68534-1

68534-1

No. 68534-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CURTIS WALKER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce Hilyer

BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Washington Constitutional Provisions

United States Supreme Court Decisions

Federal Court of Appeals Decisions

United States Constitutional Provisions

Statutes

Rules

Journals and Treatises

Other Authorities

A. SUMMARY OF ARGUMENT

Like membership in a church, social club, or community organization, the right to associate with street gangs is protected by the First Amendment. At the same time, jurors view evidence of gang membership as proof that the accused is disposed towards criminality. Thus, unless the State can establish a nexus between the fact of gang affiliation and an essential ingredient of the charged offense, the introduction of gang evidence creates an impermissible risk that the jury will render a guilty verdict based upon the defendant's beliefs, in violation of his First Amendment right to free assembly, and is reversible error.

At Curtis Walker's murder trial, the State prevailed upon the trial court to admit evidence that Walker was an "OG" in the "Bloods" street gang. The State theorized that this evidence was relevant because Alajawan Brown, who was wearing blue, was shot by an unknown gunman after Walker's friend, Johnathon Jackson, was shot, allegedly on "Crips" territory, by a man wearing blue who then fled. The State theorized that Walker shot Brown because he mistook him for Jackson's shooter. But the State did not explain what relevance Walker's gang affiliation had to its mistaken identity theory, nor did the State present evidence to contextualize the gang affiliation evidence for the jury. Walker's involvement in Brown's shooting was otherwise contested, and

the evidence suggested that another man, an associate of Walker and Jackson, may have been the killer.

The admission of the prejudicial and irrelevant evidence of Walker's affiliation with the "Bloods" gang prevented Walker from receiving a fair trial, requiring reversal of his murder conviction. Additionally, the trial court erred in denying Walker's motion to substitute counsel, and various deficiencies in the instructions provided to the jury separately and cumulatively require reversal of Walker's convictions.

B. ASSIGNMENTS OF ERROR

1. Contrary to Walker's due process right to a fair trial as secured by the Fourteenth Amendment and article I, section 3 of the Washington Constitution, the trial court erred in admitting evidence of gang membership.

2. The evidence of gang membership was admitted without proper foundation and violated Walker's First Amendment right to freedom of association.

3. The admission of evidence of gang membership violated ER 404(b).

4. Contrary to Walker's Sixth Amendment and article I, section 22 right to conflict-free counsel, the trial court erroneously denied Walker's motion to substitute counsel.

believed he was the man who shot Jackson, insufficient to justify the admission of evidence of Walker's gang affiliation?

2. The State's sole claim of a "nexus" between Walker's gang affiliation and the shooting of Brown was that Brown was wearing similar clothing to the man who had just shot Walker's friend and was possibly was a "Crip." The State did not explain why Walker's gang affiliation supplied a motive for the shooting. Did the admission of the gang affiliation evidence violate Walker's First Amendment right to free assembly?

3. When an accused person has sought substitution of counsel, the reviewing court must consider: (1) the extent of the conflict; (2) whether the trial judge made an appropriate inquiry into the extent of the conflict; and (3) the timeliness of the motion to substitute counsel. The inquiry is necessary for an informed decision, and the failure to conduct an adequate inquiry requires reversal. Walker twice moved for substitution of counsel; counsel confirmed that communications had irretrievably broken down and that the breakdown was not Walker's fault; Walker filed a bar grievance against his counsel; and counsel told the court that additional factors which counsel felt uncomfortable discussing in open court supported the conclusion that communications had irreconcilably broken down. Did the

trial court violate Walker's right to conflict-free counsel when it failed to inquire further into the circumstances underlying the breakdown?

4. An accused person is constructively denied his Sixth Amendment right to the assistance of counsel when he is forced to go to trial with a lawyer with whom he has a conflict. A conflict exists where there is an irreconcilable breakdown in communications between the accused and his lawyer. In this situation, the question of the adequacy of counsel's performance is irrelevant; rather, prejudice is presumed. Was Walker constructively denied his right to counsel when he was forced to go to trial with a lawyer with whom he had an irreconcilable conflict?

5. Article IV, section 16 of the Washington Constitution prohibits judicial comments on the evidence. A judge comments on the evidence when he conveys his personal attitude towards the merits of the case or instructs the jury that matters of fact have been established as a matter of law. The operability of a firearm possessed by Walker was a disputed fact. Despite the absence of operability language in the statutory definition of "firearm," Jury Instruction 19 resolved the dispute by telling the jury that a gun was a "firearm" if it could be rendered operable within a reasonable period of time. Was Jury Instruction 19 a prohibited judicial comment on the evidence?

6. Did the "to convict" instructions given by the court, which informed the jury that they had a "duty" to convict if the State proved the charged offenses beyond a reasonable doubt, violate Walker's federal and state constitutional right to a jury trial?

7. Should the trial court have given the jury Walker's proposed "to convict" instructions which respected Walker's inviolate right to trial by jury by omitting language that directed a verdict?

D. STATEMENT OF THE CASE

1. The shooting of Alajawan Brown.

Alajawan Brown was shot and killed outside a 7-11 in South Seattle on April 29, 2010. RP 377-81, 535.[1] Brown, who was 11 years old, had just gone to Wal-Mart to buy football cleats and was walking from a bus stop near the 7-11 towards his home. RP 541.

Earlier on the day of the shooting, appellant Curtis Walker was at a music studio working on a rap music project. RP 1327. There, he received a telephone call from a friend, Johnathon Jackson. RP 1131,

[1] The verbatim report of trial proceedings is contained in several consecutively paginated volumes, which are referenced herein as "RP" followed by page number. Pretrial proceedings that took place between March 25, 2011, and October 17, 2011 are contained in a single bound volume, and are referenced herein as "RP (Pretrial)" followed by page number. Transcripts of jury voir dire and opening statements were prepared pursuant to a supplemental order of indigency. Those are referenced as "RP (Voir Dire)" followed by page number.

1327. Jackson sounded upset. RP 1328. He said that somebody wanted to see him, and that he was going to knock that person out. Id.

Walker came home to his Kent apartment complex to give Jackson a ride to Seattle. RP 1331. As he and Jackson were preparing to leave, Rodriguez Rabun, the adult son of Walker's friend and neighbor, Billy Ray Bradshaw, decided to accompany them. RP 1333-34. Walker's wife, Shaleese Walker, did not want Walker to go and tried to dissuade him from leaving.[2] RP 1127, 1332. Walker did not listen to Shaleese. He drove off in her black Cadillac, with Jackson in the front passenger seat and Rabun in the back seat. RP 1334. Shaleese followed him in their second car, a burgundy Cadillac. RP 1128, 1135.

Walker drove to an apartment complex in South Seattle called Cedar Village. There were 25-30 people milling around outside. RP 1338. As soon as they arrived, Jackson jumped out of the car. RP 1337. Walker followed him, leaving the keys in the ignition and the engine running. Id. During the drive Jackson had been on his phone, arguing; when they arrived, he began "arguing pretty bad" with another man,

[2] Since Curtis and Shaleese Walker share a last name, Shaleese Walker is referenced in this brief by her first name. No disrespect is intended.

"BK."[3] RP 1338-39. BK was armed with a handgun. RP 1340. It was Walker's impression that Jackson was trying to start a fight. RP 1340.

"Everyone there" had guns, and the situation "was heated," according to Walker. RP 1405. Walker tried to persuade Jackson to leave, but Jackson "kept running his mouth." RP 1133. Suddenly BK shot Jackson, and mayhem ensued. RP 1345, 1412. Jackson was shot in the side and the leg and fell to the ground. RP 447, 1412. At one point he was lying on his back, trying to escape by pulling himself backwards by his elbows. RP 447. Shaleese estimated that four people were firing guns. RP 1198. BK shot Jackson twice more, and started running away. Id.

Rabun had a concealed weapons permit from a pawn shop in Bastrop, Louisiana, and carried a nine-millimeter semi-automatic handgun. RP 448, 516. He claimed he carried a handgun because "it's a wicked world out there." RP 448. When BK shot Jackson, Rabun pulled out his weapon and fired it four or five times in the direction of BK. RP 448-49. He later asserted that he did so because he believed that he himself had been shot. Id.

