

**Court of Appeals No. 36457-3-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**VERRICK VERE YARBROUGH,**

**Defendant/Appellant.**

STATE OF WASHINGTON  
BY \_\_\_\_\_  
COURT OF APPEALS  
07/17/13 10:10 AM  
CLERK OF APPEALS

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**OPENING BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 06-1-03109-3  
The Honorable Vicki Hogan, Presiding Judge**

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## **I. ASSIGNMENTS OF ERROR**

1. Mr. Yarbrough was denied his right to a fair trial.
2. The trial court erred in allowing gang-related evidence to be admitted.
3. There was insufficient admissible evidence to find that Mr. Yarbrough committed the crime in order to maintain or promote his position in a gang.
4. Mr. Yarbrough received ineffective assistance of counsel.
5. There was insufficient evidence admitted to support the aggravating factor that Mr. Yarbrough committed any crime for the purpose of maintaining or advancing his membership in a gang.
6. The imposition of an exceptional sentence on the basis that Mr. Yarbrough committed murder under circumstances manifesting an extreme indifference to human life with the aggravating factor that the murder involved a destructive and foreseeable impact on persons other than the victim violated Mr. Yarbrough's right to be free from double jeopardy.
7. Cumulative error deprived Mr. Yarbrough of his right to a fair trial.

## **II. ISSUES PRESENTED**

1. Does a defendant receive a fair trial where the trial court allows highly prejudicial yet irrelevant evidence to be admitted? (Assignments of Error Nos. 1 and 2)
2. Was the gang-related evidence relevant where it had no probative value to any issue before the jury? (Assignments of Error Nos. 1 and 2)

3. Was the gang-related evidence more prejudicial than probative where such evidence had no probative value to any issue before the jury? (Assignments of Error Nos. 1 and 2)
4. Did the admission of highly prejudicial yet irrelevant gang-related evidence deprive Mr. Yarbrough of a fair trial? (Assignments of Error Nos. 1 and 2)
5. Was it effective assistance of counsel for Mr. Yarbrough's trial counsel to fail to ensure that the jury was given a limiting instruction regarding the gang-related evidence? (Assignments of Error Nos. 1, 4, and 5)
6. Was it effective assistance of counsel for Mr. Yarbrough's trial counsel to fail to object to Det. Ringer offering highly prejudicial inadmissible profiling testimony? (Assignments of Error Nos. 1, 4, and 5)
7. Was Mr. Yarbrough afforded a fair trial where highly prejudicial gang evidence was introduced without a limiting instruction? (Assignment of Error No. 1)
8. Did the State introduce sufficient evidence to support the special verdict that Mr. Yarbrough committed these crimes for the purpose of maintaining or advancing his position in a gang? (Assignment of Error No. 5)
9. Were Mr. Yarbrough's state and federal constitutional rights to be free from double jeopardy violated when the trial court imposed an exceptional sentence on his conviction for first degree murder in violation of RCW 9A.32.030(1)(b) where the aggravating factor used to support the exceptional sentence was that the offense involved a destructive and foreseeable impact on persons other than the victim in violation of RCW 9.94A.535(3)(r)? (Assignment of Error No. 6)
10. Did cumulative error deprive Mr. Yarbrough of a fair trial? (Assignment of Error No. 7)

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### **III. STATEMENT OF THE CASE**

#### ***A. Procedural Background***

On July 10, 2006, Mr. Yarbrough was charged with the following crimes: one count of first degree murder while armed with a firearm with the aggravating factors of having committed the crime to advance his position in an organization and/or the offense involved a destructive and foreseeable impact on persons other than the victim; one count of first degree assault while armed with a firearm with the aggravating factors that the crime was committed to advance his position in an organization and/or the offense involved a destructive and foreseeable impact on persons other than the victim; and one count of unlawful possession of a firearm. CP 1-3. On August 16, 2006, the charges were amended to add allegations that the defendant or an accomplice had committed the crimes of first degree murder and first degree assault. CP 6-8.

On October 2, 2006, Mr. Yarbrough filed a motion to exclude evidence regarding any potential gang affiliations of Mr. Yarbrough and to exclude any evidence of two prior alleged confrontations. CP 9-16. Mr. Yarbrough also filed a motion to admit evidence relating to other suspects. CP 9-16.

Also on October 2, the State filed a motion to admit evidence under Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

ER 404(b), seeking to admit evidence of “gang affiliation and rivalry,” specifically, that Mr. Yarbrough and Mr. Simms had been involved in the same confrontations that Mr. Yarbrough had moved to have excluded. CP 17-25.

On December 11, 2006, the State filed a response to Mr. Yarbrough’s motions to exclude evidence and admit “other suspect” evidence. CP 30-35.

On December 13, 2006, argument was heard on the motions. RP 4-49, 12-13-06.<sup>1</sup> The trial court granted the State’s motion to admit gang-related evidence and denied Mr. Yarbrough’s motion to exclude this evidence. CP 38-40, RP 19-20, 12-13-06. Argument was also heard on Mr. Yarbrough’s motion to exclude the evidence of the two prior confrontations. RP 21- 29, 12-13-06. The trial court denied the motion. RP 29, 12-13-06.

On April 6, 2007, the trial court issued an order admitting both the gang-related evidence and the “other suspect” evidence. CP 38-40.

Trial began on April 9, 2007. RP 67.<sup>2</sup> On April 27, 2007, the jury returned verdicts of guilty on all counts and all aggravating factors. RP 1160-1167,

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<sup>1</sup> Some of the volumes of the report of proceedings are not numbered consecutively. Reference will be made to these volumes by giving the page number followed by the date of the volume.

<sup>2</sup> The volumes of the report of proceedings relating to the trial are numbered consecutively. Since these make up the bulk of the report of proceedings, reference will be made to these volume by giving the page number only.

CP 226-234.

The trial court sentenced Mr. Yarbrough to 361 months on the first degree murder charge, 123 months on the first degree assault charge, 16 months on the second degree unlawful possession of a firearm charge, and imposed two 60 month firearm enhancements to the sentence. CP 257-268. The murder and assault charges were to run consecutively, and the firearm enhancements also were to run consecutively. CP 257-268. The trial court imposed a total sentence of 724 months to be served without earned good time credit. CP 257-268.

***B. Factual Background***

On July 8, 2006, Rhacizio Simms was shot and killed outside Club Friday in downtown Tacoma. CP 4-5. Prior to the shooting, Mr. Yarbrough had been observed with a group of people inside Club Friday wearing gang-related clothing, flashing gang-related hand-signs, and yelling, "This is Hilltop Crips." CP 4-5. Also present in Club Friday were members of a rival gang, the "Murderville Folks." CP 4-5.

When the club closed, both groups exited the Club. CP 4-5. Mr. Simms arrived outside the club as the club was closing. CP 4-5. A group of people including Mr. Yarbrough was on the east side of Pacific Avenue and facing West towards Club Friday and the On the Rocks bar. CP 4-5. The Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

members of the Murderville Folks gang had parked a car in front of On the Rocks and were standing in that area. CP 4-5.

Mr. Simms got out of his car and approached the area where the Murderville Folks were congregated. CP 4-5. Mr. Yarbrough and the other people in his group began yelling “This is Hilltop Crips” and similar phrases. CP 4-5. Mr. Simms laughed at Mr. Yarbrough and the other people and said something to the effect that the men could fight right now. RP 414.

Mr. Yarbrough pulled a handgun from his waistband and fired six shots towards Mr. Simms and the group of Murderville Folks in front of On the Rocks. CP 4-5. One round hit Mr. Simms in the back of his head and killed him. CP 4-5. Another round went into On the Rocks, ricocheted off a wall, and struck Mr. Steven Burnett, creating a welt on his torso. CP 4-5.

Someone in the group of Murderville Folks started shooting back at Mr. Yarbrough as Mr. Yarbrough and the rest of the group on the East side of the street ran South to escape. CP 4-5. Ms. Tiffany Walker had been in Club Friday and was with some friends near her car. CP 4-5. She was struck by a bullet fired by one of the Murderville Folks. CP 4-5. The bullet entered Ms. Walker’s torso and lodged in her spine. CP 4-5.

Several witnesses identified Mr. Yarbrough to police as the one who had initiated the shooting. CP 4-5. At the time of his arrest, Mr. Yarbrough

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was wearing gang-related clothing, had gang-related tattoos, and a search of his residence revealed further evidence of gang affiliation. CP 4-5.

In July of 2005, Mr. Yarbrough had been adjudicated guilty of several felonies and is prohibited from possessing a gun. CP 4-5.

#### **IV. SUMMARY OF TESTIMONY**

- ***Detective Terry Krause***

Detective Krause discusses his employment and training history. RP 68-69. Officer Krause discusses his involvement with this case, including assisting in documenting the scene with the crime lab and discussing the contents of video and photographs taken at the scene. RP 69-108. Detective Krause discusses ejection patterns of handguns. RP 108-110. Detective Krause discusses bullet impact points at the scene. RP 111-112.

- ***Donovan Velez***

Mr. Velez is a Forensic specialist with the Tacoma Police Department. RP 113. Mr. Velez discusses his background and training. RP 113-114. Mr. Velez discusses his involvement in documenting the scene of the shooting and collecting evidence. RP 114-132.

- ***David Yerbury***

Mr. Yerbury was a Tacoma Police Officer in 2006. RP 135. Mr. Yerbury discusses his employment history. RP 135-136. Mr. Yerbury Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

discusses responding to the sound of gunfire. RP 136-141. Mr. Yerbury discusses his observations and actions as he came upon the scene of the shooting. RP 141-146.

- ***Daniel Hensley***

Officer Hensley is an officer with the Tacoma Police Department. RP 164. Officer Hensley describes his work history and training. RP 164. Officer Hensley describes responding to Mr. Yerbury's call of shots fired on July 8, 2006. RP 164-169. Officer Hensley describes his interaction with Tiffany Walker. RP 169-175. Officer Hensley describes contacting witnesses outside Club Friday. RP 175-180. Officer Hensley again describes arriving at the scene and interacting with witnesses. RP 182-199.

- ***Terry Franklin***

Mr. Franklin is the supervising forensic scientist of the firearm section of the Washington State Patrol Crime Laboratory in Tacoma. RP 200. Mr. Franklin discusses his employment history and training. RP 200-204. Mr. Franklin discusses exhibits 108-112 and 114, the six .380 caliber bullet casings recovered at the scene. RP 204-213. Mr. Franklin discusses exhibits 115-117, 120, and 127. RP 213-220. Mr. Franklin discusses gunshot residue analysis. RP 220-224.

- ***Tiffany Walker***

Ms. Walker discusses her background. RP 241-243. Ms. Walker discusses being shot on July 8, 2006. RP 243-244. Ms. Walker discusses her knowledge of Mr. Yarbrough, Tiayrra Bradley, and Yunique Richardson. RP 244-252. Ms. Walker describes the shooting. RP 252-268. Ms. Walker describes her hospital treatment after the shooting. RP 268-270.

- ***Sheena Walker***

Sheena Walker is Tiffany Walker's mother. RP 299. Sheena Walker describes learning that Tiffany Walker had been shot and her reaction to learning that Tiffany Walker had been shot. RP 299-304.

- ***Maurice Walker***

Mr. Walker is Tiffany Walker's brother. RP 306. Mr. Walker describes his background and his knowledge of Mr. Yarbrough. RP 306-314.

- ***Gene Miller***

Detective Miller is a Detective with the Tacoma Police Department. RP 315-316. Mr. Miller describes his work history and training. RP 315-316. Det. Miller describes his involvement with this case. RP 316-324.

Det. Miller describes his investigation of this case. RP 667-730.

Det. Miller describes receiving information about the shooting from Tavar Cook. RP 769-779.

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Det. Miller describes the search of Mr. Yarbrough's apartment and items found in the apartment. RP 823-829.

Det. Miller describes the interrogation of Darris Stokes. RP 1047-1058.

- ***William Eggebrotten***

Dr. Eggebrotten is a general surgeon. RP 332. Dr. Eggebrotten describes his work history and training. RP 332-335. Dr. Eggebrotten describes treating Tiffany Walker on July 8, 2007 at St. Joseph's Hospital. RP 335-359.

- ***Kiara Moore***

Ms. Moore is a friend of Tiffany Walker. RP 360-361. Ms. Moore discusses her familiarity with Mr. Yarbrough, Ms. Tiffany Walker, Ms. Yunique Richardson, Ms. Tiayrra Bradley. RP 361-362. Ms. Moore discusses the fight between herself and Ms. Bradley. RP 362-364. Ms. Moore discusses the shooting at Club Friday. RP 364-367. Ms. Moore discusses her knowledge of Mr. Simms, Mr. Simms' friends, and their connection to the Murderville Folks gang. R 367-369. Ms. Moore again discusses the shooting at Club Friday. RP 369-373. Ms. Moore discusses her fight with Ms. Bradley. RP 374-376. Ms. Moore discusses the shooting. RP 376-380.

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- ***Channeka Voek***

Ms. Vouk describes her background and knowledge of Tiffany Walker, Tiayrra Bradley, and Yunique Richardson. RP 382-384. Ms. Vouek discusses the shooting at Club Friday. RP 384-390.

