

COA NO. 40069-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ANDRE BONDS,

Appellant.

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

The Honorable Frank Cuthbertson, Judge

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BRIEF OF APPELLANT

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CASEY GRANNIS  
Attorney for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting ER 404(b) evidence.
2. The court erred in failing to give a limiting instruction for ER 404(b) evidence.
3. The judgment and sentence contains a clerical error regarding the date of offense.

Issue Pertaining To Assignments Of Error

1. The trial court excluded certain evidence associating appellant with a gang on the ground that such evidence was more prejudicial than probative. Did the court, however, undermine its own ruling and commit prejudicial error in admitting appellant's statement that he was "an original," where jurors could reasonably infer from surrounding evidence that the statement referred to appellant's gang association?
2. Did the trial court commit prejudicial error in failing to give a limiting instruction for this ER 404(b) evidence?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Andre Bonds with first degree assault against Tommy Pitts. CP 29. A jury found Bonds guilty. CP 48. The court imposed 276 months confinement. CP 113. This appeal follows. CP 121.

2. Trial

a. Eyewitness and Expert Testimony

In the early morning hours of December 9, 2008, Tommy Pitts attacked Bonds in a Denny's restaurant parking lot. 3RP<sup>1</sup> 23-24, 68, 384, 431, 542-43. Roosevelt Ports accompanied Pitts. 3RP 371. Ports described Pitts as his best friend. 3RP 758. Bonds and Ports knew one another. 3RP 627, 744.

According to one witness, Pitts appeared high on drugs. 3RP 414. Ports and Pitts had gone to bars earlier that night, where they both drank. 3RP 740, 761. At Denny's, Pitts was argumentative and "mean mugging" Bonds. 3RP 413. Pitts and Bonds exchanged words. 3RP 378. Argument led to physical altercation and a fistfight. 3RP 26-27, 85-86, 137-39, 173, 379-80, 417-18, 456, 535-36. One witness said Pitts was the aggressor. 3RP 542-43.<sup>2</sup> Ports denied jumping Bonds, but acknowledged grabbing him after Bonds knocked Pitts to the ground. 3RP 773, 776.

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 8/5/09; 2RP - 8/10/09; 3RP - nine consecutively paginated volumes dated 8/11/09 and 8/12/09 (a.m. session), 8/13/09, 8/17/09, 8/18/09, 8/19/09, 8/20/09, 9/8/09, 9/9/09, 9/10/09, 9/14/09; 4RP - 8/12/09 (p.m. session); 5RP - 11/6/09; 6RP - 12/4/09.

<sup>2</sup> Ports said Pitts was not acting aggressively and did not throw the first punch. 3RP 745-46, 764-65, 770. Ports had twice been convicted of a crime of dishonesty. 3RP 757.

Bonds told Ports to "grab your home boy." 3RP 766-67, 776. The fight broke up. 3RP 139-40, 456, 474.

Bonds walked to his vehicle and started to drive out of the parking lot. 3RP 420-23, 537-38, 544. There was conflicting eyewitness testimony on whether Bonds actually left the parking lot. 3RP 27, 178-79, 381-84, 420-23, 544, 935-36, 949, 965-66, 981.<sup>3</sup> In any event, Pitts soon confronted Bonds again in the parking lot. 3RP 428-30. As Bonds spoke with his friend Larry Brown, Pitts moved aggressively towards Bonds and threw a punch. 3RP 179-80, 384, 430-31, 543. Pitts instigated this second confrontation. 3RP 28-29, 431, 542-43. Bonds did not want to engage. 3RP 28-29. The fight resumed with the two men swinging and punching one another. 3RP 28-29, 72, 88, 142, 273, 385, 782. Bonds ultimately knocked Pitts to the ground. 3RP 29, 89, 142, 385, 464, 782.

A number of witnesses, from varying vantage points inside the restaurant and with varying abilities to see what happened, said that Bonds (the taller man) kicked or stomped on Pitts' head or somewhere on his body a varying number of times while Pitts was lying on his back on the ground.<sup>4</sup> 3RP 29, 34, 65-66, 78-79, 91-92, 107, 145-46, 389-90, 396, 398-

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<sup>3</sup> Ports said Bonds got in his car but did not drive off. 3RP 747. He could not recall if he and Pitts ever walked towards Bonds' car. 3RP 770.

