741. Cook testified that defendant told him that his home boy, Terrance, was his getaway driver. RP 741-742. Defendant told him that Terrance had been caught too, but that he bailed out. RP 742. Terrance Jackson had bailed out of jail. RP 773.

Cook testified that one time he was talking about his girlfriend, Tiffany, when defendant became agitated and got in his face about it. RP 743. When Cook explained that he was talking about his girlfriend, Tiffany Balck, defendant calmed down, then said "Oh I thought it was Tiffany something...I shot that bitch LOC" and then started to laugh. RP 743-744. Defendant indicated that Tiffany had snitched on him and that he couldn't have her testify against him. RP 744-745.

Defendant stipulated that he had a prior conviction that precluded him from possessing any type of firearm. RP 830-831.

Detective John Ringer testified that he is employed by the Tacoma Police Department and has been for the last 21 years. RP 831. He was a patrol officer working the Hilltop area when the gangs first hit Tacoma in and has become very knowledgeable by working on several gang task

forces. RP 831-833. He has worked gang cases in one capacity or another for most of his career and attended numerous seminars and training classes related to gang culture. RP 833-836. Ringer testified that he has had extensive on the job training regarding street gangs and, by far the most valuable experience is what he has learned from the gang members themselves. RP 833- 836. His focus has been on black street gangs and primarily the ones from California that infiltrated Tacoma. RP 836-837. He has testified numerous times as an expert on gangs in Pierce County as well as in federal court; he has also testified as an expert in Missouri in federal court. RP 838.

Ringer testified that it is difficult to define what a gang is because it is a loosely structured organization, but that generally a “gang” is a loose knit group of individuals united for a common criminal enterprise. RP 838. He testified that the structure of a gang is not hierarchical or vertical, but horizontal. RP 838. To become a member of a gang the gang has to reach out and want you as a member or “court you.” RP 839. A new recruit might be wanted by nature of who that person is related to or because he is otherwise desirable to the gang. RP 839- 840. Gang associates are individuals that hang around the gang, but may not necessarily be members. RP 840. Self-admission of gang membership is important before police will label a person a gang member. RP 835, 840-

841. If a person is regularly seen in the company of known gang members, but denies membership, the he will be labeled an “associate.”

RP 840. Gang members frequently use tattoos bandanas, graffiti, and insignia on belt buckles to indicate their allegiance to a gang. RP 841.

A gang will not have a president or absolute leader but will have certain members that have more stature than others. RP 842-843. Status or respect is very important to gang members; a showing of disrespect can lead to gunfire. RP 843. A gang member might earn respect within a gang by being a “player” in the drug trade –having contacts who can supply cocaine and marijuana- or by being a banger, someone willing to pull a gun out and shoot. RP 843. A person willing to do things for his “home boys” will advance in leadership or status within the gang. RP 843-844. A person who is not willing to be “down for his set” will become a buster or punk. RP 844. No gang member wants to be knows as this because you might be courted out of the gang – or ex communicated- if you are not strong enough. RP 844. A person courted out will be beaten out of the gang and told that he is not to be seen in the neighborhood anymore. RP 844. Loyalty is extremely important to gangs and a gang loyalty takes precedence over family loyalty. RP 851-852.

There are numerous hands signs that gang members use. RP 844-846. Hand signs can signal a connection to a certain set or can be used to

show disrespect to a rival gang. RP 844-846. Violence between rival gangs is extremely common and frequently involves gunfire. RP 850-851. It is important for a gang member to keep the respect of his fellow gang members by not allowing another gang to show disrespect to his own gang. RP 854.

Ringer explained that the Crips and the Bloods were two gangs that began in the Los Angeles area; Crips are generally associated with the color blue and Bloods with the color red. RP 847-849, 854-856. He testified that a "set" is generally a subset of a larger gang affiliation associated with a different area of the country or a different neighborhood in a city. RP 856-857. A "clique" is generally a smaller sub-set of a "set;" there may be several cliques within a set. RP 857. There can be variations however as particular sets might adopt a different color to distinguish themselves; there are gangs or sets in Tacoma that use colors other than red or blue. RP 848-849. Ringer testified that a gang member wears a bandanna of a particular color to show with whom he is associated; it is a sign of pride and support. RP 849-850. The Folks gang stem from a group that started in Chicago called the Black Gangster Disciples, something separate from the Crips and the Bloods. RP 857-858.

Ringer testified that gang rivalries tend to be deadly and without much reason; frequently the rival gang member victim of a drive-by shooting will be unknown to the shooter. RP 860-861. It is also not uncommon for innocent bystanders to get caught in the cross-fire of two rival gangs shooting at each other. RP 864-865. Ringer has interviewed many people over the years who committed violent acts to maintain or advance their position in the hierarchy of a gang. RP 865.

