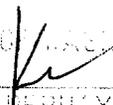




COURT OF APPEALS  
DIVISION II

Court of Appeals No. 40984-4-II

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STATE OF WASHINGTON  
BY  DEPUTY

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON

Plaintiff/Respondent,

v.

RANDALL MARQUISE EMBRY,

Defendant/Appellant.

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BRIEF OF APPELLANT

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Appeal from the Superior Court of Pierce County,  
Cause No. 09-1-01458-4  
The Honorable James R. Orlando, Presiding Judge

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in admitting gang-related evidence.
2. Mr. Embry's right to a fair trial was violated by the introduction of irrelevant but highly prejudicial gang-related evidence.
3. The State presented insufficient admissible evidence to establish that Mr. Embry was guilty of conspiracy to commit first degree murder.

## **II. ISSUES PRESENTED**

1. Is gang-related evidence admissible where the relevance of such evidence is only that the defendants have a propensity to engage in violent criminal behavior? (Assignments of Error Nos. 1 and 2)
2. Is evidence of preparation and motive relevant to any issue before the jury where preparation and motive are not elements the State must prove? (Assignments of Error Nos. 1 and 2)
3. Is a defendant deprived of a fair trial where the trial court permits highly prejudicial yet irrelevant evidence to be admitted? (Assignments of Error Nos. 1 and 2)
4. Is gang-related evidence admissible under the res gestae exception where the evidence was of actions which did not occur close in time and place of the charged crime and where the relevance of such evidence is based on an improper propensity inference? (Assignments of Error Nos. 1 and 2)
5. Does the State present sufficient evidence to convict a defendant of conspiracy where the only evidence that the defendant entered into an agreement to commit a crime was erroneously admitted propensity evidence? (Assignment of error No. 3)

## **III. STATEMENT OF THE CASE**

### *A. Factual Background*

After midnight on January 1, 2009, Mr. Tyrick Clark was involved in a fight behind the 54<sup>th</sup> Street Bar and Grill. RP 551, 573-593. Nicole

Crimmins, a friend of Mr. Clark's, saw the fight at the 54<sup>th</sup> Street Bar and Grill. RP 409, 462, 486-495. As Mr. Clark was exiting the bar, he saw someone he knew in a scuffle with Andre Parker.<sup>1</sup> RP 574. Mr. Parker attempted to hit Mr. Clark's friend who had exited the bar at the same time as Mr. Clark, so Mr. Clark retaliated by punching Mr. Parker in the mouth, making his lip bleed. RP 578-579. Mr. Parker ran off and began telling people that Mr. Clark had tried to jump him. RP 581. The fight broke up after that when somebody fired a gun several times. RP 580, 593-594

Some people at the fight were Young Gangster Crips (YGC) and others were Hilltop Crips. RP 581-582, 584-585. Mr. Clark used to be a YGC, but "chose not to participate in some of the lifestyles that they lead" after he got out of prison in 2005. RP 581-582. Mr. Parker admitted in a police interview that he was a Hilltop Crip. RP 1243. Although members from both gangs were involved, the fight on January 1, 2009, was not a gang rivalry fight. RP 585-586, 638.

On February 23, 2009, Mr. Clark went with Ms. Crimmins to a club in Tacoma called McCabe's. RP 409-412, 553, 560-562. Mr. Clark and Ms. Crimmins arrived at McCabe's around 11 p.m. and remained in the bar until closing time, 2 a.m., drinking and socializing. RP 416-418, 563, 568-570, 608.

Inside McCabe's, Mr. Clark encountered "Deuce," an acquaintance

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<sup>1</sup> Mr. Clark knew Mr. Parker by Mr. Parker's street name, "Drip." RP 574-575. While Mr. Clark often referred to Mr. Parker as "Drip" in his testimony, Mr. Parker will be referred to here by his proper name.

of his who had been at the January 1, 2009, fight at the 54<sup>th</sup> Street bar. RP 572-573. While talking to Deuce, Mr. Clark saw Mr. Randall Embry standing about three feet behind Deuce. RP 603. Mr. Embry approached Mr. Clark and Deuce, said something, then went downstairs in the club. RP 604.

Later, Mr. Clark went down the stairs and accidentally kicked Mr. Embry's shoe. RP 604. Mr. Clark apologized to Mr. Embry, and, while apologizing, saw Mr. Bryant Morgan. RP 605-606. After apologizing to Mr. Embry, Mr. Clark had no further communication with Mr. Embry or Mr. Morgan inside McCabe's. RP 607. Mr. Clark did not have any fights, disagreements, or problems while he was in McCabe's. RP 570-571.

As Mr. Clark and Ms. Crimmins left McCabe's and walked back towards Mr. Clark's vehicle, a man walked up to Mr. Clark, pushed Ms. Crimmins out of the way, and shot Mr. Clark multiple times in the torso. RP 419-426, 553, 611-614. Mr. Clark fell down, told Ms. Crimmins he had been shot and told her to get the license plate of the car the man who shot Mr. Clark had gotten into. RP 425-426, 439-441. Ms. Crimmins ran to the car the shooter had gotten into, called 911, and was able to give the 911 operator a description of the car as well as a partial license plate. RP 426.

Several off duty Tacoma police officers were working as security guards at McCabe's at the time of the shooting and were able to respond to Mr. Clark's location within seconds of the shooting. RP 245-255, 320-321, 330-332. Ms. Crimmins spoke with the officers and gave them a description of the car the shooter had getting into, a partial license plate number for the vehicle the shooter got into, and a description of the man who had shot Mr.

Clark. RP 265-266, 268, 337.

Tacoma Police Officer Jeff Thiry responded to the scene of the shooting and spoke with Ms. Crimmins. RP 359-368. Ms. Crimmins also described the shooter to Officer Thiry and gave Officer Thiry a description of the shooter's vehicle as well as a partial license plate number for the vehicle. RP 370-375. Officer Thiry relayed this information to other police units. RP 376.

