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COURT OF APPEALS
DIVISION II

10 MAR 16 AM 10:26

STATE OF WASHINGTON

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No. 39348-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KAI TREMAINE PIERCE,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 07-1-01040-0
The Honorable Thomas P. Larkin, Judge

OPENING BRIEF OF APPELLANT

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I. SUMMARY OF THE CASE

In the early morning hours of November 26, 2006, someone shot Shawn Garrett in a parking lot across from a South Tacoma nightclub. A large number of people likely witnessed the shooting, but very few were willing to provide information to investigators. Those who were willing told widely differing accounts of the events before, during and after the shooting, and identified different persons as the shooter. Garrett identified Kai Tremaine Pierce as the shooter, so the State charged Pierce with attempted first degree murder.

Police and prosecutors believed that Pierce was associated with a Hilltop Neighborhood gang called the Young Gangster Crips, and believed that the shooting was gang-related. Over defense objection, the State was allowed to present evidence to the jury showing that Pierce associated with known gang members, as well as testimony regarding gang history and culture.

Pierce did not deny being at the nightclub when the shooting occurred, but he denied being the shooter. Pierce presented expert testimony discussing certain factors that can adversely effect a victim's identification of a suspect, and lay witnesses who either saw another person shoot or heard another person confess to

being the shooter. But the jury convicted Pierce of attempted second degree murder and unlawful possession of a firearm. Pierce now appeals these convictions.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting minimally probative but unfairly prejudicial evidence of gang culture and gang affiliation.
2. Appellant was denied his right to effective assistance of counsel when his trial attorney failed to request an instruction informing the jury that it could only consider gang evidence for limited purposes.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the State had no evidence that Appellant was a current gang member, and where the gang evidence was not necessary to establish the matters for which it was admitted, did the trial court err in admitting gang evidence? (Assignment of Error 1)
2. Did the trial court err in admitting gang evidence where any probative value was minimal and where the potential for prejudice was extremely high? (Assignment of Error 1)
3. Was Appellant denied his right to effective assistance of

counsel where trial counsel fought vigorously to exclude gang evidence due to its prejudicial nature, and where the evidence was admitted only for limited purposes, but counsel failed to propose a jury instruction expressly stating the limited purposes for which gang evidence could be considered? (Assignment of Error 2)

IV. STATEMENT OF THE CASE

A. Procedural History

The State charged Kai Tremaine Pierce by Amended Information with one count of attempted premeditated murder in the first degree (RCW 9A.32.030(1)(a), 9A.28.020), while armed with a firearm (RCW 9.94A.510, .530), and one count of first degree unlawful possession of a firearm (RCW 9.41.040). (CP 4-5) A jury convicted Pierce of attempted second degree murder while armed with a firearm, and of unlawful possession of a firearm. (CP 194-97; 04/15/09 RP 6-7) The trial court sentenced Pierce to a standard range sentence totaling 240 months. (05/15/09 RP 175, 176-77; CP 231, 234) This appeal timely follows. (CP 245)

B. Substantive Facts

The Factory is a nightclub in South Tacoma that law enforcement believes is a hangout for members of a Hilltop

Neighborhood gang called the Young Gangster Crips (YGC). (3 RP 147; 9 RP 40)¹ Violent incidents were common at The Factory, so the owner hired professional bouncers and off-duty police officers to provide security and crowd management. (3 RP 147-48; 4 RP 10-11; 5 RP 9, 10)

There were several hundred patrons at The Factory on November 26, 2006. (4 RP 9; 5 RP 15) As closing-time approached, several men became engaged in a physical altercation outside the front door of the club. Witness testimony describing how and why this altercation started, and describing what occurred after it ended, is inconsistent.

Tacoma Police Officer David Fischer was one of the off-duty officers providing security that night. (6 RP 33) He was stationed in his patrol car outside the club, when he was approached by a woman who was bleeding because she had been hit over the head with a beer bottle. (3 RP 155, 156; 6 RP 37) As Fischer interviewed the woman, he noticed that a fight involving five or six men had started in the street in front of the club. (6 RP 37-38, 39) A crowd of 10 to 15 people had gathered to watch. (6 RP 37-38,

¹ Reference to the transcripts labeled Volumes 1 thru 12 will be to the volume number (# RP) followed by the page number. Reference to the unnumbered volumes will be to the date of the proceeding followed by the page number.

