SUPREME COURT NO. 91192-4
COA NO. 72434-7-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MASON FILITAULA,

Petitioner.

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

The Honorable Frank E. Cuthbertson, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Mason Filitaula asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Filitaula requests review of the published decision in State v. Mason Filitaula, Court of Appeals No. 72434–7–I (slip op. filed Dec. 8, 2014), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the constitutional right to a public trial is violated when the court conducts the peremptory challenge portion of the jury selection process in private at the time challenges are exercised, and a written record of the challenges is not filed into the court record until after the trial is over?

2. Whether the court erred in admitting gang evidence due to a lack of necessary nexus with the crime, resulting in the admission of irrelevant or unduly prejudicial evidence in violation of ER 403 and ER 404(b)?

D. STATEMENT OF THE CASE

The State charged Mason Filitaula with first degree assault and first degree unlawful possession of a firearm. CP 118-19. During jury selection, the venire panel was questioned on the record in the courtroom

and excusals for cause were made. 5RP[1] 3-204. The court then told the jury "As we have gone along, we have been exercising what we call challenges for cause, and so the benches are not quite as tight as they were this time yesterday. Now the lawyers are going to exercise what they call peremptory challenges, and while they're exercising their peremptory challenges, you all can be at ease and can even talk to each other, but I'm going to ask that, of course, you don't discuss the case and I'm going to ask that you remain right where you are and make sure that your numbers are visible on your clothing because they're going to still be operating by your pink tags." 5RP 204. Peremptory challenges were conducted off the record, designated by a "pause in proceedings" in the transcript. 5RP 209. The attorneys exercised peremptory challenges by listing names on a piece of paper, which was not filed in open court until after the trial ended. CP 260. Following the exercise of peremptory challenges, the court announced on the record who would serve as jurors for the trial without identifying which party exercised a peremptory challenge on which prospective juror. 5RP 209.

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[1] The verbatim report of proceedings is referenced as follows: 1RP - 9/23/11; 2RP 11/15/11; 3RP - 2/13/12; 4RP - six consecutively paginated volumes consisting of 2/29/12, 3/5/12, 3/7/12 (vol. I), 3/8/12 (vol. II), 3/12/12 (vol. III), 3/13/12 (vol. IV); 3/14/12 (vol. V); 3/15/12, 3/19/12, 3/20/12 (vol. 6); 5RP - 3/5/12, 3/6/12 (voir dire); 6RP - 3/7/12 (opening statement); 7RP - 4/20/12.

Evidence at trial showed Joshue Tamblin exchanged argumentative text messages with his former girlfriend, demanding the return of his deceased's father's lingerie. 4RP 259-65, 408-10. Her current boyfriend, Jeremy Gains, intervened in the text message exchange. 4RP 263-64, 414-15. Tamblin challenged Gains to a fight. 4RP 264-65, 415, 419-20. Gains arrived at Tamblin's residence with three other individuals. 4RP 730-32. A man who went by the name of "KB" went to the door and said he was there for Gains. 4RP 511, 541-43, 550, 552, 741. Tamblin came out of the house yelling and said something like "this is on Hilltop" or "cuz it's on 23rd Block in Hilltop." 4RP 299-300, 422-23. "Cuz" is a friendly term for the Crips gang. 4RP 300. "Hilltop" referred to the Hilltop Crips. 4RP 300. Tamblin said this to state where he was from. 4RP 301. Tamblin is not a Hilltop Crip. 4RP 300. He said he associated with them, which meant he had Hilltop Crip friends and his brother-in-law was a member. 4RP 300.

KB said something in response to Tamblin's Hilltop reference, but Tamblin could not recall what. 4RP 423. According to Tamblin, KB "didn't say no gang talk" or anything gang-related: "It was like bitch and shit and stuff like that." 4RP 301. 4RP 301. Tamblin and KB started yelling and swearing at one another and threatened to beat the other up. 4RP 269-70, 298-99, 426-27, 431, 553, 629, 662-63, 742-43.

Tamblin said "Slob, this is on Hilltop." 4RP 434. The prosecutor elicited from Tamblin that "slob" is a disrespectful term for Bloods. 4RP 301-02, 386. Tamblin testified that he called KB a "slob" because the other three were dressed in red. 4RP 302-04, 457. KB responded with "you don't know no one from Hilltop" or "You ain't from Hilltop." 4RP 386, 434.