Ringer testified that based upon his review of the police reports in this case and an examination of items recovered from the defendant's person on his arrest, as well as item found in his residence, it would be his opinion that defendant is a full fledged member of the 23rd Street Hilltop Crips, probably in the Trafton Block clique. RP 868- 884. He testified that the statement "What's up, cuz" said to a rival gang member is a sign of disrespect because 'cuz" is a term that Crips use to refer to one another and calling a Blood or a Folk "cuz" is insulting. This phrase is frequently uttered just before a Crip starts shooting at the Blood or Folk, he is saying it to just as "What's up Blood" would be uttered by a Blood gang member about to fire on a Crip. RP 886-887. A gang member firing on a rival gang member is going to expect the rival to shoot back. RP 888.

William Terry testified for the defense. He testified that he was talking with the defendant on the sidewalk across the street from Club

Friday when the shots began. RP 922-930. He could not tell where the shots were coming from but they were not being fired right next to him. RP 930. He took off running around the corner to the bank to get into Candance Rhem's car. RP 931. He heard two series of guns shots that sounded different from each other. RP 931. He told Ms. Rhem to drive off and she did. RP 932. He did not tell her where to go, but just happened to end up at the same gas station as the defendant. RP 932. He never saw anyone with a gun that night. RP 933.

Brian Boyd, who oversees the Club Friday program in Tacoma, was called by the defense. RP 943-944. He testified that the club has strict policies: no drugs, alcohol, smoking, or profanity is allowed. RP 944-945. There is a no re-entry policy and a no-trespass book; if anyone caused a problem, his name would be entered in the no trespass book and he would not be allowed in. RP 945-946. He testified that the club has security procedures and that everyone coming into the club is patted down; there is also a mandatory coat and purse check. RP 947. The pat down is to make sure there are no weapons or any other contraband. RP 947. There were no reports of any fights occurring in the club on Friday July 7-8, 2006. RP 950.

The defendant did not testify.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING “GANG” EVIDENCE AS IT WAS RELEVANT TO PROVE THE DEFENDANT’S EXTREME INDIFFERENCE TO HUMAN LIFE, HIS MOTIVE FOR SHOOTING, AND HIS INTENT.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court’s decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

In the case now before the court, defendant claims that the trial court erred in the admission of gang evidence under ER 404(b), that rule provides:

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.

The rule's list of purposes for which evidence of other crimes or misconduct may be admitted is not intended to be exclusive. *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

Prior bad acts are admissible only if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. *State v. Boot*, 89 Wn. App. 780, 788, 950 P.2d 964 (1998), citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence to the action and makes the existence of the identified act more probable. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).

Before admitting evidence of other crimes or wrongs under ER 404(b), a trial court must: (1) establish by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. *State v. Hernandez*, 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000), *citing State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). In determining relevancy, (1) the purpose for which the evidence is offered “must be of consequence to the out-come of the action,” and (2) “the evidence must tend to make the existence of the identified fact more . . . probable.” *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986), *citing State v. Salterelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Admission of evidence under ER 404(b) is reviewed for abuse of discretion. *Hernandez*, at 322, *citing State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995).

In *State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584 (1987), a murder prosecution, the State was allowed to introduce evidence of other prior incidents where the defendant brandished a gun against persons other than the victims. The court held that such evidence was probative because it tended to contradict the defendant’s claim that he acted in self-defense. The court permitted the State to elicit evidence regarding two separate incidents where defendant pointed a gun at other persons.

Similarly, in *State v. Turner*, 29 Wn. App. 282, 627 P.2d 1324 (1981), where the defendant was convicted of three counts of second degree assault and one count of reckless endangerment arising out of a series of Halloween shooting incidents, the court held that the trial court properly admitted evidence of prior rifle-pointing incidents to show the defendant's frame of mind. The appellate court held that "the prior incidents were relevant and necessary to prove the essential ingredients of the offense." *Turner, supra* at 290.

The trial court should weigh the probative value of the evidence against its prejudicial effect prior to admitting the evidence under ER 404(b). *Lough*, 125 Wn.2d at 852.

Although the State is not required to prove motive as an element of the offense, evidence showing motive is admissible in a homicide prosecution. *State v. Boot, supra* at 789; *State v. Osborne*, 18 Wn. App. 318, 325, 569 P.2d 1176 (1977); *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996). Motive is an inducement, which tempts a mind to commit a crime. *Boot*, at 789, (*citing State v. Bowen*, 48 Wn. App. 187, 191, 738 P.2d 316 (1987)). In *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995), the court explained, "[M]otive goes beyond gain and can demonstrate an impulse, desire or any other moving power which causes an individual to act."

