

NO. 40984-4

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

STATE OF WASHINGTON, RESPONDENT

v.

RANDALL EMBRY, APPELLANT
BRYANT MORGAN, APPELLANT
ANDRE PARKER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 09-1-01458-4

No. 09-1-01459-2

No. 09-1-01460-6

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Has defendant failed to show that his counsel’s performance fell below an objective standard or reasonableness or that he was prejudiced? 1

2. Did the trial court properly exercise its discretion when it found that evidence of the defendants’ gang affiliations was relevant to show motive and res gestae and that the that the evidence was more probative than prejudicial?..... 1

3. Where the court’s instructions to the jury accurate statements of the law and did defendant Parker fail to preserve a challenge to the court’s instruction defining “substantial step?” 1

4. Where Detective Ringer and the prosecutor’s statements regarding defendant Morgan’s “code of silence” proper where the defendant waived his *Miranda* warnings, did not invoke his right to silence, and did not, in fact, remain silent?..... 1

5. Has defendant Morgan failed to preserve his challenge to allegedly improper opinion testimony by not objecting below?..... 1

6. Have defendants Morgan and Parker failed to show that the prosecutor committed misconduct during direct examination of Detective Ringer or closing argument? 1

7. Did the State present sufficient evidence to convince a rational fact-finder that the defendants were guilty of the crimes charged? 2

8. Have defendants Morgan and Parker failed to establish that there was an accumulation of prejudicial error?..... 2

B.	<u>STATEMENT OF THE CASE</u>	2
1.	Procedure	2
2.	Facts.....	5
C.	<u>ARGUMENT</u>	11
1.	DEFENDANT PARKER HAS FAILED TO SHOW THAT HIS COUNSEL’S PERFORMANCE WAS DEFICIENT OR PREJUDICIAL.	11
2.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING EVIDENCE OF THE DEFENDANTS’ GANG AFFILIATIONS.	20
3.	THE COURT’S INSTRUCTIONS TO THE JURY WERE CORRECT STATEMENTS OF THE LAW.....	27
4.	THE STATE DID NOT IMPROPERLY COMMENT ON DEFENDANT MORGAN’S RIGHT TO REMAIN SILENT AS HE NEVER INVOKED HIS RIGHT NOR DID HE REMAIN SILENT.	34
5.	AS DEFENDANT MORGAN FAILED TO OBJECT TO ANY OF THE TESTIMONY HE NOW CONTENDS IS IMPROPER OPINION TESTIMONY, HE HAS FAILED TO PRESERVE THIS ISSUE ON APPEAL.	38
6.	THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING DIRECT EXAMINATION OF THE STATE’S WITNESSES OR DURING HIS CLOSING ARGUMENT.....	42

7. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE THAT THE DEFENDANTS WERE GUILTY OF THE CRIMES CHARGED. 49

8. DEFENDANTS MORGAN AND PARKER HAVE FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR. 61

D. CONCLUSION..... 65

Table of Authorities

State Cases

<i>In re Lord</i> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994).....	62
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	49
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....	22
<i>State v. Adams</i> , 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).....	14
<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	64
<i>State v. Anderson</i> , 141 Wn.2d 357, 5 P.3d 1247 (2000).....	60
<i>State v. Asaeli</i> , 150 Wn. App. 543, 208 P.3d 1136, 1155–1156 (2009).....	21
<i>State v. Avendano-Lopez</i> , 79 Wn. App. 706, 710, 904 P.2d 324 (1995), <i>review denied</i> , 129 Wn.2d 1007 (1996).....	38
<i>State v. Badda</i> , 63 Wn.2d 176, 385 P.2d 859 (1963).....	63
<i>State v. Barnes</i> , 85 Wn. App. 638, 664, 932 P.2d 669, <i>review denied</i> , 133 Wn.2d 1021 (1997).....	51
<i>State v. Barragan</i> , 102 Wn. App. 754, 762, 9 P.3d 942 (2000).....	14
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <i>review denied</i> , 111 Wn.2d 1033 (1988).....	50
<i>State v. Belgarde</i> , 110 Wn.2d 504, 511, 755 P.2d 174 (1988).....	34
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	13, 27
<i>State v. Berube</i> , 150 Wn.2d 498, 510-11, 79 P.3d 1144 (2003).....	27
<i>State v. Binkin</i> , 79 Wn. App. 284, 902 P.2d 673 (1995), <i>review denied</i> , 128 Wn.2d 1015 (1996).....	42

<i>State v. Boot</i> , 89 Wn. App. 780, 788–790, 950 P.2d 964, <i>review denied</i> , 135 Wn.2d 1015, 960 P.2d 939 (1998).....	22
<i>State v. Boot</i> , 89 Wn. App. 780, 950 P.2d 964 (1998)	21
<i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), <i>cert. denied</i> , 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).....	12, 46
<i>State v. Brown</i> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997), <i>cert. denied</i> , 523 U.S. 1007 (1998).....	45, 46
<i>State v. Bryant</i> , 89 Wn. App. 857, 950 P.2d 1004 (1998).....	46
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)	50
<i>State v. Campbell</i> , 78 Wn. App. 813, 822, 901 P.2d 1050, <i>review denied</i> , 128 Wn.2d 1004, 907 P.2d 296 (1995).....	21
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	13
<i>State v. Casarez-Gastelum</i> , 48 Wash.App. 112, 116, 738 P.2d 303 (1987).....	52
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1008 (1987)	50
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988).....	13, 19
<i>State v. Clark</i> , 143 Wn.2d 731, 765, 24 P.3d 1006 (2001)	35
<i>State v. Coe</i> , 101 Wn.2d 772, 789, 681 P.2d 1281 (1984)	62, 64
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	51
<i>State v. Day</i> , 51 Wn. App. 544, 552, 754 P.2d 1021 (1988)	14
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	50
<i>State v. DeRyke</i> , 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).....	30, 31
<i>State v. Donald</i> , 68 Wn. App. 543, 551, 844 P.2d 447, <i>review denied</i> , 121 Wn.2d 1024, 854 P.2d 1084 (1993).....	14
<i>State v. Easter</i> , 130 Wn.2d 228, 235, 922 P.2d 1285 (1996)	34

<i>State v. Echeverria</i> , 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).....	60
<i>State v. Gregory</i> , 158 Wn.2d 759, 810, 147 P.3d 1201 (2006)	46
<i>State v. Hodges</i> , 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004).....	34-35, 37
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	50
<i>State v. Israel</i> , 113 Wn. App. 243, 284, 54 P.3d 1218 (2002), review denied, 149 Wn.2d 1013 (2003).....	52
<i>State v. Jamison</i> , 93 Wn.2d 794, 798, 613 P.2d 776 (1980).....	14
<i>State v. Johnson</i> , 124 Wn.2d 57, 67, 873 P.2d 514 (1994).....	21
<i>State v. Johnson</i> , 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998).....	62
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	50
<i>State v. Kinard</i> , 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979).....	63
<i>State v. Kirkman</i> , 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).....	38, 39
<i>State v. Kitchen</i> , 110 Wn.2d 403, 409, 756 P.2d 105 (1988).....	62
<i>State v. Kronich</i> , 160 Wn.2d 893, 899, 161 P.3d 982 (2007)	28
<i>State v. Lane</i> , 125 Wn.2d 825, 831, 889 P.2d 929 (1995)	22
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	49
<i>State v. Mak</i> , 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).....	42
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	42
<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	49
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).....	12
<i>State v. McNeal</i> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002).....	13-14

<i>State v. Millante</i> , 80 Wn. App. 237, 250, 908 P.2d 374 (1995), review denied, 129 Wn.2d 1012 (1996).....	45
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	39, 40
<i>State v. O’Hara</i> , 167 Wn.2d 91, 104-05, 217 P.3d 756 (2009).....	28
<i>State v. Pacheco</i> , 125 Wn.2d 150, 159, 882 P.2d 183 (1994).....	51
<i>State v. Pirtle</i> , 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).....	27
<i>State v. Pirtle</i> , 127 Wn.2d 628, 672, 904 P.2d 245 (1995).....	42
<i>State v. Pittaman</i> , 134 Wn. App. 376, 382-83, 166 P.3d 720 (2006).....	28
<i>State v. Powell</i> , 126 Wn.2d 244, 260, 893 P.2d 615 (1995).....	25
<i>State v. Price</i> , 126 Wn. App. 617, 649, 109 P.3d 27, review denied, 155 Wn.2d 1018, 124 P.3d 659 (2005).....	14
<i>State v. Reed</i> , 150 Wn. App. 761, 770, 208 P.3d 1274, review denied, 167 Wn.2d 1006, 220 P.3d 210 (2009).....	30, 31, 32, 33
<i>State v. Rogers</i> , 70 Wn. App. 626, 631, 855 P.2d 294 (1993), review denied, 123 Wn.2d 1004 (1994).....	45
<i>State v. Russell</i> , 125 Wn.2d 24, 87, 882 P.2d 747 (1994).....	46
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	50, 60
<i>State v. Sargent</i> , 40 Wn. App. 340, 343–44, 698 P.2d 598 (1985)....	45, 46
<i>State v. Scott</i> , 151 Wn. App. 520, 526, 213 P.3d 71 (2009).....	21
<i>State v. Shumaker</i> , 142 Wn. App. 330, 333, 174 P.3d 1214 (2007).....	27
<i>State v. Stein</i> , 144 Wn.2d 236, 240, 27 P.3d 184 (2001)	28
<i>State v. Stevens</i> , 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990).....	63, 64
<i>State v. Tharp</i> , 27 Wn. App. 198, 204, 616 P.2d 693 (1980), aff’d, 96 Wn.2d 591, 637 P.2d 961 (1981).....	25

