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

STATE OF WASHINGTON, RESPONDENT

v.

RICKY MAY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 06-1-00407-0

BRIEF OF RESPONDENT

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

1. Did the trial court abuse its discretion where it denied defense counsel's motion to withdraw as the attorney where the motion came on the eve of trial and there was not a complete breakdown in communication?
2. Is there sufficient evidence to support a conviction of assault in the first degree where the evidence shows that defendant or an accomplice fired a gun at two people, hitting one of them?
3. Did the trial court abuse its discretion in admitting gang evidence where defendant admitted in his confession that the reason for the shooting was in retaliation for a prior gang shooting at his parents' home?

B. STATEMENT OF THE CASE.

1. Procedure
 - a. General procedure.

On July 31, 2007, the stated charged THOMAS HOPSON, hereinafter referred to as defendant, in Pierce County Superior Court with two counts of assault in the first degree, contrary to RCW 9A.36.011(1)(a), with a firearm enhancement, and one count of drive-by

shooting, contrary to RCW 9A.36.045. CP 1-4. A corrected information was later filed to correct the victim's name. CP 11-12.

On July 12, 2007, the matter came before the Honorable Judge Arend for trial. The jury convicted defendant as charged. CP 61-72. Defendant received a standard range sentence of 120 months on count one, 93 months on count two, consecutive to each other and consecutive to firearm enhancements, and 54 months on count three. CP 61-72.

This timely appeal follows. CP 74.

b. Motions for Substitution of Counsel.

i. **July 3, 2007 – Judge Culpepper.**

On July 3, 2007, the matter came before the Honorable Judge Culpepper on defendant's motion to discharge his attorney. RP 3, 7/3/07.¹ Mr. Thoenig explained that defendant wished to discharge him as his attorney, but defendant had not disclosed the reasons for requesting this. RP 3, 7/3/07.

The court made an inquiry into the matter with defendant:

Court: Mr. May, you're asking to have a different attorney appointed. What's the problem?

¹ The State will cite to the verbatim report of proceedings as follows:
July 3, 2007, before Judge Culpepper as: RP 7/3/07
July 12, 2007, before Judge Stolz as: RP 7/12/07
July 18, 2007, before Judge Stolz as RP 7/18/07
February 22, 2008, before Judge Arend as SENTENCING

The remainder of the volumes filed in this matter are numerically paginated in volumes 1-8, and the State will cite to the numerical number as RP 1 etc.

Defendant: I feel like my lawyer is not representing me. He lied to me and expressed to me to take a deal, and I feel he's not representing me to the fullest.

Court: Well, I'm not sure exactly what you mean, not representing you.

Defendant: He's pressuring me to take a deal and telling me to tell on somebody or something, and I'm not trying to do that.

...

Court: Anything else, Mr. May?

Defendant: No.

Court: Mr. Thoenig, anything you want to add here?

Mr. Thoenig: No, Your Honor.

Court: Is communications still open, Mr. Thoenig?

Mr. Thoenig: They are from my side, your Honor, Yes. We talked, and we have been talking up until the time that Mr. May advised me that he wanted different counsel.

RP 4, 5, 7/3/07. The court also inquired of the potential penalty defendant was facing and the seriousness of the case. RP 4 7/3/07. Both the prosecutor and defense counsel agreed that with trial just a week away, if a new attorney were appointed, the new attorney would need approximately 3 months to get up to speed. RP 5, 7/3/07. The court was uncertain whether he could inquire into the details of the conversations between counsel and defendant. RP 6, 7/3/07. The court denied the motion to substitute counsel, finding that it was a 367-day-old-case, that defendant's

only real dissatisfaction was with the potential penalties he's looking at, and that there was not a complete breakdown of communication. RP 6, 7/3/07.

ii. July 12, 2007

On July 12, 2007, the matter came before the Honorable Katherine Stolz, on the day of trial for assignment to a trial courtroom. RP 3, 7/12/07. Defense counsel informed the court that his client was not speaking to him. RP 3, 7/12/07. Counsel believed that it was in defendant's best interest to obtain a new attorney. RP 4-5, 7/12/07. The State objected, noting that Judge Culpepper had already denied the motion. RP 6, 7/12/07.

There was no motion made on behalf of defendant to allow defense counsel to withdraw, instead it was defense counsel's motion. *Id.* The court denied defense counsel's motion to withdraw. *Id.*

Later in the day, the parties appeared before the Honorable Stephanie Arend for trial. RP 5. Defense counsel informed the court that he was unprepared because, "I need to establish some kind of communications with my client which seems to be impossible." RP 5. Judge Arend noted that counsel had just articulated the same concerns in front of Judge Stolz. RP 6. Mr. Thoenig acknowledged that he had been on the case for a year and a half, had conducted investigations in the case, made preparations for trial, and that there was a time when he and the client were in communication. RP 6-7.