In *State v. Boot* gang affiliation evidence was admissible to prove motive for murder where evidence established that killing someone heightened a gang member's status. *Boot*, 89 Wn. App. at 789. In *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995), evidence of the defendant's gang affiliation was admissible to prove motive and intent, where the State's theory was that the defendants were gang members who responded violently to threats to their status and territory. Finally in *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 566 (2006), evidence of white supremacist beliefs were admissible to prove motive and the circumstances of the crime where the State's theory was that defendant killed the victim to enhance his status among white supremacists.

In *Powell*, the Supreme Court held that the trial court properly admitted testimony that established a hostile relationship between the defendant and his wife to show the motive for the wife's murder. *Powell*, 126 Wn.2d at 260. In *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997), the Supreme Court held that the trial court properly allowed testimony from a witness who overheard a conversation between the defendant and his wife wherein the defendant told his wife that she could drive his truck, but if anything happened to it she would be in a lot of trouble. The trial court held that because the defendant was accused of killing his wife, the nature of their relationship was relevant. The trial court concluded that there could be "an inference of antagonism" shown

by the exchange between the defendant and his wife and further concluded that the testimony did not cause any unfair prejudice. *Stenson*, at 700.

The State brought a pretrial motion to admit evidence of defendant's gang membership under ER 404(b) and the defendant brought a motion to exclude it. CP 9-16, 17-25. Specifically the State sought to admit: 1) testimony of individuals who knew defendant to be involved with the Hilltop Crips; 2) evidence of the confrontation that defendant and other Hilltop Crips had with Mr. Simms and member of the 96th Murderville Folk at the Tacoma Waterfront on the Fourth of July; 3) a video found on the defendant's cell phone of him throwing gang signs; 4) the ball cap that defendant was wearing when arrested that had gang graffiti on the bill; 5) items taken from the defendant's bedroom such as a blue do-rag or bandanna, photographs and drawings or graffiti that was gang related; 6) a photograph of defendant's tattoos of "B" on one arm and "K" on the other which stands for "blood killer;" and, 7) expert testimony that would tie those pieces of information together to help the jury understand the nature of defendant's gang involvement. 12/13 RP 5-7; CP 17-25. Defendant sought to exclude the evidence on the grounds that it interfered with his constitutional right to freely associate and that it was unfairly prejudicial. CP 9-16. Only the second objection has been pursued on appeal.

The court determined that the facts of the crime indicated that it was a gang related incident and that as such evidence showed defendant to

belong to an organization that had negative feelings toward another organization to which the victim belonged. This information was relevant to the defendant's motivation and toward establishing his mens rea at the time of the crime. 12/13 RP 17-19. The court entered a written order setting forth its reasons which comply with the steps that a court is to conduct when ruling on ER 404(b) evidence. CP 38-40.² The court found by a preponderance of the evidence that the "misconduct" occurred; it identified the purpose for introducing such evidence; it determined the evidence is relevant; it found the probative value of the evidence outweighed the prejudicial effect. CP 38-40. Defendant has failed to show that this evidentiary ruling was an abuse of discretion.

Defendant seems to acknowledge that the *Campbell* and *Boot* cases discussed above support the decision of the trial court in this case. See Appellant's brief at pp 37-45. Defendant argues that those cases are distinguishable because Campbell and Boot were charged with premeditated murder whereas he was charged with murder by extreme indifference. *Id.* While there is this difference between defendant's case and the other two, defendant offers no compelling analysis or argument as to why this distinction makes a difference. If the evidence at issue shows that a gang member will shoot at a rival gang member as a means of defending the "honor" of his gang - regardless of whether there is any

² See Appendix A.

immediate threat or risk of harm from the rival - that evidence is relevant to establish mens rea whether the gang member is planning on killing the rival, assaulting the rival, or whether it makes little difference to him whether the rival lives or dies. The shooter is engaging in an intentional act that creates a substantial likelihood of death or serious injury. When additional evidence shows that the shooter would expect the rival to return fire and still initiates gunplay in an area filled with innocent bystanders, then the evidence is highly relevant to establishing an extreme indifference to human life. Defendant also suggests that this court should abandon the precedent of *Campbell* and *Boot*, but does not engage in the proper analysis when seeking to challenge stare decisis. The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it will be abandoned by the courts. *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). In Washington, there is no firm rule either allowing or disallowing gang evidence. Rather, the established rule is that whether gang evidence should be admitted at trial is left to sound discretion of the trial court. Defendant has failed to show that this rule is either incorrect or harmful. Moreover he has failed to show that the trial court abused its discretion in admitting the gang evidence in his case. The trial court should be affirmed.

2. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she

was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case,

viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." ***Strickland***, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. ***Mickens v. Taylor***, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); ***Campbell v. Knicheloe***,

829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988).

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, defendant seeks to show ineffective assistance of his trial counsel based on two alleged errors: 1) his failure to request limiting instruction on the gang evidence; and, 2) his failure to object to Detective Ringer's testimony.

- a. Failure to request limiting instruction on 404(b) evidence is a legitimate trial strategy.