Tamblin was inconsistent on when KB pointed a gun at him, at one point testifying KB did so after making the Hilltop reference. 4RP 435. Tamblin also testified that KB pointed the gun first, at which point Tamblin said "fuck slobs." 4RP 437. Then KB said "You don't know no one from the Hill" and fired his gun, hitting Tamblin in the ankle as he ran away. 4RP 386, 388-93, 434, 437, 441-42, 486. KB and the others ran across the street toward their car after the shooting. 4RP 393, 521.

Filitaula was later connected to the scene by a jail call and recovered shell casings that matched those from a gun used by Filitaula in a previous incident. Ex. 37; 4RP 336, 340-41, 882-83, 879, 889-90.

At trial, there were inconsistencies among the eyewitnesses in identifying or not identifying Filitaula as the man who shot Tamblin; witnesses waffled and testimony differed in terms of what the shooter looked like and what he wore that day. 4RP (Tamblin: 269, 297, 304, 316, 384-85, 406-08, 422-23, 801-04, 807; Rogers: 167-68, 228-29, 234-36,

252, 607, 609, 620-23, 630-33, 661, 795-96, 800, 804, 827-28; Cindy: 141-42, 732-39, 761-62; T.: 509-13, 523-25, 530-32, 546, 573, 575). Tamblin did not make an in-court identification of Filitaula as the shooter. 4RP 269, 406, 422-23. He acknowledged that he wrote his signature over the photo in the montage associated with Filitaula, but denied the person in the montage was Filitaula. 4RP 406-08. One witness identified Filitaula as the shooter KB. 4RP 228-29, 234-36, 252, 607, 623, 630-33, 795-96, 800, 804, 827-28. Two other witnesses did not identify Filitaula in court. 4RP 511-12, 733, 761-62.

Filitaula was found guilty of second degree assault and unlawful possession of a firearm. CP 42, 44; 4RP 22, 59-62, 1047. The court sentenced him to a total of 72 months confinement. CP 124.

On appeal Filitaula argued (1) the manner in which the peremptory challenges were exercised during jury selection violated his right to a public trial and (2) the trial court erred in admitting gang association evidence under ER 404(b). Corrected Brief of Appellant at 13-50. The Court of Appeals rejected both arguments. Slip op. at 1, 4, 6.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER THE COURT VIOLATED FILITAULA'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The federal and state constitutions guarantee the right to a public trial to every criminal defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Peremptory challenges were silently exercised on a piece of paper in a manner that did not allow for public scrutiny. That piece of paper was not filed until after the trial was over, two weeks later. CP 260. The trial court committed structural error in conducting the peremptory challenge portion of the jury selection process in private without justifying the closure under the standard established by Washington Supreme Court and United States Supreme Court precedent.

The Court of Appeals disagreed. It held the exercise of peremptory challenges in writing does not implicate the public trial right when a public record is kept showing which jurors were challenged and by which party. Slip op. at 1. But that piece of paper was not filed until after the trial was over, thus thwarting the value of timely public oversight needed to ensure the vitality of the public trial right.

The issue of whether the peremptory challenge process implicates the right to a public trial is already before this Court in State v. Love (No. 89619-4). Review is appropriate because this case presents a significant question of constitutional law under RAP 13.4(b)(3), as demonstrated by the Court's decision to grant review in Love.

It is established that the right to a public trial encompasses jury selection when it comes to questioning prospective jurors to determine fitness to serve on a particular case. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012). But whether other aspects of the jury selection process are subject to the public trial mandate has resulted in considerable litigation that has yet to be resolved by this Court. See State v. Wilson, 174 Wn. App. 328, 342-43, 346, 298 P.3d 148 (2013) (public trial right not implicated when bailiff excused two jurors solely for illness-related reasons before voir dire began), review pending (No. 88818-3); State v. Jones, 175 Wn. App. 87, 97-101, 303 P.3d 1084 (2013) (public trial right violated where trial court clerk drew four names to determine which jurors would serve as alternates during a court recess off the record), review pending (No. 89321-7); State v. Miller, __Wn. App.__, 338 P.3d 873, 877 (2014) (pre-voir dire dismissal of a juror who inadvertently sits

through pretrial motions does not implicate public trial right), review pending, (No. 91160-6).