39) Fischer approached the crowd and sprayed a mist of pepper spray in an effort to stop the fight and to encourage the crowd to disperse. (6 RP 38, 39) Fischer's effort was successful, and the crowd "scattered." (6 RP 39)

According to Fischer, one of the men involved in the fight, a large African-American man named Shawn Garrett, did not immediately leave. (4 RP 13; 6 RP 39, 41-42) Fischer and a club security guard, Gary Gatewood, accompanied Garrett and his companions away from the club. (5 RP 9, 23-24; 6 RP 39, 40) Fischer testified that Garrett was still angry about the fight, and was cussing and yelling as they walked across the street to the parking lot. (6 41, 42-43)

By that time, The Factory had announced last-call, so the area outside the club was crowded with over 100 people. (6 RP 44; 81) Fischer testified that everything seemed under control in the parking lot, so he left Garrett and walked back towards the club and to his patrol car. (6 RP 43) But moments later, Fischer heard a single gunshot coming from the direction of the parking lot. (6 RP 44, 45) Fischer drove his patrol vehicle to the lot and saw a crowd of 10 to 20 people gathered around Garrett, who had been shot in the face and was lying on the ground. (6 RP 46, 47, 48)

Bouncer Gary Gatewood testified that the altercation in front of the club began because Garrett was being loud and obnoxious, and yelling that he was an "OG" (original gangster) from Hilltop. (5 RP 14, 17, 140) Gatewood testified that a man named Vernon Curry started arguing with Garrett, and the two men then came to blows. (5 RP 14, 19, 21, 22) Gatewood saw Fischer use his pepper spray. (5 RP 22) According to Gatewood, the fight ended, and no additional physical altercation occurred either near the club or in the parking lot. (5 RP 22, 97, 98)

Gatewood confirmed that he walked Garrett to the parking lot across the street from the club, and confirmed that Garrett was still angry about the fight. (5 RP 23, 25) Gatewood testified that Garrett and his companions were standing together and talking when Garrett was shot. (5 RP 26-27) He testified that he did not see where the shot came from, and did not know who fired the shot. (5 RP 27)

However, on the night of the shooting, Gatewood actually told police that he walked back to the club after escorting Garrett to the parking lot, and that he was not present when the shooting occurred. (7 RP 15, 17)

Later, after he was found in possession of a large amount of

money and drugs, Gatewood told police that he did see the shooting, and could identify the shooter. (6 RP 157, 158, 159; 7 RP 15, 17) He gave a statement that he saw Vernon Curry driving a white car into the parking lot, and saw Kai Pierce riding in the passenger seat. (6 RP 155, 157, 158) He said Pierce leaned over and fired two shots at Garrett. (6 RP 158, 159) But this last version of events did not conform to video evidence, which did not show a white car driving into the parking lot at the time of the shooting, or to all other witness statements that only one shot was fired, or to the forensic evidence indicating that the bullet traveled at a sharp downward angle.² (6 RP 155-56; 7 RP 19, 21, 22-23, 39)

Vernon Curry was also called as a State's witness, and testified that Garrett may have yelled that he was an OG, but that is not what prompted their fight. (4 RP 164, 196) According to Curry, as he was leaving the club he felt Garrett bump into him from behind "pretty hard." (4 RP 157) Curry testified that Garrett was clearly intoxicated. (4 RP 159) Curry and Garrett exchanged words, then began hitting and wrestling each other. (4 RP 157,

² This statement was not presented for its truth, but rather as impeachment, and the jury was so instructed. (CP 172) And in closing arguments, the State conceded that Gatewood's version of how the shooting occurred was improbable. (04/13/09 RP 29, 30)

158, 168) According to Curry, he saw a police officer approach, so he stopped fighting and ran away. (4 RP 168) He immediately left and went to a friend's house. (4 RP 168, 169)

Curry testified that he and Garrett were the only individuals involved in the fight. (4 RP 168, 169) He also testified that he did not see Pierce that night, and did not see who shot Garrett. (4 RP 158, 208-09)

Defense witness Jacque Banks testified that he saw Pierce at The Factory on the night of the shooting. (10 RP 215, 216) He saw a fight outside of the club, and saw Officer Fischer apply pepper spray over the crowd. (10 RP 221) Banks said he then walked with Pierce to the parking lot across the street from the nightclub, where they saw Pierce's adopted brother, Aaron Dukes, get forcefully pushed by a large African-American man. (10 RP 169, 221, 223; 11 RP 78, 125) Banks testified that Dukes and the man began to fight, so he and Pierce rushed over to help him. (10 RP 223) Banks saw Pierce punch the man, then saw Dukes disappear, then reappear holding a gun. (10 RP 224, 225) Banks testified that Dukes fired the gun, not Pierce. (10 RP 224, 225)