When the trial court ruled that evidence of defendant's gang membership would be admissible at trial, it also ruled that the "court is prepared to sign an appropriate limiting instruction in order to reduce the risk of unfair prejudice." CP 38-40. Defense counsel did not propose

such an instruction. CP 78-109. Defendant now claims that this constitutes deficient performance.

Defense counsel's decision not to request a limiting instruction on the gang evidence can reasonably be characterized as trial strategy or tactics. Several cases have held that it can be presumed that trial counsel did not request a limiting instruction regarding the use of ER 404(b) evidence of prior bad acts because "to do so would reemphasize this damaging evidence" to the jury. *State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27 (2005); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024 (1993). As noted above, tactical decisions will not support a claim of ineffective assistance. Defendant cannot show deficient performance from this alleged omission.

- b. Defendant has failed to demonstrate that an objection to Ringer's testimony would have been successful.

As noted above, in order to succeed on a claim on ineffective assistance of counsel for a motion or objection not brought, the defendant must show that the motion or objection would have be granted. Defendant cannot show that a motion to exclude Detective Ringer's testimony would have been successful.

To begin with, the State discussed the need for expert testimony in its motion to admit gang evidence. 12/13 RP 7. The court granted the

State's motion. 12/13 RP 20. While the written order does not expressly mention the expert testimony, it indicates that the Court was granting the State motion, which included being able to adduce the expert testimony. CP 38-40 . It would appear that defense counsel did not bring another motion to exclude Detective Ringer's testimony because he had already lost that motion.

Defendant has failed to show that a second motion to exclude the expert testimony would have ended in a different result than the first. The admissibility of expert testimony is analyzed under ER 702 and ER 703. When determining admissibility, the trial court should consider the proffered expert testimony in conjunction with ER 401 and ER 403. *State v. Ellis*, 136 Wn.2d 498, 523, 963 P.2d 843 (1998). In determining whether to admit expert testimony the court should ask whether the witness's testimony be helpful to the trier of fact. *State v. Farr-Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999). Evidence is helpful if the "testimony concerns matters beyond the common knowledge of the average layperson, and does not mislead the jury to the prejudice of the opposing party." *Farr-Lenzini*, 93 Wn. App. at 461.

The qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a showing of an abuse of discretion. *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wn.2d 629, 642 453 P.2d 619 (1969). As with other evidentiary

issues, the admission or exclusion of expert testimony is left to the sound discretion of the trial court.

The subject of the expert testimony should be beyond the common understanding and knowledge of the jury. *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995). Generally, neither expert nor lay witnesses are permitted to testify “regarding the veracity of another witness because such testimony invades the province of the jury as the fact finder in a trial.” *State v. Demery*, 144 Wn.2d 753, 764, 30 P.3d 1278 (2001).

Under these principles, courts have approved expert testimony about jargon and notions commonly used in narcotics transactions, *State v. Strandy*, 49 Wn. App. 537, 543, P.2d 745 P.2d 43 (1987), *United States v. Tutino*, 883 F.2d 1125 (2d Cir 1989), *cert. denied*, 493 U.S. 1081, 110 S. Ct. 1139, 107 L. Ed. 2d 1044 (1990), and the meaning of gang symbols, hand signs and other aspects of gang culture. *United States v. Sparks*, 949 F.2d 1023 (8th Cir. 1991), *cert denied*, 504 U.S. 927, 112 S. Ct. 1987, 118 L. Ed. 2d 584 (1992). Courts have also allowed expert testimony on the structure and organization of crime families in racketeering cases. *United States v. Ardito*, 782 F.2d 358, 363 (2d Cir.), *cert. denied*, 475 U.S. 1141, 106 S. Ct. 1792, 90 L. Ed. 2d 338 (1986); *United States v. Daly*, 842 F.2d 1380, 1387-1388 (2d Cir. 1988), *cert. denied*, 488 U.S. 821, 109 S. Ct. 66, 102 L. Ed. 2d 43 (1988). None of this type of testimony involves the application of the *Frye* rule.

In *State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060 (1992), the Supreme Court upheld admission of expert testimony on tracking from a man who had gained his specialized knowledge through 23 years of experience and training including tracking approximately 5000 people. The court held that the *Frye* rule, regarding scientific evidence, was not applicable because the “testimony was not based on novel scientific experimental procedures” but on the witness’s “own practical experience and acquired knowledge.” *Ortiz*, 119 Wn.2d at 311.

