

NO. 42027-9-II

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

STATE OF WASHINGTON, RESPONDENT

v.

KEVIN FRANKLIN and DESMOND JOHNSON, APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable John Hickman

No. 09-1-02724-4 and 09-1-02725-2

Brief of Respondent

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

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

2. Whether the trial court abused its discretion in admitting evidence of the defendants' gang affiliation under ER 404(b) as evidence of motive, intent, or *res gestae*?

3. Whether the State adduced sufficient evidence to prove all the elements of the crimes charged, and the aggravating circumstance charged against defendant Franklin?

4. Whether defendant Johnson may challenge the admission of specific opinion testimony for the first time on appeal, where he did not object to the testimony at trial?

B. STATEMENT OF THE CASE.

1. Procedure

On June 1, 2009, the Pierce County Prosecuting Attorney (State) filed an Information charging co-defendants, Conrad Evans, Kevin Franklin, and Desmond Johnson, with Drive-by Shooting, assault in the

first degree, Unlawful Possession of a Firearm (UPF), and assault in the second degree. CP 1-2.

On February 7, 2011, the case was assigned to Hon John McCarthy. 2/7/2011 RP 2. Because of the ongoing illness of Evans' attorney, Judge McCarthy eventually declared a mistrial. 2/14/2011 RP 2, 16.

On February 28, 2011, the case was re-assigned for trial to Hon. John Hickman. 1 RP 3¹. At the beginning of the trial before Judge Hickman, Evans reached a resolution with the State. 1 RP 32. Franklin and Johnson proceeded to trial under a Third Amended Information which charged them with Drive-by Shooting, Unlawful Possession of a Firearm (UPF), assault in the first degree, and assault in the second degree. CP 298-300.

2. Facts

In the early morning hours of May 31, 2009, Jeremy Berntzen drove Paul Richards to the 5400 block of South Cedar St. in Tacoma. 5 RP 200. Berntzen and Ben Grossman had been drinking with Paul at a nearby tavern, the Golden West. 6 RP 250. Paul was too intoxicated to drive, so

¹ The vast majority of references to the RP are regarding the trial, whose pages are numbered sequentially and divided into volumes. The State will refer to the volume and page of the RP; e.g. 1 RP 3. References to the RP other than the trial will be by date of hearing.

Berntzen drove him home in Paul's vehicle. 5 RP 200. Grossman had followed to give Berntzen a ride from there. 6 RP 250.

As Berntzen was helping Paul out of the vehicle, he saw two cars speeding down the street toward them. The lead car was a dark sedan. It was followed by a white, 4-door Explorer SUV. 5 RP 205, 207. He heard 7-9 gunshots, in rapid succession, coming from the Explorer. 5 RP 205, 207. He saw a man hanging out of the rear passenger window, with a gun, shooting at the sedan. 2 RP 206. Berntzen looked on in shock. 5 RP 205.

Grossman pulled to the side of the street to get out of the way of the two speeding vehicles. 6 RP 253. Like Berntzen, he also saw and heard 7 shots fired from the passenger side of the white Explorer. 6 RP 253, 254-255. After the fusillade, he heard air leaking from his tire. 6 RP 256. He later discovered several bullet holes in his truck. 6 RP 260.

Darlene Esqueda lived at South 54th and Cedar. 6 RP 311. She looked out the window when she heard gunshots. 6 RP 313. She saw the white Explorer following another car. She saw an arm, holding a gun, hanging out the passenger side of the Explorer. 6 RP 313. She saw the person shooting at the lead car. 6 RP 319.

Police arrived on the scene in minutes. Tacoma Police officer Chris Martin happened to be parked at a 7-11 store 2 blocks away. 6 RP 364. He heard the gunfire. *Id.* He immediately drove to the scene, where Berntzen flagged him down. 6 RP 367. Before he could begin the investigation, dispatch re-directed him to a fatal shooting that had just

occurred a short distance away at South 74th and Oakes Sts. 6 RP 370.