Divisions Two and Three of the Court of Appeals have categorically held the peremptory challenge process does not implicate the right to a public trial under the experience and logic test. State v. Love, 176 Wn. App. 911, 920, 309 P.3d 1209 (2013), review granted, (No. 89619-4); State v. Webb, __Wn. App.__, 333 P.3d 470, 472-73 (2014) (same); (adopting Love analysis); State v. Marks, __Wn. App.__, 339 P.3d 196 (2014) (same).

In Filitaula's case, Division One did not follow the rationale of the other two divisions. It recognized an open peremptory challenge process serves the values associated with the public trial right: "A record of information about how peremptory challenges were exercised could be important, for example, in assessing whether there was a pattern of race-based peremptory challenges." Slip op. at 4.

But Division One held the "process the court used here ensured public access to such information" and "satisfied the court's obligation to ensure the open administration of justice" because "[t]he written form on which the attorneys wrote down their peremptory challenges was kept and filed in the court record at the end of the case." Slip op. at 4 (citing State v. Smith, __Wn.2d__, 334 P.3d 1049, 1054 (2014) (sidebar conducted in a

hallway but on the record did not implicate the public trial right, in part because "any inquiring member of the public can discover exactly what happened at sidebar.")).

The Court of Appeals ignored the important caveat in Smith: "We caution that merely characterizing something as a 'sidebar' does not make it so. To avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and *must either be on the record or be promptly memorialized in the record.* Whether the event in question is actually a sidebar is part of the experience prong inquiry and is not subject to the old legal-factual test." Smith, 334 P.3d at 1054 n.10.

Here, the piece of paper silently passed between the attorneys, which showed which party chose which juror and the order in which this occurred, was not made part of the record at the time the peremptory challenges were exercised. It remained inaccessible until after the two-week trial was over, when it was finally filed. CP 260; 5RP 209. The proceeding was not promptly memorialized in the record. The procedure in this case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Though the courtroom itself remained open to the public, the peremptory challenge proceeding was not conducted in an open manner.

Generally speaking, the later availability of a record of a closed proceeding that implicates the public trial right fails to cure an improper closure. See State v. Paumier, 176 Wn.2d 29, 32, 37, 288 P.3d 1126 (2012) (reversing conviction due to in-chambers questioning of potential jurors despite fact that questioning was recorded and transcribed). A rule that a *later* recitation of what occurred in private suffices to protect the public trial right would eviscerate the requirement that a Bone-Club[2] analysis take place *before* a closure occurs.

While members of the public could discern, after the trial, which prospective jurors had been removed by which side (assuming they knew to look in the court file), the public could not tell, at the time the challenges were made, which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group for removal. The mere opportunity to find out, after the trial is already completed, which side eliminated which jurors is insufficient to protect the public trial right. Members of the public would need to remember the identity, gender, and race of those individuals excused from jury service to determine whether protected group members had been improperly targeted. This is not realistic. At minimum, what happened off the record needed to be

[2] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

"promptly memorialized in the record." Smith, 334 P.3d at 1054 n.10. That did not happen here.

Application of the "experience and logic" test set forth in State v. Sublett, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012) shows the peremptory challenge process implicates the core values of the public trial right and therefore must be subject to contemporaneous public scrutiny. Historical evidence reveals "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

The experience prong is satisfied because the criminal rules of procedure show our courts have historically treated the peremptory challenge process as part of voir dire on par with for cause challenges. Division Two has treated the peremptory challenge stage as part of the voir dire process that should be conducted in open court. See Wilson, 174 Wn. App. at 342-44 (in holding public trial right not implicated when bailiff excused jurors solely for illness-related reasons before voir dire began, contrasting voir dire process involving for cause and peremptory challenges); Jones, 175 Wn. App. at 97-101 (in holding private drawing of alternates violated right to public trial, comparing it to voir dire process

involving for cause and peremptory challenges); see also People v. Harris, 10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) ("The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends."), review denied, (Feb 02, 1993); cf. Marks, 339 P.3d 196 (where a different panel in Division Two disavowed Wilson's description of peremptory challenges as on par with voir dire challenges).

