

NO. 42603-0

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

STATE OF WASHINGTON, RESPONDENT

v.

MARSELE KENITH HENDERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy, Presiding Judge

No. 08-1-05882-6

BRIEF OF RESPONDENT

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

1. Did the trial court properly exercise its discretion when it admitted evidence of defendant's gang affiliation where such evidence was relevant to show motive and was not unduly prejudicial?

B. STATEMENT OF THE CASE.

1. Procedure

On December 12, 2008, the State charged MARSELE KENITH HENDERSON, hereinafter "defendant," with one count of murder in the first degree, and one count of unlawful possession of a firearm in the second degree. CP¹ 1-2. The State alleged that defendant committed the murder while armed with a firearm and 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." CP 1-2.

The case² was called to trial on June 9, 2011, before the Honorable John A. McCarthy. RP 1. Prior to trial, defendant filed a motion in limine

¹ Citations to Clerk's Papers will be to "CP." The trial transcript was sequentially numbered, so the State will cite to the verbatim report of proceedings for the trial as "RP." The sentencing hearing was not sequentially numbered, so citations to the sentencing hearing will be to "RPS."

² Prior to pretrial rulings in this case, the parties completed business remaining from defendant's previous jury trial for robbery in the first degree, attempted robbery in the first degree, and unlawful possession of a firearm. RP 11-15.

to prohibit the State “without a prior offer of proof and ruling from the Court,” 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 State noted that the gang evidence it sought to introduce was independent of the aggravator. RP 29.

Defendant moved to sever the charges and waived a jury trial for the unlawful possession of a firearm charge. RP 30-31. The court granted the motion and accepted defendant’s waiver. RP 31.

The court held a CrR 3.5 hearing to determine if defendant’s statements to law enforcement were admissible. RP 42-61. The court held that defendant was properly advised of his Miranda warnings, that his statements to the officers were freely and voluntarily made, and that his statements were admissible. RP 62. The State noted that one of defendant’s statements was an admission that he was a Hilltop Crip member, and the court acknowledged that it had seen that statement when it made its ruling. RP 62.

The State made an offer of proof of defendant's involvement in a shooting which occurred one week after the current charge took place. RP 64. The State's argument was that evidence of the second shooting was relevant to identity. RP 67-69. Defendant objected, arguing that the State had not made a showing that defendant was actually involved in that shooting, it was not relevant, and it was more prejudicial than probative. RP 70-73. The court excluded the evidence, finding that the State had not met the threshold of ER 404(b) in terms of showing defendant's involvement. RP 76. The State³ then reminded the court that it had not yet ruled on whether evidence of defendant's gang membership was admissible:

MR. GREER: The issue of gang evidence I don't think you completely ruled on.

THE COURT: Well, based on what you said —

MR. GREER: The stuff that I have offered, I'm assuming, is in?

THE COURT: Right,

MR. GREER: Okay. But just this second incident and anything related to it is out?

THE COURT: Opinion-type evidence from an expert, okay.

RP 77.

³ The State also asked the court to arraign defendant on new charges, also gang-related. RP 65, 104. The court arraigned defendant on 26 counts of burglary related charges in Pierce County Cause No. 11-1-02526-0; 39 counts of burglary related charges in Cause No. 11-1-02528-6; and 24 counts of burglary and firearm related charges in Cause No. 11-1-02527-8. RP 105-14.

On July 8, 2011, the 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 court found defendant guilty of unlawful possession of a firearm in the second degree. RP 1291.

On August 19, 2011, the court held a sentencing hearing for three different cause numbers, including the present case. RPS 2. The court imposed a high-end, standard-range sentence⁴ of 608 months in custody. CP 147-59.

Defendant filed a timely notice of appeal. CP 163-75.

2. Facts

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

⁴ Defendant had an offender score of 9, giving him a standard range of 411 to 548 months on Count I, and 33 to 43 months on count II, together with a 60 month firearm sentence enhancement on count I. CP 147-59; RPS 6-7. Defendant received firearm enhancements on another case, adding 96 months to be served consecutively to this case. RPS 6.

