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STATE OF WASHINGTON

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NO. 39348-4-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KAI TREMAINE PIERCE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Thomas P. Larkin

No. 07-1-01040-0

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**BRIEF OF RESPONDENT**

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

1. Whether the trial court properly admitted evidence of gang culture and of the participants' gang affiliation where such evidence was relevant to the charged crimes and not unduly prejudicial.

2. Whether the defendant received effective assistance of counsel where his trial counsel's failure to propose a limiting instruction regarding the use of gang evidence admitted under ER 404(b) can be characterized as a legitimate tactical decision not to reemphasize damaging evidence.

B. STATEMENT OF THE CASE.

1. Procedure

On February 23, 2007, Appellant Kai Tremaine Pierce, hereinafter referred to as "defendant," was charged by information with first degree assault with a firearm sentence enhancement in count I and first-degree unlawful possession of a firearm in count II. CP 266-67. The State filed an amended information, which amended count I to attempted first-degree murder and alleged, as an aggravating factor, that 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.” CP 4-5.

The trial court called the case for trial on March 16, 2009. 2 RP 29.<sup>1</sup> The court heard a motion to admit the defendant’s statements under Criminal Rule (CrR) 3.5 and granted that motion, allowing those statements to come into evidence at trial. 2 RP 29-56.

The State further moved to admit evidence regarding gang culture and the defendant’s gang affiliation and the court heard testimony in support of that motion, 2 RP 58-59, 75-159, followed by argument of the parties, 3 RP 89-109, 9 RP 42-49, 10 RP 115-25, 12 RP 131-39, CP 76-82; CP 104-120. The court thereafter made a ruling to admit limited testimony regarding gang culture and later, the defendant’s gang affiliation, for the purposes of establishing motive and showing *res gestae*. 3 RP 109-34, 9 RP 50-54, 149-56, 12 RP 131-39, 144.

The defense moved to admit other suspect evidence and the court, after a hearing, denied this motion. 2 RP 160-95, 03/19/2009 RP 1-19, 25-48, 3 RP 5-89.

The parties selected a jury on March 24 to 25, 2009, 3 RP 136-44, and gave their opening statements on March 25. 3 RP 144-45.

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<sup>1</sup> References to the Report of Proceedings will follow the system used in the Opening Brief of the Appellant.

The State called Officer Jared Williams, 3 RP 145-57, 4 RP 1-52, Dr. Lori Morgan, 4 RP 52-78, Officer Daniel Bambico, 4 RP 79-93, Vernon Curry, 4 RP 93-211, Gary Gatewood, 5 RP 8-164, Adrian Kinchen, 6 RP 5-31, Officer David Fischer, 6 RP 31-105, Officer Jeff Crowder, 6 RP 106-121, Detective Gary Hill, 6 RP 121-67, 7 RP 5-134, Shawn Garrett, 7 RP 134-209, 8 RP 10-166, Detective John Ringer, 9 RP 14-176, 12 RP 140-45, Harmony Wortham, 9 RP 180-93, and Michael Batts, 10 RP 126-56, and rested. 10 RP 156.

The defense called Geoffrey Loftus, 10 RP 44-113, Terri Hunter, 10 RP 156-63, Aaron Dukes, 10 RP 166-200, Jodi Christiana, 10 RP 201-06, Sharon Lewis, 10 RP 206-13, Jacque Banks, 10 RP 213-26, Deputy Seth Huber, 11 RP 12- 25, Mariah Jackson, 11 RP 26-75, Jacque Banks, 11 RP 75-84, 89-109, 113-24, Karisha Pierce, 11 RP 124-68, Sherri Patterson, 11 RP 168-96, Bobby Joe Ezra Plain, 11 RP 196-230, Keidra Lewis, 11 RP 230-42, 12 RP 10-72, and Detective Gary Hill, 12 RP 72-131. The defense then rested. 12 RP 131.

On April 10, 2009, the parties argued jury instructions. 12 RP 154-58. The State proposed 25 instructions and the defense attorney proposed five. 12 RP 156.

On April 13, 2009, the court instructed the jury, 04/13/2009 RP 4-6, and the parties gave their closing arguments. 04/13/2009 RP 6-40, 41-88, 89-115.

On April 15, 2009, the jury returned verdicts of guilty to second-degree attempted murder with a firearm sentence enhancement, a lesser-included offense of that charged in count I, and guilty to first-degree unlawful possession of a firearm, as charged in count II. 04/15/2009 6-7; CP 194-97.

On May 15, 2009, the defendant was sentenced to a standard range sentence of 240 months total confinement on count I, with 28 to 48 months in community custody, and 41 months of total confinement on count II, to be served concurrently. 12 RP 175; CP 228-41; 244-59.

On June 12, 2009, the defendant filed a timely notice of appeal. CP 245-259.