Later, Officer Martin returned to the scene of the first shooting. There, he discovered several .40 caliber shell casings. 6 RP 379.

Unbeknownst to these witnesses, the conflict that led to this early morning violence had begun a week before. The previous week, there had been an altercation between Jerome Kennedy and Johnny Morris, also known as "Little T-Lay". 9 RP 926. A group of people had gathered at a 7-11 at South 56th and Birmingham after the local bars had closed. 9 RP 926, 10 RP 1129. Curtis Hudson, Kennedy's brother, began fighting with Morris. 9 RP 926. Kennedy intervened and punched Morris. 9 RP 927.

Kennedy was a member of the Eastside Gangster Crips (EGC). 9 RP 925. Hudson was a member of the Hilltop Crips (HTC). 9 RP 922. Morris was a member of the Young Gangster Crips (YGC). 9 RP 927. The gangs all had reputations and "street credibility" to protect. 12 RP 1483-1484, 1487-1488.

In the ensuing altercation, the gold necklace that Kennedy was wearing was snatched. 9 RP 928. Morris had it. *Id.* Someone later informed Kennedy that Kennedy could buy the necklace back or fight for it. 10 RP 1140. Kennedy took offense to this. 10 RP 1133.

On May 31, 2009, Kennedy went to the Friendly Duck, a bar on South Tacoma Way, to settle the necklace issue "head up". 9 RP 929, 10 RP 1142. Conrad Evans and Franklin accompanied him. *Id.*, 13 RP 1635. They did not find their adversary at the Friendly Duck, so they proceeded

to the 54th St. Sports Bar nearby. 9 RP 929, 11 RP 1241. By then, it was nearly 2:00 a.m. and the bars were closing. 9 RP 940. People were leaving the 54th St. bar and getting their cars in the parking lot. 9 RP 940. Curtis Hudson had seen Morris inside the bar. 11 RP 1268. He then spoke with the occupants of the white Explorer as all the patrons were leaving the bar. *Id.* As it turned out, the white Explorer (with Evans driving; Kennedy, Franklin, and Johnson as passengers) was in a line of cars behind a burgundy Oldsmobile Cutlass that Curtis Hudson was in, and in turn behind the green sedan that Johnny Morris was in. 9 RP 940-941. Johnny Morris got out of the green car, looked around, and got back in. 9 RP941.

The three cars left the parking lot, headed in the same direction, east on South 56th St. 9 RP 944. The Cutlass turned off and drove south on Oakes St. The white Explorer followed the green sedan, which turned north onto South Cedar St. 10 RP 1159, 11 RP 1271. That is when Kennedy and another in the car opened fired. 5 RP 205-206, 10 RP 1159.

Both cars fled the scene. The white Explorer suffered a flat tire and ended up at a Chevron gas station/convenience store at South 74th and Hosmer St., near the freeway. 7 RP 495. There, they had arranged to meet up with Madre Combs, to leave the area. 10 RP 1057, 1063, 1122. At the gas station/convenience store, Johnson dropped a paper bag into a trash can. 7 RP 517. That bag was later found to contain 4 shell casings from a .38 revolver. 7 RP 520. Johnson entered the convenience store and

secreted a .38 revolver, ammunition, and the holster on one of the store shelves. 7 RP 534-535.

The four got into Combs car. 7 RP 509, 10 RP 1066. Police found a .40 pistol under the front seat, beneath Kennedy. 7 RP 514.

At the same time that the occupants of the white Explorer were making their way to the Chevron station, the green sedan that they had been shooting at chanced upon the maroon Cutlass that had earlier turned south on Oakes St. 9 RP 945, 973. Apparently believing that the Explorer and the Maroon Cutlass were allies, the occupants of the green sedan opened fire on the maroon Cutlass. 8 RP 754, 9 RP 945, 11 RP 1279. Marcus Jenkins, a rear seat passenger in the Cutlass was shot in the back. 9 RP 973. The driver, Kyle Ragland, was killed. 8 RP 766.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING GANG EVIDENCE UNDER ER 404(b) AS EVIDENCE OF MOTIVE, INTENT, AND AS RES GESTAE.

a. Evidence of gang affiliation and activity is admissible to prove motive and intent.