- ***Tiayrra Bradley***

Ms. Bradley discusses her background. RP 392. Ms. Bradley is Yunique Richardson's cousin and Mr. Simms' best friend. RP 393. Ms. Bradley discusses people she knows, those present at the fight between herself and Ms. Moore, and the confrontation at the waterfront on July 4. RP 394-401. Ms. Bradley discusses the shooting at Club Friday. RP 402-425. Ms. Bradley discusses the photomontage she was shown. RP 425-427.

Ms. Bradley again discusses the events of the night of the shooting at Club Friday. RP 428-430. Ms. Bradley discusses her knowledge of Mr. Yarbrough. RP 430. Ms. Bradley describes what Mr. Yarbrough was wearing the night of the shooting. RP 430-431. Ms. Bradley discusses the gang affiliations of various people she knows. RP 431-434. Ms. Bradley discusses the events on the night of the shooting. RP 434-465.

- ***Yunique Richardson***

Ms. Richardson describes her background. RP 467. Mr. Simms was Ms. Richardson's close friend. RP 467. Ms. Richardson discusses people Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

she knows and their association with gangs. RP 468-469. Ms. Richardson describes her knowledge of Mr. Yarbrough. RP 469-472. Ms. Richardson discusses the shooting at Club Friday. RP 472-490.

- ***Roberta Ramoso***

Dr. Ramoso is a forensic pathologist presently employed as an associate medical examiner for Pierce County. RP 499. Dr. Ramoso describes her education and work background. RP 500-502. Dr. Ramoso performed the autopsy on Mr. Simms. RP 502. Dr. Ramoso describes the autopsy of Mr. Simms. RP 502-520.

- ***Chad Legg***

Mr. Legg was outside the “On the Rocks” bar on Pacific Avenue the night of the shooting. RP 521. Mr. Legg was working security for the bar. RP 522. Mr. Legg describes the shooting. RP 522-543.

- ***Johnnie Dudley***

Mr. Dudley was on Pacific Avenue at the time of the shooting. RP 545. Mr. Dudley describes the shooting. RP 545-554.

- ***Stephen Burnett***

Mr. Burnett was inside the On the Rocks bar on the night of the shooting. RP 556. Mr. Burnett was injured in the shooting. RP 556. Mr. Burnett describes being shot in his posterior. RP 556-562.

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- ***Phillip Dutra***

Mr. Dutra was standing outside the On the Rocks bar on the night of the shooting. RP 563-564. Mr. Dutra describes hearing what he thought were fireworks and describes what he saw during the shooting. RP 564-568.

- ***Michael Vaughn***

At the time of the shooting, Mr. Vaughn was having dinner and drinks with friends in a restaurant on Pacific Avenue. RP 573-575. Mr. Vaughn describes the shooting. RP 576. Mr. Vaughn describes his vehicle being struck by another car as he drove away from the shooting. RP 576-589.

- ***Candace Rhem***

Ms. Rhem was in Club Friday on the night of the shooting. RP 591. Ms. Rhem describes the shooting and driving away after the shooting. RP 591-613.

- ***Monica Johnson***

Ms. Johnson went to Club Friday with Ms. Rhem on the night of the shooting. RP 629. Ms. Johnson describes the shooting and driving away after the shooting. RP 629-636. Ms. Johnson discusses not being able to identify any person in a photo lineup for police. RP 637-639. Ms. Johnson discusses the person she saw with a gun get into another car. RP 641-644.

- ***Dan Davis***

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Det. Davis is a detective with the Tacoma Police Department. RP 645. Det. Davis describes his training and work history. RP 645. Det. Davis describes his involvement with this case. RP 646-656.

- ***Robert Denully***

Officer Denully is a patrol officer with the Tacoma Police Department. RP 657. Officer Denully describes his contact with Mr. Yarbrough on July 9, 2006. RP 658-665.

- ***Tavar Cook***

Mr. Cook describes his background. RP 733-735. Mr. Cook is currently in jail. RP 735-736. Mr. Cook describes his contact with Mr. Yarbrough in the jail. RP 736-767.

- ***Gayle Pero***

Ms. Pero works in the jail. RP 788. Ms. Pero describes her work history. RP 788-789. Ms. Pero describes Mr. Cook and Mr. Yarbrough's time in jail. RP 789-798.

- ***David DeVault***

Det. DeVault is a detective with the Tacoma Police Department. RP 799. Det. DeVault describes his employment background and training. RP 800. Det. DeVault describes executing a search warrant on Mr. Yarbrough's residence. RP 800-821.

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- ***John Ringer***

Det. Ringer is a detective with the Tacoma Police Department. RP 831. Det. Ringer describes his work history and his training. RP 831-836. Det. Ringer discusses his knowledge of gangs. RP 836-865. Det. Ringer discusses his opinions about this case. RP 866-900.

- ***Antwain Humburg***

Mr. Humburg describes the shooting at Club Friday. RP 915-921.

- ***William Terry***

Mr. Terry is a friend of Mr. Yarbrough. RP 923. Mr. Terry describes the shooting at Club Friday. RP 923-941.

- ***Brian Boyd***

Mr. Boyd is a program director for World Vision, a Christian relief organization, and oversees Club Friday. RP 943-944. Mr. Boyd describes Club Friday. RP 944-950. Mr. Boyd describes the shooting. RP 950-954.

- ***Darris Stokes***

Mr. Stokes invokes his 5<sup>th</sup> Amendment right to refuse to testify, denies making any statements to the police with regards to this case, and disavows any statements he might have made. RP 980-981.

## V. ARGUMENT

### 1. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING GANG-EVIDENCE TO BE ADMITTED.

Pre-trial, the State moved to introduce under 404(b) evidence that Mr. Yarbrough was connected with the “Hilltop Crips,” evidence that Mr. Simms was connected with the “Murderville Folks” gang, evidence of a confrontation between these gangs at the King Oscar Motel several weeks prior to the shooting at Club Friday, evidence that Mr. Yarborough’s gang was seen displaying alleged gang-related hand signs inside Club Friday, photographs and video of Mr. Yarbrough displaying alleged gang hand signs and a blue bandanna, evidence that Mr. Yarbrough was wearing a baseball cap with alleged gang-related graffiti on the underside of the bill, and expert police testimony to explain “gang jargon” to the jury and to explain why gang members are motivated to use deadly force. CP 17-25. Mr. Yarbrough filed his own motion to exclude this same evidence. CP 9-16.

Evidence of prior bad acts, including acts that are merely unpopular or disgraceful, is presumptively inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Whether evidence of a defendant’s other bad acts should be admitted at trial is governed by ER 404(b), which provides:

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Evidence 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 or accident.

*State v. Stanton*, 68 Wn.App. 855, 860, 845 P.2d 1365 (1993).

[B]efore admitting evidence of other wrongs under ER 404(b), a trial court must (1) find that a preponderance of evidence shows that the misconduct occurred; (2) identify the purpose for which the evidence is being introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. In doubtful cases, the evidence should be excluded.

*State v. Baker*, 89 Wn.App. 726, 731-732, 950 P.2d 486 (1997), *review denied* 135 Wn.2d 1011, 960 P.2d 939 (1998).

“In weighing the admissibility of the evidence to determine whether the danger of unfair prejudice substantially outweighs probative value, a court considers (1) the importance of the fact that the evidence intends to prove, (2) the strength of inferences necessary to establish the fact, (3) whether the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction.” *State v. Kendrick*, 47 Wn.App. 620, 628, 736 P.2d 1079, *review denied* 108 Wn.2d 1024 (1987).

Substantial prejudicial effect is inherent in ER 404(b) evidence. *State*

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*v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Therefore, prior bad acts are admissible only if their probative value is substantial. *Lough*, 125 Wn.2d at 863, 889 P.2d 487.

Evidence of gang membership is inadmissible when it proves no more than a defendant's abstract beliefs. *Dawson v. Delaware*, 503 U.S. 159, 165, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (ruling that gang membership is inadmissible to prove abstract belief because ideology is protected by the constitutional rights of freedom of association and freedom of speech).

In its written order, the trial court found that the gang-related evidence was admissible: (1) to prove motive for the alleged crimes; (2) to prove identity of the shooter; (3) to prove the required mental state for first degree murder and assault; (4) to prove Mr. Yarbrough's intent to do great bodily harm; and (5) to prove Mr. Yarbrough's extreme indifference to human life. CP 38-40. The trial court found that the proffered evidence did not violate ER 403, i.e., that the evidence was not more prejudicial than probative, "because [the] probative value [of the evidence] is high, as it is central to the State's theory of the case, and that any danger of unfair prejudice does not substantially outweigh its probative value." CP 38-40.

A trial court's ruling under ER 404(b) will not be disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

as the trial court did. *State v. Mason*, 160 Wn.2d 910, 933-934, 162 P.3d 396 (2007). A trial court's balancing of whether or not a piece of evidence is more prejudicial than probative under ER 403 is reviewed for abuse of discretion. *In re Detention of Halgren*, 156 Wn.2d 795, 802, 132 P.3d 714 (2006).

A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

- a. *Because the State was not required to prove motive as an element of any crime charged, the probative value of the gang-related evidence on the issue of motive did not outweigh the prejudicial effect of the evidence on Mr. Yarbrough.***

“Evidence can be admitted under ER 404(b) only if the trial court finds the evidence serves a legitimate purpose, *is relevant to prove an element of the crime charged*, and, on balance, the probative value of the

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evidence outweighs its prejudicial effect.” *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003), *citing Lough*, 125 Wn.2d at 853, 889 P.2d 487.

Mr. Yarbrough was charged with first degree murder, first degree assault, and second degree unlawful possession of a firearm. None of these crimes include motive as an element. *See* RCW 9A.32.030(1)(b); RCW 9A.36.011(1)(a); and RCW 9.41.040(2)(a)(i).

In *State v. Devries*, DeVries was charged and convicted of knowingly delivering amphetamines. The State offered testimony that DeVries had given two “energy” pills to another classmate three days before the incident for which DeVries was charged. The classmate testified that the pills she received from DeVries looked different from the pill allegedly delivered by Devries in the case being prosecuted. The trial court admitted the classmate’s testimony regarding the prior act, even though the descriptions of the pills in the two incidents were strikingly different and there was no evidence that the pills in the prior incident contained a controlled substance.

On appeal, Devries challenged the admission of evidence relating to the delivery of the two “energy” pills under ER 404(b). The Washington Supreme Court ruled that the trial court erred in admitting the evidence, because since “[t]here was no evidence the prior pills were a controlled substance or that the pills were the same[, *t]he prior incident had little or no* Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

***probative value on the elements of the crime charged and it should have been excluded.” Devries, 149 Wn.2d at 849, 72 P.3d 748 (emphasis added).***

With regards to the charge of murder, where only circumstantial evidence is available, evidence of motive may be necessary. *State v. Athan*, 160 Wn.2d. 354, 382, 158 P.3d 27 (2007) (“Although motive is not an element of murder, it is often necessary when only circumstantial evidence is available.”)

Here, the State had far more than only circumstantial evidence. The State had the testimony of Ms. Walker who testified she saw Mr. Yarbrough fire a gun towards Mr. Simms and Mr. Burnette (RP 262-264), the testimony of Tavar Cook who testified Mr. Yarbrough had got into a fight and shot at somebody at Club Friday (RP 739-741) and had shot someone named Tiffany (RP 743), the testimony of Ms. Bradley who testified that she saw Mr. Yarbrough pull an object from his waistband immediately prior to the shooting (RP 415, 442) and had identified the shooter in a photomontage (RP 425-427, 450), and the testimony of Det. Miller that Ms. Bradley had identified Mr. Yarbrough in a photomontage as the person shooting a gun. RP 668-674. Under these circumstances, evidence of motive was not necessary.

Here, motive was not an element of any crime charged. Accordingly, Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

the gang-related evidence was inadmissible under ER 404(b) for purposes of establishing “motive.” The trial court abused its discretion in admitting the gang-related evidence to prove motive because the facts of the case did not meet the standard governing admissibility of evidence under ER 404(b). *Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

***b. The gang-related evidence was not admissible under ER 404(b) to prove the identity of the shooter.***

The second purpose for admitting the gang-related evidence given by the trial court was that the evidence was relevant to proving the identity of the shooter.

Under ER 404(b), evidence that a defendant has committed a prior bad act is admissible to prove the identity of the person who committed the crime being prosecuted only if the means of commission of the crime is so unique as to be considered a “signature”:

Evidence of other crimes is relevant on the issue of identity only if the method employed in the commission of both crimes is “so unique” that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged. In other words, the device used must be so unusual and distinctive as to be like a signature.

*State v. Russell*, 125 Wn.2d 24, 66, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995) (internal citations

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omitted).

When evidence of other bad acts is introduced to show identity by establishing a unique *modus operandi*, the evidence is relevant to the current charge only if the method employed in the commission of both crimes is so unique that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged.

This Court has held that the device used must be so unusual and distinctive as to be like a signature. The greater the distinctiveness, the higher the probability that the defendant committed the crime, and thus the greater the relevance. Moreover, to establish signature-like similarity, the distinctive features must be shared between the two crimes.

*State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002) (internal citations omitted).