<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	12, 14
<i>State v. Thompson</i> , 47 Wn. App. 1, 11–12, 733 P.2d 584, <i>review denied</i> , 108 Wn.2d 1014 (1987)	25
<i>State v. Tili</i> , 139 Wn.2d 107, 126, 985 P.2d 365 (1999)	27
<i>State v. Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976)	64
<i>State v. Turner</i> , 103 Wn. App. 515, 520, 13 P.3d 234 (2000)	60
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)	50
<i>State v. Wall</i> , 52 Wn. App. 665, 679, 763 P.2d 462 (1988)	63
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952)	42
<i>State v. Whalon</i> , 1 Wn. App. 785, 804, 464 P.2d 730 (1970).....	63
<i>State v. Williams</i> , 132 Wn.2d 248, 259, 937 P.2d 1052 (1997)	27
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 90, 210 P.3d 1029 (2009).....	14, 21, 22, 23, 27
<i>State v. Young</i> , 89 Wn.2d 613, 621, 574 P.2d 1171 (1978).....	35
<i>Ulve v. City of Raymond</i> , 51 Wn.2d 241, 253, 317 P.2d 908 (1957).....	14

Federal and Other Jurisdictions

<i>Beck v. Washington</i> , 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962)	43
<i>Brown v. United States</i> , 411 U.S. 223, 232, 93 S. Ct 1565, 36 L. Ed. 2d 208 (1973)	62
<i>Dawson v. Delaware</i> , 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)	21
<i>Doyle v. Ohio</i> , 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)	34
<i>Hendricks v. Calderon</i> , 70 F.3d 1032, 1040 (9th Cir. 1995)	13

<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).....	11
<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).....	12
<i>Neder v. United States</i> , 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999).....	62
<i>Rose v. Clark</i> , 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).....	61, 62
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	11, 12, 13, 14, 20
<i>United States v. Cronic</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	11
<i>Yarborough v. Gentry</i> , 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).....	13, 19

Constitutional Provisions

Article I, section 9, Washington State Constitution.....	34
Fifth Amendment, United States Constitution.....	34
First Amendment, United States Constitution	19-20
Fourteenth Amendment, United States Constitution	34
Sixth Amendment, United States Constitution.....	11, 13, 19

Statutes

RCW 9.41.040(1)(a)	60
RCW 9A.28.040(1).....	51

Rules and Regulations

CrR 3.5 3

ER 103(a)(1) 38

ER 401 22

ER 402 22

ER 403 22

ER 404(b)..... 3, 22, 23

RAP 2.5(a)(3)..... 28, 39

Other Authorities

Black’s Law Dictionary 1014 (6th rev. ed. 1990) 25

WPIC 100.021..... 31

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

1. Has defendant failed to show that his counsel's performance fell below an objective standard or reasonableness or that he was prejudiced?
2. Did the trial court properly exercise its discretion when it found that evidence of the defendants' gang affiliations was relevant to show motive and res gestae and that the that the evidence was more probative than prejudicial?
3. Where the court's instructions to the jury accurate statements of the law and did defendant Parker fail to preserve a challenge to the court's instruction defining "substantial step?"
4. Where Detective Ringer and the prosecutor's statements regarding defendant Morgan's "code of silence" proper where the defendant waived his *Miranda* warnings, did not invoke his right to silence, and did not, in fact, remain silent?
5. Has defendant Morgan failed to preserve his challenge to allegedly improper opinion testimony by not objecting below?
6. Have defendants Morgan and Parker failed to show that the prosecutor committed misconduct during direct examination of Detective Ringer or closing argument?

7. Did the State present sufficient evidence to convince a rational fact-finder that the defendants were guilty of the crimes charged?

8. Have defendants Morgan and Parker failed to establish that there was an accumulation of prejudicial error?

B. STATEMENT OF THE CASE.

1. Procedure

On March 18, 2009, the State charged defendants RANDALL MARQUISE EMBRY, BRYANT MORGAN, and ANDRE T. PARKER, with one count of assault in the first degree and one count of unlawful possession of a firearm in the first degree. CP¹ 1-2 (Embry), 254-255 (Morgan), 472-473 (Parker). The State also charged Steven Lance Lovelace as a co-defendant. *See* CP 1-2, 254-255, 472-473. Prior to trial, the State filed amended informations² for the defendants, amending the charge of assault in the first degree to one count of attempted murder in

¹ Citations to Clerk's Papers will be to "CP." Citations to the verbatim report of proceedings for the trial will be to "RP." Citations to the verbatim report of proceedings for the parties Knapstead motion will be to "RP (04/08/09)."

² The court file for defendant Parker does not contain the amended information. The court file does contain a document setting defendant Parker's conditions of release which indicate that he was arraigned for the charge of attempted murder in the first degree. CP 791-792. Also, the prosecutor brought the absence of an amended information to the court's attention on April 19, 2010 and filed another copy, which was accepted in open court. CP 793-827; RP 105-07.

the first degree. CP 24-25 (Embry), 279-280 (Morgan). The State filed an second amended information for defendant Embry, adding a charge of conspiracy to commit murder in the first degree. CP 67-68.

On April 4, 2009, the court heard Knapstead motions from Mr. Lovelace, as well as defendants Embry and Morgan. RP (04/08/09) 3. The court denied defendant Embry's and Morgan's motions. RP (04/08/09) 7, 10. The court does grant Mr. Lovelace's motion to dismiss under Knapstead. RP (04/08/09) 23.

The case was called for trial on April 15, 2010, before the Honorable James R. Orlando. RP 1. Prior to empanelling a jury, the court initially granted the defendants' motion to exclude evidence of their gang affiliations under ER 404(b). RP 48-51. The court reconsidered its ruling after reviewing the exhibits. RP 130-35. The court also concluded that the defendants' in-custody statements to Detective Ringer were made knowingly and voluntarily after holding a CrR 3.5 hearing. RP 104-05.

On May 3, 2010, the defendants' moved for the court to reconsider its ruling on the admission of gang affiliations. RP 177-208. The court declined to reconsider its ruling. RP 213-27.

Testimony began May 4, 2010. RP 244. At the close of the State's case, defendants Morgan and Parker moved for dismissal of the unlawful possession of a firearm charge. RP 1471-78. The court denied the

defendants' motions; holding that there was sufficient circumstantial evidence for the jury to find that both defendants had constructive possession of the firearm used against Mr. Clark. RP 1478-79. Defendant Embry moved to dismiss the conspiracy to commit first degree murder charge. RP 1480-82. The court denied defendant Embry's motion, finding that there was a sufficient factual basis for the jury to decide. RP 1482.

Defendant Parker called Tacoma Police Officer Ryan Koskovich to impeach testimony given by one of the State's witnesses. RP 1492-93. Neither defendant Morgan nor defendant Parker testified on their own behalf. Defendant Embry did testify. RP 1498-556.

The case went to the jury on May 26, 2010. RP 1790. The jury found the defendants guilty as charged on June 1, 2010. CP 198, 199, 200 (Embry), 428, 429 (Morgan), 730, 731 (Parker); RP 1803-08.

On July 16, 2010, the court sentenced the defendants. CP 234-247 (Embry), 434-447 (Morgan), 737-750 (Parker). The court sentenced defendant Embry to 771 months³ in custody, a high-end, standard-range

³ Defendant Embry had an offender score of 9+ on Count I, giving him a standard range of 308.25-401 months, with 60 months additional time for the firearm sentence enhancement; an offender score of 9 for Count II, giving him a standard range of 87-116 months; and an offender score of 0 for Count III, giving him a standard range of 180-240 months, with a 60 month firearm sentence enhancement. CP 234-247; RP 1812.

sentence. CP 234-247; RP 1818. The court sentenced defendant Parker to 372 months⁴ in-custody, a high-end, standard-range sentence. RP 737-750; RP 1827-28. Finally, the court sentenced defendant Morgan to 350 months⁵ in-custody, the middle of the standard range for Count I. CP 434-447; RP 1842-43.

The defendants filed timely notices of appeal. CP 202-223 (Embry), 448-460 (Morgan), 760-774 (Parker).

2. Facts

On February 23, 2009, Tyrick Clark and his friend, Nicole Crimmins went to a dance club called McCabes. RP 560-62. While at the club, Mr. Clark had a conversation with Michael White about a fight that had occurred on January 1, 2009. RP 570-72, 598-99. Despite not knowing Mr. Clark or having been at the fight, defendant Embry attempted to interject himself into the conversation. RP 553, 603-05. During the January 1st fight, Mr. Clark punched defendant Parker in the mouth,

⁴ Defendant Parker had an offender score of 6.5 on Count I, giving him a standard range of 234-312 months with a 60 month firearm sentence enhancement; and an offender score of 5.5 on Count II, giving him a standard range of 41-54 months. CP 737-750, RP 1822-23.

