NO. 43480-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MASON FILITAULA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 11-1-03371-8

BRIEF OF RESPONDENT

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

1. Did the open-court exchange of the parties' peremptory challenge list violate defendant's public trial right when the challenges were exercised in open court and reduced to a written document that was filed as a public record?

2. Was it an abuse of the trial court's discretion to admit evidence of the name-calling that passed between defendant and his victim moments before the assault on trial occurred when it was highly probative of defendant's motive for the shooting and *res gestae* of the incident?

B. STATEMENT OF THE CASE.

1. Procedure[1]

Appellant, MASON FILITAULA ("defendant") was charged by amended information with firearm enhanced first degree assault and unlawful possession of a firearm in the first degree under Pierce County

[1] Citations to VRP Volumes I -VI will appear as 1RP-6RP and page number 1-1049, *e.g.*, 1RP 13. All other VRP will be cited by the date of the proceeding and page number, *e.g.* RP (3-7-12) 5.

cause number 11-1-03371-8.[2] CP 118-119. The Honorable Frank E. Cuthbertson presided over the trial.[3] 1RP 1.

The court denied defendant's pretrial motion to exclude evidence of gang-styled name calling that passed between defendant and the victim moments before the assault on trial occurred as it was more probative than prejudicial to explain a potential motive for the shooting. 1RP 37-43, 47-48. 1RP 45, 48-49. The ruling was clarified at trial. 2RP 269-85; 4RB 689-90, 742.[4]

A procedure for exercising peremptory challenges was established by agreement of the parties. RP (3-5-12 & 3-6-12) 2-3. Jury selection was explained to the venire. *Id.* at 7-9. Voir dire was conducted in open court. 1RP 63-64; RP (3-5-12 & 3-6-12) 9-53, 55-204. Peremptory challenges were alternately exercised through the open court exchange of a strike list. RP (3-5-12 & 3-6-12) 46, 54, 59-60, 185, 204-209; CP 256-

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[2] The State moved to join the firearm-related offenses called for trial as cause number 11-1-03371-8 with the firearm-related offense in No. 11-1-02789-1 pursuant to CrR 4.3 due to the cross-admissibility of bullet casing and moniker evidence to prove defendant's identity in both cases. 1RP 1, 22-26, 31, 33-36;. 5RP 856-62, 866. The court denied joinder, but allowed the cross-admissible evidence subject to a limiting instruction. 1RP 31-35, 37; 2RP 312-13, 331-32, 335-41; 5RP 863-685, 886, 888; CP 253, Ex. 15, 16, 22.

[3] The court excluded defendant's custodial statements. 1RP 65-83. The parties gave opening statements. RP (3-7-12) 1-14. The State presented its case. 1RP 100-212; 2RP 218-396; 3RP 402-589; 4RP 595-810; 5RP 816-97; CP 253-255, Ex. 5, 6-7, 9, 15-16, 22, 26, 33, 37. Defendant made a half-time motion to dismiss. 5RP 898. The motion was denied. 5RP 899. Defendant called three witnesses and introduced one exhibit, but did not testify. 6RP 912-943; CP 254, Ex. 39. The jury was instructed. 6RP 991; CP 48-72. The parties made closing remarks. 6RP 992-1038.

[4] The court ruled witnesses who knew defendant only as "KB" could use that name at trial. 1RP 51-2; 4RP 798-800.

59. Stricken and seated jurors were formally announced in open court. *Id.* The strike list was made a part of the public record. CP 260.

The jury found defendant guilty of firearm enhanced second degree assault. 6RP 1044-46.[5] The court found defendant guilty of unlawful possession of a firearm in the first degree ("UPOF"). 6RP 1047.[6] Sentence was imposed on April 20, 2012. CP 120. Defendant's offender score was 5 as to the assault and 4 as to the UPOF; the court respectively imposed low-end sentences of 22 months and 36 months. CP 123, 126. A 36 month consecutive sentence was imposed for the enhancement. *Id.* Defendant's notice of appeal was timely filed on May 18, 2012. CP 235.

2. Facts

Shooting victim Joshua Tamblin[7] spent most of July 23, 2011, arguing with Michelle Webb through a series of telephone calls and text messages. 2RP 258-263, 265; 3RP 414; 4RP 741. Joshua accused Michelle of taking property that belonged to his recently deceased father.[8] 2RP 262; 3RP 409-10. Michelle's boyfriend (Jeremy) intervened. 2 RP

[5] Defendant was acquitted of first degree assault. *Id.*
[6] Defendant strategically stipulated to a bench trial for the firearm charge. 1RP 60-61.
[7] Each witness will be first referenced by first and last name (if a last name is provided) then referenced by the name that most commonly appears in the record for the purpose of clarity. No disrespect is intended.
[8] The property at issue was a bag containing the father's paperwork and lingerie. 2 RP 262; 3RP 410.

263-64; 3RP 414. Joshua called Jeremy's cousin (Vance) a "snitch"[9] due to his alleged cooperation with law enforcement. 2RP 365, 367-69, 379; 3RP 419, 465. Joshua challenged Jeremy to a fist fight. 2RP 264; 3RP 420. Jeremy accepted the challenge, in part because he was angry about Joshua calling Vance a "snitch." 2RP 380; 3RP 420. The fight was to take place at the residence Joshua shared with his two year old daughter, mother (Cindy Tamblin), brother (Tyler Tamblin), and girlfriend (Crystal Rogers) in Lakewood, Washington. 3RP 420; 4RP 726, 728, 751. Cindy's three other grandchildren (ages 3, 8, and 12) as well as her adult friend Patricia Ignacio ("Patty")[10] were also present at the home. 2RP 259, 266; 4RP 712-15, 727-29.

[9] A "Snitch" is someone who violates street-cultural norms by cooperating with police; "snitching" is generally punished through retaliatory assaults. 2RP 369-70.
[10] Ignacio is referred to as "Patty" throughout the testimony. *See e.g.*, 4RP 727-29.

Jeremy arrived[11] at Joshua's house with Vance, Luta,[12] and defendant.[13] 2RP 265, 302, 305; 3RP 510; 4RP 731-02, 758.[14] Defendant identified himself as "KB," then told Cindy to get Joshua. 2RP 267-69, 296; 3RP 511; 4RP 609, 724, 741-02. Joshua emerged from the house to confront defendant, stating: "cuz it's on 23rd Block in the Hilltop...." 2RP 270, 296-301; 3RP 422; 4RP 629, 742-43. The statement proclaimed Joshua's alleged association with the Hilltop Crip gang. 2RP 300-01. Defendant responded without "gang talk," but commented on Joshua calling Vance a "snitch." 2RP 279, 301. Defendant has not assigned error to this evidence. *See* App. Br. at 28-29.

A chaotic physical altercation ensued. 2RP 380-81; 3RP 431-33, 473, 512, 516; 4RP 745-46. Joshua's two year old daughter wandered near to the fray. 4RP 744-45. Bystanders urged the men to stop the fight due to the risk it posed to children at the home. 2RP 375; 4RP 608.

