

No. 49534-1-II  
(CONSOLIDATED CASE)

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

ALEXANDER JABBAAR KITT,

Appellant.

---

On Appeal from the Pierce County Superior Court  
Cause No. 15-1-01787-1  
The Honorable Stephanie Arend, Judge

---

OPENING BRIEF OF APPELLANT

---

STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

## TABLE OF CONTENTS

<b>I.</b>	<b>ASSIGNMENTS OF ERROR</b> .....	1
<b>II.</b>	<b>ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR</b> .....	1
<b>III.</b>	<b>STATEMENT OF THE CASE</b> .....	2
	A. PROCEDURAL HISTORY.....	2
	B. SUBSTANTIVE FACTS .....	3
<b>IV.</b>	<b>ARGUMENT &amp; AUTHORITIES</b> .....	14
	A. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT KITT INTENDED TO CAUSE ANYONE GREAT BODILY HARM. ....	14
	B. THE TRIAL COURT ERRED IN ADMITTING MINIMALLY PROBATIVE BUT UNFAIRLY PREJUDICIAL EVIDENCE OF KITT’S GANG AFFILIATION. ....	17
	C. THE APPEARANCE AND SEATING OF THE JUROR WHO WAS NOT SUMMONED CREATED A VOLUNTEER JUROR, WHICH DESTROYED THE RANDOMNESS OF THE JURY SELECTION PROCESS IN VIOLATION OF WASHINGTON’S JURY SELECTION STATUTE. ....	23
<b>V.</b>	<b>CONCLUSION</b> .....	28

## TABLE OF AUTHORITIES

### CASES

<i>City of Tacoma v. Luvene</i> , 118 Wn.2d 826, 827 P.2d 1374 (1992).....	14
<i>Dawson v. Delaware</i> , 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992).....	19
<i>Robinson v. Safeway Stores, Inc.</i> , 113 Wn.2d 154, 776 P.2d 676 (1989).....	24
<i>State v. Balisok</i> , 123 Wn.2d 114, 866 P.2d 631 (1994) .....	24
<i>State v. Bennett</i> , 36 Wn. App. 176, 672 P.2d 772 (1983) .....	18-19
<i>State v. Campbell</i> , 78 Wn. App. 813, 901 P.2d 1050 (1995) .....	19
<i>State v. Choi</i> , 55 Wn. App. 895, 781 P.2d 505 (1989).....	15, 16
<i>State v. Halstien</i> , 122 Wn.2d 109, 857 P.2d 270 (1993).....	18
<i>State v. Hardesty</i> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	17
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1988).....	17
<i>State v. Laureano</i> , 101 Wn.2d 745, 682 P.2d 889 (1984).....	18
<i>State v. Louther</i> , 22 Wn.2d 497, 156 P.2d 672 (1945).....	15
<i>State v. Monschke</i> , 133 Wn. App. 313, 135 P.3d 966 (2006) .....	21
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995) .....	17-18
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	14
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982) .....	18
<i>State v. Scott</i> , 151 Wn. App. 520, 213 P.3d 71 (2009) .....	18, 21

<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	18
<i>State v. Tingdale</i> , 117 Wn.2d 595, 817 P.2d 850 (1991) .....	28
<i>State v. Wilson</i> , 125 Wn.2d 212, 883 P.2d 320 (1994).....	15
<i>Thiel v. Southern Pac. Co.</i> , 328 U.S. 217, 66 S. Ct. 984, 90 L. Ed. 1181 (1946).....	24, 25
<i>United States v. Branscome</i> , 682 F.2d 484 (4th Cir. 1982).....	27
<i>United States v. Kennedy</i> , 548 F.2d 608 (5th Cir. 1977).....	26, 27
<i>United States v. Roark</i> , 924 F.2d 1426 (8th Cir. 1991) .....	21

**OTHER AUTHORITIES**

28 U.S.C.A. § 1861 .....	26
ER 403.....	19
ER 404.....	17
RCW 2.36.054 .....	25
RCW 2.36.072 .....	25
RCW 2.36.080 .....	25, 27-28
RCW 9A.04.110.....	15
RCW 9A.08.010.....	15
RCW 9A.36.011 .....	14-15

## **I. ASSIGNMENTS OF ERROR**

1. The State failed to meet its constitutional burden of proving all of the essential elements of the crime of first degree assault.
2. The trial court erred in admitting minimally probative but unfairly prejudicial evidence of Alexander Kitt's gang affiliation under ER 404(b).
3. Juror 11's service on Alexander Kitt's jury violated Washington's jury selection statute because Juror 11 answered a summons intended for a different person.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where the State's evidence showed at most that Alexander Kitt and/or the other defendants fired a gun from a significant distance towards people standing outside of a market, and that none of the defendants expressed any intention to do anything other than scare or show disrespect towards the people outside the store, did the State fail to prove that Alexander Kitt intended to cause anyone great bodily harm?  
(Assignment of Error 1)
2. Where evidence of Alexander Kitt's gang affiliation was not necessary to establish a motive for the crime, did the trial

court err in admitting the evidence under ER 404(b)?