The "logic" component of the Sublett test is satisfied as well. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." State v. Saintcalle, 178 Wn.2d 34, 74, 309 P.3d 326 (2013) (Gonzalez, J., concurring). "The peremptory challenge is an important 'state-created means to the constitutional end of an impartial jury and a fair trial.'" Saintcalle, 178 Wn.2d at 62 (Madsen, C.J., concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

While peremptory challenges may be exercised based on subjective feelings and opinions, a prosecutor is forbidden from using peremptory challenges to remove a juror based on race, ethnicity, or gender. McCollum, 505 U.S. at 48-50; Batson v. Kentucky, 476 U.S. 79,

86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992). Discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

The public trial right encompasses circumstances in which the public's supervision contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny. Wise, 176 Wn.2d at 5-6. An open peremptory process of jury selection acts as a safeguard against discriminatory removal of jurors. Public scrutiny discourages discriminatory removal from taking place in the first instance and, if such a peremptory challenge is exercised, increases the likelihood that the challenge will be denied by the trial judge. This Court should grant review to determine whether this integral aspect of the jury selection process is subject to the public trial right and whether that right is protected when the piece of paper documenting what happened is not filed until after the trial is over.

2. WHETHER GANG EVIDENCE IS ADMISSIBLE TO PROVE MOTIVE OR RES GESTAE FOR AN ASSAULT WHEN THE DEFENDANT IS NOT A GANG MEMBER IS A QUESTION OF SUBSTANTIAL PUBLIC INTEREST.

Admission of gang affiliation evidence is measured under the standards of ER 404(b). State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71 (2009), review denied, 168 Wn.2d 1004, 226 P.3d 780 (2010). Evidence associating the defendant with a gang is inadmissible when there is no nexus between the crime and gang membership, such as when the defendant is not a gang member at all. State v. Embry, 171 Wn. App. 714, 732-33, 287 P.3d 648 (2012), review denied, 177 Wn.2d 1005, 300 P.3d 416 (2013); Scott, 151 Wn. App. at 526; State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609, review denied, 164 Wn.2d 1016, 195 P.3d 88 (2008).

But now, gang evidence is admissible even where there is no nexus and the defendant is not a gang member so long as witnesses make gang references identifying themselves or others as gang members in the course of events leading up to the crime. That is what the Court of Appeals decision stands for. Slip op. at 5-6. It authorizes the admission of evidence associating the defendant with a gang under ER 404(b) even though the defendant is not a gang member. Filitaula seeks review of this aspect of the Court of Appeals decision under RAP 13.4(b)(4) as an issue involving substantial public importance.

Before the trial court may admit gang evidence under ER 404(b), it must (1) find by a preponderance of the evidence that misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect. Embry, 171 Wn. App. at 732.

The first part of this test — that "misconduct" occurred — is satisfied by a trial court's supported finding that a defendant belonged to a gang. Id. at 733 (this step satisfied where State presented evidence of the defendants' gang affiliation, the victim's affiliation with a different gang, and a previous altercation between members of the victim's and defendants' gangs); Ra, 144 Wn. App. at 702 ("the State never presented evidence that Ra was a gang member and, if so, what the gang mores were. Without such evidence, we have no basis to conclude that the State's gang evidence was admissible under ER 404(b).").

Over defense objection, the trial court ruled Tamblin's testimony that referenced gangs and gang terms, including testimony that Tamblin called the shooter a "slob" (a derogatory term for a member of the Bloods), was admissible to show motive. 4RP 39, 44-45. But the trial court did not find that Filitaula was a gang member. 4RP 44-45. Even the State acknowledged it had no real evidence that Filitaula was a gang member

and it expressly decided not to put on expert testimony to explain the significance of the "slob" gang insult in relation to gang culture. 4RP 42-43, 47. Without a supported finding that Filitaula was a gang member, the gang evidence was inadmissible under the first step of the ER 404(b) analysis.