By this point, Shaleese was hysterical. RP 1348. She did not want Rabun in her car. RP 1347. Walker decided they needed to leave, with or

[3] This individual is referenced by this nickname in the transcripts.

without Rabun. RP 1347, 1349. He got into the back seat of the red Cadillac and told Shaleese to "mash it." RP 1348.

What happened next was disputed. According to Walker, he was crouched in the back seat of the car because of continuous gunfire at the Cedar Village apartment complex. RP 1350. At one point when Shaleese was stopped at a traffic light near a 7-11, he heard several shots fired, looked out, and saw the black Cadillac behind them, being driven by Rabun. RP 1350. Walker did not see whether Rabun had fired the shots.

Shaleese averred that when the shots were fired at the 7-11, she saw Rabun shooting out of the car, although she did not see who he was shooting or whether he hit his target. RP 1140. Alarmed by this behavior and by the fact that Rabun was in her car, she told Walker to get in the black Cadillac. RP 1146, 1350, 1354-55. Walker got in the black Cadillac, where he saw three firearms on the passenger seat: Rabun's nine-millimeter semi-automatic handgun, his own .22 caliber handgun, and a revolver.[4] RP 1356.

According to Walker, he and Rabun then had a conversation about whether Jackson was going to survive. RP 1361. Rabun said, "I think I hit him," but Walker did not ask him who he meant. Id. They continued to drive southbound. As they arrived at the junction for Monster Road,

[4] It was later determined by a ballistics examiner that Brown had been shot with a bullet from the revolver. RP 1003.

two King County Sheriff's Office police vehicles came towards them. RP 1154. 1356. Rabun drove the black Cadillac through the red light, hit another car, and kept driving. RP 1154.

Walker was a convicted felon and on probation. RP 1364. Concerned about getting caught in a car that had just left the scene of an accident with three guns, he told Rabun that they had to get rid of the guns. RP 1364-65. Rabun dumped all of the guns, including his own firearm which he was licensed to carry, in some bracken behind a Bank of America parking lot, where they were later found by security personnel and collected by the police. RP 797, 818, 818-21, 1446.

After they dumped the guns, Walker and Rabun drove to the home of a friend of Walker, "Speedy," who ran a chop shop. RP 1369. When they arrived there, Walker telephoned Shaleese, who arrived ten minutes later, followed by Billy Ray Bradshaw, Rabun's father. RP 1370-71. Bradshaw said to Rabun, "Boy, are you all right?" RP 1371. Then Bradshaw told Rabun to get in his car. Id. That was the last time that Walker saw Rabun: he fled to Louisiana, taking a flight at four a.m. the following morning. RP 480, 1371. "Speedy" stripped the black Cadillac of the tire rims and stereo, punched the ignition so the car could not be driven, and left it by the side of the road. RP 1451-52, 1456.

2. The police investigation and criminal charges.

The day after the shooting, Walker and Shaleese left for a long-planned trip to Ocean Shores to celebrate their anniversary. RP 1382. Shaleese was tired, so they stopped en route in Yelm and checked into the King Oscar motel. RP 1384, 1510. When they arrived at their room, Walker realized he forgot his cigarettes and went down to the car to fetch them. RP 1385. He never made it there; in the hotel lobby, he was arrested at gunpoint. RP 1385.

The police interrogated both Walker and Shaleese. RP 1189-90; 1386-88. According to Shaleese, it was during this interrogation that she learned of Brown's death; although she had seen Rabun firing his gun near the 7-11, she did not realize that anyone had been hit. RP 1174, 1180. After learning about Brown, Walker and Shaleese lost heart to continue their planned trip to Ocean Shores, and returned to Kent. RP 1390. They gave statements on two subsequent days to police. RP 1391.

Walker was arrested, and the State ultimately charged Walker by amended information with one count of murder in the first degree with a firearm enhancement and one count of unlawfully possessing a firearm in the first degree. CP 23-24.

3. Conflicting eyewitness evidence, and Rabun's claim that Walker was the shooter.

Walker proceeded to a jury trial. There were several eyewitnesses to Brown's shooting, however the scene was chaotic and their testimony regarding what they observed diverged. Austin Cassell, who was buying gasoline at the 7-11, said he saw a burgundy Cadillac and a black Cadillac pull up to the traffic light near the 7-11. RP 593-94. Cassell believed he saw a gun drawn from the passenger-side window of the burgundy Cadillac. RP 599, 603-04. He was only able to describe the shooter in the "vaguest terms," but believed him to be an African-American man in his mid- to late-thirties, with a dark complexion. RP 598. He believed the man was wearing a white t-shirt. Id. Although he believed the vehicle passenger had fired the shot, he told detectives that it was possible that the driver had leaned across the passenger seat and shot Brown. RP 603-04.

Ryan Harper, a passenger in Austin Cassell's car, said he saw someone he believed was appellant Curtis Walker get out of the burgundy car and fire two shots. RP 613. This individual then got into the black car. RP 615. According to Harper, the shooter was wearing a multi-colored jacket, like a NASCAR coat, which was blue, yellow, and black. RP 618. Harper said the shooter was wearing dark pants, and was not wearing any kind of hat or glasses. RP 621.

Stacey Sparks saw a man she later described as resembling the rapper "Scar Face" walking towards the black car at the traffic light near the 7-11. RP 572-73. She said that he was wearing a Muslim prayer cap, a long leather coat, and a blue shirt. Id. She said that he was carrying something that she speculated was a silver gun underneath his coat.[5] RP 574-75. Other witnesses, whose observations of the shooter were more limited, said that the shooter was wearing blue jeans. RP 644, 663.

On the day of the shooting, Rabun was wearing a hat, sunglasses, and a multi-colored coat, with shorts cut off below the knees. RP 1298, 1358. Walker was wearing a red cowboy hat and a black-and-white t-shirt, a leather coat, black pants with red pockets, and red-and-white shoes. RP 1333. He was not wearing the hat when he got out of Shaleese's red Cadillac and into the black Cadillac driven by Rabun. RP 1205.

Renton police officer Thomas Smith collected the guns. RP 797. He wore rubber gloves, and secured the guns by unloading each one. RP 820-28. Although Smith packed the guns and cartridges individually, he wore the same pair of gloves to handle each gun. RP 824, 838-39. Walker's DNA was found on the revolver that allegedly was used to shoot

[5] Sparks was not asked to submit to any formal identification procedure, however when she saw Walker on television, she claimed she recognized him as the shooter, although she said his hair was shorter during the incident. RP 580.

Brown. RP 1061, 1063. Tara Roy, a forensic scientist, testified that a DNA transfer could have occurred during the collection and transport of the firearms, particularly if someone handling the guns wore the same pair of gloves for each one. RP 1072-73.

To convict Walker, the State relied principally on the testimony of Rabun, who they flew from Louisiana to testify against him. Rabun admitted to shooting at BK four to five times while at Cedar Village. RP 448-49. Rabun also admitted that when Walker drove away from the Cedar Village in the burgundy Cadillac, he followed in the black Cadillac. RP 451-52. According to Rabun, when the burgundy Cadillac stopped at the red light by the 7-11, Walker got out of the car, reached out, and with his arm extended fired three times at Brown. RP 458, 460. Brown ran away; Rabun did not believe that he had been shot. RP 461.

Rabun claimed that Shaleese drove off through the red light, and Walker got in the passenger side of the black Cadillac and told Rabun to "mash it." RP 463. Rabun averred that he was "traumatized" and did what Walker told him to do. Id. They drove to a parking lot where they encountered Shaleese. Rabun claimed that Shaleese shouted at Walker, saying, "Why did you kill that little boy? Why did you kill him?" RP 470. Rabun claimed that Walker responded, "Because he killed my

homeboy [sic]."[6] Id. Rabun stated that he did not say anything because he was still traumatized. RP 471.