<sup>4</sup> Some witnesses said another man, later identified as Brown, also stomped on Pitts. 3RP 105-06, 145, 187, 283. Two witnesses gave earlier

99, 432, 435, 458-61, 467-68, 514, 536-37, 783-85, 808-09, 937, 953-56, 959. Ports testified he saw Pitts being kicked once or twice. 3RP 750, 771. Blood pooled underneath Pitts' head. 3RP 954. Some witnesses said they did not see Pitts move or defend himself while on the ground. 3RP 89-91, 297, 460, 465, 784, 937, 952. Some said Pitts appeared unconscious or they did not know if he was unconscious. 3RP 59, 90-91, 385, 387, 432-33, 435, 502, 515, 519, 937, 984. One witness testified Pitts had his hands in the air covering his face after he initially went to the ground but did not appear to be moving after being stomped. 3RP 810-11, 825. The witnesses inside the restaurant watched from a distance of 35 feet or more. 3RP 63-64, 433, 1024-25.

Bonds left in Brown's blue Cadillac. 3RP 38, 332, 397, 461-63, 466, 505, 621. Pitts appeared unconscious when Bonds left and upon police arrival. 3RP 150-51, 210, 752, 754, 775; 4RP 12, 61. He regained consciousness 10 minutes later. 3RP 402, 528.

Pitts sustained an orbital fracture, a nasal fracture, and brain injury. 3RP 1082-83, 1144, 1154. A doctor opined Pitts' brain function was permanently and significantly diminished. 3RP 1101, 1150. Pitts did not

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statements that more than one man stomped on Pitts but said they were mistaken about that trial. 3RP 823, 985-86. One witness saw a man apparently stomping but did not know if it was Bonds or Brown. 3RP 281-83, 301, 304-05, 307.

remember what happened to him. 3RP 193-94, 201. He reported memory and vision problems. 3RP 197-99, 203. In term of brain functioning, Pitts made significant progress during the course of hospitalization and there was hope for further cognitive improvement. 3RP 1087-89, 1102.

b. Ringer Testimony

Detective Ringer interviewed Bonds following arrest. 3RP 607. Ringer related the contents of that interview to the jury. According to Ringer, Bonds said Pitts and Ports jumped him at Denny's. 3RP 618-19, 621. Pitts started trash talking and insulting Bonds after Ports introduced them. 3RP 624-25, 627. Pitts was from California, not Tacoma. 3RP 624, 655. Pitts felt disrespected because Bonds was unimpressed with Pitts' California status. 3RP 658.

Pitts took his jacket off, indicating he wanted to fight. 3RP 627. Bonds said Pitts "was the aggressor" but that he had "just been doing it longer, I guess." 3RP 657. Bonds said he was defending himself. 3RP 619, 689. There were no weapons involved. 3RP 619. The fight left Bonds with a split lip, bruised knuckles, a swollen right hand and ear pain. 3RP 618, 659-60.

Bonds said he kicked Pitts two or three times. 3RP 653. Pitts was coherent at that time. 3RP 632. Bonds believed Pitts was unconscious by the time he left the scene. 3RP 630.

Bonds indicated Pitts had disrespected him, "that he wasn't giving Mr. Bonds all the respect that he was due, and that was his explanation as to why he had kicked the individual." 3RP 632. Ringer asked why he "put the boots" to Pitts. 3RP 631. Bonds explained Pitts "was talking so much and basically being insulting, that he needed to know where he was from, where Bonds was from. And he said, quote 'I'm an original from here. Don't come talking like that,' end quote." 3RP 631.

c. Bonds Testimony

Bonds testified that he was forced to defend himself. 3RP 1165. Earlier that night, he had attended a friend's birthday party at a sports bar named Charley's. 3RP 1165. While there, Ports exchanged greetings with Bonds while accompanied by Pitts. 3RP 1166-67. Bonds did not know Pitts. 3RP 1166. Bonds gave Pitts a head nod and sensed no hostility. 3RP 1167.

After leaving Charley's and stopping at a few establishments, Bonds parked his car at Denny's. 3RP 1170-71. He saw Ports and Pitts standing in front of the entrance. 3RP 1171. Bonds greeted Ports. 3RP 1171. When Bonds turned to say hello to Pitts, Pitts said "what the fuck are you looking at?" 3RP 1171-72. Bonds turned to Ports and asked, "Is your friend high or drunk?" 3RP 1172. Ports shook his head up and down. 3RP 1172.