In this case, the “prior bad acts” were Mr. Yarbrough’s alleged association with the Hilltop Crips gang and the allegation that Mr. Yarbrough was taunted by Mr. Simms during an argument between two groups of alleged gang members at 4<sup>th</sup> of July festivities four days prior to the shooting. CP 18. Membership in a gang and participation in an argument are not “prior bad acts” as contemplated by ER 404(b). Even if these were considered to be “prior bad acts,” evidence that Mr. Yarbrough was associated with the Hilltop Crips, such as statements, articles of clothing, or the display of alleged gang-hand signs, have no probative value in determining whether or

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not Mr. Yarbrough was the person who shot Mr. Simms and Mr. Burnett. The “method employed” by Mr. Yarbrough in allegedly being part of a gang and getting in an argument with Mr. Simms was not so unique as to create a high probability that he shot Mr. Simms.

In *People v. Perez*, 114 Cal.App.3d 470, 170 Cal.Rptr. 619 (1981), Mr. Perez was charged with kidnapping, robbery, and unlawful taking of a motor vehicle. At trial, the trial court allowed the State to introduce evidence that Mr. Perez was a member of a gang for purposes of proving identity. *Perez*, 114 Cal.App. at 474, 170 Cal.Rptr. 619. On appeal, Mr. Perez argued that the trial court erred in admitting evidence of his gang membership. *Perez*, 114 Cal.App. at 476, 170 Cal.Rptr. 619. The California Court of Appeals held that the trial court abused its discretion in admitting the evidence of Mr. Perez’s gang membership and that the admission of the evidence deprived Mr. Perez of a fair trial. *Perez*, 114 Cal.App. at 479, 170 Cal.Rptr. 619.

Evidence Code section 210 defines relevant evidence as “evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.”

The asserted active membership in the...gang by [Mr. Perez], as testified to by Deputy Valdemar, did not have any “tendency in reason” to prove a disputed fact, i.e., the identity

of the person who committed the charged offense. **Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion.** Hence, the evidence was not relevant. It allowed, on the contrary, unreasonable inferences to be made by the trier of fact that the defendant was guilty of the offense charged on the theory of “guilt by association.”

When the gang and shooting incident evidence was offered, the prosecution had already proved the commission of the three charged crimes. [Mr. Perez] had already been identified as [having been involved in the crimes]

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We hold that the admission in this case of gang membership...constitutes an abuse of discretion. Such testimony should have been excluded under Evidence Code Section 352.<sup>3</sup> The error was prejudicial. The defendant did not receive a fair trial.

*Perez*, 114 Cal.App. at 477-479, 170 Cal.Rptr. 619 (emphasis added).

This case is like *Perez*. The evidence of Mr. Yarbrough’s gang involvement had no probative value on the issue of whether or not Mr. Yarbrough shot Mr. Simms and Mr. Burnett. However, it did allow and even encourage the jury to make the impermissible propensity inference that because Mr. Yarbrough was in a gang it was more likely that he was guilty. This court should adopt the reasoning of the California Court of Appeals and

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<sup>3</sup> California Evidence Code Section 352 gives the trial court discretion “to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice.” *Perez*, 114 Cal.App. at 478, 170 Cal.Rptr. 619.

find that the gang-related evidence was inadmissible and the trial court erred in admitting it.

The gang-related evidence in this case is not in any way similar to the shooting of Mr. Simms and Mr. Burnett and was therefore inadmissible under ER 404(b). The trial court abused its discretion in finding that the gang-related evidence was admissible to prove the identity of the person who shot Mr. Simms and Mr. Burnett because the facts of the case did not meet the standard governing admissibility of the gang-related evidence under ER 404(b). *Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

***c. The gang-related evidence was not admissible under ER 404(b) to prove the required mental state for first degree murder and assault.***

Mr. Yarbrough was charged with committing first degree murder by engaging in conduct which created a grave risk of death under circumstances manifesting an extreme indifference to human life. CP 6-8. Mr. Yarbrough was charged with committing assault by intentionally assaulting Mr. Burnett with a firearm with intent to inflict great bodily harm. CP 6-8. Thus, to be admissible under ER 404(b) for purposes of proving Mr. Yarbrough's mental state at the time of the shootings, the gang-related evidence would have to be probative of whether or not Mr. Yarbrough fired the gun with an extreme indifference to human life and while intending to inflict great bodily harm.

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- i. The gang-related evidence was irrelevant and not probative to the determination of whether or not Mr. Yarbrough acted with extreme indifference to human life.

“First-degree murder by extreme indifference to human life requires proof that the defendant acted (1) with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person.” *State v. Pastrana*, 94 Wn.App. 463, 470, 972 P.2d 557, review denied 138 Wn.2d 1007, 984 P.2d 1035 (1999).

Whether or not a person commits a murder with extreme indifference to human life is determined from examining the circumstances surrounding how the murder was committed, specifically, whether or not the means employed to commit the murder endangered the lives of people other than the intended target. For example, in *Pastrana*, the Court of Appeals held that evidence was sufficient to find Mr. Pastrana guilty of first-degree murder by extreme indifference where he pursued and fired at another vehicle on a major freeway ramp in heavy traffic, even though Mr. Pastrana’s conduct was directed at a specific victim, the driver of the other car, because Mr. Pastrana’s conduct jeopardized the lives of the other people on the highway. *Pastrana*, 94 Wn.App. at 472-473, 972 P.2d 557.

In *State v. Berge*, 25 Wn.App. 433, 607 P.2d 1247, review denied 94

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Wn.2d 1016 (1980), the State charged Mr. Berge with first-degree murder under RCW 9A.32.030(1)(b) after Mr. Berge had fired 30 rounds from a rifle into and around a man sleeping on a couch, killing him. The Court of Appeals vacated Mr. Berge's conviction and remanded for a new trial. In so ruling, the Court reasoned,

As we read the homicide statutes, the legislature intended that one who kills with the intent to cause the death of a **particular individual** be charged with murder in the first degree, pursuant to RCW 9A.32.030(1)(a), or murder in the second degree, as defined in the instruction given by the trial court. As other statutory provisions cover acts directed at a particular individual or individuals, we shall assume that the legislature intended RCW 9A.32.030(1)(b) to provide for those situations **indicating a recklessness and extreme indifference to human life generally**. The record reveals that Berge's violent attack was specifically directed at a **particular victim**. Therefore, he should have been charged and tried pursuant to RCW 9A.32.030(1)(a), not RCW 9A.32.030(1)(b), and consequently a new trial must be granted.

*Berge*, 25 Wn.App. at 437, 607 P.2d 1247 (emphasis added).

The conclusion to be drawn from these cases is that whether or not a defendant has committed murder with an extreme indifference to human life is determined solely by the means used to effect the murder and whether or not those means endangered more people than just the intended target.

In this case, whether or not Mr. Yarbrough murdered Mr. Simms under circumstances manifesting an extreme indifference to human life must

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be determined solely by the method employed by Mr. Yarbrough to affect the death of Mr. Simms, specifically, by shooting a gun toward a crowd of people. Thus, the only evidence relevant and probative of whether or not Mr. Yarbrough acted with extreme indifference to human life is evidence relating to the means by which Mr. Simms was killed. The gang-related evidence had nothing to do with the method of killing Mr. Simms employed by Mr. Yarbrough and was therefore wholly irrelevant to determining whether or not Mr. Yarbrough acted with extreme indifference. The trial court abused its discretion in admitting the gang-related evidence for the purpose of determining whether or not Mr. Yarbrough acted with extreme indifference in killing Mr. Simms because the facts of the case did not meet the standard governing admissibility of the gang-related evidence under ER 404(b). *Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

- ii. The gang-related evidence was more prejudicial to Mr. Yarbrough than it was probative to the determination of whether or not Mr. Yarbrough acted with the intent to inflict great bodily harm.

To convict a defendant of first degree assault, a jury must find that he intended to inflict “great bodily harm,” assaulted the victim, and inflicted “great bodily harm.” *State v. Rodriguez*, 121 Wn.App. 180, 187, 87 P.3d 1201 (2004), *citing* RCW 9A.36.011.

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A person acts with intent when he or she acts with the objective or purpose to accomplish a result constituting a crime. RCW 9A.08.010(1)(a); *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

Similar to the determination of whether or not a defendant commits murder with extreme indifference to human life, the determination of whether or not a defendant commits first degree assault with intent to inflict great bodily harm is also determined from the means used to commit the assault. “Evidence of intent ... is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.” *Wilson*, 125 Wn.2d at 217, 883 P.2d 320, (quoting *State v. Ferreira*, 69 Wn.App. 465, 468, 850 P.2d 541 (1993)). Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances. *Wilson*, 125 Wn.2d at 217, 883 P.2d 320.

Under a literal interpretation of RCW 9A.36.011, a person is guilty of assault in the first degree if he or she, with the intent to inflict great bodily harm, assaults another with a firearm, administers poison to another, or assaults another person and causes great bodily harm. The mens rea for this crime is the “intent to inflict great bodily harm.” Assault in the first degree requires a specific intent; but it does not, under all circumstances, require that the specific intent match a specific victim. Consequently, once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the

mens rea is transferred under RCW 9A.36.011 to any unintended victim.

*Wilson*, 125 Wn.2d at 218, 883 P.2d 320.

In this case, the charge of assault arises from Mr. Burnett being struck by a stray bullet fired by Mr. Yarbrough as he shot at Mr. Simms. Thus, under *Wilson*, because Mr. Burnett was not the intended victim of Mr. Yarbrough, Mr. Yarbrough's intent in shooting at Mr. Simms is transferred to the assault charge arising from Burnett's injuries. Therefore, the law governing the determination of Mr. Yarbrough's intent in shooting at Mr. Simms controls the determination of Mr. Yarbrough's intent in assaulting Mr. Burnett.

The term "great bodily harm" is defined as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). While it is true that whether injuries sustained constitute grievous bodily harm is ordinarily a question for the fact finder (*State v. Salinas*, 87 Wn.2d 112, 121, 549 P.2d 712 (1976)), evidence that the victim of an assault received permanent 2 centimeter long scars is sufficient to support a finding that the victim suffered serious permanent disfigurement. *State v. Hill*, 48 Wn.App.

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344, 739 P.2d 707, *review denied* 109 Wn.2d 1018 (1987). Therefore, under *Hill*, it is not possible to fire a firearm at a person with the intent the bullet strike them and not intend to inflict great bodily harm since a bullet will always inflict sufficient harm to a human body to at least leave a scar. Therefore, the manner of the commission of either the murder or the assault, shooting a handgun at Mr. Simms, clearly indicates that Mr. Yarbrough acted with intent to inflict great bodily harm.

Under *Wilson*, the gang related evidence could be considered by the jury as evidence of the nature of the prior relationship between Mr. Yarbrough and Mr. Simms. However, in this case, the gang-related evidence was more prejudicial than probative of Mr. Yarbrough's intent to inflict great bodily harm on Mr. Simms, and therefore on Mr. Burnett. The act of firing the gun with the intent the bullets strike Mr. Simms plainly established that Mr. Yarbrough acted with intent to inflict great bodily harm. The gang-related evidence would therefore be unnecessary to establish Mr. Yarbrough's intent, yet be highly prejudicial.

Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. The trial court therefore abused its discretion in admitting the gang-related evidence under ER 404(b)

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to determine whether or not Mr. Yarbrough acted with intent to inflict great bodily harm since the evidence was inadmissible under ER 403 as more prejudicial and probative. Similarly, the gang-related evidence was inadmissible under ER 403 as needless cumulative evidence of Mr. Yarbrough's intent to inflict great bodily harm since the use of the firearm clearly establishes Mr. Yarbrough's intent to inflict great bodily harm rendering any further evidence on that issue unnecessary and cumulative.

The facts of this case did not meet the standard governing admissibility of the gang-related evidence under ER 404(b) to prove whether or not Mr. Yarbrough acted with intent to commit great bodily harm, therefore, the trial court abused its discretion in admitting the gang-related evidence. *Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

***d. The gang-related evidence was not probative of whether Mr. Yarbrough committed the crimes to maintain or advance his position in a gang.***

Although it was not listed in the trial court's order as one of issues the gang-related evidence was admissible to prove, it is anticipated that the State will argue that the gang-related evidence was admissible to prove the aggravating factor of whether or not Mr. Yarbrough committed the crimes for purposes of maintaining or advancing his position in a gang. This argument fails.

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“Gang affiliation, standing alone and without more detailed information about that gang's activities and the victims' participation, [has] little evidentiary weight.” *State v. Ferguson*, 131 Wash.App. 855, ¶46, 129 P.3d 856, *review denied* 158 Wash.2d 1016, 149 P.3d 377 (2006).

The evidence admitted by the trial court in its December 13, 2006 ruling consisted only of evidence of gang affiliation on the part of Mr. Yarbrough. The gang-related evidence did not include evidence which would support an inference as to whether or not Mr. Yarbrough committed any crime in order to maintain or advance his position in a gang.

As stated above, “[e]vidence of gang membership is inadmissible when it proves no more than a defendant’s abstract beliefs.” *Dawson*, 503 U.S. 159, 165, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (ruling that gang membership is inadmissible to prove abstract belief because ideology is protected by the constitutional rights of freedom of association and freedom of speech). The gang-related evidence in this case supported the inference only that Mr. Yarbrough was in a gang, not what his motivation was with regards to the shooting of Mr. Simms. As such, the evidence proved no more than Mr. Yarbrough’s abstract beliefs regarding gangs, and was inadmissible.