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[11] There was a discrepancy about the type of vehicle the four men arrived in and where it was parked in relation to Joshua's residence. 1RP 176-85; 2RP 394-95; 3RP 405; 4RP 730-31.

[12] Luta's last name does not appear in the record.

[13] Defendant's identity as the shooter ("KB") was established through four witnesses that identified defendant as the shooter from police montage selections and Crystal's in-court identification. 2RP 268-69; 406-8; 3RP 524, 527-31; 4RP 630-35, 735-42, 800-09; CP 253, Ex. 6A-6C. Crystal was the only witness able, or willing, to identify defendant as the shooter KB at trial; she had met him twice before the incident. 4RP 606-60, 625-27. Defendant's appearance changed by the time of trial. *See e.g.*, 3RP 510-12, 531-3; 4RP 733. Witnesses may have been exposed to pressure that adversely affected their willingness to identify defendant in court or answer subpoenas. 2RP 270-73; 3RP 422-23, 492-502; 4RP 677.

[14] There was a discrepancy about the number of men with defendant. *See e.g.*, 4RP 640, 659 (four or five), 731 (four).

Defendant turned to leave at Jeremy's behest. 2RP 386. Joshua responded by calling defendant "slob," while reiterating his own purported association with the Hilltop Crips. 2RP 301, 386; 3RP 434. "Slob" is a derogatory word Crips use to belittle Bloods. *Id.* Joshua testified he called defendant "slob" because the men he was with wore red clothing (a color associated with the Blood gang). 2RP 302. Defendant turned back toward Joshua with a black 9mm pistol in his hand. 2RP 298, 377, 386-88; 3RP 434-35, 512, 516-519, 684-85.[15] He threatened to shoot Joshua while waving the pistol in the air then pointed the pistol at a downward angle toward Joshua's chest. 2RP 388; 3RP 433; 4RP 747-48. Joshua said: "fucking slob ... fuck slobs" ... "Oh homey, you're going to shoot me?" "Then shoot me?" 3RP 437; 4RP 669. Defendant responded: "you ain't [sic] from Hilltop" "you don't know no one [sic] from Hilltop," then opened fire. 2RP 298, 377, 386-88; 3RP 434-35, 491; 4RP 748-50. Defendant assigns error to the admission of this pre-shooting exchange of reciprocal name-calling at trial. *See* App. Br. at 28-29.

Defendant fired approximately five bullets in rapid succession, directing them toward Joshua in a sweeping motion that tracked his 20 foot escape route from outside the garage to the back door. 2RP 387-89,

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[15] Others in defendant's group may have been armed; Joshua's group was not. *See e.g.*, 2RP 382; 3RP 448, 474.

392; 3RP 439-41, 489, 518-21, 562; 4RP 612-13, 671, 748-50.[16] Children were hurried downstairs. 4RP 718, 749. The last bullet passed through Joshua's right ankle. 1RP 158; 2RP 371-72; 3RP 442; 4RP 749. Cindy called 911 as Joshua screamed in pain. 4RP 719, 752. Defendant's group fled the scene. 2RP 393-394.

Police responded within minutes. 1RP 116, 149; 4RP 719, 753. Joshua said the shooter's name was "KB." 1RP 163; 5RP 826-27. Joshua was transported to the hospital where he remained for three days. 1RP 129-30, 160; 3RP 442. He could not walk for several months. 3RP 443. Evidence was collected at the scene. 1RP 127; 5RP 838, 844; CP 253, Ex. 5, 7, 15-16. Two 9mm casings were recovered. 1RP 173-74; 5RP 841-43; CP 253, Ex. 15-16. Washington State Patrol concluded the casings were ejected from the same 9mm pistol that ejected a casing recovered in Pierce County ("PCSD") Incident No. 111750546[17] on June 24, 2011. 2RP 331-32, 335-41; 5RP 844-45, 882-83; CP 253-54, Ex. 15, 16, 22. A witness to that incident (Dawn Zamora) identified defendant as the shooter ("KB"). 5RP 589, 887, 889.

Four other witnesses identified defendant as ("KB"), the man who shot Joshua on July 23, 2011. 1RP 136-37, 141-42, 167-68, 131; 2RP

[16] Police did not locate bullet strikes. 5RP 848-49.
[17] Charged as 11-1-02789-1 and addressed in the State's motion for joinder. *Supra* at 2.

229-32, 236, 252; 3RP 524, 527-32; 4RP 606-07, 625-27, 630-35, 735-741, 793, 795, 800-08;[18] 5RP 828-29; CP 253, Ex. 6A-6C. Defendant was arrested on August 18, 2011. 5RP 829-30. He acknowledged being present when Joshua was shot during a telephone call recorded by the Pierce County Jail. 5RP 877-79, 1008; CP 254, Ex. 37.

C. ARGUMENT.

1. THE OPEN-COURT EXCHANGE OF A PEREMPTORY CHALLENGE LIST DOES NOT VIOLATE A DEFENDANT'S PUBLIC TRIAL RIGHT WHEN THE CHALLENGES ARE EXERCISED IN OPEN COURT AND MADE A PART OF THE PUBLIC RECORD.

"The public trial right is not absolute ...." ***State v. Sublett***, 176 Wn.2d 58, 71, 292 P.3d70, 292 P.3d 715 (2012) (*citing* ***Waller v. Georgia***, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). "[I]t is [nevertheless] strictly guarded to ensure that proceedings occur outside the public courtroom in only the most unusual circumstances." ***State v. Leyerle***, 158 Wn. App. 474, 478, 242 P.3d 921 (2010) (*citing* ***State v. Easterling***, 157 Wn.2d 167, 182, 137 P.3d 825 (2006)). The right "is found in article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution, both of which provide

[18] Crystal was initially showed a single photograph of defendant as the suspects were actively fleeing the area at that time. 4RP 808-09.

a criminal defendant with a public trial by an impartial jury." ***Sublett***, 176 Wn.2d 58 at 71. *Id.*[19] "These provisions ensure a fair trial, foster public understanding and trust in the judicial system, and give [participants] the check of public scrutiny." ***Leyerle***, 158 Wn. App. at 479 (*citing* ***State v. Brightman***, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); ***Dreiling v. Jain***, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004)).

"Whether the right to a public trial has been violated is a question of law reviewed *de novo*." *Id.* (*citing* ***State v. Momah***, 167 Wn.2d 140, 147-48, 217 P.3d 321 (2009); ***State v. Bone-Club***, 128 Wn.2d 254, 256, 906 P.2d 325 (1995)). Reversal and remand for new trial is the remedy when a criminal defendant's public trial right is violated. ***State v. Leyerle***, 158 Wn. App. 474, 478, 242 P.3d 921 (2010)(***In re Personal Restraint of***

[19] Article I, section 10 of Washington's Constitution also provides justice in all cases shall be administered openly, granting both the defendant and the public an interest in open, accessible proceedings. This right is mirrored federally by the First Amendment. Washington's Supreme Court historically analyzed court-closure allegations under either article I, section 10 or article 1, section 22, analogously, although each is subject to different relief depending upon who asserts the violation. ***Sublett***, 176 Wn.2d 70, n.6 (*citing* ***Press-Enter. Co. v. Superior Court***, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)(transcript will remedy violation of public trial right asserted by member of the public); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***State v. Easterling***, 157 Wn.2d 167, 182, 137 P.3d 825 (2006)(remanding for new trial when right asserted by defendant excluded from proceeding).

Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004)).[20] Whereas courtroom management decisions that do not amount to a public trial right infringing closure are reviewed for an abuse of discretion and will not be reversed unless they are manifestly unreasonable or based on untenable grounds for untenable reasons. ***Lormor***, 172 Wn.2d at 93, 95; ***In re Marriage of Littlefield***, 133 Wn.2d 39, 46-7, 940 P.2d 1362(1997); *see also* RCW 2.28.010.

a. Defendant's public trial right was observed through the open court exchange of the parties' list of alternately exercised peremptory challenges.

The rules governing the constitutionality of an alleged courtroom closure only "come into play when" "the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." ***Sublett***, 176 Wn.2d at 71; ***State v. Lormor***, 172 Wn.2d 85, 92, 257 P.3d 624 (2011)(*citing* ***Bone-Club***, 128 Wn.2d at 257 (no spectators allowed in courtroom during suppression hearing); ***Easterling***, 157 Wn.2d at 172 (all spectators excluded during plea-bargaining). A courtroom closure implicating the public trial right must meet the standards

[20] "A defendant does not waive his or her public trial right by failing to object at the time of an alleged closure. ***Leyerle***, 185 Wn. App. at 478 (*citing* ***State v. Brightman***, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)).

announced in ***Waller***,[21] or Washington's equivalent ***Bone-Club*** analysis.[22] Courtroom management decisions are reviewed for an abuse of discretion when the courtroom remains open because"[i]n addition to its inherent authority, the trial court, under RCW 2.28.010,[23] has the power to ... provide for the orderly conduct of its proceedings." ***Lormor***, 172 Wn.2d at 93, 95.

"Neither the number of peremptory challenges nor the manner of their exercise is constitutionally secured." ***United States v. Turner***, 558 F.2d 535, 538 (1977) (*citing* ***Stilson v. United States***, 250 U.S. 583, 40 S. Ct. 28, 63 L. Ed. 1154(1919)). "[W]ide discretion is committed to the

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[21] ***Waller*** provides: (1) the party seeking the closure must advance an overriding interest likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) the trial court must make findings adequate to support the closure. ***Lormor***, 172 Wn.2d at 92, n.2 (*citing* ***Waller***, 467 U.S. at 48).

[22] ***Bone-Club*** requires: (1) The proponent of closure must show a compelling interest, and if based on anything other than defendant's right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given an opportunity to object; (3) the least restrictive means must be used; (4) the court must weigh the competing interests of the proponent of the closure and the public; and (5) the order must be no broader in application or duration than necessary." ***Sublett***, 176 Wn.2d at 73, n. 8 (*citing* ***Bone-Club***, 128 Wn.2d at 285-59).

[23] RCW 2.28.010 provides: "Every court of justice has power—(1) To preserve and enforce order in its immediate presence. (2) To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority. (3) To provide for the orderly conduct of proceedings before it or its officers. (4) To compel obedience to its judgments, decrees, orders, and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein. (5) To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto. (6) To compel the attendance of persons to testify in an action, suit or proceeding therein, in the cases and manner provided by law. (7) To administer oaths in an action, suit or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers or the performance of its duties."

[trial] courts in setting the procedure for the exercise of peremptory challenges...[yet] [t]he method chosen ... must not unduly restrict the defendant's use of his challenges, ... and ... the defendant must be given adequate notice of the system to be used." *Id.* Washington's trial courts must also exercise their discretion in accordance with CrR 6.4(e). A defendant bears the burden of proving prejudice where the challenged procedure substantially complies with the rules governing jury selection. *See e.g.*, ***State v. Tingdale***, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

The public trial right was not implicated by the open court exchange of the peremptory challenge list in this case.[24] Spectators had an opportunity to hear the court and counsel decide on the process for exercising peremptory challenges on the list before it was exchanged. RP (3-5-12 & 3-6-12) 2-3. The list was then alternately passed between the parties in the presence of the venire followed by an open-court

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[24] The peremptory challenge list in this case was exchanged in open court so the trial court can be affirmed as properly exercising its discretion without this Court needing to draw a finer analytical line as to when a preemptory challenge is actually exercised, *i.e.*, when a party enters a selection on the alternately exchanged strike list or when the trial court announces the strike and seats the remaining jurors after giving the opponent an opportunity to object. That latter interpretation would be consistent with the fact that a party's peremptory challenge is not given effect until the challenged juror is stricken by the court. *See e.g.*, CrR 6.4(e); ***State v. Vreen***, 143 Wn.2d 923, 926, 26 P.3d 236 (2001)(privilege to strike individual jurors through peremptory challenges may be properly denied by the trial court when the challenge is based on purposeful discrimination); *See e.g.*, ***Batson v. Kentucky***, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2nd 69 (1986)(unconstitutional challenges based on race); ***State v. Saintacalle***, ___ Wn.2d ___, ___ P.3d ___, 2013 WL 3946038 at 21 (Slip Op. filed Aug. 1, 2013)(Gonzalez, J., concurring)).

announcement of stricken and seated jurors. RP (3-5-12 & 3-6-12) 46, 54, 59-60, 185, 204-209; CP 256-59. The challenges could have been publicly scrutinized for any disconcerting patterns, either in court when announced, or when they were made part of the public record with the "Original Jury Panel Selection List" and a written record of the seated jury panel. CP 256-60.

There is no showing public attendance was prohibited when the list was exchanged. The doors were not closed to all spectators as there were in ***Brightman***, 155 Wn.2d at 511, 122 P.3d 150. Defendant was not excluded from attending like the defendant in ***Easterling***, 157 Wn.2d at 172, 137 P.3d 825. None of the proceeding was conducted in an inaccessible location such as the judge's chambers as happened in ***Momah***, 167 Wn.2d at 146, 217 P.3d 321, and ***Strode***, 167 Wn.2d at 224, 217 P.3d 310, or a hallway like the one at issue ***Leyerly***, 158 Wn. App 482. The claimed public trial right violation could not have occurred as defendant's courtroom was not closed when peremptory challenges were exercised.

The argument defendant advances to urge reversal of his conviction in this case would require courts to find courtroom closures whenever spectators are incapable of perceiving every aspect of a trial court's publicly-conducted business with their full array of senses. *See* App. Br. at 16. That requirement was rejected by the Ninth Circuit in

D'Aquino v. United States., 192 F.2d 338, 365 (1951). In that case the government introduced five audio records inaudible without the earphones provided to select participants and attendees such as court, counsel, and the media. *Id.* ***D'Aquino*** argued the procedure denied her a public trial because public spectators could not hear the exhibits. *Id.* The Ninth Circuit found that claim "wholly without merit" analogizing the argument to a claim that the public trial right was violated "because certain exhibits such as photographs, samples of handwriting, etc., although examined by the parties and by the jury were not passed around to the spectators in the courtroom." *Id.* (*citing* ***Gilliars v. United States***, 87 U.S.App.D.C. 16, 182 F.2d 962, 972-73 (1950)).