A person may not be prosecuted for gang membership, nor may evidence of such membership be used to show propensity to commit crime. *See, Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L.Ed.2d 309 (1992); *see also State v. Scott*, 151 Wn. App. 520, 526-527, 213 P.3d 71 (2009).

As defendant Franklin points out in his brief, a person has the right to be a member of a gang, or to associate with gang members. App. Br. at 35, citing *Scott, supra*. However, unlike membership in a church, social club, or community organization, courts have recognized that evidence of membership in a gang is admissible in a criminal trial for several reasons; including *res gestae*, proving motive or intent, and demonstrating interest or bias of a witness.

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

ER 404(b) provides that

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

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

evidence and determines that the relevance of the evidence outweighs any prejudicial impact.” *Scott*, 151 Wn. App. at 527.

b. Evidence of motive and intent.

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

“Courts have regularly admitted gang affiliation evidence to establish the motive for a crime or to show that defendants were acting in concert.” *Scott*, 151 Wn. App. at 527 (citing *Yarbrough*, 151 Wn. App. at 66, *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050, (1995)); *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964 (1998); *State v. Johnson*, 124 Wn.2d 57, 69, 873 P.2d 514 (1994). It is only when there was “no connection between a defendant’s gang affiliation and the charged offense [that] admission of such gang evidence was found to be prejudicial error.” *Scott*, 151 Wn. App. at 527.

Review of a trial court's ruling under ER 404(b) is for a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. *Yarbrough*, 151 Wn. App. at 81. A trial court only "abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons." *Id.* (citing *Powell*, 126 Wn.2d at 258).

In the present case, the State offered evidence of gang culture and the participant's gang affiliation to establish motive and to provide the jury with the necessary and relevant *res gestae* of the crime.

Evidence of the parties' respective gang ties was properly admissible under ER 404(b) as evidence of the defendants' collective motive and intent to commit the charged offenses, i.e., why Kennedy would respond so violently to an insult as trivial as a necklace theft and why the defendants would be willing to assist him.

"Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity...[while]
"Criminal street gang associate or member" means any person who actively participates in any criminal street gang and who intentionally promotes, furthers, or assists in any criminal act by the criminal street

gang.” RCW 9.94A.030(12),(13). The aggravating circumstance accompanying each of the charged offenses required the State to prove that the defendants “committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group”

In addition to passing ER 404(b)’s four-prong test for admissibility, the use of the gang-related evidence requested here has been upheld in situations strikingly similar to the facts in this case. In *Boot*, evidence of the defendant’s gang affiliation was admissible under ER 404(b) to prove motive because “[t]he testimony on gangs established that killing someone heightened a gang member’s status” and “the evidence show[ed] the context in which the murder was committed.” *Yarbrough*, 151 Wn. App. at 83 citing *Boot*, 89 Wn. App. at 789.

In *Campbell*, gang evidence was admissible to establish motive under ER 404(b) because the evidence “was highly probative of the State’s theory—that [the defendant] was a gang member who responded with violence to challenges to his status and to invasions of his drug sales territory.” 78 Wn. App. 813, 822, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004, 907 P.2d 296 (1995).