Another defense witness named Bobby Joe Ezra Plain testified that he does not know Dukes, but knows Pierce, and saw

him standing outside of The Factory when the first fight occurred. (11 RP 197, 202) A few minutes later, Plain walked across the street and saw another fight in the parking lot involving several men all beating a larger man, who was crouched on the ground. (11 RP 205) He saw one of the men pull out a gun and shoot the large man in the face. (11 RP 205) Plain did not recognize the shooter, but was sure it was not Pierce. (11 RP 206)

Michael Batts testified the he and Pierce drove together to The Factory that night, and Pierce parked his car in the lot across from the club. (10 RP 128, 129) Near closing time, Dukes rushed over to Batts and told him to come outside to join the altercation. (10 RP 149, 151) Batts declined, and later left the club alone. (10 RP 132, 151) He walked to the parking lot, and saw Garrett on the ground surrounded by police and onlookers. (10 RP 132, 133) Batts did not see Pierce, but his car was still in the lot. (10 RP 133) Batts eventually got a ride from another friend. (10 RP 133) He later learned that Dukes had called his girlfriend, and told her that Batts should go home because "it went down." (10 RP 142, 143)

Shawn Garrett, testified that he went to The Factory that night with some family members. He played several games of pool and had a few drinks. (7 RP 147, 154, 155) At one point in the

evening, while Garret was returning to the pool tables from the bathroom, a stranger (who he later identified as Vernon Curry) approached him and began demanding information about his identity and where he was from. (7 RP 157, 158, 159) Garrett tried to ignore Curry's questions and walk away, but Curry hit him several times. (7 RP 159)

According to Garrett, he fought back and was getting the better of Curry, so Curry called out to his friends, saying: "Cuz, I can't handle him." (7 RP 160, 161) Garrett testified that six or seven men then rushed towards him and began beating him, and one man hit him over the head with a glass bottle. (7 RP 162) Garrett managed to break away and get outside, where he waited for his companions to join him. (7 RP 162-63, 165)

Garrett testified that he saw Curry and his friends come outside, and they rushed towards Garrett and hit him a few more times. (7 RP 166, 169) Garrett saw Curry run across the street to the parking lot, and Garrett decided to follow him. (7 RP 169, 170) According to Garrett, he was "lured" to the parking lot, then "surrounded" by men who began to attack him. (7 RP 170, 172; 8 RP 40-41)

Garrett testified that he would fight off one man then another

would rush him. He threw one man onto a car, but another would come at him. (7 RP 173) Garrett described the situation as an “all out war.” (7 RP 173) But the men finally overwhelmed him, and Garrett ended up on his hands and knees on the ground. (7 RP 176) As he tried to rise, he looked up and saw Vernon Curry standing next to another man, who was pointing a gun directly at Garrett. (7 RP 176-77) The last thing that Garrett remembered was a white flash, then he awoke a few weeks later in the hospital. (7 RP 177-78)

Adrian Kinchen was also at The Factory that night, but left because there was a “ruckus.” (6 RP 8, 10) As he walked past the parking lot across the street, he saw Garrett laying on the ground, and a second man kneeling next to Garrett while trying to console him. (6 RP 15) Kinchen testified that no one else was in the parking lot at the time. (6 RP 15) He stayed for a few minutes until the police finally arrived, then he left. (6 RP 16, 17) On the way to his car, he found a cellular phone on the ground next to the parking lot’s entrance. (6 RP 18) He scrolled through its contents, and saw several photographs of Pierce with his children. (6 RP 19) He tried unsuccessfully to contact Pierce’s sister to return the phone, but eventually gave it away to a friend. (6 RP 19-20)

Police officers who responded to the scene of the shooting encountered a “hostile” crowd. (4 RP 9, 10; 6 RP 109, 112-13) Many of the people gathered were angry at the police for not preventing the shooting, and angry that medical aid was taking a long time to arrive. (4 RP 11, 14, 19) The officers asked several times whether anyone had seen the shooting, or whether anyone had information about the shooter, but they received no useful assistance, even from members of Garrett’s family who witnessed the events. (3 RP 15; 6 RP 50, 52, 112-13, 115, 119, 125, 126-27, 128) The only valuable tip came from Gatewood, who pulled Fischer aside to tell him that Vernon Curry initiated the fight with Garrett. (6 RP 83, 94)

The bullet entered Garrett’s right eye traveling at a downward trajectory and came to rest next to several vertebra, where it remains today. (4 RP 57, 73, 75; 7 RP 139) Garrett remained at the hospital for several weeks, drifting in-and-out of consciousness. (7 RP 178) He lost his right eye, and suffers partial paralysis on one side of his face. (4 RP 61; 7 RP 139-40) Garrett at first had trouble remembering the details of that night, but he said that over time his memory improved. (7 RP 179, 180; 8 RP 142)