⁵ Defendant Morgan had an offender score of 7.5, giving him a standard range on Count I of 253.5-337.5 months with a 60 month firearm sentence enhancement; and a standard range of 67-89 months on Count II. CP 434-447; RP 1836-37.

bloodying his lip. RP 578-79. After talking to Mr. White, Mr. Clark believed that defendant Parker was still angry about the situation. RP 602.

Mr. Clark and Ms. Crimmins left the club at approximately 1:50 a.m. RP 1365. The three defendants were all outside the club, watching for Mr. Clark to leave. *See* Exhibit 19; RP 1362-67. While Mr. Clark made his way across the parking lot, stopping to speak to various people, defendants Embry and Morgan ran off in the direction of Mr. Clark's car. Exhibit 19; RP 1366-37.

As Mr. Clark and Ms. Crimmins approached their car, they saw a man, later identified as defendant Embry, approach. RP 425, 429-30, 554, 611, 622. Defendant Embry did not say anything, but he grabbed Ms. Crimmins and shot Mr. Clark in the torso. RP 432-33, 553, 611. Defendant Embry then got into the back seat of a car that was parked in front of Mr. Clark's car. RP 436, 617. Ms. Crimmins was able to get the license plate number of the car before it drove away and she called 911. RP 547.

Defendant Embry shot Mr. Clark in his left side, right shoulder, and left hip. RP 742. He was in a coma for a month after he was shot. RP 559.

Defendant Parker called to report his rental car as stolen at approximately 3:30 a.m. RP 853. The responding officers were aware of

the shooting earlier that morning and that defendant Parker's rental car was the one identified with the shooter. RP 851. Defendant Parker told the responding officers that his car had been stolen at 1:15 a.m. from outside his girlfriend's apartment. RP 856-57. Defendant Parker's girlfriend, Christine Borland, testified that defendant had called her at approximately 3:00 a.m. to pick him up at a gas station on Highway 512 because his car had been stolen from the club. RP 1035-36, 1041. Defendant Parker told Ms. Borland that he planned to tell the police that his car had been stolen from her apartment complex. RP 1045-46. Defendant's rental car was found in the Green River on March 10, 2009. RP 1119.

Defendant Parker was interviewed by Tacoma Police Detective John Ringer at approximately 11:30 p.m. on February 24, 2009. RP 1237. Defendant Parker repeated his story about his car being stolen from Ms. Boreland's apartment complex. RP 1238-40. Defendant Parker added that he had been to McCabe's, but had left at approximately 1:00 a.m. RP 1239-40. Defendant Parker acknowledged that his story about the stolen car was not particularly plausible. RP 1243.

Defendant Parker asked Detective Ringer why he was being interviewed, and the detective told him about rumors that tied him to the McCabe's shooting. RP 1241. Defendant Parker denied having been at

McCabe's during the shooting and claimed he did not know who had been shot. RP 1241. Defendant Parker did indicate several times that he thought he was going to be booked for the shooting. RP 1243. Defendant Parker admitted that he was a member of the Hilltop Crips "[a] long time ago, when I was young." RP 1243.

Detective Ringer interviewed defendant Morgan on March 17, 2009. RP 1258. Defendant Morgan admitted that he was an active member of the Five Deuce Hoover Crip gang out of Seattle. RP 1259. When asked about the events at McCabe's on February 24th, defendant Morgan stated that he was "loaded that night" and could not remember anything except that he had been at McCabe's that night. RP 1259-60. Defendant Morgan stated that he did not know Mr. Clark and had never seen him before. RP 1260. Defendant Morgan told Detective Ringer that he "had a feeling riding down here that [the shooting] is what this is about." RP 1260. Defendant Morgan then stated, "I probably have been following this case as much as you have." RP 1260.

After reviewing the surveillance video from McCabe's, defendant Morgan admitted that he was the person in the red sweatshirt who had run off with defendant Embry. RP 1261. Defendant Morgan concluded that "[i]t is what it is. You will be able to put it all together." RP 1261.

Detective Ringer also interviewed defendant Embry on March 17,

2009. RP 1266. Defendant Embry admitted that he was a member of the 74 Hoover Crips out of Seattle. RP 1270. Defendant Embry stated he went to McCabe's with his "Seattle home boys," but he would not identify who he arrived with or describe the car he arrived in. RP 1272. Defendant Embry stated that he did not know Mr. Clark, he had no "beef" with him, and he did not hear any gunshots. RP 1273. When shown the surveillance video, defendant Embry explained that he was running because he was "chasing some bitches?" RP 1272-73. When asked about his involvement in the shooting, defendant Embry stated, "I didn't do nothing, I don't know nothing, and I wouldn't tell you if I did." RP 1273.

Detective Ringer has been a member of several gang taskforces. RP 1229-30. He testified that, in his experience, the Hoover Crips and Hilltop Crips "get along well together" and have worked together in drug and property crimes. RP 1264-65, 1397. Both gangs use the Houston Astros athletic symbol, which is a five-pointed star and the letter "H," to represent the gang. RP 1452. Detective Ringer also testified that, in his experience, it is not unusual in gang culture for seemingly insignificant incidents to quickly escalate to violence. RP 1387.

Defendant Embry testified on his own behalf. RP 1498. Defendant Embry testified that he did not shoot Mr. Clark and does not know him. RP 1498. He stated that he drove himself to McCabe's and arrived at

approximately midnight. RP 1499-501. He stated that he knew defendant Morgan and that he knew of defendant Parker, but did not know him. RP 1502. He admitted that he did know defendant Parker prior to the night of the shooting when confronted with a picture of them together. RP 1503-04.

Defendant Embry testified that he did not attempt to insert himself in the conversation between Mr. Clark and Mr. White, and that he was standing nearby so he could order a drink at the bar. RP 1509-10. He stated that he never had a conversation with defendant Parker or Mr. Lovelace about Mr. Clark, and that he did not know Mr. Lovelace at all. RP 1504, 1514.

According to defendant Embry, he was standing outside the club during closing to talk to a girl and arranged to meet her at Denny's. RP 1516-18. After smoking a cigarette, he jogged off toward his car and left. RP 1517-18. Defendant Embry claimed he was gone before any shots were fired. RP 1519.

Defendant Embry denied several of his statements to Detective Ringer. RP 1532-33, 1544, 1547. Defendant Embry also stated that his tattoo of the Houston Astro's symbol stands for "highway" not "Hoover" because he represents the street he grew up on: Pacific Highway. RP

1543. He explained that he was not a Hoover Crip because there is no Hoover Street in Seattle. RP 1543.

C. ARGUMENT.

1. DEFENDANT PARKER HAS FAILED TO SHOW THAT HIS COUNSEL'S PERFORMANCE WAS DEFICIENT OR PREJUDICIAL.

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

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v.*

Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that

defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

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

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

"If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn.2d

352, 362, 37 P.3d 280 (2002) (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)). Courts can presume counsel did not request limiting instructions to avoid reemphasizing damaging evidence. *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009); *State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27, *review denied*, 155 Wn.2d 1018, 124 P.3d 659 (2005); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024, 854 P.2d 1084 (1993).

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

Testimony describing how a person reacts to emotional news is not necessarily improper testimony. See *State v. Day*, 51 Wn. App. 544, 552, 754 P.2d 1021 (1988). A witness who personally observes a defendant may convey facts to provide a foundation for the observation, and then “state his opinion, conclusion, and impression formed from such facts and circumstances as came under his observation.” *State v. Jamison*, 93 Wn.2d 794, 798, 613 P.2d 776 (1980) (quoting *Ulve v. City of Raymond*, 51 Wn.2d 241, 253, 317 P.2d 908 (1957)).

Here, defendant Parker alleges that he received ineffective assistance of counsel for counsels' failure to request limiting instructions regarding the testimony of two of the State's witnesses. Defendant cannot show deficient performance or prejudice.

Prior to Curtis Hudson's testimony, counsel moved to exclude any information Mr. Hudson may have acquired through hearsay, specifically Mr. Hudson's street knowledge of a conflict between defendant Parker and the victim. RP 883-84. Counsel objected on the basis that Curtis Hudson's impression was based on hearsay. RP 886-87. The court considered that a person who leads a particular lifestyle, or is a member of a particular culture, has a "sense of developing problems [that] has kept them probably safe out on the streets and avoiding being a victim." RP 887. The court held that Mr. Hudson's general knowledge that "these two people have a beef with one another" was not hearsay, but that Mr. Hudson could not testify as to specifics. RP 887. The court informed counsel that it would consider giving a limiting instruction if counsel proposed one. RP 890.

Curtis Hudson testified, in part:

Q Did you know whether there was a beef, so to speak, between T-Loc and any other person at the club that evening?

A I heard about a fight that happened between Drip and

--

MR. JOHNSON: Objection, hearsay.

THE COURT: Rephrase your question, please, Mr. Greer.

Q Was there -- did you have an impression that there was a beef between two people?

A Yes.

Q And which two people?

A Drip and T-Loc.

Q Now, when you saw Deuce and T-Loc talking, again, did that -- what was your reaction to them talking? What were your impressions?

