

NO. 40344-7-II

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

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL MEE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Susan Serko

No. 08-1-03121-9

11 JUN 20 PM 2:00
STATE OF WASHINGTON
DEPUTY
BY
COURT OF APPEALS
DIVISION II

Brief of Respondent

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Whether the court properly admitted the gang evidence where such evidence was relevant to motive, *res gestae*, knowledge and identity? 1

2. Whether the defense argument as to the gang evidence is flawed? 1

3. Whether the defendant is precluded from raising a challenge to the special verdict jury instruction for the first time on appeal? 1

4. Whether the instruction given in this case was not erroneous, or if it was, whether it was harmless? 1

5. Whether the court properly denied the defense motion for a mistrial based on juror misconduct? 1

B. STATEMENT OF THE CASE. 1

1. Procedure 1

2. Facts 5

C. ARGUMENT. 17

1. THE COURT PROPERLY ADMITTED THE GANG EVIDENCE WHERE SUCH EVIDENCE WAS RELEVANT TO MOTIVE, RES GESTAE, KNOWLEDGE AND IDENTITY. 17

2. THE DEFENSE ARGUMENT AS TO THE GANG EVIDENCE IS FLAWED 28

3. THE DEFENDANT MAY NOT RAISE A CHALLENGE TO THE SPECIAL VERDICT JURY INSTRUCTION FOR THE FIRST TIME ON APPEAL 31

4.	THE JURY INSTRUCTION GIVEN IN THIS CASE REGARDING THE SPECIAL VERDICT WAS NOT ERRONEOUS, AND EVEN IF IT WERE ERROR, ANY ERROR WAS HARMLESS.....	32
5.	EVEN IF THE COURT WERE TO HOLD THE INSTRUCTION WAS ERRONEOUS, ANY SUCH ERROR WAS HARMLESS.....	40
6.	THE COURT PROPERLY DENIED THE MOTION FOR A MISTRIAL	42
D.	<u>CONCLUSION</u>	54

Table of Authorities

State Cases

<i>Gardner v. Malone</i> , 60 Wn.2d 836, 376 P.2d 651 (1962)	43, 44
<i>Hendrickson v. Konopaski</i> , 14 Wn. App. 390, 393, 541 P.2d 1001 (1975).....	43
<i>Hosner v. Olympia Shingle Co.</i> , 128 Wash. 152, 154-55, 222 P. 466 (1924).....	44
<i>In re Pers. Restraint of Hegney</i> , 138 Wn. App. 511, 521 158 P.3d 1193 (2007).....	32
<i>State v. Aguilar</i> , 153 Wn. App. 265, 273, 223 P.3d 1158 (2009)	18
<i>State v. Aker</i> , 54 Wash. 342, 345-46, 103 P. 420 (1909)	44, 46
<i>State v. Athan</i> , 160 Wn.2d 354, 383, 158 P.3d 27 (2007).....	27, 28, 29
<i>State v. Barnes</i> , 85 Wn. App. 638, 668-669, 932 P.2d 669 (1997).....	43
<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010).....	31, 34, 35, 36, 37, 38, 41
<i>State v. Boot</i> , 89 Wn. App. 780, 950 P.2d 964 (1998)	22
<i>State v. Brenner</i> , 53 Wn. App. 367, 372, 768 P.2d 509 (1989)	47
<i>State v. Brewer</i> , 148 Wn. App. 666, 673, 205 P.3d 900 (2009).....	31
<i>State v. Brown</i> , 147 Wn.2d 330, 341, 58 P.3d 889 (2002).....	32, 41
<i>State v. Campbell</i> , 78 Wn. App. 813, 901 P.2d 1050 (1995)	22
<i>State v. Coleman</i> , 152 Wn. App. 552, 216 P.3d 479 (2009) ..	33, 34, 36, 37
<i>State v. Colwash</i> , 88 Wn.2d 468, 470, 564 P.2d 781 (1977).....	31
<i>State v. Costich</i> , 152 Wn.2d 463, 477, 98 P.3d 795 (2004)	17, 19, 24
<i>State v. Crowell</i> , 92 Wn.2d 143, 146, 594 P.2d 905 (1979).....	43

<i>State v. Dana</i> , 73 Wn.2d 533, 537, 439 P.2d 403 (1968).....	32
<i>State v. Dennison</i> , 115 Wn.2d 609, 628, 801 P.2d 193 (1990).....	30
<i>State v. Gamble</i> , 168 Wn.2d 161, 178, 225 P.3d 973 (2010).....	40
<i>State v. Goldberg</i> 149 Wn.2d 888, 72 P.3d 1083 (2003).....	33, 34, 35, 36, 37, 38
<i>State v. Hall</i> , 40 Wn. App. 162, 169, 697 P.2d 597 (1985).....	44
<i>State v. Harris</i> , 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963).....	31
<i>State v. Havens</i> , 70 Wn. App. 251, 255-56, 852 P.2d 1120, review denied, 122 Wn.2d 1023 (1993).....	43, 46
<i>State v. Hawkins</i> , 72 Wn.2d 565, 566, 434 P.2d 584 (1967)	42
<i>State v. Jackman</i> , 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989)	46
<i>State v. Jackson</i> , 70 Wn.2d 498, 424 P.2d 313 (1967)	31
<i>State v. Kilgore</i> , 147 Wn.2d 288, 294-95, 553 P.3d 974 (2002)	20
<i>State v. Kirkman</i> , 159 Wn.2d 918, 928, 155 P.3d 125 (2007)	40
<i>State v. Lemieux</i> , 75 Wn.2d 89, 91, 448 P.2d 943 (1968)	47
<i>State v. Lillard</i> , 122 Wn. App. 422, 431-32, 93 P.3d 696 (2004)	26, 27
<i>State v. Murphy</i> , 44 Wn. App. 290, 296, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986).....	47
<i>State v. O'Hara</i> , 167 Wn.2d 91, 98, 217 P.3d 756 (2009).....	41
<i>State v. Powell</i> , 126 Wn.2d 244, 259, 893 P.2d 615 (1995)...	22, 28, 29, 30
<i>State v. Rahier</i> , 37 Wn. App. 571, 575, 681 P.2d 1299 (1984).....	31
<i>State v. Russell</i> , 171 Wn.2d 118, 122-23, 249 P.3d 604 (2011)	26
<i>State v. Saenz</i> , 156 Wn. App. 866, 873, 234 P.3d 336 (2010).....	17, 18, 19, 22, 26, 30

<i>State v. Saltarelli</i> , 98 Wn.2d 358 at 362-63, 655 P.2d 697 (1982).....	30
<i>State v. Stenson</i> , 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).....	18
<i>State v. Veliz</i> , 160 Wn. App. 396, 412-13, 247 P.3d 833 (2011)	27
<i>State v. Watkin</i> , 136 Wn. App. 240, 244, 148 P.3d 1112 (2006).....	32
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 81, 210 P.3d 1029 (2009).....	18, 22, 23

Federal and Other Jurisdictions

<i>Hyde v. United States</i> , 225 U.S. 347, 384, 32 S. Ct. 793, 56 L.Ed.1114 (1912).....	45
<i>Mattox v. United States</i> , 146 U.S. 140, 149, 13 S. Ct. 50, 36 L.Ed.917 (1892).....	44
<i>McDonald v. Pless</i> , 238 U.S. 264, 35 S. Ct. 783, 59 L.Ed.1300 (1915)..	45
<i>Parker v. Gladden</i> , 385 U.S. 363, 365, 87 S. Ct. 468, 17 L.Ed.2d 420 (1966).....	44
<i>Remmer v. United States</i> , 347 U.S. 227, 228-230, 74 S. Ct. 450, 98 L.Ed.654 (1954).....	45, 48, 49
<i>Smith v. Phillips</i> , 455 U.S. 209, 217, 102 S. Ct. 940, 71 L.Ed.2d 78 (1982).....	45, 47
<i>Tanner v. United States</i> , 483 U.S. 107, 116-34, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987).....	44, 45, 48, 49
<i>Tracey v. Palmateer</i> , 341 F.3d 1037, 1044 (9th Cir. 2003)	43
<i>United States v. Aiello</i> , 771 F.2d 621, 629 (2d Cir. 1985).....	43
<i>United States v. Barber</i> , 668 F.2d 778, 786-87 (4th Cir. 1982).....	46
<i>United States v. Briggs</i> , 291 F.3d 958, 963 (7th Cir).....	49
<i>United States v. Brown</i> , 823 F.2d 591, 596 (D.C. Cir. 1987).....	45
<i>United States v. Casamayor</i> , 837 F.2d 1509, 1515 (11th Cir. 1988).....	46