Garrett first learned the name of Vernon Curry from his cousins, who had heard through friends that Curry was the man Garrett fought at The Factory. (7 RP 181) Garrett also learned that Curry and his friends had MySpace accounts on the Internet. (7 RP 181)

Garrett searched the Internet and found photographs of Curry and his friends posted on various MySpace pages. (7 RP 182) Garrett saw one man in some of those photos who he felt certain was the shooter, so he gave those photos to investigators. (6 RP 132; 7 RP 182, 183, 184, 185, 188)

Garrett became increasingly frustrated when the police did not arrest the suspect he identified in the photos. (7 RP 193) On the night of February 21, 2007, a friend called Garrett from The Factory, and told him that his suspect was at the club that night. (6 RP 57; 7 RP 194) Garrett drove to the club, and approached the off-duty police officer monitoring the club that night, who happened to be Officer Fischer. (6 RP 57; 7 RP 194, 194) Garrett gave his information and the photos to Fischer. (6 RP 57, 60)

When Fischer later saw the man in the photos leaving the club, he followed the man to his car. (6 RP 60) The man's car was illegally parked, so Fischer contacted him and learned that his

name was Kai Pierce. (6 RP 60-61) Fischer did not question Pierce about the shooting at The Factory. (6 RP 60) Police subsequently obtained a warrant for Pierce's arrest, and took him into custody a few weeks later. (6 RP 64-65, 66-67)

When interviewed by investigators, Pierce confirmed that he was present at The Factory on the night of the shooting. (6 RP 136) But Pierce said that he tried to stop the fight, and when it ended he simply left. (6 RP 136) As Pierce was walking to his car, he heard the gunshot. (6 RP 136)

During the months between Pierce's arrest and his trial, Garrett continued to look for the people he believed were involved in this incident. He learned that Aaron Dukes was on trial for assault in an unrelated matter, and came to court to watch the proceedings. (8 RP 118) As Dukes was being escorted out of the courtroom after a pretrial hearing, Garrett approached him and stated: "Mother fucker, take the deal or I'll fuck you up[.]" (11 RP 17) The corrections officer escorting Dukes asked why Garrett would say that, and Dukes replied: "because he thinks I shot him." (11 RP 21)

The corrections officer was so concerned about Garrett's statement that he notified his superiors and filed a written report.

(11 RP 14-15, 17-18) And as a result, an additional security officer was stationed in the courtroom during Dukes' trial proceedings. (11 RP 19) At Pierce's trial, Garrett denied threatening Dukes. (8 RP 104-05, 119, 120)

Later, during Dukes' trial, Garrett became disruptive and yelled at the victim while she was testifying in front of the jury, saying: "You don't have to be scared." (CP 136) The judge immediately called a recess and excluded Garrett from the courtroom. (8 RP 119, 133; CP 136)

Jacque Banks testified that he was approached and threatened by Garrett as he watched a pretrial hearing in Pierce's case. (11 RP 82) Garrett denied this event as well. (8 RP 121-22)

Detective John Ringer testified as a gang expert during Pierce's trial. According to Ringer, The Factory was a hangout for members of a Tacoma gang called Young Gangster Crips (YGC). (9 RP 40) Ringer also testified that members of the YGC would often congregate at a South Tacoma Shell Station, where they would purchase food and alcohol before the coolers were locked for the night. (9 RP 66) Crip gang members wear certain identifying colors, and use particular hand gestures to show their gang affiliation. (9 RP 25, 30, 34, 40-41) Crip gang members also call

each other “cuz.” (5 RP 96)

According to Ringer, the primary purpose of a gang is to conduct criminal activities. (9 RP 19-20, 21-22) Ringer testified that African-American street gangs in Tacoma focus on the sale of illegal drugs. (9 RP 19-20) One way to become a member of a gang is to commit a crime. (9 RP 19-20) According to Ringer, anyone who associates closely with a gang, even if they are not a member, is likely involved in criminal activity. (9 RP 28-29)

Showing respect is an important part of gang culture, and an “original gangster,” or “OG,” is accorded extra respect. (9 RP 19, 89) The term “wanabe” has negative connotations, and refers to a person who wants to be or claims to be a gang member but is not. (9 RP 28) Cooperation with the police, or “snitching,” is not tolerated within a gang, and may lead to violent retaliation. (9 RP 89-90)

Ringer testified that Curry, Banks and Plain are current gang members. (9 RP 61; 12 RP 141, 143-44) He testified that Pierce was formerly a member of a Crip gang that disbanded while Pierce was in prison. (12 RP 144, 145) The State presented a number of recent photographs showing Pierce posing with Curry, Banks, and other “known gang members,” who were flashing what Ringer

believes are gang-related hand gestures. (9 RP 30, 34, 57, 61-65; Exh 23-28, 31-33) Ringer identified one photo of Pierce at the Shell station where the YGC congregated. (9 RP 66) The State also called a witness who testified that she saw Pierce at the same Shell station on the night of the shooting shortly after The Factory closed. (9 RP 188, 189)