A Trying to talk out what had happened.

RP 908. Mr. Hudson's first "impression" testimony was an attempt by the prosecutor to avoid hearsay. His second "impression" was proper testimony, as it was based on facts and circumstances from his observing the discussion between "Deuce" and the victim. *See* RP 909.

Defendant Parker is correct that counsel never asked for the limiting instruction as suggested by the court, yet such omission was clearly a trial tactic. During cross-examination, counsel challenged Mr. Hudson's "impression" of the conversation he witnessed between "Deuce" and the victim. RP 922-24. He noted that Mr. Hudson was not present during the entire conversation and that he was not close enough to hear what was said. RP 922-24. Counsel also questioned Mr. Hudson's knowledge that there was a conflict between defendant Parker and the victim. RP 927-28. He drew the jury's attention to the fact that Mr. Hudson was not present for the event that precipitated the conflict, he never saw any altercation between the two, and that defendant Parker had

never told him of a conflict. Rather than suggesting an instruction which would have allowed the jury to consider Mr. Hudson's testimony for any limited purpose, he undermined the testimony and encouraged the jury to reject the testimony in its entirety. Additionally, it is reasonable to conclude that counsel did not wish to remind the jury of Mr. Hudson's testimony by requesting a limiting instruction. Both reasons are legitimate trial tactics and defendant Parker cannot show that counsel's performance was deficient.

Nor can defendant show prejudice. Prior to Mr. Hudson's testimony, the jury heard from Nicole Crimmins that there had been a large fight on New Year's Eve which both defendant Parker and Mr. Clark were involved in. RP 486-92. Ms. Crimmins observed that defendant Parker's mouth was bleeding. RP 494.

Mr. Clark had testified that he spoke to "Deuce" while in McCabe's about a fight which had occurred on New Year's Eve. RP 570-81. Through Mr. Clark's testimony, the jury heard that Mr. Clark had punched defendant Parker in the mouth. RP 579. Mr. Clark also testified that he spoke to Deuce at McCabe's the night he was shot. RP 595-96. His conversation with Deuce was about the New Year's incident, but nothing was resolved. RP 599-600.

After Mr. Hudson's testimony, the jury heard from Detective John Ringer. RP 1228. Detective Ringer testified about defendant Parker's custodial statements. RP 1237-43. Specifically, defendant Parker admitted that he had been punched in the mouth on New Year's Eve by a "big black dude," who may have been Mr. Clark. RP 1241-42, 1243-44.

Given the evidence presented at trial, Mr. Hudson's impression that there was some kind of "bad blood" between defendant Parker and Mr. Clark is not so significant that the result of the trial would have been different but for counsel's failure to request a limiting instruction. Defendant Parker cannot show he was prejudiced by counsel's performance.

Likewise, counsel's failure to quest a limiting instruction for Detective Ringer's⁶ testimony was neither deficient performance nor prejudicial. Detective Ringer was permitted to narrate events on the surveillance video as they were happening, and but was not permitted to draw any conclusions or make any inferences from the video. *See* RP 1331. The court considered giving the jury an instruction that Detective

⁶ Defendant Parker claims that Detective Ringer was permitted to testify regarding his "impressions" of the video. *See* Brief of Appellant (Parker) at 37. Defendant does not provide any citation to the record and the State cannot find any testimony of Detective Ringer's "impressions" of the video at trial. *See* RP 1228-1310, 1338-1466.

Ringer may provide an opinion, but that it was the jury's duty to determine the facts. RP 1331. Counsel argued that Detective Ringer should be merely narrating, without speculating as to the thoughts and motives of the individuals in the video. RP 1332. Whenever Detective Ringer engaged in any form of speculation, one of the three defendants objected. *See* RP 1339, 1342, 1344, 1348, 1355, 1362, 1373, 1461. As Detective Ringer was ultimately limited to narration of the events on the video, the limiting instruction was not necessary. Counsel's performance was not deficient and Detective Ringer's identification of people and places on the surveillance video was not prejudicial.

Finally, defendant Parker's focus on counsel's performance in failing to request a limiting instruction leads the court away from the proper standard of review under Strickland and its progeny. The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *Ciskie*, 110 Wn.2d at 263. The Sixth Amendment guarantees reasonable competence, not perfection, and counsel can make demonstrable mistakes without being constitutionally ineffective. *Gentry*, 540 U.S. at 8.

The entirety of the record reveals that defendant Parker received his Sixth Amendment right to counsel. He had an attorney who made

pretrial motions and objected to Detective Ringer's ability to testify as an expert witness, and objected to Detective Ringer's narration of a surveillance video, and objected to the introduction of gang evidence. RP 110-11, 143-151, 177-90. Counsel encouraged defendant Parker to stipulate to a prior serious offense so the State could not introduce evidence of the prior criminal act at trial. RP 239. Counsel gave an opening statement. RP 244. Counsel moved to exclude the admission of the 911 tape. RP 530. He made objections and cross-examined the State's witnesses. RP 284, 337, 377, 399, 504, 624, 702, 724, 785, 811, 821, 834, 836, 837, 917, 957, 984, 1063, 1147, 1163, 1168, 1387, 1463, 1465, 1494. Counsel cross examined co-defendant Embry's testimony. RP 1552. Counsel raised objections to jury instructions. RP 1559. He made a coherent closing argument. RP 1617-70. It is clear that defendant Parker had counsel and that his attorney tested the State's case. Looking at the entirety of the record, defendant Parker cannot meet his burden on either prong of the *Strickland* test.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING EVIDENCE OF THE DEFENDANTS' GANG AFFILIATIONS.

Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment

right of association. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (citing *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)). Therefore, evidence of criminal street gang affiliation is not admissible in a criminal trial when it merely reflects a person's beliefs or associations. *Scott*, 151 Wn. App. at 526. There must be a connection between the crime and the organization before the evidence becomes relevant. *Scott*, 151 Wn. App. at 526.

Washington courts likewise have recognized the need for this connection before admitting evidence of gang membership. *State v. Johnson*, 124 Wn.2d 57, 67, 873 P.2d 514 (1994). Accordingly, to admit gang affiliation evidence there must be a nexus between the crime and gang membership. *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004, 907 P.2d 296 (1995). Washington courts have repeatedly held that gang affiliation evidence is admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See State v. Yarbrough*, 151 Wn. App. 66, 210 P.3d 1029 (2009); *State v. Boot*, 89 Wn. App. 780, 950 P.2d 964 (1998); *State v. Campbell*, 78 Wn. App. 813, 901 P.2d 1050 (1995).

Evidence of gang affiliation is considered prejudicial. *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136, 1155–1156 (2009). Admission

of such evidence is measured under the standards of ER 404(b). *State v. Boot*, 89 Wn. App. 780, 788–790, 950 P.2d 964, *review denied*, 135 Wn.2d 1015, 960 P.2d 939 (1998); *Yarbrough*, 151 Wn. App. 66. Evidence of other bad acts can be admitted under ER 404(b) when a trial court identifies a significant reason for admitting the evidence and determines that the relevance of the evidence outweighs any prejudicial impact. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The balancing of these interests must be conducted on the record. *Lane*, 125 Wn.2d at 832. The decision to admit or deny admission of ER 404(b) evidence is reviewed for abuse of discretion. *Lane*, 125 Wn.2d at 831. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Relevant evidence is “evidence having 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. Relevant evidence is admissible; irrelevant evidence is not admissible. ER 402.

Relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. ER 403. Evidence of prior bad acts is not admissible to show that the person acted in conformity

on a particular occasion, but is admissible for other purposes such as “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). Before a court admits such evidence it 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.

Yarbrough, 151 Wn. App. at 81–82.

Here, the court did not abuse its discretion when it admitted evidence of the defendants’ gang affiliations. The evidence that the State sought to introduce were photos of the defendants associating with each other, which incidentally involved them making gang signs, the defendants’ statements to Detective Ringer that they were active gang members, and the relationship between the Hoover Crips and the Hilltop Crips.

The court found, by a preponderance of the evidence, that the misconduct occurred. RP 49. The court determined that there was a connection between the defendants and gang activities. RP 49. Each of the defendants admitted to Detective Ringer that they were members of the

Hilltop Crips and Hoover Crips. RP 1243, 1259, 1264, 1269. Defendant Parker was also aware that Mr. Clark was a member of the Young Gangster Crips (YGC). RP 1242. Detective Parker testified that he was aware, though his own knowledge and experience, that the Hoover Crips and Hilltop Crips “get along well together.” RP 1263-34. While defendant Embry testified that he was not a Hoover Crip, he admitted that other gang members were his “homies,” he had a tattoo of the Hoover Crip symbol, used gang slang in his online social networks, used gang symbols, and had teardrops tattooed under his eyes. RP 1542-48.

The State sought to admit evidence that all three defendants were members of gangs to show motive, intent, and *res gestae*. RP 20. The court determined that the evidence of the defendants’ gang affiliations went to motive, intent, and plan or preparation. RP 49. On reconsideration, the court included that the evidence was additionally necessary under the concept of *res gestae*. RP 133.

While motive and *res gestae* are not essential elements of the crime of attempted murder, courts recognize that such evidence may be admissible.