In *Yarbrough*, the Court of Appeals referenced *Boot* and *Campbell* when it upheld the admissibility of gang evidence similar to the evidence presented by stating that “[t]he trial court did not abuse its discretion in admitting the gang-related evidence under ER 404(b) to establish motive

and the requisite mental state in a first degree assault charge as excluding this evidence would deprive the State of relevant evidence necessary to establish an essential element of its case.” 151 Wn. App. at 87 citing *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). In reaching its decision, the Court of Appeals specifically found that: “[t]he gang-related evidence was highly probative to establishing the inducing cause for [the defendant] to [commit the murder and assault charged] because the evidence established that (1) [the defendant] was affiliated with a gang known as the Hilltop Crips; (2) [the defendant] perceived [the victim] to be associated with a rival gang; (3) the rival gangs had an altercation days before the shooting; and (4) a gang member can elevate his status by being willing to pull a gun out and shoot.” 151 Wn. App. at 86-87.

Once the predicate requirements of the rule have been met, ER 404(b) operates to prevent, “a defendant [from] sanitize[ing] the events of a brutal crime by dictating what evidence the State is entitled to present.” *State v. Elmore*, 139 Wn.2d 250, 285, 985 P.2d 289 (1999).

It was undisputed that Morris assaulted Kennedy and took his chain one week before the charged offenses, as it is undeniable that defendants Franklin and Johnson were with Kennedy before, during, and after the shooting. When taken together in the context of the shooting incident that occurred, the evidence of previous quarrels and ill-feelings between the defendants— vis-à-vis their connection to Kennedy and

association with the Eastside Gangster Crips—exceeds the evidentiary standard required by ER 404(b).

As to the evidence's relevant purpose, "[i]t is undoubtedly the rule that evidence of quarrels between victim and the defendant preceding a crime, and evidence of threats by the defendant, are probative upon the question of the defendant's intent." *State v. Parr*, 93 Wn.2d 95, 102, 606 P.2d 263 (1989). "Such evidence tends to show the relationship of the parties and their feelings one toward the other, and often bears directly upon the state of mind of the accused" *State v. Powell*, 126 Wn.2d 244, 261, 893 P.2d 615 (1995). Similarly, "[a] number of cases dealing with the admissibility of evidence of prior assaults and quarrels have found that evidence of previous quarrels and ill-feeling is admissible to show motive." *Powell*, 126 Wn.2d at 260. *See also State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997).

The trial court was presented with an episode in an escalating feud between members of the Eastside Gangster Crips and the Young Gangster Crips in a trial in which motive and intent were squarely at issue. Accordingly, evidence of the altercation that occurred at the 7-11 one week before the shooting, as well as the defendants' identification with Kennedy's cause, were highly relevant to understanding why the defendants were with Kennedy participating in a drive by shooting that targeted Morris; and why they would work together to disperse and conceal the evidence of their respective involvement. As such, the

circumstances of the previous altercation between Kennedy and Morris were relevant.

The trial court properly admitted the evidence under ER 404(b) to show the defendants' motive in assaulting the victim car, and vicariously, Berntzen and Grossman, the bystanders. In the present case, the State presented its theory of the case: that Jerome Kennedy was angry about his run-in with Johnny Morris the week before.

The gang-related evidence was relevant. The State charged the defendants with drive-by shooting and firearm enhanced assaults of various degrees, all aggravated by specific allegations that the defendants committed the crimes with the intent to advantage their criminal street gang and advance their position within it. Accordingly, evidence of the defendants' association with the Crips and their perception of Morris as a rival Young Gangster Crip, as well as the circumstances surrounding the defendant Kennedy's and Morris's previous gang-related altercation, is proof of the motive, intent, and aggravating circumstances attending the defendants' crimes—proof of why the Defendants would target Morris for a drive-shooting. Excluding the gang-related evidence would have deprived the jury from reaching a coherent understanding of an otherwise inexplicable shooting by precluding the State from introducing highly relevant evidence necessary to establish essential elements of the its case.

While gang-related evidence is always somewhat prejudicial, it is not unduly so in this instance. Here, the gang-related evidence was highly probative to the State's legitimate theory—that the crimes charged stem from a retaliatory act motivated by a variety of pride unique to the Defendants' gang allegiances—and explains the circumstances peculiar to Kennedy's, and through him the defendants', preexisting gang-related relationship with their intended target.

c. Res gestae exception.