Ringer testified that gang members generally do not have traditional jobs, do not attend church regularly, and do not spend evenings at home with their families. (9 RP 172-73) Such behavior would be frowned upon by fellow gang members, and would not indicate that an individual is living a gang lifestyle. (9 RP 172-73)

Defense witnesses testified that since Pierce's release from prison a few months before the shooting, he had been working consistently, had been spending time with his daughter, had been going to church regularly, and had been going out to clubs infrequently. (10 RP 158, 159, 159, 208; 12 RP 24) Pierce had a job at a local Dollar Store, and his boss testified that he was a model employee who always arrived on time and always looked professional. (10 RP 202, 203)

In addition to the direct eyewitness testimony that Pierce was not the shooter, the defense presented other evidence

indicating that Aaron Dukes shot Garrett. Sherri Patterson is Dukes' former roommate. (11 RP 170) She testified that on the day after the shooting, Dukes told her that he got into a fight at The Factory and shot a man in the head. (11 RP 174, 178) Several witnesses heard from Banks or other eyewitnesses that Dukes was the shooter. (11 RP 131, 146-47; 12 RP 44)

Several of Pierce's friends and family were gathered together at an apartment just after Pierce was arrested. (11 RP 29, 35) When Dukes joined them, they confronted him about Pierce's arrest and asked whether he would confess to the shooting. (11 RP 37, 81, 133, 12 RP 22) According to those present at the gathering, Dukes did not deny being the shooter, and said something to the effect that he was not going to go to jail for the shooting and that Pierce was going to have to "ride that out." (11 RP 37, 38, 54, 81, 133; 12 RP 22-23)

Police showed Garrett a photo montage containing Dukes' photograph, but Garrett could not positively identify Dukes. (8 RP 125, 129) Dukes also testified at trial and denied that he was the shooter. (10 RP 174, 189)

Officer Fischer testified that Garrett was present when the pepper spray was dispersed over the fighting crowd, and that

pepper spray can adversely affect a person's vision. (6 RP 74, 76)
Garrett denied being intoxicated on the night of the shooting, even though blood drawn at the hospital after the shooting showed a .20 alcohol content, which generally indicates a high level of intoxication. (7 RP 156; 9 RP 140, 177; 12 RP 78)

In support of its theory that Garrett misidentified Pierce as the shooter, the defense also called Dr. Geoffrey Loftus, an expert in the field of perception and memory. (10 RP 46, 53, 54-55) Dr. Loftus testified that alcohol diminishes eyesight, affects long-term memory, and detracts from memory quality. (10 RP 58-59, 60) The consumption of alcohol slows the rate at which a person's brain can absorb and store information, and diminishes a person's overall cognitive ability. (10 RP 61-62, 63)

Dr. Loftus also testified that there have been a number of documented cases where an individual has been identified by eyewitnesses as the perpetrator of a crime, only to later be exonerated by DNA tests. (10 RP 96) Finally, Dr. Loftus testified that the human brain can reconstruct a memory based on information that is later learned; in other words, the brain can incorporate subsequently learned facts and details into an incomplete memory, and those facts can replace the person's

actual memory. (10 RP 97-98)

V. ARGUMENT & AUTHORITIES

A. The trial court erred in admitting minimally probative but unfairly prejudicial evidence of gang culture and gang affiliation.

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

Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to commit crimes, but may be admissible for other purposes:

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.

ER 404(b); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). In addition to the exceptions identified in ER 404(b), our courts have recognized a “res gestae” or “same transaction” exception, under which evidence of other crimes or bad acts is

admissible “[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (quoting State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980))

Bad acts under ER 404(b) include “acts that are merely unpopular or disgraceful.” State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (quoting 5 K. Tegland, WASH. PRACT., EVIDENCE § 114 at 383-84 (3rd ed. 1989)). Gang affiliation falls within the definition and is treated accordingly. See State v. Scott, 151 Wn. App. 520, 526-27, 213 P.3d 71 (2009) (admission of gang evidence measured under the standards of ER 404(b)).

Before such evidence may be admitted, the trial court must first identify the purpose for which the evidence is being admitted. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Next, the court must determine that the proffered evidence is logically relevant to prove a material issue. Powell, 126 Wn.2d at 262. The test is whether such evidence is relevant and necessary to prove an essential fact of the crime charged. Saltarelli, 98 Wn.2d at 362; State v. Laureano, 101 Wn.2d 745, 764, 682 P.2d 889 (1984). Evidence is logically relevant if it tends to make the existence of the identified fact more or less probable. Saltarelli, 98 Wn.2d at 361-

62.