That same night, Joshua Adams was having a party at his house on 56th and Yakima. RP 181-82. Mr. Adams had done extensive advertising for his party, so members of the public were invited provided they paid a cover charge and followed a dress code. RP 182-85. Mr. Adams also hired security for the party. RP 185. One of the security members, Victor Schwenke was shot and killed during the party. CP 78, 544. 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.

Police interviewed defendant after Mr. Schwenke's shooting. During the interview officers asked defendant about his actions during and after Mr. Johnson's shooting. RP 530-33. Defendant told them "Let's cut to the chase. You want to know about the shooting on Yakima." RP 533. Defendant said he read in the paper that Mr. Schwenke was killed and he heard that it was the 96th Street Murderville gang who did the shooting. RP 533-34. He identified the shooter as "Fat something." RP 534. Defendant denied involvement with Mr. Schwenke's shooting and claimed he never went to the party on 56th and Yakima. 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 indicated that defendant was near the location of the Yakima Avenue party at the time of the shooting. CP 79; RP 768-69.

*Koloneus McClarron*⁵

Mr. McClarron was spending the evening with defendant and “Sleeze.” RP 918-19. When they got word that Mr. Johnson had been shot, they went to the hospital. RP 921. While they were there, no one mentioned that Mr. Johnson had died. RP 926. Despite having heard that Mr. Johnson had been shot, he and defendant were “calm and chill,” and decided to go to a party to “clear the head.” RP 928. Later he admitted that, while they were “chill,” they were “a little somewhat angry.” RP 930. When they got to the party on Yakima, they parked their car in front of the house and “chilled.” RP 932. As they were “chillin’,” partygoers cell phones started ringing and he discovered that Mr. Johnson had died from his wounds. RP 935. Mr. McClarron kept describing the scene as “chill,” until confronted with the shooting. *See* RP 936-37. Finally Mr.

⁵ Due to the large number of witnesses and convoluted testimony presented in this case, the State is summarizing each witness’s testimony individually for the sake of clarity.

McClarron admitted that he saw defendant shooting into the crowd. RP 938. He heard defendant say “What’s up cuz⁶,” just before he started shooting. RP 977.

Mr. McClarron ran away from the scene and went to William Terry’s house. RP 938-39. While at Mr. Terry’s house, he saw defendant talking and “just chillin’.” RP 944. He heard defendant say that “he got into it,” but did not pay attention to anything else. RP 944-45.

Mr. McClarron never called the police to report the shooting initially because he “didn’t feel like [he] had anything to do with anything.” RP 947-48. Later, when he discovered that Mr. Schwenke had died, he did not call the police because he was scared of “losing [his] life over something.” RP 949. When originally interviewed by police, Mr. McClarron informed them that he had been present at the party, but never saw the shooting. RP 950-51.

Defendant and Mr. McClarron are both affiliated with the Hilltop Crips. RP 923-24. McClarron testified as part of a plea agreement with the State. RP 954.

Nakeshia Brooks

Ms. Brooks attended the party on Yakima Avenue. RP 1010. On her way to the party, she received the phone call telling her Mr. Johnson

⁶ According to Mr. McClarron, “cuz” is a word Crips use if there is a “beef” with someone, or could be used with a “homey.” RP 976-77.

had been shot. RP 1012. She saw defendant at the party on Yakima and stopped to give him a hug as she was leaving. RP 1014. When she got to her car, she heard shots fired. RP 1016. She saw the shooter standing in the middle of the street, but she could not describe the person. RP 1018-19. Before the first shot was fired, she heard someone shout “this is Hilltop.” RP 1024. She also knew that many people affiliated with 96th Street Murderville were present. RP 1024.

Jamilah Adjepong

Ms. Adjepong was at the Yakima Avenue party when she heard that Mr. Johnson had been shot. RP 849. She saw defendant and Mr. McClarron arrive at the party just as people were leaving to go to the hospital. RP 854. Mr. McClarron asked if people from 96th Street Murderville were present. RP 855. She told them that the 96th Street people had already left the party. RP 855, 859. She saw defendant pull out a gun and start shooting toward the house. RP 856. Mr. McClarron was standing near defendant as he was shooting. RP 857. Ms. Adjepong testified as part of a plea agreement with the State. RP 865-66.

Cynthia Gillis

Ms. Gillis was also attending the Yakima Avenue party. RP 827. She saw that the shooter was a man matching defendant’s description. RP 838.