“Motive” is said to be the moving course, the impulse, the desire that induces criminal action on the part of the accused; it is distinguished from “intent” which is the purpose or design with which the act is done, the purpose to make the means adopted effective.

State v. Powell, 126 Wn.2d 244, 260, 893 P.2d 615 (1995) (quoting Black’s Law Dictionary 1014 (6th rev. ed. 1990)). Establishing motive is often necessary when only circumstantial proof of guilt exists. *Powell*, 126 Wn.2d at 260. However, evidence of motive must be of consequence to the action to justify its admission. *Powell*, 126 Wn.2d at 260.

Under the res gestae exception, evidence of other bad acts is admissible “to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” *Powell*, 126 Wn.2d at 263 (citing *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff’d*, 96 Wn.2d 591, 637 P.2d 961 (1981)); *see also State v. Thompson*, 47 Wn. App. 1, 11–12, 733 P.2d 584, *review denied*, 108 Wn.2d 1014 (1987). Each act must be “a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.” *Powell*, 126 Wn.2d at 263 (citing *Tharp*, 96 Wn.2d at 594).

Here the court determined that the evidence was relevant to show motive, intent, plan or preparation, and res gestae. RP 49, 133. Circumstantial evidence linked defendants Morgan and Parker to the shooting. The State sought to introduce evidence which would explain why defendant Embry would shoot Mr. Clark when neither party knew the other. Evidence of the history between defendant Parker and Mr. Clark as

rival gang members and the relationship between the defendants' gang affiliations was necessary to prove both the impulse that induced the criminal action and to provide a complete picture for the jury.

Finally, the court weighed the probative value of the evidence against its prejudicial effect. The court considered the above-referenced cases when it engaged in the weighing process. RP 49-50, 132-33. Initially, the court concluded that the prejudice outweighed any probative value. RP 50-51. Upon reconsideration, however, the court determined that the probative value of the evidence was that:

[While] there may not be a direct connection or loyalty or allegiance between the Hoover gang or Hilltop Crips, I think the inference here is there was a 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.

RP 134. The court held that, without being able to draw that inference, the “State is left with really the inability to establish any kind of motive for [the crime].” RP 134. The court then considered that “case law points out retaliation of violence and gang violence is relatively common experience,” and that the probative value of the evidence outweighed the “substantial prejudice that there still may be there for the defendants.” RP 134.

The court engaged in the four-part analysis on the record as required by *Yarbrough* prior to admitting any evidence of the defendants' gang affiliations. As the evidence was relevant to show motive and res gestae, and the probative value outweighed its prejudicial impact, the court did not abuse its discretion by admitting the evidence of the defendants' gang affiliations.

3. THE COURT'S INSTRUCTIONS TO THE JURY WERE CORRECT STATEMENTS OF THE LAW.

Jury instructions must accurately state the law and be supported by the evidence. *State v. Berube*, 150 Wn.2d 498, 510-11, 79 P.3d 1144 (2003) (citing *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993)). When taken as a whole, jury instructions must properly inform the jury of the applicable law, may not be misleading, and must permit each party to argue its theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). A defendant is entitled to an instruction on his theory of the case if sufficient evidence supports it. *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997).

The validity of jury instructions is reviewed under a de novo standard. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Shumaker*, 142 Wn. App. 330, 333, 174 P.3d 1214 (2007).

- a. Defendant Parker’s challenges to the jury instructions cannot be raised for the first time on appeal.

Generally, an issue cannot be raised for the first time on appeal unless it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). Whether RAP 2.5(a)(3) applies is based on a two-part test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is “manifest.” *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). “An error is manifest when it has practical and identifiable consequences in the trial of the case.” *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001).

A jury instruction that relieves the State of its burden to prove every element of the crime is an error of constitutional magnitude that we may review for the first time on appeal. *See Stein*, 144 Wn.2d at 241. An alleged error regarding a definitional instruction is not manifest when the elements instruction contains the correct language and overall instructions accurately convey the State’s burden of proof. *State v. Pittaman*, 134 Wn. App. 376, 382-83, 166 P.3d 720 (2006); *see also State v. O’Hara*, 167 Wn.2d 91, 104-05, 217 P.3d 756 (2009).

Here, defendant Parker did not object to jury instructions 13 and 27 that he now contends were erroneous. These instructions contained two

definitions of “substantial step.” CP 162-97; 392-427; 694-729⁷ (Jury Instruction 13; Jury Instruction 27). Jury instruction 13 correctly defines “substantial step” as “conduct, that strongly indicates a criminal purpose and which is more than mere preparation.” CP 162-97 (Jury Instruction 13). Jury instruction 27, however, leaves off the “more than mere preparation” portion of the definition. CP 169-97 (Jury Instruction 27). The prosecutor noted that “substantial step” was defined twice in the jury instructions and the court informed the jury that the second definition was merely a duplicate. RP 1560. As Jury Instruction 13 contains the accurate definition, the overall instructions accurately convey the State’s burden of proof. Any error is not manifest and defendant Parker cannot raise this issue for the first time on appeal.

Defendant Parker also challenges Jury Instruction 19 for the first time on appeal. Jury Instruction 19 reads:

You may give such weight and credibility to any alleged out-of-court statements of the defendant Embry as you see fit, taking into consideration the surrounding circumstances.

CP 169-97 (Jury Instruction 19). This instruction was given as defendant Embry was the only defendant to testify. RP 1557-58. Defendants Parker

⁷ Each defendant designated the court’s instructions to the jury as Clerk’s Papers. The court’s instructions to the jury are identical for each defendant. For the sake of brevity, the State will cite to the first designated jury instructions only for the remainder of this brief.

and Morgan recognized that such instruction is necessary when there was a dispute as to the voluntariness of the out-of-court statements. RP 1527. Defendant Parker did not object to the instruction and any error was not manifest. *See* RP 1558.

- b. While defendant Morgan may challenge the court’s “to-convict” instruction for the first time on appeal, his contention that an essential element of the crime of attempted first degree murder is missing is without merit.

“Because it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence, generally the “to convict” instruction must contain all elements of the charged crime.” *State v. Reed*, 150 Wn. App. 761, 770, 208 P.3d 1274, *review denied*, 167 Wn.2d 1006, 220 P.3d 210 (2009) (citing *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (internal quotation marks omitted)). “Premeditation” is not an element of *attempted* first degree murder. *See Reed*, 150 Wn. App. at 772-73.

The Supreme Court in *DeRyke* unequivocally held that “[a]n attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime.” 149 Wn.2d 906, 910 (internal citations omitted). Although the *DeRyke* case involved the

crime of attempted rape in the first degree, the court talked about the elements of an attempt crime in general. 149 Wn.2d at 910.

The *DeRyke* court also addressed the issue of whether an attempt instruction must necessarily provide the elements of the crime allegedly attempted and answered in the negative. 149 Wn.2d at 911. The Supreme Court held that the jury instructions were proper on the charge of attempted first degree rape when “the jury received a separate elements instruction for first degree rape, which separately listed the elements of that crime.” *DeRyke*, 149 Wn.2d at 911. The court partially relied on WPIC 100.021:

If attempt to commit the crime is being submitted to the jury along with the crime charged, the jury will be receiving instructions defining and setting out the elements of the crime charged. If the basic charge is an attempt to commit a crime, a separate elements instruction must be given delineating the elements of that crime. This may require a modification of the instruction in WPIC that defines that particular crime so that the elements of that crime are delineated as separate elements necessary to constitute that crime.

DeRyke, 149 Wn.2d at 911. Thus, *DeRyke* indicates that, in the context of an attempt crime, the separate instruction for the underlying crime should be broken into separate elements that need to be proven. *See supra*.

In *State v. Reed*, the defendant was charged and tried for attempted first degree murder. 150 Wn. App. at 762. Reed argued that his “to

convict” instruction was erroneous, as it did not contain the essential element of “premeditated intent.” *Reed*, 150 Wn. App. at 769. The jury instructions contained a definition of first degree murder and a subsequent definition of “premeditated.” *Reed*, 150 Wn. App. at 772. The court held that, since Reed was not charged with completed first degree murder, the State was not required to prove that he acted with premeditated intent to commit murder, only that he attempted to commit murder. *Reed*, 150 Wn. App. at 774. Since the jury had to consider the definitions of first degree murder and premeditation when determining Reed’s guilt for the attempted crime, the “to convict” instruction did not relieve the State of its burden to prove the actual elements of attempted first degree murder. *Reed*, 150 Wn. App. at 774-75.

Here, *Reed* is directly on point. The “to convict” instruction in this case stated:

To convict the defendant, Bryant Deshean Morgan, of the crime of attempted murder in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 24th day of February, 2009, the defendant or an accomplice did an act which was a substantial step toward the commission of murder in the first degree;
- (2) That the act was done with the intent to commit murder in the first degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 169-97 (Jury Instruction 15). Instruction 11 defined first degree murder: “A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.” CP 169-97 (Jury Instruction 11). Finally, Jury Instruction 12 defined premeditated:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 169-97 (Jury Instruction 12).

As did the instructions in *Reed*, the instructions given by the court in the instant case contained accurate statements of the law, defined the elements of the crime, did not relieve the State of its burden to prove the actual elements of attempted first degree murder, and allowed the parties

to argue their theories of the case. Defendant Morgan's argument that the "to convict" instruction was erroneous fails.