<i>United States v. Kelly</i> , 722 F.2d 873, (1st Cir. 1983), <i>cert. denied</i> , 465 U.S. 1070, 104 S. Ct. 1425, 79 L.Ed.2d 749 (1984).....	43
<i>United States v. Klee</i> , 494 F.2d 394, 395-96 (9th Cir. 1974).....	49
<i>United States v. Logan</i> , 250 F.3d 350, 378 (6th Cir.), <i>cert. denied</i> , 534 U.S. 895, 122 S. Ct. 216, 151 L.Ed.2d 154 (2001).....	48, 49
<i>United States v. Olano</i> , 62 F.3d 1180, 1192 (9th Cir. 1995).....	48
<i>United States v. Prosperi</i> , 201 F.3d 1335, 1340-41 (11th Cir.)	50
<i>United States v. Rigsby</i> , 45 F.3d 120, 123 (6th Cir.), <i>cert. denied</i> , 514 U.S. 1134, 115 S. Ct. 2015, 131 L.Ed.2d 1013 (1995).....	48
<i>United States v. Romero-Avila</i> , 210 F.3d 1017, 1024 (9th Cir. 2000).....	48
<i>United States v. Symington</i> , 195 F.3d 1080, 1086 (9th Cir. 1999).....	45
<i>United States v. Webster</i> , 750 F.2d 307, 338 (5th Cir. 1984), <i>cert. denied</i> , 471 U.S. 1106, 105 S. Ct. 2340, 85 L.Ed.2d 855 (1985).....	43
<i>United States v. Yoakam</i> , 168 F.R.D. 41, 45-46 (D. Kan. 1996).....	50
<i>Williams v. Bagley</i> , 380 F.3d 932, 945 (6th Cir. 2004).....	47
 Constitutional Provisions	
Sixth Amendment	49
 Statutes	
RCW 9A.32.030(1)(b)	23
 Rules and Regulations	
CrR 6.15.....	31
ER 401	17
ER 402	17

ER 403	17, 27
ER 404(b).....	18, 26, 28, 29, 30
RAP 2.5(a)	31
FRE 606(b).....	46

Other Authorities

8 J. Wigmore, EVIDENCE § 2352, pp. 696-697 (J. McNaughton rev. ed. 1961)	44
Tegland, WASHINGTON PRACTICE, vol. 5: EVIDENCE, 5 th Ed. § 404.18, 404.21, 404.22.....	23, 26
Tegland, WASHINGTON PRACTICE, vol. 5: EVIDENCE, 5 th Ed. § 404.9	18
WPIC 26.06.....	23

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

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B. STATEMENT OF THE CASE.

1. Procedure

On July 2, 2008, based on an incident that occurred on May 10, 2008, the State charged Michael Mee with: Count I, Murder in the First Degree, with a firearm sentence enhancement; and Count II, Unlawful Possession of a Firearm in the first Degree. CP 1-2.

On April 22, 2009, the court determined that the matter should be preassigned to a judge, so that the case was assigned to the Honorable Judge Susan Serko. CP 354

The defense and State entered a stipulation that the defendant had previously been convicted of a felony crime defined as a “serious offense”, and was therefore prohibited from possessing a firearm at all times relevant to the present crime. CP 40.

On December 1, 2009, the court empaneled a jury. CP 355. The State brought a motion *in limine* regarding gang evidence it sought to use, and whether that evidence could properly be admitted in light of ER 404(b). The court considered the motion and ruled the evidence admissible, subject to the evidence elicited at trial conforming to the prosecutor’s offer of proof at the motion hearing. I RP 94, ln. 1 to p. 95, ln. 15.

Here, the jury had announced that it had reached a verdict, but due to defense counsel’s schedule conflicts, the court was not able to take the verdict that day and released the jury until the following morning. XI RP 1887, ln. 1-10. After leaving the jury room, one of the jurors returned to retrieve something. XI RP 1887, ln. 11-15. While doing so, he commented to the Judicial Assistant that his wife was flipping through channels and saw the prosecutor on a television show. XI RP 1887, ln. 16-22.

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The court had the unread verdict sealed without anyone looking at it. XI RP 1887, ln. 1-5. Prior to taking the jury's verdict, the court questioned the juror. XI RP 1898, ln. 25 to p. 1903, ln. 5.

When the court told the juror that the Judicial Assistant mentioned that the juror said he may have seen the prosecutor outside the courtroom, the juror acknowledged that was true. XI RP 1900, ln. 17-19. The juror stated that he and his wife were watching the History Channel at home. XI RP 1900, ln. 22-24. The Channel aired a spot promoting the next episode, which was a show about gangs. The promo talked about different types of gangs in Tacoma and it showed the Tacoma Dome area. XI RP 1901, ln. 6-9. The juror told his wife that was Tacoma on there. XI RP 1901, ln. 9. The story was about white supremacists who went to a place called Hobo Village or something similar and beat up one or two individuals. XI RP 1901, ln. 10-13. The picture that came on next happened to be of the prosecutor in this case, Greg Greer, who the juror recognized and was surprised to see. XI RP 1901, ln. 14-16; p. 1902, ln. 8-10.¹ The juror was impressed with what he heard, and by the wildness of the crime. XI RP 1901, ln. 15-17. The juror said he watched the episode. XI RP 1901, ln. 21-23.

¹ Mr. Greer prosecuted the defendants in that case.

. . .

When asked, the juror told the court he did not discuss any of what he had seen with the other jurors. XI RP 1901, ln. 24 to p. 1902, ln. 1. He did say something to the other jurors that he had seen Mr. Greer on television that week and he thought it was kind of ironic, but that was all he said about that. XI RP 1902, ln. 5-7. The juror said that the time when he said that was prior to the jury reaching a verdict. XI RP 1903, ln. 7-10.

The court decided to excuse the juror from deliberations and call in the alternate. XI RP 1911, ln. 16-20. The court excused the juror from further participation in the process. XI RP 1916, ln. 12-15.

The court denied the defense motion for a mistrial. XI RP 1920, ln. 22. Instead, the court seated the alternate and had them return to deliberate anew as to a verdict. XI RP 1925, ln. 18-25; p. 1932, ln. 2-25.

The jury returned verdicts finding the defendant guilty as to both counts, and returned a special verdict that the defendant was armed with a firearm at the time he committed count I. CP 296-98.

On February 12, 2010, the court sentenced the defendant. CP 328-340. However, the Judgment and Sentence omitted the period of incarceration for count I, and II, as well as the total period of incarceration. *See* CP 343. A notice of appeal was timely filed that same day. CP 308-18.

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A corrected Judgment and Sentence was entered on February 16, 2010. CP 356-57; 342-50. The court sentenced the defendant to 493 months on count I, 102 months on count II, and to a 60 month firearm sentence enhancement on Count I, for a total sentence of 553 months. CP 346.