Finally, assuming the evidence is logically relevant, the court must determine whether its probative value outweighs any potential prejudice. Saltarelli, 98 Wn.2d at 362-63; State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983); ER 403.

In this case, the State sought to introduce evidence of gang culture and Pierce's connection to known gang members for the purposes of establishing a motive for the fight and the res gestae of the crime, and to explain why witnesses did not cooperate with the police or prosecutors. (CP 102-03; 104-20, 121-24; 12 RP 134) The defense repeatedly objected to admission of such evidence. (CP 104-20; 3 RP102-04, 133-34; 4 RP 108-12, 124, 9 RP 24, 43-55) After a lengthy hearing and arguments on the issue, the trial court ruled that the State could introduce most of its proffered evidence for the limited purposes proposed by the State. (3 RP 109-10)

A trial court's decision to admit evidence is reviewed for an abuse of discretion. State v. McBride, 74 Wn. App. 460, 463, 873 P.2d 589 (1994). The court abuses its discretion if there are no tenable grounds for its decision. Tharp, 27 Wn. App. at 206. The trial court abused its discretion when it admitted gang evidence in

this case because the evidence was not necessary to prove a material issue in the case, and the probative value was slight in comparison to its potential for prejudice.

It is important to note that the State, by its own admission, had no evidence that Pierce was a member of the YGC or any other gang at the time of the shooting. (3 RP 119) The State's evidence merely showed that Pierce associated with current known gang members, and that police believed Pierce was once a member of a now-defunct gang called the Nutty Block Crips. (3 RP 119; 12 RP 141, 143-44, 145)

Nevertheless, the State's theory of the case was that the fight began because Curry took offense when Garrett falsely claimed to be an "OG from the Hilltop." (3 RP 122-23, 127-28; 5 RP 18; 4/13/09 RP 28, 33-34; CP 102) The State also argued in closing the alternative motivation that Garrett was disrespectful of Curry, and gangs do not tolerate disrespect. (04/13/09 RP 33-34) The State also argued that the gang evidence explained why Pierce would come to Curry's aid during the fight. (04/13/09 RP 33, 34; CP 102)

However, Detective Ringer's gang testimony shed no light on what might have motivated either Curry or Pierce to become

involved in the fight or what might have motivated Pierce to shoot Garrett. The State did not elicit any testimony to establish that gang members will react with violence to a false claim of gang membership or to perceived disrespect from a non-gang member, or that members or associates are expected to come to the aid of other gang members during a fight.³

The State made no connection between gang culture and Curry's acts and made no connection between gang culture and the crime for which Pierce was accused. And when there is no connection made between a defendant's gang affiliation and the charged offense, admission of gang evidence is prejudicial error. See Scott, 151 Wn. App. at 527, 528 (citing State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136, 1155-1156 (2009)).

Furthermore, expert testimony is admissible when it will "assist the trier of fact to understand the evidence or to determine a fact at issue[.]" ER 702. Expert opinion is helpful to the trier of fact when it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. State v. Farr-

³ Detective Ringer's testimony was limited to explaining that respect is an important part of gang culture, and that someone who falsely claims to be a gang member is looked down upon. (9 RP 19, 28) There was no testimony to suggest that gang members resort to physical violence or murder when they or their fellow gang members are disrespected.

Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999).

In this case, Detective Ringer's expert gang testimony was not necessary because the matters that he testified to are not beyond the common knowledge of the average juror, and because sufficient non-expert testimony was available to explain those same matters.

First, Garrett denied making the "OG" statement, and Curry denied that he fought Garrett because of it. (3 RP 196; 7 RP 168-69) Instead, Curry testified that Garrett bumped into him and became belligerent when Curry asked for an apology, and that is why they fought. (3 RP 157-58, 159) In Gatewood's opinion, Garrett's loud and obnoxious behavior, not the content of his statement, precipitated Curry and Garrett's fight. (5 RP 140, 161)

This evidence was sufficient to establish that Curry and Garrett fought, and to establish what provoked Curry. The jury did not need to hear that Curry and Pierce might be gang members, or that respect is an important part of gang culture, in order to understand why Curry and Garrett fought. Any juror could have appreciated, without the benefit of expert testimony, that intoxicated people sometimes get into fights over what, to the outside observer, seems like a minor issue. The gang evidence was totally

unnecessary to establishing this aspect of the State's case.