Judge Arend addressed defendant and told him it was in his best interest to communicate with Mr. Thoenig and that Mr. Thoenig was one of the best attorneys in the county, if not the State. RP 9. Defense counsel again expressed concern over the preparation of jury instructions without the assistance of defendant since he would not speak with him. RP 22, 24. The court encouraged defendant to communicate with his attorney. *Id.* No motion for substitution of counsel or withdrawal of counsel was made. *Id.*

iii. July 16 – Judge Arend.

On July 16, 2007, the matter resumed before Judge Arend for a CrR 3.5 hearing. RP 29. Defense counsel asked the court: “Again, I would ask the Court to consider my motion to withdraw in this case. My personal feeling is that, as I indicated to Judge Stolz who has decided this, however, she did not decide fully – she was not confronted with the ramifications, for instance, the 3.5 hearing. It’s my position that I cannot effectively represent my client in these circumstances.” RP 32.

The court clarified with defense counsel that Judge Stolz had already ruled on that motion, which defense counsel agreed. RP 36. The court treated it as a renewal of that motion and instructed counsel that he would have to bring that in front of Judge Stolz again. RP 36. The court felt that, “Since trial technically has commenced, it’s on a little bit different footing for withdrawal and substitution of counsel, and I’m not

going to entertain the motion. You'll have to bring that before Judge Stolz." RP 36. The court felt that since one of her peers had already considered the motion, she was not going to reconsider the decision. RP 38. The court clarified that unless counsel could say that some facts had changed, then Judge Stolz would reconsider her own motion, "If it had been three months ago and factors had changed, I think you might have a good argument, . . . but otherwise I think you go back to Judge Stolz." RP 39, 7/16/07. Defense counsel did not argue that there was any change in circumstances. RP 39.

iv. July 18, 2007 – Judge Stolz.

The parties returned before Judge Stolz on July 18, 2007, on a motion to reconsider the motion to withdraw. RP 3, 7/18/07. Mr. Thoenig argued that there were new facts, namely that there was a 3.5 hearing and his client will not communicate either with him or the court. RP 4-5, 7/18/07. Mr. Thoenig expressed frustration in that "[t]here's a question of his participation. He is refusing, as far as I can tell, to participate in any way." RP 5, 7/18/07.

The court inquired if defendant had anything to say, and he shook his head. RP 5, 7/18/07. The court determined that due to the age of the case, defense counsel's work on reviewing discovery, interview of witnesses, and review of lab reports, and defendant's refusal to cooperate, she was denying the motion. RP 6, 7/18/07. The court stated:

If Mr. May, at this stage of the proceedings, chooses not to participate in the trial by effectively remaining silent, that is his choice. If he were to act out and be disruptive, that doesn't mean the Court terminates the trial. If he doesn't wish to participate, that's his choice. If he wishes to act like a three-year-old, holding his breath because he's not getting the toy that he wants, that's his choice. This case has started. There's nothing to indicate that Mr. May is anything other than being uncooperative; and I am therefore, denying the motion to withdraw.

RP 6, 7/18/07.

On July 23, 2007, the parties appeared before Judge Arend for trial. RP 123-24. They began discussing jury selection and Mr. Thoenig pointed out to the court that he was trying to communicate with his client regarding the selection process, but that defendant chose not to speak with him. *Id.* 124-25.

Defense counsel argued against drug and evidence coming in under 404(b). RP 150-170. The court held that the gang evidence was admissible to show motive, identity, absence of mistake and preparation, but the defense successfully kept the drug evidence out. RP 170. Mr. Thoenig's argument evidenced a command of the facts in relation to the legal issues at trial. *Id.*

Following the 404(b) motion, the court noted for the record that "during jury selection that Mr. May was communicating with Mr. Thoenig," and there was back and forth communication between the two of them. RP 175.

After the State rested, Mr. Thoenig advised the court that he would need some time to meet in private with his client because his client communicated to him that he wished to testify. 6RP 624. However, the next day when court resumed, defendant told his attorney that he changed his mind and he did not wish to testify. 7RP 654.

c. ER 404(b).