In addition to the purposes listed in ER 404(b), evidence of other misconduct is admissible as part of the *res gestae* of the crime if it is so connected in time or place that proof of the misconduct constitutes proof of the history of the crime charged. *See, gen.* 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice, § 404.18, 526-527(5th ed.2007); *see also State v. Lane*, 125 Wn.2d 825, 831, 889 P. 2d 929 (1995) (evidence may be admitted as part of the *res gestae* to complete the story of the crime on trial by proving happenings near in time and place). Evidence admitted under this exception to ER 404(b) must be a “piece in the mosaic” and necessary to depict a complete picture for the jury. *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). Testimony concerning a defendant's escalating gun use was admissible as *res gestae* evidence to show his quest for greater gang status, thereby permitting the jury to get the whole picture and “try to make some sense out of a senseless crime.” *Boot*, 89 Wn. App. 780, 789–790.

Under this exception, where another offense constitutes a “link in the chain” of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible in order that a complete picture be depicted for the jury.” *State v. Brown*, 132 Wn.2d 529, 570-572, 940 P.2d 546 (1997). *See also State v. Lillard*, 122 Wn. App. 422, 430, 93 P.3d 969 (2004)(“Under the *res gestae* or same transaction exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in time and place to the charged crime.”). Under the *res gestae* exception the State must prove the existence of the collateral crimes or acts by a preponderance of the evidence. *State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981).

In *Brown*, the defendant unsuccessfully argued that a witness’s testimony did not qualify as *res gestae* evidence because he committed the violent crimes she testified about more than two days after and hundreds of miles away from the victim of the offense for which he was tried. The Court found the defendant’s argument was without merit for two reasons.

ER 404(b) applies to evidence of other crimes or misconduct regardless whether they occurred before or after the conduct for which a defendant is currently charged. While *res gestae* evidence is, as the [defendant] argued, restricted to proving the immediate context within which a charged crime took place, geographical distance and the passage of two days between these two similar and connected crimes do not defeat

immediacy of context in [the defendant's] case. *Brown*, 132 Wn. 2d at 575-576. Finding that the events in the charged offense culminated a sequence of events which began in another state with the crimes involving an earlier victim, the Court held that the jury was entitled to know about the events in the subsequent incident in order to have a more complete picture of the circumstances surrounding the charged offense. *Brown*, at 575.

Similar to the evidence challenged in *Brown*, in the present case the State presented the two-part conflict between the Eastside Gangster Crips and the Young Gangster Crips for the charged drive-by shooting incident to be comprehensible. Without context the case was simply random gun fire, in a random neighborhood, from a random vehicle, without explanation. Stated otherwise, an understanding of Kennedy's desire to seek retribution for the assault and theft he suffered one week prior at the hands of his gang rival is inextricable from an understanding of why Kennedy and the defendants joined Hudson at the 54th Street Bar and open fired on Morris from a moving vehicle on a residential street.

Moreover, evidence of their common gang association was also inextricable to an understanding of why Evans, Franklin and Johnson would be willing to join Kennedy in a retaliation, which but for the common bond of gang association, would be personal to Kennedy and Hudson. Accordingly, evidence of the fight between the "EGC" and "YGC" at the 7-11 one week prior to the incident, as well as the common

bond of gang association connecting the parties to one another, was required to provide a complete picture of the State's case to the jury.

The trial court ruled on the various gang-related evidence that the State proposed. 5 RP 164, 170, 180, 188. The court decided that the proffered evidence was admissible. *Id.* When ruling on each, the court strongly encouraged limiting instructions. 5 RP 163, 170, 180, 188. Although the State offered to do so, Johnson's counsel stated that he would propose the instructions. 5 RP 163-164. The court did give some limiting instructions, as requested. *See* Instructions 7 and 8; CP 89, 90. The court considered and decided that the probative value outweighed the potential prejudicial effect. 5 RP 188. The court based its decision on the law and the evidence in the case. The court did not abuse its discretion.

2. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE ALL OF THE ELEMENTS OF THE CRIMES CHARGED AGAINST DEFENDANT FRANKLIN, BEYOND A REASONABLE DOUBT.

In determining whether sufficient evidence supports a conviction, “[t]he standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.” *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829

P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable for purposes of drawing inferences. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The appellate court need not be convinced of the defendant's guilt beyond a reasonable doubt, only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). The reviewing court defers to the jury's decisions resolving conflicting testimony, evaluating witness credibility, and determining the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992).

In the present case, defendant Franklin was found guilty of drive-by shooting, UPF1, and assault in the first degree. CP 515, 517, 520, 587. The jury also found that the crimes were committed while the defendant or an accomplice was armed with a firearm. CP 587.

The jury was correctly instructed regarding accomplice liability. Instruction 9, CP 91; *see also*, RCW 9A.08.020(3)(a).

An accomplice need not participate in the crime, have specific knowledge of every element of the crime, or share the same mental state as the principal. *State v. Berube*, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). Rather, an accomplice must merely act with the knowledge that he is aiding a particular crime. *See State v. Whitaker*, 133 Wn. App. 199, 230, 135 P.3d 923 (2006).

The assault, drive-by shooting, and UPF were proven with the same evidence. Franklin was with Kennedy, who was looking for Morris or whoever took the necklace. 13 RP 1635. Franklin's purpose that night was to assist Kennedy in retaliation. There is no question that Franklin was in the back seat of the Explorer. Evans testified that Franklin was behind him. 11 RP 1248. However, Det. Vold testified that Johnson had claimed the rear driver side seat. 11 RP 1367, 1368.

The jury was correctly instructed that, in order to convict Franklin of drive-by shooting, the jury would have to find:

- (1) That on or about the 31st of May, 2001, the defendant or an accomplice recklessly discharged a firearm;
- (2) That the discharge created a substantial risk of death or serious physical injury to another person;
- (3) That the discharge was either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge; and
- (4) That this act occurred in the State of Washington.

Instruction 14, CP 96.

The jury was correctly instructed that, to convict Franklin of assault in the first degree, it would have to find that:

- 1) That on or about the 31st of May, 2009, the defendant or an accomplice assaulted Benjamin Grossman;
- (2) That the assault was committed with a firearm;
- (3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and
- (4) That this act occurred in the State of Washington.

Instruction 26, CP 108.

Regarding the UPF1, the court correctly instructed the jury that:

- (1) That on or about the 31st of May, 2009, the defendant knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of a serious offense; and
- (3) That the possession or control of the firearm occurred in the State of Washington

Instruction 19, CP 101.

Possession may be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). To establish constructive possession, the State had to show that Franklin had dominion and control over the firearm. See, *State v. Nyegaard*, 154 Wn. App. 641, 647, 226 P.3d 783 (2010). This control need not be exclusive, but the State must show more than mere proximity. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). One can be in constructive possession jointly with another person. *State v. Morgan*, 78 Wn. App. 208, 212, 896 P.2d 731 (1995).

In *Nyegaard*, although the defendant was charged with drug possession, with intent to deliver, with a firearm enhancement, the facts and proof issues in *Nyegaard* are similar to those in the present case. Nyegaard was a passenger in someone else's vehicle which had been stopped for traffic infractions. Police found a gun, and a paper bag

containing cocaine and methamphetamine near where Nyegaard had been sitting. *Id.*, at 645. They found over \$3,000 on one of the other occupants. *Id.* On appeal, Nyegaard challenged the sufficiency of the evidence and the search. Like the present defendant, he argued that the State failed to prove constructive possession. Considering all the evidence and the inferences and conclusions that the jury could draw from them, the Court of Appeals rejected his argument. *Id.*, at 648.