Pitts was acting weird and aggressive and said something to Bonds. 3RP 1172-73. Bonds asked Ports if his friend was serious. 3RP 1173. Bonds said to Pitts "hey, dude, relax, I'm just here to eat some breakfast." 3RP 1174. Ports told Pitts to chill out. 3RP 1174. After thanking Ports for telling Pitts to chill out, Pitts hit Bonds in the face, busting his lip. 3RP 1174-75. Pitts and Bonds exchanged blows. 3RP 1175. Pitts went down. 3RP 1175. When Bonds backed up, Ports grabbed him in a bear hug. 3RP 1175. As Bonds tried to break free, Pitts got up off the ground and hit Bonds in the head. 3RP 1176. Bonds broke free and started defending himself again by exchanging blows with Pitts. 3RP 1176. Bonds then stopped fighting, saying he did not want to fight anymore. 3RP 1176. This first altercation lasted about 20 seconds. 3RP 1176.

Bonds told Ports to "get his boy" and walked toward his car. 3RP 1177. Pitts was yelling threats. 3RP 1177. As Bonds opened the door to his car, he noticed Pitts kneeling down along the edge between the parking lot and the walkway, where there were bushes. 3RP 1178. Ports stood over Pitts, "as if he was trying to block me from seeing him." 3RP 1178. Bonds began driving out of the parking lot. 3RP 1179. Pitts and Ports cut through the walkway toward Bonds' car and blocked his exit. 3RP 1179, 1184. Bonds stopped because he did not want to run them over. 3RP

1184. Nor did he want to drive next to them and in that way expose himself to the risk of being shot. 3RP 1241.

Bonds pulled over near the Denny's entrance, "just in case they was trying to shoot or something because I didn't want to fight no more." 3RP 1179. They were coming toward his car, yelling threats. 3RP 1179. Bonds stayed in his car. 3RP 1179. Brown, an old friend, drove into the lot and parked. 3RP 1169, 1179. Pitts and Ports walked toward Brown's car. 3RP 1179-80. Bonds was concerned for Brown's safety. 3RP 1180. Ports knew Brown was Bonds' friend. 3RP 1180-81. Bonds wanted to alert Brown that "they were drunk and acting belligerent and just acting like they were up to no good." 3RP 1180. Brown got out of his car. 3RP 1181. Bonds walked over to warn Brown about their attitude and behavior. 3RP 1181.

Pitts started trash talking and challenging Bonds again. 3RP 1181-82. Bonds told Brown they were "drunk and acting crazy, and they basically jumped me back here." 3RP 1182. Pitts threw his coat to the ground and demanded that Bonds fight him. 3RP 1182. Bonds told him he did not want to fight. 3RP 1182. Pitts "lunged at me like a madman swinging wildly." 3RP 1182. Bonds defended himself by exchanging blows. 3RP 1183. Bonds feared for his safety because Pitts "just kept coming after me like he -- like he just wasn't going to stop." 3RP 1183.

At that point, Bonds was concerned Pitts may be armed because he had been kneeling down earlier while Ports blocked Bonds' view. 3RP 1183.

Pitts went to ground as a result of Bonds' blow. 3RP 1184, 1206, 1249-50. Pitts was conscious. 3RP 1184. As Pitts lay on the ground, Bonds thought Pitts was reaching for a weapon because his left hand was moving toward his mid-section and left side. 3RP 1184. This movement, in combination with the earlier movement of kneeling down, made Bonds fear that he could be injured or killed from a knife or gun. 3RP 1184-85. Bonds thought Pitts had a weapon. 3RP 1185. Neither Ports nor Brown assisted or otherwise became involved in the fight. 3RP 1187.

Bonds kicked at Pitts three times, connecting twice with the face and missing a third time. 3RP 1185-86. Bonds denied stomping on Pitts' head. 3RP 1198, 1233, 1237. Bonds' intent was not to kill or severely hurt Pitts: "I just wanted to do enough so I can get away from him." 3RP 1186. Bonds felt it was necessary to kick Pitts because he thought Pitts had a weapon. 3RP 1187.

Upon determining it was safe to get away, Bonds left the scene. 3RP 1187-89, 1240. Bonds told the detectives who interviewed him that he acted in self-defense and thought Pitts was going for a weapon. 3RP 1192, 1208-10. In telling police no weapons were involved, Bonds meant

that he had no weapons. 3RP 1240. Bonds received jury instructions on self-defense. CP 69-71.

C. ARGUMENT

1. IMPROPER ADMISSION OF GANG EVIDENCE REQUIRES REVERSAL.

The jury heard evidence that Bonds claimed he was "an original." In the context of this case, Bonds' statement referred to his gang membership. The jury would have drawn that conclusion in light of the surrounding evidence. Reversal is required because there is a reasonable probability that the jury's knowledge of Bonds' gang association tainted deliberations.

a. The Trial Court Excluded Overt Gang Association Evidence As More Prejudicial Than Probative But Allowed Admission Of Another Piece Of Gang Evidence.