Rabun confirmed that he dumped all three guns that were found behind the Bank of America, including his own gun that he was licensed and permitted to own, but said he did so because he was "in a panic." RP 474-76. He said that they then drove to the house of one of Walker's acquaintances. RP 476. While they were there, Shaleese arrived in the burgundy Cadillac and Rabun's father arrived in his own car. RP 477. Rabun said that his father took him home, and that Rabun left for Louisiana the next day because he was scared. RP 480, 530.

4. The State's misuse of evidence of Walker's gang affiliation, and jury verdict.

Pretrial, the State sought to introduce evidence of Walker's affiliation with the "Bloods" gang. The State claimed it did not want to elicit evidence that gangs were "violent" or "bad," but to show Walker's motive for the crime. RP 210-11. The State noted that Walker had told the police during his statements that he was an "OG", meaning "original gangster" or "old gangster," and that he wore red. RP 210. The State theorized that the individuals at Cedar Village were associated with the "Crips" gang whose members wear blue, that BK was wearing blue and

[6] Rabun testified that Walker "used the 'N' word." RP 470.

fled after shooting Jackson, and that Walker shot Brown because he thought Brown was BK. RP 210-11, 213; Supp. CP __ (Sub. No. 69, State's Trial Memorandum at 8-10).

Walker strenuously objected to the admission of the evidence, both before and during the trial. RP 212, 456, 1211, 1504. The court overruled the objections and, at Walker's request, instructed the jury that "gang membership is not a crime." CP 81.

In opening statements, the State told the jury that Walker wore red and was a "Blood" and that the people at Cedar Village wore blue and black and were "Crips." RP (Voir Dire) 306. The State told the jury that Walker may have shot Brown because he thought Brown was BK, "or he may have thought it was just another one of his associates, just another Crips in blue and black." RP (Voir Dire) 308. The jury convicted Walker as charged. CP 68-70. Walker appeals. CP 156-57.

E. ARGUMENT

1. **The admission of unduly prejudicial evidence of gang affiliation prevented Walker from receiving the fair trial guaranteed by the due process clauses of the federal and state constitutions.**

a. An accused person has the due process right to a fair trial.

An accused person is guaranteed a fundamentally fair trial by the due process clauses of the federal and state constitutions. Cone v. Bell,

556 U.S. 449, 451, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009); U.S. Const. amend. XIV; Const. art. I, § 3. The erroneous admission of highly prejudicial evidence may deny an accused person his due process right to a fair trial, and only a fair trial is a constitutional trial. Dawson v Delaware, 503 U.S. 159, 165, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). Here, the admission of evidence of gang membership violated Walker's right to due process in two ways: first, given the extraordinarily prejudicial nature of the evidence of gang affiliation, the State failed to show that the evidence was sufficiently probative of Walker's alleged motive to commit the offense, or that the State could not have elaborated its theory without eliciting evidence that Walker was an "OG" and a "Blood." Second, the State never introduced any foundation to explain how the evidence should be used by the jury, creating an impermissible risk that Walker would be punished for exercising his First Amendment right to freedom of association, and leaving the jury free to inject their own prejudices and assumptions – i.e., facts not in evidence – into their deliberations. Walker's first-degree murder conviction should be reversed.

b. The evidence of Walker's affiliation with the "Bloods" was unduly prejudicial and was not necessary to prove Walker's alleged motive for the offense.

Courts consider evidence of gang membership inherently prejudicial. State v. Embry, __ Wn. App. __, 287 P.3d 648, 658 (2012).[7] Due to the highly inflammatory nature of gang evidence, it is analyzed pursuant to ER 404(b). State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71 (2009). Under ER 404(b), evidence of other bad acts is presumed to be inadmissible. State v. McCreven, 170 Wn. App. 444, 458, 284 P.3d 793 (2012). Because of the tendency of such evidence to be utilized as proof of the accused's propensity to engage in criminal behavior, the trial court must identify a non-propensity purpose for the evidence and determine that the evidence's relevance outweighs its potential prejudicial impact. Id. at 526-27. Even relevant evidence must be excluded if its probative value is substantially outweighed by its prejudicial effect. State v. Smith, 106 Wn.2d 772, 725 P.2d 951 (1986); ER 403.

The required showing of relevance requires proof of a nexus between gang membership and the crime. Id. at 526.

> [G]eneralized evidence regarding the behavior of gangs and gang members, 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, serves

[7] At the time of this writing, pin citations to the Washington Reporter of Deicsions were not available on Westlaw.

> no purpose but to allow the State to "suggest[ ] 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, 159, 275 P.3d 1192 (2012) (quoting State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)).

Where courts have found evidence of gang membership properly admitted to prove motive for the crime, which was the State's claimed purpose for admission here, the State has customarily made a showing that there was "a connection between the gang's purposes or values and the offense committed." Scott, 151 Wn. App. at 527. Absent evidence of this nexus, the admission of evidence of gang membership infringes upon an accused person's First Amendment right to freedom of association and is unconstitutional. See e.g. State v. Johnson, 124 Wn.2d 57, 873 P.2d 514 (1994) (evidence of "turf" wars between rival gangs, without more, irrelevant to commission of the offense even where defendant acknowledges gang membership); Mee, 168 Wn.2d at 158-59 (gang evidence's prejudicial effect substantially outweighed its probative value because it invited jury to draw the inference that gang membership showed propensity to commit charged offense); State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050 (evidence of gang membership admissible because other evidence established nexus between gang affiliation and motive for murder: that victims were not showing proper respect, were

usurping economic drug turf, and were members of an inferior gang), rev. denied, 128 Wn.2d 1004 (1995); State v. Asaeli, 150 Wn. App. 543, 578 n. 36, 208 P.3d 1136 (court finds evidence of gang's existence was not proven, and notes in a dictum that evidence of defendant's association and nexus to crime was, "at best, thin but it was extremely and unduly prejudicial"), rev. denied 167 Wn.2d 1001 (2009).

In this case, the State's theory as to why Walker's gang affiliation was relevant can be summarized according to the following proposition: "Bloods" wear red, and "Crips" wear blue. "BK," who shot Jackson, wore blue, as did Brown. Walker was a "Blood." Therefore, Walker shot Brown because he believed that Brown was a "Crip." As this false tautology demonstrates, the nexus between the fact of Walker's gang affiliation and the crime was so thin as to be nonexistent.

The State's case amounted to a theory of mistaken identity. According to the State's star witness, Rabun, Walker told Shaleese that he shot Brown because he believed that Brown had killed his friend. RP 470. The evidence indeed showed that Walker was friends with Jackson. RP 1181. They were certainly close enough for Jackson to contact Walker for a ride to Seattle, and for Walker to override his wife's wishes to the contrary and agree to drive Jackson.

It is reasonable and plausible to infer that a person who has seen a close friend shot and badly injured – perhaps killed – in front of him may be motivated to take revenge by killing the killer. It is likewise reasonable to infer that under the sway of powerful emotion and adrenaline, a person may mistakenly shoot someone who resembles the killer because of his stature and dress. This theory of a revenge killing has nothing to do with gang membership.

Under ER 401, evidence is relevant if it has "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." The evidence that Walker was a "Blood," that Cedar Village was "Crip" territory, and that there were a lot of "Crips" present at the scene of Jackson's shooting did not enhance the State's revenge killing/mistaken identity theory with respect to the shooting of Brown. Cf. State v. Bluehorse, 159 Wn. App. 410, 431, 248 P.3d 537 (2011) (finding State presented insufficient evidence to prove that defendant committed drive-by shooting to advance his position in a gang, or for reasons of gang status). This is particularly true in light of Walker's repeated assertions, which the State did not rebut, that he was a "hustler," not a "gangbanger," that he "put his flag up years ago," and that he is friends with many Crips. RP 1409; 1495-96.

The State did not introduce evidence that established "BK" was a "Crip." Walker said it was his impression that "BK" and Jackson were family members. RP 1403. Shaleese likewise testified that during the altercation that preceded the shooting, Jackson shouted at "BK," "do you want to kill me? We are supposed to be family. Do you want to kill me?" RP 1133.