While it is true that Det. Ringer’s testimony, discussed below, referenced whether or not Mr. Yarbrough committed the crimes for purposes Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

of maintaining or advancing his position in a gang, Det. Ringer's testimony was not the subject of the pre-trial motion, argument, and evidentiary ruling.<sup>4</sup>

*e. The trial court abused its discretion in finding that admission of the gang-related evidence did not violate ER 403.*

Evidence is relevant if it has "any tendency to make the existence of any fact that is **of consequence** to the determination of the action more probable or less probable than it would be without the evidence." ER 401 (emphasis added). Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. The ER 403 balancing test is incorporated into the test for admissibility under ER 404(b):

Before admitting ER 404(b) evidence, a trial court "must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

*State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (emphasis added).

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<sup>4</sup> Mr. Yarbrough filed his motion to exclude gang-related evidence on October 2, 2006. CP 9-16. Argument on the motion was heard on December 13, 2006. RP 4-20, 12-13-06. Det. Ringer was disclosed as a potential witness on December 15, 2006. CP DESIGNATE. Because of this, neither Mr. Yarbrough's Motion to Exclude the gang evidence or argument on the exclusion of the evidence references or applies to Det. Ringer or his testimony.

Probative evidence is “evidence that tends to prove or disprove a point in issue.” Black’s Law Dictionary (7<sup>th</sup> ed., 1999) p. 579. The probative value of evidence is directly linked to the relevance of the evidence: “To be relevant, evidence must meet **two** requirements: (1) the evidence must have a tendency to prove or disprove a fact (**probative value**), and (2) **that fact must be of consequence** in the context of the other facts and the applicable substantive law (materiality).” *State v. Rice*, 48 Wn.App. 7, 12, 737 P.2d 726 (1987) (emphasis added). Therefore, evidence that is not probative is not relevant.

As discussed above in section 1(a) through 1(c), the gang-related evidence in this case was neither logically relevant nor necessary to prove any essential element or fact that was of consequence to the crimes charged. Because the gang-related evidence was not relevant, it was not probative. Despite this, the trial court admitted the gang-related evidence over objection from Mr. Yarbrough.

Here, the crimes charged did not have gang membership as an element the State was required to prove. Further, to convict Mr. Yarbrough of the crimes charged, it was not necessary that the State present evidence relating to the activities of gangs in general or the Hilltop Crips and the Murderville Folks specifically.

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The gang-related evidence was not probative of any fact of consequence to the determination of Mr. Yarbrough's guilt, but at the same time was highly prejudicial towards Mr. Yarbrough. Because the gang-related evidence lacked any probative value, the prejudice to Mr. Yarbrough outweighed the probative value of the evidence and it was an abuse of discretion for the trial court to allow the evidence to be admitted.

*f. State v. Campbell and State v. Boot are not controlling.*

It is anticipated that the State will argue that under *State v. Campbell*, 78 Wn.App. 813, 901 P.2d 1050, *review denied* 128 Wn.2d 1004, 907 P.2d 296 (1995) and *State v. Boot*, 89 Wn.App.780, 950 P.2d 964, *review denied* 135 Wn.2d 1015, 960 P.2d 939 (1998), evidence of Mr. Yarbrough's gang affiliation was admissible to prove Mr. Yarbrough's motive. Both *Campbell* and *Boot* are factually distinguishable, and both cases were incorrectly decided and should be overruled.

*i. State v. Campbell.*

In *Campbell*, Mr. Campbell was charged with two counts of first degree murder committed by two means: premeditation and felony murder predicated on robbery. *Campbell*, 78 Wn.App. at 817, 901 P.2d 1050. The State also charged Mr. Campbell with one count of conspiracy to commit first

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degree premeditated murder. *Campbell*, 78 Wn.App. at 817, 901 P.2d 1050.

Pretrial, the State sought to introduce evidence regarding Mr. Campbell's prior bad acts and expert testimony regarding gang behavior. *Campbell*, 78 Wn.App. at 817, 901 P.2d 1050. The State sought introduction of this evidence to prove a motive for the murders: Mr. Campbell and an accomplice killed the victims because the victims did not give Mr. Campbell and his accomplice appropriate respect, were invading Mr. Campbell's drug territory, and Mr. Campbell believed himself to be a member of a superior gang. *Campbell*, 78 Wn.App. at 817-818, 901 P.2d 1050. The trial court determined there was a nexus between gang culture, gang activity, gang affiliation, drugs, and the homicides. *Campbell*, 78 Wn.App. at 818, 901 P.2d 1050. Based on this determination, it allowed the introduction of Mr. Campbell's gang affiliation and drug selling activity. *Campbell*, 78 Wn.App. at 818, 901 P.2d 1050. The trial court also ruled admissible expert testimony on gang culture for the purpose of showing premeditation, intent, motive, and opportunity. *Campbell*, 78 Wn.App. at 818, 901 P.2d 1050. However, the trial court also limited the testimony, excluding matters that it considered were more prejudicial than probative, such as certain aspects of Mr. Campbell's criminal history and expert opinion that certain gangs are particularly adept at selling drugs and that gang members ordinarily carry and

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use guns. *Campbell*, 78 Wn.App. at 818, 901 P.2d 1050.

The jury found Mr. Campbell guilty on both counts of felony murder but acquitted Mr. Campbell of premeditated first degree murder. *Campbell*, 78 Wn.App. at 818, 901 P.2d 1050.

On appeal, *inter alia*, Mr. Campbell challenged the admission of evidence regarding his gang activities. *Campbell*, 78 Wn.App. at 821, 901 P.2d 1050. The Court of Appeals affirmed the trial court's ruling admitting the gang-related evidence under ER 404(b) for the purpose of proving Mr. Campbell's premeditation, motive, and intent. *Campbell*, 78 Wn.App. at 822, 901 P.2d 1050.

1. *Campbell* is distinguishable from this case.

Mr. Campbell was charged with premeditated first degree murder. This placed the burden on the State to prove premeditation to commit the murders.

“Premeditation has been defined as ‘the deliberate formation of and reflection upon the intent to take a human life,’ and involves ‘the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.’” *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992) (internal citations omitted). Four

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characteristics of the crime are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing. *Ortiz*, 119 Wn.2d at 312, 831 P.2d 1060.

As discussed above, “Evidence can be admitted under ER 404(b) only if the trial court finds the evidence serves a legitimate purpose, *is relevant to prove an element of the crime charged*, and, on balance, the probative value of the evidence outweighs its prejudicial effect.” *DeVries*, 149 Wn.2d at 848, 72 P.3d 748 (emphasis added).

Motive is not an element of the charge of murder that the State is required to prove, however, where only circumstantial evidence is available to the State, evidence of motive may become necessary. RCW 9A.32.030; *State v. Athan*, 160 Wn.2d 354, 382, 158 P.3d 27 (2007) (“Although motive is not an element of murder, it is often necessary when only circumstantial evidence is available.”)

Thus, evidence of motive is relevant and potentially admissible in a murder case in two situations: (1) when the defendant has been charged with premeditated murder (motive is only one of four criteria which are relevant); and (2) where the State has only circumstantial evidence of the defendant’s guilt. The instant case involves neither of these scenarios.

Mr. Yarbrough was charged with first degree murder by causing the

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death of another person under circumstances manifesting an extreme indifference to human life under RCW 9A.32.030(1)(b), *not* premeditated first degree murder under RCW 9A.32.030(1)(a). Further, also as discussed above, the State had more than mere circumstantial evidence that Mr. Yarbrough committed the crimes. This case is factually distinguishable from *Campbell* both in the State's burden and in the evidence available to the State. *Campbell* does not control this case.

2. *Campbell* was incorrectly decided.

In *Campbell*, the Court of Appeals affirmed the trial court's admission of gang-related evidence under ER 404(b) for purposes of proving premeditation, motive, and intent. *Campbell*, 78 Wn.App. at 821-822, 901 P.2d 1050.

Gang evidence, by its very nature, is highly prejudicial. *State v. Perez-Mejia*, 134 Wn.App. 907, 919, 143 P.3d 838 (2006). Substantial prejudicial effect is inherent in ER 404(b) evidence. *Lough*, 125 Wn.2d at 863, 889 P.2d 487. Therefore, prior bad acts are admissible only if their probative value is substantial. *Lough*, 125 Wn.2d at 863, 889 P.2d 487.

As discussed above, motive is not an element of the crime of murder. Motive may be one of four categories of evidence to be evaluated for purposes of establishing premeditation, but it *is* only one of four. Where the Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

crime charged does not have premeditation as an element, gang-related evidence is not admissible for purposes of proving motive since such evidence introduced for that purpose would fail ER 403's balancing test: gang-related evidence of motive is irrelevant but at the same time highly prejudicial. In cases like *Campbell* where the charge involves premeditation, the inherently highly prejudicial nature of gang evidence will always outweigh any probative value the evidence may have.

Also as discussed above, the intent of a person to commit first degree murder or first degree assault is determined from the means employed to complete the assault or the murder. Gang-related evidence is irrelevant in determining whether or not the act was performed with the intent to kill or cause great bodily harm since a defendant's gang affiliation has no relevance to the means used to commit an assault or a murder.

The *Campbell* court erred in affirming the admission of highly prejudicial yet irrelevant gang-related evidence. This court should take this opportunity to correct the erroneous ruling in *Campbell*.

ii. *State v. Boot*

In *Boot*, Mr. Boot, like Mr. Campbell, was charged with first degree premeditated murder. *Boot*, 89 Wn.App. at 789, 950 P.2d 964. The trial court ruled that evidence relating to Mr. Boot's gang affiliation on grounds

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that it was probative of motive and premeditation. *Boot*, 89 Wn.App. at 788-789, 950 P.2d 964. At trial, Mr. Boot confirmed he was a gang member and other evidence was introduced which established that killing someone heightened a gang member's status. *Boot*, 89 Wn.App. at 789-790, 950 P.2d 964.

1. *Boot is distinguishable from this case*

Like Mr. Campbell, Mr. Boot was charged with premeditated murder. This alone is sufficient to distinguish Mr. Yarbrough's case from *Boot*, since the State had the burden of proving premeditation in *Boot* but not in the instant case. As discussed above, the added element of premeditation changes the analysis of the admissibility of gang-related evidence for purposes of establishing motive.

2. *Boot was incorrectly decided.*

On appeal, Mr. Boot challenged the trial court's admission of the gang-related evidence. The Court of Appeals affirmed the trial court's admission of the gang-related evidence under ER 404(b), finding that the trial court correctly determined the evidence was admissible under the motive, premeditation, and res gestae exceptions, and that the probative value of the evidence outweighed the prejudicial effect of the evidence. *Boot*, 89 Wn.App. at 788-791, 950 P.2d. 964. Mr. Boot also challenged the admission Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

of the gang-related evidence on grounds that admission of the evidence violated his First Amendment right to freedom of association. *Boot*, 89 Wn.App. at 791, n. 1, 950 P.2d 964. Citing *Campbell*, the Court of Appeals held that “association evidence is admissible when relevant to an issue in a case.” *Boot*, 89 Wn.App. at 791, n. 1, 950 P.2d 964.

As stated above, evidence that a defendant is in a gang is not probative on the issues of motive or premeditation. Both the trial court and Court of Appeals in *Boot* erred in finding the gang-related evidence admissible for purposes of establishing motive and premeditation.

The res gestae “exception permits the admission of evidence of other crimes or misconduct where it is a link in the chain of an unbroken sequence of events surrounding the charged offense in order that a complete picture be depicted for the jury. **The res gestae exception requires that evidence be relevant to a material issue and its probative value must outweigh its prejudicial effect.**” *State v. Acosta*, 123 Wn.App. 424, 442, 98 P.3d 503 (2004) (internal citations omitted) (emphasis added). Thus, saying evidence goes to the res gestae of a criminal act is not sufficient -- the evidence must still be relevant to a material issue and the probative value of the evidence must outweigh the prejudicial effect of the evidence.

As discussed above, the gang-related evidence was not relevant to

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a material issue. Further, the gang-related evidence was highly prejudicial. Therefore, under *Acosta*, the evidence was not admissible under res gestae exception to ER 404(b). The *Boot* court erred in affirming the trial court's admission of the gang-related evidence under the res gestae exception to ER 404(b).

The *Boot* court erred in affirming the admission of highly prejudicial yet irrelevant gang-related evidence, and continued the erroneous precedent set by *Campbell*. This court should take this opportunity to correct the erroneous ruling in *Campbell* and disagree with the holding in *Boot*.<sup>5</sup>

## **2. ADMISSION OF THE GANG-RELATED EVIDENCE DEPRIVED MR. YARBROUGH OF HIS RIGHT TO A FAIR TRIAL**

Both the United States Constitution and the Washington State Con-

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<sup>5</sup> *Campbell* and *Boot* are the only published cases counsel was able to find which discuss the admissibility of gang evidence to prove motive. However, RCW 10.95.020(6) defines aggravated murder as a murder committed by a person "to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group." This language is identical to the aggravating factor set forth in RCW 9.94A.535(3)(s): "The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group."

Counsel was able to find only one published Washington case discussing RCW 10.95.020(6), *State v. Monschke*, 133 Wn.App. 313, 135 P.3d 966 (2006), review denied 159 Wn.2d 1010, 154 P.3d 918, certiorari denied 128 S.Ct. 83, 76 USLW 3158 (2007). At trial, evidence was introduced regarding Mr. Monschke's membership in white supremacist organizations to establish that Mr. Monschke had committed the murder to further his position in those white supremacist groups. However, like *Campbell* and *Boot*, the charge in *Monschke* included motive as an element that the State was required to establish. For this reason, *Monschke*, like *Campbell* and *Boot*, is distinguishable and not controlling on this case.