At the CrR 3.5 hearing, Detective Ringer described his post-arrest interview with Bonds. According to Ringer, Bonds said he was an "original." 1RP 42. Pitts was a gang member in California. 1RP 45, 77. Pitts started trash talking and insulting Bonds on the night in question. 1RP 56. Bonds said Pitts "wasn't even from Tacoma." 1RP 56. When Ringer asked why he kicked or stomped Pitts, Bonds said, "I'm an original from here. Don't come talking like that." 1RP 59. Ringer took that to mean Bonds was defending his territory or "turf" and that he needed to

respond to Pitts' disrespect by setting him straight. 1RP 60. Based on the context of the interview, Detective Davis reached the same conclusion. 1RP 100-01.

Ringer knew Bonds as an "Original Gangster, one of the founders of the 23rd Street Hilltop Crips dating back to the late '80s." 1RP 41. The word "original" was commonly used as a shorthand way of referring to "original gangster." 1RP 44-45. Ringer was familiar with the term "Original" or "Original Gangster" as something that dated back to formation of the gang in Los Angeles and Tacoma. 1RP 44. There were several thousand gang members in the Tacoma area. 1RP 73.

Defense counsel moved in limine "to limit the State to present any evidence from any law enforcement witnesses or any civilian witnesses that indicates that the defendant Andre Bonds is a known gang member or associate of any gangs." CP 27. The defense further moved to "exclude any alleged admissions of Mr. Bonds about being an 'Original' from Tacoma, pursuant to ER 403." CP 28. The defense also moved to suppress any gang expert testimony under ER 403, ER 404(b), ER 702 and ER 703. CP 22-25.

The State, meanwhile, sought to admit evidence of Bonds' gang ties, including his description of himself as an "original," to show intent, motive and *res gestae*. 2RP 14-17, 40. The State argued this evidence

was needed to show why Bonds felt disrespected and reacted the way that he did. 2RP 22, 26.

The prosecutor wanted Detective Ringer to describe his understanding of the term "original" to mean "original gangster," and that it signified Bonds was a member of a Tacoma area gang. The prosecutor argued it was completely illogical that the term "original" simply referred to being originally from Tacoma. 2RP 23.

Defense counsel argued the prosecution wanted to smear his client and prejudice the jury against him. 2RP 27. He argued the statement in which Bonds described himself as an "original" should be excluded:

[W]hen you use the word original, there is only one meaning that the jury is going to take from that. Whether the detective testifies as to -- speculates as to what he believes original means, the jury is going to speculate as to what original means. Whether it means original as an original gangster or my client just said original gangster or whether or not he meant original from Tacoma. Certainly, I think that statement can be sanitized because I think that there is an issue as far as one of the other things that was said was that "I am an original from Tacoma." And certainly if this is trash talking between two people, then it's possible to just say, "I'm from Tacoma, you don't bring your California trash talk and talk to me like that." If in fact that's something that is the State's theory as far as why this assault occurred.

2RP 36.

Counsel followed up on this theme by contending "one thing we don't want the jury to do is speculate as far as whether or not my client has

had any prior bad acts or whether or not he has engaged in any criminal activities prior to this incident at this point." 2RP 37.

The trial court excluded evidence regarding Bonds' gang history and precluded Ringer from speculating or giving his opinion about what being an "original" meant. 2RP 41-43. The court determined gang affiliation evidence was more prejudicial than probative. 2RP 42-43. Gang evidence was not needed to show intent or motive. 2RP 42-43. As part of that ruling, however, the court allowed the State to elicit evidence of Bonds' actual verbatim statements to Ringer, which included the statement that he was "an original." 2RP 43-44.

The jury subsequently heard Ringer testify about what Bonds told him in the post-arrest interview. According to Ringer, Bonds said Pitts "wasn't from the Tacoma area." 3RP 624. Bonds said Pitts was "supposedly from Cali." 3RP 655. "He was unimpressed with that and stated, quote, 'that shit don't matter to me,' end quote." 3RP 656. Pitts felt Bonds "wasn't respecting him" based on Bonds dim view of Pitts' California representation. 3RP 658.

Ringer testified people say they are from "Cali" as a point of pride but also as an "intimidation factor, sort of a I'm tough, tougher than the locals here." 3RP 656. Bonds was not intimidated by Pitts, telling Ringer that: "he doesn't know -- you know, I'm from Tacoma. I'm original." 3RP

656-57. Bonds also explained he kicked Pitts because the latter had not given Bonds all the respect he was due. 3RP 632. Pitts was insulting and "needed to know where he was from, where Bonds was from. And he said, quote 'I'm an original from here. Don't come talking like that,' end quote." 3RP 631.

