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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER

v.

MARSELE KENITH HENDERSON, RESPONDENT

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Court of Appeals, Division II  
COA No. 42603-0

Pierce County Superior Court Case No. 08-1-05882-6

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**PETITIONER'S SUPPLEMENTAL BRIEF**

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A. ISSUES PERTAINING TO SUPREME COURT REVIEW

1. Did the trial court properly decline to instruct the jury that first degree manslaughter was a lesser included offense of first degree murder by extreme indifference where the factual prong of *Workman* had not been met?

2. Has defendant failed to show that the trial court abused its discretion when it admitted evidence of defendant's gang affiliation where defendant shot a gun at a group of people in retaliation for an earlier shooting?

B. STATEMENT OF THE CASE.

On November 16, 2008, Philip Johnson informed defendant, his friend and fellow Hilltop Crip member, that he was going to a party located in south Tacoma. RP 529-30, 1167. Defendant advised Mr. Johnson not to attend the party, because it was too close the 96th Street Murderville gang's territory. RP 529-30, 1166-67. Mr. Johnson went to the party and was subsequently shot and killed. RP 544.

The same night, Joshua Adams was having a party at his house on 56<sup>th</sup> and Yakima Avenue. RP 181-82. Mr. Adams had done extensive advertising for his party, so he expected members of the public to attend and hired security for the party. RP 182-85. One of the security members, Victor Schwenke was shot and killed during the party. CP 78, 544. Approximately 30 minutes prior to the shooting, there were between 130-

200 people present, located in both the front and back yard of the house. RP 187, 193-97. By the time police arrived after the shooting, there were still approximately 30 people present. RP 133.

Partygoers described the two men involved in the shooting as a lighter-skinned, black male, later identified as Koloneus McClarron, and a darker-complexioned, black male, later identified as defendant. RP 196, 331, 445-46, 752, 780, 838. The shooter stood in the middle of the street in front of the house while he fired directly at the house and the people standing in the front yard. RP 856, 1018-19. The majority of the witnesses identified defendant as the shooter. RP 391, 856, 938. Witness also heard defendant state some "Hilltop jibber babber<sup>1</sup>" before opening fire. RP 753. When defendant started shooting into the crowd, another of the security guards returned fire. RP 752-54.

Police interviewed defendant after the shooting. During the interview officers asked defendant about his actions during and after the time Mr. Johnson was shot and killed. RP 530-33. Defendant told them to "cut to the chase. You want to know about the shooting on Yakima." RP 533. Defendant said he had heard that it was 96<sup>th</sup> Street Murderville members who shot Mr. Schwenke. RP 533-34. He identified the shooter

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<sup>1</sup> Mr. McClarron heard defendant state, "What's up cuz," before he started shooting into the crowd. RP 977. "Cuz" is a word Crips use if there is a "beef" with someone, or could be used with a "homey." RP 976-77. Nakeshia Brooks heard someone shout "this is Hilltop" before the shots were fired. RP 1024. Joshua Adams heard Mr. McClarron say "Hey cuz," and defendant say "this is Hilltop" before shots were fired. RP 233, 237-38, 309-312.

as “Fat something.” RP 534. Defendant denied all involvement and claimed he never went to the Yakima Avenue party. RP 534.

Police recovered eighteen shell casings from the scene of the Yakima Avenue shooting, all 9mm caliber. RP 626-27. The casings were fired from two different guns, six from one gun and twelve from the other. RP 686. The six casings had been fired from a gun later found by a diver in the water of Commencement Bay off Ruston Way. RP 653-54, 701-02. Cell phone records showed that defendant was near the location of the Yakima Avenue party at the time of the shooting. CP 79; RP 768-69.

Kerry Edwards was at the Yakima Avenue party when he heard about Mr. Johnson’s shooting. RP 549. He went to the hospital to see Mr. Johnson. RP 549. Everyone was upset when they heard that Mr. Johnson had died. RP 556. Defendant was present and angrily demanding to know if the other Hilltop Crips present were “just gonna sit here and not do nothing?” RP 556-57. Defendant left the hospital with Mr. McClarron and Lewis Davis. RP 557, 562, 558.