(Assignment of Error 2)

3. Did the trial court err in admitting evidence of Alexander Kitt's gang affiliation where any probative value was minimal and where the potential for prejudice was extremely high?

(Assignment of Error 2)

4. Did Juror 11's service on Alexander Kitt's jury violate Washington's jury selection statute, where the statute requires that the jury pool be selected at random from a fair cross section of the population, and where Juror 11 answered a summons intended for a different person?

(Assignment of Error 3)

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

#### **A. PROCEDURAL HISTORY**

The State charged Alexander Jabbaar Kitt with one count of first degree murder (RCW 9A.32.030(1)(b)) and one count of second degree felony murder (RCW 9A.32.050(1)(b)) for the shooting death of Brandon Morris. (CP 1-2) The State charged Kitt with four counts of first degree assault (RCW 9A.36.011(1)(a)), for each of the four individuals who were standing with Morris when he was shot. (CP 2-3) Finally, the State charged Kitt with one count

of unlawful possession of a firearm (RCW 9.41.010, .04.), and alleged that he was armed with a firearm during the commission of the murder and assault offenses (RCW 9.94A.530, .533). (CP 1-4)

Kitt was tried with two co-defendants, Jermohnn Gore and Clifford Krentkowski. The jury found Kitt guilty as charged. (CP 378-93; 20RP 3683-84)<sup>1</sup> The trial court denied Kitt's motion for a new trial, and sentenced Kitt to a standard range sentence totaling 1,010 months of confinement.<sup>2</sup> (SRP 104-06, 121, 154; CP 394-411, 418-24, 449, 452) The court found that Kitt is indigent, and waived all discretionary costs and legal financial obligations. (SRP 154; CP 450, 463-64) Kitt now appeals. (CP 460)

#### B. SUBSTANTIVE FACTS

In the morning of May 1, 2015, witnesses saw two African-American men shooting at each other in the area of South 15<sup>th</sup> Street and South M Street in Tacoma. (5RP 745, 755, 758, 759-60, 761, 777, 782, 787) Responding officers found a bullet hole in a white truck and a nearby residence, and shell casings on the street. (5RP 748, 816, 820-21, 824-25, 838)

---

<sup>1</sup> The transcripts labeled volumes 1 through 20 will be referred to by their volume number (#RP). The transcript of the sentencing hearing on October 12, 2016 will be referred to as "SRP".

<sup>2</sup> The court dismissed the second degree murder conviction to avoid a double jeopardy violation. (CP 450)

Later that afternoon, police responded to reports of another shooting in an alleyway just off of South 45th Street, between South Union Avenue and South Puget Sound Avenue. (5RP 858) When officers arrived, they found friends Anthony Stone, Dylan Browning, Phillip Valentine, and Jordyn Almond waiting in a carport. (5RP 858) They also found Brandon Morris laying on the ground in the carport, having suffered a gunshot wound to his head. (5RP 858, 861, 862; 6RP 985-86) Morris passed away a few days later as a result of the injury. (5RP 733; 11RP 1956)

Earlier that afternoon, Morris, Stone, Browning, Valentine, and Almond had walked to a marijuana dispensary located at the corner of South Union Avenue and South 45<sup>th</sup> Street. (6RP 1139-40; 7RP 1243; 10RP 1762; 11RP 1979; Exh. 107) Valentine went into the dispensary, while the rest of the group waited outside and talked. (6RP 1141-42; 7RP 1244; 10RP 1764)

The dispensary is across the street from the H&L Market. (6RP 1004, 1143-44) H&L Market is a known hangout for members of a Crips street gang called the Knoccoutz. (9RP 1500-01) There have been several shootings reported at that location over the years. (6RP 1025) But nothing out of the ordinary occurred while the group waited outside of the dispensary, and once Valentine

rejoined the group they went to the H&L Market to buy candy, and then began walking home. (6RP 1142; 7RP 1244-45; 11RP 1980, 1982)