Even if "BK" was a "Crip," however, and even if, as Shaleese allegedly told the police during questioning, the shooting at Cedar Village was a "Crips Bloods thing," this does not mean that the shooting of Brown – by either Rabun, as the defense alleged, or by Walker, as the State theorized – was gang-related. Again, there is no evidence that the person who shot Brown shot him because he thought Brown was a "Crip." The evidence suggested that the person who shot Brown did so because he believed Brown was the person who shot Jackson.

Although a decision whether to admit evidence is reviewed for an abuse of discretion, a trial court's decision is made for untenable reasons if it is based on facts unsupported in the record. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Furthermore, in determining whether the probative value of evidence outweighs its unfair prejudice, a trial court "should consider the availability of other means of proof and other factors." McCreven, 170 Wn. App. at 457. Here, the State could

have fully developed its mistaken identity theory without injecting the inflammatory evidence about Walker's gang affiliation into the trial. This Court should conclude that the gang affiliation evidence was not relevant to any fact at issue in the trial. Even if it was minimally relevant, any relevance was substantially outweighed by its prejudicial effect. The gang affiliation evidence and should have been excluded.

c. The admission of the gang affiliation evidence infringed upon Walker's First Amendment right of freedom of association.

"Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association." Scott, 151 Wn. App. at 526 (citing Dawson, 503 U.S. at 166-68). The First Amendment prohibits the use by the State at trial of evidence of abstract beliefs and associations with certain groups where the evidence is not relevant to any issue at trial. Dawson, 503 U.S. at 168.

Gang membership is not illegal, however courts recognize its "inflammatory nature." Asaeli, 150 Wn. App. at 579. Jurors are likely to infer that the accused has a criminal disposition from evidence that he is a gang member. Evidence of gang affiliation must be relevant before it can be admitted, therefore, because otherwise the State makes use of a defendant's protected exercise of his First Amendment right to free

assembly to support the "forbidden inference" of propensity to commit the charged offense. Dawson, 503 U.S. at 168; Mee, 168 Wn. App. at 159.

Here, as shown, the evidence of Walker's affiliation with the "Bloods" was not relevant to prove his alleged motive to commit the charged murder. The misuse of the evidence permitted the State to urge an inference of a criminal disposition from Walker's protected right to freedom of association, and violated the First Amendment and the Fourteenth Amendment guarantee of due process of law.

d. The State failed to connect the evidence of gang affiliation to any essential ingredient of the charged offenses, permitting the jury to inject their own prejudices and assumptions into their consideration of the evidence.

Where a trial court admits highly prejudicial evidence of gang affiliation, the court must provide the jury with some context with which to assess the evidence to avoid the risk of the evidence stimulating an emotional, rather than a rational, response. See McCreven, 170 Wn. App. at 458-59; Scott, 151 Wn. App. at 528-29; State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (2008). In Scott, the defendant was charged with two counts of first degree assault and one count of first degree burglary. Scott, 151 Wn. App. at 523. The State, in its offer of proof, said that the evidence would show the crimes were committed out of retaliation for a show of "disrespect." Id. At trial, however, although the chief detective

confirmed that Scott was a member of the 18th Street Gang, the State presented no evidence to connect the charged attack to the role of "respect" in gang culture, or the gang response to "disrespect." Id. at 523-24.

On review, the Court held that the testimony presented "fell far short of proving the connection between gang affiliation and the crime." Id. at 528. Nor did the State connect the testimony about gang membership to Scott's alleged motive for committing the offense, even though this was the ostensible purpose behind the State's motion to admit the testimony. Id. The Court held that this was prejudicial error and reversed Scott's conviction. Id. at 529.

In this case, the State claimed pretrial that it did not wish to introduce evidence that gangs are "violent" or "bad," RP 210-11, but this is a facile and disingenuous claim.[8] Washington State has a significant gang problem, with an estimated four to six gang members per 1,000 people. Federal Bureau of Investigation (FBI), 2011 National Gang

[8] Interestingly, a recent publication from the King County Prosecutor's office regarding prosecutions by the King County Prosecutor's Gang Unit cited Walker's case as an example "of the community damage from gang violence," and asserted that "Walker mistakenly thought the youth was a rival gang member." King County Prosecuting Attorney's Office, Gang Unit Prosecutions: One Year Review (Aug. 15, 2012), available at http://www.kingcounty.gov/Prosecutor/news/2012/august/gangunit.aspx, last accessed February 9, 2013.

Threat Assessment: Emerging Trends (2011).[9] Approximately 40 percent of criminal gangs in Washington are in King County. Dave Rodriguez, "Washington State Gang Intelligence Bulletin 2010," Office of National Drug Control Policy, Northwest High Intensity Drug Trafficking Area at 5 (2010).[10]

The "Bloods" street gang is one of the most notorious street gangs in the country, with an alarming reputation for ruthlessness and violence. Commonwealth of Virginia, Department of State Police, Virginia Fusion Center, Bloods Street Gang Intelligence Report, November 2008.[11] A 2003 Department of Justice publication describes the "Bloods" as "one of the largest and most violent associations of street gangs in the United States," and notes its involvement with the distribution of controlled substances, particularly powdered and crack cocaine and marijuana, and in violent crime, including drive-by shooting and homicide. U.S.

---

[9] Available at http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment, last visited January 14, 2013.

[10] Available at http://www.mfiles.org/publications/NW%20HIDTA%20Gangs%20Report%20Bulletin%202010.pdf, last visited February 15, 2013.

[11] Available at http://info.publicintelligence.net/BloodsStreetGangIntelligenceReport.pdf, last accessed January 14, 2013.

Department of Justice, Drugs and Crime Gang Profile: Bloods, February 2003.[12]

The "Bloods" emigrated to Seattle from California in the early 1980s. Rodriguez, supra, at 2. In Seattle and surrounding areas, the "Bloods" feature prominently in broadsheets for their criminal activity. See eg. Evan Hoover, "Tacoma Survey Points to Serious Gang Problem along I-5," KPLU News for Seattle and the Northwest (April 19, 2012);[13] Jonah Spangenthal-Lee, "No Way Out: A Gang Member and Murder Suspect Says He Wants a New Life," The Stranger (September 17, 2009);[14] Levi Pulkkinen, "Six Alleged West Seattle Gang Members Charged in Prostitution Ring," Seattle Post-Intelligencer (March 24, 2009).[15]

In this case, early news reports linked the allegations against Walker to his affiliation with the "Bloods" street gang. Caleb Hannan, Curtis Walker Accused of Killing 12-Year-Old Alajawan Brown, Seattle Weekly (June 18, 2010) (Seattle Weekly Crime and Punishment blogger

---

[12] Available at http://cryptome.org/gangs/bloods.pdf, last visited January 14, 2013.

[13] Available at http://www.kplu.org/post/tacoma-survey-points-serious-gang-problem-along-i-5, last visited February 9, 2013.

[14] available at http://www.thestranger.com/seattle/no-way-out/Content?oid=2242388, last visited February 9, 2013.

[15] available at http://www.seattlepi.com/local/article/Six-alleged-West-Seattle-gang-members-charged-in-1302849.php, last visited January 14, 2013.

describes Walker as an "ex-con," details his past convictions, and mistakenly states that Walker "told his father[16] the killing was 'on the Bloods,' a reference to his gang").[17] This link was pressed in media reports during the trial, an indication of the success of the State's strategy behind eliciting evidence of Walker's gang affiliation. See e.g. Sara Jean Green, Gang Member and Wife Testify: They Didn't Know Boy was Killed, Seattle Times (January 30, 2012);[18] Dean A. Radford, Defendant Takes Stand in Death of 12-Year-Old Alajawan Brown, Renton Reporter (February 2, 2012) (noting, "Walker is a member of the Bloods gang. The Cedar Village apartment complex, as well as the 7-11 store, is known to be in Crips territory, a Bloods rival, according to court testimony");[19] Sara Jean Green, Guilty Verdict in Shooting Death of 12-Year-Old Boy in Skyway, Seattle Times (February 2, 2012) (averring that Brown "was shot because Walker, a 20-year member of the Blood Pirus gang, mistakenly

---

[16] Since no evidence was elicited during pretrial or trial proceedings regarding Walker's father, it is probable that the reference is to a statement made by Rabun, whose father, Billy Ray Bradshaw, featured heavily in the trial testimony.