On July 23, 2007, defendant brought a motion to require the State to disclose what evidence it was seeking to introduce under ER 404(b). RP 119. The State discussed what matters it wished to introduce, including a prior gang related incident. RP 121. The State proffered that the detectives would say that this incident was a back-and-forth shooting between two gangs - the LOCs and the LBs. RP 122. When the court inquired further of defense on this matter, defense counsel stated he would file a brief. RP 122. Defendant's main objection under ER 404(b) was that they could not prove the prior act occurred by use of the defendant's statements. *Id.*

On July 24, 2007, the State submitted a brief in support of admission of gang related evidence at trial. CP 6-10. The defense did not brief the issue. RP 150. The State made further argument to the court for admission of the gang evidence, including that it was relevant because the defendant explained to the detective that this incident was in retaliation for a shooting of his parent's house. RP 149. The State submitted that these acts showed res gestae and motive for the crime. RP 149.

Relying on the State's briefing with its citation to *State v. Campbell*, and *State v. Boot*, the court concluded that the gang affiliation evidence was admissible under ER 404(b) to show motive. RP 170.

2. Facts

Several days before defendant committed a drive-by shooting, defendant and a man known as Bolo, traded Viet Ngo his black Mitsubishi 3000, license plate 968 TOM, for drugs. RP 184-86, 188, 205. Police would locate Ngo's vehicle a day after the drive-by shooting, burned and still smoldering. RP 188, RP 616-18.

There are two primary Cambodian gangs in the Tacoma area, "LOC" or "LOC's Out Crips," whose color is blue, and "LBs" or "Local Boys" whose color is red. RP 573. At the time of the shooting, tensions were running high between these two rival gangs. RP 417-418.

On the day of the shooting, Saroeun Phai was working at his home on his Cadillac with his cousin, Sophan Phal. 4RP 220-223. Phai's house is associated with the LOC gang, and Phal is known to belong to the same gang. RP 573. The phrase "LOC" was painted on Phai's house. RP 240. Later, Detective Bair noticed that the letters LOC were painted on the pillar of the victim's home, and the O and the C were crossed out. RP 575. Detective Bair explained that a gang will cross out C to show that they are "Crip killers." RP 576.

While working on the car, Phai heard a noise, turned and saw someone in a black Mitsubishi car pull out a gun and cock it back. Phai dodged, but his cousin jumped to the left and was shot in the leg. RP 222-23. The driver appeared to be a fat girl with long hair, but the gunfire came from the passenger side. RP 224-25. There were also a couple of bullet holes in Phai's car after the shooting occurred, but Phai was uncertain if they were there previously. RP 225-26. The Cadillac's windows were cracked as a result of the shooting, including damage to the right passenger window of the Cadillac. RP 228, RP 471-72.

Phal was working on his cousin's car when he noticed a car coming very slow with a gun pointed at he and Phai. RP 397. Phal saw the gun come out of the passenger side. RP 398. Several shots were fired and Phal was shot in the right leg. RP 402.

Tacoma Police Officer O'Neill was the first officer to arrive on the scene. RP 253. Phal's pants were recovered and placed into evidence, and there was a visible bullet hole located in the high area of the pants. RP 270.

Forensic Officer Lally collected two spent bullets, and five .45 caliber Speer shell casings from the scene. RP 455, 460-61. The spent shell casings were located throughout the road, just north of the victim's house and all the way to the south. RP 319, 338. Later forensic testing confirmed all five casings were fired from the same gun. RP 515. A spent bullet was located on the left front floorboard under the floor mat of the

Cadillac Sedan Deville. The bullet was identified to come from a .38 caliber weapon. RP 515.

Several eyewitnesses witnessed the shooting. Michael Reeder was standing outside in the street on the day the shooting occurred, talking to a couple of people, when he saw a 3000 GT Mitsubishi pull around the corner. RP 294, 297. There was a piece of wet cardboard on the license plate which fell off as the car pulled away. RP 294. Reeder had a sense that something was up and started to move off the street toward a garage. RP 294. After he moved inside the garage, he heard a few shots. RP 295. He came back outside and saw a guy laying on the ground. RP 295-96. The driver of the vehicle appeared to be a heavy set Asian, Native American or Hispanic female. RP 295. Reeder could not recall seeing anyone in the passenger side of the vehicle. RP 308.

John Cabral was with Mike Reeder and Joe Hoffman on the day of the shooting. RP 428. Cabral saw a 3000 GT black Mitsubishi car come down the alley and turned in front of his house, as it pulled out, a piece of cardboard fell off the license plate revealing the letters "T O M." RP 429, 431-32. Cabral heard five to six shots fired. RP 429, 434.

Gary Noel was standing outside of his home working on his car on the day of the incident at the same time Phai and Phal were working on their cars. RP 490-92. As he was working on his car, he saw a black sports car come pulling up to a home located three houses down from his.