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stitution article I, section 22, guarantee the criminal defendant a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wn.2d 506, 22 P.3d 791 (2001).

**a. *The gang-related evidence was irrelevant.***

As discussed above, the gang-related evidence was not relevant to any issue before the jury. Therefore, the gang-related evidence was not probative and therefore not relevant.

**b. *The gang-related evidence was highly prejudicial.***

As discussed above, substantial prejudicial effect is inherent in ER 404(b) evidence. *Lough*, 125 Wn.2d at 863, 889 P.2d 487 (1995). Evidence of gang membership carries heightened prejudice due to the highly negative societal bias against gang members.

The admission of the highly prejudicial yet irrelevant gang evidence deprived Mr. Yarbrough of a fair trial.

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### **3. MR. YARBROUGH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL**

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480, *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183 (2000), *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”).

In order to show that he received ineffective assistance of counsel, an appellant must show (1) that trial counsel’s conduct was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2005).

There is a strong presumption that defense counsel’s conduct is not deficient, however, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel’s

performance. *Reichenbach*, 153 Wn.2d at 130, 101 P.3d 80 (2005).

Where a defendant has received ineffective assistance of counsel, the proper remedy is remand for a new trial with new counsel. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

a. ***It was ineffective assistance of counsel for Mr. Yarbrough's trial counsel to fail to ensure that the jury was given a limiting instruction regarding the gang-related evidence.***

i. It was not objectively reasonable for Mr. Yarbrough's trial counsel to fail to request a limiting instruction be given regarding the gang-related evidence.

Where ER 404(b) evidence is admitted, a cautionary instruction has been recommended by the Supreme Court. *State v. Mahmood*, 45 Wn.App. 200, 212-213, 724 P.2d 1021 *review denied* 107 Wn.2d 1002 (1986), *citing State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982) (“If the evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose or purposes”).

“‘[E]vidence of prior crimes, wrongs or acts is admissible if it is offered for a proper purpose, is relevant, has probative value which is not substantially outweighed by danger of unfair prejudice, and if requested, is coupled with limiting instruction.’ This statement of the law regarding ER Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

404(b) evidence is in accord with Washington law.” *Lough*, 125 Wn.2d at 859-860, 889 P.2d 487, *citing State v. McKinney*, 110 N.C.App. 365, 372, 430 S.E.2d 300, 304 (1993).

As discussed above, ER 404(b) evidence in general and evidence that a defendant is in a gang in particular are highly prejudicial types of evidence. When evidence of this type is admitted, trial courts typically attempt to limit the prejudice towards the defendant by instructing the jury that the jury is not to consider the evidence for general propensity purposes and is to only consider the evidence for the limited purposes identified by the trial court. Here, despite the trial court’s suggestion that an instruction be given (RP 19, 12-13-06), trial counsel for Mr. Yarbrough failed to request the court instruct the jury that the gang-related evidence could be considered only for the purposes of establishing Mr. Yarbrough’s motive, identity, or mental state, the reasons the trial court admitted the evidence. CP 38-40.

Given the extremely prejudicial nature of the evidence admitted by the trial court under ER 404(b), trial counsel’s failure to request a limiting instruction cannot be considered to be a legitimate trial strategy or even objectively reasonable.

- ii. The failure of Mr. Yarbrough’s trial counsel to request a limiting instruction on the gang-related evidence prejudiced Mr. Yarbrough.

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As discussed above, ER 404(b) evidence is inherently prejudicial. *Lough*, 125 Wn.2d 847, 863, 889 P.2d 487. That Mr. Yarbrough was prejudiced by the introduction of the gang-related evidence is a foregone conclusion. Therefore, failure of Mr. Yarbrough's trial counsel to attempt to mitigate this prejudice by requesting a limiting instruction further prejudiced Mr. Yarbrough.

***b. It was ineffective assistance of counsel for Mr. Yarbrough's trial counsel to fail to object to Det. Ringer offering highly prejudicial inadmissible profiling testimony.***

As stated above, Mr. Yarbrough filed his motion to exclude gang-related evidence on October 2, 2006. CP 9-16. Argument on the motion was heard on December 13, 2006. RP 4-20, 12-13-06. Det. Ringer was disclosed as a potential witness on December 15, 2006. CP DESIGNATE. Because of this, neither Mr. Yarbrough's Motion to Exclude the gang evidence or argument on the exclusion of the evidence references Det. Ringer or his testimony.

At trial, the State called Det. Ringer as an expert on gangs. RP 831-900. Det. Ringer offered testimony regarding common "values" held by gangs in general (RP 837), the definition of a street gang (RP 838), how an individual becomes a member of a black street gang (RP 838-840), what a

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“gang associate” is (RP 840-841), how law enforcement officers know someone is in a gang (RP 841-842), the leadership and structure of a gang (RP 842, 856-857), how someone in a gang acquires the ability to lead the gang (RP 842-843), the importance of status in a gang and how status permits a gang member to advance or to maintain their position in a gang (RP 843-844), how someone is “courted-out” of a gang (RP 844), gang hand signs of national and local gangs (RP 844-846), the relationship of colors to gangs and bandanas to gangs (RP 846-850), the history of gangs in Tacoma (RP 846-848, 854-859), the involvement of gangs with drug sales nationwide (RP 846-848), common behaviors associated with gangs and gang members (RP 850-854), why there are rivalries between gangs and the nature of the rivalries (RP 859-861), how common it is for gang members to carry guns (RP 861-862), “predictable or common violent scenarios between rivals” (RP 862-863), whether or not a gang member on the street at 1 a.m. who encountered a group of his rivals would reasonably expect that one or more of the rivals would have a gun (RP 863), whether it would be reasonable for a gang member from one group who started firing a gun at a group of rivals across the street to expect return gunfire from the rivals (RP 863-864), whether or not it would be foreseeable to gang members shooting back and forth that a third party who is in the crossfire might get struck with a bullet (RP 864-865).

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865), whether or not acts of violence are committed by a gang member solely to maintain or advance their position in a gang (RP 865), Det. Ringer's involvement with the investigation in this case (RP 866), the evidence reviewed by Det. Ringer in preparing his opinion (RP 866-867), whether or not Mr. Yarbrough was in a gang (RP 867-868), the interpretation of gang graffiti (868-869), interpretation of alleged gang-related tattoos on Mr. Yarbrough's body (RP 870), interpretation of the meaning of evidence found during the search of Mr. Yarbrough's residence (RP 870-875), evidence that bolsters Det. Ringer's opinion that Mr. Yarbrough is a gang member (RP 882-884), his opinion as to whether or not the shooting of Mr. Simms was done by Mr. Yarbrough was gang motivated and done by Mr. Yarbrough for purposes of maintaining or advancing his position in the Hilltop Crips (RP 885-888), his opinion as to whether or not it would have been reasonable for Mr. Yarbrough to expect return fire from across the street (RP 888), whether it would have been reasonable for Mr. Yarbrough to foresee that a third party could be caught in a crossfire and struck by a bullet and harmed (RP 888-889), and whether gang members flee to particular areas after being involved in criminal activity. RP 899.

- i. The testimony of Det. Ringer was inadmissible under ER 702 since it was not relevant to any fact in issue.

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In general, ER 702 and 703 govern the admissibility of an expert witness' testimony. Under these rules, (1) the witness must be qualified as an expert, and (2) the expert's testimony must be helpful to the trier of fact. *State v. Farr-Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999). Expert opinion is helpful to the trier of fact when it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. *Farr-Lenzini*, 93 Wn. App. at 461.

As discussed above, evidence relating to Mr. Yarbrough's gang membership or affiliation was not probative of the elements of any crime with which Mr. Yarbrough was charged. The only portions of Det. Ringer's testimony which were potentially relevant to any issue before the jury were Det. Ringer's opinions, based on "hypothetical" facts, as to whether or not Mr. Yarbrough, in circumstances identical to the State's version of how the shooting in this case occurred, (1) would have committed the shooting for purposes of maintaining or advancing his position in a gang, and (2) would have reasonably foreseen that the opposing gang members would return fire and that a 3<sup>rd</sup> party would have been caught in the crossfire. RP 885-889. However, as discussed below, Det. Ringer's testimony on these issues was inadmissible as impermissible opinion testimony lacking a foundation in the record.

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- ii. The testimony of Det. Ringer constituted impermissible “profile” or “pattern” opinion testimony.

Under ER 704, “[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”

However, “[i]t is well-established that no witness may testify as to an opinion on the guilt of the defendant, whether directly or inferentially.” *State v. Jones*, 71 Wn.App. 798, 813, 863 P.2d 85, review denied 124 Wn.2d 1018, 881 P.2d 254 (1994), citing *State v. Haga*, 8 Wn.App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); *State v. Madison*, 53 Wn.App. 754, 760, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); *State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1989). “Nor may the expert state an opinion as to the defendant’s guilt; such testimony invades the province of the jury to weigh the evidence and decide the credibility of witnesses.” *Jones*, 71 Wn.App. at 812, 863 P.2d 85; citing *Alexander*, 64 Wn.App. at 154, 822 P.2d 1250; *Madison*, 53 Wn.App. at 760, 770 P.2d 662.

As a general rule, profile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice. For example, in *State v. Petrich*, 101 Wn.2d 566,

683 P.2d 173 (1984), a sexual abuse expert testified that in “eighty-five to ninety percent of our cases, the child is molested by someone they already know.” The court explained that such testimony “invites the jury to conclude that because of defendant’s particular relationship to the victim, he is statistically more likely to have committed the crime.” Thus, the court ruled that on remand such evidence should be excluded because its “potential for prejudice is significant compared to its minimal probative value.” *Petrich* at 576, 683 P.2d 173.

Similarly, in *State v. Maule*, 35 Wn.App. 287, 667 P.2d 96 (1983), an expert testified that “the majority” of child sexual abuse cases involve “a male parent-figure”. Deeming such evidence unduly prejudicial, the court reasoned that it invited the jury to conclude that because the defendant had been “identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child sexual abuse, it is more likely the defendant committed the crime.” 35 Wn.App. at 293, 667 P.2d 96; *see also State v. Claflin*, 38 Wn.App. 847, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985) (testimony that 43 percent of child molestation cases “were reported” to have been committed by “father-figures” inadmissible under ER 403).

*State v. Braham*, 67 Wn.App. 930, 936, 841 P.2d 785 (1992).

We have clearly rooted our rejection of profile testimony in ER 403, ER 702, and ER 703. Under ER 403, we have determined that profile testimony should be excluded because its “potential for prejudice is significant compared to its minimal probative value.” *Petrich*, 101 Wn.2d at 576, 683 P.2d 173; *Braham*, 67 Wn.App. at 939, 841 P.2d 785 (testimony on SVP “grooming” behaviors similar to conduct of defendant inadmissible under ER 403); *Claflin*, 38 Wn.App. at 852, 690 P.2d 1186 (testimony that 43 percent of child molestation cases reported to have been committed by “father figures” inadmissible under ER 403). Other profile testimony has been rejected under ER 702 and ER 703. In

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*Marriage of Luckey*, an expert testified that he had administered the Minnesota Multiphasic Personality Inventory to the father in a custody dispute and concluded that the father's scaled scores matched the profiles of known child molesters. *Marriage of Luckey*, 73 Wn.App. at 204, 868 P.2d 189. The Court of Appeals affirmed the trial court's exclusion of this evidence under ER 702 and ER 703. *Marriage of Luckey*, 73 Wn.App. at 204, 868 P.2d 189; *Maule*, 35 Wn.App. at 293, 667 P.2d 96 (holding ER 702 and ER 703 excluded testimony by expert that "the majority" of child sexual abuse cases involve "a male parent-figure").

*In re Detention of Thorell*, 149 Wn.2d 724, 757-758, 72 P.3d 708 (2003),  
*cert. denied* 541 U.S. 990, 124 S.Ct. 2015, 158 L.Ed.2d 496 (2004).

Here, the State alleged Mr. Yarbrough had committed murder and assault and charged that both crimes (a) were committed to maintain or advance Mr. Yarbrough's position in a gang and (b) the offenses involved a destructive and foreseeable impact on persons other than the victim. CP 6-8. At the close of the direct examination of Det. Ringer, the State, after asking Det. Ringer to assume hypothetical facts which mirror the State's version of the facts of this case exactly, asked Det. Ringer to offer his opinion as to whether or not Mr. Yarbrough committed the crimes for purposes maintaining his position in the hierarchy of the Hilltop Crips and whether it would be foreseeable to Mr. Yarbrough that a 3<sup>rd</sup> party could be caught in the crossfire and harmed by a bullet:

Q: I want to ask you to assume certain hypothetical facts

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that I am going to lay out for you, and then ask you some questions about it.

A: Okay.

Q: Just please be patient because it will take me a little bit to lay these out here for you.

I want you to assume that the Defendant, whom you have told us you believe is a gang member with the Hilltop Crips, that the Defendant is with other gang members, or people associated with the Hilltop Crips, approximately 7 to 10 additional people, and he is on one side of Pacific Avenue. Assume further that on the other side of the street is a group of about 4 young men believed by the Defendant to be members of, or associated with, the 96<sup>th</sup> Street Murderville Folks gang.