Moreover, the State did not need expert gang testimony to establish why Pierce might have helped Curry in this fight. Even the trial court recognized that most jurors understand that friends and family often help friends and family if they get into a fight, especially when alcohol is involved. (3 RP 133-34) And there was no dispute that Pierce and Curry were friends, and that all the men involved had been drinking. (4 RP 95, 102; 9 RP 177) So it was not necessary to show Pierce and Curry's common gang ties in order to suggest that Pierce would help his friend during the fight.

The State also wanted to argue that the reason witnesses did not cooperate with the investigation and prosecution of this case is because they were either afraid of retaliation from gangs or they were gang members who would not "snitch" on each other. (CP 102-03; 9 RP 89-90) But once again, the State had ample evidence to explain the lack of cooperation without resorting to playing the gang card.

Again, most jurors would naturally understand that a witness to a violent crime, whether gang related or not, might be concerned for their own safety if they were to become a witness for the State. And several witnesses specifically testified to that very fact. For

example, Gatewood testified that he was concerned for his safety not because of any possible gang connection, but because anytime there is a violent situation he is concerned about retaliation. (5 RP 39, 41) Similarly, witness Adrian Kinchen believed that the witnesses' reluctance to talk to police had more to do with a general concern for retaliation rather than a specific concern for gang retaliation. (6 RP 26, 27)

There was also evidence of a general reluctance to cooperate with police that had nothing to do with a fear of gangs. Gatewood explained that, in certain African-American communities, there is often a general mistrust of police and a general unwillingness to cooperate with police, which has nothing to do with gangs. (5 RP 106) And Kinchen explained that in the Hilltop Neighborhood where he grew up, it is generally socially unacceptable to cooperate with the police unless the victim is a family member or loved one. (6 RP 24, 25, 26)

Sherri Patterson testified that she would not necessarily report a crime to the police because she believes the police do not help and instead just stereotype African-Americans. (11 RP 186-87) During the pretrial hearing, Detective Ringer conceded that it is sometimes difficult to get witness cooperation even when the crime

is not gang-related. (1 RP 127-28) And at trial, Ringer agreed that an inner-city African-American community might be less trusting of police and less likely to cooperate with police regardless of whether an incident involved gang members. (9 RP 96-97)

Finally, an average juror does not need an expert witness to explain that a defendant's friends and family are sometimes reluctant to give prejudicial testimony against their loved one. The State was perfectly able to argue its opinion that Pierce's friends and family were not credible because they were protecting him, without needing to elicit damaging evidence of gangs and gang affiliation.

In sum, the State did not need to present evidence of gang culture or Curry and Pierce's ties to gang members in order for the jury to understand why and how this fight started, why Pierce might join the fight to help Curry, and why some witnesses in this case were hesitant or uncooperative. It was simply unnecessary to present evidence of gang culture and gang affiliation in order for the State to prove its relevant facts and to argue its theory of the case.

On the other hand, the potential for prejudice was significant. "Evidence of gang affiliation is considered prejudicial." Scott, 151 Wn. App. at 526. "It is common knowledge that there is a deep,

bitter and widespread prejudice against street gangs in every large metropolitan area in America.” State v. Parrott, 352 N.E.2d 299, 302, 40 Ill. App. 3rd 326 (1976). As noted by the Alabama Supreme Court:

In light of the massive media coverage of gang violence in contemporary society, the assertion that a defendant’s membership in a gang . . . will not prejudice him in the eyes of the jury is simply untenable.

Ex Parte Thomas, 625 So.2d 1156, 1157 (Ala. 1993). In view of the prejudicial impact associated with gang evidence and the limited probative value of such evidence in this case, the trial court should have excluded all evidence of gangs and gang membership.

The improper admission of gang evidence can be harmless, but only if, within reasonable probabilities, it did not materially affect the verdict. Scott, 151 Wn. App. at 529.

Detective Ringer essentially testified that all gang members are violent criminals, and that violence is a recurrent problem wherever gang members congregate. (9 RP 19-20, 28-29, 40, 66) Ringer testified in detail about various YGC gang members’ violent criminal histories. (9 RP 162-65) The State presented numerous photographs showing Pierce and/or “known gang members” posing together and “throwing” gang hand signs. (9 RP 30, 34, 38, 56-57,

61-65; Exhs. P24-P28, P31-P38) The State relied heavily on the fact that Pierce associated with gang members, and on the stereotypical behavior of a gang member, to establish that Pierce was the shooter. (04/13/09 RP 28, 32-33, 34-35) The State argued that the case is “one hundred percent about gangs[.]” (04/13/09 RP 101)

However, the State presented minimal evidence indicating that Pierce was the shooter. There was no forensic evidence connecting Pierce to the crime. Garrett’s identification was the only piece of evidence suggesting that Pierce was the shooter. Even though Garrett was intoxicated and on his knees in a dark parking lot after supposedly being beaten by a large group of unfamiliar men; and even though he had been in-and-out of consciousness for weeks after the shooting; he was certain that it was Pierce holding the gun. But nearly all of the other witnesses described the scene that night very differently from Garrett. And several people identified a different person as the shooter.