RP 492-93. Noel then heard a couple of quick shots and looked up to see an arm sticking out of the passenger side window with a gun. RP 492. Three or more shots were fired and he saw the other two individuals duck down as well. RP 492. Noel noticed a taller person that lived in the home yelling, and jumping around, saying “he got the wrong guy.” RP 493. His wife immediately went over with a towel to help the person who was wounded in the leg. RP 494.

Another eyewitness to the crime was 17 year old Andrew Stansberry, who was friends with defendant in middle school. RP 354. He was walking to the park on the day of the shooting and saw a black car pull out of the alley, and then heard gunshots. RP 355-56. Stansberry saw two people in the car, including defendant who was driving the vehicle. RP 357. Stansberry was able to identify defendant in a photo montage. RP 556-59.

Tacoma Police Officer Ryan Larson arrested defendant on July 28, 2006, on an arrest warrant. RP 537. Officer Larson was conducting surveillance outside of defendant’s home on that day when a vehicle pulled out from the home. RP 539. Officers followed the vehicle and initiated a traffic stop. RP 540-41. The driver of the vehicle jumped into the back seat and the passenger jumped into the driver’s seat. RP 542. The driver then went up over the curb and attempted to flee the area,

eventually colliding with a fully-marked patrol car. RP 542. Officer Smith approached the vehicle and was able to pull defendant out of the vehicle and place him under arrest. RP 543. Defendant was advised of his Miranda rights. RP 544.

Officer Larsen asked defendant why he tried to flee the scene and he stated because he did not want to go to Remann Hall. RP 546. Officer Larsen asked him if he knew what he was wanted for and defendant replied that some time ago he had been arrested for possession of marijuana, and that he was probably wanted for that offense. RP 547.

Detective Bair contacted defendant following his arrest at the jail. RP 578. After reading defendant his rights, Detective Bair interviewed him about the January 11, 2006, shooting. RP 579. Initially defendant denied any involvement in the shooting until Detective Bair told him that he did not believe him, and that it was not a “matter of whether he did it, it was a matter of why.” RP 589. The detective assured him that he knew the LOCs had “dumped on” him or shot at him, and his homies, and that defendant may have had to do things because of those shootings. RP 589. Defendant then shook his head in agreement and said, “yeah.” RP 590. Defendant eventually admitted that he was involved in the incident and that he was the driver. RP 590. He knew details of the shooting, including that they had obtained the vehicle used in the shooting by

exchanging drugs for the car, that he had drove the car to Phal's house to do the drive-by, and that there were three to four rounds fired at the house. RP 590, 596. Defendant expressed frustration with the history of drive-by shootings at his house, and began crying when he spoke of the individuals shooting at his parents' house. RP 591, 598. He named some individuals responsible for those shootings, and said they are associated with the LOC'd Out Crips, and that they were driving a baby blue Civic. RP 593-94.

The detective confronted defendant with the fact that witnesses had described the driver as a larger Asian or Hispanic female, and defendant explained that they wore puffy jackets. RP 614.

The detective pressed defendant for details on who the shooter was in the incident, and at first defendant made up a story that it was a guy named "Sill Path." RP 591. Defendant admitted that he had handled the weapon used in the drive-by. RP 597. While defendant would concede that a man named "Bolo" was involved in the shooting, he would not admit that Bolo was the co-assailant. RP 599.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED THE MOTION FOR WITHDRAWAL OF COUNSEL WHERE IT CAME ON THE EVE OF TRIAL AND THERE WAS NOT A COMPLETE BREAKDOWN IN COMMUNICATION.

Defendant complains that the trial court erred when it denied his last minute request to replace his attorney who had been working on his case for almost a year, after plea negotiations had failed and defendant refused to speak to his attorney. The trial court was well within its exercise of discretion where it denied this request and the record shows competent and capable representation below.

CrR 3.1(e)² provides: “*Withdrawal of lawyer.* Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown.”

A determination of whether a court should grant or deny a request for substitution of counsel is reviewed for manifest abuse of discretion.

State v. Lopez, 79 Wn. App. 755, 764-67, 904 P.2d 1179 (1995).

² Defendant also submits separate argument under CrR 3.1(e) as analyzed in *State v. Hegge*, 53 Wn.App. 345, 766 P.2d 1127 (1989). From the State’s research of this issue, and reading of *Hegge*, the analysis under CrR 3.1(e) is the same as *Sixth Amendment* analysis and the State has nothing separate to add with respect to the court rule, with the only caveat that under CrR 3.1 the presumption is that trial counsel shall not be permitted to withdraw unless a good reason is shown.