The group decided to take a shortcut through the alley located along the side of the market. (6RP 1142, 1145-46; Exh. P107; 11RP 1980) Stone testified that he heard a gunshot, then saw a white SUV turn from South 45<sup>th</sup> Street into the alley. (6RP 1142; 7RP 1176) As soon as the SUV turned, Stone could hear gunshots in rapid succession, and saw a man in the rear passenger seat holding a firearm out of the rear window. (6RP 1142; 7RP 1181) Stone hid behind a Jeep that was parked in the carport. (6RP 1146)

Browning testified that he heard a loud bang, and a few seconds later saw a gold colored SUV turn into the alley. (7RP 1246, 1247, 1249) He saw the rear passenger, an African-American male, hanging out of the window, holding a pistol. (7RP 1249) Browning saw the passenger fire the pistol eight or nine times. (7RP 1249, 1251-52)

Valentine also heard a gunshot, and a few seconds later saw a white SUV turn into the alley. (10RP 1765) Then he heard more gunshots, and saw a black-skinned hand holding a pistol out of the

back passenger window. (10RP 1765, 1766-67) Valentine dove to the ground in the carport. (10RP 1769)

Almond testified that she heard a pop, then saw a white SUV driving down the alley. (11RP 1984) As it passed, she saw that the rear passenger was holding and shooting a gun. (11RP 1984, 1987) Morris grabbed her and pulled her behind the Jeep in the carport. (11RP 1985) While she was on the ground she heard seven or eight more shots being fired. (11RP 1984, 1986, 1989) It was not until she stood up again that she realized Morris had been shot. (11RP 1990)

Several other people were standing outside of the store when the incident occurred, including Jerry Hoffman. (7RP 1216-17, 1217-18; 1274-75; 10RP 1720, 1739, 1792; 13RP 2357-58) He testified that he saw shots being fired from a white SUV as it drove past the front of the market on South 45<sup>th</sup> Street. (10RP 1722, 1723, 1726, 1731) The SUV then turned into the alley, and Hoffman heard several more gunshots from the direction of the alley. (10RP 1723)

Carlmissa Jives was in the alley loading her children into her car when she heard the gunshots. (15RP 2802, 2805) She saw a white SUV racing down the alley. (15RP 2802, 2805) She could

see shots fired from a gun being pointed out of the right rear window of the SUV. (15RP 2802, 2805-06, 2807, 2814)

But Amber Fetcher also heard the gunshots and looked out of her apartment window to see a blue Chevrolet Corsica driving past the alley. (17RP 3233, 3234, 3235) There were several African-American males in the car, and one of them was hanging out of the back window pointing a gun in the direction of the alley. (17RP 3235, 3236, 3258) She heard several more gunshots, and it sounded to her as though they came from the blue car. (17RP 3235, 3247, 3248) She did not see any other cars in the area. (17RP 3249)

At the same time, Kayle Moss was returning to work after her lunch break. As she turned her car into the alley behind her office building, she saw a white SUV speeding towards her. (10RP 1904) The SUV came to a rapid stop, and she could see the young male African-American occupants yelling at her to get out of the way. (10RP 1904, 1911, 1913) She saw the back doors of the SUV open and close again, but nobody got out. (10 RP 1905, 1912) The SUV then pulled forward and out of the alley, bumping into the passenger side of her car as it passed. (10RP 1904-05) Moss' bumper had to be replaced as a result of the damage from

the collision. (10RP 1905)

Investigators noted bullet strikes on the east and south sides of the market, a bullet hole through a garbage can and storage shed in the alley, and a bullet fragment in the hood of the Jeep parked in the carport. (6RP 1004, 1005, 1006, 1008; 17RP 3234) They also collected bullet fragments and shell casings on the ground on South 45<sup>th</sup> Street in front of the market, in the alley and carport, and on wooden pallets stacked next to the market. (6RP 1005, 1006, 1084, 1098, 1101) Some of the casings were .40 caliber and were headstamped "WIN 40 S&W."<sup>3</sup> (6RP 1086, 1103-05) Other casings were .9mm caliber and were headstamped "9mm Luger AP14." (6RP 1005, 1086, 1098, 1106)

On May 3, police found a white Cadillac Escalade SUV with body damage on the right side near the front tire. (10RP 1826, 1828-29, 1832, 1843) They impounded and searched the SUV, and found .40 caliber shell casings behind the right rear passenger seat. (10RP 1851, 1852) The casings were headstamped "WIN 40 S&W." (10RP 1857)

Investigators were able to identify the owner of the Cadillac

---

<sup>3</sup> A headstamp is a marking on the base of a shell casing that notes the caliber and the brand of bullet. (6RP 1086)