[17] available at http://blogs.seattleweekly.com/dailyweekly/2010/06/curtis_walker_accused_of_killi.php, last visited January 14, 2013.

[18] Available at http://blogs.seattleweekly.com/dailyweekly/2010/06/curtis_walker_accused_of_killi.php, last visited January 14, 2013.

[19] Available at http://www.rentonreporter.com/news/138368369.html, last visited January 14, 2013.

thought Brown was a member of the rival Crips gang involved in a shootout at a nearby apartment complex only minutes earlier").[20]

In Walker's trial, the jury repeatedly heard that Walker was affiliated with the "Bloods" and was considered an "OG." RP 868-69, 1184, 1214, 1219, 1400-02, 1410, 1493. See United States v. Whitten, 610 F.3d 168, 216 (2nd Cir. 2010) ("OG" status within the "Bloods" is "the highest status, reserved for those who have committed the most acts of violence on behalf of the gang"). Yet no expert testified about the significance of this affiliation to the charged crimes or linked the testimony to Walker's alleged motive. No expert explained the relevance of Walker's gang membership or "OG" status to the criminal charges. This gap left the jurors free to ascribe to the evidence any relevance they saw fit, including the inference of a propensity towards criminality drawn by the media observers of Walker's trial.

The issuance of a limiting instruction by the court did not cure this error. The court instructed the jury:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony regarding gangs and may be considered by you only for the purpose of motive, premeditation, intent, and lack of accident. You may not consider it for any other purpose.

---

[20] Available at http://seattletimes.com/html/localnews/2017409279_walker03m.html, last visited January 14, 2013.

> Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 80.

If, however, the "testimony regarding gangs" was intended as a reference to the loose testimony about hostilities between "Crips" and "Bloods" and underscored the fact of Walker's affiliation with the "Bloods," without any other evidentiary foundation or mooring to the facts of the case, then the jury was free to inject its own understanding of the evidence's significance to Walker's motive. Some of the jurors could have believed that the mere fact of Walker's gang affiliation meant that he was more likely than the average citizen to commit violent crimes, or that he was less credible than other witnesses.[21] Others may have thought that as an "OG," Walker was disposed to be violent and use guns, and considered it in this respect to be probative of intent and lack of mistake or accident. Other jurors may have leapt to the false and speculative

---

[21] In voir dire, a potential juror told the court that when she heard the word "gangs" mentioned, she immediately thought, "violence, robbery," and that she believed a gang member's first loyalty would be to his gang, so he would be less likely than other witnesses to give truthful testimony. RP 96-97. She said that if she learned that Walker was a gang member, she would be fearful. RP 97. Another potential juror discussed his preconceptions that gang members are violent, and said that he would have difficulty keeping an open mind if he heard evidence about gangs. RP 111-13. Compare McCleven, 170 Wn. App. at 460 (noting that although jurors did not hear specific evidence about Bandidos' reputation for violence, several acknowledged during voir dire that they were familiar with their reputation or motorcycle gangs generally).

conclusion, urged by the State in its opening statement,[22] that as a "Blood," Walker had a propensity to be violent towards anyone he believed to be a "Crip," including Brown, who was dressed in blue.

As in Scott, even assuming evidence of gang affiliation had some marginal relevance, the State failed to present the testimony required to link the affiliation to an essential ingredient of the charged murder. There was therefore a substantial likelihood that the jury would conclude that Walker was a "criminal-type person" and use his First Amendment right of free assembly against him to convict. Mee, 168 Wn. App. at 159; see also id. at 161 (generalized evidence about gang membership improperly encourages jurors "to assume that the defendant adheres to the stereotyped gang actions"). This Court should conclude that the State's failure to present evidence connecting Walker's gang affiliation created an impermissible risk that the jury would inject their own prejudices, preconceptions, and assumptions about gangs into their deliberations, and convict based upon propensity.

e. The error prejudiced Walker and requires reversal of his conviction for first-degree murder.

The erroneous admission of ER 404(b) evidence is reversible error if the evidence was likely to have materially affected the jury verdict on

[22] See RP (Voir Dire) 307.

the charged offense. Scott, 151 Wn. App. at 529. That standard is met here. In this case, there were two potential suspects to the charged offense, Rabun and Walker. Rabun was known to carry a firearm, shot repeatedly at Jackson's assailant in an effort to avenge him, and then rapidly left Cedar Village in a Cadillac in apparent pursuit of "BK." Rabun stashed the guns in some bracken after Brown's shooting and fled the jurisdiction for Louisiana at 4:00 a.m. the next morning. Two eyewitnesses to the shooting described the shooter as (a) having shot Brown from a car while (b) wearing a multicolored coat, consistent with Shaleese's statement that Rabun shot Brown through the open window of the black Cadillac and the description of the clothing he wore on the day of the shooting. RP 603-04, 618.

Walker freely admitted to possessing the .22 caliber gun that Jackson took to Cedar Village, but denied shooting Brown. The State's strongest evidence against Walker was the discovery of his DNA on the revolver used to kill Brown. As forensic scientist Roy testified, however, a DNA transfer from the .22 to the revolver could have occurred when the guns were stashed by Rabun or when they were collected by Officer Smith. RP 1072-73. Although Stacey Sparks claimed at trial that she recognized Walker as the shooter, she did not participate in any pretrial identification procedure, and her claim of recognition succeeded Sparks

having seen Walker's court proceedings on television a few days before her testimony. RP 580. See Nancy K. Steblay, Maintaining the Reliability of Eyewitness Evidence: After the Lineup, 42 Creighton L. Rev. 643, 648-49 (2009) (discussing how two phenomena of memory contamination, source confusion and unconscious transference, can cause a witness's memory to be redirected onto an innocent suspect).

The evidence of Walker's affiliation with the "Bloods" street gang colored the State's case with the unsavory hue of violence and lawlessness. Given the conflicting evidence and the strong reasons to suspect Rabun may have been the killer, this Court should conclude that the evidence materially affected the jury's verdict. Walker's conviction for first-degree murder should be reversed.

2. **The denial of Walker's motion to substitute counsel denied him his Sixth Amendment right to conflict-free counsel.**

a. Walker moved for substitution of counsel because he lost confidence in his appointed attorney.

Walker initially retained attorney Ali Pearson to represent him. Pearson filed a notice of appearance on June 10, 2010. Supp. CP __ (Sub No. 4); RP (Pretrial) 22. On October 5, 2010, due to Walker's indigence and Pearson's professional commitments elsewhere, Jerry Stimmel substituted as counsel. Supp. CP __ (Sub No. 26); RP (Pretrial) 23. Mr.

Walker, however, developed concerns regarding Stimmel's ability to effectively represent him. At a hearing on June 30, 2011, Stimmel moved on Walker's behalf to have substitute counsel appointed. He advised the court, "Mr. Walker has lost confidence in me and would like another lawyer appointed." RP (Pretrial) 19. Stimmel felt uncomfortable discussing the details in open court, but said,

> Mr. Walker I think needs to have confidence in his attorney. An innocent man proceeding to trial on a murder charge needs to have confidence. In our system, not everyone gets to choose, but he needs to have confidence.

RP (Pretrial) 20.

Stimmel noted that part of Walker's distrust related to problems with discovery, some of which he candidly admitted were his fault. Id. Stimmel noted as well that due to some issue at the jail, Walker was unable to reach him by telephone. Id. Walker concurred with Stimmel's summary and noted further that months would pass between contacts from Stimmel, which, given the seriousness of the charges, was a source of great concern for him. RP (Pretrial) 23-24. The court found that Walker's concerns were not a basis to substitute counsel and denied the request. RP (Pretrial) 32-34.