Javonnie Jeter

Ms. Jeter was living at the house on 56th and Yakima Avenue the night of the shooting. RP 772. The party being held that night was for her birthday. RP 772. During the night, she heard someone arguing with security and then heard gunshots. RP 776, 779. At trial, she could only describe the shooter as a black male, but during her interview with law enforcement, she was able to give more detail. RP 780, 792-94. She explained to the officers that there were two black men involved, and the darker of the two men raised and fired a handgun. RP 794.

Reynold Taii

Mr. Taii was in charge of security at the party. RP 733. Someone told him there was a person in front of the house waving a gun, so he went to investigate. RP 736. He heard the shots fired before he made it to the front of the house. RP 737, 746-47. Mr. Taii saw “one gunman and his buddy.” RP 749. After the first shot, he heard the men bragging, some “Hilltop jibber jabber.” RP 753. He could not tell which man made the Hilltop statement. RP 753. Mr. Taii knew Mr. McClarron from high school and recognized him as one of the men involved. RP 749-50. He did not know defendant, but the second person involved matched defendant’s description. RP 751. Mr. Taii’s brother returned fire, Mr. McClarron and defendant ran away. RP 752-54.

Mr. Taii was not cooperative with police because he was considering “vigilante justice.” RP 757-58. Mr. Taii never clarified which man was the shooter, but indicated that his need for justice was “satisfied” when he heard defendant had been arrested. RP 765-66.

Musical Tulifua

Mr. Tulifua was working security at the Yakima Avenue party. RP 712. Mr. Schwenke was Mr. Tulifua’s uncle. RP 712. Mr. Tulifua did not see the shooter or any vehicle associated with them. RP 719. He did testify that 96th Street Murderville members had been at the party, but were turned away approximately fifteen minutes before the shooting. RP 715.

Kerry Edwards

Mr. Edwards was at the Yakima party when he heard about Mr. Johnson’s shooting. RP 549. He went to the hospital to see Mr. Johnson. RP 549. When he arrived, he saw defendant and Mr. McClarron. RP 551-53. Everyone was upset when they heard, at the hospital, that Mr. Johnson had died. RP 556. Defendant was angry, and demanded 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 in a maroon Toyota Camry. 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,⁷” 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.

Mr. Edwards testified pursuant to a plea agreement with the State. RP 574. Defendant’s mother owned a maroon Toyota Camry, but it had been destroyed in October 2008. RP 1136. Mr. Parker was actually in custody at the Pierce County Jail from September 10, 2008 until November 30, 2008. RP 1136.

Cassandra Modeste

Ms. Modeste was with a group of friends at the Yakima Avenue party when she heard that Mr. Johnson had been shot. RP 428, 431. As she was leaving the party to go to the hospital, she saw Mr. McClarron, who she knew from high school, and a man matching defendant’s

⁷ A big homey is “somebody you look up to,” and it is common to have one when a person joins a gang. RP 567.

description. RP 445-46. She knew Mr. McClarron to be affiliated with the Hilltop Crips. RP 447. Her own family associates with the “Knockouts” and the 96th Street Murderville street gangs. RP 447. Before she got to her car, she heard shots fired. RP 432, 434. She saw Mr. McClarron go running past her and defendant run in the other direction. RP 437, 450-54. She did not see the shooter, but thought it was Mr. McClarron because he was closest to where the shots were coming from. RP 466. She had seen Mr. McClarron backing away from the house with his hand up, but never saw a gun in his hand. RP 454, 467.

Jose Martinez

Mr. Martinez lived at the house on 56th and Yakima Avenue. RP 324. During the party, Mr. Martinez told defendant that he would have to pay a cover charge to enter. RP 333. Defendant pulled a gun from his waistband and stated that the gun was his entry fee. RP 333. Mr. Martinez immediately left to inform security. RP 337. Within a few moments, he heard gunshots. RP 340. When he ran outside, he saw Mr. Schwenke on the ground and “a lot of blood.” RP 347. Mr. Martinez thought the gun looked like a .45 caliber, but he testified that he was not very familiar with guns. RP 383.

At trial, Mr. Martinez originally testified that Mr. McClarron, “the light-skinned fellow,” was firing the shots. RP 351. Later, when confronted with his statements to law enforcement at the time of the shooting, Mr. Martinez agreed that his statements to the officers was more

accurate than his memory at trial and that defendant was actually the shooter. RP 391.