4. THE STATE DID NOT IMPROPERLY COMMENT ON DEFENDANT MORGAN'S RIGHT TO REMAIN SILENT AS HE NEVER INVOKED HIS RIGHT NOR DID HE REMAIN SILENT.

The right to remain silent is contained within the Fifth Amendment, applied to the states via the Fourteenth Amendment of the U.S. Constitution, and article I, section 9 of the Washington Constitution. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). We give the same interpretation to both clauses and liberally construe the right against self-incrimination. *Easter*, 130 Wn.2d at 235–36. In Washington, a defendant's constitutional right to silence applies in both pre-and post-arrest situations. *Easter*, 130 Wn.2d at 243; *State v. Belgarde*, 110 Wn.2d 504, 511, 755 P.2d 174 (1988). *Miranda* warnings themselves carry the implicit assurance that the defendant's silence will carry no penalty. *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); *Belgarde*, 110 Wn.2d at 511.

A defendant may invoke his right to remain silent after questioning begins but the invocation must be "clear and unequivocal." *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), *review denied*, 151

Wn.2d 1031 (2004). When a defendant does not remain silent and instead talks to police, the State may comment on what he does not say. *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001); *State v. Young*, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978).

In *Hodges*, the defendant waived his *Miranda* rights and spoke with law enforcement. 118 Wn. App. at 670-71. On appeal, he claimed that his refusal to answer the question, “what happened next,” was an assertion of his right to remain silent, and that all subsequent questioning should have ceased. *Hodges*, 118 Wn. App. at 671. The court held that the defendant’s failure to respond to the question was not a clear and unequivocal invocation of the right to remain silent because he did not, in fact, remain silent. *Hodges*, 118 Wn. App. at 673. Rather, the defendant answered other questions without hesitation. *Hodges*, 118 Wn. App. at 673.

Here, Detective Ringer read defendant Morgan’s *Miranda* warnings prior to the interview. RP 88-89. Defendant Morgan indicated he understood his rights and was willing to speak to the officer. RP 89. Defendant Morgan never asked Detective Ringer to stop asking questions nor did he ask for an attorney. RP 90. Defendant Morgan believed that some of his statements would not be admissible due to relevancy issues,

but was satisfied that he was properly advised and his statements were voluntary. RP 104.

Defendant Morgan asserts that statements he made to Detective Ringer were expressions of his right to remain silent.⁸ *See* Brief of Appellant (Morgan) at 56-57. Yet defendant Morgan volunteered to speak with Detective Ringer and never invoked his right to silence.

Detective Ringer testified:

Morgan acknowledged himself. When shown that he jogged off towards the scene of the shooting, he said he didn't know why he had ran off. After the video was turned off, Morgan concluded, quote, "It is what it is. You will be able to put it all together," end quote.

He also made it clear that the code he was raised with would not allow him to cooperate or testify against others. His answer was, quote, "I'll take my chances with the court. I have got to go all the way, trial, witnesses, everything," end quote.

He also said on multiple occasions, quote, "That is what it is right there," end quote. He repeated that, quote, "Can't do anything but go to trial with that. Can't do anything else," period, end quote.

⁸ Defendant Morgan originally objected to the statements as not relevant. RP 1209-11. The only instance which defendant Morgan objected to as a violation of his right to silence was, in fact, struck by the court. The court struck the portion of the defendant's interview where the defendant did not respond to the Detective Ringer's questions. RP 1210.

RP 1261. Defendant Morgan continued with the interview and continued to answer questions, including identifying himself and other individuals in photographs. RP 1262.

During closing argument, the prosecutor discussed the testimony of State's witnesses Manny Hernandez and Curtis Hudson and how they did not stay at the scene to speak to police. RP 1597. The prosecutor argued:

This is not what you would expect in a civilized community where an individual gets shot five times and brings back to reality and take away the games that have been created by these individuals in their so-called code of the street. Code of the street is garbage. Code of the street: Don't cooperate with the police. Shoot people. Kill people. In this scenario, don't talk to the police about it.

Well, any criminal, of course, committing an act won't talk to the police. That makes sense because they are going to jail. They're going to be held accountable. But it doesn't make sense for other people in the community to turn the other way. That makes no sense, but it's the reality.

RP 1598. This argument was in no way related to defendant Morgan's statements to the Detective Ringer, but was an explanation of why Mr. Hernandez and Mr. Hudson did not put themselves forward as witnesses the night of the shooting.

As in *Hodges*, defendant Morgan was properly notified of his right to remain silent, waived his right, and answered questions. His refusal to answer some questions was not an unequivocal invocation of his right to remain silent. His statements were properly admitted and Detective

Ringer did not imply that defendant Morgan was guilty because he would not implicate any of his friends. Also, the prosecutor's closing argument was not a reference to defendant Morgan, but to the State's own witnesses. Neither Detective Ringer nor the prosecutor commented on defendant Morgan's right to remain silent.

5. AS DEFENDANT MORGAN FAILED TO OBJECT TO ANY OF THE TESTIMONY HE NOW CONTENDS IS IMPROPER OPINION TESTIMONY, HE HAS FAILED TO PRESERVE THIS ISSUE ON APPEAL.

Generally, when a defendant does not object to impermissible opinion testimony, he has failed to preserve the issue for appeal. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007); *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), *review denied*, 129 Wn.2d 1007 (1996); ER 103(a)(1). Only an improper opinion which deprives the defendant of his right to a jury trial may be raised for the first time on appeal. *See Kirkman*, 159 Wn.2d at 926-27.

Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *Kirkman*, 159 Wn.2d at 927. However, our Supreme Court has explained that admission of witness

opinion testimony on an ultimate fact without objection is not automatically reviewable as a manifest constitutional error. *Kirkman*, 159 Wn.2d at 933, 936-37; RAP 2.5(a)(3). To qualify as such “manifest” error, a witness must make an explicit or almost explicit statement expressing a personal opinion as to the defendant’s guilt or veracity, or the veracity of another witness. *Kirkman*, 159 Wn.2d at 933, 936-37.

In *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), officers had followed two defendants while they purchased items which could be used to make methamphetamine. One of the officers testified that he, “felt very strongly that [the defendants] were, in fact, buying ingredients to manufacture methamphetamine based on what [the defendants] had purchased, the manner in which [the defendants] had done it, going from different stores, going to different checkout lanes.”

Montgomery, 163 Wn.2d at 587-88. A second officer testified that the defendants were not apprehended at the store because, “[i]t’s always our hope that if the person buying these chemicals, that are for what we believe to be methamphetamine production, that we can take them back to the actual lab location.” *Montgomery*, 163 Wn.2d at 588. The officer then testified, “those items were purchased for manufacturing.”

Montgomery, 163 Wn.2d at 588. Finally, the forensic chemist testified that the combined purchases made by the defendant’s “lead me toward this

pseudoephedrine is possessed with intent.” *Montgomery*, 163 Wn.2d at 588.

The Court held that each of these statements was an improper opinion regarding the defendant’s guilt as each went to the core issue and only disputed element, the defendant’s intent. *Montgomery*, 163 Wn.2d at 594. The Court found that the testimony was quite direct, and the explicit expressions of personal belief were most troubling. *Montgomery*, 163 Wn.2d at 594. Yet despite the explicit language, the Court ultimately ruled that Montgomery failed to preserve the issue for appeal as he failed to object each of the statements. *Montgomery*, 163 Wn.2d at 596. The Court determined that there was no actual prejudice since the jurors were instructed that they were the sole judges of credibility of witnesses and a timely objection would have cured any potential error. *Montgomery*, 163 Wn.2d at 596.

Defendant Morgan failed to object to any of the statements to which he now assigns error. As none of these statements were explicit or near-explicit statements expressing the officers’ personal opinions as to defendant’s guilt or veracity, they are not manifest and cannot be raised for the first time on appeal.

Defendant Morgan admitted to Detective Ringer that he was an active member of the Five Deuce Hoover Crip gang out of Seattle. RP

1259. Detective Ringer has had experience working with both gangs when they have worked together in drug and property crimes. RP 1397.

Detective Ringer testified that the Hilltop and Hoover Crips are on “friendly terms,” and have worked side-by-side through the years. RP 1263-64, 1451-52. Defendant Morgan objected to the introduction of this evidence based on lack of foundation and confrontation. RP 1263, 1296.

Detective Ringer also testified that, in the course of his extensive work in investigating gang-related assault crimes, he has seen numerous occasions where seemingly insignificant incidents quickly escalate to violence. RP 1387. He described one event of innocuous behavior which erupted into violence and testified that he had heard of and seen first-hand thousands of others. RP 1407-08. Defendant Morgan did not object to this testimony. *See* RP 1387, 1407-08.

Detective Ringer’s statements involved his knowledge of general gang culture which helped the trier of fact to understand how gangs may react to events and how they interact. His testimony was the result of twenty-four years of experience as a police officer and his extensive involvement with various gang-related task forces. *See* RP 1229-30. Detective Ringer never testified that he believed this shooting was performed in retaliation for an earlier assault. He also never testified that he believed a Hoover Crip would attempt to murder a person at the request

of a Hilltop Crip or that defendant Morgan was guilty of the charged crimes. None of Detective Ringer's statements were explicit or near-explicit opinions of defendant Morgan's guilt and the defendant has failed to preserve this issue on appeal.