Later that evening, Mr. Edwards received a call from defendant telling him defendant had shot into a crowd and someone had “dropped.” RP 564. Defendant told Mr. Edwards to meet him at “Tike’s” house. RP 565. Once at Tike’s house, defendant was “kind of hyper” and said that he killed someone. RP 566, 567-68. Andre Parker, defendant’s “big

homey,<sup>2</sup>” told him to calm down and “stop telling people your business.” RP 566. Defendant was carrying a 9mm hand gun in the waistband of his pants. RP 570-71. Defendant gave the gun to Mr. Parker and Mr. Edwards never saw it again. RP 571. The parties stipulated that Mr. Parker was in custody at the Pierce County Jail from September 10, 2008, until November 30, 2008. RP 1136.

Defendant testified that he had gone to the location where Mr. Johnson had been shot with Mr. McClarron and “Sleeze.” RP 1148-49. Defendant admitted that he had taken Mr. Johnson’s gun with him because “we didn’t know what was going on” and he had to protect himself. RP 1151, 1167. The three men went to the hospital when directed there by the police. RP 1152. Defendant testified that there were other people at the hospital, but that Mr. Edwards was not one of them. RP 1152. Defendant claimed that he thought Mr. Johnson was going to recover, so he did not encourage any retaliation. RP 1152. He left the hospital within a few minutes of arrival because Mr. McClarron wanted to go to the Yakima Avenue party. RP 1153.

Defendant and Mr. McClarron were dropped off at the party. RP 1154. According to defendant, he immediately wanted to leave because it was a bad party. RP 1156-57. Before he could leave, he heard that Mr. Johnson had died. RP 1157. That made him “a little angry.” RP 1157.

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<sup>2</sup> A big homey is “somebody you look up to,” and it is common to have one when a person joins a gang. RP 567.

Defendant then claimed that he heard shots and could not believe Mr. McClarron was shooting. RP 1157-59. Defendant testified that he never fired a shot and had not even known that Mr. McClarron had a gun. RP 1160. Defendant immediately ran away from the scene and called Sleeze to pick him up. RP 1160. Defendant testified that he went to his father's house that night, did not go to Tike's, did not see Mr. McClarron again, and never admitted to the shooting. RP 1161-62.

According to defendant, he lied during his police interview because he did not want to get Mr. McClarron into trouble. RP 1145, 1162. Despite knowing for over a year that Mr. McClarron identified defendant as the shooter, defendant claimed that he was still protecting Mr. McClarron. RP 1162-63. Defendant admitted that he lied about even being present at the shooting only until the witnesses at the trial all testified that he was there. RP 1180-81.

Defendant acknowledged he was a member of the Hilltop Crips. RP 1164-66. Defendant also admitted that he had advised Mr. Johnson not to go to the party because of an issue between Hilltop Crips and 96<sup>th</sup> Street Murderville. RP 1166-67. Defendant admitted that he was very close to Mr. Johnson and that Mr. Johnson had lived with him off and on ever since defendant joined the gang. RP 1182-84. Mr. McClarron and Mr. Johnson were not close at the time of Mr. Johnson's death. RP 1184.

On July 8, 2011, a jury found defendant guilty of murder in the first degree and that defendant was armed with a firearm during the

commission of the crime. CP 135, 136; RP 1277-78. The trial court found defendant guilty of unlawful possession of a firearm<sup>3</sup> in the second degree. RP 1291.

Prior to trial, defendant filed a motion in limine to prohibit the State from eliciting any evidence of prior bad acts and that defendant was a member of a gang. CP 183-84. The State objected, arguing that evidence of defendant's gang ties was necessary to show motive. RP 24. The State clarified that it did not intend to call a law enforcement officer to testify as a gang expert and ultimately moved to strike the gang aggravator alleged in the information. RP 28-29. The court reserved ruling and the State moved to admit evidence of defendant's involvement in a different shooting, which occurred one week after the charged events took place, alleging that the evidence was relevant to prove identity. RP 64, 67-69. The court excluded the evidence under ER 404(b). RP 76. The State then reminded the court that it had not yet ruled on whether evidence of defendant's gang membership was admissible. RP 77. The court held that any evidence related to the second shooting and any "opinion-type evidence from an expert" were excluded. RP 77.