In an attempt to open her own door to the admission of overt gang evidence, the prosecutor elicited Bonds' testimony denying that he talked about being an "original" as testified by Ringer: "What I told them was that I was the original brother from Tacoma, and I did not need to be involved in this foolishness because I have kids to raise." 3RP 1213-14. The judge maintained the in limine ruling, and instructed the jury to disregard the question and answer. 3RP 1214-20. The prosecutor then elicited Bonds' testimony that he did not recall telling the detectives "I'm an original from here and you don't come talking like that." 3RP 1220-21.

Ringer also testified Brown and Bonds were "close associates" who shared "very similar nicknames, street names." 3RP 645. During trial, Ports referred to Brown as "Stretch." 3RP 750. Ports identified the man who kicked Pitts as "Stretch," which was Bonds' nickname or "street name." 4RP 16. Brown knew of a nickname or street name for Pitts. 3RP 671. Pitts was known as "Ewok." 3RP 621-22, 683, 735, 741, 753-54. Pitts and Ports had been "locked up together for a long time." 3RP 735.

b. Evidence Must Not Be Admitted To Show Bad Character Or Propensity To Commit Crime, And Even Character Evidence Theoretically Admissible For A Permissible Purpose Should Be Excluded If It Is Unduly Prejudicial.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 403 prohibits admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.<sup>5</sup> ER 404(b) prohibits admission of character evidence to prove the person acted in conformity with that character on a particular occasion.<sup>6</sup>

"ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." Wade, 98 Wn. App. at 336. Prior misconduct is inadmissible to show the defendant is a "criminal

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<sup>5</sup> ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

<sup>6</sup> ER 404 provides in relevant part: "(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: . . . (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

type" and is likely to have committed a crime for which charged. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). ER 404(b) also prohibits admission of evidence to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

ER 404(b) provides evidence of other crimes, wrongs, or acts may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In applying ER 404(b), a trial court must establish the relevance of the evidence and identify its permissible purpose, then balance on the record the probative value of the evidence against the prejudicial effect it may have on the fact-finder. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); Wade, 98 Wn. App. at 334.

"ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403." State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). That is, ER 404(b) incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. Id. at 361-62.

Relevant evidence is excludable if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. Saltarelli, 98 Wn.2d at 361-62. Unfair prejudice is that which is more

likely to arouse an emotional response than a rational decision by the jury.

State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

The correct interpretation of an evidentiary rule is reviewed de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion only if the trial court correctly interprets the rule. Id.; State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Failure to adhere to the requirements of an evidentiary rule is considered an abuse of discretion. Foxhoven, 161 Wn.2d at 174.

c. Bonds' Statement Referring To Himself As "An Original" Constituted Gang Association Evidence That Should Have Been Excluded.

Admission of gang affiliation evidence is measured under the standards of ER 404(b). State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71 (2009). Evidence of a defendant's gang membership creates a risk that the jury will improperly infer that the defendant has criminal propensities, acted in accordance with such propensities, and is therefore guilty of the charged offense. People v. Williams, 16 Cal.4th 153, 193, 66 Cal.Rptr.2d 123 (Cal. Ct. App. 1997). Evidence of gang affiliation is therefore considered prejudicial. Scott, 151 Wn. App. at 526 (citing State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136, 1155-1156 (2009)).

The trial court properly excluded a good deal of evidence that Bonds was a gang member after determining such evidence was more prejudicial than probative. The court, however, did not go far enough. It let a piece of evidence get to the jury that undermined the court's own ruling. Bonds' statement to Ringer that he was "an original from here," in the context of surrounding evidence, constituted gang association evidence that should have been excluded.

Jurors could reasonably infer from the surrounding evidence that Bonds was associated with a gang based on his statement "I'm an original from here." The jury heard evidence that Bonds was from Tacoma and Pitts was from California. 3RP 624, 655. Ringer testified people say they are from "Cali" as an "intimidation factor, sort of a I'm tough, tougher than the locals here." 3RP 656. Bonds was unimpressed with Pitts' California representation, telling Ringer that: "he doesn't know -- you know, I'm from Tacoma. I'm original." 3RP 656-57. Pitts felt disrespected because Bonds discounted Pitts' California status. 3RP 658. Bonds kicked or stomped Pitts because Pitts had not given him all the respect Bonds was due. 3RP 631-32. It was in this context that Pitts "needed to know where he was from, where Bonds was from. And he said, quote 'I'm an original from here. Don't come talking like that,' end quote." 3RP 631.