## 2. Facts

Shawn Garrett attended the University of Idaho on a football scholarship and graduated with a Bachelor of Arts degree. 7 RP 137. He later completed an associate of arts degree in information technology and, in 2006, was working with computers. 7 RP 137-38.

On November 26, 2006, Garrett attended a family gathering where he met his maternal grandfather for the first time. 7 RP 144-46. He left at about 11:00 to 11:15 p.m. However, his cousin, Micquel Wilson, was visiting from California, wanted to go someplace to “shoot some pool” and “have a drink or something.” 7 RP 146-47. So, Garrett, his cousins Micquel and Deshon, and his uncle, went to a club on 56<sup>th</sup> and Washington in Tacoma called “The Factory.” 7 RP 149. While he was there, Garrett played pool and had three drinks containing alcohol. 7 RP 154-55, 201-02.

The Factory was a hangout for a street gang called the Young Gangster Crips (YGCs). 9 RP 40. Gang-associated violence was so common at The Factory that the owners hired private security and off-duty police officers to help maintain order. 3 RP 147-48, 4 RP 10-12, 5 RP 10-12. One member of the private security staff was Gary Gatewood. 5 RP 10-12. Gatewood testified that he was working that night, 5 RP 8-10, and that he saw Garrett being loud, and yelling that he was an “OG.” 5 RP 14-18; 9 RP 105, 140-41. *See* 6 RP 153.

Gatewood explained that “OG” stands for “[o]riginal gangster,” and is used to refer to someone who has been in a gang for a long time. 5 RP 17. Gatewood testified that gang members would be offended at

hearing a non-gang-member referring to himself as an OG as it would be considered disrespectful. 5 RP 139-40.

Gatewood indicated that both Vernon Curry and the defendant were at The Factory when Garrett was yelling to the crowd that he was an “OG.” *See* 5 RP 18-19, 77. *See also* 9 RP 186. Vernon Curry was a member of the YGCs gang. 5 RP 39-40. The defendant was a former member of the 92<sup>nd</sup> Street Nutty Block Crips gang, 12 RP 144, and was, at the time, a current associate of the YGC gang. 9 RP 165-68

Gatewood testified that Curry seemed to take offense to Garrett calling himself an OG. 5 RP 19. Gatewood said that Curry and Garrett then began to argue, with Garrett saying that he was an OG and Curry telling him that he was not. 5 RP 21. Garrett denied ever using the term “OG,” though he indicated that he knew it meant original gangster and was used to describe “older gang members.” 7 RP 166-69. Garrett testified that he had never seen Curry before, but that Curry started asking him questions “like where are you from.” 7 RP 159. Garrett said that he started to leave when Curry hit him twice.” 7 RP 159. Garrett stated that he started to punch Curry back and that Curry said, “hey, Cuz, I can’t handle him, Cuz.” 7 RP 161. Garrett explained that the word “cuz” is a term used exclusively by Crips and that once Curry said this, he was attacked by “seven or eight more guys.” 6 RP 168.

Gatewood indicated that Curry and Garrett began to fight with each other, throwing a couple punches before security and one of the police officers broke up the fight. 5 RP 22. Gatewood said that, after the struggle, he walked Garrett out of the club and across the street to a bank parking lot. 5 RP 26.

Garrett, however, stated that once he got to that parking lot, the fight continued. 7 RP 171-76. He testified that he was “swarmed by guys” who were kicking and punching him. 7 RP 176. Garrett stated that he was finally able to get to one knee with one hand on the ground when he looked up to see the defendant standing over him, pointing a gun at him. 7 RP 176-77. Curry was standing next to the defendant. 7 RP 177. Garrett said that the next thing he saw was “just white” before waking up three weeks later in the hospital. *Id.* Garrett testified that he had no doubt that the defendant shot him. 7 RP 178.

Gatewood testified that while in that bank parking lot, a white Camaro drove by Garrett. 5 RP 27-32. Gatewood said that Curry was driving that Camaro and that the defendant was in the passenger seat. 5 RP 80, 129-30, 147-48; 6 RP 158. Gatewood told Detective Hill that Curry leaned across and said something to Garrett and that he observed two muzzle flashes come from the passenger seat of the Camaro, where

the defendant was sitting. 6 RP 158-59. Gatewood testified that he heard gunfire come from the area of the vehicle. 5 RP 152.

No one in the crowd around the vehicle ran, acted as if they had just shot somebody or as if they were concerned about being shot. 5 RP 152-53. Garrett fell backwards and grabbed at his eye. 5 RP 35.

Gatewood went to Garrett and assisted in holding him down until the ambulance arrived because Garrett was “trying to pull material out of his eye.” 5 RP 36.