After trial, defendant filed a timely notice of appeal. CP 163-75. On direct appeal, defendant initially challenged only the court's ruling admitting evidence of defendant's gang affiliation. Defendant later

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<sup>3</sup> Pretrial, defendant moved to sever the charges and waived a jury trial for the unlawful possession of a firearm charge. RP 30-31.

supplemented his brief, adding the issue of whether the trial court erred in concluding that defendant was not entitled to a lesser included instruction for manslaughter in the first and second degree. The Court of Appeals granted defendant's motion over the State's objection and, in a published opinion, reversed defendant's conviction based on the jury instruction issue. See *State v. Henderson*, 180 Wn. App. 138, 321 P.3d 298 (2014). The Court of Appeals did not reach the gang evidence issue.

This Court granted the State's petition for discretionary review.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO INSTRUCT THE JURY ON MANSLAUGHTER WHERE THAT CRIME IS NOT A LESSER INCLUDED CRIME TO FIRST DEGREE MURDER BY EXTREME INDIFFERENCE.

The right to instruct the jury on a lesser included offense is a statutory right. *State v. Bowerman*, 115 Wn.2d 794, 805, 802 P.2d 116 (1990); RCW 10.61.003, 10.61.006. A defendant is entitled to a lesser included offense instruction if two conditions are met: first, under the legal prong of the test, each element of the lesser offense must be a necessary element of the charged offense; and second, under the factual prong, the evidence must support an inference that only the lesser crime was committed. *State v. Sublett*, 176 Wn.2d 58, 83, 292 P.3d 715 (2012); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). “[T]he

factual test includes a requirement that there be a factual showing more particularized than that required for other jury instructions. Specifically, ... the evidence must raise an inference that only the lesser included ... offense was committed to the exclusion of the charged offense.” *State v. Fernandez–Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

An appellate court views the evidence that purports to support a requested instruction in the light most favorable to the party who requested the instruction at trial. *Fernandez–Medina*, 141 Wn.2d at 455–56. This Court reviews de novo the legal prong of a request for a jury instruction on a lesser included offense. *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010) (citing *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)). Where a trial court’s refusal to give instructions is based on the facts of the case, an appellate court reviews this factual determination for abuse of discretion. *LaPlant*, 157 Wn. App. at 687; *State v. Hunter*, 152 Wn. App. 30, 43, 216 P.3d 421 (2009). A trial court abuses its discretion if it bases its decision on an erroneous view of the law or applies an improper legal standard. *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

Under RCW 9A.32.060, first degree manslaughter requires proof that the defendant recklessly caused the death of another. RCW 9A.32.060(1)(a). In contrast under RCW 9A.32.030(1)(b), first degree murder by extreme indifference requires proof that the defendant “acted (1) with extreme indifference, an aggravated form of recklessness, which

(2) created a grave risk of death to others, and (3) caused the death of a person.” *State v. Pastrana*, 94 Wn. App. 463, 470, 972 P.2d 557 (1999). Here, the legal prong of the *Workman* test is satisfied. “The elements of first degree manslaughter are necessarily included in first degree murder by extreme indifference ....” *State v. Pettus*, 89 Wn. App. 688, 700, 951 P.2d 284 (1998).

That defendant fired the shots that ultimately killed Mr. Schwenke is not in dispute. The only remaining question is whether there is any evidence that would suggest that defendant’s actions were merely reckless.

*Pastrana* and *Pettus* are instructive. In both of these cases, the defendant was charged with first degree murder by extreme indifference. *Pettus*, 89 Wn. App. at 691; *Pastrana*, 94 Wn. App. at 467. Division II of the Court of Appeals held in both cases that the factual prong of the *Workman* test was not satisfied; therefore neither defendant was entitled to a lesser included instruction on first degree manslaughter. *Pastrana*, 94 Wn. App. at 471–72; *Pettus*, 89 Wn. App. at 700.