Similar courtroom practices are common in Washington. Exhibits may be properly admitted, yet never published in a way that permits public inspection before the verdict is entered. *See e.g.*, ER 611(a);[25] ER 901(a).[26] They may even be properly withheld from the jury when used for limited purposes such impeachment under ER 608(b)[27]or refreshing

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[25] ER 611(a)"The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

[26] ER 901(a) "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent says."

[27] ER 608 "(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting a witness credibility, other than conviction of a crime as provided by ER 609, may not be proved by extrinsic evidence ...."

witness recollection under ER 612.[28] *See also* WPIC 1.02 ("[e]xhibits may have been marked ... but they do not go ... to the jury room...."). The public quality of the proceeding is nevertheless preserved through the inclusion of those exhibits in a public record capable of subsequent review. *See e.g.*, ***Ishikawa***, 97 Wn.2d at 37. The public's right to open criminal trials does not impose upon trial courts a duty to tailor publicly conducted proceedings to the viewing preferences of its audience.

b. The peremptory challenges did not need to be exchanged in open court because neither experience nor logic require they be exercised in public.

"Before determining whether there was a [public trial right] violation, [reviewing courts] first consider whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all." ***Sublett***, 176 Wn.2d at 71. "Existing case law does not hold that a defendant's public trial right applies to every component of the broad jury selection process.... Rather, [it] addresses application of the public trial right related only to a specific component of jury selection—*i.e.*, the voir dire of prospective jurors who form the venire...." ***State v. Wilson***, 174

[28] ER 612 "Writing Used to Refresh Memory."

Wn. App. 328, 338, 298 P.3d 148 (2013);[29] ***Orange***, 152 Wn.2d at 807-08 (entire voir dire closed to all spectators); ***Brightman***, 155 Wn.2d at 511 (entire voir dire closed to all spectators). ***Paumier***, ***Wise***, and the cases these opinions cite for support all involved courtroom closures during ... *the voir dire component* of jury selection ... The[y] did not... address or purport to characterize as "courtroom closures" the entire jury selection spectrum (from initial summons to jury empanelment)...." ***Wilson***, 174 Wn. App. at 339-40; ***Lormor***, 172 Wn.2d at 93 (*citing* ***Momah***, 167 Wn.2d at 146; ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009).

The exercise of peremptory challenges[30] is a component of Washington's jury selection process that has yet to be specifically addressed in our Supreme Court's recent expansion of public trial right jurisprudence. ***Wilson***, 174 Wn. App. at 338. A determination of whether peremptory challenges must be exercised in public must come from

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[29] In ***State v. Paumier***, 176 Wn.2d 29, 34, 228 P.3d 1126 (2012) and ***State v. Wise***, 176 Wn.2d 1, 10, 228 P.3d 1113 (2012) "our Supreme court appears to have used the terms 'jury selection' and 'voir dire' interchangeably in the *Bone-Club* context. But [this Court] view[s] this interchangeable usage as inadvertent and *not* as evincing the Court's intent to treat these two terms as synonymous for precedential purposes...." ***Wilson***, 174 Wn. App. at 339-40.

[30] CrR 6.4(e)(1) *Peremptory Challenges Defined.* A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror...."

application of the "experience and logic test." ***Sublett***, 176 Wn.2d at 141.[31]

That test requires courts to assess a closure by consideration of both history (experience) and the purposes of the open trial provision (logic). *Id.* at 73. The experience prong asks whether the practice in question has been historically open to the public, while the logic prong asks whether public access is significant to the functioning of the right. *Id.* The ***Bone-Club*** analysis must be applied before the court can close the courtroom if both prongs are answered affirmatively. *Id.*

A historical review of peremptory challenges in this state "does not require that th[eir] exercise ... [be] conducted in public." ***State v. Love***, ___ Wn. App. ____, 7, 9, No. 30809-0-III (Pub. Sept., 2013). "[I]n over 140 years ... there is little evidence of public exercise of such challenges, and some evidence that they were conducted privately." *Id.* The ***Love*** court only discovered one case in which defense challenged the "use of secret—written—peremptory jury challenges" as defendant does in the instant case. *See Id.* (*quoting* ***State v. Thomas***, 16 Wn. App. 1, 13, 553 P.2d 1357 (Div. 2, 1976)). Thomas, like defendant, argued "Kitsap County's use of use of secret— written— peremptory jury challenges

[31] Although no opinion gathered more than four votes, eight of the nine justices sitting in ***Sublett*** approved the "experience and logic" test."

denie[d] both a fair and public trial." This Court held that claim "ha[d] no merit" due in part to the Court's "fail[ure] to see how th[at] practice, which is utilized in several counties in this state, could in any way prejudice the defendant." 16 Wn. App. at 13. This Court concluded the "manner of exercise ... rests exclusively with the legislature and the courts, subject only to the requirement of a fair and impartial jury." *Id.* (*citing* ***State v. Persinger***, 62 Wn.2d 362, 383 P.2d 497 (1963)). ***Love*** found ***Thomas*** to be "strong evidence that preemptory challenges can be conducted in private." ***Love***, ___ Wn. App. at 8.[32]

Love's consideration of the logic prong similarly revealed that public exercise of peremptory challenges was not necessary. ***Love***, __ Wn. App.___, 9. The purposes of the public trial right are: to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. ***Brightman***, 155 Wn.2d at 514. "Those purposes are not furthered by a party's actions in exercising a peremptory challenge ... as [it] presents no question of public oversight." ***Love***, __ Wn. App.___, 9.

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[32] "The current statutes governing ... preemptory challenges in civil cases are found in RCW 4.44.130-.250. All of these statutes trace back to at least 1869; some are earlier. *See* Laws of 1869 §§ 212-223. CrR 6.4(e) supersedes the former statutes that provided for peremptory challenges in criminal cases. Those statutes, former RCW 10.49.030-.060, were repealed by Laws of 1984, ch. 76, § 30, and had their genesis in the laws of 1854 §§ 102-06. *Id.* at 8, n.6.

Any risk that privately exercised peremptory challenges might conceal a litigant's attempt to strike potential jurors for impermissible reasons, such as race,[33] is negated when objections to challenges and the identity of stricken jurors are either disclosed in open court at trial or committed to the public record as public scrutiny could follow either form of disclosure. *See e.g.*, ***Cohen v. Senkowski***, 290 F.3d 485, 490 (2nd Cir. 2002) (*citing* ***United States v. Fontenot***, 14 F.3d 1364, 1370 (9th Cir.1994)).[34] "The written record of [the peremptory challenge process consequently] satisfies the public's interest in the case and assures that all activities were conducted aboveboard, even if not within public earshot." ***Love***, ___Wn. App.___, 10.