Tacoma Police Officer David Fischer was “working in an off-duty capacity” at a The Factory on the night of the shooting. 6 RP 33. He was working with fellow officer Jared Williams. 6 RP 34. Fischer indicated that between 1:00 and 1:30 a.m. on November 26, 2006, a woman came out of The Factory bleeding from the head. 6 RP 37. She indicated that she had been assaulted. *Id.* Officer Fischer called paramedics and began an investigation of this assault, but was interrupted by the fight involving Curry and Garrett. *Id.*

Fischer said that five or six people were actually fighting and another ten to fifteen were gathered around them. 6 RP 38-39. Fischer indicated that he was by himself at the time and that there were so many people around the parties fighting that he could not reach them. 6 RP 38. Therefore, he sprayed pepper spray over the top of the crowd to break up

the fight. *Id.* The crowd dispersed except for three people including Shawn Garrett. 6 RP 42. Fischer said that after Gatewood escorted Garrett and people accompanying him to their vehicle in the Heritage Bank parking lot, 6 RP 43, 71, he heard a single gunshot. 6 RP 44-45. Fischer got into his patrol car and drove to the Heritage Bank parking lot, where he found Garrett, laying on the ground, shot in the right eye. 6 RP 45-46.

There were approximately 100 to 200 people in the parking lot when Fischer arrived there with ten to twenty people within a 15-foot radius of Garrett. 6 RP 48, 81. None of these people were seen running or hiding. 6 RP 48-49. Officer Fischer summoned an ambulance and provided basic first aid to Garrett until that ambulance arrived. 6 RP 50-52. Officer Fischer then talked to people in the area to try to find out if anyone had seen anything, but did not get any useful information from anyone aside from Gatewood. 6 RP 52, 84. Gatewood indicated that a man he knew as C.C. was involved in the fight with Garrett and may have been involved in the shooting. *Id.* Fischer tried, unsuccessfully, to obtain video surveillance footage of the incident. 6 RP 54-57.

Tacoma Police Officer Jared Williams was working with Fischer that night. 3 RP 146-48. He testified that, sometime after 1:00 a.m., he was contacted by a woman who had been struck in the head and was

bleeding profusely. 3 RP 154-55. He followed, stopped, and detained the suspect in that assault in the area of 56<sup>th</sup> and Tyler. 3 RP 157. Williams was engaged in an investigation of that incident when he learned that Officer Fischer had heard “shots fired in the area of The Factory” and that there was a “subject down” in the Heritage Bank parking lot. 4 RP 6-7.

Officer Williams drove to that location where he found a crowd of a couple hundred people gathered around Officer Fischer, who was with a victim, who was lying on the ground. 4 RP 8-9. The people in the crowd “appeared very angry and hostile,” 4 RP 9, and officers were not able to get any information from them, 4 RP 15, 21 , with the exception of a person who indicated that there had been a vehicle involved and who provided a partial license plate number of that vehicle. 4 RP 21. After additional officers arrived, they were able to move the crowd back about twenty feet to “pull up yellow crime scene tape to establish a perimeter.” 4 RP 14-17. Tacoma Fire Department personnel were then allowed in to treat Garrett. 4 RP 18-20.

Tacoma Police Officer Donald Bambico responded to The Factory after officers requested assistance regarding fights breaking out in the streets outside the club. 4 RP 80-81. As he drove to the location, he learned “that shots [were] fired with one down in the parking [lot].” 4 RP 81. Bambico noted that there were a lot of people in the area and

indicated that they were “[h]ostile.” 4 RP 81-83. After insuring that the original officers were safe, officers moved the crowd back to set up crime scene tape and establish a perimeter. 4 RP 84. Bambico testified that he asked if anybody had seen anything, but that he either got no response or was told that they were just leaving and had seen nothing. *Id.* No one from the crowd approached Officer Bambico with any information. 4 RP 86-87.

Officer Jeff Crowder responded to the Factory after Garrett had been shot. 6 RP 106-109. When he arrived, he found that the parking lot was full of “a lot of very upset people” and noted that a lot of small fights were starting to break out. 6 RP 109-10. Crowder indicated that he and other officers then tried to secure the scene to prevent the loss of any physical evidence. 6 RP 111. He testified that he talked to some people at the scene, but that “[e]verybody said that they didn’t see anything.” 6 RP 115.

On November 27, 2006, Detective Gary Hill was assigned the case for follow-up investigation. 6 RP 123. He read the reports and tried to contact Garrett’s cousins, Deshon McDaniels and Micquel Wilson, who had been with him at the time of the shooting. 6 RP 124. After leaving multiple messages for Wilson, he was finally able to contact him by telephone, but Wilson stated that he did not see anything and that he

“doesn’t pay attention to things he can’t make a profit on.” 6 RP 126-27. McDaniels was polite, but uncooperative. 6 RP 127-28. Hill was able to identify C.C. as Vernon Curry, through staff at Foss High School, but was unable to locate him. 6 RP 128-30.