SUV, and interviewed the owner's daughter, Jade Dukes. (9RP 1654; 10 RP 1855) On May 1, Dukes had allowed her boyfriend, Lance Milton-Ausley, to drive the SUV while she was at school. (9RP 1652; 16RP 2975-2976, 2980) Dukes testified that Milton-Ausley picked her up from school in the afternoon and told her that something happened on South 45<sup>th</sup> Street, and he eventually acknowledged that someone had been shot. (9RP 1657-58; 16RP 2987, 2992) Dukes also testified that Milton-Ausley did not tell her who did the shooting. (9RP 1657-58; 16RP 2982-93)

But Dukes previously told investigators that Milton-Ausley told her that his friend "Too Real" had opened the back door of the SUV and fired a gun. (16RP 3003, 3033) She also told police that the shooting was in retaliation for a shooting incident that had occurred earlier that same day when another of Milton-Ausley's friends, "Baby Fold 'em," had been targeted. (16RP 3003)

Lance Milton-Ausley was charged in connection with the shooting, but entered into a generous plea agreement in exchange for his testimony at trial. (7RP 1303, 1363-65) Milton-Ausley drove Dukes to school in her parents' white Cadillac SUV on the morning of May 1, then picked up his friends, Jeremy Bolieu, Clifford Krentkowski and Jermohnn Gore. (7RP 1307, 1309, 1310, 1311-

12)

When Gore got into the SUV, he told the others that Alexander Kitt had been fired upon earlier that morning. (7RP 1318) The young men then picked up Kitt, also known as “Too Real,” and Trevion Tucker, also known as “Baby Fold’em.” (7RP 1322, 1330) According to Milton-Ausley, they are all members of the Trafton Block sect of the Hilltop Crips street gang. (7RP 1328)

Milton-Ausley noticed that Kitt had a blue and black backpack with him. (7RP 1323) He testified that Kitt showed him two pistols inside the backpack. (7RP 1325) Kitt also confirmed that someone had fired a gun at him that morning, and said the shooter was driving a black Monte Carlo. (7RP 1331) They suspected the shooter was LaShaun Alexander because he drives a black Mont Carlo and is a member of a rival Crips gang called the Knoccoutz. (7RP 1331; 9RP 1500)

Milton-Ausley first drove the group to an apartment shared by Rebecca Timpe and Maria Baker, because Timpe owed Kitt money. (7RP 1334, 1335; 12RP 2329, 2331, 2340; 15RP 2827) Their apartment is near South 45<sup>th</sup> Street and South Union Avenue, which is considered Knoccoutz territory. (7RP 1333, 1340; 12RP 2328)

Timpe decided to walk to the H&L Market to withdraw money and repay Kitt. (12RP 2343, 2345-46, 15RP 2832) But the group got tired of waiting for Timpe to return, so they left the apartment and drove towards the store. (7RP 1338-39; 13RP 2451) Milton-Ausley was driving, Bolieu was in the front passenger seat, and Krentkowski, Gore, Tucker and Kitt were in the back seat of the SUV. (7RP 1339) According to Milton-Ausley, their plan was to drive by the H&L Market and take pictures of themselves in Knoccoutz territory to post on Facebook as a show of disrespect. (7RP 1333, 1340, 1341-42)

They saw Timpe on the way, and they stopped so Timpe could give Kitt the money she owed him. (13RP 2451-52; 15RP 2839, 2842, 2845) Timpe testified that the young men seemed to be in a hurry to leave. (15RP 2843) Shortly after the group drove away, Timpe heard gunshots from the area where the SUV had gone. (15RP 2846, 2848)

According to Milton-Ausley, they left Timpe and drove towards the market. They turned onto South 45<sup>th</sup> Street, and noticed several Knoccoutz gang members standing outside of the market. (7RP 1344) They also saw LaShaun Alexander's Monte Carlo. (7RP 1345-46) As they turned into the alley, Kitt and Gore

began shooting towards the market. (7RP 1347) Milton-Ausley also testified that, after the gunshots, Kitt told him to "Go, go, go; I just got off on them." (9RP 1600) As they left the alley, they encountered a small car going the other way, and Milton-Ausley sideswiped it as he drove past. (7RP 1351-52)

Trevion Tucker also entered a plea agreement with the State to avoid a lengthy prison term. (13RP 2519-20) He testified that he was awakened in the morning of May 1 to the sound of gunshots outside of his house. (13RP 2400) Moments later, a panicked Kitt arrived at his house and said that someone in a black Monte Carlo had just shot at him. (13RP 2400-01, 2405) LaShaun Alexander had also recently shot at Tucker from a black Monte Carlo. (13RP 2406, 2408-09, 2411-12, 2414; 14RP 2598-99)