Under the above authority for admitting expert testimony, it is clear that defendant cannot show that any objection to the testimony of Detective Ringer would have been successful. Detective Ringer was clearly qualified as an expert on gangs based upon his training and years of experience. He has testified as an expert in more than one state and the federal courts. Moreover, his testimony was helpful to a jury. A jury would have no method of assessing or interpreting gang signs or any specialized knowledge of gang culture. It was critical for the jury to understand how status, respect, and most importantly, disrespect, are handled in a street gang. Without his testimony, for example, the jury would not understand the importance of the phrase “What’s up cuz” when it is said by a Crip gang member to a Folks gang member. This type of specialized knowledge is simply beyond common knowledge of most jurors. Similar testimony has been admitted in other cases and been upheld by the appellate courts. Having admitted the evidence of

defendant's gang membership, it was likely the court would also allow the expert testimony that could put the other evidence into context. As defendant did not meet his burden of showing resulting prejudice, the failure to object to this testimony will not provide a basis for finding ineffective assistance of counsel.

Defendant failed to meet his two pronged burden of showing deficient performance and resulting prejudice necessary to succeed in a claim of ineffective assistance of counsel. This claim is without merit.

3. THERE IS NO DOUBLE JEOPARDY VIOLATION FOR INCREASING DEFENDANT'S SENTENCE BECAUSE HIS CRIME HAD A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM AS THIS AGGRAVATING CIRCUMSTANCE IS NOT "AN OFFENSE" BUT A SENTENCING FACTOR FOR WHICH THE LEGISLATURE AUTHORIZED ADDITIONAL PUNISHMENT.

The Washington State Constitution, article I, section 9, and the Fifth Amendment to the federal constitution prohibit multiple prosecutions or punishments for the same offense. *State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). The state constitution provides the same protection against double jeopardy as the federal constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Although the protection itself is constitutional, it is for the Legislature to decide what conduct is criminal and to determine the appropriate punishment. *State v.*

Louis, 155 Wn.2d 563, 568, 120 P.3d 936 (2005); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). The court's role is limited to determining whether the Legislature intended to authorize multiple punishments. *Id.* When the trial court has imposed cumulative punishment without legislative authorization, it has also violated the separation of powers doctrine. See *State v. Frohs*, 83 Wn. App. 803, 810, 924 P.2d 384 (1996). So when a claim of improper multiple punishments is raised, the appellate court must determine whether the lower court exceeded the punishment authorized by the legislature. See *Calle*, 125 Wn.2d at 776.

There have been numerous double jeopardy challenges to enhanced sentences, usually involving weapons or firearm enhancements. Washington courts have repeatedly rejected arguments that weapons enhancements violate double jeopardy. *State v. Husted*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003) (citing *State v. Claborn*, 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981)); see also *State v. Nguyen*, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006), review pending, 2007 Wash. LEXIS 102 (Wash. Jan. 30, 2007). In *State v. Claborn*, the defendant received separate weapons enhancements for burglary and theft convictions arising from the same event. 95 Wn.2d at 636-38. On appeal, Claborn argued that separate enhancements for the "single act" of being armed with a deadly weapon during the burglary and theft violated double jeopardy. Noting that burglary and theft have separate elements and that the

enhancement statutes did not themselves create criminal offenses, the *Claborn* court held that the enhancements did not create multiple punishment for the same offense.

Courts have also rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon was an element of the crime charged. See *State v. Caldwell*, 47 Wn. App. 317, 319, 734 P.2d 542, review denied, 108 Wn.2d 1018 (1987); *State v. Pentland*, 43 Wn. App. 808, 811, 719 P.2d 605, review denied, 106 Wn.2d 1016 (1986); *State v. Harris*, 102 Wn.2d 148, 160, 685 P.2d 584 (1984), overruled on other grounds by *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). These cases make clear that, for purposes of sentence enhancements, “the double jeopardy clause does no more than prevent greater punishment for a single offense than the Legislature intended.” *Caldwell*, 47 Wn. App. at 319 (quoting *State v. Pentland*, 43 Wn. App. 808, 811-12, 719 P.2d 605 (1986) (citing *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983))). That court concluded that the Legislature had clearly expressed its intent that a person who commits certain crimes while armed with a deadly weapon will receive an enhanced sentence, notwithstanding the fact that being armed with a deadly weapon was an element of the offense. *Caldwell*, 47 Wn. App. at 320.

When the Legislature amended RCW 9.94A.535 in the aftermath of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), it went from an illustrative or non-exclusive list of

aggravating circumstances to an exclusive list of factors that could support a sentence above the standard range. Compare Former RCW 9.94A.535 (Laws of Washington 2003 c 267 §4) with RCW 9.94A.535³ (Laws of Washington 2007 c 377 §10). When the Legislature enacted this exclusive list pertaining to factors considered by a jury, it expressly limited some aggravating circumstances to certain classes of offenses, *see e.g.* RCW 9.94A.535(3)(c) (violent offense), (d) (major economic offense), and (o) (sex offense), or to a specific crime, *see e.g.* RCW 9.94A.535(2)(l) (trafficking), (u) (burglary), and (z)(i)(A) (theft and possession of stolen property). The vast majority of the provisions, however, contain no limitations as to the type of crime to which it may be applied. *See* RCW 9.94A.535(3). If a jury makes a finding of an aggravating factor listed under RCW 9.94A.535(3), the Legislature authorized the court, in its discretion, to use this factor to impose a term of confinement up to the maximum allowed under RCW 9A.20.021. RCW 9.94A.537(6).⁴