2. Facts

On May 9, 2008, Tracy Steele was engaged to Asha-Mone Brooks. III RP 475, ln. 6-9. III RP 503, ln. 25 to p. 504, ln. 2. The next day Mr. Steele was celebrating his 32nd birthday. III RP 475, ln. 2, ln. 14-15. Ms. Brooks had a birthday barbecue for him and her brother at her house that day, and Tracy had spent the day with her. III RP 476, ln. 17 to p. 477, ln. 2. Tracy Steele left Ms. Brooks' house about 6:00 p.m. to go to the house of her aunt, Crystal Roberts. III RP 477, ln. 3-6; p. 478, ln. 7-18. Mr. Steele briefly returned to Ms. Brook's house around 11:00 p.m. before returning to Crystal Robert's house. III RP 477, ln. 3-6. Prior to his leaving Ms. Brooks' barbecue at 6:00 p.m., they hadn't been drinking alcohol. III RP 477, ln. 19-20.

Crystal Roberts lived in Tacoma at 41st and J Street in Tacoma. III RP 502, ln. 1-5. Also living at that residence was D'Andre Sullivan who was the father of Crystal Robert's children, as well as a person named James. III RP 502, ln. 3-24. Crystal had been living there about six months. III RP 503, ln. 2-3.

On the evening of May 9, 2008, around 10:00 p.m. or 11:00 p.m. someone Crystal Roberts knew by the name Scram came to the house with another person who went by the name "Shotty." III RP 506, ln. 15-25; p. 507, ln. 13-14. Shotty's first name is Charles. V RP 891, ln. 21-25. In addition to going by the name Shotty, he also went by the name Big Shotty. V RP 892, ln. 6-8; V RP 873, ln. 13-20. Scram's true name is apparently Jason Greer. See VI RP 935, ln. 14-16; VI RP 940, ln. 5-23.

D'Andre Sullivan had known Shotty for a long time from when they were younger and working in music studios around Tacoma. V RP 874, ln. 21 to p. 875, ln. 6. Crystal Roberts didn't know much about Scram, but she knew Shotty was a troublemaker and a member of the Lakewood Hustler Crips. III RP 507, ln. 1-13; V RP 660, ln. 6-14; V RP 875, ln. 7-9. According to Crystal Roberts, Scram ended up leaving after a few minutes and left Shotty behind. III RP 507, ln. 14-17; p. 508, ln. 9-10. However, according to Scram [Jason Greer] himself, he remained at the residence until after a fight started to break out, at which point he left. VI RP 945, ln. 10-12. Regardless as to whether Crystal Roberts was actually correct as to when Scram departed, believing that he had in fact already left, Crystal Roberts and her family didn't understand why Scram left Shotty there, because it was a family gathering and Shotty wasn't invited. III RP 507, ln. 17-19.

Shotty appeared to have been drinking and was just really gross. III RP 510, ln. 12-13. Shotty began to engage in disrespectful and

obnoxious behavior. III RP 510, ln. 3; p. 941, ln. 11 to p. 942, ln. 7.

Crystal Robert's sister was in the kitchen and Shotty said, "dang, you're a tall A-S-A-B-I-T-C-H." III RP 509, ln. 22-24. He also made a comment about one of Crystal Robert's kids not looking like the father. III RP 511, ln. 9-10. Kids were present, and at that point she decided it was enough and Shotty had to go. III RP 510, ln. 1-2; p. 511, ln. 10-11.

So Shotty asked D'Andre to use his phone to call for a ride. III RP 511, ln. 13-16. A ride showed up for him at about 12:30 or 1:00. The vehicle that arrived to pick up Shotty contained four people Crystal Roberts had never seen before, a male driver, a male passenger and two girls. III RP 512, ln. 11 to p. 516, ln. 5. They all appeared to be younger than their late twenties. III RP 516, ln. 8-11. The driver of the vehicle was the defendant, Michael Mee. III RP 512, ln. 23 to p. 513, ln. 13.

When the vehicle pulled up to the house, it did so either loudly or abruptly with screeching and parked all crazy in front of the house. See III RP 513, ln. 16-17; III RP 565, ln. 8-9. D'Andre told the defendant that it was a family gathering, not to disrespect his house and pull up like that, like they have a problem. III RP 516, ln. 24 to p. 517, ln. 3. The defendant responded that he wasn't scared of anyone and "cuz" and "loc" and that he was Shotty. III RP 517, ln. 5-14. "Cuz" is a crip gang term that refers to fellow homeboys [gang members] from the hood, while "loc" is a gang term that means something like crazy. III RP 517, ln. 17-19.

Mee was a member of the Lakewood Hustler Crips gang. VI RP 995, ln. 5-21. At some point, Mee referred to himself as “Little Shotty,” and he referred to the person who he was there to pick up as “Shotty.” III RP 520, ln. 1-2. The name “Little Shotty” means that Mee is under “Shotty” in the gang. V RP 889, ln. 10-17; IV RP 665, ln. 2-24. *See also*, V RP 661, ln. 21 to p. 662, ln. 2. The male passenger in the car was known to some of the members of the household as “Young Shotty Deuce” or “Little Shotty Deuce.” IV RP 663, ln. 4 to p. 664, ln. 19.

The girls in the car came in the house to use the bathroom, which the people in the house allowed them to do. III RP 567, ln. 24-25. However, the people in the house thought the girls were casing the place because they were looking around to see how many people were in there. III RP 570, ln. 11-14. They thought the girls were coming in to report back to the people that they came with the atmosphere and what they saw inside. III RP 570, ln. 14-16. But no one confronted them or had any issues with them. III RP 570, ln. 19-21. While the defendant was there he was being loud and they thought he came for trouble. III RP 571, ln. 10-25.

About fifteen minutes after Shotty’s ride arrived, Shotty, Little Shotty, and the others from that vehicle were outside the house getting ready to leave when another vehicle pulled up with two girls in it. I RP 520, ln. 20-24; p. 521, ln. 14-22. Crystal Roberts knew of the two girls as Tina and Tempestt. III RP 521, ln. 7-8; p. 523, ln. 14-17. The girls in the

second car asked the guys from the first car why they were there with those white bitches. III RP 879, ln. 24 to p. 880, ln. 7.

Mee started arguing with the girls who were still in the second car. III RP 523, ln. 22; p. 524, ln. 12-24. D'Andre told the girls in the second car to leave. III RP 524, ln. 23 to p. 525, ln. 14. Then the defendant told them to leave also. III RP 525, ln. 20-21.

The defendant and D'Andre were talking and the defendant kind of laid his hands on D'Andre's chest. III RP 526, ln. 15-17. D'Andre's stepbrother, DeShawn Henry, was coming out of the house and saw this. III RP 525, ln. 23 to p. 526, ln. 18. It may have looked like something else to him, like Mee was hitting D'Andre, so DeShawn ran out of the house and hit Mee. III RP 526, ln. 18-24.

At that point it broke into a big commotion with everyone fighting. III RP 527, ln. 1-7. Crystal Roberts was holding onto D'Andre so he didn't get hit or hit anybody. III RP 527, ln. 13-16. Big Shotty was yelling that this was his homeboy, his homeboys. III RP 527, ln. 16-18. People were asking why he brought them there and to get them out of there. III RP 18-19. During this, Tracy Steele came out of nowhere and hit Mee once. III RP 528, ln. 6-7, ln. 16. The defendant kept saying "Cuz, Cuz, Cuz" to them. III RP 528, ln. 21-22. Big Shotty didn't get physically involved with the fight. III RP 528, ln. 25 to p. 529, ln. 2. But he did keep saying generally to anyone that would listen that the others were his little homeboys. III RP 529, ln. 2-7.

As the fight broke up, Mee was yelling at the top of his voice about what he was going to do and that he was going to come back. IV RP 671, ln. 7-14. The other male who had arrived in the car with Mee just tried to stay out of the way. III RP 529, ln. 10-13.