Vernon Curry did testify at trial. 4 RP 93-211. Curry testified that he had known the defendant for 12 to 13 years and described him as “an associate.” 4 RP 95-96. Curry identified himself pictured in photographs with the defendant. 4 RP 114-56. *See* 7 RP 185. In some of those photographs, Curry made signs with his hands which he identified as a “hang loose” sign. 4 RP 114. He is not a surfer. *Id.* Curry made signs with his hands in the shape of a “Y,” which he said was associated with “Young Gangster Entertainment,” but denied that he was associated with Young Gangster Entertainment. 4 RP 114-15. Curry denied that the sign he was making represented the Young Gangster Crips gang, 4 RP 115, and denied that he was a member of that gang. 4 RP 127. In different photos, Curry displayed a large amount of cash, 4 RP 118-19, 137, and a chain. 4 RP 131.

Curry stated that he was at The Factory on November 26, talking to girls when he was “bumped” from behind, 4 RP 156-57, by a man he later identified as Shawn Garrett. 4 RP 168. Curry testified that Garrett may have said that he was an “OG,” but denied that Garrett said that he

was an “OG from the Hilltop.” 4 RP 163-64. Curry had earlier told Detectives Hill and Ringer that Garrett said he was an OG. 6 RP 142. Curry initially testified that he did not know what “OG” meant, but then testified that he knew it did not mean original gangster. 4 RP 163-65.

Curry said that he asked Garrett to apologize and that the two then got into “a physical altercation.” 4 RP 159. He explained that during the fight, he and Garrett ended up on the ground when a police officer broke up the fight. 4 RP 168. Curry stated that he then ran across the street, got in his car, and left. 4 RP 168-69. Curry testified that everyone thinks that he told on the defendant and that he wanted to set the record straight. 4 RP 171. Curry wanted it in the record that he was not working for Detective John Ringer as a confidential informant or “snitch.” 4 RP 170. He later testified that, although he was not present at the time Garrett was shot in the face, he knew the defendant did not shoot Garrett. 4 RP 208-09.

Dr. Lori Morgan, medical director of the Tacoma trauma trust and a trauma surgeon, testified that she was on the trauma team that met Shawn Garrett when he was brought to the hospital on November 26, 2006. 4 RP 53-56. Morgan testified that Garrett had suffered a gunshot wound to the face, that he had a wound around his right eye, that the “right globe” was destroyed, and that Garrett was in “sort of a midlevel coma”

with a Glasgow coma scale of 7T. 4 RP 57-59. All of the bones around the eye socket “were fractured and what we call comminuted, which is fractured into tiny little pieces.” 4 RP 61. Garrett also fractured his maxilla, and first and second vertebra. *Id.* He underwent surgeries to remove his eye, which was destroyed, and to reconstruct his face and jaw. 4 RP 60. Garrett’s injury was very nearly fatal. 4 RP 66. Dr. Morgan noted that if “the bullet had been really even millimeters in one direction or another, it would have been a fatal event.” *Id.*

After Garrett was released from the hospital, Detective Hill interviewed him at his home. 6 RP 130-31. “It was quite evident that he had a gunshot wound to the right eye.” 6 RP 131. Garrett provided Hill with “My Space photos” in which he identified Vernon Curry and the man who shot him. 6 RP 132-33; 7 RP 112. Hill, in turn provided these photos to detectives and to Officer Fischer. 6 RP 133.

On February 21, 2007, while Officer Fischer was again working at The Factory, Garrett approached him with a photograph of the person who shot him. 6 RP 57-59; 7 RP 193-95. Garrett told the officer that this person was inside the club at that time. 6 RP 60. Officer Fischer then watched as the patrons of the club exited at closing and saw the person in the photograph that Garrett had identified as the one who shot him. 6 RP Fischer contacted this person as he opened his car door because this

person's car was parked illegally. *Id.* This person was then identified as the defendant. 6 RP 61. The defendant was driving a white Chevrolet Camaro that he said belonged to a friend. 6 RP 61-62.

A warrant was subsequently issued for the defendant's arrest. 6 RP 64. On February 26, 2007, Officer Fischer saw the white Camaro that the defendant had been driving in the parking lot of McCabe's nightclub. 6 RP 65. Fischer conferred with Mr. Gatewood, who was then working as security at McCabes, and found that the defendant was in fact inside. 6 RP 65. He then called for additional units and three to four officers went into the club to the table at which the defendant was sitting. 6 RP 65-66.

The defendant was seated with his head down and was trying to cover his face so that officers would not recognize him. 6 RP 66. Although there were other people with the defendant, none of them reacted to the officer's appearance as the defendant did. 6 RP 67. Officer Fischer tapped the defendant on the shoulder, at which time the defendant looked up and Fischer recognized him. *Id.* The defendant was then arrested, read the *Miranda* warnings, and transported to jail. *Id.*; 7 RP 122.