The third part of the ER 404(b) test — relevancy — requires a nexus between gang activity, the crime, and gang members. Embry, 171 Wn. App. at 734; Scott, 151 Wn. App. at 526. The requisite nexus is what establishes the probative value of such evidence. Embry, 171 Wn. App. at 732. Evidence of gang affiliation may be admitted to establish the motive for a crime, but only if there is "a connection between the gang's purposes or values and the offense committed." Scott, 151 Wn. App. at 527. The trial court's ruling fails here as well. Testimony on gang culture, the significance of respect, and gang violence as a response to perceived disrespect is important to establishing the relevancy of gang affiliation to motive. Scott, 151 Wn. App. at 528-29. That kind of evidence is lacking in Filitaula's case.

According to the Court of Appeals, the testimony regarding gangs was not introduced to identify Filitaula as a gang member or to show that gang membership supplied a motive for him to shoot Tamblin, but rather to show "the taunting back and forth" that preceded the assault and

supplied a motive for it. Slip op. at 6. The Court of Appeals held "[t]heir statements to each other were part of the immediate context of the assault and were admissible under the res gestae exception." Slip op. at 6.

But even under the res gestae rationale, the fact remains that the jury was allowed to hear testimony that smeared Filitaula as a gang member. The salient question is whether the trial court abused its discretion in allowing this to happen.

The Court of Appeals proclaimed it was unaware of any authority "that requires trial courts to edit eyewitness testimony in a way that will sanitize the event being described." Slip op. at 6. The authority is ER 403,[3] which prevents the admission of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Allowing the jury to hear Tamblin associate Filitaula with a gang when Filitaula was not a gang member is confusing and misleading. The jury was never actually informed that Filitaula was not a gang member. Tamblin's testimony allowed the jury to make the erroneous inference that he was.

ER 403 also prevents admission of needlessly cumulative evidence. The jury already heard testimony that there was a lot of taunting between

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[3] ER 404(b) incorporates an ER 403 analysis. State v. Gunderson, __Wn.2d__, 337 P.3d 1090, 1093-94 (2014); State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982).

the two men. Elicitation of the actual gang references was cumulative of the taunts that made no mention of gangs.

Finally, the "unfair prejudice" aspect of ER 403 authorizes trial courts to sanitize testimony in a manner that avoids unnecessarily inflaming the prejudices of the jury. See State v. DeVincentis, 150 Wn.2d 11, 23, 74 P.3d 119 (2003) (the need for ER 404(b) evidence is a relevant factor in balancing prejudice against probative value; affirming trial court's admission of ER 404(b) evidence in part because "[n]o less inflammatory documentation or corroboration that the crime occurred was available."); State v. DeLeon, __Wn. App.__, __P.3d__, 2014 WL 7335530 at *8 (slip op. filed Dec. 23, 2014) (testimony suggesting that gang tattoo signified that defendant had committed a prior homicide or drive-by shooting goes "way beyond evidence needed to prove motive.").

The addition of the word "unfair" in ER 403 "obligates the court to weigh the evidence in the context of the trial itself, bearing in mind fairness to both the State and defendant." State v. Bernson, 40 Wn. App. 729, 736, 700 P.2d 758, review denied, 104 Wn.2d 1016 (1985). Defense counsel proposed before trial that the State could elicit testimony that an insult was made without specifying what that insult was. 4RP 43-44. In the alternative, if the court allowed the specific insult, then the witness could explain that "slob" is a derogatory term without explaining what the

insult meant in relation to gangs. 4RP 43-44. Thus, the fact that an insult was made was relevant, but the gang connotation was irrelevant or unnecessary to the State's case. 4RP 43. Defense counsel's proposed solution was sensible. It would have allowed the State to show an insult was made before the shooting while avoiding the irrelevant and unfairly prejudicial gang connotation.

Gang evidence is considered prejudicial due to its general "inflammatory nature." State v. Asaeli, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009). Why then inject such evidence into a trial when it is not needed for the State to fairly present its theory of the case to the jury? There was no need for the jury to hear that some of the taunts involved gang references when Filitaula was not a gang member.