“A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.” *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), citing *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991). A substitution of counsel will be permitted only when “counsel and defendant are so at odds as to prevent presentation of an adequate defense.” *Id. citations omitted*. “The general loss of confidence or trust alone is not sufficient to substitute new counsel.” *Id.*

“A trial-delaying substitution is ordinarily justifiable only when counsel has not prepared a defense or has a conflict of interest, or there is a complete breakdown in communication between defendant and counsel such that defendant's right to a fair trial is threatened.” *State v. Staten*, 60 Wn. App. 163, 169-70, n. 7, 802 P.2d 1384 (1991).

When determining whether the trial court properly exercised its discretion in denying a motion for withdrawal of counsel, an appellate court should consider: “(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion. *In re Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001). “A defendant may not discharge

appointed counsel unless the motion is timely and upon proper grounds.”
State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006) (citing *In re Stenson*, 142 Wn.2d at 732-34.

a. Timeliness of the motion.

The State will turn first to the timeliness of the motion, since this is dispositive. Here, defendant did not express dissatisfaction with counsel until the eve of trial. When his attorney originally brought the motion, all parties agreed that with trial just a week away, a new attorney would need three months to get up to speed. RP 5, 7/3/07. Apparently defendant had been discussing the case with his attorney throughout his representation, which at this point would have been almost a year. RP 4-5, 7/3/07. It was not until the motion in July, that defendant informed counsel that he no longer wished him to represent him. *Id.* The trial court properly considered that it was a 367 day old case and that there was not a complete breakdown of communication, warranting a new appointment. The motion for reconsideration, brought on July 18, 2007, in front of Judge Stolz, was similarly untimely. RP 3, 7/18/07.

b. Adequacy of inquiry.

When the original motion was made, the trial court made inquiry into the extent of the breakdown in communication. It was evident that defendant did not like his attorney’s advice regarding accepting a plea deal, or counsel’s opinion that he give information up on another

individual. RP 4-5, 7/3/07. Despite his attorney's recommendation to accept a plea deal, defense counsel had obviously honored his client's wishes by agreeing to take the matter to trial. This was true, even though it was a confession case where defendant had admitted his complicity.

The trial court also examined the level of breakdown in communication. RP 4, 5, 7/3/07. Defense counsel acknowledged that communication was still open on his end. RP 4, 5, 7/3/07. While defendant mocks Judge Stolz's later finding that a defendant may choose to "act like a three-year-old, holding his breath because he's not getting the toy that he wants, that's his choice . . . There's nothing to indicate that Mr. May is anything other than being uncooperative," this observation has the ring of truth. RP 6, 7/18/07.

If a trial court feels that a defendant is intentionally trying to obstruct or delay proceedings by not communicating with the court or attorney, the trial judge does not have to give into these tantrums by appointment of another attorney. "It is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys." *State v. Schaller*, 143 Wn. App. 258, 177 P.3d 1139 (2007) (citing *Harding v. Davis*, 878 F.2d 1341, 1344 n.2 (11th Cir. 1989) ("[A]n accused cannot force the appointment of new counsel by simply refusing to cooperate with his attorney, notwithstanding the attorney's competence and willingness to assist.")).

c. The extent of the conflict.

In *Stenson, supra*, the court took a good look at other instances where courts had found a breakdown in communication. 142 Wn.2d at 724 (citing *Brown v. Craven*, 424 F.2d 1166-1170 (9th Cir. 1970) (where there was no communication whatsoever and where defense was perfunctory, prejudice was found for refusal to appoint another attorney); *United States v. Williams*, 594 F.2d 1258, 1259 (9th Cir. 1979) (where the attorney-client relationship was a “stormy one with quarrels, bad language, threats, and counter-threats,” defendant was denied effective representation); *Frazer v. United States*, 18 F.3d 778, 783 (9th Cir. 1994) (where attorney verbally assaulted his client by using a racially derogatory term and threatening to provide substandard performance for him if he chose to exercise his right to go to trial, there was a complete breakdown of communication and denial of representation).

These cases stand in stark contrast to the level of alleged breakdown in communication which occurred here. The lack of communication is more akin to the record cited in *Stenson, supra*, from the United States Supreme Court case in *Morris v. Slappy*, 461 U.S. 1, 3-4, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983):

In *Morris*, an indigent defendant had a unilateral falling out with his attorney caused not by any identifiable objective misconduct by the attorney, but by (1) [Slappy's] dissatisfaction with a switch from one public defender to

another, (2) [Slappy's] opinion that the new public defender had not had enough time to prepare for trial, and (3) by the second public defender's assessment that [Slappy] had no "defense to [the] charges." Because of this unilateral falling out, [Slappy] refused to participate in his own defense. In affirming the denial by the district court of [Slappy's] petition for a writ of habeas corpus, the Court rejected [Slappy's] claim that a defendant has the right to a certain "rapport" with his attorney.