Detective Hill met the defendant at the jail the next day, read him the *Miranda* warnings again, and interviewed him. The defendant admitted that he was at The Factory on the date of the shooting and said

that he had seen his step-brother, Curry, fighting with Garrett. 6 RP 136. The defendant said that he tried to break up the fight but that he ended up exchanging punches with Garrett. *Id.* The defendant did not say how the fight ended, but indicated that he walked to his car when he heard the gunshot. *Id.*

Detective John Ringer testified that in local street gangs there is a relatively equal distribution of power, but that “OGs, or original gangsters, the ones who form the gang” are “respected” and that “respect is a big part of gang culture.” 9 RP 18-19. Ringer indicated that law enforcement did not label a person a gang member “lightly” and that there had to be some reason to label him a gang member, such as admissions, tattoos, or hand signs. 9 RP 27. He testified that an “associate” is someone who may very well be a gang member, who associates with a gang, but about whom law enforcement has insufficient evidence to label a gang member. *Id.* A “wannabe” is a person who wants to be a gang member, but is not allowed into the gang at that point in time. 9 RP 28. This term has a “negative connotation.” *Id.*

Ringer testified that The Factory was “a Crip hangout” and that the Young Gangster Crips were very strong at The Factory and “involved in a lot of the incidents that happened there.” 9 RP 40. Ringer identified the defendant in a photograph with several other men that he identified as

being member of the Young Gangster Crips. 9 RP 61. One of the men with whom the defendant was pictured was Vernon Curry, who is known to be a member of the Young Gangster Crips. 9 RP 61-62. Curry is seen in the photographs “throwing up the Young Gangster Crip” hand sign. 9 RP 62. Ringer indicated that he has never known this sign to be associated with surfing. *Id.*

Ringer testified that cooperating with law enforcement, or snitching, is not tolerated and likely to be met by the gang with violence. 9 RP 89-90.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF GANG CULTURE AND OF THE PARTICIPANT’S GANG AFFILIATION BECAUSE SUCH EVIDENCE WAS RELEVANT TO THE CHARGED CRIMES AND NOT UNDULY PREJUDICIAL.

The admission of “[g]ang evidence falls within the scope of ER 404(b).” *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029, 1037 (2009).

ER 404(b) provides that

[e]vidence 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.

Prior to admission of such evidence, the court must (1) find that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of such evidence against its prejudicial effect. *Yarbrough*, 151 Wn. App. at 81-82. Thus, “[e]vidence of other bad acts can be admitted under ER 404(b) when a trial court identifies a significant reason for admitting the evidence and determines that the relevance of the evidence outweighs any prejudicial impact.” *State v. Scott*, 151 Wn. App. 520, 527, 213 P.3d 71 (2009).

“[I]t is well established that the State can prove motive even when it is not an element of the crime charged.” *Yarbrough*, 151 Wn. App. at 83 (citing, *inter alia*, *State v. Athan*, 160 Wn.2d 354, 382, 158 P.3d 27 (2007)(finding that “[a]lthough motive is not an element of murder, it is often necessary when only circumstantial evidence is available”)). “Motive” is an inducement, which tempts a mind to commit a crime. *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964 (1998). “[M]otive goes beyond gain and can demonstrate an impulse, desire or any other moving power which causes an individual to act.” *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

“Courts have regularly admitted gang affiliation evidence to establish the motive for a crime or to show that defendants were acting in concert.” *Scott*, 151 Wn. App. at 527 (citing *Yarbrough*, 151 Wn. App.

66, *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050, review denied, 128 Wn.2d 1004, 907 P.2d 296 (1995)); *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964 (1998); *State v. Johnson*, 124 Wn.2d 57, 69, 873 P.2d 514 (1994). It is only when there was “no connection between a defendant’s gang affiliation and the charged offense [that] admission of such gang evidence was found to be prejudicial error.” *Scott*, 151 Wn. App. at 527.

An appellate court “will not disturb a trial court’s ruling under ER 404(b) absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did.” *State v. Yarbrough*, 151 Wn. App. 66, 81 210 P.3d 1029, 1036 (2009). A trial court only “abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons.” *Id.* (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

In the present case, the State offered evidence of gang culture and the participant’s gang affiliation “to establish motive and to provide the jury with the necessary and relevant *res gestae* of the crime.” CP 79. The trial court then heard the testimony of Detective John Ringer, a gang expert, 2 RP 75-149, and found that gang evidence was relevant for at least two reasons: first, such evidence established a motive for the shooting which gave rise to counts I and II and second, it explained why witnesses refused to cooperate with law enforcement. 2 RP 153-54. The

court also considered its concern regarding the prejudice to the defendant that such evidence would engender. 2 RP 155-57, 3 RP 92-93.