6. THE PROSECUTOR DID NOT COMMIT
MISCONDUCT DURING DIRECT
EXAMINATION OF THE STATE'S WITNESSES
OR DURING HIS CLOSING ARGUMENT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks are both improper and prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). Prejudice is established only if there is a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing

essential unfairness be sustained by him who claims such injustice.” *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

- a. The prosecutor did not elicit testimony that one of the State’s witnesses knew defendant Parker based on her employment with DOC.

Defendant Parker claims that the court made a pretrial ruling prohibiting the State from eliciting testimony that Nicole Crimmins knew him because he reported to the Department of Corrections when she worked there. Brief of Appellant (Parker) at 43. Defendant Parker does not provide a citation for the court’s ruling, nor can the State find this pretrial ruling. However, the State does acknowledge that the introduction of such evidence would be improper, and the prosecutor acknowledged that he sought to introduce Ms. Crimmins’ knowledge of defendant Parker from her lifestyle outside of work because “[o]bviously the DOC stuff, that doesn’t come in.” RP 470.

On direct examination, the prosecutor asked Ms. Crimmins:

- Q. Were you on friendly terms with Mr. Parker? How long a period time have you known Mr. Parker?
- A. Well, I never really know him personally.
- Q. When did you first know who he was?
- A. From work.
- Q. And just give me a time period. A year? Two years? Month?
- A. I couldn’t tell you for sure how long he reported to my office.

RP 493. Defendant Parker objected and moved to strike the testimony.

RP 493. The court overruled his objection. RP 493. The prosecutor's questions were not misconduct as they were not designed to elicit information about defendant Parker's history with DOC. Rather, the prosecutor questioned Ms. Crimmins to find out how long she had known the defendant and her answers were not responsive.

Defendant Parker appears to recognize that Ms. Crimmins' responses were inappropriate to the questions and instead speculates that the prosecutor failed to inform Ms. Crimmins of the court's pretrial ruling excluding evidence of defendant Parker reporting to DOC. *See* Appellant's Opening Brief (Parker) at 43. Such speculation is not proof of bad faith or that the prosecutor acted improperly.

In addition, defendant Parker cannot show prejudice. Ms. Crimmins' revelation that defendant Parker reported to DOC was consistent with his stipulation that he had been convicted of a serious felony in the past. *See* RP 1488. The court also instructed the jury that evidence of all three defendants' previous convictions could be considered only for the purpose of establishing a required element of the crime of unlawful possession of a firearm in the first degree and could not be considered for any other purpose. CP 162-97 (Jury Instruction 22). There

is no substantial likelihood that Ms. Crimmins' brief testimony about where she met defendant Parker affected the jury's verdict.

- b. Defendants Morgan and Parker have failed to show that the prosecutor's closing argument was improper, let alone so flagrant and ill-intentioned that an instruction could not have cured any potential prejudice.

It is improper for a prosecutor to personally vouch for the credibility of a witness. *State v. Sargent*, 40 Wn. App. 340, 343–44, 698 P.2d 598 (1985) (finding impropriety meriting a new trial where the prosecutor repeatedly stated during closing that he believed a witness). Prosecutors do, however, have wide latitude to argue inferences from the evidence. *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995), *review denied*, 129 Wn.2d 1012 (1996).

Comments are prejudicial only where “there is a substantial likelihood the misconduct affected the jury’s verdict.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). The fact that defense counsel did not object to a prosecutor’s statement “suggests that it was of little moment in the trial.” *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294 (1993), *review denied*, 123 Wn.2d 1004 (1994). A defendant who fails to object to an improper comment waives the error unless he or she demonstrates that the comment

is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice” that no curative instruction could have neutralized. *Brown*, 132 Wn.2d at 561. Where vouching is alleged, prejudicial error will not be found unless it is “clear and unmistakable” that counsel is expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (finding no improper comment where the prosecutor argued from the evidence as to why the jury should believe one witness over another) (citing *Sargent*, 40 Wn. App. at 344), *cert. denied*, 516 U.S. 1121 (1996).

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence doesn’t support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

The prosecutor stated in closing:

Law enforcement did a great job investigating this case. The evidence you have is the same evidence that the defense has seen and they’re arguing and arguing their position to you. It’s the same evidence. The video doesn’t lie.

RP 1613. Defendant Morgan argues, for the first time on appeal, that this statement was improper vouching of the State's witnesses by the prosecutor. Appellant's Opening Brief (Morgan) at 60. Defendant Parker, also for the first time on appeal, claims that the prosecutor improperly vouched for the credibility of its witnesses when he argued "that Det. Ringer was doing his duty when he sifted through the lies of the defendants and other witnesses with gang ties in his effort to discover the truth." Appellant's Opening Brief (Parker) at 44. As neither defendant objected at trial, he must show that the remark was so flagrant and ill-intentioned that an instruction could not have cured any prejudice. The defendants cannot make such a showing.

When reviewed in the context of the entire argument, the challenged statements were not improper. The prosecutor's theme in closing was based on defendant Morgan's statements to Detective Ringer, "It is what it is. You'll be able to put it all together." RP 1566, 1592; *see also* RP 1613 ("It is what it is. You'll be able to figure it out."). The prosecutor's argument boiled down to the idea that the police officers put it all together, despite the defendants' attempts to divert them and the witnesses were unwilling to cooperate with them. *See* RP 1592, 1597-98, 1600-01, 1613. The prosecutor inferred that the jury could find the law enforcement investigation credible based on the evidence presented at

trial. The prosecutor pointed out that the defendants' statements to Detective Ringer regarding their activities on the night of the shooting were not supported by their movements on the surveillance video. RP 1582, 1590-91. Christine Borland, one of defendant Parker's girlfriends, admitted that she lied to the police at her initial interview. RP 1054. She also testified that defendant Parker's story about having his car stolen was false. RP 1034-43, RP 1045-46. As the prosecutor is allowed wide latitude to argue inferences about credibility based on the evidence, his argument here was not flagrant and ill-intentioned misconduct.

Also, as neither defendant objected to the now challenged argument, they must show that the comments were a clear and unmistakable personal opinion of the witnesses' credibility and caused an enduring and resulting prejudice that could not have been cured by instruction. As argued above, the prosecutor's statements were a reasonable inference based on the evidence adduced at trial. They were not an expression of the prosecutor's personal opinion and were therefore not prejudicial.

Even if the argument was improper, the court instructed the jury that it was the sole judge of the credibility of each witness and that the attorneys' statements were not evidence. CP 162-97 (Jury Instruction 1). The prosecutor also informed the jury it was to make credibility

determinations. RP 1567. If the defendants had objected the court would have reminded the jurors that the prosecutor's arguments were not evidence and that they were the sole judges of credibility. Neither defendant can show that such an instruction would have failed to cure any potential prejudice.

The prosecutor's argument encouraged the jury to infer that the law enforcement investigation was credible was based on the evidence presented at trial. This argument is not misconduct, let alone flagrant and ill-intentioned. Also, because the prosecutor did not express a "clear and unmistakable" personal opinion of the witnesses' credibility, defendants Morgan and Parker were not prejudiced by the prosecutor's argument.

7. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE THAT THE DEFENDANTS WERE GUILTY OF THE CRIMES CHARGED.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the

witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

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

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

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

- a. The State presented sufficient evidence to prove that defendant Embry was guilty of conspiracy to commit first degree murder

A person is guilty of criminal conspiracy if, with the intent to commit a crime, he agrees with one or more persons to engage in or cause the performance of such conduct and any member of the conspiracy takes a substantial step in pursuance of the agreement. RCW 9A.28.040(1).

The State must show an actual, rather than feigned, agreement with at least one other person to prove conspiracy. *State v. Pacheco*, 125 Wn.2d 150, 159, 882 P.2d 183 (1994). The State does not need to show a formal agreement. *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669, *review denied*, 133 Wn.2d 1021 (1997). And the conspiracy may be proven by the declarations, acts, and conduct of the parties, or by a concert of action. *Barnes*, 85 Wn. App. at 664. A “concert of action” is shown by all the

parties working together understandingly, with a single design for the accomplishment of a common purpose.” *State v. Casarez-Gastelum*, 48 Wash.App. 112, 116, 738 P.2d 303 (1987). This proof may be circumstantial. *State v. Israel*, 113 Wn. App. 243, 284, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1013 (2003).

Here, taking all inferences in favor of the State, there was sufficient evidence to prove that defendant Embry entered into an agreement to kill

Mr. Clark. The jury was instructed:

To convict the defendant Randall Marquise Embry of the crime of conspiracy to commit murder in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) That on or about the 24th day of February, 2009, the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of murder in the first degree;
- 2) That the defendant made the agreement with the intent that such conduct be performed;
- 3) That any one of the persons involved in the agreement took a substantial step in the pursuance of the agreement; and
- 4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 162-97 (Jury Instruction 28). The evidence admitted at trial showed that defendant Embry engaged in a concert of action with defendant Parker to murder Mr. Clark.