Love found further support for its reasoning through analogy to ***Sublett*** since a written record of the peremptory challenge process had been committed to public record in ***Love*** as the written jury question and

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[33] *See e.g.*, ***Batson v. Kentucky***, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2nd 69 (1986); ***State v. Saintacalle***, ___ Wn.2d ___, ___ P.3d ___, 2013 WL 3946038 at 21 (Slip Op. filed Aug. 1, 2013)(Gonzalez, J., concurring)).

[34] "Many ... circuits have held that if a defendant is given an opportunity to register his opinions with counsel after juror questioning and is present when the exercise of strikes is given formal effect, then his constitutional right to be present is satisfied. ***United States v. Fontenot***, 14 F.3d 1364, 1370 (9th Cir.1994); ***United States v. Gayles***, 1 F.3d 735, 738 (8th Cir.1993); ***United States v. Bascaro***, 742 F.2d 1335, 1349–50 (11th Cir.1984); cf. ***United States v. Washington***, 705 F.2d 489, 497 (D.C.Cir.1983) (finding that defendant has right to be present for juror questioning). [Some] [D]istrict courts ... have consistently held that a defendant's absence during the exercise of challenges does not violate his constitutional rights provided he is present for juror questioning and the formal reading of challenges in open court. *See, e.g.*, ***Evans v. Artuz***, 68 F.Supp.2d 188, 195 (E.D.N.Y.1999); ***Benitez v. Senkowski***, 1998 WL 668079, at 8 (S.D.N.Y. Sept.17, (1998)."

response had been, pursuant CrR 6.15(f)(1),[35] in ***Sublett***. The Supreme Court found that rule's directive to "put the questions, answer and objections in the record" sufficiently advanced and protected the interests underlying the constitutional requirements of open courts to include the appearance of fairness...." 176 Wn.2d at 77. The public filing of the peremptory challenge list in defendant's case ensured a commensurate protection of the public trial right. *See* CP 260.

Allowing parties to privately exchange a peremptory challenge list also logically serves legitimate interests in facilitating confidential communications on how peremptory challenges should be exercised. Such communications often involve the expression of protected mental impressions about perceived the merit of particular jurors or insights into the opponent's strategy, which in turn influences the way peremptory challenges are exercised. The doctrines of work product and attorney client privilege as applied to an adversarial trial proceeding warrant giving parties the ability to freely discuss and exercise peremptory challenges beyond the observation of opponents and spectators. *See e.g.,* ER 201; ER

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[35] CrR 6.15(f)(1) "The jury shall be instructed that any questions it wishes to ask the court about the instructions or evidence should be signed, dated, and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response, and any objections thereto shall be made a part of the record...." (Emphasis added).

502 (disclosures made in a proceeding waive attorney-client privilege or work product protection); CR 26(b)(4) (absolute protection from disclosure of mental impressions). Similar concern for protecting confidential information parties beneficially use to facilitate publicly conducted voir dire contributed to the Supreme Court's decision that the sealing of juror questionnaires did not constitute a courtroom closure in ***State v. Beskurt***, 176 Wn.2d 441, 447, 293 P.3d 1159 (2013).

Neither experience nor logic suggest peremptory challenges must be publicly exercised, at least where auxiliary safeguards of the public trial right are present as they were in this case.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING EVIDENCE OF NAME-CALLING BETWEEN DEFENDANT AND JOSHUA MOMENTS BEFORE THE ASSAULT ON TRIAL OCCURRED AS IT WAS PROOF OF DEFENDANT'S MOTIVE FOR THE SHOOTING AND RES GESTAE OF THE INCIDENT.

Defendant assigns error to the trial court ruling admissible name-calling between defendant and shooting victim (Joshua) that consisted of Joshua calling defendant "slob" (defined by a lay witness as a pejorative for Bloods) and defendant's responsive rejection of Joshua's claimed Crip affiliation that immediately preceded the shooting at issue in his case. *See* App. Br. at 28; 2RP 298, 301, 377, 386-88; 3RP 434-35, 491; 4RP 748-50.

Evidentiary rulings are reviewed for an abuse of discretion. ***Lormor***, 172 Wn.2d at 94. A trial court abuses its discretion if no reasonable person would have decided the matter as the trial court did. ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970 (2004) (*citing* ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)). This requires the ruling be "manifestly unreasonable." ***State v. Hughes***, 118 Wn. App. 713, 724, 77 P.23d 681 (2003) (*citing* ***State v. Brown***, 132 Wn.2d 529, 571-572, 940 P.2d 546 (1997), *cert denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998)). Unreasonableness is manifest when it is based on untenable grounds or reasons;" it must be "obvious, directly observable, overt or not obscure...." *Id.*; *see also* ***State v. Taylor***, 83 Wn.2d 594, 598, 521 P.2d 699 (1974).

Admissibility of the challenged name-calling was first addressed during defendant's motion in limine. 1RP 37-9. The court took judicial notice that "slob" in "this community" can be a derogatory term for a particular street gang and the response: "[Y]ou don't know me. You're

not from Hilltop," could be "taunting or a motive that involves gang affiliation." 1RP 39, 42-43.[36]

Defendant conceded the name-calling was relevant, yet urged the court to limit the evidence to testimony the men "insulted each other" or that Joshua called defendant "slob" and that "slob" is an insult," without an explanation of the word's actual meaning. 1RP 43.

The court ruled the statements were admissible on the issue of defendant's potential motive for shooting Joshua, finding their probative value exceeded their prejudicial effect as they were a part of the mutual taunting that escalated the confrontation. 1RP 37-44, 45, 47-49. The court also found the evidence did not necessarily implicate defendant as a Blood. 1RP 45. The scope of the ruling was clarified at trial. 2RP 269-

[36] "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. ER 201(b). "A court may take judicial notice, whether or not requested." ER 201(c). Defendant's trial counsel conceded the probable accuracy of the trial court's understanding of the street gang meaning of "slob." 1RP 39.

85;[37] 4RB 689-92,[38] 742.[39] Defendant did not request a limiting instruction. No evidence of "defendant's gang status"[40] or gang expert testimony on the issue of gang culture was offered or admitted. 1RP 42-43; 1RP-6RP.

a. Defendant waived any error attending the challenged name-calling evidence when he failed to request a limiting instruction to tailor its use.

"When error may be obviated by an instruction to the jury, the error is waived unless an instruction is requested." ***State v. Ramirez***, 62 Wn. App. 301, 305, 814 P.2d 227 (1991) (*citing* ***State v. Barber***, 38 Wn. App. 758, 771, 689 P.2d 1099 (1984), *review denied*, 103 Wn.2d 1013 (1985); *see also* ***State v. Newbern***, 95 Wn. App. 277, 295-296, 975 P.2d 1041, *review denied*, 138 Wn.2d 1018 (1999); ***State v. Ellard***, 46 Wn.

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[37] The first clarification followed defendant's ER 403 and ER 404(b) objection to Joshua's testimony that his argument with defendant included "a little bit of gang talk" 2RP 270. The court ruled Joshua's unsolicited reference to "gang talk" fell within the court's preliminary ruling as "the representations and the dialogue or the "gang talk" may have been a motive for the shooting... or at least the motive for [the incident] to go from merely fisticuffs to something obviously a lot more serious." 2RP 278, 295.