Stenson, 142 Wn.2d at 725 (citing, *Frazer*, 18 F.3d at 783 (citations omitted)).

In the instant case, defendant, unlike the defendant in *Slappy*, *supra*, was in communication with his attorney. The record shows that defendant communicated with his attorney during pretrial motions where the parties were arguing important drug and gang evidence. RP 175. The record also shows that defendant entered into serious discussions about whether to take the stand in his own defense, first communicating with his attorney that he would, but then changing his mind. RP 624, RP 654.

But even if there were no communication between defendant and his attorney, this does not mean that appointment of a new attorney was necessary. General dissatisfaction and refusal to speak to one's attorney are generally not grounds for withdrawal of counsel. This was not the standard set by the U.S. Supreme Court in *Slappy*, where the record showed that defendant "refused to cooperate with or even speak," to his attorney. 461 U.S. at 9. Instead, the Court held that there is no *Sixth Amendment* right to a "meaningful attorney-client relationship." *Id.* at 13.

The record also bears out that defendant received effective representation. See *Stenson, supra* at 724 (that when the Ninth Circuit looks into a breakdown in communication, it examines the “breakdown’s effect on the representation the client actually receives.”) Counsel cross-examined witnesses at CrR 3.5 hearing, (2RP 62-65, 3RP 82-94); made continued attempts to keep his end of the conversation open (RP 5, 7/12/07, 3 RP 123-24, 3RP 175, 6RP 624, 7RP 654); argued a motion to exclude evidence under ER 404(b) (3RP 175); successfully made foundation objections to admission of bullet evidence (5RP 275); and meaningfully discussed with defendant whether or not he would testify (6 RP 624, 7RP 654).

Unlike the perfunctory representation in *Brown, supra*, the attorney provided effective representation within the meaning of the *Sixth Amendment*. Whether defendant felt he received “meaningful” representation is immaterial when analyzing whether defendant received adequate representation. *Slappy, supra*, 461 U.S. at 13.

Defendant also incorrectly mischaracterizes that the trial court refused to exercise its discretion, and therefore abused its discretion.

Defendant argues that Judge Arend, the trial judge in this matter, and only Judge Arend, could consider whether to allow counsel to withdraw. Defendant makes this argument, but does not acknowledge that Mr. Thoenig’s motion in front of Judge Arend was a motion for

reconsideration of his motion³ in front of Judge Stolz. RP 36, 7/16/07. In fact, Judge Arend advised defense counsel that unless he articulated new facts which would require her to make a new ruling regarding appointment of new counsel, she was not going to second-guess her colleague's decision. In the face of this invitation, defense counsel stood silent and did not articulate what circumstances had changed. RP 39, 7/16/07.

In support of his argument, defendant cites to *State v. Gossett*, 11 Wn. App. 864, 527 P.2d 91 (1974). *Gossett* involves a much different set of circumstances, and stands without citation for over 22 years for this portion of the opinion. In *Gossett*, the court was speaking to circumstances where the trial judge has presided over trial where the presentation of evidence was made, and then allows another judge to rule on trial matters, such as instructions to the jury. 11 Wn. App. at 871-72 (citing *State v. Johnson*, 55 Wn.2d 594, 596, 349 P.2d 227 (1960)). That was not the case here. No presentation of evidence had been made. Instead, the court had heard some testimony in the CrR 3.5 hearing.

Moreover, in *Johnson*, which the *Gossett* court relies on, the Supreme Court held that there is no rule that a substitution of judge may not occur where only the jury has been sworn and no evidence taken. 55 Wn.2d at 596. Here, no evidence had been taken at all. Moreover, defendant cannot establish prejudice. See *Johnson, supra* at 597 (holding

³ Motions for Reconsideration are governed by CR 59(a)(b).

that defendant was not prejudiced by a substitution of judges). In order to establish prejudice, defendant would have to show that only Judge Arend could rule on the motion for reconsideration; or alternatively, that Judge Stolz abused her discretion in denying the motion. Defendant fails to put forward either argument in a persuasive fashion.

Defendant also challenges that because the court failed to rule on his motion, there was a complete failure to exercise discretion, and this in turn is an abuse of discretion (Opening Brief of Appellant at 18). However, the proper analysis should be whether defendant's motion was heard. Judge Arend ruled that the motion must be put properly before the court where the original facts and ruling lie – in Judge Stolz's courtroom.

2. THERE WAS SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF FIRST DEGREE ASSAULT WHERE THE EVIDENCE SHOWS THAT DEFENDANT OR AN ACCOMPLICE FIRED A GUN AT TWO PEOPLE.