Tucker testified that Gore called him and said he wanted to go look for Alexander. (13RP 2421) Tucker agreed to go along, and a short time later Gore, Krentkowski, Bolieu, and Milton-Ausley arrived in a white Cadillac SUV. (2421, 2422, 2423) According to Tucker, Kitt had a small blue backpack containing a .40 caliber pistol and 9mm handgun. (13RP 2434) Kitt gave the 9mm handgun to Gore. (13RP 2435)

According to Tucker, the group wanted to find Alexander and

his fellow Knoccoutz gang members and shoot at them in retaliation for all the times the Knoccoutz had shot at them. (13RP 2440) Gore and Kitt sat in the back seat, with Kitt next to the passenger side window. (13RP 2454) As they approached the H&L Market, they saw Knoccoutz gang members standing outside and saw the black Monte Carlo parked nearby. (13RP 2457, 2458, 2465) Milton-Ausley turned the SUV into the alley, and Kitt and Gore began shooting towards the store. (13RP 2459, 2461-62)

Police arrested Kitt and Gore on May 5. (11RP 2018, 2023; 17RP 3316) During a subsequent search of the car that Kitt and Gore had been riding in, police found a blue and black backpack. (11RP 2020-21, 2043, 2047) Police found two firearms inside the backpack, including a loaded .40 caliber Smith & Wesson semiautomatic pistol. (11RP 2086, 2088, 2089; 12RP 2152) The casings of the bullets removed from the pistol were headstamped "WIN 40 S&W." (11RP 2094) The State's firearm expert opined that the .40 caliber casings collected from the alley were fired from the .40 caliber Smith & Wesson pistol found in the backpack because of the distinctive markings created on the casings when the gun is fired. (12RP 2171-72, 2187) The firearm expert was unable to match the 9mm casings with any firearm submitted into

evidence. (12RP 2194, 2196)

#### IV. ARGUMENT & AUTHORITIES

- A. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT KITT INTENDED TO CAUSE ANYONE GREAT BODILY HARM.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

The State charged Kitt with four counts of first degree assault pursuant to RCW 9A.36.011(1)(a).<sup>4</sup> (CP 1-2) That statute provides that a person commits first degree assault “if he or she,

---

<sup>4</sup> Relying on the doctrine of transferred intent, the State charged one count of assault for each of the surviving individuals in the carport; Stone, Browning, Valentine, and Almond. (CP 2-3, 328)

with intent to inflict great bodily harm ... [a]ssaults another.” RCW 9A.36.011(1)(a). Great bodily harm is “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c).

Assault in the first degree requires a specific intent to cause great bodily harm. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). A person acts with intent when he or she acts with the objective or purpose to accomplish a result constituting a crime. RCW 9A.08.010(1)(a). “Evidence of intent . . . is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.” *State v. Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989). But “[s]pecific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act.” *State v. Louthier*, 22 Wn.2d 497, 502, 156 P.2d 672 (1945).

In this case, the evidence, at best, proved Kitt acted recklessly, not intentionally. There is no question that the individuals in the carport were not intended targets. (RP7 1264,

1282; 14RP 2600) In fact, the testimony from the State's witnesses established that their presence in the carport went completely unnoticed. (9RP 1601; 13RP 2484-85; 14RP 2600)

Nevertheless, Milton-Ausley testified that they went to the market only to show disrespect to the Knoccoutz. (7RP 1341-42) Tucker testified they planned to shoot towards the Knoccoutz, but they were not aiming at anyone. (14RP 2600, 2602) Neither testified that they planned or intended to actually injure anyone. Accordingly, proof of intent to cause great bodily harm must come from the circumstances of the shooting. But the State's evidence fails in this regard.

In *Choi*, the court found sufficient proof of intent to cause great bodily harm because the shooter pointed the gun directly at the victims, who were outside on the street and at close range. 55 Wn. App. at 906-07. But in this case, the shots were fired from the alley through a carport and a chain link fence and across a parking lot, and therefore not directly at the Knoccoutz and not at close range. (6RP 1006; 13RP 2465; Exh. 107)

The State failed to present evidence to show that Kitt or the other young men in the SUV intended to cause great bodily harm to anyone outside the market. The evidence did not prove beyond a

reasonable doubt that they intended to do anything other than disrespect and intimidate the Knoccoutz. This behavior is perhaps reckless, but does not rise to the level of first degree assault.<sup>5</sup>

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1988); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Accordingly, this court should reverse and dismiss Kitt's four first degree assault convictions.