In *Pettus*, the defendant was convicted of first degree murder by extreme indifference after driving alongside the car of his victim and firing at it. 89 Wn. App. at 691–92. “The first shot hit the [victim’s car] in front of the rear tire. The second shot hit [the victim] in the left arm and penetrated his chest. Two other shots passed nearby or through the windshield and exited through the plastic rear window.” *Pettus*, 89 Wn. App. at 692. The court concluded that:

[t]he evidence of the force of a .357 magnum, the time of day, the residential neighborhood, and Pettus's admitted inability to control the deadly weapon, particularly from a moving vehicle, does not support an inference that Pettus's conduct presented a substantial risk of some wrongful act instead of a "grave risk of death."

*Pettus*, 89 Wn. App. at 700.

In *Pastrana*, the defendant was driving on the interstate when another car cut in front of him. 94 Wn. App. at 469.

Pastrana retrieved a gun from behind the seat[,] ... rolled down the passenger window and fired one shot out the window, directly in front of [the passenger's] face.

....

After he fired the gun, [the passenger] asked Pastrana what he was thinking. Pastrana replied that he was aiming for a tire. [The passenger] mentioned that "it's kind of hard to be aiming at anything when you are going down the freeway that fast."

*Pastrana*, 94 Wn. App. at 469. This court then held that "indiscriminately shooting a gun from a moving vehicle is precisely the type of conduct proscribed by RCW 9A.32.030(1)(b)." *Pastrana*, 94 Wn. App. at 471.

Here, the court declined to give the lesser included instructions based on the facts of the case. RP 1191. Therefore, the court's ruling is reviewed for an abuse of discretion. The trial court's reliance on *Pettus* and *Pastrana* was not erroneous as both cases are still relevant authority.

As in *Pastrana* and *Pettus*, defendant's actions demonstrated not mere recklessness regarding human life but extreme indifference, an aggravated form of recklessness. Defendant stood in front of a house

where a large party was being held. RP 187, 193-97, 408, 564, 937. People were “packed” in the front of the house facing the street. RP 931, 933-34, 966-67. He rapidly fired multiple shots indiscriminately into the crowd. RP 201, 345, 406-08, 564. Even viewed in the light most favorable to defendant, his actions do not support an inference that defendant presented only a substantial risk of death, as opposed to a grave risk of death. When measured against the defendants’ conduct in *Pettus* and *Pastrana*, the trial court was well within its discretion to deny the requested instruction.

Defendant claims that *Pettus* and *Pastrana* have been abrogated by later cases. Specifically, defendant claims that *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005), and *State v. Peters*, 163 Wn. App. 836, 261 P.3d 199 (2011), undermine the reasoning behind the earlier cases. Defendant’s claim is without merit.

In *Gamble*, the Washington Supreme Court held that manslaughter was not a lesser included offense of second degree felony murder where second degree assault was the predicate felony. 154 Wn.2d at 460. Washington courts have routinely held that manslaughter fails the legal prong of the *Workman* test. *Gamble*, 154 Wn.2d at 463-64. To prove felony murder, the State is required to prove the defendant intentionally assaulted another and recklessly inflicted bodily harm, whereas to prove manslaughter, the State is required to prove that the defendant recklessly caused the death of another person. *Gamble*, 154 Wn.2d at 467.

In *Peters*, Division I of this Court held that jury instructions which defined recklessness in the context of first degree manslaughter as “Peters knew of and disregarded a substantial risk that a wrongful act may occur,” was contrary to the Supreme Court’s analysis in *Gamble*. *Peters*, 163 Wn. App. at 849-50. The jury instruction should have defined recklessness as Peters knew of and disregarded “a substantial risk that death may occur.” *Peters*, 163 Wn. App. at 850.