[38] The second clarification followed defendant's objection to questions posed to witness Crystal Rogers regarding Joshua's use of the "slob" insult as exceeding the scope of cross examination. 4RP 688-90. The court found the line of questioning was within the scope of issues raised during cross and reiterated that evidence was within the scope of its pre-trial ruling. 4RP 690-92.

[39] Defendant objected when Cindy Tamblin testified her son (Joshua) and defendant yelled "gang words" at each other. 4RP 742. The objection was overruled. *Id.* The prosecutor responded by instructing the witness to avoid that characterization. 4RP 742.

[40] Although no evidence of defendant's gang affiliation was presented to the jury, the state provided the trial court reports pertaining to defendant's affiliation or potential membership with the East Side Pirus—a Blood gang. 1RP 41-42.

App. 242, 244, 730 P.2d 109 (1986), *review denied*, 108 Wn.2d 1011 (1987); *see also* ***State v. Russell***, 171 Wn.2d 118, 249 P.3d 604 (2011); ***State v. Dow***, 162 Wn. App. 324, 253 P.3d 476 (2011). The decision to forego a limiting instruction for evidence admitted under ER 404(b) may be a legitimate trial tactic to avoid reemphasizing damaging evidence. ***State v. Yarbrough***, 151 Wn. App. at 90, 210 P.3d 1029 (2009) (citations omitted).

Defendant waived his right to appeal the challenged evidentiary ruling when he failed to request a limiting instruction that would have obviated the prejudice he claims occurred. His improbable contention that the challenged name-calling was misused by the jury to convict him for being a gang member is precisely the type of misuse a properly worded limiting instruction would have prevented since jurors are presumed to follow their instructions. *See generally*, ***State v. Bythrow***, 114 Wn.2d 713, 720-721, 790 P.2d 154 (1990); ***Ramirez***, 62 Wn. App. at 305, 814 P.2d 227 (1991) (*citing* ***State v. Grisby***, 97 Wn.2d 493, 400, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 2d 4466 (1983). Defendant's pursuit of limiting instructions for other evidence at trial suggests the failure to request one for the challenged evidence was grounded in valid trial strategy. *See e.g.*, 1RP 32, 53; 2RP 312; 4RP 653, 681; 5RP 886; *see also* ***Yarbrough***, 151 Wn. App. at 90. The waiver

accompanying that decision was not affected by the fact the strategy may have proved unsuccessful.

The jury was nevertheless properly instructed to only consider the evidence admitted by the court, which did not include evidence of defendant's gang ties. CP 49 (Instruction No. 1). The law presumes the verdict was a product of that instruction. *See* ***State v. Post***, 59 Wn. App. 389, 396, 797 P.2d 1160 (1990); *see also* ***State v. Mason***, 127 Wn. App. 554, 40-41, 126 P.3d 34 (2005). The claimed evidentiary error was not preserved for review.

b. The challenged name-calling was admissible under ER 403 as minimally prejudicial evidence highly probative of defendant's mental state and motive for the shooting.[41]

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); ***State v. Dolan***, 118 Wn. App. 323, 331, 73 P.3d 1011 (2003). To this end "[r]elevant evidence" is evidence having any tendency to make the existence of any

[41] Reviewing court's can affirm the trial court's rulings on any grounds the record and the law support. ***State v. Costich***, 152 Wn.2d 463, 477, 98 P.3d 795 (2004); ***State v. Morales***, 173 Wn.2d 560, 580, 269 P.3d 263 (2012) (*citing* ***State v. Carroll***, 81 Wn.2d 95, 101, 500, P.2d 115 (1972)). The trial court did not expressly ground the challenged ruling in a specific evidentiary rule, but conducted a balancing test consistent with ER 404(b). 1RP 37-43, 45, 47-49.

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; ***State v. Beeb***, 44 Wn. App. 893, 723 P.2d 512 (1986), aff'd 108 Wn.2d 515, 740 P.2d 829 (1987) (this rule requires only a showing of minimal logical relevance); *see also* 5D Karl B. Tegland, Wash.Prac.: Evid., author's cmts. at 209 (2010-11 ed.); WPIC 5.01 (the law does not distinguish between direct and circumstantial evidence).

Relevant evidence of defendant's state of mind or motive that does *not* involve evidence of other conduct under ER 404(b) is generally admissible pursuant to ER 402 unless its probative value is substantially outweighed by its risk of undue prejudice under ER 403. *See e.g.*, ***State v. Grier***, 168 Wn. App. 635, 645-46, 278 P.3d 225 (2012) (events attending the immediate context of the charged offense are not other acts contemplated by ER 404(b)).

The State in the instant case was required to prove defendant intentionally assaulted[42] Joshua with a firearm. *See* CP 56 (Instruction No. 6); CP 62 (Instruction No. 12); CP 59 (Instruction No. 7: "A person acts ... intentionally when acting with the object or purpose to accomplish

[42] CP 61 (Instruction No. 9—Assault Defined); *see also* RCW 9A.36.011; The jury's verdict on the lesser included offense of assault in the second degree also required the State to prove defendant intentionally assaulted Joshua. CP 64 (Instruction No. 14); CP 67 (Instruction No. 17); RCW 9A.36.021.

a result that constitutes a crime."); *see also* ***State v. Hackett***, 64 Wn. App. 780, 786, n.2, 827 P.2d 1013 (1992).

Defendant's mental state was therefore necessarily at issue and "[i]t is undoubtedly the rule that evidence of quarrels between the victim and the defendant preceding a crime .... are probative upon the question of the defendant's intent." ***Powell***, 126 Wn.2d at 260; ***State v. Finch***, 137 Wn.2d 792, 822, 975 P.2d 967 (1999), *see also e.g.*, ***State v. Riley***, 137 Wn.2d 904, 906, 976 P.2d 624 (1999) (defendant asked shooting victim about his gang status suggesting he was a "wanna-be" before firing the shot). Such evidence is "competent to show ill will of the accused and a motive [43] for assault." ***State v. Atkinson***, 19 Wn. App. 107, 111, 575 P.2d 240 (1978); ***State v. Yarbrough***, 151 Wn. App. 66, 83, 210 P.3d 1029 (2009) (*citing* ***State v. Athan***, 160 Wn.2d 354, 382, 158 P.3d 27 (2007); ***State v. Young***, 87 Wn.2d 129, 138, 550 P.2d 1 (1976); ***State v. Price***, 126 Wn.App. 617, 638-39, 109 P.3d 27, *review denied*, 155 Wn.2d 118 (2005); ***State v. Boot***, 89 Wn.App. 780, 789, 950 P.2d 964 (1998)).

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[43] Motive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act." ***State v. Mee***, 168 Wn.2d 144, 157, 275 P.3d 1192 (2012) (*citing* ***State v. Powell***, 126 Wn.2d 244, 259, 893 P.3d 615 (1995)). ***Powell*** defined motive as "[c]ause or reason that moves the will ... An inducement, or that which leads or tempts the mind to indulge a criminal act ... the moving power which impels to action for a definite result ... that which incites or stimulates a person to do an act." *Id.* (*citing* 126 Wn.2d at 259, *quoting* ***State v. Tharp***, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)).