In defendant's case the jury found beyond a reasonable doubt that two aggravating factors applied to defendant's crime: 1) "the offense involved a destructive and foreseeable impact on persons other than the victim" under RCW 9.94A.535(3)(r); and 2) the "defendant committed the offense to obtain or maintain his ... membership or to advance

³ See Appendix B for current text of RCW 9.94A.535.

⁴ See Appendix C for full text of statute.

his...position in the hierarchy of an organization, association, or identifiable group” under RCW 9.94A.535(3)(s). CP 228. Defendant now contends that imposition of an exceptional sentence premised on the first factor violates double jeopardy as this is the “same offense” as his substantive crime of “first degree murder by extreme indifference.” *See* Appellant’s brief at 69-73.

This case does not present a situation where a defendant has been convicted of two “offenses” that must be analyzed under the *Blockburger* test. The aggravating factor is not “an offense” at all and may not be separately prosecuted. Defendant’s reliance upon cases assessing double jeopardy implications when a defendant has been convicted of multiple offenses is misplaced. The only question is whether the Legislature authorized increased punishment when a crime has a destructive and foreseeable impact on persons other than the victim. It clearly authorized increased punishment under RCW 9.94A.535(3)(r) and did not place any limitations as to which crimes this factor may be applied. This situation is similar to the cases involving weapon enhancements. In those cases the sentencing factor mirrors an element of a crime yet both may be punished because of the express legislative authority. Here the aggravating factor cannot be said to be a mirror image of the element of murder by extreme indifference. A defendant could commit murder by extreme indifference shooting a single shot into a crowd of people that he knew to be unarmed and killing one person. With the exception of a bullet passing through two

bodies, the risk of death is limited to a single person. No great destructive force has been unleashed. Whereas in defendant's case, he fired multiple shots, in a crowd filled area, at persons who were likely to return fire. The risk of a destructive impact on persons other than the victim of the homicide in this scenario is considerably greater than what was necessary to prove the crime. This is why the Legislature authorized additional punishment when this factor is present.

As the increased punishment was authorized by the Legislature there is no double jeopardy violation.

4. THIS COURT SHOULD AFFIRM THE IMPOSITION OF THE EXCEPTIONAL SENTENCE AS IT WAS SUPPORTED BY THE EVIDENCE AND BASED ON TWO PROPER AGGRAVATING CIRCUMSTANCES.

In most cases governed by the Sentencing Reform Act (SRA) a trial court is required to impose a sentence within the standard range. *See* RCW 9.94A.505(2)(a)(i). In order to depart from the standard range, the SRA indicates that a court may do so "if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The SRA also sets forth the scope of appellate review of exceptional sentences:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard

sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4). The Washington Supreme Court has interpreted this provision “as establishing three prongs each with its own corresponding standard of review.” *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717

(2005). Those prongs are:

1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

Id.; *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997).

As noted by Justice Alexander, the “decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) represented a ‘sea change in the body of sentencing law.’” *State v. Suleiman*, 158 Wn.2d 280, 295, 143 P.3d 795 (2006) (Alexander, J. dissenting) quoting *United States v. Ameline*, 376 F.3d 967, 973 (9th Cir. 2004). The Legislature responded to both the *Blakely* decision and to the Washington State Supreme Court’s opinion in *State v. Hughes*, 154 Wn.2d 118, 126, 110 P.3d 192 (2005), as to what was required in a post-*Blakely* world with amendments to the SRA. See *State v. Newlund*, 142

Wn. App. 730, 739-741, 176 P.3d 529 (2008). Where the old SRA made the sentencing court the fact finder on aggravating circumstances, the new amendments authorize the trial court to impose an exceptional sentence if the jury finds that the State has proved “one or more of the facts alleged . . . in support of an aggravated sentence” and if “the facts found are substantial and compelling reasons justifying an exceptional sentence.” Laws of 2005, chapter 68, section 4(5). But while making significant changes as to who was the fact finder of aggravating circumstance and the burden of proof to be employed in RCW 9.94A.535 and 9.94A.537, the Legislature did not amend the provisions of RCW 9.94A.585(4). While the *Law* decision issued in the post-*Blakely* world, the facts of that case did not involve jury determined aggravating circumstances and the opinion did not address whether the first prong of the three pronged standard of review still had applicability when the facts were found by a jury beyond a reasonable doubt. The State can find no post-*Blakely* published Washington case that has reviewed an exceptional sentence upward based upon a jury determination of the aggravating factors. It appears to be a matter of first impression as to whether there needs to be an adjustment to the review process post-*Blakely*.