It is common knowledge that street gangs generally claim a "home territory" and attempt to prohibit rival gang members from entering the area upon threat of severe physical injury. Medina v. Hillshore Partners, 40 Cal. App. 4th 477, 481, 46 Cal. Rptr. 2d 871 (Cal. Ct. App. 1995). Jurors could infer from the evidence that Bonds was claiming a "home territory" in declaring he was "an original" from Tacoma while sneering at Pitts' California representation. The evidence also showed both Bonds and Pitts took offense and reacted violently due to each believing the other had disrespected one another's territorial affiliation.

The jury also heard evidence that Bonds and Pitts had street names, and that Bonds' "close associate," Brown, had a street name very similar to Bonds' street name. 3RP 622, 645, 750; 4RP 16.<sup>7</sup> The jury also learned of Bonds' statement to Ringer that, in relation to his fight with Pitts, that Bonds "literally had been doing it longer than the victim had and was better at it." 3RP 657. The unmistakable implication is that Bonds had a long history of violence. The jury also learned that Bonds believed Ports was working for the police as an informant based on a "situation" that happened several years ago, which suggested Bonds had an insider knowledge of criminal activity. 3RP 647, 651-52.

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<sup>7</sup> The prosecutor considered the term "original" to be Bonds' "actual name on the street." 2RP 15.

Jurors are expected to bring common sense, insight and deductive reasoning into deliberations to determine the truth from the evidence. State v. Balisok, 123 Wn.2d 114, 119, 866 P.2d 631 (1994); State v. Carlson, 61 Wn. App. 865, 878, 812 P.2d 536 (1991). The jury here was instructed to draw reasonable inferences from common experience in considering the existence of facts. CP 55 (Instruction 4). Circumstantial evidence can be as probative as direct evidence and may create a chain of facts from which the jury may draw reasonable inferences.

The context involved territorial dispute and disrespect, street names, Bonds' acknowledgement that he had fought more often than Pitts, and evidence of Bonds' insider knowledge of criminal activity. That context informed the meaning of the phrase "I'm an original" for the jury. From it, jurors could reasonably infer Bonds identified himself as a gang member in stating he was "an original." That inference was more likely than an innocuous one involving a simple dispute over where each person came from. Mere geographic differences do not tend to lend themselves to violent confrontations. Again, it is common knowledge that violent street gangs generally claim a "home territory." Medina, 40 Cal. App. 4th at 481.

The jury did not need to be told by Ringer that "original" was short for "original gangster" in order to infer Bonds was associated with a gang.

The phrase "original gangster" was released into the popular culture almost 20 years ago. Rap artist Ice-T coined the phrase "Original Gangster," which is both the name of Ice-T's popular 1991 album and a single song on that album. See United States v. Cook, 550 F.3d 1292, 1296 n.3 (10th Cir. 2008) (citing Ice-T, O.G., Original Gangster (Sire Records 1991)).<sup>8</sup>

The statement in which Bonds identified himself as an "original," repeatedly dropped in front of the jury, called attention to itself because it was offered without express explanation of what it meant. Jurors could not be expected to disregard the intriguing statement. They could be expected to fill the statement with a meaning, especially given the fact that the prosecution proffered it as the explanation for why Bonds did what he did. The context in which that phrase was uttered and the surrounding evidence provided that meaning.

Jurors are assumed to be intelligent. People v. Barnum, 104 Cal. Rptr.2d 19, 24 (Cal. Ct. App. 2001), superseded on other grounds, 29 Cal.4th 1210, 131 Cal.Rptr.2d 499, 64 P.3d 788 (Cal. 2003). "A juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box."

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<sup>8</sup> A movie called "Original Gangstas" was released in 1996. See Original Gangstas (Po' Boy Productions 1996).

People v. Long, 38 Cal. App.3d 680, 689, 113 Cal. Rptr. 530 (Cal. Ct. App. 1974). As Ringer stated in his pre-trial testimony, there are thousands of gang members in the Tacoma area. 1RP 73. Intelligent jurors aware of the harsh realities of life cannot be expected to ignore that obvious fact in combination with a number of other facts presented at trial that lead to the conclusion that "I'm an original" refers to being in a gang.

The context of Bonds' fight with Pitts and other evidence at trial allowed jurors to infer a gang meaning. Evidence of gang affiliation need not be express to be unduly prejudicial. Inferences can be just as damaging. See State v. Smith, 749 N.W.2d 88, 96 (Minn. Ct. App. 2008) (photograph, which showed defendant and another man wearing bandanas and making hand gestures that worldly jurors could easily interpret as gang signs, invited an inference that men depicted were criminals, and thus photograph had substantial potential for activating a sequence of impermissible character reasoning).