B. THE TRIAL COURT ERRED IN ADMITTING MINIMALLY PROBATIVE BUT UNFAIRLY PREJUDICIAL EVIDENCE OF KITT'S GANG AFFILIATION.

Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to commit crimes, but may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); *State v. Powell*,

---

<sup>5</sup> Notably, that State did not allege for either of the murder charges that Kitt or the other young men acted with intent to cause injury, instead the State alleged that they acted with recklessness or a disregard for the risk created by their behavior. (CP 309, 325, 326, 330)

126 Wn.2d 244, 258, 893 P.2d 615 (1995). Bad acts under ER 404(b) include “acts that are merely unpopular or disgraceful.” *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (quoting 5 K. Tegland, WASH. PRACT., EVIDENCE § 114 at 383-84 (3rd ed. 1989)); see eg. *State v. Scott*, 151 Wn. App. 520, 526-27, 213 P.3d 71 (2009) (admission of gang evidence measured under the standards of ER 404(b)).

Before such evidence may be admitted, the trial court must first identify the purpose for which the evidence is being admitted. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Next, the court must determine that the proffered evidence is logically relevant to prove a material issue. *Powell*, 126 Wn.2d at 262. The test is whether such evidence is relevant and necessary to prove an essential fact of the crime charged. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984). Evidence is logically relevant if it tends to make the existence of the identified fact more or less probable. *Saltarelli*, 98 Wn.2d at 361-62.

Finally, assuming the evidence is logically relevant, the court must determine whether its probative value outweighs any potential prejudice. *Saltarelli*, 98 Wn.2d at 362-63; *State v. Bennett*, 36 Wn.

App. 176, 180, 672 P.2d 772 (1983); ER 403.

Over defense objection, the State was allowed to present evidence that Kitt and the other occupants of the SUV were members of the Hilltop Crips street gang, and that Alexander and was a member of a rival gang. (2RP 198-01; 7RP 1328-31; 9RP 1651; 12RP 2233-34; 13RP 2393, 2395-96, 2398, 2408) The trial court agreed with the State that gang membership was relevant to establish motive—that the incident was a retaliatory act for the earlier attempted shooting by members of the Knoccoutz gang. (2RP 182-90, 225-26)

Because of the grave danger of unfair prejudice, evidence of gang affiliation is inadmissible unless the State establishes a sufficient nexus between the defendant's gang affiliation and the crime charged. *See State v. Campbell*, 78 Wn. App. 813, 901 P.2d 1050 (1995). Evidence of gang membership is inadmissible when it proves no more than a defendant's abstract beliefs. *Dawson v. Delaware*, 503 U.S. 159, 165, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) (gang membership inadmissible to prove abstract belief because it is protected by constitutional rights of freedom of association and freedom of speech); *Campbell*, 78 Wn. App. at 822.

In this case, the trial court abused its discretion when it allowed several witnesses to testify that Kitt and the other young men were members of the Hilltop Crips gang because the State did not show a nexus between the evidence and the crime, the evidence was not necessary to prove a material issue in the case, and the probative value was slight in comparison to its potential for prejudice.

First, the evidence was totally unnecessary to prove a motive for shooting at LaShaun Alexander. The jury certainly could have grasped the idea that Kitt and his friends were angry that they had been repeatedly shot at by Alexander in the past few weeks, regardless of their affiliation with the Hilltop Crips. The concepts of revenge and retaliation are not exclusive to gang culture. The State could have easily established a motive without this evidence.

In fact, the State never made any connection between Kitt's affiliation and a motive for the shooting. There was no evidence about gang culture, behavior or norms that would have motivated Kitt or the other young men to respond to earlier attempts on their safety by shooting at the building where they believed Alexander was hanging out. When there is no connection made between a defendant's affiliations and the charged offense, admission of such

evidence is prejudicial error. See *Scott*, 151 Wn. App. at 527, 528 (when no connection made between a defendant's gang affiliation and the charged offense, admission of gang evidence is prejudicial error) (citing *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136, 1155-1156 (2009)).

Finally, any probative value was slight at best, but the potential for prejudice was quite high. Evidence of unpopular beliefs and associations is prejudicial to a defendant. See *Scott*, 151 Wn. App. at 526 (evidence of gang affiliation is considered prejudicial); *United States v. Roark*, 924 F.2d 1426, 1430-34 (8th Cir. 1991) (gang affiliation causes jurors to "prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged"). Admission of such evidence also implicates a defendant's constitutional rights of freedom of association and freedom of expression. See *State v. Monschke*, 133 Wn. App. 313, 331, 135 P.3d 966 (2006) (citing *Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)) (the First Amendment protects an individual's right to hold and express unpopular views and to associate with others who share that viewpoint). Thus, there was a danger that the jury would view Kitt as a bad person with anti-social or violent

tendencies, and that the jury would feel compelled to punish him for associating with a group that the average citizen associates with violence and crime. This is exactly what ER 404(b) is designed to prevent.