When the fight broke out, Jason Greer, who had originally driven Shotty to the residence, got in his car and left. VI RP 950, ln. 7-13. Leaving, Greer went home and got something to eat. VI RP 950, ln. 20-21.] After that, but not too long after, Mee called Jason Greer on the phone. VI RP 950, ln. 14-21. Mee was upset and told Greer that he got jumped, that he thought his jaw might be broken, and that Shotty just let them do it and didn't do anything. VI RP 951, ln. 1-7; VII A RP 1160, ln. 7-11. Mee may have called Shotty a "bitch" for not doing anything. VII A RP 1160, ln. 9-11. He also said people don't get to jump him and get away with it. 7-A RP 1167, ln 2-5.

The defendant and the people who had been in the car with him all got back into it and left. III RP 529, ln. 22-24. However, Shotty remained behind. III RP 534, ln. 17-19. Crystal Roberts asked D'Andre why Shotty was still there because they were his friends and Shotty needed to go. III RP 535, ln. 6-9. Crystal was yelling at Shotty, telling him he needed to leave, and her sister came and got Crystal to go in the house. III RP 535, ln. 10-14.

Under gang cultural rules, in a fight Shotty is supposed to help Little Shotty, and failure to do so would be a violation of a gang rule and

could have consequences. V RP 890, ln. 16-23. Loyalty to fellow gang members is important. VI RP 978, ln. 10-16. A gang member's failure to assist a fellow gang member in a fight would result in that member later having to fight members of one's own gang as a consequence. VI RP 977, ln. 7-23. A gang member who failed to support a fellow gang member in a fight would lose "stripes" (respect), while a person who assisted a fellow gang member would gain "stripes." VI RP 978, ln. Getting beat or knocked down in a fight in front of a homey would not be good. V RP 891, ln. 10-12.

That evening, Marjorie Morales was over at the house of Hokeshina (Hoke) Tolbert drinking liquor. IV RP 714, ln. 11-13, 19-22; V RP 802, ln. 17-18; V RP 840, ln. 1-15. The house is on 48th Street in Tacoma. IV RP 714, ln. 21 to p. 715, ln. 1. At the house also drinking were Hokeshina Tolbert, Dan Bluehorse (Hokeshina's cousin), Jose Cota Ancheta and Jesus Cota Ancheta. IV RP 714, ln. 11-17; p. 716, ln. 1-13; V RP 802, ln. 11-18. Ms. Morales was very intoxicated at the time, estimating her level of intoxication at 10 on a scale of 1 to 10. IV RP 720, ln. 9-14.

At some point that night when it was dark, Michael Mee pulled up at the residence in a green car containing other people as well. IV RP 720, ln. 21 to p. 720, ln. 1; p. 720, ln. 15-24; p. 721, ln. 9 to p. 722, ln. 16. Mee is a friend of Dan Bluehorse. V RP 807, ln. 17 to p. 808, ln. 13. Ms. Morales and the others were in the garage drinking, so Mee got out of the

car and came into the garage. IV RP 722, ln. 22 to p. 723, ln. 4. Mee was yelling and angry because he claimed he got jumped. IV RP 723, ln. 8 to p. 724, ln. 9; V RP 811, ln. 6-21. Mee didn't have any obvious injuries, but his shirt was ripped. V RP 811, ln. 22-25. Mee claimed he was jumped by some "slobs" which is a derogatory Crip gang term for members of Blood gangs. IV RP 759, ln. 17 to p. 760, ln. 15. Mee also went by the name as "Little Shotty" when he appeared. IV RP 729, ln. 18-23.

The people in the garage followed Mee to the front of the house and they were all talking about where they were going to go, because they were going to beat the people who jumped Mee. IV RP 724, ln. 11-15.

Since the time she was young, Ms. Morales was familiar with two gangs, the Native Gangster Crips and the Native Gangster bloods, because almost all of her friends had been members of those gangs, she had dated members of both gangs, the father of her children is a Native Gangster Crip and throughout those years members of those gangs were almost exclusively who she hung out with. IV RP 725, ln. 19 to p. 726, ln. 27; p. 727, ln. 19 to p. 728, ln. 2.

Ms. Morales said that Dan Bluehorse was probably a member of the Native Gangster Crips because he hung out with them, but that she didn't know if he was actually a member of that gang. IV RP 725, ln. 2-18. Dan's sister Camille Bluehorse said she assumed he was a gang member because NGC and other stuff was written on her garage walls,

and that his gang name was Little Dough Boy V RP 824, ln. 12 to p. 825, ln. 10. Hoke's street name was "Young Stupid," which meant that he was "Little Stupid's" younger homey. VI RP 992, ln. 14-24. "Little Stupid" was the name of another gang member [apparently not involved in this incident]. VI RP 993, ln. 25 to p. 993, ln. 11.

Dan, Hoke, Jesus, and Jose were in fact members of the 40-block gang of the Native Gangster Crips (NGC) gang set. IV RP 726, ln. 18-23.; IV RP 727, ln. 5-8; VI RP 968, ln. 21 to p. 970, ln. 8. Jesus goes by the gang name "Crip Face" and Jose is known by the gang name "Baby Crip Face." IV RP 727, ln. 9-14; V RP 825, ln. 9-23.

The gang members commonly have firearms among them, others know that, and they are capable of serious harm. VI RP 993, ln. 12-22. The different Crip gang sets were friendly with each other. VI RP 995, ln. 22-25. They would share information with each other as to where a gun can be obtained. VI RP 996, ln. 1-3. "Thing" is a gang street word used to refer to a gun. VI RP 996, ln. 7-16.

Mee was the only person who had gotten out of his car at the house. IV RP 722, ln. 19-20. Mee asked for, "the thing" and apparently knew the gun was there. IV RP 994, ln. 22-24; 996, ln. 4-24. After about ten to fifteen minutes, Mee and the others at Hokeshina's residence then all got into Ms. Morales' car, except for Hokeshina. IV RP 731, ln. 13-14; 732, ln. 5-7. Jesus was driving, Mee was in the front, Ms. Morales was

behind Mee, Jose was in the middle in the back, and Dan was in the driver side back seat. IV RP 731, ln. 17-23.

When the people at Hokeshina's residence had first started drinking that night, Ms. Morales had seen a rifle in the garage. IV RP 732, ln. 11 to p. 733, ln. 3. The rifle was out because everybody was looking at it. IV RP 733, ln. 13-18.

Hoke got the rifle from the garage and either handed it to Mee in the backyard, or handed the rifle through the car window to Mee, "Little Shotty" before the car left because Little Shotty, i.e. Mee, had asked for it. IV RP 735, ln. 20 to p. 736, ln. 6; VI RP 994, ln. 10-21; VI RP 998, ln. 9-25.

Before they left Hoke's house, Jose knew or understood that Mee planned on going somewhere with the intent to use the gun because he had asked for it. VI RP 999, ln. 23 to p. 1000, ln. 8. When the others went to get in the car, Jose walked up the alley because he knew something was going to happen and he was trying to get away from that situation. VI RP 1000, ln. 13 to p. 1001, ln. 6. However, the car caught up to Jose half a block away, his brother told him to get in the car, so he did. VI RP 999, ln. 6 to p. 1002, ln. 10.

It took five minutes or less to get to where Mee said he had been beat up. IV RP 736, ln. 20-23. As the car approached, Jesus turned the lights off, the car pulled up and stopped. IV RP 737, ln. 3-4; VI RP 1004, ln. 8-23. Jose was concerned that something real bad, a drive by shooting,

was about to happen and that someone was going to get shot. VI RP 1004, ln. 21 to p. 1005, ln. 20. Ms. Morales thought they were going to get out, but a couple of seconds after they arrived there, Mee shot the rifle leaning out from the window but without ever actually getting out of the car. IV RP 737, ln. 3-11; p. 739, ln. 9-11; VI RP 1009, ln. 4-10; VI RP 1012, ln. 18-24. He shot the gun two or three times. IV RP 737, ln. 5-15. Ms. Morales saw about three or four people standing on the front porch of the house where she thought the fight was going to take place. IV RP 738, ln. 8-18.