Medical aid arrived and transported Mr. Clark to St. Joseph's hospital as Officer Thiry was speaking with Ms. Crimmins. RP 270, 370, 730-738.

Police recovered the security video from McCabe's for the night of the shooting. RP 1095. Police showed Mr. Clark and Ms. Crimmins photomontages which included Mr. Embry's pictures as well as photos of the clothes he was wearing at McCabe's. Both Mr. Clark and Ms. Crimmins identified Mr. Embry as the man who shot Mr. Clark. RP 621-622, 1244-1247, 1256-1257. Police investigation revealed that the vehicle the shooter was seen getting into was a rental vehicle that had been rented by Mr. Parker. Mr. Parker had reported the vehicle stolen on the morning of the shooting. RP 849-865, 1119-1122, 1137-1139, 1238-1239.

On March 17, 2009. Mr. Embry was arrested in Seattle and transported to Tacoma where he was interviewed by Tacoma Police Detective John Ringer. RP 1266-1270. Mr. Embry admitted that he was at McCabe's on the night of the shooting and identified himself in the security video, but denied any involvement in the shooting of Mr. Clark. RP 1271-1273. Mr. Embry acknowledged that he was a member of the 74 Hoover Crips in

Seattle. RP 1269.

*B. Procedural Background*

On March 18, 2009, Mr. Embry was charged with assault in the first degree, and unlawful possession of a firearm in the first degree. CP 1-2.

On March 26, 2009, Mr. Embry filed a Motion to Dismiss the charges against him pursuant to *State v. Knapstad*. CP 5-12.

On April 8, 2009, the State filed a Response to Mr. Embry's Motion to Dismiss. CP 19-22. A hearing on Mr. Embry's *Knapstad* motion was held on April 8, 2009, and the trial court denied the motion. RP 6-7, 4-8-09.<sup>2</sup>

On May 21, 2009, an Amended Information was filed which amended the charges against Mr. Embry to attempted murder in the first degree and unlawful possession of a firearm in the first degree. CP 24-25.

On February 16, 2010, the State moved to consolidate the trials of Mr. Embry, Mr. Morgan, and Mr. Parker. CP 33-56.

On February 17, 2010, Mr. Embry moved to exclude the alleged expert testimony of Detective Ringer, to exclude all gang-related evidence at trial, and to exclude all statements made by non-testifying co-defendants. CP 57.

On February 19, 2010, Mr. Embry filed a Motion for Probable Cause Hearing demanding a hearing where the State would be required to produce its witnesses and evidence it intended to rely upon to establish probable cause

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<sup>2</sup> The transcript of this April 8, 2009 hearing is not numbered continuously with the rest of the transcript volumes. Reference to the April 8, 2009 hearing will be made by giving the RP number followed by the date. Reference to all other portions of the transcript will be made by giving the RP number only.

that Mr. Embry should be charged with conspiracy in violation of RCW 9A.28.040. CP 59. Also on February 19, 2010, Mr. Embry filed a Motion for a Bill of Particulars regarding the anticipated amended charge of conspiracy. CP 60. Mr. Embry additionally filed a motion objecting to the State's motion to join Mr. Embry's case with the cases of Mr. Parker and Mr. Morgan. CP 61.

There is no formal record of the trial court's ruling joining Mr. Embry's case with the cases against Mr. Parker and Mr. Morgan, but it is apparent that the trials were joined at some point prior to April 15, 2010, since the State's Brief RE: Admission of Defendant's Statements to Law Enforcement filed on April 15, 2010 lists all three defendants in the caption and the brief references statements given by the "defendants." CP 59-73.

On April 14, 2010, the State filed a Second Amended Information charging Mr. Embry with attempted murder in the first degree, unlawful possession of a firearm, and conspiracy to commit murder in the first degree. CP 67-68.

On April 15, 2010, the State filed a Brief RE: Admission of Defendant's Statements to Law Enforcement. CP 69-73. Also on April 15, 2010, the State filed a Memorandum in Support of the Admission of ER 404(b) Evidence in the case of Mr. Andre Parker. CP In this brief, the State argued that gang-related evidence was admissible in this case to prove motive, intent or premeditation, and plan, that the gang evidence was relevant and necessary evidence of the res "jesta" [sic] of the crime. CP 254-266.

On April 15, 2010, Mr. Embry filed a motion in limine seeking the following: (1) incorporation by reference of the motions in limine filed by Mr. Parker in Pierce County Superior Court Cause Number 09-1-01460-6 and by Defendant Morgan in Pierce County Superior Court Cause Number 09-1-01459-2; (2) exclusion of the "gang expert" testimony of Detective Ringer; (3) exclusion of Detective Ringer's expected narration of the security video from McCabe's; (4) exclusion of all gang-related evidence from the State's case in chief; (5) exclusion of all post-incident photographs of Mr. Clark's skin grafts and stomach surgery. CP 74-75. Mr. Embry's motion to exclude Detective Ringer's testimony was based on ERs 401-406, 602, 608, 701-705, 801, and 802. CP 74-75. On April 19, 2010, the State also filed its proposed jury instructions. CP 76-113.

A hearing was held on April 19, 2010, to determine the admissibility of statements made by the defendants under CrR 3.5 as well as to determine the admissibility of the State's proposed ER 404(b) evidence. RP 8-162. At the hearing regarding the ER 404(b) gang-related evidence, the State gave an offer of proof as to what it believed the evidence would be at trial and argued that the gang evidence was relevant to the issues of premeditation, motive for Mr. Embry to shoot Mr. Clark, and to establish that Mr. Parker had invited Mr. Embry and Mr. Morgan to perform the shooting. RP 18. The State further argued that the gang-related evidence was important to show that the defendants knew each other, that retaliation is expected behavior amongst gang members, and that gang members are more violent than other citizens. RP 19. The State averred that the gang evidence was admissible as evidence

of the res gestae of the shooting, as evidence of intent, evidence of motive, and as evidence of a plan. RP 20, 42.