A claim of insufficiency admits the truth of the State's evidence, and all reasonable inferences drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Circumstantial evidence is no less reliable than direct evidence; specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993) (quoting *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991)).

An appellate court must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997) (citing *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011, 833 P.2d 386 (1992)). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Intent to inflict great bodily harm is an element of first degree assault. RCW 9A.36.011.⁴ The trier of fact ascertains “intent” by determining whether a person acts with the “objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a). The trier of fact should also look to “all 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” to determine

⁴9A.36.011 provides: “(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.” RCW 9A.04.110(4)(c) defines “[g]reat bodily harm” 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.”

intent. *State v. Ferreira*, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993) (quoting *State v. Woo Won Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002 (1990)).

A person is guilty as an accomplice if "[w]ith knowledge that it will promote or facilitate the commission of the crime," he or she "solicits, commands, encourages, or requests [another] person to commit it" or "aids or agrees to aid [another] person in planning or committing it." RCW 9A.08.020(3)(a)(i), (ii); *State v. Carter*, 154 Wn.2d 71, 78, 109 P.3d 823 (2005).

Defendant points to *State v. Ferreria*, 69 Wn. App. 465, 850 P.2d 541 (1993) in support of his argument that there was no intent to inflict great bodily harm. However, in *Ferreria*, the trial court specifically rejected a factual finding in a drive-by shooting case of a person's home that the defendant saw anyone inside the house when they fired the shots. 69 Wn. App. at 469. This stands in contrast to the evidence presented in this case. It is unnecessary to even look to the prior relationship between the parties in order to infer an intent to inflict substantial bodily harm in this case. Unlike *Ferreria, supra*, where it was unclear from the record whether there were persons inside the home who could fall victim to the gunshot wounds, here the shooter pointed the gun directly at Phal and Phai, thus supporting charges of both assault and drive-by shooting. RP 397. In fact, there was enough pause between the aiming of the gun at them and the firing, that Phai ducked and Phal ran to the side, thus getting

shot in the leg. RP 222-23, 5RP 398. One of the bullets from the firing also hit the window of the car Phal and Phai were working on and shell casings were found throughout the road, just north of the victim's house. RP 319, 338, 471-72. The number, location, and close proximity of the victims to the firing, establishes an intent to inflict substantial bodily harm.

The circumstances of the shooting also establish an intent to inflict substantial bodily harm. Defendant admitted that the shooting was in retaliation for a shooting that occurred at his home by rival gang LOCs. RP 589, 591, 598. The Phal brothers are part of the LOCs, and the house where the shooting occurred was associated with the LOCs. RP 573. One may infer that the defendant and his accomplice went there with the intent to inflict bodily harm given the history between the feuding parties.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHERE IT RULED THAT EVIDENCE OF GANG ACTIVITY WAS ADMISSIBLE IN THIS CASE BECAUSE THE VICTIM SAID THE SHOOTING WAS IN RETALIATION FOR A GANG RELATED SHOOTING AT HIS PARENTS' HOME.

ER 404(b) prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith." ER 404(b). ER 404(b) evidence, may, however, be admissible for another purpose, such as proof of motive, plan, or identity. ER 404(b).

To admit evidence under ER 404(b), the 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. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)(citing *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)). "To be relevant, the purpose for admitting the evidence must be of consequence to the outcome of the action and must make the existence of the identified fact more probable." *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).

A trial court's rulings on ER 404(b) evidence are reviewed for abuse of discretion. *State v. Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995).

The trial court properly concluded that the evidence of gang activity was properly admitted to establish motive for a drive-by shooting. “Motive is an inducement which tempts a mind to commit a crime.” *State v. Boot*, 89 Wn. App. 780, 950 P.2d 964, *rev. denied*, 135 Wn.2d 1015 (1998). While motive is not an element of the crime, evidence of motive may be admissible. *Id.* (citations omitted).

The evidence at trial revealed that there were two primary Cambodian gangs in the area, the “LOCs” or “Locked out Crips,” and “LBs” – “Local Boys.” 6RP 573, 594. One of the victims, the Phal

brothers, was associated with the LOCs, so was the house where the shooting occurred. 6RP 573. When Detective Bair confronted defendant with the reason for the shooting he was involved with, he informed the defendant that he knew the LOCs had “dumped on” him and his homies, and that defendant had to do things because of those shootings. RP 590. The defendant agreed with Detective Bair and expressed frustration with the LOCs shooting at his parents’ house. RP 590, 593-94. According to victim Phal, tension was running high at the time of the shooting between the two rival gangs. RP 417-18. Phal himself denied involvement in the gang, but said that his brothers had been members of the gang – LOCs. RP 408. Phai reported that Phal was in fact associated with the LOCs. RP 239.