Ultimately, however, the court found that the State could introduce evidence of gang culture to include the importance of respect in gang culture, that “OGs,” or “original gangsters” are accorded more respect than other members, that gang members are expected to “work together” to support one another, and that within the gang there is a cultural expectation of non-cooperation with law enforcement. 3 RP 109-33.

Given the evidence before the court, this decision cannot be said to be unreasonable or based on untenable grounds or reasons. The shooting at issue was precipitated by a physical fight between the victim, Garrett, and Curry. *See, e.g.*, 5 RP 21-36. According to witnesses, just prior to that fight, Garrett was referring to himself as an “OG.” 5 RP 14-18; 4 RP 163-64; 6 RP 142; 9 RP 105, 140-41. Vernon Curry and Garrett then began to argue. 5 RP 21-22. Gatewood testified that the two began to fight with each throwing a couple punches before security and one of the police officers broke up the fight. 5 RP 22. According to Gatewood, the defendant was present but not involved in this fight. 5 RP 77. However, the evidence showed that minutes later, it was the defendant and not Mr. Curry who shot Garrett in the face. 7 RP 177-78; 5 RP 27-36, 152. These facts, were they to go to a jury by themselves, would raise a very serious question as to what motive the defendant could possibly have had to shoot

Garrett. In fact, the jury would be left without even a definition of “OG” or why use of this term could have sparked the original fight at all. It is for this reason that evidence of gang culture and of the participants’ gang affiliation was so vitally relevant and indeed necessary to provide evidence of motive for the jury.

That gang evidence showed that “OG” is a gang term meaning “Original Gangster,” that an original gangster is one of the founders of a gang that commands more respect than other gang members, and that gang members would be offended at hearing a non-gang-member referring to himself as an OG because it would be considered disrespectful. 2 RP 81-82, 87-88, 5 RP 139-40, 9 RP 19. That evidence also showed that Vernon Curry was a member of the YGCs gang, 2 RP 129, 137; 3 RP 90-91, and that the defendant had been a crip gang member before he went to prison and was associating with the YGCs after his release. 12 RP 144, 2 RP 90-91, 114-16. Further, the gang evidence showed that gang members are expected to help one another in time of a fight, 2 RP 84-85, and that associates will do things to enhance their attractiveness to the gang, including such things as drive-by shootings. 9 RP 28-29. According to Detective Ringer’s testimony, “[y]ou have to be there to protect your fellow gang members” even if this means acting violently. 2 RP 84.

Only with such evidence could the jury properly understand the defendant’s motive to shoot Garrett. Only with this evidence could the jury know that when Garrett claimed to be an OG he was being

disrespectful to Curry and only with this evidence could the jury know that the defendant, as at least an associate of the YGCs gang, had a gang-imposed duty to protect Curry, especially after violence erupted. *See, e.g.*, 2 RP 84-85, 9 RP 19. The disrespect shown the gang and this duty to protect members clearly provides a motive for the defendant to shoot Garrett. Therefore, evidence of gang culture and of the participants' gang affiliation was relevant and indeed necessary, to prove the defendant's motive and intent in this case. It was therefore, necessary to prove the State's case itself.

Such evidence was also clearly necessary to prove the aggravator alleged in count I that the defendant "committed the offense to obtain or maintain his or her membership or advance his or her position in the hierarchy of an organization, association or identifiable group." CP 4-5. As Detective Ringer testified, gang associates, such as the defendant, will often "do things to enhance their attractiveness to the gang" including "doing a drive-by shooting." 9 RP 28-29. Without testimony of this sort the State could never show that the defendant committed the offense at issue here "to obtain or maintain his or her membership" in the YGCs. Therefore, such evidence was not only relevant but necessary to proof of the aggravator charged in count I. As a result, the court's decision to admit such evidence cannot be considered unreasonable or based on untenable grounds or reasons. That decision should therefore be affirmed.

While the evidence at issue undoubtedly had some prejudicial effect, it was not unfairly prejudicial. It was only with this evidence of gang culture that the initial confrontation makes any sense whatsoever. It is only with such evidence that a jury could possibly understand what motive a person who was otherwise a third-party to that confrontation would have to eventually shoot one of the parties to that confrontation. The evidence at issue here was simply so necessary to proof of the State's case, that its probative value clearly outweighed its prejudicial effect.

Certainly, the court's decision to admit this evidence cannot be said to be unreasonable or based on untenable grounds or reasons. Thus, the trial court could not have abused its discretion and must be found to have properly admitted the evidence at issue. Therefore, its decision to do so should be affirmed.

The defense challenges the use of gang testimony to establish why witnesses would not cooperate with law enforcement by arguing that the State "had ample evidence to explain the lack of cooperation without resorting to playing the gang card." Opening Brief of Appellant at p. 26-28. However, simply because relevant evidence may be available, the State is not precluded "from offering additional relevant evidence." *Yarbrough*, 151 Wn. App. at 85; ER 402. In this case, Gary Gatewood, arguably the only independent witness to the shooting itself, testified that he did not cooperate more fully with police, in part, because of a fear of

retaliation since “there were gang members involved” in the shooting. 5 RP 38-39; 9 RP 85.