The prejudice from the admission of this evidence was compounded by the fact that Morris' mother testified at the start of the trial that her son was not involved with gangs (5RP 735), by the failure of the court to give a limiting instruction, and by the State's closing argument. The prosecutor repeatedly told the jury that it could know the defendants were guilty because they were gang members:

- These six assailants are gang members, Hilltop Crip gang members, and these six assailants, Hilltop Crip gang members, decided to take the law into their own hands on this day, and they decided, with no concern for the lives of completely innocent people, to act as if it's the Wild West and to cross town and to just shoot at individuals that apparently shot at them earlier. (18RP 3502)
- [S]ix very close friends--gang members--respond. (18RP 3506)
- [T]hey were all of the exact same mindset. How do you know that? Again, common sense. These are gang members, Hilltop Crip gang members, and it's important that you understand and appreciate that. (19RP 3648)
- [T]his concept of strength in numbers, as I said. It is a strength concept. It emboldened them, and it's part of the gang culture. (19RP 3654)

The prosecutor also argued:

- As you know, Brandon was not in a gang on May 1st, 2015. He wasn't causing any problems. Brandon was just a young man and out with his friends, and Brandon had no concept that on that day, that would be the last day of his life. Now, Jordyn Almond, Anthony Stone, Dylan Browning and Phillip Valentine, they were also young people on May 1st, 2015, that were not causing any problems. They weren't in a gang.

The prosecutor used the evidence of gang membership not to establish motive, but to argue that Kitt and the other young men were bad people with warped values who shot and killed an innocent bystander.

Without a strong showing that the evidence regarding Kitt's gang affiliation was necessary to establish motive, and that there was in fact a nexus between his association and the crime, the evidence should not have been admitted. The admission of the evidence was improper, unnecessary, and highly prejudicial. Kitt's convictions should therefore be reversed.

C. THE APPEARANCE AND SEATING OF THE JUROR WHO WAS NOT SUMMONED CREATED A VOLUNTEER JUROR, WHICH DESTROYED THE RANDOMNESS OF THE JURY SELECTION PROCESS IN VIOLATION OF WASHINGTON'S JURY SELECTION STATUTE.

After the jury was excused from service, it came to the court's attention that Juror 11 had answered the jury summons sent to his son, who shared his same first and last name. (Sup. CP 912) The defense filed a motion for a new trial based in part on this

irregularity. (CP 394-411, 418-24; SRP 19) The court called Juror 11 back for questioning. (SRP 32)

Juror 11 told the court that the jury summons was mailed to his house, where his son no longer lives. (SRP 32) They share a first and last name, and Juror 11 did not notice a discrepancy until he received his juror appreciation certificate with his son's middle initial printed on it. (SRP 32) The trial court denied the defense motion for a new trial because it viewed Juror 11's action as a mistake and not intentional misconduct. (SRP 103-04) This was an abuse of discretion because Juror 11's appearance and seating on the jury violated Washington's jury selection statute.<sup>6</sup>

Neither the federal nor state constitutions provide for volunteer jurors. Jury service is a duty as well as a privilege of citizenship. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 224, 66 S. Ct. 984, 90 L. Ed. 1181 (1946). Jury duty is a cornerstone of our legal system and cannot be altered without doing violence to the democratic nature of the jury system. "[T]he broad representative character of the jury should be maintained, partly as

---

<sup>6</sup> The appellate court reviews a trial court's grant or denial of a motion for a new trial based on juror misconduct for abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994); *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 158, 776 P.2d 676 (1989)

assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.” *Thiel*, 328 U.S. at 227 (Frankfurter, J., dissenting).

In Washington, RCW 2.36.080(1) requires that “all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court.” Thus, Washington juries are drawn from a master list which is comprised of all registered voters and holders of driver’s licenses residing in the county. RCW 2.36.054. As part of the process of selecting a fair and impartial jury, RCW 2.36.072(1) provides for a written or electronic declaration confirming the juror’s qualifications: “Each court shall establish a means to preliminarily determine by a written or electronic declaration signed under penalty of perjury by the person summoned, the qualifications ... of each person summoned for jury duty prior to their appearance[.]” In sum, RCW 2.36 et seq. protects the randomness of the jury pool so a qualified, fair and impartial jury can be obtained. This was not done in Kitt’s case. Juror 11 was a volunteer juror who sat through the trial and rendered verdicts. But volunteer jurors are not allowed.