Given this evidence of gang activity/association, the trial court properly admitted the evidence to establish motive. In *State v. Campbell*, this court upheld the admission of gang evidence in a murder case on the basis that the gang evidence provided a “basis for the State’s theory of the case.” 78 Wn. App. 813, 821, 901 P.2d 1050 (1995), *rev. denied*, 128 Wn.2d 1004 (1995); *see also, State v. Boot*, 89 Wn. App. at 789 (upholding the admission of a prior gun incident and gang affiliation to establish motive for committing aggravated murder).

Defendant attempts to argue that there was no evidence that defendant and the victims were in a gang. This is untrue. While the State maintains there was evidence to establish more likely than not that

defendant was part of the rival gang, LBs, this was not necessary to admit the gang evidence. For the purpose of establishing motive in this case, evidence that (1) the defendant wanted to seek revenge on the LOCs, and (2) that the victims and the house were associated with LOC, was sufficient to admit the gang evidence, regardless of whether defendant was in a gang himself. It is odd that the defendant would complain prejudice from the State's lack of attention to defendant's gang membership. The State did not belabor the point below. Instead, the State established through the testimony of Detective Bair that the defendant admitted that the shooting was in retaliation for acts against his "homies." RP 589. From the use of the term "homies", one may infer that defendant aligned himself with a gang, and that gang was the rival gang to the LOCs, the LBs. Anymore detail about defendant and his activity within the LB's would have heightened the potential for prejudice, rather than lessened it.

The prosecution also established its offer of proof to the court during the 404(b) motion that there was plenty of evidence tying the defendant to the LBs. RP 168. The State warned that it did not feel it was necessary to parade in front of the jury all of the evidence about the shooting at defendant's house that was the basis for the motive, but that he could prove that up if needed. RP 168. The State had evidence that when defendant was arrested he was riding in a car with other known LBs, and was wearing red, and that there were multiple reports where the defendant admits to being an "LB." 4RP 168.

There was sufficient evidence to establish more likely than not that the incident was gang related, and the trial court properly admitted this evidence. Without this evidence, the jury would have been presented with a shooting that was random and without a motive.

Defendant also complains that the trial court erred when it failed to conduct a balancing test on the record. Any failure to balance on the record is harmless if the record reflects adequate reasoning, and a reviewing court can determine from the record that the trial court would have admitted the evidence if it had performed the balancing test. *State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003).

Here, the court gave the following reason when admitting the gang evidence:

[T]he cases the State cites in their brief . . . *State vs. Campbell*, *State v. Boot*, appear to support the State's position that evidence of the defendant's gang affiliation and motivation for committing the shooting are part of the admissible evidence under 404(b) because they're not being offered to show conformity but to show motive, identity, absence of mistake, perhaps even preparation, but clearly motive, and I guess the analogy that Mr. Greer just pointed out with the reason a person might say that they shot their wife,⁵ whether that reason is in fact true or not, is not something that needs to be proved.

⁵ The State argued during the motion by way of analogy that in a case where a man murders his wife on the pretence that they think that she's having an affair, the State does not have to prove that the wife was having an affair, just that this was the proffered reason the defendant gave. 4RP 167.

So I'm going to allow the State to offer evidence with respect to the defendant's statements and the testimony regarding the events leading up to this event . . .

RP 170. Although the court did not mechanically State that the probative value outweighed the potential prejudice, such a ruling may be inferred by the court's citation to other cases where such a finding was made. *See* RP 170, *citing, State v. Campbell, State v. Boot, supra*. The above rationale given by the court also supports a finding by this court that even if the trial court failed to properly balance under ER 404(b), any such failure was harmless given the court's thoughtful consideration and reason for admission of evidence.

Finally, even if the court erred in admission of the evidence, any error was harmless given the overwhelming evidence in this case. Evidentiary errors under ER 404(b) are not of constitutional magnitude, and are harmless unless the outcome of the trial would have differed had the error not occurred. *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). Here, the defendant confessed to being involved in the shooting as the driver, and admitted that they drove to the house for the purpose of doing a drive-by. RP 590-96. An old friend from middle school was able to identify defendant as the driver. Given the confession and eyewitness identification in this case, the jury would have convicted regardless of this evidence and the claimed error was harmless.

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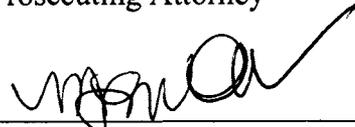
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D. CONCLUSION

For the foregoing reasons, the State requests that the court affirm the conviction.

DATED: October 29, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



MICHELLE LUNA-GREEN
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WSB # 27088

Certificate of Service:

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

10/29/08 Michelle
Date Signature