Name-calling between a defendant and victim in the immediate context of an assault on trial is consequently relevant to prove the mental effect of the victim's insult on the defendant regardless of its truth. ***Atkinson***, 19 Wn. App. at 110-11(defendant's awareness of victim's claim he was a "wife-beat[er]" relevant regardless of its truth as proof of defendant's motive for shooting); ***State v. Stenson***, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997) (evidence of disputes "tends to show ... the parties ... feelings one toward the other and often bears directly upon the state of mind of the accused....") *see also e.g.*, ***State v. Hamilton***, 58 Wn. App. 229, 792 P.2d 176 (1990) (victim's statement to defendant should have been permitted as proof of defendant's state of mind); 5C WAPRAC § 803.15;[44] ***Riley***, 137 Wn.2d at 908-09.

The challenged name-calling was an incident-specific event highly probative of defendant's motive for shooting Joshua as defendant had refrained from violently introducing his firearm into their physical altercation until after that name-calling occurred. 1RP 158; 2 RP 270, 296, 298, 301, 371-72, 377, 386-88; 3RP 434-35, 442, 491, 512, 516-19; 4RP 629, 684-85, 742-43, 748-50. A literal translation of the words used by

[44] "An out of court statement offered to prove the mental or emotional effect upon the hearer or reader is not objectionable as hearsay. The result is usually not based upon the theory that any particular hearsay exception applies, but upon the theory that the statement is not hearsay in the first place. The statement is offered not to prove the truth of the matter asserted, but as circumstantial evidence of the state of mind of the hearer...."

each man was necessary for the jury to fully appreciate the hostile import of the exchange as it was the timing and intentionally condescending meaning of the statements in the context of their delivery that set them apart from the hostile banter preceding it. *See e.g.*, 3RP 555; 4RP 662.

Joshua directed the parting "slob" insult at defendant in a way understood in the community to publicly belittled defendant as he walked away from the fight at his friend's request. Defendant's verbal response communicated contempt for Joshua's disbelieved claim of Crip affiliation as an intimidation tactic. It is only in this context that the shooting can be accurately understood as defendant's overreaction to Joshua's attempt to have the last word in their dispute by directing a demeaning remark at defendant's back in the moment of his public withdraw from their fight. There is nothing in the record to support, nor did the prosecutor argue, that defendant responded with gun fire because the insult was true (*i.e.*, he was actually a Blood that would not suffer being called "slob."). Based on the evidence adduced at trial it was more probably inferred that defendant was upset about Joshua maligning him with a false accusation of gang membership.

Any potential for the jury to draw an unfounded inference that defendant was a gang member merely because Joshua indirectly called him one was not substantially more prejudicial than probative. The trial

court accurately observed the name-calling did not implicate defendant as a gang member. 1RP 45. Whereas the testimony demonstrated Joshua to be a "poser,"[45] or an individual who uses gang slang in a misguided attempt at self-aggrandizement despite a lack of actual gang ties. 1RP 48; 2RP 300-01. Joshua's "poser" status was manifest in his poor grasp of the gang-styled vocabulary he tried to employ: *i.e.*, he inconsistently entered the argument calling defendant "cuz," a fraternal expression among Crips, and ended it by calling defendant "slob," a derogatory term for Bloods. 1RP 48; 2RP 300-01. Joshua even testified he called defendant "slob" for no better reason than the men with him wore red clothing. 2RP 302. It is nearly inconceivable the jury would assume defendant was a bona fide gang member, or bore any of the other unflattering titles the Tamblin family used to describe him,[46] merely because of name-calling directed at him by irrational people on the other side of a dispute that allegedly began with the theft of the Tamblin's property.

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[45] The trial court recognized that Joshua appeared to be a "poser," or one falsely claiming affiliation with a street gang. 1RP 48; *see also* ER 201 (judicial notice may be taken at any stage in the proceeding); *see also* onlineslangdictionary.com/meaning-definition-of/poser (Poser, noun: "a person who pretends to be a member of a group that they are not actually a member of; 'wannabe.' For example, by adopting the mode of dress, speech patterns, etc. of the group.").

[46] At least one member of the Tamblin family called defendant "little punk bitch" during the altercation and defendant appropriately does not claim on appeal that introduction of such name-calling was likely to be interpreted by the jury as anything more than unfortunate fighting words. *See* 3RP 555; 4RP 662.

Like the prosecutor in ***Atkinson***, 19 Wn. App. 112, the prosecutor in the instant case made no effort to portray the "slob" insult as true. The prosecutor won Joshua's concession he was not really a Crip and would not be welcome at Crip meetings. 2RP 301. The prosecutor urged Joshua's mother to avoid describing the challenged statements as "gang words" even though the trial court would have allowed that characterization. 4RP 742. The prosecutor used the neutral euphemism "nickname" when eliciting testimony about defendant's moniker ("KB") on the issue of identity. 4RP 801. And the prosecutor only addressed the challenged name-calling in rebuttal argument after defendant referenced the statements in closing. 6RP 1013, 1030-32. Even then, the prosecutor simply described it as "posturing" in the context of a confrontation that motivated the shooting. 6RP 1031-32. The challenged evidentiary ruling should be affirmed.

c. The challenged name-calling was admissible under ER 403 since any attending prejudice did not substantially outweigh its probative value as res gestae of the charged offense.[47]

"Res gestae evidence pertains to the factual context of the crime, not to the defendant's mindset. [It] is so unlike the expressly listed ER

[47] Reviewing court's can affirm the trial court's rulings on any grounds the record and the law support. ***Costich***, 152 Wn.2d at 477; ***Morales***, 173 Wn.2d at 580.

404(b) exceptions that considering res gestae evidence to be an ER 404(b) exception contravenes the ejusdem generis doctrine." (internal quotation marks omitted). ***Grier***, 168 Wn. App. at 646. It "more appropriately falls within ER 401's definition of "relevant evidence," which is generally admissible under ER 402 unless substantially more prejudicial than probative under ER 403. *Id.*; *see also* ***State v. Briejer***, 172 Wn. App. 209, 225, 289 P.3d 698 (2012)).

The res gestae doctrine "recognizes that, under [certain] circumstances, a declaration may be of such spontaneous utterance that, metaphorically, it is an event speaking through the person...." ***State v. Pugh***, 167 Wn.2d 825, 837, 225 P.3d 892 (2009) (*citing* ***Beck v. Dye***, 200 Wash. 1, 10-11, 92 P.2d 1113 (1939)). The doctrine is still employed as a basis for admitting evidence necessary "to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." ***Boot***, 89 Wn. App. at 790. "Each act must be a piece necessarily admitted to ensure the jury has the complete picture" as "[t]he jury [i]s entitled[48] to know the whole story." *Id.* (*citing* ***Powell***, 126 Wn.2d at 263)

[48] Since credibility determinations are for the trier of fact "it [i]s important for the jury to see the whole sequence of events...." ***State v. McBride***, 74 Wn. App. 460, 464, 873 P.2d 589 (1994); ***State v. O'Hara***, 141 Wn. App. 900, 910, 174 P.3d 114 (2007) (*citing* ***State v. Lliard***, 122 Wn. App. 422, 437, 93 P.3d 482 (2005), *review denied*, 154 Wn.2d 1002, 113 P.3d 482 (2005), *reversed on other grounds*, 167 Wn.2d 91, 217 P.3d 756 (2009); *See also* ***Hughes***, 118 Wn. App. at. 725 (*citing* ***Brown***, 132 Wn.2d at 571-572 (internal quotations omitted).