Initially, the trial court ruled that the State had demonstrated by a preponderance of the evidence “that there is some connection between [the defendants] and supposed gang activities and potentially with themselves as result of other activities” and found that there was “reason to consider the admission of the [gang-related] evidence, and that is for motive, intent, and certainly plan or preparation.” RP 49. However, the court went on to rule that “While there certainly may be some connection here between the gang activity and this crime, it’s very scant showing” and that the “extreme prejudicial effect” of the gang-related evidence outweighed the probative value of the evidence. RP 50.

The State immediately moved the court to reconsider its ruling, emphasizing the existence of photographs of the defendants allegedly “throwing up gang signs,” posing in front of a vehicle allegedly owned by a known Hilltop Crip, and photographs of the defendants in a group of people whom Detective. Ringer “knew” were Hilltop Crips. RP 51-57.

After viewing these photographs, the trial court reconsidered its ruling excluding the gang-related evidence. RP 130-135. Noting that the five photographs depicted the defendants posing together and showing apparent gang signs, the trial court found that “one of the issues in this case is whether or not there’s any kind of allegiance or any kind of connection between the gang that Mr. Embry and Mr. Morgan reportedly belong to, and the gang Mr. Parker belonged to,” and that the photographs “show what appears to be

and gang expert testimony in light of *State v. McDaniel* and *State v. Marlow*, recent Division II decisions. CP 118-119.

On May 3, 2010, a hearing was held regarding the defendants' motions to reconsider the admissibility of gang evidence and gang expert testimony. RP 175-216. The trial court declined to reconsider his ruling regarding the gang evidence, reaffirming its belief that the evidence was admissible for purposes of establishing motive, intent, plan, and preparation. RP 214.

On May 3, the trial court granted the motion to join the conspiracy charge to Mr. Embry's case and Mr. Embry was arraigned on this new charge. RP 225, 229-230. Also on May 3, 2010, Mr. Embry stipulated that he had been convicted of an offense which rendered it unlawful for him to possess a firearm. RP 238.

Jury trial began on May 4, 2010. RP 245. On the same date the State filed Proposed Supplemental Instruction to the Jury. CP 120-124.

On May 10, 2010, Mr. Embry filed an Objection to Nicole Crimmins' In-Court Identification of Defendant Randall Embry. CP 125-127. The trial court ruled that Ms. Crimmins could not identify Mr. Embry in court. RP 483.

At trial, the State had Detective Ringer testify by reading his police reports into the record. RP 1236-1243, 1259-1262, 1271-1274. Counsel for Mr. Embry objected to this procedure, but the trial court overruled the objection. RP 1253, 1271. At numerous points during Detective Ringer's testimony, Mr. Embry objected to Detective Ringer offering testimony

about gang-related evidence without the State having established a sufficient foundation for Detective Ringer's testimony. Mr. Embry also objected on the basis that Detective Ringer's testimony was derived from testimonial hearsay of third parties who did not testify at trial and who were unavailable for defense counsel to interview pretrial. RP 1263, 1264.

On May 17, 2010, the parties entered into a stipulation regarding the admissibility of the shell casings found at the scene of the shooting. CP 129-130.

On May 20, 2010, Mr. Embry filed proposed jury instructions and objections to the State's proposed jury instructions. CP 132-140.

At the close of the State's case, Mr. Embry moved for dismissal of the conspiracy charge on the basis that the State had presented insufficient evidence to sustain a conviction on that charge. RP 1480-1481. The trial court denied the motion to dismiss. RP 1482.

Mr. Embry testified in his defense. He testified that he did not shoot Mr. Clark, that he did not know Mr. Clark, and that he had never met Mr. Clark before the shooting. RP 1498. Mr. Embry further testified that he had been at McCabe's on the night of the shooting, that he knew of Mr. Parker but that Mr. Parker was not a friend or acquaintance of his, and that he didn't know Mr. Morgan. RP 1499-1504.

On May 24, 2010, the parties again stipulated that Mr. Embry had been convicted of a felony defined as a serious offense and was not permitted to possess a firearm at the time of the shooting. CP 141. The parties also stipulated to the admissibility of pictures of Mr. Clark as he appeared in St.

Joseph's hospital in recovery from the gunshot wounds. CP 142-143. On the same date, the State filed a third set of proposed supplemental jury instructions. CP 144-154.

On June 1, 2010, the Court's Instructions to the Jury were filed. CP 162-197. On the same date, the jury found Mr. Embry guilty of all crimes charged and found by special verdict that Mr. Embry was armed with a firearm during the commission of the attempted first degree murder. CP 198-201.

On July 16, 2010, Mr. Embry stipulated to his prior record and offender score. CP 231-233. He was sentenced to 471 months for the attempted murder conviction, 116 months for the unlawful possession of a firearm conviction, 240 months for the conspiracy conviction, and 60 months for the firearm enhancement of the attempted murder conviction. CP 234-247. The trial court ran the sentences for the attempted murder and conspiracy convictions consecutive to each other, and ran the sentence for the firearm enhancement consecutive other convictions, for a total sentence of 771 months. CP 234-247.

Mr. Embry filed a Notice of Appeal on July 16, 2010. CP 202-223.

#### **IV. ARGUMENT**

- 1. Mr. Embry's right to a fair trial was violated by the erroneous introduction of highly prejudicial yet irrelevant or otherwise inadmissible evidence.**

Both the United States Constitution and the Washington State Constitution Article I, Section 22, guarantee the criminal defendant a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56

(1983).

“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).

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wn.2d 506, 22 P.3d 791 (2001).

a. *The trial court abused its discretion in ruling that the gang-related evidence was admissible under ER 404(b).*

A trial court’s ruling under ER 404(b) will not be disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. *State v. Mason*, 160 Wn.2d 910, 933-934, 162 P.3d 396 (2007). A trial court’s balancing of whether or not a piece of evidence is more prejudicial than probative under ER 403 is reviewed for abuse of discretion. *In re Detention of Halgren*, 156 Wn.2d 795, 802, 132 P.3d 714 (2006).