On October 14, 2011, Walker renewed his request to substitute counsel. RP (Pretrial) 69; CP 17-18. The court heard argument on the

motion on October 17, 2011. Walker had filed a grievance against Stimmel with the Washington State Bar Association, a circumstance which prompted Stimmel to contemporaneously make an affirmative motion to withdraw. RP (Pretrial) 75-76. Stimmel contacted the King County Office of Public Defense and ascertained that attorney Julie Gaisford would be willing to substitute as counsel pending a conversation with Walker. Id. Although Stimmel agreed that a Bar grievance was not normally a basis on its own to merit substitution of counsel, he stated that Bar grievances were far from routine in his practice and he did not feel he could prepare for trial on such serious charges while responding to a Bar grievance. RP (Pretrial) 76-77.

Stimmel stated further that if the Bar grievance concerned Walker's complaints about Stimmel's failure to adequately communicate with him,[23] then Walker had a point, explaining, "there has been some difficulty in our communication, and it's not his fault." RP (Pretrial) 77. Stimmel explained that for unknown reasons it had been challenging to arrange face-to-face meetings at the jail, and that when an appointment was finally arranged, the jail officers did not procure Walker or provide a satisfactory explanation for his absence. RP (Pretrial) 77-78. Stimmel stated that given Walker's earlier sentiments of having lost confidence in

[23] Walker submitted a letter to the court in which he detailed his lawyer's lack of communication with him. CP 17-18.

him, "I don't think I can create not only fairness but the appearance of fairness in my representation of Mr. Walker and I ask to be excused and to withdraw and to have another lawyer appointed." RP (Pretrial) 79.

The State objected to the substitution and complained that the proper showing had not been made. RP (Pretrial) 80-81. Stimmel responded that although he could not disclose the substance of the issues without breaching attorney-client privilege, there had been "an irreconcilable inability to communicate effect." 3RP (Pretrial) 81.

The court did not excuse the prosecutor to further explore this concern, but ruled immediately. RP (Pretrial) 81-85. The court found that Walker's concerns were "predominantly concerned with the system that we have rather than Mr. Stimmel as a lawyer." RP (Pretrial) 81. The court stated that it would be "unfortunate and unfair" to delay the trial to accommodate the substitution of counsel, and contrary to "the needs of our system to resolve it based on the freshest testimony available to us." RP (Pretrial) 81-82. Although Gaisford was present at the hearing, the court did not ask her how much time she would need to be prepared for trial if she were permitted to substitute as counsel. The court stated that it would contemplate appointing Gaisford as second chair in the case, but admitted that there was not "anything we can do to remove the uneasiness that you both experience." RP (Pretrial) 84. The court said this discomfort was

simply "one of the costs of getting this case to trial." Id. Pursuant to the court's ruling, a second attorney, Ann Mahony was appointed to assist Stimmel. CP 22; Supp. CP __ (Sub No. 68).

b. An accused person has the Sixth Amendment right to conflict-free counsel.

Accused persons are guaranteed the right to the assistance of counsel at all critical stages of the proceedings against them. United States v. Wade, 288 U.S. 218, 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); U.S. Const. amends. VI; XIV; Const. art. I, § 22. The right to counsel is so "fundamental and essential to a fair trial" that it is binding on states through the doctrine of incorporation. Gideon v. Wainwright, 372 U.S. 335, 342-43, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Although the Sixth Amendment does not guarantee a "meaningful relationship" between the accused and his counsel, Morris v. Slappy, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), "[t]he Sixth Amendment right to counsel contains a correlative right to representation that is unimpaired by conflicts of interest or divided loyalties." Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991); see also Wheat v. United States, 486 U.S. 153, 159-60, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) (right to effective assistance of counsel contemplates right to conflict-free counsel). Where a court "compel[s] one charged with [a] grievous crime

to undergo a trial with the assistance of an attorney with whom he has become embroiled in [an] irreconcilable conflict [it] deprive[s] him of the effective assistance of any counsel whatsoever." Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970). The failure to respect the elemental right to conflict-free counsel violates the defendant's right to due process, and can never be harmless. Wood v. Georgia, 450 U.S. 261, 271-72, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); Chapman v. California, 386 U.S. 18, 23 & n. 8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

c. The trial court's failure to inquire into the conflict and to give deference to counsel's representations regarding the breakdown in communications violated Walker's right to conflict-free counsel.

To justify appointment of new counsel, a defendant "must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). Even if present counsel is competent, a complete breakdown in communications can result in an inadequate defense. United States v. Nguyen, 252 F.3d 998, 1003 (9th Cir. 2001).

The Sixth Amendment right to counsel is violated if the defendant is unable to communicate with his lawyer during key trial preparation

times. Daniels v. Woodford, 428 F.3d 1181, 1197 (9th Cir. 2005) (citing Riggins v. Nevada, 504 U.S. 127, 144, 112 S.Ct. 1810, 18 L.Ed.2d 479 (1992)). "Similarly, a defendant is denied his Sixth Amendment right to counsel when he is 'forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.'" Id. (citation omitted); see also Douglas v. United States, 488 A.2d 121, 136 (D.C. App. 1985) (finding conflict of interest where defendant had filed complaint against his court-appointed attorney with the Office of the Bar Counsel).

In determining whether a motion to appoint new counsel should be granted, courts must give deference to the opinion of current counsel:

> [A]n attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted[.] . . . An "attorney. . . in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." . . . Second, defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem . . . Finally, attorneys are officers of the court, and "when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath."

Holloway v. Arkansas, 435 U.S. 475, 485-86, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (citations omitted).

A reviewing court assessing whether a motion to substitute counsel should have been granted engages in much the same inquiry as a court determining whether an irreconcilable conflict existed. Daniels, 428 F.3d at 1197.

> The court must consider: (1) the extent of the conflict; (2) whether the trial judge made an appropriate inquiry into the extent of the conflict; and (3) the timeliness of the motion to substitute counsel.

Id. at 1197-98.

Where the trial court learns of a conflict between an accused person and his attorney, the court has the "obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction." Smith v. Lockhart, 923 F.2d at 1320 (quoting United States v. Hart, 557 F.2d 162, 163 (8th Cir. 1977)). The court "must conduct 'such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern.'" United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001) (quoting United States v. Garcia, 924 F.2d 925, 926 (9th Cir. 1991)). This inquiry should "provide a 'sufficient basis for reaching an informed decision.'" Id. (quoting United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986)). Thus the court "may need to evaluate the depth of any conflict between defendant and counsel, the extent of any breakdown in communication, how much time may be necessary for a new attorney to

prepare, and any delay or inconvenience that may result from substitution." Id.

In this case, several things were plain. First, Stimmel readily acknowledged that the breakdown in communications between himself and Walker was not Walker's fault. RP (Pretrial) 77. Compare Daniels, 428 F.3d at 1198 ("Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel") (citing Adelzo-Gonzalez, 268 F.3d at 779). Second, additional difficulties between Walker and Stimmel that Stimmel did not feel comfortable disclosing in a proceeding at which the prosecutor was present had led to an irreconcilable breakdown in communications. RP (Pretrial) 80-81. Third, Stimmel had identified counsel who would be willing to substitute for him. RP (Pretrial) 75-76. Fourth, although the trial was pending, the date was not so imminent that it could not have been continued.

Given these circumstances, the trial court had an affirmative duty to inquire further into the breakdown in communications between Walker and Stimmel. "[I]n most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." Adelzo-Gonzalez, 268 F.3d at 777-78. This the trial court did not do. Rather, the court concluded, without the benefit of further

information regarding the breakdown in communication, that Walker's problems were with "the system," rather than with his lawyer. RP (Pretrial) 81. This Court should conclude that the trial court's failure to inquire into Walker's breakdown in communications with his lawyer constructively denied him his right to counsel.

d. Counsel's performance at trial is irrelevant to whether Walker's constitutional rights were violated.

"'[T]o compel one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.'" Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000) (quoting Brown v. Craven, 424 F.2d at1170).