In this case defendant challenges his sentence only on the grounds that there was insufficient evidence for the jury to find that the defendant committed his crimes to obtain or maintain his membership or to advance his position in the hierarchy of an organization, association, or identifiable

group. The State submits that in the post-*Blakely* world, when the jury has found facts to be used for sentencing purposes that appellate review of the factual determination should employ the same analysis that a court uses to review the sufficiency of the evidence on the substantive elements of the crime.

There are several reasons that this form of appellate review is more appropriate than the old standard of review. The old manner of review is no longer functional. Whereas a court can articulate the evidence it relied upon to make a factual determination in an oral or written ruling, there is no established process for getting a jury to articulate the factual underpinnings of its special verdict without encroaching into matters which inhere in the verdict. The situations are analogous. The jury is asked to make the same type of determination on a sentencing factor as it is on an element of a crime: find the existence of a certain fact beyond a reasonable doubt. Perhaps the most appealing consideration is that by using a well-established analysis for review of evidentiary sufficiency, it is likely that there would be little future litigation as to whether the review process satisfied constitutional concerns.

The defendant employs traditional sufficiency of the evidence analysis in his brief without explanation as to why he is ignoring precedent as to the review process of the factual underpinnings of an exceptional sentence. *See* Appellant's brief at pp 65-69. Clearly, he does not object to the court applying this standard of review. As the defendant agrees, at

least tacitly, that the old manner of review is no longer appropriate, the State will also analyze the issue with principles applicable to reviewing the sufficiency of the evidence of the substantive offense.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Anderson*, 72 Wn. App. 453, 458, 864 P.2d 1001, *review denied*, 124 Wn.2d 1013 (1994).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). This is because the written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations. The trier of fact, who is best able to observe the witnesses and evaluate their testimony, should make these determinations. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial courts factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (internal citations omitted).

Defendant argues that there was insufficient evidence to uphold the jury's determination that he "committed the offense to obtain or maintain his...membership or to advance his...position in the hierarchy of an organization, association , or identifiable group" under RCW 9.94A.535(3)(s).

In this case, there was sufficient evidence presented, when viewed in the light most favorable to State, that the defendant was a member of the 23rd Street Hilltop Crips, a gang who felt that it had been disrespected by the Murderville Folks, including the victim, on the Fourth of July. The defendant and his gang were ready to "bust" on the victim at that time except for the nearby presence of the police. RP 400. When the defendant next sees the victim, he shoots him after uttering "What's up cuz. This is Hilltop." RP 441, 460. As Detective Ringer explained this language is an insulting challenge and a warning that gunfire is about to erupt. RP 886-888. He also explained that gang members gain status within the gang by being a gang banger, someone who is willing to engage in gunplay to defend the honor of the gang and that someone who is perceived as unwilling to defend his "home boys" may be kicked out. The jury was

free to conclude from this evidence that defendant's actions were done solely to maintain or increase his position in the 23rd Street Crips.

There certainly was no evidence of any other reason for this completely senseless killing presented at trial. Defendant was under no actual threat of harm from Mr. Simms at the time of the killing. Mr. Simms was unarmed and walking on the other side of the street. There was no financial gain for defendant to be had from Mr. Simms death. Other than the incident on the Fourth of July, there was no history of animosity between them stemming from any wrongful act on either's part. Mr. Simms had not stolen from defendant; there was no romantic triangle involving the two men. The testimony did not reveal any real offense having occurred on the Fourth of July to justify resorting to gunplay. It apparently was nothing more than an exchange of verbal hostilities. So not only was there ample evidence to support the jury's determination that this crime was done so that defendant could maintain or advance his position in his gang, the record is completely devoid of any evidence of any other possible motivation for this crime.

This court should affirm the trial court's imposition of an exception sentence. The court relied on two aggravating circumstances, which were found by the jury beyond a reasonable doubt. Defendant has failed to show that either aggravator is invalid on appeal. As defendant does not challenge his sentence in any respect other than sufficiency of the

evidence, this court should affirm the trial court's reliance upon the factors found by the jury.

5. DEFENDANT HAS FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that

the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal...”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence,

and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. *Compare State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial because of: 1) the enormity of the errors; 2) the errors centered around a key issue, or 3) the same conduct was repeated so many times that a curative instruction lost all effect. *See e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use

codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error); *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue); *State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See *Stevens*, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in the trial. He has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the judgment and sentence below.