A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court’s decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the

correct standard.

*Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime. *See State v. Holmes*, 43 Wn.App. 397, 400, 717 P.2d 766 ("once a thief always a thief" is not a valid basis to admit evidence), *review denied*, 106 Wn.2d 1003 (1986). Substantial prejudicial effect is inherent in ER 404(b) evidence. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995).

Evidence of prior bad acts, including acts that are merely unpopular or disgraceful, is presumptively inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Whether evidence of a defendant's other bad acts should be admitted at trial is governed by ER 404(b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

*State v. Stanton*, 68 Wn.App. 855, 860, 845 P.2d 1365 (1993).

[B]efore admitting evidence of other wrongs under ER 404(b), a trial court must (1) find that a preponderance of evidence shows that the misconduct occurred; (2) identify the purpose for which the evidence is being introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. In doubtful cases, the evidence should be excluded.

*State v. Baker*, 89 Wn.App. 726, 731-732, 950 P.2d 486 (1997), *review*

*denied* 135 Wn.2d 1011, 960 P.2d 939 (1998).

“In weighing the admissibility of the evidence to determine whether the danger of unfair prejudice substantially outweighs probative value, a court considers (1) the importance of the fact that the evidence intends to prove, (2) the strength of inferences necessary to establish the fact, (3) whether the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction.” *State v. Kendrick*, 47 Wn.App. 620, 628, 736 P.2d 1079, *review denied* 108 Wn.2d 1024 (1987). “Gang affiliation, standing alone and without more detailed information about that gang's activities and the victims' participation, [has] little evidentiary weight.” *State v. Ferguson*, 131 Wn.App. 855, 129 P.3d 856, *review denied* 158 Wn.2d 1016, 149 P.3d 377 (2006).

Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association. Therefore, evidence of criminal street gang affiliation is not admissible in a criminal trial when it merely reflects a person's beliefs or associations. There must be a connection between the crime and the organization before the evidence becomes relevant.

Washington courts likewise have recognized the need for this connection before admitting evidence of gang membership. Accordingly, to admit gang affiliation evidence there must be a nexus between the crime and gang membership.

*State v. Scott*, 151 Wn.App. 520, 526-527, 213 P.3d 71 (2009), *review denied* 168 Wn.2d 1004, 226 P.3d 780 (2010) (internal citations omitted).

As will be discussed below, the trial court's erroneous admission of gang-related evidence deprived Mr. Embry of a fair trial since the gang-related evidence was both highly prejudicial yet utterly irrelevant to any issue

before the finder of fact.

The State's theory of the case was that Mr. Parker was upset at being punched by Mr. Clark on January 1, 2009, so, on February 23, 2010, Mr. Parker asked Mr. Embry and Mr. Morgan, who happened to also be at McCabe's that night, to shoot and kill Mr. Clark. Then, Mr. Embry and Mr. Morgan agreed to shoot Mr. Clark as a favor to a fellow Crip-affiliated gang member. RP 10-21. The gang-related evidence the State sought to introduce consisted of evidence that the defendants were in different Crip-affiliated gangs (RP 10), that the defendants knew each other as evidenced by the photographs of the defendants (RP 10), that retaliation is expected when gang members are involved in a conflict (RP 19), that gang members are more violent than other members of the public (RP 19), that gang members will retaliate when disrespected (RP 42), and that gang violence often quickly escalates from minor incidents such as punching to violent incidents such as shootings. RP 53. The State's argument as to why the gang evidence was relevant was that Mr. Embry's actions of shooting Mr. Clark made no sense without the gang evidence since Mr. Embry had no other motive to shoot Mr. Clark than being asked to by Mr. Parker. RP 52-54.

Initially, the trial court ruled that the State had made "a very scant showing" of the relationship between the gang-related evidence and the shooting of Mr. Clark and that the "extreme prejudicial effect" of the gang-related evidence outweighed the probative value of the evidence. RP 50. When the State moved for reconsideration of the court's exclusion of the gang-related evidence, however, the trial court reversed its ruling and

admitted the evidence after reviewing several photographs showing the defendants posing together and showing alleged gang signs. RP 51-54, 130-135.

The trial court reversed its initial ruling excluding the evidence and found that the issue of gang affiliation and alliance was important in a case like this one because without evidence of the gang association the jury would be “deciding the case in a total vacuum without any rational understanding of why there would be this potentially deadly assault upon a victim in this case.” RP 132. The trial court found that the gang-related evidence was admissible for the issues of intent, plan, preparation, motive, and as part of the res gestae of the crime. RP 132. The court found that

while there may not be a direct connection or loyalty or allegiance between the Hoover gang and the Hilltop Crips, I think the inference here is there was close enough connection that would encourage, at the request of Mr. Parker, two known associates to commit allegedly a significant assault upon the victim in this case.

And I think without that, the State is left with really the inability to establish any kind of motive for this other than the assault that occurred upon Mr. Parker at a previous occasion that was a relatively trivial assault. I think the case law points out retaliation of violence and gang violence is relatively common experience in this, and I think it does tip the balancing in favor of admissibility of the evidence, despite the substantial prejudice that there still may be there for the defendants.

I think that in cases such as this, we are putting the jury in a very difficult position by giving them a very small piece of the puzzle without giving the balance of it to them and giving them a reason to understand why this degree of assault would have occurred upon the victim in this case.

RP 134-135.

The trial court did limit Detective Ringer's testimony regarding the security video to commentary as to what is seen on the video, and to no testimony that was speculative about what someone was doing. RP 123. The trial court also ruled that Detective Ringer's testimony regarding gangs was limited to issues of retaliation, use of force, and the concept of disrespect in gang culture. RP 139.