Further, assume that 4 days earlier than the day in question, at another location, the Defendant was with a group of members of Crips or Crip associates, and that his group exchanged angry words and had a near violent exchange with one or more of the rivals from the 96<sup>th</sup> Street group.

Now, on the day in question, assume that the Defendant and possibly others from his group, yelled out the words, “what’s up, cuz, this is Hilltop Crips”, and that that happened moments before the defendant fired multiple rounds from a handgun toward the group on the other side of the street.

Assume further, that the Defendant fired, and then he and his companions ran away down the sidewalk, jumped into cars, and immediately drove to a gas station at South 19<sup>th</sup> Street and MLK, Martin Luther King Way in the Hilltop. Assume further, that back at the shooting scene, at least one of the perceived rivals

fired several rounds in response, and that it may have been one of those rounds that struck a young lady who was in the street, not involved in the situation, the altercation.

Now, Detective, based on these hypothetical facts, do you have an opinion, to a reasonable degree of certainty, as a gang expert, whether this scenario appears to you to be a gang motivated shooting?

A: From what I know, considering the hypothetical facts, all indications is, you have two different gangs squaring off, insulting each other, and it escalated to the point that where a shooting would not be out of the ordinary.

Q: Based on the hypothetical facts that I have described for you, do you have an opinion to a reasonable degree of certainty as to whether the Defendant by shooting at his perceived rivals would be maintaining, or advancing his position, in the hierarchy of the Hilltop Crips?

A: By the actions described, what I know, including the insults, and it is an insult to call a rival gang, what' up, cuz, followed by shots, definitely a person is building their reputation, building their status.

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Q: Having these hypothetical facts in mind, do you have an opinion, again to a reasonable degree of certainty, whether it would be reasonable for the Defendant to expect return fire from across the street?

A: A person who is immersed in gang culture, knows that when shots are fired toward another gang, the other gang is more than likely to fire right back, or retaliate in short notice. It's a fact of life under gang culture. We see it time and time again.

Q: Finally, under these hypothetical facts to a certain degree of certainty, that it would be reasonable for the Defendant to foresee that a third party could be caught in a cross fire and be struck by a bullet and harmed?

A: Again, there is enough common knowledge on the street among the gangs of multiple instances where innocent parties are hit. You know, you can go up and talk with any gang member and they can tell you, yeah, you know, at this particular time somebody was cruising through. They know the name, and got hit. Got caught in a cross fire. You know, it's in the lingo. It is openly known that innocent people commonly get shot as a result of these kind of things.

Q: So that would be reasonably foreseeable for the Defendant to know that under these hypothetical facts?

A: I believe so.

RP 885-889.

At best, Det. Ringer's testimony constituted impermissible profiling testimony that Mr. Yarbrough was in a gang, that gang members kill people to move up in gang hierarchy, and that gang members shoot people in the street so often that they know rival gang members will open fire and shoot bystanders. At worst, despite the prosecutor's effort to characterize Det. Ringer's testimony as expert opinion testimony based on hypothetical facts,<sup>6</sup>

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<sup>6</sup> See *Seattle v. Heatley*, 70 Wn.App. 573, 578, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994): "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony."

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Det. Ringer's testimony constitutes impermissible opinion testimony that Mr. Yarbrough committed the crimes and that the facts of the case met the requirements of the aggravating factors.

It is anticipated that the State will argue that Det. Ringer's testimony was permissible under *Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994), *State v. Cruz*, 77 Wn.App. 811, 894 P.2d 573 (1995), and *State v. Avendano-Lopez*, 79 Wn.App. 706, 904 P.2d 324 (1995), *review denied* 129 Wn.2d 1007, 917 P.2d 129 (1996). Mr. Yarbrough's case is factually distinguishable from all these cases.

In *Seattle v. Heatley*, Mr. Heatley appealed his convictions for DUI and negligent driving. On appeal, Mr. Heatley contended that the trial court erred in admitting testimony of the officer who administered field sobriety tests to Mr. Heatley that Mr. Heatley was "obviously intoxicated" and "could not drive a motor vehicle in a safe manner." Mr. Heatley argued that because the officer's opinion encompassed what was essentially the only disputed issue, it was an improper opinion that he was guilty of the DWI charge. The Court of Appeals disagreed with Mr. Heatley and ruled that the officer's testimony was admissible because,

[the officer's] testimony contained no direct opinion on  
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Heatley's guilt or on the credibility of a witness. The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. It is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material. More important, [the officer's] opinion was based solely on his experience and his observation of Heatley's physical appearance and performance on the field sobriety tests. The evidentiary foundation "directly and logically" supported the officer's conclusion.

*Heatley*, 70 Wn.App. at 579, 854 P.2d 658 (internal citation's omitted). In other words, the officer's testimony was not improper opinion testimony because the officer offered no direct opinion on Mr. Heatley's guilt and because the officer based his opinion on his direct involvement in the case which direct involvement supplied a sufficient evidentiary foundation to support the officer's conclusion.

In *State v. Cruz*, Mr. Cruz was convicted of one count of delivery of heroin. On appeal, Mr. Cruz argued that the trial court erred by permitting a detective, who was not involved in Mr. Cruz's case, to testify about heroin users, heroin transactions, and the Seattle heroin market. Citing *Heatley*, the Court of Appeals held that the testimony was not an impermissible expression of the detective's opinion as to Mr. Cruz's guilt because,

the detective's testimony did not amount to a directive telling the jury what result to reach on the issue of Cruz's guilt or innocence. The detective did not render an opinion or

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otherwise make an assertion that directly implicated Cruz. Rather, the testimony consisted solely of the detective's knowledge of typical heroin transactions and typical heroin users gained from his involvement in 500 to 600 undercover investigations involving that drug. Even after the detective testified, the jury still had to decide (1) whether to believe the detective, and (2) the ultimate issue of whether the other evidence presented demonstrated Cruz's guilt of the crime charged.

*Cruz*, 77 Wn.App. at 815, 894 P.2d 573. As in *Heatley*, the *Cruz* court based its ruling on the fact that the challenged testimony did not contain the police officer's opinion as to the guilt of the defendant.

In *State v. Avendano-Lopez*, Mr. Avendano-Lopez was found guilty of possession of cocaine with intent to deliver. At trial, the State presented the testimony of a police officer who had been investigating drug cases for two years, averaging two to four felony arrests per day. The officer testified about certain characteristics or behaviors of a typical drug dealer. On appeal, Mr. Avendano-Lopez argued that the introduction of this testimony required reversal of his conviction because its prejudicial effect outweighed any probative value. The Court of Appeals did not reach the issue, finding that it had not been properly preserved for appeal. However, the Court went on to discuss the issue in dicta and wrote that

Even if we were to address the merits of Avendano-Lopez's contention, the officer's testimony was not "criminal profile" testimony. "Profile" testimony identifies a group as more

likely to commit a crime and is generally “inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice. The officer’s testimony in this case did not identify any group as being more likely to commit drug offenses. Rather, it was permissible expert opinion; it explained the arcane world of drug dealing and certain drug transactions and thus was helpful to the trier of fact in understanding the evidence. “Profile” testimony and permissible expert opinion overlap, which underscores the necessity of objecting to questionable testimony during trial so that the trial court can limit any objectionable “profile” aspect and channel the testimony toward admissible expert opinion instead.

*Avendano-Lopez*, 79 Wn.App. at 710-711, 904 P.2d 324. Again, the Court’s discussion indicates that the testimony of the officer was proper because he didn’t identify any group or person as being more likely to commit drug offenses.

In the present case, the testimony of Det. Ringer constituted improper opinion. The prosecutor asked Det. Ringer to assume “hypothetical” facts, indistinguishable to the State’s version of events, and to give his opinion as a gang expert as to whether Mr. Yarbrough committed the crimes to advance his position in the Hilltop Crips and could have reasonably foreseen that 3<sup>rd</sup> person would be shot and injured in the crossfire. By interjecting Mr. Yarbrough as part of the “hypothetical,” rather than using a neutral hypothetical gang member in facts not identical to the evidence presented by the State, Det. Ringer’s testimony became opinion testimony that Mr. Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

Yarbrough was guilty.

- iii. It was not objectively reasonable nor was it legitimate trial strategy for Mr. Yarbrough's trial counsel to fail to object to Det. Ringer's testimony, and the failure to object prejudiced Mr. Yarbrough greatly.

Everything Det. Ringer testified about was gang-related.

As discussed above, ER 404(b) evidence is inherently prejudicial. *Lough*, 125 Wn.2d 847, 863, 889 P.2d 487. Furthermore, "testimony from a law enforcement officer may be especially prejudicial because the officer's testimony often carries a special aura of reliability." *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001).

Det. Ringer was not only a law enforcement officer, but was an expert witness. The prejudice to Mr. Yarbrough from Det. Ringer's testimony was extremely high, however, counsel for Mr. Yarbrough failed to either object to Det. Ringer being allowed to testify regarding gang-evidence or to Det. Ringer's improper "profile" testimony. As the Court recognized in *Avendano-Lopez*, "'profile' testimony and permissible expert opinion overlap, **which underscores the necessity of objecting to questionable testimony during trial** so that the trial court can limit any objectionable 'profile' aspect and channel the testimony toward admissible expert opinion instead." *Avendano-Lopez*, 79 Wn.App. at 710-711, 904 P.2d 324 (emphasis Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

added).

Aside from the prejudicial nature discussed above of Det. Ringer's testimony regarding gangs in general, Det. Ringer's opinion testimony amounted to Det. Ringer vouching for the credibility of the State's witnesses and informing the jury that he, an expert law enforcement witness, personally believed that Mr. Yarbrough was guilty as charged of all crimes, including the aggravating factors. This prejudice was heightened by trial counsel's failure to request a limiting instruction be give to the jury regarding gang evidence in general or regarding Det. Ringer's testimony. Given the highly prejudicial an improper nature of Det. Ringer's testimony, the failure of Mr. Yarbrough's trial counsel to object to Det. Ringer's testimony cannot be considered a legitimate trial tactic or objectively reasonable and it greatly prejudiced Mr. Yarbrough.

**4. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH THAT MR. YARBROUGH COMMITTED ANY CRIME FOR PURPOSES OF ADVANCING OR MAINTAINING HIS POSITION IN AN IDENTIFIABLE GROUP.**

In a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn from them. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

reviewed in the light most favorable to the State. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

Circumstantial evidence and direct evidence are equally reliable *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

Under RCW 9.94A.535(3), the State must prove facts supporting aggravating circumstances to a jury beyond a reasonable doubt.

The trial court imposed an exceptional sentence of 120 months beyond the standard range on the charge of first degree murder based on the jury finding the aggravating factors that the crime was committed to maintain or advance Mr. Yarbrough's position in an organization and that the crime Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

involved a destructive and foreseeable impact on persons other than the victim in this case. RP 1199, CP 257-268.

At trial, the State produced sufficient evidence to allow the jury to infer that Mr. Yarbrough was in a gang. However, the State produced insufficient evidence to establish that Mr. Yarbrough's motive in shooting at Mr. Simms was to advance Mr. Yarbrough's position in the Hilltop Crips.

The only evidence presented by the State which would support an inference that Mr. Yarbrough committed the murder for purposes of maintaining or advancing his position in a gang was the improper opinion testimony of Det. Ringer. Absent Det. Ringer's opinion, the evidence presented by the State only supported the inference that Mr. Yarbrough was in a gang and had no probative value on whether Mr. Yarbrough shot at Mr. Simms to advance his position in the gang.

The proper basis for expert opinions or inferences is set out in ER 703:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

“Although this rule is intended to broaden the acceptable basis for

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expert opinion, there is no value in an opinion where material supporting facts are not present. 5A K. Tegland, Wn.Prac. § 304 (1982). Likewise, an inference is a logical conclusion or deduction from established facts.” *Davidson v. Municipality of Metropolitan Seattle*, 43 Wn.App. 569, 575, 719 P.2d 569, review denied 106 Wn.2d 1009, see also *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 102-103, 882 P.2d 703 (1994) (“while ER 703 is intended to broaden the acceptable bases for expert opinion, there is no value in an opinion that is wholly lacking some factual basis”).

The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), review denied, 80 Wn.2d 1004 (1972), cited in *Hutton*, 7 Wn.App. at 728, 502 P.2d 1037. “A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.” *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950); *State v. Miles*, 162 P.3d 1169 (2007).

Here, while there was a factual basis for Det. Ringer to opine that Mr. Yabrough was a member of a gang, there is no factual basis in the record to support Det. Ringer’s opinion that Mr. Yabrough’s actions in shooting at Mr. Simms were motivated by Mr. Yabrough’s desire to advance his position in the Hilltop Crips. Det. Ringer’s testimony that Mr. Yabrough shot Mr. Yabrough, Verrick V. - Opening Brief - COA No. 36457-3-II

Simms to advance his position in the Hilltop Crips was purely speculation and conjecture and lacked any factual support in the record.

Because Det. Ringer's testimony was the only evidence which would support the inference that the shooting was performed to advance Mr. Yarbrough's position in the Hilltop Crips, and because Det. Ringer's testimony lacked support from the facts introduced at trial, there was insufficient evidence to support the jury's finding that the aggravating factor that the crime was committed to advance Mr. Yarbrough's standing in the Hilltop Crips applied.