Although the defendant further claims that that gang evidence was “totally unnecessary” to prove the State’s case because “[t]he 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,” Opening Brief of Appellant at 24-26, he is plainly mistaken. The defendant argues that any juror could understand “that intoxicated people sometimes get into fights over what, to the outside observer, seems like a minor issue.” *Id.* The flaw in this argument is that, to an outside observer, there seemed to be no issue over which to fight in this case.

According to Gatewood, Garrett was yelling that he was an “OG.” 5 RP 14-18; 9 RP 105, 140-41, and Curry took offense to Garrett calling himself an “OG.” 5 RP 19. *See* 6 RP 153. In fact, Gatewood said that just prior to punches being thrown, the two men began to argue, with Garrett saying that he was an OG and Curry telling him that he was not. 5 RP 21. To an outside observer, without some knowledge of street gangs, this would not be a “minor issue”; it would be utter nonsense.

It is only when witnesses are allowed to testify that “OG” stands for “[o]riginal gangster”, 5 RP 17, that gang members would be offended at hearing a non-gang-member referring to himself as an OG, 5 RP 139-

40, that Curry was a gang member, 5 RP 39-40, and that Curry took offense to Garrett calling himself an “OG,” 5 RP 19, that this confrontation makes any sense at all.

It is only with testimony that gang associates will go so far as to conduct drive-by shootings for the gang, *see* 9 RP 28-29, that what might otherwise appear to be a “minor issue” becomes motive for an attempted murder by a third party. It is for these reasons that such gang testimony was so utterly relevant and necessary to the State’s proof of its case.

Thus, the court’s decision to admit this evidence cannot be said to be unreasonable or based on untenable grounds or reasons and, as a result, the trial court could not have abused its discretion in admitting such evidence. Therefore, the trial court properly admitted evidence of gang culture and of the participants’ gang affiliation and its decision to do so should be affirmed.

2. THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL COUNSEL’S FAILURE TO PROPOSE A LIMITING INSTRUCTION REGARDING THE USE OF GANG EVIDENCE CAN BE CHARACTERIZED AS A LEGITIMATE TACTICAL DECISION NOT TO REEMPHASIZE DAMAGING EVIDENCE.

“Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X).” *State v. Yarbrough*, 151 Wn. App. 66, 89,

210 P.3d 1029, 1040-41 (2009); *State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. *Yarbrough*, 151 Wn. App. at 89.

“Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.” *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001)(citing *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See also *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was deficient” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *Cienfuegos*, 144 Wn.2d at 226-27. 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. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); *In Re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The first prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the

defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Specifically, “[t]o establish deficient performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness.” *Johnston*, 143 Wn. App. at 16. “The reasonableness of trial counsel’s performance is reviewed in light of all the circumstances of the case at the time of counsel’s conduct.” *Id.*; *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). “Competency of counsel is determined based upon the entire record below.” *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001)(citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969).

“To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective.” *Yarbrough*, 151 Wn. App. at 90. This presumption includes a strong presumption “that counsel’s conduct constituted sound trial strategy.” *Rice*, 118 Wn.2d at 888-89. “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *Yarbrough*, 151 Wn. App. at 90 (citing *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)). “[F]ailure to request a limiting instruction for

evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence.” *Id.* at 90 (citing *State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27, *review denied*, 155 Wn.2d 1018, 124 P.3d 659 (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, 854 P.2d 1084 (1993)).

With respect to the second prong, “[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Cienfuegos*, 144 Wn.2d at 229.

Although the defendant here alleges that his trial counsel was ineffective by failing to propose a limiting instruction regarding the jury’s use of gang evidence, Opening Brief of Appellant, p. 31-34, his counsel’s conduct can be characterized as a legitimate tactical decision not to reemphasize damaging evidence and therefore, cannot be ineffective assistance of counsel.

In *Yarbrough*, this Court very recently considered and rejected the same argument advanced by the defendant here. In that case, the trial court granted the State’s motion to admit gang-related evidence from the same witness who testified in the present case, but “ruled that it would be

‘prepared to sign an appropriate limiting instruction in order to reduce the risk of unfair prejudice.’” *Yarbrough*, 151 Wn. App. at 89-90. However, Yarbrough’s defense attorney did not propose such an instruction and, on appeal, Yarbrough claimed that this constituted deficient performance. *Id.* at 90.

In rejecting this claim, this Court relied on *Price*, *Barragan*, and *Donald*. *Yarbrough*, 151 Wn. App. at 90. These cases all involved claims of ineffective assistance of counsel where counsel had failed to propose a limiting instruction regarding the use of ER 404(b) evidence. *Id.*; *Price*, 126 Wn. App. at 648-50; *Barragan*, 102 Wn.App. at 762-64; *Donald*, 68 Wn.App. at 550-51.