However, as will be discussed below, the trial court's ruling admitting this evidence was an abuse of discretion because (1) the defendant's preparation and motive were irrelevant to any issue before the jury, (2) the State failed to demonstrate that the gang evidence it sought to introduce was probative of any of the defendants' intent, plan, preparation, or motive, without relying on the prohibited propensity inference, (3) the res gestae exception was inapplicable to the gang related evidence offered by the State, and (4) all gang-related evidence was more prejudicial to the defendants than it was probative of the identified purpose for its admission.

- i. Mr. Embry's preparation and motive were irrelevant to any issue before the jury.

"Evidence can be admitted under ER 404(b) only if the trial court finds the evidence serves a legitimate purpose, *is relevant to prove an element of the crime charged*, and, on balance, the probative value of the evidence outweighs its prejudicial effect." *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003), *citing Lough*, 125 Wn.2d at 853, 889 P.2d 487.

Evidence is relevant if it has "any tendency to make the existence of any fact that is **of consequence** to the determination of the action more

probable or less probable than it would be without the evidence.” ER 401 (emphasis added). Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. The ER 403 balancing test is incorporated into the test for admissibility under ER 404(b):

Before admitting ER 404(b) evidence, a trial court “must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) **weigh the probative value against the prejudicial effect.**”

*State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (emphasis added).

Probative evidence is “evidence that tends to prove or disprove a point in issue.” Black’s Law Dictionary (7<sup>th</sup> ed., 1999) p. 579. The probative value of evidence is directly linked to the relevance of the evidence: “To be relevant, evidence must meet **two** requirements: (1) the evidence must have a tendency to prove or disprove a fact (**probative value**), and (2) **that fact must be of consequence** in the context of the other facts and the applicable substantive law (materiality).” *State v. Rice*, 48 Wn.App. 7, 12, 737 P.2d 726 (1987) (emphasis added). Therefore, evidence that is not probative is not relevant.

Mr. Embry was charged with attempted first degree murder in violation of RCW 9A.32.030(1)(a) and RCW 9A.28.020, conspiracy to commit murder in the first degree in violation of RCW 9A.28.040 and RCW 9A.32.030(1)(a), and unlawful possession of a firearm in the first degree in

evidence established that Mr. Clark had been shot, that Mr. Embry was likely the individual who shot Mr. Clark, that Mr. Morgan was likely with Mr. Embry at the time of the shooting, and that Mr. Parker at least rented, if not drove, the car the defendants left the scene of the shooting in. In light of this evidence, the only issues before the jury were to determine the credibility of the State's eye witnesses and the identification of Mr. Embry as the man who shot Mr. Clark. Evidence relating to the defendants' preparation and motive was simply irrelevant to the jury's determination of the credibility of the State's witnesses.

"Evidence which is not relevant is not admissible." ER 402. The trial court abused its discretion in admitting the gang-related as evidence the defendants' preparation and motive because the defendants' preparation and motive were not relevant to any element of the crimes or probative of any issue before the jury. Further, as will be discussed below, the gang-related evidence was far more prejudicial to Mr. Embry and the other defendants that it was probative of any issue before the jury.

- ii. The State failed to demonstrate that the gang evidence it sought to introduce was probative of any of the defendants' intent, plan, preparation, or motive, without relying on the prohibited propensity inference.

1. *Intent.*

When the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged offense. That a prior act "goes to intent" is not a magic password whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in its name.

*State v. Wade*, 98 Wn.App. 328, 334, 989 P.2d 576 (1999) (emphasis in original).

In *Wade*, a police officer on patrol observed Wade walking away from a vehicle. The officer stopped his patrol car, got out, and invited Wade to talk to the officer. Wade refused and walked away. As Wade walked away, the officer saw him fumbling in his pocket, and then saw a plastic baggy-type wrapper drop to the ground. After the baggy dropped, Wade began running. The officer recovered the baggie which contained nine rocks of cocaine. Wade was later found and arrested.

At trial on a charge of possession of a controlled substance with intent to deliver, the State moved in limine to admit two prior drug dealing acts committed by Wade fourteen and ten months prior to the current prosecution. The trial court allowed the evidence to be admitted as evidence of intent under ER 404(b). Wade objected to the admission of the evidence again during trial, but the trial court again ruled the evidence was admissible as evidence of intent. Mr. Wade was found guilty and appealed.

The Court of Appeals found that the trial court had erred in admitting the evidence of Wade's prior acts of dealing drugs, and reversed Wade's conviction on grounds that the State presented insufficient evidence that Wade intended to deliver the drugs. *Wade*, 98 Wn.App. at 332-342, 989 P.2d 576.

In reaching its ruling, the *Wade* Court engaged in an in depth analysis of how evidence of prior bad acts may properly be used to support an inference of intent, and how prior bad acts can be improperly used to

establish intent through a propensity inference:

The inquiry here is whether it is legally appropriate to infer from Wade's past acts intent to deliver in the present act. Wigmore describes the nature of this inference as at least a three-step process because "an act is not evidential of another act"; there must be an intermediate step in the inference process that does not turn on propensity. "[I]t cannot be argued: Because A did an act last year, therefore he probably did the act X as now charged." WIGMORE ON EVIDENCE § 192, at 1857.

When the State seeks to prove the element of criminal intent by introducing evidence of past similar bad acts, the State is essentially asking the fact-finder to make the following inference: Because the defendant was convicted of the same crime in the past, thus having then possessed the requisite intent, the defendant therefore again possessed the same intent while committing the crime charged. If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current case.

**Use of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant. To use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves.** Wigmore calls this the "abnormal factor" that ties the acts together. WIGMORE, § 302. Once this connection is established, then other reasonable inferences, such as intent or motive, can logically flow from introduction of the prior acts.