The ability to reduce an object to actual possession is an aspect of dominion and control. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). No single factor is dispositive in determining dominion and control. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243 (1995). The totality of the circumstances must be considered. *Id.*, at 501.

In *Echeverria*, as in the present case, the defendant was in someone else's car with a firearm and other weapons. Although he was driving, the gun was under the seat, and Echeverria denied any knowledge that the gun was there. 85 Wn. App. at 781; 6 RP 733. From the totality of the evidence, the trial court found that Echeverria possessed the weapons. The Court of Appeals affirmed. 85 Wn. App. at 783.

Here, the evidence showed that the revolver was in the back seat with Franklin and Johnson. As argued above, they shared an intent and purpose with Kennedy to use the gun to shoot at the green sedan. The

circumstances of the chase of the target car required Franklin or Johnson to use the gun, depending on who had a clear shot. Both possessed the revolver, for the same purpose.

The direct and circumstantial evidence supports the jury's verdict. Kennedy was on mission. He wanted to settle a score with Johnny Morris. He recruited Evans, Franklin, and Johnson to help in some way; whether to drive, bring a gun, or just back him up. 13 RP 1635. They went looking for Morris in bars in South Tacoma where he and his friends were known to frequent.

Considered with the other circumstantial evidence, the text messages between Franklin's girlfriend, Crystal Jenkins, and Franklin helped prove his intent and his participation. When Jenkins sent him a text message at 1:35 a.m. asking what he was doing, Franklin responded: "Handlin' this." 11 RP 1320. Concerned that it was nearly 2:00 a.m., she asked what could be taking so long. He responded: "Stop askin questions and use your head and you'll know what I'm on. I jus got jacc't and now it's time to give some1 the blues." *Id.* Her response to that at 1:38 a.m. was: "So u out searchin for someone u don't even know who it was. What is it uve got accomplished and when will u come home?" 11 RP 1320-1321.

Shortly before closing time, Curtis Hudson saw Morris at the 54th St. Bar. 9 RP 930. When Steve Kales, the DJ at the bar, saw Hudson there, he became suspicious because he had never seen Hudson at the bar

before, and knew that Hudson had a beef with Morris stemming from the incident the week before. 11RP 1267. Outside, as people were leaving the bar, Kales saw Hudson talking with the occupants of the Explorer. 11 RP 1268. Evans, Kennedy, and the others waited in the parking lot and fell in line behind the car Morris was in. They followed close behind him around the corner. As Evans drove, there were two guns to be used by Kennedy, Franklin, and Johnson. Kennedy, who had the conflict with Morris, used one. Franklin and Johnson would use the other, depending on which of them had a clear shot.

The jury could certainly conclude that the four men in the Explorer discussed what was happening and their participation. Franklin presented a defense. It was not one of shock and dismay, or even acknowledgement, at the behavior of his companions, who shared the confines of the Explorer with him. 13 RP 1649. He asserted that he slept through the gunfire. 13 RP 1645. Obviously, the jury did not believe him.

b. Evidence of street gang aggravator.

The State also alleged the gang sentence aggravating circumstance, as described in the statute:

The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

RCW 9.94A.535(3)(aa); CP 298-299.

There was ample evidence that Franklin was an active gang member. He admitted being a “jumped in” Eastside Gangster Crip (EGC). 13 RP 1623. He has an enormous tattoo across his back proclaiming himself an “EGC”. 13 RP 1624, 1626. He has smaller tattoos of “ES”, “Crip”, and “East side or nothin’”. *Id.* He also has a large tattoo across his stomach of his gang moniker: “Monster”. *Id.* He claimed that he had reformed. 13 RP 1628. However, while awaiting trial, he organized a gang set in the Pierce County Jail. 14 RP 1754-1755, 1761.