Joshua Adams

Mr. Adams lived at the house on 56th and Yakima Avenue along with Mr. Martinez and Ms. Jeter. RP 181. At one point, he had told a group of people who he would not allow in that they needed to leave. RP 194-95. Among this group was Mr. McClarron and defendant. RP 196, 211. Later, shots were fired and Mr. Schwenke was killed. RP 198, 216. Mr. Adams testified that he heard Mr. McClarron say “Hey, cuz,” and someone say “this is Hilltop,” before the shots were fired. RP 233, 237-38. Mr. Adams recognized the word “cuz” as being associated with “Crip.” RP 236. He recognized the men in front of his house as either Crips or Hoover Crips. RP 210. Mr. Adams called his own gang to prepare for retaliation. RP 210. While Mr. Adams admitted that he did not see the shooting, he identified defendant as the more vocal person and Mr. McClarron as the shooter. RP 309, 312.

Melanna Henderson

Ms. Henderson, defendant’s sister, testified on defendant’s behalf. RP 1102. According to Ms. Henderson, Ms. Adjepong had called her before trial and said she was not sure if defendant had been at the party, but that she had to testify against him as part of a plea agreement. RP 1103. According to Ms. Henderson, Ms. Adjepong did not want to “cook” defendant, but had to because of her own legal problems. RP 1109. Ms.

Henderson acknowledged that Mr. Johnson was defendant's best friend and that she had not been with defendant on the night of the shooting. RP 1104.

Defendant's testimony

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 was not encouraging anyone to retaliate for the shooting. RP 1152. He left the hospital within five or ten minutes of arrival because Mr. McClarron wanted to go to the Yakima Avenue party. RP 1153.

Defendant, Mr. McClarron and Sleeze all left to go to the party. RP 1154. Sleeze dropped them off and left in the car. 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 "upset, a little angry." RP 1157. Defendant then claimed that he heard shots and could not believe Mr. McClarron was shooting. RP 1157-59. Defendant claimed 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 and 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, but claimed that he could not change his street name because the jail would not allow it. RP 1164-66. Defendant also admitted that he had advised Mr. Johnson not to go to the party where he was shot because of an issue between Hilltop Crips and 96th Street Murderville. RP 1166-67. According to defendant, the party was too close to the Murderville gang's territory. RP 1167. 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. Defendant acknowledged that Mr. Johnson had never lived with Mr. McClarron and the two men were not close at the time of Mr. Johnson's death. RP 1184.

Defendant also claimed that the gun he was carrying that night was a .45 caliber, but he could not remember what happened to the gun. RP 1168.

C. ARGUMENT.

1. 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). A trial court abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Lord*, 161 Wn.2d at 284.

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

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

Evidence of gang affiliation is considered prejudicial. *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136, 1155–1156 (2009). Admission of such evidence is measured under the standards of ER 404(b). *State v. Boot*, 89 Wn. App. 780, 788–790, 950 P.2d 964, *review denied*, 135 Wn.2d 1015, 960 P.2d 939 (1998); *Yarbrough*, 151 Wn. App. 66. “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. The decision to admit or deny admission of ER 404(b) evidence is reviewed for abuse of discretion. *Lane*, 125 Wn.2d at 831. Discretion is abused when it is exercised on untenable grounds or for

untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Relevant evidence is admissible; irrelevant evidence is not admissible. ER 402. Relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. ER 403. Evidence of prior bad acts is not admissible to show that the person acted in conformity on a particular occasion, but is admissible for other purposes such as “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

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 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. The court held that, 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. Nonetheless, 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); *Yarbrough*, 151 Wn. App. at 82-83.

Defendant had warned his friend and fellow Hilltop Crip member against going to a party located within the territory of the 96th Street Murderville gang. RP 1166-67. Later that evening, defendant discovered that Mr. Johnson had been shot while at that party and he was so concerned with his own safety that he had to bring a gun with him to the location. RP 1151, 1167. 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. Defendant then went to a party where he suspected 96th Street Murderville members to be present. RP 855. When defendant fired into the crowd, he yelled gang-related phrases. RP 233, 237-38, 753, 1024. Defendant's action, mere hours after the shooting death of a fellow HTC, was 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 the facts in *Mee*, 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, as a gang member, defendant 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*. Rather, the evidence was used to show that defendant responded in-kind to the shooting death of his fellow gang member.