In *State v. Holmes*, the defendant was charged with burglary; the State sought to introduce previous theft convictions to show intent in the charged act. *State v. Holmes*, 43 Wn.App. 397, 717 P.2d 766 (1986). The court held that before prior acts can be admitted to show intent, the prior acts "must have some additional relevancy beyond mere propensity." *Holmes*, 43 Wn.App. at 400-401, 717 P.2d 766. **This additional relevancy turns on the facts of the prior acts themselves and not upon the fact that the same person committed each of the acts. Otherwise, the only relevance between the prior acts and the current act is the inference that once a criminal always a criminal.** It is the facts of the prior acts, not the propensity of the actor, that establish the

permissive inference admissible under ER 404(b).

Using Wade's prior bad acts to prove current criminal intent, however, is tantamount to inviting the following inference: Because Wade had the same intent to distribute drugs previously, he must therefore possess the same intent now. ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime. 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. Eric D. Lansverk, Note, Admission Of Evidence Of Other Misconduct In Washington To Prove Intent Or Absence Of Mistake Or Accident: The Logical Inconsistencies Of Evidence Rule 404(b), 61 Wn. L.Rev. 1213 (1986). For this reason, we do not generally allow propensity, or character evidence, to establish a basis for criminal conviction.

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Here, the trial court admitted evidence of Wade's prior offenses to prove intent. Wade offered no defense; nor did he claim mistake, inadvertent possession, or misidentification. The trial court relied on the past acts having occurred within the preceding one and a half years and in the same geographic location in Tacoma.

But the facts of the charged offense here differ significantly from the facts of the previous offenses. The prior acts included police observation of Wade trafficking in drugs and selling drugs to an undercover police officer. Here, Wade simply saw an officer, emptied the contents of his pocket and ran. That the prior acts occurred in the same general geographic location as the charged act does not support an inference here of intent to deliver.

**The only reasonable inference to be drawn from Wade's prior acts is as follows: Because the previous convictions are for the same type of crime, including the requisite intent, Wade was predisposed to have that same intent on the current occasion. Such evidence and inference merely establish Wade's propensity to commit drug sale offenses. No matter how relevant such propensity evidence may be, ER 404(b) requires exclusion, absent other permissible purposes. We thus conclude that the trial court erred in admitting Wade's prior acts to prove intent.**

*Wade*, 98 Wn.App at 335-337, 989 P.2d 576 (emphasis added).

This case is like *Wade* because the only way the State's gang-related evidence was relevant to establishing Mr. Embry's intent, or any of the defendants' intent, was if the fact finder drew prohibited propensity inferences. There were no similarities between any of the gang-related evidence and the shooting of Mr. Clark. Indeed, the State was not alleging any specific acts, but was, instead, alleging only that the defendants were gang members and that gang members, as a class, were violent people. If the State's argument as to the admissibility of the gang-related evidence to show the defendants' intent is represented as a syllogism, it becomes patently clear that the trial court in this case made the same error as the trial court in *Wade* in finding that the evidence was admissible based on an impermissible propensity inference:

<u>MAJOR PREMISE</u>	<u>MINOR PREMISE</u>	<u>CONCLUSION</u>
Gangs work together and gang members are more likely to use violence than average citizens and respond to minor problems with higher levels of violence	Mr. Embry and the other defendants were all gang members	Therefore, Mr. Embry conspired with the other defendants to shoot and kill Mr. Clark

It is impossible to reach the conclusion in the above syllogism without making the prohibited propensity inference that, since Mr. Embry was in a gang, he was more likely to have conspired with the other defendants to shoot and kill Mr. Clark and to have actually shot Mr. Clark. This is precisely the

improper logic identified by the *Wade* court as reversible error.

The State's argument for admissibility of the gang evidence to prove intent in this case was even more improper than in *Wade* since the prior bad acts were not even tied to Mr. Embry specifically, but were generalized assertions about all gang members. The gang-related evidence was not evidence of any of the defendants acting in concert on previous occasions to shoot any other person. Rather, the gang-related evidence was simply that the defendants were in gangs, gang members in general were violent and retaliatory, and gang members in general work together. The State failed to identify any similarity in facts between the shooting of Mr. Clark and Mr. Embry's membership in a Seattle gang. The only way this generalized information about gangs becomes relevant to Mr. Embry's intent on the night of the shooting of Mr. Clark is if the fact finder were to make propensity inferences.

The gang-related evidence did nothing more than demonstrate Mr. Embry's beliefs and associations. The State demonstrated no specific connection, nexus, or factual similarity between Mr. Embry's membership in a gang, the fact that gangs are violent in general, the fact that gangs retaliate in general, and the fact that gangs sometimes work together, and the shooting of Mr. Clark.

The trial court abused its discretion in admitting any gang-related evidence for purposes of showing intent since the only way such evidence became relevant to demonstrating Mr. Embry's or any other defendant's intent is if the fact finder made the impermissible propensity inferences

barred by ER 404(b). The trial court's ruling was based on untenable factual and legal bases since the State never established a factual link between the gang-related evidence and the current charges and, therefore, never established the relevance or admissibility of the evidence to show intent.

## 2. *Plan*

If the defendants could be said to have a plan in this case, it would have been that, after discovering Mr. Clark was present at McCabe's on the night of February 23, 2009, the defendants all agreed that one of them would retrieve a gun from a vehicle outside the club and would shoot Mr. Clark as he exited the club. The gang-related evidence in this case is utterly void of relevance to establish that the defendants had such a plan. Beyond the defendants themselves, there is no similarity between the fact that the defendants were gang members and the shooting of Mr. Clark. The gang related evidence established nothing more than that the defendants were in a gang and that, in general, gangs were violent, vengeful, and retaliated with great force, sometimes deadly force. The State presented no specific acts of the defendants that would lead the fact finder to make the inference that the defendants were acting according to any plan on the night of the shooting.

The trial court engaged in the same improper propensity reasoning in ruling that the gang-related evidence was admissible for purposes of establishing the defendants' plan as the court engaged in when analyzing the admissibility of the gang-related evidence to prove intent. As with intent, the relevance of the gang-related evidence was premised on the impermissible propensity inference that just because the defendants were in

gangs, that they were likely to have planned to shoot and kill and actually have shot Mr. Clark. Also as with intent, the admission of the gang-related evidence to prove plan on the basis of this logic was an abuse of discretion.