To support his position that *Gamble* and *Peters* abrogated *Pettus* and *Pastrana*, defendant focuses on one statement made in *Pettus* where that court was focused on the *factual* prong of *Workman*: “the evidence showed much more than mere reckless conduct - a disregard of a substantial risk of causing a wrongful act.” *Pettus*, 89 Wn. App. at 700. Defendant claims that *Pettus* has been overruled because *Gamble* and *Peters* both hold that the elements of manslaughter require the State to prove that the defendants knew of and disregarded a substantial risk that a homicide may occur.” See, *Gamble*, 154 Wn.2d at 467. Yet the definition of a wrongful act as a homicide goes to whether an element of the crime is satisfied. Whether the elements of two crimes are similar is viewed under the *legal* prong of *Workman*. There is no dispute that first degree murder by extreme indifference and first degree manslaughter meet the legal prong of *Workman*. See *Pettus*, 89 Wn. App. at 700; *Pastrana*, 94 Wn. App. at 470-71. Neither *Gamble* nor *Peters* abrogate the analysis of *Pettus* and *Pastrana* because the difference between first degree murder

by extreme indifference and first degree manslaughter has never been the risk of death, but *the degree of risk involved*. See *State v. Dunbar*, 117 Wn.2d 587, 549, 817 P.2d 1360 (1991). Both *Pettus* and *Pastrana* correctly focused on the degree of risk, not the type.

Defendant did not fire into the air, or at the ground, or even toward an area he believed to be empty. Each of these situations might have supported a finding that defendant acted recklessly when he knew of and disregarded that a substantial risk of death may occur. Defendant's conduct did not merely create an unreasonable risk of death, but created a very high degree of risk of death. Thus the evidence does not support a finding that only the lesser offense was committed to the exclusion of the greater offense. Firing a gun indiscriminately into a crowd is exactly the type of conduct proscribed by RCW 9A.32.030(1)(b).

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED EVIDENCE OF DEFENDANT'S GANG AFFILIATIONS WHERE THE EVIDENCE WAS RELEVANT TO SHOW MOTIVE AND WAS NOT UNDULY PREJUDICIAL.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Morales*, 154 Wn. App. 26, 37, 225 P.3d 311, *affirmed in part, reversed in part*, 173 Wn.2d 560 (2012). A trial court's ER 404(b) ruling will not be disturbed absent a manifest abuse of discretion such that no reasonable trial judge would have ruled as the trial court did. *State v.*

*Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283–84, 165 P.3d 1251 (2007).

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). 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 *Yarbrough*, 151 Wn. App. 66; *State v. Boot*, 89 Wn. App. 780, 950 P.2d 964, review denied, 135 Wn.2d 1015, 960 P.2d 939 (1998); *Campbell*, 78 Wn. App. 813.

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). *Boot*, 89 Wn. App. at 788–790; *Yarbrough*, 151 Wn. App. 66. “ER 404(b) is not designed ‘to deprive the State of relevant evidence necessary to establish an essential element of its case,’ but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.” *State v. Mee*, 168 Wn. App. 144, 154, 275 P.3d 1192, (2012) (citing *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

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. 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).

In *Mee*, this Court reiterated its holding that evidence of gang affiliation is admissible to show motive from *Yarbrough*. 168 Wn. App. at 156-57. Yet the *Mee* court held that, under the facts of the case, the admission of Mee’s gang affiliations was error because the danger of unfair prejudice substantially outweighed its probative value. 168 Wn. App. at 157. The facts of the case involved generalized evidence regarding the behavior of gangs and gang members, and testimony that gang members were expected to assist other gang members in a fight or risk losing respect. *Mee*, 168 Wn. App. at 158-59. The court found that the testimony was irrelevant to prove that Mee killed the victim by extreme indifference when he fired a gun into an occupied house. *Mee*, 168 Wn. App. at 159. Absent evidence showing adherence by the defendant or the defendant’s alleged gang to those behaviors *and* that the evidence was not relevant to prove the elements of the charged crime, the admission of gang affiliation evidence served no purpose but to allow the State to suggest that Mee’s gang membership showed his propensity to commit the charged crime. *Mee*, 168 Wn. App. at 159. The court ultimately found the error harmless and affirmed Mee’s conviction for first degree murder by extreme indifference. *Mee*, 168 Wn. App. at 160.

Here, the court did not abuse its discretion when it admitted evidence of the defendants' gang affiliations because defendant's membership in the Hilltop Crips was relevant to show motive. To convict defendant of first degree murder by extreme indifference, the State had to prove beyond a reasonable doubt that 1) defendant acted with extreme indifference, an aggravated form of recklessness; 2) he created a grave risk of death to others; and 3) his actions caused the death of a person. *See* CP 120-134 (Jury Instruction 6); *see also*, RCW 9A.32.030(1)(b).