Walker twice moved for substitution of counsel. After Walker's first motion was denied, conditions deteriorated to the point that Walker filed a bar complaint against Stimmel. The bar complaint caused Stimmel to feel constrained and mistrustful of Walker. RP (Pretrial) 76-77. Stimmel told the court that he did not believe he could adequately prepare for trial under these circumstances. An attorney who is unable to effectively communicate with his client "perform[s] his duty under the gravest handicap." Brown v. Craven, 424 F.2d at 1160. Further, when the right to counsel is violated, prejudice is presumed. Penson v. Ohio, 488

U.S. 75, 88, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988); Chapman, 386 U.S. at 23 n. 8; see also Daniels, 428 F.3d at 1197 ("We have applied the constructive denial of counsel doctrine to cases where the defendant has an irreconcilable conflict with his counsel, and the trial court refuses to grant a motion for substitution of counsel"); Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989) (the constructive denial of counsel gives rise to a presumption of prejudice).

In State v. Thompson, 169 Wn. App. 436, 290 P.3d 996 (2012), this Court found that a breakdown in communications between the defendant and his appointed counsel did not violate the defendant's right to counsel. Thompson, 290 P.3d at 1009-1013.[24] A key difference between Thompson and this case, however, is that there is no suggestion that Walker created the difficulties between himself and his lawyer. Further, settled federal precedent dictates that where a conflict exists, trial counsel's abilities are a non sequitur to the question of whether the conflict between the defendant and counsel warrants substitution. Cf., Nguyen, 262 F.3d at 1004:

> There is no question in this case that there was a complete breakdown in the attorney-client relationship. By the time of trial, the defense attorney had acknowledged to the Court that Nguyen "just won't talk to me anymore." In light of the conflict, Nguyen could not confer with his counsel

[24] At the time of this writing, pin citations to the Washington Reporter of Decisions were not available on Westlaw.

> about trial strategy or additional evidence, or even receive explanations of the proceedings. In essence, he was "left to fend for himself," in violation of his Sixth Amendment right to assistance of counsel. Nonetheless, the District Judge ignored the problems between Nguyen and his attorney, commenting that Nguyen's "strike" was not ground for a continuance, explaining to Nguyen that "the Federal Public Defenders provide very good representation to defendants," and remarking that he was "totally comfortable" with the public defender representing Nguyen. The issue in this case is the attorney-client relationship and not the comfort of the court or the competency of the attorney.

See also United States v. Amore, 56 F.3d 1202, 1206 (9th Cir. 1995) ("we should not affirm a denial of a motion to substitute counsel simply because we believe that the original counsel's performance was adequate"), overruled on other grounds by United States v. Garrett, 179 F.3d 1143 (9th Cir. 1999).

This Court should conclude that to the extent that the holding in Thompson was based upon the Thompson Court's perception that Thompson had manufactured the difficulties between himself and his lawyer, Thompson is inapplicable. This Court should further conclude that any consideration of whether counsel did a "good job" for Walker is irrelevant to the question of whether substitution was proper. Walker's convictions should be reversed.

3. **Jury Instruction 19, defining a "firearm," violated the prohibition in article IV, section 16 of the Washington Constitution against judicial comments on the evidence.**

a. The trial court instructed that an inoperable firearm is a firearm for purposes of the unlawful possession of a firearm charge.

The State charged Walker with unlawful possession of a firearm in the first degree. CP 23-24, 70. Walker acknowledged at trial that the .22 caliber weapon found behind the Bank of America belonged to him, but said the gun was non-functional. RP 1148, 1411, 1423, 1445. In instructing the jury, the trial court gave the following definition of a firearm:

> A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder. A temporarily inoperable firearm that can be rendered operational with reasonable effort and within a reasonable time period is a "firearm." A disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a "firearm."

CP 93 (Instruction No. 19).

b. The court's instruction removed a disputed issue of fact from the jury's consideration and was a comment on the evidence.

Judicial comments on the evidence are explicitly prohibited by the Washington Constitution. Const. art IV, § 16.[25] The Washington

[25] Article IV, section 16 reads "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Supreme Court has interpreted this section as forbidding a judge from "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing a jury that "matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1231 (1997). A violation of the constitutional prohibition will arise not only where the judge's opinion is expressly stated but where it is merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

A judicial comment is presumed prejudicial. The presumption of prejudice may only be overcome if the record affirmatively shows no prejudice could have resulted. Levy, 156 Wn.2d at 725. The fundamental question in deciding whether a judge has impermissibly commented on the evidence is whether the alleged comment or omission "conveys the idea that the fact has been accepted by the court as true." Levy, 156 Wn.2d at 726. In Becker and Jackman, the Court found improper comments warranted reversal where the comments concerned questions that were highly contested or the principal issues in the case. Jackman, 156 Wn.2d at 744 (judicial comment removed material fact from the jury's consideration); Becker, 132 Wn.2d at 65 (finding comment "tantamount to a directed verdict").

Here, the only firearm that Walker admitted to possessing was the .22 caliber gun that Walker asserted was inoperable because the firing mechanism was jammed. RP 1411, 1423, 1445. The State's ballistic examiner testified that the gun was capable of firing a bullet but said that it did not fire flawlessly. RP 1004. He acknowledged that the gun "had a little bit of a problem" with extracting and ejecting bullets." Id.

The statute defining a "firearm" does not contain the additional language regarding operability that was inserted into the jury instruction defining a "firearm" for purposes of the unlawful possession of a firearm count. RCW 9.41.010(7).[26] Rather, it seems that this language was proposed by the State because of the conflicting testimony regarding operability. The instruction was thus tailored to meet the facts of this case.

Whether the gun was, in fact, a "firearm" was a question of fact for the jury. By including language that resolved the disputed question of operability, the court removed this issue from the jury's consideration, and directed a verdict based on Walker's testimony that he had the gun in his possession. Although Walker did not object to the instruction below, he may raise this claim of error for the first time on appeal as a manifest error affecting a constitutional right. RAP 2.5(a); State v. Watkins, 136 Wn.

[26] RCW 9.41.010(7) provides: '"Firearm" means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.'

App. 240, 244-45, 148 P.3d 1112 (2006). This Court should hold that Jury Instruction 19 violated the Washington Constitution's prohibition on judicial comments on the evidence. Walker's conviction for unlawful possession of a firearm must be reversed.

4. **The trial court violated Walker's federal and state constitutional right to a jury trial by instructing the jury they had a duty to convict.**

a. Walker proposed to-convict instructions that omitted language instructing the jurors they had a duty to convict.

Walker objected to the jury instructions that directed that the jurors had a duty to convict if they found the elements of the charged offense had been proven beyond a reasonable doubt. He submitted proposed jury instructions that omitted this directive and instead simply provided:

> In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proven beyond a reasonable doubt. On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty ...

CP 65-67.

The Court ruled that it was bound by this Court's decision in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319 (1998), and instead gave standard to-convict instructions that told the jury, "If you find from the evidence that each of these elements has been proved beyond a reasonable

doubt, then it will be your duty to return a verdict of guilty ..." CP 86, 89, 94.

b. The "to convict" instructions violated Walker's federal constitutional right to a jury trial.

The right to jury trial in a criminal case is one of the few guarantees of individual rights enumerated in the United States Constitution of 1789, and is the only guarantee to appear in both the original document and the Bill of Rights. U.S. Const. art. III, § 2, 3; U. S. Const. amend. VI; U.S. Const. amend. VII.

In criminal trials, the right to jury trial is fundamental to the American scheme of justice. It is thus further guaranteed by the due process clauses of the Fifth and Fourteenth Amendments. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982). Trial by jury was not only a valued right of persons accused of crime, but was also an allocation of political power to the citizenry:

> [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. at 156.[27]

c. The language telling jurors they have a "duty to convict" undermined the Washington Constitution's "inviolate" right to trial by jury.

i. Differences in textual language

The drafters of our state constitution not only granted the right to a jury trial, Const. art. I, § 22, they expressly declared it "shall remain inviolate." Const. art. I, § 21.[28]

> The term "inviolate" connotes deserving of the highest protection . . . . Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assault to its essential guarantees.