For example, in *United States v. Kennedy*, the Court of Appeals for the Fifth Circuit condemned the practice of choosing volunteers for jury service and held that such practice constituted a substantial violation of the Federal Jury Selection and Service Act of 1968 (“the Act”).<sup>7</sup> 548 F.2d 608 (5th Cir. 1977). In that case, the district court had resolved a shortage of potential petit jurors by having the clerk request volunteers from the list of persons who had completed jury service in the previous month. Three such volunteers served on the jury that convicted Kennedy. Kennedy appealed to the Fifth Circuit, which held:

It is abundantly clear that the practice of filling gaps in the month’s jury pool with volunteers from last month’s jurors introduces a significant element of nonrandomization into the selection process that not only technically violates, but substantially departs from, the Act’s requirements.

548 F.2d at 610. The Court further noted:

It seems self-evident that allowing people to decide whether they wish to perform a particular task is quite the opposite of randomly selecting those who, unless within narrow and objectively determined categories of exemptions and excuses, must perform the task. A

---

<sup>7</sup> Like Washington’s jury selection act, the Federal Jury Selection and Service Act also requires random jury selection:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.

28 U.S.C.A. § 1861 (West)

volunteer is not a random selectee.

548 F.2d at 611 (footnote omitted). Thus, even though the original selection of these potential jurors was random, the subsequent step of asking for volunteers from that group was a substantial violation of the Act.

Similarly, in *United States v. Branscome*, the Fourth Circuit held that selection of volunteers to serve on a grand jury from a pool of prospective jurors who had been randomly selected violated the Act. 682 F.2d 484, 485 (4th Cir. 1982). The Court held that “(1) selection of volunteers introduces a subjective criterion for grand jury service not authorized by the Act, and (2) the selection of volunteers results in a non-random selection process in violation of the Congressional intent that random selection be preserved throughout the entire selection process.” 682 F.2d at 485.

Likewise, the jury selection process in this case was not in substantial compliance with the statutes (RCW 2.36 et seq.). Juror 11 was not randomly selected for jury service. Instead, he essentially volunteered for service by answering a summons not addressed to him. His service on the jury did not comply with RCW 2.36.080(1)'s requirement that “all persons selected for jury service be selected at random from a fair cross

section of the population of the area served by the court.”

Prejudice is presumed if there is a material departure from the statutes. *State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991). Because Juror 11’s service on Kitt’s jury represented a material departure from Washington’s juror selection statute, prejudice is presumed and his convictions must be reversed.

#### **V. CONCLUSION**

The lack of any evidence showing that Kitt intended to cause great bodily harm to any of the bystanders requires that his first degree assault convictions be reversed and dismissed with prejudice. Alternatively, because the relevance of the gang evidence presented by the State was minimal compared to its highly prejudicial nature, and because Juror 11’s service as a volunteer juror violated the random selection process required by Washington’s jury selection statute, all of Kitt’s convictions should be reversed and his case remanded for a new trial.

DATED: May 31, 2017



---

STEPHANIE C. CUNNINGHAM  
WSB #26436  
Attorney for Alexander Jabbaar Kitt

**CERTIFICATE OF MAILING**

I certify that on 05/31/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Alexander J. Kitt, DOC# 351364, Washington State Penitentiary, West Complex Fox Unit E-227, 1313 N 13th Ave., Walla Walla, WA 99362.

*Stephanie Cunningham*

---

STEPHANIE C. CUNNINGHAM, WSBA #26436

**May 31, 2017 - 2:54 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49534-1  
**Appellate Court Case Title:** State of Washington, Respondent v. Alexander J. Kitt, et al., Appellants  
**Superior Court Case Number:** 15-1-01787-1

**The following documents have been uploaded:**

- 1-495341\_Briefs\_20170531145217D2681870\_1252.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Kitt Brief.pdf*
- 1-495341\_Designation\_of\_Clerks\_Papers\_20170531145217D2681870\_4747.pdf  
This File Contains:  
Designation of Clerks Papers - Modifier: Supplemental  
*The Original File Name was Kitt SupDCP.EXH.pdf*

**Comments:**

Sender Name: Stephanie Cunningham - Email: sccattorney@yahoo.com  
Address:  
4616 25TH AVE NE # 552  
SEATTLE, WA, 98105-4183  
Phone: 206-526-5001

**Note: The Filing Id is 20170531145217D2681870**