With so much contradictory evidence, and where many witnesses were either mistaken or lying when they testified, it cannot be said that the gang evidence did not impact this case, and did not help sway the jury into believing that Pierce was the

shooter. The gang evidence put an unnecessary cloud of suspicion over Pierce that would be impossible for any juror to ignore.

B. Pierce was denied his right to effective assistance of counsel when his trial attorney failed to request a limiting instruction.

Effective assistance of counsel is guaranteed by both the United States and Washington State constitutions. U.S. Const. amd. VI; Wash. Const. art. I, § 22 (amend. x); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

The test for ineffective assistance of counsel has two parts: (1) the defendant must show that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) such conduct must have prejudiced the defendant, i.e., there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would have been different. State v. Thomas, 109 Wn. 2d 222, 225-26, 743 P.2d 816 (1987) (adopted test from Strickland). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the

case.” Strickland, 466 U.S. at 693.

As noted above, evidence of other bad acts “is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). Evidence of a defendant’s affiliation with gangs is not automatically precluded under this rule. There are certain limited circumstances under which a jury may consider gang evidence for a non-propensity purpose. See State v. Campbell, 78 Wn. App. 813, 821-22, 901 P.2d 1050 (1995) (evidence properly admitted to show premeditation, motive, and intent).

But as a number of courts have recognized, gang evidence is inherently prejudicial. And when a jury may have considered this evidence for an improper purpose, a new trial is the only sufficient remedy. See Scott, 151 Wn. App. at 526; United States v. Roark, 924 F.2d 1426, 1430-34 (8th Cir. 1991) (gang affiliation causes jurors to “prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged.”).

Therefore, where evidence of other misconduct, such as gang affiliation, is admitted under ER 404(b), it should be accompanied by a limiting instruction under ER 105 directing a jury

to disregard the propensity aspect of the evidence and focus solely on its proper purpose. State v. Griswold, 98 Wn. App. 817, 825, 991 P.2d 657 (2000); State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (pointing out “vital importance” of a limiting instruction to stress limited purpose of evidence).

In this case, the trial court admitted the gang evidence for the purpose of explaining the res gestae and motive for the fight, and to explain why witnesses were uncooperative. (3 RP 109-12) Unfortunately, the jury was never told that they could consider the gang evidence for these limited purposes only.

An attorney's failure to propose an appropriate jury instruction can constitute ineffective assistance. State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001). An attorney's failure to request a jury instruction that would have aided the defense constitutes deficient performance. See Thomas, 109 Wn.2d at 226-29 (failure to propose voluntary intoxication instruction). Legitimate trial strategy or tactics generally cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

Defense counsel made every effort to prevent jurors from

hearing about Pierce's ties to known gang members, arguing vigorously that it was irrelevant and highly prejudicial. Yet once the trial court ruled the evidence admissible, counsel failed to ensure that jurors would only consider the evidence for the narrow purpose for which it was admitted. This was not the result of legitimate tactics; it was the result of inattention and was therefore ineffective.

Pierce suffered significant prejudice from this inattention. Curry was quite clearly the primary actor in the fight with Garrett. Even Curry himself admitted that he was the instigator of the violence. Pierce's role in the fray was far less certain, and each witness told a different account of events leading up to the shooting.

But the State's witnesses testified that Pierce associated with known gang members and that gangs are criminal enterprises where violence and intimidation are a way of life. Without a limiting instruction, the jurors were free to convict Pierce not because they were convinced beyond a reasonable doubt that he pulled the trigger, but because he was painted as the type of person who was capable of such a terrible act. The jury was free to base its determination of guilt on Pierce's character. This is the exact result that ER 404(b) seeks to avoid.

VI. CONCLUSION

The gang evidence was simply not necessary to prove any fact of consequence in this case. Any probative value was minimal, at best. But the prejudice was extreme, and denied Pierce a fair trial. In addition, by failing to instruct the jury as to the gang evidence's limited purpose, the jury was free to consider the evidence for any purpose, and free to find that because Pierce was affiliated with gang members he must have committed the crime. For either or both of these reasons, Pierce's convictions must be reversed and he must be given a new trial.

DATED: March 15, 2010



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CERTIFICATE OF MAILING

I certify that on 03/15/2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Kai T. Pierce, DOC# 799894, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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