Evidence of insults should have been handled in a way that avoided inflammatory gang connotation. The exact words tied to gang association did not need to be put into evidence. Courts in other jurisdictions recognize a fair trial sometimes requires such sanitization. See, e.g., State v. Nelson, 791 N.W.2d 414, 419 (Iowa 2010) ("we will only allow the admission of other crimes, wrongs, or acts evidence to complete the story of the charged crime when a court cannot sever this evidence from the narrative of the charged crime without leaving the narrative unintelligible, incomprehensible, confusing, or misleading.");

State v. Collier, 316 N.J. Super. 181, 195, 719 A.2d 1276 (N.J. Super. Ct. App. Div. 1998) ("a trial judge, in admitting other-crimes evidence that is inherently inflammatory must take appropriate steps to reduce the inherent prejudice of that evidence by considering whether it can reasonably be presented to the jury in a less prejudicial form, and, when necessary, requiring the evidence to be presented to the jury in a sanitized form.").

Filitaula's case gives this Court the opportunity to directly weigh in on whether and under what circumstances the sanitization of witness testimony concerning gangs is needed to avoid tainting the trial with unnecessarily inflammatory evidence.

F. CONCLUSION

For the reasons stated above, Filitaula requests that this Court grant review.

DATED this 7th day of January 2015.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MASON IOPU FILITAULA, Appellant.	)	No. 72434-7-I DIVISION ONE PUBLISHED OPINION FILED: December 8, 2014

BECKER, J. — Allowing litigants to exercise peremptory challenges in writing does not implicate the public trial right when a public record is kept showing which jurors were challenged and by which party.

On July 23, 2011, Joshue Tamblin exchanged argumentative text messages with his former girl friend, demanding the return of property. Her current boyfriend, Jeremy Gains, intervened in the text message exchange. Tamblin challenged Gains to a fight. Gains went to Tamblin's home with appellant Mason Filitaula and two other individuals. As soon as they arrived, Tamblin began hurling insults at Filitaula. Filitaula responded with his own insults. He then shot Tamblin in the ankle. This incident led to criminal charges against Filitaula. A jury convicted him of second degree assault and unlawful possession of a firearm.

Filitaula contends that his right to a public trial was violated when the parties exercised their peremptory challenges in writing.

After voir dire, counsel exercised their peremptory challenges on a written form while in an open courtroom. Members of the public and potential jurors were allowed to remain in the courtroom. The judge said:

> THE COURT: I want to thank the lawyers for your questions. I want to thank you all for your answers. As we have gone along, we have been exercising what we call challenges for cause, and so the benches are not quite as tight as they were this time yesterday. And now the lawyers are going to exercise what they call peremptory challenges, and while they're exercising their peremptory challenges, you all can be at ease and can even talk to each other, but I'm going to ask that, of course, you don't discuss the case and I'm going to ask that you remain right where you are and make sure that your numbers are visible on your clothing because they're going to still be operating by your pink tags.

After a pause in the proceedings, the judge reviewed the peremptory challenge form, announced the individuals who had been selected to make up the jury, and excused the remaining members of the jury pool.

Filitaula contends that allowing the peremptory challenges to be exercised in writing rather than orally was a court closure. He claims that because the public could not hear what was happening even if they could see that something was going on, the public was "denied the opportunity to scrutinize events." Brief of Appellant at 17.

Article I, section 10 of our state constitution provides, "Justice in all cases shall be administered openly." This provision grants the public an interest in open, accessible proceedings. State v. Lormor, 172 Wn.2d 85, 91, 257 P.3d 624 (2011). Additionally, a criminal defendant has a right to a public trial under Article

I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. Whether a defendant's right to a public trial has been violated is reviewed de novo on direct appeal. State v. Smith, ____ Wn.2d ____, 334 P.3d 1049, 1052 (2014).

The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public. Sublett, 176 Wn.2d at 71. For example, no violation of the public trial right occurred in Sublett when the court considered a jury question in chambers. "None of the values served by the public trial right is violated under the facts of this case. . . . The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." Sublett, 176 Wn.2d at 77.

The other divisions of this court have rejected arguments that the exercise of peremptory challenges in writing necessarily implicates the public trial right. State v. Marks, No. 44919-6-II (Wash. Ct. App. Dec. 2, 2014); State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014); State v. Love, 176 Wn. App. 911, 920, 309 P.3d 1209 (2013). We join them.

Filitaula argues that the parties should have been required to announce each challenge out loud as the peremptory challenge process was taking place.