In considering whether evidence is admissible under ER 404(b), doubtful cases should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334. The trial court here failed to balance the probative value of Bonds' verbatim statement "I'm an original from here" to describe himself against its potential for unfair prejudice on the record. After excluding Ringer's interpretation of what "an original" meant, the court simply

announced Ringer could recount Bonds' verbatim statement without balancing its probative value against its potential for unfair prejudice. 2RP 43-44. "Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981); accord Halstien, 122 Wn.2d at 126-27. The trial court balanced the other gang evidence, but did not apply a balancing analysis to the verbatim statement itself. This was error. State v. Venegas, 155 Wn. App. 507, 526, 228 P.3d 813 (2010); State v. Thach, 126 Wn. App. 297, 310-11, 106 P.3d 782 (2005).

Even if the court had conducted a balancing analysis, the evidence would still be inadmissible because its prejudicial effect outweighed whatever probative value it retained. In denying defense counsel's mid-trial motion to prevent Ports from testifying about Bonds' and Pitts' territorial affiliations, the court touched upon her pre-trial ruling prohibiting gang evidence, saying "I have sanitized this as much as I can." 3RP 730. But Bonds' statement to Ringer could have been paraphrased in the manner defense counsel earlier suggested without distorting the meaning allowed by the trial court. See 2RP 36 ("And certainly if this is trash talking between two people, then it's possible to just say, 'I'm from Tacoma, you don't bring your California trash talk and talk to me like that.'").

There was no need to elicit the verbatim statement containing the problematic "original" term. See Old Chief v. United States, 519 U.S. 172, 184-85, 117 S. Ct. 644, 136 L. Ed.2d 574 (1997) (in determining whether to exclude evidence on grounds of unfair prejudice, the availability of other means of proof is an appropriate factor to consider); State v. Collier, 316 N.J. Super. 181, 195, 719 A.2d 1276 (N.J. Super. Ct. App. Div. 1998) ("a trial judge, in admitting other-crimes evidence that is inherently inflammatory must take appropriate steps to reduce the inherent prejudice of that evidence by considering whether it can reasonably be presented to the jury in a less prejudicial form, and, when necessary, requiring the evidence to be presented to the jury in a sanitized form.").

"If the trial court properly analyzes the ER 404(b) issue, its ruling is reviewed for an abuse of discretion." State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). The trial court here did not properly analyze the ER 404(b) issue and its evidentiary decision is not entitled to deference. Foxhoven, 161 Wn.2d at 174. In any event, the court abuses its discretion in failing to adhere to the requirements of an evidentiary rule. Id. Under either de novo standard or an abuse of discretion standard, the court erred in admitting this evidence.

d. It Is Reasonably Probable Wrongful Admission Of The Gang Evidence Affected The Outcome.

Reversal of the conviction is required because there is a reasonable probability that juror consideration of ER 404(b) evidence tainted deliberation on whether the State proved beyond a reasonable doubt that Bonds did not act in self-defense.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Oswald, 62 Wn.2d 118, 122, 381 P.2d 617 (1963) (quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)).

Evidence of other misconduct is prejudicial because jurors may convict on the basis that they believe the defendant deserves to be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Such evidence "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Id. "This forbidden inference is rooted in the

fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." Wade, 98 Wn. App. at 336. "The presumption of innocence is the bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

Revulsion attaches when an accused's street gang membership is revealed at trial: "It is common knowledge that there is a deep, bitter, and widespread prejudice against street gangs in every large metropolitan area in America." People v. Rivera, 145 Ill. App.3d 609, 617-18, 495 N.E.2d 1088 (Ill. Ct. App. 1986) (quoting People v. Parrott, 40 Ill.App.3d 328, 331, 352 N.E.2d 299 (Ill Ct. App. 1976)). Identifying Bonds as a member of a gang was prejudicial because juries associate such groups with criminal activity and improperly convict on the basis of inferences as to the defendant's character. Jurors were more likely to discount Bonds' version of events, including his crucial testimony that he believed Pitts was reaching for a weapon while on the ground, when faced with evidence that Bonds was a gang member. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

The prejudicial effect of the evidentiary error was compounded by the court's failure to give a limiting instruction. State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990). The prejudicial effect of this evidence was in no way diminished by court instruction. Bonds' case stands in contrast to those where ER 404(b) errors were found harmless because the trial court instructed the jury to disregard. See, e.g., State v. Essex, 57 Wn. App. 411, 416, 788 P.2d 589 (1990).