After the last shot, the car pulled off and drove back over to the Hoke's house on 48th Street. IV RP 742, ln. 8-9.

At his house, D'Andre was outside when he heard tires screeching and a car pulling around at a high speed and heard gunshots. III RP 884, ln. 55-7. D'Andre only heard two or three shots, but Crystal's sister Nikki heard five or six. III RP 578, ln. 8-9; V RP 885, ln. 12. Outside with D'Andre were Tracy, D'Andre's brother, his cousin Joe, his roommate and Shotty. V RP 886, ln. 1-7. D'Andre was worried about his kids and ran inside to protect them. V RP 886, ln. 18-23.

Crystal hadn't been in the house even two minutes, when D'Andre came in the house first, saying get down, get down, get down. III RP 535, ln. 15-17. Everybody got down and Crystal threw or shoved her children under the bed. III RP 536, ln. 16 to p. 536, ln. 12.

After a little time went by, D'Andre heard a knock on the front door. V RP 887, ln. 5-7. His first thought was that the people who were shooting at them were trying to come in and finish them off. V RP 887, ln. 8-10. But he looked out the door and answered it and it was Tracy. IV RP 703, ln. 702, ln. 22-24; V RP 887, ln. 9-10.

Tracy Steele came running into the house, shaking his head, got to the bathroom and collapsed. III RP 539, ln. 5-18; IV RP 703, ln. 1-3. Then they could see that he was shot and that there was a hole in him. III RP 539, ln. 22 to p. 540, ln. 2. Crystal Robert's mom and sister were there with Crystal trying to help him. III RP 540, ln. 10-20; IV RP 703, ln. 6-8. Crystal's sister Nikki reverted to her war zone experience from the military and saw Tracy laying on his face and he was gurgling, so she put him on his back and called for help. III RP 576, ln. 7-16. They got blankets and things to apply pressure. III RP 576, ln.

Tracy's eyes were open. III RP 540, ln. 19-24. He was calling out the name of Asha, his fiancée. III RP 576, ln. 24 to p. 577, ln. 2. Crystal's mom had his hand and was telling him to just hang on, just hang on. III RP 541, ln. 1-2; IV RP 703, ln. 7-8. Tracy replied, "Ma, I can't." III RP 5441, ln. 1-2; IV RP 703, ln. 8-9.

The ambulance seemed to be taking a long time so they tried to pick him up and get him in the car. III RP 541, ln. 2-5. They got to the grass and Tracy's eyes were still open, Crystal's sister, Nikki, had the

baby's blanket and was trying to apply pressure to the wound and they were talking to Tracy and his eyes closed. III RP 541, ln.

Tracy Steele died of significant internal bleeding as a result of injuries associated with gunshot wounds. VIII RP 1432, ln. 16-20.

C. ARGUMENT.

As a preliminary matter, it is worth noting as to all the arguments below that this Court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

1. THE COURT PROPERLY ADMITTED THE GANG EVIDENCE WHERE SUCH EVIDENCE WAS RELEVANT TO MOTIVE, RES GESTAE, KNOWLEDGE AND IDENTITY.

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. *State v. Saenz*, 156 Wn. App. 866, 873, 234 P.3d 336 (2010) (quoting ER 401). Relevant evidence is generally admissible, while irrelevant evidence is not. *Saenz*, 156 Wn. App. at 873 (citing ER 402). However, relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. *Saenz*, 156 Wn. App. at 873 (citing ER 403). Still, the threshold for the admissibility of relevant

evidence is very low and even minimally relevant evidence is admissible. *State v. Aguilar*, 153 Wn. App. 265, 273, 223 P.3d 1158 (2009).

Evidence of other wrongs or acts is generally inadmissible to prove character of a person to show action in conformity therewith. *Saenz*, 156 Wn. App. at 873 (citing ER 404(b)). However, evidence of other bad acts may be admissible for other purposes, such as “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Saenz*, 156 Wn. App. at 873 (quoting ER 404(b)). Such other purposes are often mistakenly referred to as exceptions, but are in fact merely types of evidence that is not barred by the rule because it falls outside the rule insofar as it is not offered to prove conformity therewith. *See* Tegland, WASHINGTON PRACTICE, vol. 5: EVIDENCE, 5th Ed. § 404.9

Gang evidence qualifies as other bad acts evidence that falls within the scope of ER 404(b). *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009).

A trial court’s decision to admit evidence under ER 404(b) is reviewed for a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. *Saenz*, 156 Wn. App. at 873 (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)); *Yarbrough*, 151 Wn. App. at 81. The trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. *Saenz*, 156 Wn. App. at 873.

Normally, before a trial court may admit evidence of other bad acts, it must 1) find by a preponderance of the evidence that the misconduct [other bad acts] occurred; 2) identify the purpose for which the evidence is sought to be introduced; 3) determine whether the evidence is relevant to an element of the crime charged; and 4) weigh the probative value against the prejudicial effect. *Saenz*, 156 Wn. App. at 873.

The court properly applied the four-part test in considering whether to admit the gang evidence. However, even if this Court were to hold that the trial court erred its application of the four-part test, this Court may nonetheless affirm on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Ultimately, the trial court did not abuse its discretion in admitting the gang evidence given the facts of this case. For purposes of this argument, the State incorporates by reference the facts as contained in section B.2 above.

- a. The Court Properly Found That The State's Offer Of Proof Established The Gang Status Of The Defendant And Other Persons Involved In The Incident By A Preponderance Of The Evidence.

The court found that the State's offer of proof established the defendant's gang status and the other gang evidence by a preponderance. I RP 95, ln. 8-11.

The defense argued that as a preliminary matter, the State had not put forth any evidence at the preliminary hearing, that it would therefore be premature to admit any such evidence, and to therefore exclude any such evidence until a specific proffer was made. I RP 88, ln. 1-15.

The court recognized the issue raised by the defense, but concluded based on case law that as part of the preliminary hearing it was not necessary for the court to conduct a full-blown evidentiary hearing and take testimony as it would in a hearing under CrR 3.5 or 3.6. I RP 94, ln. 1 to p. 95, ln. 11. Instead, the court relied on a summary of the expected evidence provided by the Deputy Prosecuting Attorney as an offer of proof.² I RP 95, ln. 8-11. The court noted that if the evidence did not conform with the State's offer of proof, the court would entertain the possibility of a mistrial. I RP 95, ln. 11-15. As the State's memorandum demonstrated, such a procedure is proper. *See State v. Kilgore*, 147 Wn.2d 288, 294-95, 553 P.3d 974 (2002).

Under the facts of this case, especially as the testimony was ultimately elicited at trial, the court's approach made good sense. The gang evidence involved not only the defendant's status as a gang member, but also the status of several other persons, both co-defendants and non-co-defendants as gang members, and also the fact of different participants

² The particular case upon which the court relied is not cited in the record. However, the court appears to rely upon *State v. Kilgore* as quoted by the State in its memorandum. *See* I RP 94, ln. 4-9; CP 13-14.

in the case being known to various witnesses through their gang affiliation and gang name. Thus, to conduct a preliminary hearing on the evidence would have essentially necessitated trying the case twice, once in the preliminary hearing, and a second time in front of the jury. That would have been contrary to principles of judicial economy.

Therefore, the court's approach was not an abuse of discretion, especially where the court properly noted that it would entertain a motion for a mistrial if the actual evidence elicited by the State did not conform to the State's offer of proof as presented at the preliminary hearing and establish the gang evidence by a preponderance.