The court in *Donald*, relying on the *Rice* presumption that counsel’s conduct constituted sound trial strategy, held that it could “presume trial counsel decided not to ask for a limiting instruction as a trial tactic so as not to reemphasize this very damaging evidence.” *Donald*, 68 Wn. App. at 551 (citing *Rice*, 118 Wn.2d at 888-89). The Courts in *Barragan* and *Price* employed similar presumptions. *Barragan*, 102 Wn.App. at 762 (“we can presume counsel decided not to request a limiting instruction because to do so would reemphasize this damaging evidence”); *Price*, 126 Wn. App. at 649 (“We can presume that 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”).

Because Yarbrough did not attempt to distinguish these cases, this Court presumed “that Yarbrough’s trial counsel decided not to request a limiting instruction on the gang-related evidence as a legitimate trial strategy not to reemphasize damaging evidence.” *Yarbrough*, 151 Wn. App. at 90-91. Since “a legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance of counsel claim,” this Court rejected Yarbrough’s claim and affirmed his convictions. *Id.* at 91-98.

The trial court here, like that in *Yarbrough*, granted the State’s motion to admit gang-related evidence from Tacoma Police Detective John Ringer. *See, e.g.*, 3 RP 109-12; *Yarbrough*, 151 Wn. App. at 90. The defendant’s trial attorney, like trial counsel in *Yarbrough*, failed to propose a limiting instruction relating to this evidence and the defendant now claims that counsel’s failure to do so constituted deficient performance. Opening Brief of Appellant, p. 32-34.

However, trial counsel did propose an instruction based on WPIC 6.12, which he argued should be given to prevent the jury from considering gang evidence as evidence of “bad character.” 12 RP 156. While counsel’s proposed instruction was not a limiting instruction, it clearly demonstrated that counsel was aware of the potential for the jury to

misuse gang evidence and that he was making a tactical decision to confront that potential without “reemphasizing” such evidence.

Moreover, because the defendant has not and cannot distinguish *Yarbrough* or the cases upon which it relied, *Yarbrough* controls and it must be presumed that the defendant’s “trial counsel decided not to request a limiting instruction on the gang-related evidence as a legitimate trial strategy not to reemphasize damaging evidence.” *Yarbrough*, 151 Wn. App. at 90-91. Because “a legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance of counsel claim,” *Id.* at 91-98, the defendant cannot establish deficient performance. Therefore, his claim of ineffective assistance of counsel must fail and his convictions should be affirmed.

Even assuming *arguendo* that counsel should have proposed a limiting instruction, this would not mean that counsel’s performance was constitutionally deficient. To prevail on a claim of ineffective assistance of counsel, the defendant must show, “based upon the entire record below,” *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001), “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. This is something the defendant here has not and cannot do.

The entire record reflects that counsel below zealously and aggressively represented the defendant throughout the trial and particularly with respect to the State's efforts to admit gang-related evidence. Counsel argued at every opportunity against the admission of such evidence, *see* 3 RP 89-109, 9 RP 42-49, 10 RP 115-25, 12 RP 131-39, CP 104-120, and proposed a jury instruction designed by him to address the potential misuse of evidence which was admitted. 12 RP 156. Even assuming *arguendo* that his failure to propose a limiting instruction was in error, it was an isolated incident and, viewing the record in its entirety, in no way left the defendant without the counsel guaranteed by the Sixth Amendment.

However, the court should assume no error here. Rather, under *Yarbrough*, it must be presumed that "trial counsel decided not to request a limiting instruction on the gang-related evidence as a legitimate trial strategy not to reemphasize damaging evidence." *Yarbrough*, 151 Wn. App. at 90-91. Because "a legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance of counsel claim," *Id.* at 91-98, the defendant cannot establish deficient performance and his claim of ineffective assistance of counsel must fail.

Therefore, the defendant's convictions should be affirmed.

D. CONCLUSION.

The trial court properly admitted evidence of gang culture and the participants' gang affiliation because such evidence was relevant to the charged crimes and not unduly prejudicial. Therefore the trial court's admission of such evidence should be affirmed.

The defendant was not denied effective assistance of counsel because his trial counsel's failure to propose a limiting instruction regarding the use of gang evidence admitted under ER 404(b) can be characterized as a legitimate tactical decision not to reemphasize damaging evidence. Therefore, his claim of ineffective assistance of counsel fails and his convictions should be affirmed.

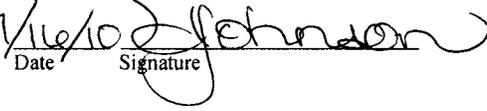
DATED: July 16, 2010.

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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.

7/16/10   
Date Signature

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