(victim statements within hours of murder relevant to establish hostilities with defendant); ***State v. Lane***, 125 Wn.2d 825, 832, 889 P.2d 929 (1995)). The logical corollary of that rule is the prosecution cannot be forced to "present a truncated or fragmentary version of the transaction...." *See Id; see also* ***Grier***, 168 Wn. App. at 645, 648-50 (derogatory name calling and gun threats between defendant and victim admissible as res gestae because it "showed a continuing course of ... behavior that ...set the stage for [the] shooting") (*citing* ***State v. Mutchler***, 53 Wn. App. 898, 902, 771 P.2d 1168 (1989)).

The challenged name-calling was an inseparable part of the confrontation that immediately culminated with the shooting. It was highly probative as the shooting would have been inexplicable absent an understanding of what was said just before defendant used potentially deadly force that had been withheld from the altercation until the name-calling occurred. 2RP 298, 377, 386-88; 3RP 434-35, 512, 516-519. The evidence was not substantially more prejudicial than probative because the jury had no evidentiary basis from which to interpret the challenged statements as anything other than a mutual exchange of purposefully offensive fighting words and defendant's excessive reaction to Joshua's final act of ill-timed bravado. *See supra.* The name-calling was properly admitted.

d. The name-calling is mislabeled as "gang evidence" requiring analysis under ER 404(b), yet was sufficiently probative to claim admissibility under the stricter standard employed by that rule.[49]

Under ER 404(b) "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." The rule provides for the admissibility of a defendant's gang affiliation to explain a gang-related component of a charged offense. *See e.g.*, ***State v. Embry***, 171 Wn. App. 714, 728-29, 732-33, 287 P.3d 648 (2012)("gang affiliation evidence" consisting of photograph of defendants "flashing gang signs," witness statements that "the defendants were active gang members," and expert evidence on gang culture admissible under ER 404(b) to prove motive); ***State v. Saenz***, 156 Wn. App. 866, 871-72 234 P.3d 336 (2010) (evidence of defendant's gang affiliation admissible as proof of gang motive) *reversed on other grounds*, 175 Wn.2d 167, 283 P.3d 1094(2012); ***Yarbrough***, 151 Wn. App. at 86 (defendant motivated by his gang affiliation and previous altercation with victim); ***Boot***, 89 Wn. App. at 789-91 (evidence of defendant's gang affiliation admissible to prove motive, premeditation, and res gestae);

[49] *See e.g.*, App. Br. at 1.

State v. Cambell, 78 Wn. App. 813, 821-22, 901 P.2d 1050 (1995) (crime explained as consequence of defendant's gang-related violent response to territorial challenge).

The rule precludes evidence of a defendant's general gang ties or gang-like behavior when it only tends to cast a defendant as the criminal type. *See e.g.*, ***State v. Mee***, 168 Wn. App. 144, 275 P.3d 1192 (2012) (unduly prejudicial evidence of defendant's gang membership paired with generalized expert testimony about gang culture without sufficient nexus between defendant's gang and crime); ***State v. Asaeli***, 150 Wn. App. 543, 576, 208 P.3d 1136 (2009) (evidence of defendants' "gang association" improperly admitted under ER 404(b) absent proof of actual gang, making gang-expert testimony erroneous as unhelpful under ER 702); ***State v. Scott***, 151 Wn.App. 520, 526, 213 P.3d 71 (2009), *review denied*, 168 Wn.2d 1004, 213 P.3d 780 (2010) (evidence of a defendant's gang affiliation inadmissible when it merely reflected his personal associations); ***State v. Ra***, 114 Wn. App. 688, 701-02, 175 P.3d 609 (2008) (forbidden propensity inference through indirect presentation of gang-culture evidence).

Joshua's confused use of a gang-styled insult and defendant's incredulous response to Joshua's claimed gang ties cannot be reasonably characterized as evidence of defendant's gang affiliation necessitating

application of ER 404(b). The trial court nevertheless evaluated the evidence under ER 404(b)'s more stringent standard for admissibility when it determined it was more probative than prejudicial; implicit in the ruling is that the evidence was not substantially more prejudicial than probative as required for exclusion under ER 403. 1RP 37-43, 45, 47-49. Defendant cannot show an abuse of discretion under either standard given the necessity of the challenged evidence to explain defendant's offense-specific mental state and the immediate context in which he committed the shooting for which he was tried.

e. Any cognizable error was harmless given the substantial evidence of defendant's guilt.

The admission of evidence that does not implicate a constitutional right is not error of a constitutional magnitude. ***State v. Read***, 147 Wn.2d 238, 53 P.3d 26 (2002); ***State v. Cole***, 54 Wn. App. 93 97, 772 P.2d 531 (1989). Such evidentiary error is only a ground for reversal if it results in prejudice. ***State v. Neal***, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (citation omitted). An error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *Id.* Improper admission of evidence constitutes harmless error if the evidence is of minor significance in

reference to the evidence as a whole. *Id.*; *see also* ***Tharp***, 96 Wn.2d at 599, ***State v. Cunningham***, 93 Wn.2d 823, 613 P.2d 1139 (1980).

Assuming *arguendo* the trial court should have somehow sanitized the name-calling that precipitated the shooting, the trial court's failure to do so could not have materially affected the outcome of the verdict given the substantial evidence defendant ended the relevant argument by shooting Joshua in the ankle with a 9mm pistol. *See e.g.*, 1RP 167-68, 173-74; 2RP 229-32, 252, 331-32, 335-41, 268-69, 406-08; 3RP 524, 527-32; 4RP 606-07, 625-27, 630-35, 735-742, 793, 795, 800-09; 5RP 589, 828-29, 841-45, 877-79, 887, 889, 1008; CP 253, Ex. 6A-6C, 15, 16, 22; CP 254, Ex. 37. Defendant's claim of prejudicial evidentiary error should be rejected because it is not supported by the record.

D. CONCLUSION.

Defendant failed to prove a courtroom closure implicating his public trial right or an evidentiary error that prejudiced the verdict reached by the jury in his case. The assignments of error on appeal should be rejected and defendant's conviction should be affirmed.[50]

DATED: October 11, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

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

10/11/13 Johnson
Date Signature

[50] The viability of defendant's UPOF conviction is not issue in this appeal.

PIERCE COUNTY PROSECUTOR

October 11, 2013 - 2:01 PM

Transmittal Letter

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Court of Appeals Case Number: 43480-6

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