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

Article 1, section 21 "preserves the right [to jury trial] as it existed in the territory at the time of its adoption." Pasco v. Mace, 98 Wn.2d at 96; State v. Strasburg, 60 Wash. 106, 115, 110 P. 1020 (1910). The right to trial by jury "should be continued unimpaired and inviolate." Strasburg, 60 Wash. at 115.

---

[27] In Sofie v. Fibreboard Corp., 112 Wn.2d 636, 650-53, 771 P.2d 711, 780 P.2d 260 (1989), the majority saw this allocation of political power to the citizens as a limit on the power of the legislature. Two of the dissenting members of the court acknowledged the allocation of power, but interpreted it rather as a limit on the power of the judiciary. Sofie, 112 Wn.2d at 676 (Callow, C.J., joined by Dolliver, J., dissenting).

[28] "The right of trial by jury shall remain inviolate . . . ."

The difference in language between the federal and state constitutional provisions suggests the drafters intended a different and broader protection of the right to a jury trial than is contained in the federal Bill of Rights. See Hon. Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984).

Other constitutional protections enshrined in the Washington Constitution help to protect and safeguard the "inviolate" right to trial by jury. A judge is not permitted to convey to the jury his or her own opinion of the evidence. Const. art. IV, § 16. Even a witness may not invade the province of the jury. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987). The right to jury trial also is protected by the due process clause of article I, section 3.

In short, although there is no specific language in the constitution that addresses the precise question of how "to convict" instructions must be worded, the right to a jury trial is so fundamental that any infringement violates the constitution.

ii. *State Constitutional and Common Law History*

Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal

constitution. This difference supports an independent reading of the Washington Constitution. Utter, supra, at 496-97.

iii. *Preexisting state law*

Since article I, section 21 "preserves the right [to jury trial] as it existed in the territory at the time of its adoption," preexisting state law is instructive. Sofie, 112 Wn.2d at 645; Pasco, 98 Wn.2d at 96. In Leonard v. Territory, 2 Wash. Terr. 381, 7 Pac. 872 (1885), in which the Supreme Court reversed a murder conviction, the Court set out in some detail the jury instructions given in the case. Those instructions supply a view of the law before the adoption of the Constitution:

> If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you may find him guilty of such a degree of crime as the facts so found show him to have committed; but if you do not find such facts so proven, then you must acquit.

Leonard, 2 Wash. Terr. at 399 (emphasis added).

The courts thus acknowledged, and incorporated into the jury instructions, the threshold requirement that each element be proved beyond a reasonable doubt to permit a conviction, but any reasonable doubt required an acquittal. Because this was the law regarding the scope of the jury's authority at the time of the adoption of the Constitution, it was incorporated into Const. art. 1, § 21, and remains inviolate. Sofie, 112 Wn.2d at 656; Pasco, 98 Wn.2d at 93, 96.

In Meggyesy, the Court attempted to distinguish Leonard on the basis that Leonard "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. The Meggyesy court missed the point; at the time the Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of telling juries it is their duty to convict.

iv. *Differences in Federal and State Constitutional Structure*

State constitutions were originally intended to be the primary devices to protect individual rights, with the United States Constitution adding a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, Presenting a State Constitutional Argument: Comment on Theory and Technique, 20 Ind. L. Rev. 637, 636 (1987). State constitutions were accordingly intended to give broader protection than the federal constitution. An independent interpretation is necessary to accomplish this end. It is evident, therefore, that the "inviolate" Washington right to trial by jury was more extensive than that which was protected by the federal constitution when it was adopted in 1789. Pasco, 98 Wn.2d at 99.

v. *Matters of Particular State Interest or Local Concern*

Criminal law is a local matter. State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). There is no need

for national uniformity in criminal law. Until the Fourteenth Amendment was interpreted to apply the U.S. Bill of Rights in state court proceedings, all matters of criminal procedure were considered a matter of state law. See, e.g., Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922).

d. The "inviolate" right to jury trial in Washington safeguards juries' power to acquit.

A court may never direct a verdict of guilty in a criminal case. United States v. Garaway, 425 F.2d 185 (9th Cir. 1970) (directed verdict of guilty improper even where no issues of fact are in dispute); State v. Holmes, 68 Wash. 7, 12-13, 122 Pac. 345 (1912). A court's improper withdrawal of a particular issue from the jury's consideration may deny the defendant the right to a jury trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration); see Neder v. United States, 527 U.S. 1, 8, 15-16, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999) (omission of element in jury instruction constitutional error). The constitutional protections against double jeopardy also protect the right to a jury trial by prohibiting a retrial after a verdict of acquittal. U.S. Const. amend. V; Const. art. I, § 9. A jury verdict of not guilty is thus non-reviewable.

Also well-established is "the principle of noncoercion of jurors," first articulated in Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. See generally Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L.Rev. 867, 912-13 (1994). If there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, there can be no "duty to return a verdict of guilty." Indeed, there is no authority in law that suggests such a duty.

> We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. . . . If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970).

Washington courts also recognize that a jury may always vote to acquit. A judge cannot direct a verdict for the State because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power." State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 714 (1982). See also State v. Salazar, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence). This is not to say there is a right to instruct a jury that it may disregard the law in reaching its verdict. See, e.g., United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other grounds). However, if the court may not tell the jury it may disregard the law, it is equally wrong for the court to direct the jury that it has a duty to return a verdict of guilty if it finds certain facts to be proved.

e. The instruction proposed by Walker omitted the permissive "may" language disapproved in *Meggyesy* and *Bonisisio* and so did not encourage jury nullification.

Since Meggyesy, other Divisions of the Court of Appeals have declined to find that the "duty to convict" language runs afoul of the right to a jury trial. See State v. Brown, 130 Wn. App. 767, 773-74, 124 P.3d 663 (2005); State v. Bonisisio, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998). In both Meggyesy and Bonisisio, the defendants had proposed alternative "to convict" instructions that told the jury they "may" convict

upon proof beyond a reasonable doubt. Bonisisio, 92 Wn. App. at 794; Meggyesy, 90 Wn. App. at 700. The Courts found the instructions were equivalent to telling the jury they had the power to acquit against the evidence, and held that the jury is not entitled to a nullification instruction.[29] Id.

The "to convict" instructions proposed by Walker omitted the permissive "may" language disapproved in those decisions. At the same time, the instructions did not encroach upon the inviolate right to a jury trial because they simply accurately stated the jurors' constitutional role and prerogatives:

> In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proven beyond a reasonable doubt. On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty ...

CP 65-67. The instruction thus did not direct a verdict, but preserved Walker's inviolate right to a jury trial, and should have been given.

This Court should revisit and reverse its opinion in Meggyesy. Because the defense-proposed instructions correctly reflected the law, they should have been given. Walker's convictions should be reversed.

---

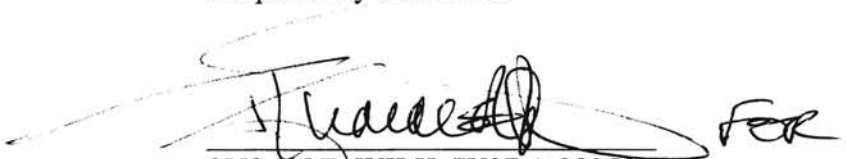
[29] In Brown, the proposed instruction apparently was different from the instructions addressed in Meggyesy and Bonisisio, but it was not reproduced in the opinion. See Brown, 130 Wn. App. at 771.

F. CONCLUSION

For the foregoing reasons, Curtis Walker's convictions should be reversed and this matter remanded for a new trial. On retrial, Walker should be afforded new counsel, the prejudicial and irrelevant evidence of gang membership should be excluded, and the jury should be correctly instructed on the applicable law.

DATED this 15th day of February, 2013.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68534-1-I
v.	)	
	)	
CURTIS WALKER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF FEBRUARY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] CURTIS WALKER 754152 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE. WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF FEBRUARY, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710