3. *Preparation.*

The trial court employed the same flawed logic in ruling that the gang-related evidence was admissible to demonstrate preparation on the part of the defendants as it employed in finding the gang-related evidence was admissible to demonstrate intent and plan. The State's gang-related evidence contained no specific prior acts of any of the defendants with similarities to the shooting of Mr. Clark which would lead to an inference that the defendants had prepared to shoot and kill Mr. Clark without the fact finder engaging in the improper propensity inference that the defendants engaged in preparation simply because they were gang members. The trial court abused its discretion in admitting the gang-related evidence for purposes of proving the defendants made preparations to shoot Mr. Clark.

4. *Motive*

Again, as with intent, plan, and preparation, the trial court engaged in the same improper reasoning in finding that the gang-related evidence was admissible under ER 404(b) to demonstrate the motive of any of the defendants. The State failed to establish any prior acts of Mr. Embry or of any other co-defendant which would support any conclusion that Mr. Embry had a motive to shoot and kill Mr. Clark without relying on an improper propensity inference. The trial court abused its discretion in finding that the gang-related evidence was admissible under ER 404(b).

The State failed to establish the necessary nexus or “abnormal factor” linking any of the defendants’ membership in a gang with Mr. Embry’s intent, plan, preparation, or motive in engaging in any activity. Instead, the State relied entirely on propensity arguments to convince the court that the evidence was admissible. RP 19-20, 38, 39, 40. The trial court ultimately agreed with the State that the gang-related evidence was admissible precisely because it demonstrated that the defendants had a propensity to commit first degree murder or conspire to commit first degree murder: “we are talking about a culture that has demonstrated the propensity to retaliate with greater violence for relatively slight insults or acts by either a rival or someone not within their own immediate group of associates.” RP 895

It is clear from the State’s arguments, the ruling, and the comments of the trial court that improper propensity inferences were used to establish the admissibility of the gang-related evidence under ER 404(b). Accordingly, the trial court abused its discretion in admitting the gang-related evidence under ER 404(b).

- iii. The “res gestae” exception to ER 404(b)’s prohibition of propensity evidence did not apply to the facts of this case.

“Under the res gestae or ‘same transaction’ exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.” *State v. Lillard*, 122 Wn.App. 422, 432, 93 P.3d 969 (2004), *review denied* 154 Wn.2d 1002, 113 P.3d 482 (2005). “Unlike most ER 404(b) evidence, res gestae evidence is not evidence of unrelated

prior criminal activity but is itself a part of the crime charged.” *State v. Sublett*, 156 Wn.App. 160, 196, 231 P.3d 231 (2010).

Under the res gestae exception, evidence of other crimes or misconduct is admissible to complete the crime story by establishing the immediate time and place of its occurrence. Where another offense constitutes a link in the chain of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible in order that a complete picture be depicted for the jury.

*State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003), *review denied* 151 Wn.2d 1039, 95 P.3d 758 (2004).

Like other ER 404(b) evidence, res gestae evidence must be relevant for a purpose other than showing propensity, and it must not be unduly prejudicial. *State v. Lane*, 125 Wn.2d 825, 834, 889 P.2d 929 (1995).

In the case at bar, the fight at the 54<sup>th</sup> Street Bar occurred on January 1, 2009, nearly two months prior to the shooting of Mr. Clark on February 24, 2009. The derivative gang evidence cannot be pinpointed as being close either in time or place to the shooting of Mr. Clark.

Further, the admission of the gang-related evidence under the res gestae exception to ER 404(b) suffers from the same flawed logic identified in *Wade, supra*, where relevance is based on a propensity inference. Other than propensity, the evidence of the gang-related evidence is not relevant in any way to the charged crimes in this case.

The trial court abused its discretion in admitting the gang-related evidence under the res gestae exception to ER 404(b) because such evidence was not admissible under the applicable legal standard, specifically, that the res gestae evidence is relevant evidence of acts occurring close in time and

place with the charged crime, which are not introduced to prove propensity.

- iv. The gang-related evidence was far more prejudicial to Mr. Embry than it was probative of any issue in the case.

Substantial prejudicial effect is inherent in ER 404(b) evidence. *Lough*, 125 Wn.2d at 863, 889 P.2d 487. Therefore, prior bad acts are admissible only if their probative value is substantial. *Lough*, 125 Wn.2d at 863, 889 P.2d 487.

Evidence of gang affiliation is considered prejudicial. *State v. Asaeli*, 150 Wn.App. 543, 208 P.3d 1136, 1155-1156, *review denied* 167 Wn.2d 1001, 220 P.3d 207 (2009). “Gang affiliation, standing alone and without more detailed information about that gang's activities and the victims' participation, [has] little evidentiary weight.” *Ferguson*, 131 Wn.App. at 45, 129 P.3d 856.

Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association. Therefore, evidence of criminal street gang affiliation is not admissible in a criminal trial when it merely reflects a person's beliefs or associations. There must be a connection between the crime and the organization before the evidence becomes relevant.

Washington courts likewise have recognized the need for this connection before admitting evidence of gang membership. Accordingly, to admit gang affiliation evidence there must be a nexus between the crime and gang membership.

*Scott*, 151 Wn.App. at 526-527, 213 P.3d 71 (2009).

The gang-related evidence in this case consisted of the testimony that the defendants were in gangs, and of Detective Ringer's testimony that different Crip-gangs associated and operated with each other and were on

friendly terms (RP 1263-1264, 1452), that gang assault cases involve situations where seemingly insignificant incidents escalate to violence (RP 1387, 1407), and that gang members will “pass around” guns and vehicle for use in crimes and will dispose of the guns and vehicle after the crime, often in a river, and report the vehicle stolen. RP 1445-1447. However, none of this evidence was ever specifically linked to Mr. Embry. The only gang-related evidence introduced specifically involving Mr. Embry was that he was in a gang and had admitted to being in a gang. RP 1269, 1303.