Defendant Embry clearly intended to kill Mr. Clark when he approached him and fired at point blank range. RP 425-26, 432.

Defendant Parker was the only one of the three defendants who knew Mr. Clark. RP 553, 574-75, 648. Mr. Clark had punched defendant Parker in the face only a few weeks prior. RP 573-79.

The surveillance video taken from McCabe's the night of the shooting showed a concert of action between all three defendants. Exhibit 19. An integral part of this video was the testimony of Detective Ringer, pointing out the defendants⁹ and other individuals who were involved with or witnessed the shooting. *See* RP 1305-1310, 1337, 1338-77; Exhibit 19.

The video showed that Mr. Clark was having a conversation with Mr. White. RP 1352; Exhibit 19. Mr. Clark testified that were talking about his altercation with defendant Parker. RP 572. The video shows

⁹ Prior to the admission of the video, the court instructed the jury that Detective Ringer's testimony was intended to assist the jury in viewing the video, but that it was the juror's independent decision to determine what was actually shown. RP 1337.

that defendant Embry was listening to Mr. Clark and Mr. White converse. RP 1355-56; Exhibit 19. After the conversation was over, Mr. White approached all three defendants. RP 1357-58; Exhibit 19. The defendants watched Mr. Clark as he moved around the bar. RP 1358-59; Exhibit 19. Detective Ringer described scenes in the video where all three defendants were together, watching Mr. Clark before Mr. Embry shot him. RP 1363-67.

As defendant Embry did not know Mr. Clark, he had no independent reason for his actions. Rather, the evidence supported a reasonable inference that defendant Embry performed the shooting on behalf of defendant Parker. It is reasonable to infer that defendant Embry would not have killed a random stranger for no purpose, but that he acted on behalf of an allied gang member who had a reason to see Mr. Clark dead. It was also reasonable for the jury to infer¹⁰ from the defendants' concert of action that defendant Embry came to an agreement with the other defendants to kill Mr. Clark.

¹⁰ At closing, the prosecutor argued a concert of action between all three defendants as shown on the surveillance video. RP 1602-1613.

- b. The State presented sufficient evidence to convince a rational fact finder that defendants Morgan and Parker were guilty of attempted murder in the first degree.

Here, the jury was instructed on the elements of first degree attempted murder as follows:

To convict the defendant, [named], of the crime of attempted murder in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 24th day of February, 2009, the defendant or an accomplice did an act which was a substantial step toward the commission of murder in the first degree;
- (2) That the act was done with intent to commit murder in the first degree; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 162-97 (Jury Instruction 14 (Parker); Jury Instruction 15 (Morgan)).

The jury was further instructed that:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice

of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.

However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 162-97 (Jury Instruction 8).

The State presented sufficient evidence for a reasonable fact finder to infer that both defendant Morgan and defendant Parker were accomplices of defendant Embry when he shot Mr. Clark.

Mr. Clark testified about the New Year's Eve fight and that defendant Parker was still angry at him about it. RP 602. Witnesses to Mr. Clark's conversation with Deuce about the incident indicated that all three defendants were interested in the discussion. RP 758, 909, 969-70.

The defendants' behavior outside the club indicated that there was an issue between them and Mr. Clark. The video showed all of the

defendants, together with Mr. Lovelace, milling around the front door of the club until Mr. Clark exited. Exhibit 19; RP 1362-67. Defendants Morgan and Embry were with Mr. Lovelace, watching the front door. Exhibit 19; 1364-65. Defendant Morgan moved toward defendant Parker, but watched Mr. Clark as he walked past. Exhibit 19; RP 1365. Once he has contacted defendant Parker, defendant Morgan moved off into the direction of Mr. Clark's car, along with defendant Embry. Exhibit 19; RP 1365-66. As Mr. Clark started toward his car, defendants Morgan and Embry moved more quickly ahead of him. Exhibit 19; RP 1366-67. Once defendants Morgan and Embry and Mr. Clark left the area, defendant Parker also left. Exhibit 19; RP 1367. Mr. Lovelace watched Mr. Clark walk away in the same direction as defendants Morgan and Embry before catching up with defendant Parker. Exhibit 19; RP 1367. It was reasonable for the jury to infer from the defendants' behavior that they were focused on Mr. Clark and that there was some plan in effect against him.

As none of the defendants had a gun when they entered the club, it is reasonable to infer that they did not have a gun upon leaving. *See* Exhibit 19; RP 1346. Defendant Embry acquired a gun in the three minutes between his leaving the area and his shooting of Mr. Clark. *See* Exhibit 19; RP 1366-1370. Defendant Morgan was with defendant Embry

when he left the club as well as during the shooting and the two entered the same vehicle afterwards. Exhibit 19; RP 769, 912-13, 1366. It was reasonable for the jury to infer that defendant Morgan was with defendant Embry when he acquired the gun and was ready to assist Mr. Embry in the commission of the crime.

Finally, in addition to his behavior before the shooting, defendant Parker's actions after the shooting indicates he knew of the plan against Mr. Clark and that he assisted by driving the getaway vehicle. The car was rented in defendant Parker's name. RP 1138-39. Ms. Crimmins saw four people inside the car. RP 440-41. Telon Walker saw defendants Morgan and Embry get into the back seat of the car before it drove away immediately after the shooting. RP 768-69, 771.

After the shooting, defendant Parker called his girlfriend, Christine Borland, from a gas station located off of Highway 512. RP 1035-36. When she asked why he was at the gas station, defendant Parker responded, "Something bad happened; I don't want to talk about it," and that his car had been stolen. RP 1041. Defendant Parker told her that he was going to call the police to report the car stolen, but that he was going to report it stolen from her apartment. RP 1045-46. Defendant Parker called the police at approximately 3:30 a.m. to report the car had been stolen from in front of Ms. Borland's apartment 45 minutes prior to the

shooting and was able to provide the responding officers with both the license plate and VIN numbers. RP 853, 856-57.

The totality of the circumstances of this case, taken in the light most favorable to the State, support a conclusion that defendant Parker solicited defendant Embry's assistance in killing Mr. Clark. As noted above, defendant Parker was the only person present who had a grudge against Mr. Clark. As the only person with a motive, defendant Parker had to distance himself from all ties to the shooting. Defendant Parker's location after the shooting indicates that he left with defendants Morgan and Embry and was dropped off mid-route so the other defendants could dispose of the car. His lying to the police about the time and location that his car was allegedly stolen also supports his attempts to distance himself from the crime.

The evidence admitted in this case support a reasonable inference that all three defendants had a planned together to kill Mr. Clark and that defendants Morgan and Parker encouraged and aided defendant Embry when he shot Mr. Clark.

- c. The State presented sufficient evidence to convince a rational fact finder that defendants Morgan and Parker were guilty of unlawful possession of a firearm in the first degree.

Evidence is sufficient to prove first degree unlawful possession of a firearm if, when viewed in the light most favorable to the prosecution, it permits a rational trier of fact to find beyond a reasonable doubt that the defendant knowingly had a firearm in his possession or control after being convicted of a serious offense. RCW 9.41.040(1)(a); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000) (citing *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000)); CP 162-97 (Jury Instruction 23(Parker), Jury Instruction 25 (Morgan)). Evidence shows constructive possession if it supports an inference that the defendant had dominion and control over the firearm or the vehicle in which the firearm was found. *Turner*, 103 Wn. App. at 520-21; *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). One may constructively possess a firearm jointly with another person. *Turner*, 103 Wn. App at 521.

Taken in the light most favorable to the State, the evidence here supports an inference that defendant Parker had dominion and control over both the car and the firearm and defendant Morgan had dominion and control over the firearm. As no gun was found at the scene, it was

reasonable to infer that defendant Embry had the gun in his hands when he entered the car. *See* RP 273, 280, 318, 976. It is reasonable to infer that defendants Morgan and Parker were aware of the gun as defendant Embry had shot Mr. Clark only a few feet away before entering the car. Inside the vehicle, the three defendants were in close proximity, with defendant Parker in the front seat and defendant Morgan sharing the back seat with defendant Embry. In addition, the evidence supports an inference that defendant Morgan was with defendant Embry when he retrieved the gun. The gun could easily have passed from one defendant to another, causing both defendants Morgan and Parker to be in constructive possession.

8. DEFENDANTS MORGAN AND PARKER HAVE FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the

judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”).

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

Cumulative error does not turn on whether a certain number of errors occurred. *Compare, State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh

testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see e.g.*, ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see e.g.*, ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant Parker and defendant Morgan have failed to establish that the trial was so flawed with prejudicial error as to warrant relief. The defendants failed to show that there was any prejudicial error much less an accumulation of it.

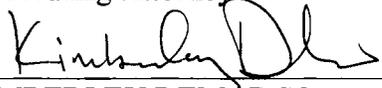
Neither defendant Parker nor defendant Morgan are entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm the defendants' convictions.

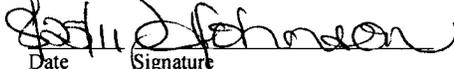
DATED: AUGUST 25, 2011

MARK LINDQUIST
Pierce County
Prosecuting Attorney


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Deputy Prosecuting Attorney
WSB # 39218

Certificate of Service:

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


Date _____ Signature _____

to OC. Arnold + Elmer

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