He claims this is necessary so the public can know which party brought each peremptory challenge and in what order.

A record of information about how peremptory challenges were exercised could be important, for example, in assessing whether there was a pattern of race-based peremptory challenges. See Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). The process the court used here ensured public access to such information. The written form on which the attorneys wrote down their peremptory challenges was kept and filed in the court record at the end of the case. It contains the names and numbers of the prospective jurors who were removed by peremptory challenge, lists the order in which the challenges were made, and identifies the party who made them. The record supplies no basis for an argument that the public lacked access to this information. See Smith, 334 P.3d at 1054 (sidebar conducted in a hallway but on the record did not implicate the public trial right, in part because "any inquiring member of the public can discover exactly what happened at sidebar.")

In summary, we do not accept Filitaula's description of the peremptory challenge process as a private, off-the-record proceeding. We conclude peremptory challenges need not be conducted orally to fulfill the public trial right. The procedure used here satisfied the court's obligation to ensure the open administration of justice.

Filitaula's second argument on appeal is that the trial court erred by allowing Tamblin to tell the jury the gang-related words he used when he insulted

Filitaula just before the shooting occurred. Tamblin testified that he yelled, "cuz it's on 23rd Block in the Hilltop," and that he used these words to identify himself with the Hilltop Crips Street Gang and to state where he was from. He said that Filitaula responded with verbal insults "like bitch and shit and stuff like that, but it was no gang related." Tamblin testified that he also called Filitaula a "slob," which he described in his testimony as a disrespectful term for "Bloods." Tamblin testified that Filitaula responded by proclaiming "you don't know no one from the Hill" and then shot him.

The issue of potential prejudice from the use of gang-related words first arose when Filitaula asked the court in a pretrial motion to prohibit the State from introducing expert witness testimony about gang activity in Pierce County. The court granted this request but declined to expand the ruling to prohibit Tamblin from using the terms "slob" and "Hilltop" or explaining what they referred to.

We review evidentiary rulings for an abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Evidence of gang affiliation is a special subset of prior bad act evidence. It can be admitted in a criminal trial if there is a connection between the crime and gang membership that makes the gang evidence relevant. State v. Scott, 151 Wn. App. 520, 526-27, 213 P.3d 71 (2009), review denied, 168 Wn.2d 1004 (2010). Filitaula claims that the terms "slob" and "Hilltop" were inadmissible and prejudicial because there was no evidence he was a gang member.

Unlike in Scott, here the testimony was not introduced to identify Filitaula as a gang member or to show that gang membership supplied a motive for him to

shoot Tamblin. The court allowed the testimony to show "the taunting back and forth" that preceded the assault and supplied a motive for it. Tamblin's testimony about how he insulted Filitaula not only went to the issue of motive, it was also admitted under the "res gestae" or "same transaction" exception to ER 404(b) because the conduct took place in the immediate timeframe of the assault. See State v. Lane, 125 Wn.2d 825, 831-33, 889 P.2d 929 (1995). Evidence is properly admitted under the res gestae exception if it is necessary to depict a complete picture for the jury. Lane, 125 Wn.2d at 832. As the trial court observed, "I think to understand what happened . . . at Tamblin's house, what was said is within bounds." Hearing the actual words Tamblin and Filitaula exchanged allowed the jury to perceive the escalating tension that led to the gunshot. Their statements to each other were part of the immediate context of the assault and were admissible under the res gestae exception.

Filitaula claims the prejudicial effect of terms like "slob" and "Hilltop" was so great that the trial court should have required that the testimony merely show that the two men insulted each other. Filitaula cites no authority, and we are aware of none, that requires trial courts to edit eyewitness testimony in a way that will sanitize the event being described. In the absence of any effort by the State to use Tamblin's statements as evidence that Filitaula was affiliated with a gang, the trial court did not abuse its discretion by concluding that the words actually spoken were not unduly prejudicial.

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Dwyer, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. MASON FILITAULA, Appellant.	)))))))))	SUPREME COURT NO. _____ COA NO. 72434-7-I

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF JANUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MASON FILITAULA
DOC NO. 872099
MONORE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JANUARY 2015.

X Patrick Mayovsky

Sanders, Laurie

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