- b. The Court Properly Held That The Purpose in the State's Seeking To Admit The Gang Evidence Was To Establish Motive. The State Also Sought to Admit The Evidence to Establish *Res Gestae*, Knowledge And Identity.

Here, the State explicitly claimed that it sought to admit the evidence for three reasons: motive, *res gestae* and knowledge. I RP 73, ln. 5-6. However, in the course of argument on the issue, the State also argued an additional reason – identity. *See* I RP 82, ln. 8-13.

The court held that the evidence was relevant to establish motive. I RP 94, ln. 10-11. The court did not address the other reasons for which the State sought to admit the evidence. The inference from the court's treatment of the issues seems to be that motive alone was a sufficient basis to admit the evidence, so that it did not reach the other bases.

The courts have recognized that gang affiliation evidence may appropriately be used to prove motive, knowledge, identity and *res gestae*. See *State v. Saenz*, 156 Wn. App. 866, 872-73, 873-74, 234 P.3d 336 (2010) (citing *State v. Yarbrough*, 151 Wn. App. 66, 210 P.3d 1029 (2009); *State v. Boot*, 89 Wn. App. 780, 950 P.2d 964 (1998); *State v. Campbell*, 78 Wn. App. 813, 901 P.2d 1050 (1995)).

Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

c. The Gang Evidence Is Relevant To The Elements Of The Crime Charged

The gang evidence is relevant to the elements of crime charged. The court found the evidence very relevant. I RP 94, ln. 11-12.

The defendant was charged in Count I with Murder in the First Degree, such that he unlawfully and feloniously, under circumstances manifesting an extreme indifference to human life, engaged in conduct which created a grave risk of death and thereby caused the death of Tracy Steele. CP 1.

The jury instructions as to this count were:

(1) That on or about the 10th day of May, 2008, the defendant or an accomplice created a grave risk of death to another person;

- (2) That the defendant or an accomplice knew of and disregarded the grave risk of death;
- (3) That the defendant or an accomplice engaged in that conduct under circumstances manifesting an extreme indifference to human life;
- (4) That Tracy Steele died as a result of defendant's or an accomplice's acts
- (5) That any of these acts occurred in the State of Washington.

CP 285. *See also* RCW 9A.32.030(1)(b); WPIC 26.06.

Even when motive is not itself an element of the crime charged, it is nonetheless relevant as circumstantial evidence of other essential elements of the crime. *See Yarbrough*, 151 Wn. App. 66, 83, 210 P.3d 1029 (2009). The second element here is that the defendant or an accomplice knew of and disregarded the grave risk of death. The defendant's motive is directly relevant to that element. It is also relevant to the third element that the defendant or an accomplice engaged in that conduct under circumstances manifesting an extreme indifference to human life. Accordingly, admitting the evidence for the purpose of showing motive was relevant to elements of the crime.

Here, the trial court did not address the State's other three reasons for offering the gang evidence: *res gestae*, knowledge and identity. *See* Tegland, WASHINGTON PRACTICE, vol. 5: EVIDENCE, 5th Ed. § 404.18, 404.21, 404.22. However, even if this Court were to hold the evidence was not admissible to establish motive, its admission of the evidence should nonetheless be affirmed if any of the other three reasons justified

its admission. That is because the Court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, under the second element, the State was required to prove that the defendant or an accomplice knew of and disregarded the grave risk of death. Under the third element, the State was required to prove that the defendant or an accomplice engaged in that conduct under circumstances manifesting an extreme indifference to human life. The gang evidence is relevant to both of these elements, with regard to knowledge, as well as intent. Jury instruction 13 directed the jury in pertinent part that "... When acting knowingly as to a particular factis [sic] required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact." CP 287 (jury instruction no. 13).

Knowledge and intent were relevant to elements two and three for several reasons. Knowledge, and therefore intent, is directly relevant to the second element, which is that the defendant knew of and disregarded the grave risk of death. Moreover, the defense argued that Dan Bluehorse was actually the person who fired the gun, thereby putting the defendant's knowledge of Bluehorse's actions at issue in terms of whether or not Bluehorse purportedly acted with in a manner Mee intended or knew. The

defense also raised a question as to whether Mee would have been Bluehorse's accomplice. Mee's knowledge and intent in returning to the house where the shooting occurred was relevant to whether he disregarded the grave risk of death, and whether he manifested an extreme indifference to human life.

The gang evidence was also relevant to the issue of identity. Several of the witnesses only knew people by their gang names. Thus, in order to properly identify them, distinguish them from other persons present, and to show the relative relationship of these members, the gang evidence was relevant.

Finally, the gang evidence was relevant to the *res gestae* of the crime. The gang evidence showed the relative relationships of the persons involved in the initial fight, and the subsequent shooting. It showed the reasons for the shooting. The gang evidence showed why Mee knew there was a gun at the Bluehorse residence, and why the people there supplied him with a gun, and why they then returned to the scene of the shooting. The gang evidence was relevant to the motives of Mee and the others in their actions, which is also part of the *res gestae* of the crime. It is also relevant to show why Bluehorse would have fired the gun (on Mee's behalf), if he in fact did so as the defense argued.

Here, the gang status of the various persons involved in the crime or the incident leading up to it was an inextricable aspect of the *res gestae* of the crime. *Res gestae* evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide immediate context for events close in both time and place to the charged crime. *State v. Lillard*, 122 Wn. App. 422, 431-32, 93 P.3d 696 (2004); see Tegland, WASHINGTON PRACTICE, vol. 5: EVIDENCE, 5th Ed. § 404.18. Thus, to show the *res gestae* of a crime is a valid basis for the admission of gang evidence under ER 404(b). See *State v. Saenz*, 156 Wn. App. 866, 872-73, 234 P.3d 336 (2010).

The court properly concluded the gang evidence was relevant.

d. The Court Properly Weighed the Evidence When It Held That Its Probative Value Outweighed Its Prejudicial Effect

The court held that the probative value outweighed the prejudicial effect. I RP 94, ln. 19-21. That holding was proper where the gang evidence was so intertwined with the *res gestae* of the crime, including motive, as well as knowledge, intent and identity.

e. The Court Did Not Err When It Did Not Give A Limiting Instruction, because no instruction was requested.

Where the defense failed to request a limiting instruction, the court was not obligated to give such an instruction. *State v. Russell*, 171 Wn.2d 118, 122-23, 249 P.3d 604 (2011); *State v. Lillard*, 122 Wn. App. 422, 93

P.3d 969 (2004). “Although a limiting instruction on such evidence [hearsay admitted for rebuttal purposes] is generally required, the failure of a court to give a limiting instruction is not error when no instruction was requested.” *State v. Athan*, 160 Wn.2d 354, 383, 158 P.3d 27 (2007).

Here, any harm from the gang evidence could have been cured with a limiting instruction. However, the defense requested no such instruction. *See* VI RP 1116, ln. 7-10; 7-B RP 136, ln. 19-23; p. 1575ff. *See also* III RP 372ff; VI RP 1116; VIII RP 1394.

Contrary to the argument of defense, there are few cases where gang evidence could be more centrally relevant than this one. Essentially what the defense is arguing is that gang evidence is so prejudicial that it can never be admissible. The defense argument is flawed. ER 403 does not prohibit all prejudicial evidence, for indeed, all the evidence put forth by the State has a tendency to be prejudicial to the defendant. Rather, ER 403 only prohibits evidence the probative value of which is outweighed by its unfair prejudice. *State v. Veliz*, 160 Wn. App. 396, 412-13, 247 P.3d 833 (2011).