Kennedy and Franklin were both ESG’s. Kennedy admitted it. 10 RP 1131. So did Franklin. 13 RP 1623. Both also claimed to be reformed. 10 RP 1130, 13 RP 1628. Although Kennedy asserted that he knew Franklin “very little” (10 RP 1138), he called him to join him in his quest that evening. 13 RP 1635. And despite the urgings of his girlfriend to return home (11 RP 1320), Franklin stayed with Kennedy and the others until they had finished “Handlin business”. 11 RP 1320.

Det. Ringer testified regarding gang culture. In that culture, respect and disrespect can have serious consequences, including violence. 12 RP 1487. For Kennedy to lose a fight and have the necklace taken, would result in a loss of status or “street credibility”. 12 RP 499. The necklace-snatching was a serious sign of disrespect in the gang culture. *Id.* A gang member’s response to such a display of disrespect would likely be escalating violence. 12 RP 1487-1488, 1489, 1499. Fellow gang members

are expected to assist in enforcing the power and reputation of the gang 12 RP 1483-1484.

Based upon this evidence, and the inferences drawn from it, the jury could find, beyond a reasonable doubt, that Franklin's participation was to benefit a criminal street gang.

3. DEFENDANT JOHNSON FAILED TO PRESERVE THE ISSUE FOR APPEAL WHERE HE FAILED TO OBJECT TO DET. RINGER'S STATEMENT REGARDING THE HONESTY OF GANG MEMBERS.

A defendant must object to testimonies at trial in order to preserve the issue for review. RAP 2.5(a); *see State v. McGrew*, 156 Wn. App. 546, 234 P. 3d 268 (2010). The Court of Appeals does not review an alleged error raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *see, State v. Curtiss*, 161 Wn. App. 673, 696-697, 250 P. 3d 496 (2011).

Defendant Johnson now objects to Det. Ringer's statement, that "Almost 100 percent of the time, a gang individual, gang member, is not going to be totally honest with law enforcement in an interview." 12 RP 1406. App. Br. at 11. No objection was lodged to this statement.

Johnson's attorney did not object in general principle to Det. Ringer testifying as an expert on Tacoma street gangs: "With regard to the proffered expert testimony, I think the State's entitled to call what experts they may, provided that they can qualify them as an expert witness." 5 RP

185. Johnson's objections to gang evidence were that it was irrelevant regarding him because he was not a gang member. 5 RP 167, 177, 184.

Det. Ringer testified generally regarding gang culture, including the challenges in investigating crimes where gangs are involved. 12 RP 1406-1407. Further, again without objection, he testified that gang members and associates are extremely reluctant to cooperate or to testify, even if there are many people who see the incident. 12 RP 1408-1409. He also testified specifically regarding the cooperation and veracity of witness Kennedy. 12 RP 1406.

The defense did not object to this testimony because two of the state's key witnesses were gang members: Kennedy and Hudson. The defense could, and did, use Det. Ringer's characterization of gang witnesses against them. In cross-examination, Johnson's attorney made the point that Det. Ringer did not trust Kennedy at all. 12 RP 1512. Det. Ringer questioned Kennedy's truthfulness throughout the investigation. *Id.* Johnson's attorney went on to attack Hudson's credibility through Det. Ringer. 12 RP 1514-1515.

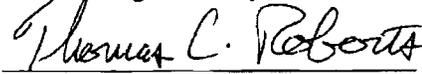
D. CONCLUSION.

The defendants received a fair trial where the court properly considered and ruled on evidence under ER 404(b) before it was admitted. The court properly ruled that evidence of gang association was admissible

to show intent and motive for the crimes charged, as well as a gang activity aggravating circumstance. The jury also heard this evidence as part of the greater circumstances or picture of the events on the night of the crimes. The state respectfully requests that the convictions be affirmed.

DATED: March 14, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

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

3.14.12 
Date Signature

PIERCE COUNTY PROSECUTOR

March 15, 2012 - 1:50 PM

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