Defendant believed Mr. Johnson had been shot by a rival gang. RP 1166-67. Witnesses at the hospital where Mr. Johnson was taken heard defendant express his frustration with his fellow gang members because no one was offering to retaliate. RP 556-57. When defendant left the hospital, he went to a party where he suspected members of the rival gang to be present. RP 855. When defendant fired into the crowd, he yelled gang-related phrases. RP 233, 237-38, 753, 1024. Defendant's actions were clearly retaliatory and would not have occurred but for defendant's membership in the Hilltop Crips. Evidence of defendant's gang affiliation had a nexus to the crime and it supported the State's theory by showing that the crime was gang-motivated retaliation.

Unlike *Mee*, here there was no generalized testimony about the behavior of gangs and the State made no suggestion to the jury that

defendant was guilty merely because gang members had the propensity to commit murder. Nor was the evidence offered to show the reason for an escalation of violence as was the case in *Scott*. The evidence was used to show that defendant's motive to commit the crime.

- a. The record is sufficient to show that the trial court conducted a 404(b) analysis when it found that defendant was a member of a gang and that the evidence of defendant's gang affiliations were more probative than prejudicial and were relevant to show motive.

Before a court admits evidence under an exception to ER 404(b) 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. The trial court must conduct this analysis on the record. *Foxhoven*, 161 Wn.2d at 175. However, if the record shows that the assigned trial court adopted one party's express argument as to the weighing of probative and prejudicial value, then there is no error. *State v. Pirtle*, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995).

Moreover, such error is harmless when (1) there is a sufficient record to determine that, had the court explicitly balanced prejudice and

probative value, it still would have admitted the evidence, or (2) the trial's result would have been the same without the challenged evidence. *State v. Carelton*, 82 Wn. App. 680, 686-87, 919 P.2d 128 (1996).

Here, the court's 404(b) analysis is implicit in its ruling. The State sought to introduce two pieces of evidence: the fact of defendant's membership in the Hilltop Crips, and evidence that defendant was involved in a second shooting which occurred seven days after the events which led to the current charge. RP 23-24; 67. The State argued that defendant's gang affiliation was necessary to show motive and the second shooting was necessary to show identity. RP 24, 67. Prior to ruling on the evidence, the parties held a CrR 3.5 hearing to determine if defendant's statements to law enforcement were admissible at trial. RP 43. During the interview, defendant admitted that he was a Hilltop Crip. RP 62. The court acknowledged that he saw that admission. RP 62. Defendant's admission was proof by a preponderance of the evidence that defendant was a member of a gang.

Defendant argued that evidence of the later shooting was inadmissible under ER 404(b). RP 70. Defendant argued that there was not proof by a preponderance of the evidence that the misconduct occurred. RP 70. Defendant also argued that evidence of the second shooting was more prejudicial than probative. RP 71-73. The court rejected the State's argument and agreed with defendant that the second shooting was inadmissible under ER 404(b). RP 76. Clearly the court

found that the State had not presented sufficient evidence to prove defendant had committed the misconduct and it was more prejudicial than probative. When the State asked the court about the evidence of defendant's gang affiliation, the court responded, "well, based on what you said[.]" RP 77. The court's statement shows that it was adopting the State's argument.

The court balanced the probative value of the evidence offered by the State against its prejudicial effect. The court expressly found that some of the evidence was unduly prejudicial, inferring that the remaining evidence was not. While the court did not specifically conduct the ER 404(b) analysis of whether defendant's gang membership was admissible on the record, the necessary balancing is inherent in the court's ruling.

Moreover, even if the court did err by not conducting the analysis on the record, such error was harmless. The record was sufficient to determine that, had the court explicitly balanced prejudice and probative value, it still would have admitted the evidence.

- b. The trial court did not abuse its discretion when it allowed the State to explore defendant's gang affiliation on cross-examination.