DATED: May 5, 2008

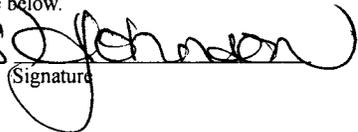
GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

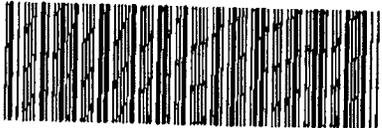
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/5/08 
Date Signature

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DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

APPENDIX "A"

*Order Admitting Gang-Related
and
"Other Suspect" Evidence*



06-1-03109-3 27286698 OR 04-11-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-03109-3

vs.

VERRICK VERE YARBROUGH,

ORDER ADMITTING GANG-RELATED AND "OTHER SUSPECT" EVIDENCE

Defendant.

THIS MATTER having come on regularly before the undersigned judge of the above-entitled court, and the court having considered the records and files herein and the arguments of counsel,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The State's motion to admit gang-related evidence is granted and Defendant's motion to exclude such evidence is denied. The court finds that the Plaintiff's verbal offer of proof of December 13, 2006, together with its pleadings, establish that the Plaintiff has sufficient evidence to prove the following by a preponderance:

A. Defendant is affiliated with a particular "set" of the Hilltop Crips street gang, as evidenced by his words, tattoos, gang-related graffiti, clothing, his associates, and his conduct at relevant times.

B. Defendant, and/or his gang had altercations, verbal and physical, with a rival gang called the "96th St. Murderville Folks," and these problems occurred within several days to a few weeks

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1 before July 8, 2006. The altercations occurred at Tacoma's waterfront July 4th festivities and at a
2 local hotel.

3 C. Defendant, and/or his gang were motivated to harm persons perceived to be associated
4 with the 96th St. gang. Victim Rhaczio Simms was perceived by Defendant, and/or his gang to
5 be affiliated with the 96th St. gang.

6 D. The shooting on the night in question occurred immediately after gang-related insults
7 were yelled back and forth between rivals situated across the street from each other.

8 2. The court further finds that the State's purpose in offering the gang-related evidence is to
9 prove motive for the alleged crimes and to prove identity of the shooter, and to prove the
10 required mental state for first degree murder and assault, and that these purposes are consistent
11 with ER 404(b).

12 3. The court also finds that the proffered evidence would satisfy the purposes described
13 because proof of Defendant's gang affiliation, and his motivation to harm perceived rivals,
14 particularly because of earlier altercations, would provide circumstantial proof of his motive, his
15 identity as the shooter from a rival gang, and his intent to do great bodily harm or his extreme
16 indifference to human life.

17 4. The Court further finds that the proffered evidence would not violate ER 403 because its
18 probative value is high, as it is central to the State's theory of the case, and that any danger of
19 unfair prejudice does not substantially outweigh its probative value. The court is prepared to
20 sign an appropriate limiting instruction in order to reduce the risk of unfair prejudice.

21 *

22 *

23 *

06-1-03109-3

IT IS FURTHER ORDERED:

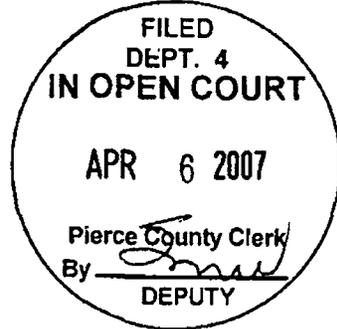
1 5. The defense will be permitted to introduce "other suspect" evidence during trial, provided
2 a proper foundation is laid, that is, the defense must offer a trail of facts and circumstances that
3 clearly point to another person as the guilty party.

4 DONE IN OPEN COURT this 6th day of April, 2007.

5
6 *Myke Chubbuck*
7 JUDGE

8 Presented by:

9 *Gerald Costello*
10 GERALD T. COSTELLO
11 Deputy Prosecuting Attorney
12 WSB # 15738



13 Approved:

14 *Robert Meyers*
15 ROBERT MEYERS
16 Attorney for Defendant
17 WSB # 15199

APPENDIX "B"

RCW 9.94A.535

§ 9.94A.535. Departures from the guidelines

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances -- Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances -- Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances -- Considered by a Jury -Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

(z) (i) (A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property or nonferrous metal property, as defined in RCW 19.290.010.

HISTORY: 2007 c 377 § 10; 2005 c 68 § 3; 2003 c 267 § 4; 2002 c 169 § 1; 2001 2nd sp.s. c 12 § 314; 2000 c 28 § 8; 1999 c 330 § 1; 1997 c 52 § 4. Prior: 1996 c 248 § 2; 1996 c 121 § 1; 1995 c 316 § 2; 1990 c 3 § 603; 1989 c 408 § 1; 1987 c 131 § 2; 1986 c 257 § 27; 1984 c 209 § 24; 1983 c 115 § 10. Formerly RCW 9.94A.390.

APPENDIX "C"

RCW 9.94A537(6)

§ 9.94A.537. Aggravating circumstances -- Sentences above standard range

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(4) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(5) If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

HISTORY: 2007 c 205 § 2; 2005 c 68 § 4.