"When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial." State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968). A new trial is required here for that reason. "A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). The admission of the ER 404(b) evidence unfairly prejudiced Bonds because it allowed the jury to infer Bonds had criminal propensities. Bonds' conviction should be reversed because error in admitting the improper evidence was not harmless.

e. The Failure To Give A Limiting Instruction Allowed The Jury To Consider The Evidence For An Improper Propensity Purpose.

The purpose of a limiting instruction is to prevent the jury from basing its verdict on a "once a criminal, always a criminal" reasoning that ER 404(b) is designed to guard against. State v. Burkins, 94 Wn. App. 677, 690, 973 P.2d 15 (1999). Admission of evidence of "independent and unrelated crimes, placing a defendant, as it virtually does, on trial for offenses with which he is not charged, and which may well be better calculated to inflame the passions of the jurors than to persuade their judgment, should be surrounded with definite safeguards." State v. Goebel, 36 Wn.2d 367, 378, 218 P.2d 300 (1950). Those safeguards include an explanation to the jury of the proper purpose for which it is admitted. Id. That safeguard was not honored here.

A limiting instruction must be given to the jury if ER 404(b) evidence is admitted. Foxhoven, 161 Wn.2d at 175. A limiting instruction must be given even if the defense does not ask for one. State v. Russell, 154 Wn. App. 775, 777, 784-85, 225 P.3d 478 (2010), review granted, 169 Wn.2d 1006, 234 P.3d 1172 (2010).

Without a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997); see also State v. Holmes, 43 Wn. App. 397,

400, 717 P.2d 766 (1986) (propensity evidence may be logically relevant but is not legally relevant). There is no reason to believe the jury did not consider the gang evidence as evidence of Bonds' propensity to commit the charged crime. The jury is naturally inclined to treat evidence of other bad acts in this manner. Bacotgarcia, 59 Wn. App. at 822. "The law has long recognized that evidence of prior crimes is inherently prejudicial to a defendant in a criminal case." State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994). Failure to give a limiting instruction allows the jury to consider bad acts as evidence of propensity, giving rise to the danger that the jury will convict a defendant because he has a bad, criminal-type character.

The lack of limiting instruction may have tipped the scale in favor of conviction here. The jury was more likely to dismiss his claim of self-defense in light of evidence that Bonds was a gangster, unable to resist the tempting "once a criminal, always a criminal" reasoning in the absence of a limiting instruction.

2. A CLERICAL ERROR IN THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

The judgment and sentence entered on December 4, 2009 states the crime of first degree assault was committed on "12//8/09." CP 109. This is a scrivener's error. The offense took place on December 9, 2008. CP

63. A judgment and sentence may be amended to correct the offense date. State v. Casarez, 64 Wn. App. 910, 915, 826 P.2d 1102 (1992). The remedy is to remand to the trial court for correction of the scrivener's errors in the judgment and sentence. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P .3d 353 (2005).

D. CONCLUSION

For the reasons stated, Bonds respectfully requests that this Court reverse the conviction and remand for a new trial.

DATED this 12<sup>th</sup> day of November 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
\_\_\_\_\_  
CASEY GRANNIS  
WSBA No. 37301  
Office ID No. 91051  
Attorneys for Appellant

ERIC J. NIELSEN  
ERIC BROMAN  
DAVID B. KOCH  
CHRISTOPHER H. GIBSON

OFFICE MANAGER  
JOHN SLOANE

LAW OFFICES OF  
**NIELSEN, BROMAN & KOCH, P.L.L.C.**

1908 E MADISON ST.  
SEATTLE, WASHINGTON 98122  
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT  
JAMILAH BAKER

DANA M. LIND  
JENNIFER M. WINKLER  
ANDREW P. ZINNER  
CASEY GRANNIS  
JENNIFER J. SWEIGERT  
OF COUNSEL  
K. CAROLYN RAMAMURTI  
JARED B. STEED

State V. Andre Bonds

No. 40069-3-II

Certificate of Service by Mail

On November 12, 2010, I deposited in the mails of the United States of America,  
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Kathleen Proctor  
Pierce County Prosecuting Atty Ofc  
930 Tacoma Ave S Rm 946  
Tacoma WA 98402-2171

Andre Bonds, 2010077030  
Pierce County Jail  
910 Tacoma Ave S  
Tacoma, WA 98402

Containing a copy of the brief of appellant, re Andre Bonds Cause No. 40069-3-II,  
in the Court of Appeals, Division II, for the state of Washington.

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

  
\_\_\_\_\_  
John Sloane  
Office Manager  
Nielsen, Broman & Koch

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