Cross-examination is generally limited to the scope of the direct examination. *State v. Hobbs*, 13 Wn. App. 866, 868, 538 P.2d 838 (1975). But a trial court has great discretion in setting the scope of cross-examination. *Hobbs*, 13 Wn. App. at 868.

Here, the State did not exceed the scope of direct examination. On direct examination, defendant described his activities on the night of the shooting, stating that he was spending time with “Sleeze” and Mr. McClarron, but denied spending time with other Hilltop Crips. RP 1147, 1162. Defendant testified that he and Mr. Johnson were close, but denied trying to get the people at the hospital to retaliate. RP 1146, 1148, 1153. He also admitted that he went to the location of Mr. Johnson’s shooting and to the Yakima Street party with Mr. Johnson’s gun in the waistband of his trousers. RP 1151, 1155. Finally, defendant claimed that he could not believe that Mr. McClarron was shooting people. RP 1158-59.

On cross-examination and without objection, defendant testified that he was a member of Hilltop Crips. RP 1163. The prosecutor asked defendant if, as a member of the gang, he knew about issues related to the gang. RP 1166. Defendant objected as beyond the scope. RP 1166. The court overruled the objection. RP 1166. When defendant testified that he went to the Yakima Avenue party because it was “no big deal” that Mr. Johnson had been shot, the prosecutor asked “That’s the way gang members act when their homie gets shot?” RP 1170. The court overruled defendant’s objection and defendant responded affirmatively. RP 1170.

The questions asked of defendant did not clearly exceed the scope of direct examination. They clarified how and why defendant had Mr. Johnson’s gun, why he did not go to the party with Mr. Johnson, his

knowledge as to the circumstances surrounding Mr. Johnson's shooting, and why he attended the Yakima Avenue party with a gun. The further testimony regarding defendant's knowledge of whether the 96<sup>th</sup> Street Murderville gang had been involved impeached his direct testimony that, despite hearing that one of his closest friends had been shot, defendant went to the house on 56<sup>th</sup> and Yakima merely to "party."

- c. Defendant was not prejudiced by the introduction of "generalized gang related evidence" as no such evidence was admitted.

Washington courts have determined generalized gang evidence to be general evidence regarding the behavior of gangs and gang members. See *Mee*, 168 Wn. App. at 159; see also *State v. Bluehorse*, 159 Wn. App. 410, 429, 248 P.3d 537 (2011). Such evidence serves no purpose absent 1) evidence showing adherence by the defendant or the defendant's alleged gang to those behaviors, and 2) that the evidence relating to gangs is relevant to prove the elements of the charged crime. *Mee*, 168 Wn. App. at 159.

Here, there was no general evidence regarding the behavior of gangs or gang members. There was no testimony, expert or otherwise, that gangs, or gang members, in general retaliate for assaults against their members. There was no nebulous or non-specific gang evidence presented. The evidence was all specific as to defendant's actions and motivations in shooting Mr. Schwenke.

In addition, defendant's claim that the prosecutor tied the credibility of the witnesses to the witnesses' gang membership is equally without merit. The prosecutor's statement, made in rebuttal closing argument, was in direct response to defendant's argument that the State could have, but did not, call additional gang members as witnesses. RP 1260. The prosecutor noted that, without some kind of leverage over the person, the State was unable to secure testimony from one gang member against another. RP 1260. Hence, every gang member who testified at trial was doing so under a plea agreement with the State. *See* RP 574, 865-66, 954. A prosecutor is "entitled to make a fair response to the arguments of defense counsel." *State v. Gregory*, 158 Wn.2d, 759, 863, 147 P.3d 1201 (2006).

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm defendant's convictions.

DATED: August 13, 2014.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



Kimberley DeMarco  
Deputy Prosecuting Attorney  
WSB # 39218

Certificate of Service:

The undersigned certifies that on this day she delivered by E-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.

8/5/14 [Signature]  
Date Signature

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Please see attached the State's Supplemental Brief in the below stated matter:

St. v. Henderson  
No. 90154-6  
Submitted by: K. DeMarco  
WSB # 39218

Please call me at 253/798-7426 if you have any questions.

Therese Kahn  
Legal Assistant to K. DeMarco