2 THE DEFENSE ARGUMENT AS TO THE GANG EVIDENCE IS FLAWED.

The defense claims that *State v. Athan* and *State v. Powell*, “...stand for the proposition that, where only circumstantial evidence is available in a murder case, evidence of motive might be necessary, not that evidence of motive automatically becomes admissible in all such cases.” Br. App. 14-15 (citing *State v. Athan*, 160 Wn.2d 354, 158 P.3d 27 (2007); *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995)). The essence of the defense argument is that the gang evidence is circumstantial evidence of motive, however motive itself is not an essential element of the crime in those cases, and therefore it was improper to admit the gang evidence where the State had more than circumstantial evidence of the essential elements. The defense argument is logically flawed in two ways.

First, the legal authority does not support the defense claim that the rule in Washington is that evidence of motive is only admissible in cases where the state’s evidence is limited to circumstantial evidence of the elements. *See* Br. App. 14-15, 31. Indeed, that is not a correct statement of the law.

In support of its proposition, the defense relies upon *State v. Athan* and *State v. Powell*. However, statement quoted by the defense in *Athan* occurred in the context of the analysis of the applicability of the state of mind exception to the hearsay rule. *Athan*, 160 Wn.2d at 381-82. The court in *Athan* was not considering the issue under ER 404(b), nor was it

even considering when motive evidence is relevant in a murder case. Rather, the court in *Athan* made the bare statement quoted by defense and cited to *Powell*. *Athan*, 160 Wn.2d at 382. Thus, nothing in *Athan* stands for the proposition claimed by defense that “where only **circumstantial** evidence is available in a murder case, evidence of motive **might** be necessary...” Br. App. at 15 (emphasis in original).

The court’s opinion in *Powell* did consider motive as an alternative valid basis for admitting other bad acts evidence under ER 404(b) in the context of a murder case. *See Powell*, 126 Wn.2d at 258-264. The court in *Powell* essentially laid out the same standard identified by the State in section 1 above.

Under ER 404(b) evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character and show action in conformity therewith. However, when demonstrated, such evidence may be admissible for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”. If admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged.

Powell, 126 Wn.2d at 258 (citations omitted). However, most relevant to the defense claim is the sentence which follows the language above.

Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable.

Powell, 126 Wn.2d at 259 (citing *State v. Dennison*, 115 Wn.2d 609, 628,

801 P.2d 193 (1990); *State v. Saltarelli*, 98 Wn.2d 358 at 362-63, 655 P.2d 697 (1982). Thus, neither does anything in *Powell* support the rule claimed by the defense that “where only circumstantial evidence is available in a murder case, evidence of motive might be necessary...” To the contrary, evidence of motive is relevant and necessary whenever it is of consequence to the action and makes the existence of the identified fact more probable.

Recognizing this flaw in the defense argument then leads to the second flaw. The defense argument is that motive is not an essential element of the crime, so that evidence of motive is not evidence of an essential element. That is a logical fallacy for the simple reason that the test for “other purposes” evidence under ER 404(b) is merely that it be relevant to an essential element. *Saenz*, 156 Wn. App. at 873.

Although motive itself is not an essential element of the crime, evidence of motive is often, if not usually, relevant to the essential elements of the crime, whether murder or some other crime. Generally the only time motive isn’t going to be relevant is when the crime is a strict liability crime. In almost any crime with a *mens rea* component, motive is going to be relevant to the crime even if it isn’t an essential element in and of itself.

3 THE DEFENDANT MAY NOT RAISE A CHALLENGE
TO THE SPECIAL VERDICT JURY INSTRUCTION
FOR THE FIRST TIME ON APPEAL.

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963). The Court of Appeals will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); See *State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009).

The defense relies on *State v. Bashaw* for its claim that the special verdict instruction was erroneous. Supp. Br. App. at 9 (citing *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010)). However, the rule adopted in *Bashaw* is not constitutional. *Bashaw*, 169 Wn.2d at 146 n. 7. Rather, it is a common law rule. *Bashaw*, 169 Wn.2d at 146 n. 7. As such, this challenge cannot be raised for the first time on appeal.

In order to challenge this instruction, it must have been objected to below because a defendant may not object to an instructional error where it was not objected to below unless the error invades a fundamental right of the accused. *State v. Watkin*, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006). In the instant case, no objection to this jury instruction was raised. *See* VI RP 1116, ln. 7-10; 7-B RP 136, ln. 19-23; p. 1575ff. *See also* III RP 372ff; VI RP 1116; VIII RP 1394. There is no ruling from the trial court to be considered on appeal. As such, this Court should decline to address defendant's challenge to the special verdict instruction as it is not of a constitutional nature and is raised for the first time on appeal.

4. THE JURY INSTRUCTION GIVEN IN THIS CASE REGARDING THE SPECIAL VERDICT WAS NOT ERRONEOUS, AND EVEN IF IT WERE ERROR, ANY ERROR WAS HARMLESS

Jury instructions are proper where, read together, they correctly inform the jury of the applicable law, do not mislead the jury and, allow both parties to argue their theories of the case. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). Claimed errors of law in a jury instruction are reviewed *de novo*. *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 521 158 P.3d 1193 (2007). Errors in jury instructions are subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Defendant challenges jury instruction number 19, which instructed the jury on how to enter a special verdict. Supplemental

Opening Brief of Appellant at 8ff; CP 294 (jury instruction no. 19). Jury instruction no. 19 states:

You will also be given a special verdict form for the crime charged in Count I. If you find the defendant not guilty of this crime do not use special verdict form. If you find the defendant not guilty of this crime do not use special verdict form. [Sic.] If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to the question, you must answer “no.”

CP 294.

- a. The Special Verdict Instruction Given In This Case Was Not An Incorrect Statement Of The Law.

State v. Goldberg 149 Wn.2d 888, 72 P.3d 1083 (2003), established that unanimity was only required for finding in the affirmative on a special verdict for a sentence enhancement. This decision was applied by the court in *State v. Coleman*, 152 Wn. App. 552, 216 P.3d 479 (2009).

The trial courts in *Goldberg* and *Coleman* instructed their juries that: “In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer “no”.”

Goldberg, 149 Wn.2d 888, 893, *Coleman*, 152 Wn. App. at 565. In both cases, the jury returned non-unanimous “no” answers on the special

verdict forms. *Goldberg*, 149 Wn.2d at 891, *Coleman*, 152 Wn. App. at 559. Each jury was polled, and upon finding that the jury was not unanimous, both trial judges instructed the jury to continue deliberations in an effort to reach a unanimous verdict. *Goldberg*, 149 Wn.2d at 891, *Coleman*, 152 Wn. App. at 559.

The Washington Supreme Court in *Goldberg*, and this Court in *Coleman*, held that it was error for the jury to be ordered to continue deliberations after returning a non-unanimous “no” answer on the special verdicts, because the non-unanimous “no” constituted a valid verdict when it is returned. *Goldberg*, 149 Wn.2d at 894, *Coleman*, 152 Wn. App. at 565. In addition, both courts specifically noted that the instructions given did not require that the jurors be unanimous in order to answer “no” on the special verdict forms. *Goldberg* 149 Wn.2d at 894, *Coleman*, 152 Wn. App at 565.

Recently, the Washington Supreme Court upheld the *Goldberg* ruling, and clarified its holding that unanimity was only required in order to answer “yes” to the special verdict inquiry. *State v. Bashaw*, 169 Wn.2d 133, 145, 234 P.3d 195 (2010). In that case, the court instructed the jury, in their written instructions, that “[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict.”. *Bashaw*, 169 Wn.2d at 139.

The issue before the court in *Bashaw* was whether “when a jury has unanimously found a defendant guilty of a substantive crime and proceeds

to make an additional finding that would increase the defendant's sentence beyond the maximum penalty allowed by the guidelines, must the jury's answer be unanimous in order to be final?" *Bashaw*, 169 Wn.2d at 145.

The court's answer was that,

"[a] nonunanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt."

Bashaw, 169 Wn.2d at 145.