- 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.

ER 404(b) prohibits a court from admitting “[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith.” This prohibition encompasses not only prior bad acts and unpopular behavior but any evidence offered to “show the character of a person to prove the person acted in conformity” with that character at the time of a crime. *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). 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. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). 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 noted that there was no witness to identify him at that shooting, implying 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 asked the State to respond to the issues it saw with admitting evidence of the second shooting. RP 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 clearly 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 analysis of whether defendant's gang membership was admissible

under ER 404(b) 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.

The evidence that the court ruled admissible was relevant to show motive for defendant to go to a party and open fire into a crowd. Defendant was retaliating for the shooting death of a fellow gang member. He also made gang-affiliation statements contemporaneously with the shooting. Nearly every person who testified at trial, outside of law enforcement, was either a member of, or spent significant time with, criminal street gangs. *See* RP 210, 447, 547-48, 923-24, 1024. The State did not offer any expert testimony relating to "generalized gang behavior," but presented only witnesses who knew defendant personally. While those witnesses testified that defendant was a member of Hilltop Crips, none of them suggested that defendant merely acted in conformity with gang behavior. The fact that defendant was a member of a gang as well was not unduly prejudicial given the testimony in the case. It is clear that the court would have admitted the evidence if it had performed the balancing test on the record.

- 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 D'Orman, but denied spending time with other Hilltop Crips. RP 1147, 1162. Defendant testified that he and Mr. Johnson were "real close friends." RP 1146. He stated that Mr. Johnson had gone to a party, which defendant did not attend. RP 1148. Defendant denied trying to get the people visiting Mr. Johnson at the hospital to retaliate. RP 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 D'Orman was actually shooting and did not understand why. 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. The prosecutor then clarified that defendant had actually advised Mr. Johnson not to attend the party, as it was too close to the 96th Street Murderville gang's territory. RP 1166-67. The prosecutor asked if defendant felt the need to keep Mr. Johnson's gun for protection, when he was not attending the same party. RP 1167-68. The prosecutor asked if defendant suspected 96th Street Murderville members of shooting Mr. Johnson, which defendant denied. RP 1168-69. The prosecutor also clarifies that Mr. Johnson and the people defendant was spending time with that evening were fellow Hilltop Crip members. RP 1169. Defendant testified that he went to the Yakima Street party because it was "no big deal" that Mr. Johnson had been shot. RP 1170. Defendant objected to the prosecutor asking "That's the way gang members act when their homie gets shot?" RP 1170. The court overruled the 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 when he was not attending the same party as Mr. Johnson, 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 Street party with a gun. The further testimony regarding defendant's knowledge of whether the 96th 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 56th 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. The evidence in this case was that defendant was a member of a gang, his fellow gang member was shot while he was in rival gang territory, defendant knew of his friend’s location when he was shot, and, believing that the rival gang members were present, defendant shot into a crowd at the Yakima Street party in retaliation. 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. Rather, the evidence was all specific as to defendant's actions and motivations in shooting Mr. Schwenke.

Defendant's claim actually appears to be entirely a challenge to the credibility of the State's witnesses. *See* Appellant's Brief at 20-22. Issues concerning conflicting testimony and the credibility of witnesses are for the finder of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

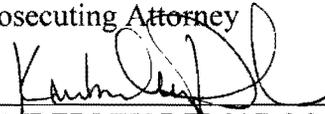
In addition, defendant's claim that the prosecutor tied the credibility of the witnesses to the witnesses' gang membership is equally without merit. The prosecutor's statement, made in rebuttal closing argument, was in direct response to defendant's argument that the State did not call additional gang 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.

The State respectfully requests this Court to affirm defendant's conviction for murder in the first degree where the trial court properly exercised its discretion in admitting evidence of defendant's gang affiliation.

DATED: September 4, 2012.

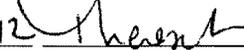
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The undersigned certifies that on this day she delivered by ~~U.S. mail or~~ ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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.

9.5.12 
Date Signature

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