**5. IMPOSITION OF THE EXCEPTIONAL SENTENCE ON THE CHARGE OF FIRST DEGREE MURDER IN VIOLATION OF RCW 9A.32.030(1)(b) BASED ON THE AGGRAVATING FACTOR SET FORTH IN RCW 9.94A.535(3)(r) THAT THE MURDER INVOLVED A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM VIOLATED MR. YARBROUGH'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.**

The double jeopardy clauses of the Washington State Constitution, article I, section 9, and the fifth amendment to the federal constitution "protect against multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction."

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*In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

Where a defendant contends that his sole act has been punished twice under separate criminal statutes, the question is “whether, in light of legislative intent, the charged crimes constitute the same offense.” *In re Orange*, 152 Wn.2d at 815, 100 P.3d 291. If the relevant statutes do not disclose legislative intent, the reviewing court will apply the “same evidence” or *Blockburger* test, (*See Orange*, 152 Wn.2d at 816 n. 4, 100 P.3d 291 (citing *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995))) by which two charged crimes will not be deemed the same offense if each statute requires proof of a fact not required by the other statute.

In order to be the “same offense” for purposes of double jeopardy, the offenses must be the same in law and in fact. For two offenses to be “the same in fact,” proof of one offense must necessarily also prove the other. *In re Pers. Restraint of Fletcher*, 113 Wn.2d 42, 47, 776 P.2d 114 (1989), citing *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). In order for two offenses to be “the same in law” for purposes of double jeopardy analysis, each offense, as charged, must not include an element not included in the other. *Fletcher*, 113 Wn.2d 42, 49, 776 P.2d 114 (1989), citing *Vladovic*, 99 Wn.2d at 423, 662 P.2d 853 (1983). *See also Calle*, 125 Wn.2d at 777, 888 P.2d 155 (If there is an element in each offense which is not

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included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses).

- a. First degree murder committed in violation of RCW 9A.32.030(1)(b) is the same in fact as the aggravating factor set forth in RCW 9.94A.535(3)(r), that the offense involved a destructive and foreseeable impact on persons other than the victim.***

First-degree murder by extreme indifference to human life requires proof that the defendant acted (1) with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person. *Pastrana*, 94 Wn.App. 463, 470, 972 P.2d 557.

RCW 9.94A.535(3)(r) authorizes an exceptional sentence where the jury finds that “[t]he offense involved a destructive and foreseeable impact on persons other than the victim.”

As discussed above, whether or not a person commits a murder with extreme indifference to human life is determined from examining the circumstances surrounding how the murder was committed, specifically, whether or not the means employed to commit the murder endangered the lives of people other than the intended target. *See* section 1(c)(i), *supra*.

Where a person is found to have violated RCW 9A.32.030(1)(b), that person will necessarily have been found to have committed an act which

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created a grave risk of death to others. By definition, an act which created a grave risk of death to others is an act which involved a destructive and foreseeable impact on persons other than the victim. Thus, proof that a defendant violated RCW 9A.32.030(1)(b) necessarily also proves that the person violated RCW 9.94A.535(3)(r)

***b. First degree murder committed in violation of RCW 9A.32.030(1)(b) is the same in law as the aggravating factor set forth in RCW 9.94A.535(3)(r), that the offense involved a destructive and foreseeable impact on persons other than the victim.***

As stated above, first-degree murder by extreme indifference to human life requires proof that the defendant acted (1) with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person. *Pastrana*, 94 Wn.App. at 470, 972 P.2d 557.

RCW 9.94A.535(3)(r) authorizes an exceptional sentence where the jury finds that “[t]he offense involved a destructive and foreseeable impact on persons other than the victim.”

Also as stated above, any time a defendant is found to have violated RCW 9A.32.030(1)(b), that defendant will have necessarily also be found to have committed an act which “involved a destructive and foreseeable impact on persons other than that victim” in violation of RCW 9.94A.535(3)(r).

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Therefore, these two crimes are the same in law.

The remedy for a violation of double jeopardy is vacation of one of the convictions at issue. *State v. Adel*, 136 Wn.2d 629, 637, 965 P.2d 1072 (1998).

Because Mr. Yarbrough's double jeopardy rights were violated by his being found guilty of a crime and a finding that an aggravating factor applied, this court should remand for resentencing without consideration of the aggravating factor that the crime involved a destructive and foreseeable impact on persons other than the victim.

**6. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE IMPOSITION OF AN EXCEPTIONAL SENTENCE**

Here, Mr. Yarbrough's exceptional sentence was based on the jury's determination that Mr. Yarbrough had committed the murder to maintain his membership or advance his position in the Hilltop Crips and that the murder involved a destructive and foreseeable impact on persons other than the intended victim, Mr. Simms. However, as discussed above, there was insufficient evidence in the record to support the jury's verdict that the crime was committed to maintain or advance Mr. Yarbrough's position in the Hilltop Crips, and the imposition of the aggravating factor that the murder involved a destructive and foreseeable impact on persons other than the Yarbrough, Verrick V. - Opening Brief - COA No. 36457-3-II

intended victim violated Mr. Yarbrough's right to be free from double jeopardy and was therefore invalid.

Upon "a determination that all the factors supporting an exceptional sentence are insufficient, the proper remedy is for resentencing within the standard range." *State v. Law*, 154 Wn.2d 85, 108, n. 21, 110 P.3d 717 (2005).

This court should vacate Mr. Yarbrough's sentence for the murder conviction and remand for resentencing within the standard range.

#### **7. CUMULATIVE ERROR DEPRIVED MR. YARBROUGH OF A FAIR TRIAL**

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. Rather, the combined errors effectively denied the defendant a fair trial.

*State v. Rooth*, 129 Wn.App. 761, ¶ 75, 121 P.3d 755 (2005).

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial.

*State v. Stevens*, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

Should this court find that none of the errors described above warrant a new trial, this court should find that the prejudicial effect of these errors

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combined deprived Mr. Yarbrough of a fair trial. This court should vacate Mr. Yarbrough's convictions and remand for a new trial.

**VI. CONCLUSION**

For the reasons stated above, this court should either vacate Mr. Yarbrough's convictions and remand his case for a new trial, or vacate Mr. Yarbrough's exceptional sentence and remand for resentencing within the standard range.

DATED this 19th day of December, 2007.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sheri Arnold". The signature is written in black ink and is positioned above a horizontal line.

Sheri Arnold, WSBA No. 18760  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on December 19, 2007, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Tacoma, WA. 98402, and by U.S. mail to appellant, Verrick V. Yarbrough, DOC # 307096, Washington State Penitentiary, 1313 North 13<sup>th</sup> Street, Walla Walla, , WA.. 99362-1065, true and correct copies of this Opening Brief. 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 December 19, 2007.

  
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Norma Kinter

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**APPENDIX**

***People v. Perez*, 114 Cal.App. 3d 470, 170 Cal. Repr. 619 (1981)**

Westlaw.

114 Cal.App.3d 470  
114 Cal.App.3d 470, 170 Cal.Rptr. 619  
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▷People v. Perez  
Cal.App.2.Dist.

THE PEOPLE, Plaintiff and Respondent,  
v.  
NICHOLAS PEREZ, Defendant and Appellant.  
**Crim. No. 36380.**

Court of Appeal, Second District, Division 5, California.  
Jan 8, 1981.

#### SUMMARY

Defendant was charged with kidnaping for the purpose of robbery (Pen. Code, § 209), robbery (Pen. Code, § 211), and the unlawful taking of a vehicle (Veh. Code, § 10851). The trial court ruled that defendant's membership in a youth gang was relevant to the issue of identity, and that a subsequent shooting incident involving the stolen car was also relevant, and admitted those matters into evidence. After a jury trial defendant was found guilty as charged. (Superior Court of Los Angeles County, No. A 615937, George R. Perkovich, Jr., Judge.)

The Court of Appeal reversed. The court held the admission of evidence of defendant's gang membership and the shooting incident constituted an abuse of discretion, as such testimony should have been excluded under Evid. Code, § 352, providing for the exclusion of evidence whose probative value is substantially outweighed by its probable prejudicial effect. The court held that, because the evidence of gang membership was allowed to be associated with gang activities, the error was prejudicial and defendant did not receive a fair trial. (Opinion by Torres, J., <sup>FN\*</sup> with Kaus, P. J., and Ashby, J., concurring.

FN\* Assigned by the Chairperson of the Judicial Council.

## HEADNOTES

Classified to California Digest of Official Reports

**(1) Criminal Law § 286--Evidence--Admissibility--Relevance--Gang Membership.**

Evidence of a defendant's gang membership in a criminal prosecution is not per se inadmissible, but in order to be admissible it must meet the test of relevancy.

**(2) Criminal Law § 286--Evidence--Admissibility--Relevance--Gang Membership.**

In a prosecution of defendant for kidnaping for the purpose of robbery (Pen. Code, § 209), robbery (Pen. Code, § 211), and the unlawful taking of a vehicle (Veh. Code, § 10851), in which the victim identified defendant as one of the perpetrators, evidence of defendant's membership in a youth gang, admitted for the purpose of proving identity, was not relevant, as it did not have any tendency in reason to prove the identity of the person who committed the charged offense. Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion. Moreover, such evidence allowed an unreasonable inference to be made that defendant was guilty of the offense charged on the theory of guilt by association.

**(3) Criminal Law § 302--Evidence--Admissibility--Evidence of Other Crimes or Misconduct--Rule of Inadmissibility.**

Evidence of other criminal acts or misconduct of a defendant may not be admitted in a criminal trial where the sole relevancy is to show defendant's criminal propensities or bad character as a means of creating an inference that defendant committed the charged offense. Such evidence is admissible only when it is logically relevant to some material issue in a particular prosecution other than as character trait evidence. Accordingly, in a prosecution of defendant for kidnaping, robbery, and unlawfully taking a vehicle, evidence that defendant used the stolen car in a gang-related shooting and subsequently abandoned it constituted an abuse of discretion, where the evidence was admitted to show that the abandonment indicated knowledge the car was stolen, but where it was more reasonable and logical to infer that the car had been abandoned because it was not operable, had just

been involved in a shooting, and that the police might arrive at any moment to investigate.

[See **Cal.Jur.3d**, Criminal Law, § 1009; **Am.Jur.2d**, Evidence § 320.]

**(4) Criminal Law § 288--Evidence--Admissibility--Discretion of Trial Court.**

In a prosecution of defendant for kidnaping, robbery, and unlawful taking of a vehicle, defendant's objection to the introduction of any evidence relating to gangs or a subsequent shooting incident, on the ground that the prejudicial effect of that evidence would be so great as to abate any probative value, specifically invoked the discretion vested in the trial court by Evid. Code, § 352, to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice.

**(5) Criminal Law § 288--Evidence--Admissibility--Discretion of Trial Court.**

Under Evid. Code, § 352, it is in the trial court's power to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice; trial courts must weigh the admission of such evidence carefully in terms of whether the probative value of the evidence is greater than the potentially prejudicial effect its admission would have on the defense.

**(6) Criminal Law § 302--Evidence--Admissibility--Evidence of Other Crimes or Misconduct--Rule of Inadmissibility--Gang Membership.**

In a prosecution of defendant for kidnaping, robbery, and unlawful taking of a vehicle, the trial court abused its discretion in admitting evidence of defendant's membership in a youth gang and a gang-related shooting incident involving the stolen vehicle, where such evidence was not relevant to any disputed issue of fact, where the trial court failed to exercise its discretion of weighing the relevancy of the evidence against its possible prejudicial effect, and where the evidence of gang membership was allowed to be associated with gang activities to the prejudice of defendant. Accordingly, defendant did not receive a fair trial and the error was prejudicial.

**COUNSEL**

Derek L. Tabone, under appointment by the Court of Appeal, for Defendant and Appellant.  
George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Norman H. Sokolow and Howard J. Schwab, Deputy Attorneys General, for Plaintiff and Respondent. \*473

TORRES, J. <sup>FN\*</sup>

FN\* Assigned by the Chairperson of the Judicial Council.

Defendant was charged in a three-count information with kidnaping for the purpose of robbery (Pen. Code, § 209), robbery (Pen. Code, § 211), and the unlawful taking of a vehicle (Veh. Code, § 10851) occurring on April 16, 1979. After a jury trial he was found guilty as charged and sentenced to prison for life. He appeals.

#### Facts

At the pretrial hearing on defendant's motion for a preliminary ruling on the admissibility of evidence (Evid. Code, § 402), the prosecutor made an offer of proof as follows: "Your Honor, I have some deputies here, Deputy Grani and Valdemar, who are assigned to the Lynwood Station, experts in the street gang activities.

"I intend to show through the testimony of these deputies two things: that the defendant in this case, Mr. Perez, is a member of a gang called the CV3 and that in addition to that that the other codefendant in this case, who was identified by Mr. Bautista, is also a member of the CV3 gang, and the relevancy of this, first of all, shows an association between these two people which tends to corroborate the identification of Mr. Bautista, that is, Mr. Bautista picked out two people who have an association in the past and therefore he tends to be correct when he finds them as having been associated in this robbery against him. In other words, Mr. Perez and Ontiveros are not strangers to one another and that they associated in the past.

"In addition to that, this crime occurred at 8:00 o'clock on April 16, 1979. The car that was stolen from Mr. Bautista was used in a shooting at 1:25 a.m., on April 19, 1979, in which Perez drove that car by a house at 2914 East Poplar Street in Lynwood. That house was occupied by a member of the rival gang, Lynwood Paragons, and Mr. Marty Buchanan was a Lynwood Paragon, shot one of the passengers in that car as it drove by the house. Mr. Buchanan claims that the people in the car had guns and that is why he fired.