As discussed above, the fact that Mr. Embry was in a gang was irrelevant to any purpose save an impermissible propensity inference. There was not even any evidence introduced linking Mr. Embry to the purported triggering incident, the fight on January 1, 2009.

The highly prejudicial nature of gang evidence was acknowledged by the State in Mr. Embry’s case,:

[I]t’s very true that the gang evidence is highly prejudicial. The courts have said it; there’s just no issue. **The common citizen is not only tired of the gang activity but petrified of gang members and the kind of violence that occurs with them.**

RP 44 (emphasis added).

Thus, highly prejudicial yet irrelevant gang-related evidence was admitted against Mr. Embry. As discussed above, this evidence supported only one inference: that Mr. Embry and the other defendants had a propensity to commit violent criminal acts by virtue of the fact that they were in gangs. The gang-related evidence introduced lacked any sort of specific

detail which would allow any other inference to be drawn from the evidence. Indeed, the trial court made clear that it was admitting the evidence for purposes of allowing the jury to make this improper propensity inference: “[W]e are talking about a culture that has demonstrated the propensity to retaliate with greater violence for relatively slight insults or acts by either a rival or someone not within their own immediate group of associates...So I think that’s my expectation of where the testimony is going to go.” RP 895-896.

The trial court erred when it determined that the gang-related evidence was more probative of any material issue before the jury than it was prejudicial towards Mr. Embry and the other defendants.

*b. The introduction of the gang-related evidence deprived Mr. Embry of a fair trial.*

As discussed at length above, the gang-related evidence was highly prejudicial to Mr. Embry while at the same time irrelevant. “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.” *Miles*, 73 Wn.2d at 70, 436 P.2d 198.

Not only did the introduction of the gang-related evidence inflame and prejudice the jury against Mr. Embry, but, given the generalized nature of the gang related evidence, the only inference which the jury could draw from the gang-related evidence was that Mr. Embry and the other defendants had a propensity to commit violent crimes because they were gang members. This inference is specifically prohibited by ER 404(b), and, as recognized in

*Wade*, is an improper basis for a criminal conviction and requires the vacation of the conviction. *Wade*, 98 Wn.App at 335-337, 989 P.2d 576.

The trial court erred in admitting the gang-related evidence and the admission of such evidence deprived Mr. Embry of a fair trial.

**2. The State presented insufficient admissible evidence to establish that Mr. Embry was guilty of the crime of conspiracy to commit first degree murder.**

The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence most favorably to the State, any rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt. *State v. Prestegard*, 108 Wn.App. 14, 22, 28 P.3d 817 (2001), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In determining whether the “necessary quantum of proof exists,” the reviewing court must be convinced that “substantial evidence” supports the State’s case. *Prestegard*, 108 Wn.App. at 22-23, 28 P.3d 817, *citing State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972), *cited in Hutton*, 7 Wn.App. at 728, 502 P.2d 1037.

Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97,

103, 954 P.2d 900 (1998).

Mr. Embry was charged with criminal conspiracy to commit first degree murder in violation of RCW 9A.28.040 and RCW 9A.32.030(1)(a). CP 67-68. As stated above, to convict Mr. Embry of conspiracy to commit first degree murder, the State had the burden of proving that Mr. Embry agreed with one or more persons to murder Mr. Clark, and that Mr. Embry or any other person with whom he had agreed to kill Mr. Clark took a substantial step towards killing Mr. Clark. RCW 9A.28.040, RCW 9A.32.010. “[A]n agreement to commit a crime is an essential part of a conspiracy.” *State v. Miller*, 131 Wn.2d 78, 87, 929 P.2d 372 (1997).

The only evidence the State presented to establish that Mr. Embry entered into an agreement with other people to kill Mr. Clark was the video of the defendants interacting in the night club, the evidence that the defendants were in gangs, and the testimony of Detective Ringer that gangs associate with each other.

As discussed above, the gang-related evidence was inadmissible since the relevance of the evidence was based on improper propensity inferences. Without the evidence that the defendants were in Crip-affiliated gangs, the State had no evidence to support an inference that the defendants agreed to commit any crime. There was no audio on the security video recovered from the nightclub, and there is no other evidence to establish what, if anything, the defendants talked about or agreed to that night at McCabe’s. The only evidence which supported a conclusion that Mr. Embry entered into an agreement with the co-defendants to kill Mr. Clark was the improperly

admitted gang related evidence. If the jury did not have the evidence that the defendants were in gangs, and that gangs worked together to commit crimes, then the jury would have had no facts upon which to base a determination that Mr. Embry had entered into any agreement.

In the absence of the gang-related evidence, any conclusion by the jury that Mr. Embry had entered into an agreement to kill Mr. Clark would be based entirely on guess, speculation, and conjecture. Aside from the gang-related evidence, substantial evidence did not exist to support the conclusion that Mr. Embry entered into any agreements to do any act. The State presented insufficient admissible evidence to establish that Mr. Embry committed the crime of conspiracy to commit murder in the first degree. This court should vacate Mr. Embry's conviction on this crime and remand for dismissal of that charge with prejudice.

## **VI. CONCLUSION**

For the reasons stated above, this court should vacate Mr. Embry's convictions, remand for dismissal of the conspiracy charge with prejudice, and for retrial on the attempted murder charge.

DATED this 22<sup>nd</sup> day of February, 2011.

Respectfully submitted,



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Attorney for Appellant

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

**CERTIFICATE OF SERVICE**

The undersigned certifies that on February 22, 2011, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 910 Tacoma Avenue South, Tacoma, Washington 98402, and by United States Mail to appellant, Randall M. Embry, DOC # 794030, Washington State Penitentiary, 1313 North 13<sup>th</sup> Avenue, Walla Walla, Washington 98584, true and correct copies of this Opening Brief. 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 February 22, 2011.

[Signature]  
Norma Kinter