“So that would also show a motive for Mr. Perez to take that car so that he could use a stolen car and to drive by, about a day and a half \*474 later. That would be my offer of proof concerning the admissibility of this. I don't intend to go into very deeply the association, just that these two are both members of the CV3, both of them have tattoos on their body which say CV3.”

Defendant objected to any testimony relating to gangs or shootings on the grounds such testimony was not relevant and was so prejudicial as to far outweigh any probative value.

The court ruled that gang membership was relevant to the issue of identity and the shooting incident was relevant as to the accuracy of Mr. Denney's testimony.<sup>FN1</sup> The court stated, “Counsel, I think we have to consider two aspects. I'm going to be very zealous about the inflammatory nature of this testimony on your direct, on your case in chief. Rebuttal is a different matter. I'm not going to hamstring you on rebuttal, but I don't think you need to have that testimony as to all these other gang related things.”

FN1 Ricky Denney, a friend of defendant, was a passenger in the rear seat of the stolen car being driven by defendant at the time of the shooting on April 19, 1979.

#### People's Case in Chief

On the evening of April 16, 1979, Francisco Bautista was in possession of a 1965 Chevy Nova, license No. REW170, which he had borrowed from the owner Miguel Flores. Bautista drove over to an apartment building on El Segundo Boulevard, near Peach Street. He parked the car on the street, went into the apartment building and visited with his friends.

Bautista returned to the car at about 8 p.m. He entered the car and started it with a key. Before he had a chance to drive away, he was approached by a person Bautista identified as defendant. Defendant made an inquiry of Bautista, and then signaled to another person who also approached the vehicle on the driver's side. The second person, identified at the trial as Robert Ontiveros, placed a knife to Bautista's neck. The blade was four or five inches long. Defendant told Bautista to move over and

turn the engine off. Defendant threatened to kill Bautista if he did not move over.

Defendant got into the driver's seat and told Bautista to give him all the money he had. Ontiveros got into the back seat and placed the knife \*475 to the back of Bautista's neck. As defendant was starting the vehicle, Bautista was removing the \$17 he had in his pocket. He had some more change in his wallet. By the time Bautista had given defendant the money, they had traveled approximately half a mile. Bautista took his wallet out and placed it on the seat. He was asked for more money and was searched by Ontiveros. Defendant continued to drive the car and told Bautista to take off his boots. The car was stopped after driving around for 15 to 30 minutes. Bautista minus money, wallet and boots was ordered out of the car. Ontiveros got into the front seat and defendant drove off.

Sometime later, the police showed Bautista some photographs. Bautista was able to pick out photographs of defendant and Ontiveros. Bautista was asked on cross-examination if he had noticed anything unusual about defendant. He replied that he had not.

On April 19, 1979, Marty Buchanan resided at 2922 Poplar Drive, Lynwood. At 1:30 a.m., a car similar to the Chevy Nova belonging to Flores stopped in front of his home. He was in fear that the persons in the vehicle were going to shoot at his house so he got his rifle. He stated that a person in the back seat fired at him so he fired three rounds into the car. He was not able to identify any of the occupants in the car.

On the evening of April 18, 1979, Richard Leroy Denney had met defendant at Chico's Pizza Palace. Defendant picked Denney up in the 1965 Chevy Nova owned by Flores. There were two other individuals in the car, one of whom was Ontiveros. Defendant was the driver, Ontiveros sat in the front passenger seat, and Denney was in the back. In the early morning hours of April 19, 1979, the car was driven down Poplar Street. The car came to a stop in front of a house. Three shots were fired at the car, one striking Denney. He was taken to the Martin Luther King Hospital and left there for treatment. The 1965 Chevy Nova was found abandoned in the hospital lot, parked illegally. The front tire had collapsed, there was a bullet hole in the left rear fender, and there was a red stain on the rear seat which appeared to be blood.

Deputy Valdemar testified that he was a deputy sheriff for the County of Los Angeles assigned to Youth Services Bureau, Operation Safe Streets, Lynwood gangs. He has had approximately 50 hours of classroom study concerning street gangs and is familiar with the Mexican-American barrio gangs in the Lynwood/Compton area. \*476

He has run across members of the Compton Varrrios Tres gang in his duties. It is common among gang members to tattoo themselves prominently with their gang symbol. The gang symbol for Compton Varrrios Tres is CV3. Defendant and Ontiveros are members of the Compton Varrrios Tres gang and each has the tattoo CV3 on his hand.

Defendant and Ontiveros were required by the court to walk by the jury and show their tattoos. The court admonished the jury as follows: "Ladies and Gentlemen, I caution you again. These people aren't being tried for whether or not they are associated in a gang or club or sorority or fraternity. Goes only to issues of identification. That is all. No law against anyone belonging to a gang."

#### Defense

Defendant's sisters and the sister of Ontiveros testified that at the time of the kidnap-robbery on April 16, 1979, defendant was at Chico's Pizza Palace. Defendant testified that on the night of April 16, 1979, while at Chico's he saw Ontiveros arrive in the Chevy Nova. He further testified that in the early morning hours of April 19, 1979, he drove the Chevy Nova because of Ontiveros' intoxication. There was a key in the ignition, he did not know the 1965 Chevy Nova was stolen and he left it at the Martin Luther King Hospital because it was not "runable."

No rebuttal evidence was presented.

#### Issues

Defendant Perez contends that: (1) the trial court committed prejudicial error in admitting evidence

of the defendant's gang membership and of the shooting on April 19, 1979; (2) the trial court failed to exercise its discretion in sentencing defendant on the kidnap-robbery charge.

### Discussion

On appeal the people argue that it is proper to introduce evidence which is either unpleasant or negative pertaining to an organization to which a defendant belongs where it can be shown that the organization to which the defendant belongs is relevant to an issue at trial. \*477

(1) We agree with this basic proposition and state at the outset that evidence of gang membership is not per se inadmissible. In order to be admissible it must meet the test of relevancy.

Evidence Code section 210 defines relevant evidence as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

(2) The asserted active membership in the "CV3" gang by defendant, as testified to by Deputy Valdemar, did not have any "tendency in reason" to prove a disputed fact, i.e., the identity of the person who committed the charged offense. Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion. Hence, the evidence was not relevant. It allowed, on the contrary, unreasonable inferences to be made by the trier of fact that the defendant was guilty of the offense charged on the theory of "guilt by association." (*In re Wing Y.* (1977) 67 Cal.App.3d 69, 79 [136 Cal.Rptr. 390].)

When the gang and shooting incident evidence was offered, the prosecution had already proved the commission of the three charged crimes. Defendant had been identified as the first to approach and drive the car by Bautista, who was in the car with defendant for 15 to 30 minutes.

(3) The prosecutor contended that evidence of the April 19, 1979, shooting was relevant to prove

motive in that defendant took the car so he and the other occupants could attack the dwelling of a rival gang member. He argued that proving defendant was driving would be probative to some extent, that he had taken it without permission and that abandoning the car at the hospital showed knowledge the car was stolen. The trial court ruled evidence of abandonment would be relevant.

Evidence of other criminal acts or misconduct of a defendant may not be admitted at trial when the sole relevancy is to show defendant's criminal propensities or bad character as a means of creating an inference that defendant committed the charged offense. (Evid. Code, § 1101, subd. (a); *People v. Sam* (1969) 71 Cal.2d 194 [77 Cal.Rptr. 804, 454 P.2d 700].) Such evidence has been held admissible only when it was logically relevant to some material issue in the particular prosecution other than as character-trait evidence. (*People v. Durham*\*478 (1969) 70 Cal.2d 171 [74 Cal.Rptr. 262, 449 P.2d 198]; *People v. Schader* (1969) 71 Cal.2d 761 [80 Cal.Rptr. 1, 457 P.2d 841].)

The only possible relevant probative value of the April 19, 1979, shooting incident is the abandonment of the car to imply knowledge it was stolen. However, this is unreasonable and of slight probative value, if any. It is reasonable and logical to infer that the car was abandoned because it was not operable, had just been involved in a shooting and that the police might arrive at any moment to investigate.

(4) Defendant objected to the introduction of any evidence relating to gangs or the shooting of April 19, 1979, on the grounds "that the prejudicial effect of that alone would be so great as to completely abate any probative value." He thereby specifically invoked the discretion vested in the court by Evidence Code section 352 to exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice ...." (*People v. Green* (1980) 27 Cal.3d 1, 24 [164 Cal.Rptr. 1, 609 P.2d 468].)

(5) It has been held that trial courts must weigh the admission of such evidence carefully in terms of whether the probative value of the evidence is greater than the potentially prejudicial effect its admission would have on the defense. (*People v. Gibson* (1976) 56 Cal.App.3d 119 [128 Cal.Rptr. 302]; *People v. Haston* (1968) 69 Cal.2d 233 [70 Cal.Rptr. 419, 444 P.2d 91]; *People v. Green* (1980) *supra*.)

The record does not show that the trial court did in fact discharge its duty in these circumstances by weighing the evidence for prejudice against its probative value. It simply ruled that the evidence was relevant to either identity, knowledge, or credibility. The evidence was admitted with the jury being admonished.

All of the evidence in this case was presented in one day, August 8, 1979. At the section 402 Evidence Code hearing before presentation of the evidence, defendant brought to the attention of the trial court an article appearing in the Los Angeles Times that morning as follows: "Your Honor, I think the fact-today in part 3 of the Los Angeles Times in the view section-part 4 in the view section is a front page article, eighteen gang-related shootings on Whittier Boulevard in the last six months." The court responded: "Well, this isn't on Whittier Boulevard, is it?" Defendant offered to admit that he drove the car in question on \*479 the morning of April 19, 1979, and that he was acquainted with Ontiveros. This offer was rejected.

The People on appeal contend that the mere fact that appellant belonged to a gang would not in itself be prejudicial and cite *People v. Zammora* (1944) 66 Cal.App.2d 166, 214 [152 P.2d 180].

*Zammora* was decided in 1944. In the decision on page 215 it states "it seems only reasonable to assume that the use of the word 'gang' referred only to the usual and ordinary crowd of young people living in any particular neighborhood, who associate themselves together, and from time immemorial has been referred to as a 'gang.'" Thirty-six years have passed since *Zammora*. It is fair to say that when the word "gang" is used in Los Angeles County, one does not have visions of the characters from the "Our Little Gang" series. The word gang as used in the case at bench connotes opprobrious implications. The trial judge in *Zammora* recognized that the use of the word "gang" takes on a sinister meaning when it is associated with activities. In the case at bench, gang membership was allowed to be associated with gang activities to the prejudice of the defendant.

(6) We hold that the admission in this case of gang membership and the shooting incident on April 19, 1979, constitutes an abuse of discretion. Such testimony should have been excluded under Evidence Code section 352. The error was prejudicial. The defendant did not receive a fair trial. (*People v. Watson* (1956) 46 Cal.2d 818, 835 [299 P.2d 243].)

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Because we are compelled to reverse the judgment, we do not consider any other issue.

The judgment is reversed.

Kaus, P. J., and Ashby, J., concurred.

A petition for a rehearing was denied February 5, 1981, and respondent's petition for a hearing by the Supreme Court was denied March 11, 1981. Richardson, J., was of the opinion that the petition should be granted. \*480

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END OF DOCUMENT

**KEYCITE**

▷ **People v. Perez, 114 Cal.App.3d 470, 170 Cal.Rptr. 619 (Cal.App. 2 Dist., Jan 08, 1981) (NO. CR. 36380)**

**History  
Direct History**

⇒ 1 **People v. Perez, 114 Cal.App.3d 470, 170 Cal.Rptr. 619 (Cal.App. 2 Dist. Jan 08, 1981) (NO. CR. 36380)**

**Negative Citing References (U.S.A.)**

*Declined to Follow by*

▷ 2 **People v. Smith, 2002 WL 31160865 (Cal.App. 2 Dist. Sep 30, 2002) (NO. B144995), unpublished/noncitable (Sep 30, 2002), review denied (Dec 18, 2002) \*\*\*HN: 4 (Cal.Rptr.)**

*Distinguished by*

▷ 3 **People v. Plasencia, 140 Cal.App.3d 853, 189 Cal.Rptr. 804 (Cal.App. 2 Dist. Mar 16, 1983) (NO. CR. 39995), hearing granted (Jul 14, 1983) \*HN: 4 (Cal.Rptr.)**

H 4 **People v. Plasencia, 168 Cal.App.3d 546, 223 Cal.Rptr. 786 (Cal.App. 2 Dist. May 22, 1985) (NO. CRIM. 39995) \*HN: 4 (Cal.Rptr.)**

▷ 5 **People v. Acuna, 2002 WL 276487 (Cal.App. 2 Dist. Feb 27, 2002) (NO. B142948), unpublished/noncitable (Feb 27, 2002), review denied (May 15, 2002) \*\*HN: 1 (Cal.Rptr.)**

▷ 6 **People v. Aguayo, 2002 WL 844742 (Cal.App. 2 Dist. May 03, 2002) (NO. B149191), unpublished/noncitable \*\*HN: 4 (Cal.Rptr.)**

▷ 7 **People v. Breaux, 2005 WL 2222200 (Cal.App. 2 Dist. Sep 14, 2005) (NO. B178003), unpublished/noncitable \*\***