The court noted that *Goldberg* had established that special verdicts do not need to be unanimous in order to be final. *Bashaw*, 169 Wn.2d at 146, citing *Goldberg*, 149 Wn.2d at 895. Thus, under *Goldberg*, a nonunanimous jury decision is nonetheless a final determination that the State has not proved the special finding beyond a reasonable doubt.

Bashaw, 169 Wn.2d at 146.

Because the instruction at issue in *Bashaw* contained different language from that issued in *Goldberg*, the court in *Bashaw* reaffirmed the rule in *Goldberg* without considering the specific language of the instruction given in that case. Rather the *Bashaw* court held that "the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law." *Bashaw*, 169 Wn.2d at 147.

The written instruction in *Bashaw* was akin to the oral order of the judge in *Goldberg* requiring the jury to return to deliberations after they

had returned a valid special verdict answer, only the instruction in *Bashaw* was given preemptively. *Bashaw*, 169 Wn.2d at 147. According to the court, that is because the instruction given in *Bashaw* preemptively directs the jury to reach unanimity. *Bashaw*, 169 Wn.2d at 147.

Because the court in *Bashaw* did not consider the language of the instruction here, nor the language of the instruction in *Goldberg*, none of the three cases, *Goldberg*, *Coleman*, or *Bashaw*, supports defendant's claim that the instruction in this case is deficient. For a comparison of the language at issue in the special verdict instructions in each of the four cases, *see* Appendix A (Special Verdict Instruction Comparison Chart).

i. The Instruction Issued In This Case Was Valid Under Goldberg.

The courts in *Goldberg* and *Coleman* held that the juries performed as instructed in returning non-unanimous “no” answers to the special verdict inquiries. *Goldberg*, 149 Wn.2d at 894, *Coleman*, 152 Wn. App. at 565.

Here, the instruction did not tell the jury they were required to answer the special verdict form. Rather, it told them that they must all twelve agree in order to answer the special verdict form; in order to answer the form, “yes” they must be unanimous; and if they unanimously have a reasonable doubt as to the question they must answer, “no.” CP 294. This instruction left open the possibility that they could not reach a

unanimous answer, in which case, under the instruction, they would not be able to enter anything on the form.

As such, under both *Goldberg* and *Coleman*, the instruction does not preemptively coerce the jury to return a unanimous verdict. Unlike the instruction in *Bashaw*, under the instruction here, if the jury could not reach a unanimous verdict, they should leave the verdict form blank.

ii. The Issue In Goldberg Was The Trial Judge's Order That The Jury Return To Deliberations

The error in both *Goldberg* and *Coleman* was the trial court's order that the jury return to deliberations after reaching a non-unanimous "no" answer on the special verdict form. *Goldberg*, 149 Wn.2d at 894; *Coleman*, 152 Wn. App. at 565. Defendant does not raise this as an issue in this case.

This case is distinguishable from *Goldberg* and *Coleman* in that the jury did not return a non-unanimous verdict. *Goldberg*, 149 Wn.2d at 894; *Coleman*, 152 Wn. App. at 565; *See* CP 298. Thus, although there was error in *Goldberg* and *Coleman*, no such error occurred in this case.

iii. The Special Verdict Instruction Given In This Case Is Not Defective Under Bashaw

The instruction given in *Bashaw* read: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." *Bashaw*, 169 Wn.2d at 139. In *Bashaw*, the court held that the special

verdict instruction itself was in error. *Bashaw*, 169 Wn.2d at 146. The *Bashaw* court adopted the ruling of the *Goldberg* case, and held that the instruction stating that the jury must be unanimous in order to answer no functioned in the same way that the judge's order to return to deliberations did in *Goldberg*. *Bashaw*, 169 Wn.2d at 146. The *Bashaw* decision does not invalidate the instruction given in *Goldberg*, but rather reaffirms that a jury need not be unanimous in order to return a "no" answer to the special verdict inquiry. *Bashaw*, 169 Wn.2d at 146.

Because the jury here was never instructed to be unanimous in order to answer no, either through the written instructions, or by the judge ordering a return to deliberations, the jury instruction is not unlawful under *Bashaw*.

b. The Jury Instructions Given Were Not Misleading.

Instruction no. 18 informed the jurors that they "must fill in the blank provided in verdict form the words 'not guilty' or the word 'guilty', according to the decision you reach." CP 292, (jury instruction no. 18). The instructions go on to explain that the jury must be unanimous in order to enter either verdict. CP 293 (jury instruction no. 18). The special verdict forms had their own instruction stating:

You will also be given a special verdict form for the crime charged in Count I. If you find the defendant not guilty of this crime do not use special verdict form. If you find the defendant not guilty of this crime do not use special verdict

form. [Sic.] If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to the question, you must answer “no.”

CP 294, (jury instruction no. 19) [emphasis added]. The differences in the instructions and the order in which the forms must be used clearly delineated between the requirements for verdict forms and special verdict forms.

The jury instructions were not misleading when read in their entirety. The instructions clearly differentiated between verdict forms and special verdict forms, and there was a different instruction associated with each. CP 292-93 (jury instruction no. 18); CP 294 (jury instruction no. 19). The instructions for the verdict forms for count I and II required that the jury enter “guilty” or “not guilty” into the blank on the form, where the special verdict forms required that the jury enter “yes” or “no” into the blank. CP 292-93 (jury instruction no. 18); CP 294 (jury instruction no. 19). Moreover, the jury was instructed that they were not to use the special verdict forms unless and until they came to a unanimous guilty verdict on the verdict forms. CP 294 (jury instruction no. 19). After reading all the instructions as a whole, it is clear that the unanimity

instruction for guilty and not guilty verdicts does not apply to the special verdicts. The unanimity instructions for special verdicts did not require unanimous “no” answers.

The court here instructed the jury that they should each decide the case for themselves, and not change their mind solely for the purpose of reaching a unanimous verdict. CP 271 (jury instruction no. 17). This is in the same instruction as the instruction indicating that the jury should strive for a unanimous verdict. CP 271 (jury instruction no. 17). This indicated to the jurors that unanimity is not so important as to warrant the jurors giving up their personal beliefs as to the evidence presented.

A jury is presumed to have followed the instructions given unless there is something in the record which overcomes this presumption. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010), *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). The jury instructions in the instant case were neither incorrect nor misleading. It did not require the jury to enter a unanimous verdict, as under the instructions given, the jury would not enter anything onto the special verdict form if they were not unanimous.

5. EVEN IF THE COURT WERE TO HOLD THE INSTRUCTION WAS ERRONEOUS, ANY SUCH ERROR WAS HARMLESS.

Even if this Court were to determine that the jury instruction regarding the special verdict forms contained an error, it is subject to a

harmless error analysis. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An error is harmless if the court concludes beyond a reasonable doubt that the jury verdict would have been the same absent the error. *State v. Bashaw*, 169 Wn.2d 133, citing *State v. Brown*, 147 Wn.2d at 341.

In this case, any error was harmless where the jury separately found the defendant guilty of unlawful possession of the one firearm alleged in the same incident. CP 297. Moreover, the murder itself occurred by way of a drive-by shooting resulting in a gunshot wound to the defendant. CP 297.

Highlighting portions of a quote from *Bashaw*, the defendant argues that it is not possible to tell what result the jury would have reached if it had been given a correct instruction. Appellant's Brief at 12 (quoting *Bashaw*, 169 Wn.2d at 147-48. However, under the particular facts of this case, is unlikely that the outcome of the trial would have been different if the jury had been instructed differently.

In Instruction 20, regarding the special verdict the jury was instructed in pertinent part that:

“For the purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant or an accomplice was armed with a firearm at the time of the commission of the crimes in Count I.”

CP 295 (jury instruction no. 20).

In addition to finding defendant guilty of one count of murder with the special verdict finding that the defendant was armed with a firearm, the jury also found defendant guilty of one count of unlawful possession of a firearm in a separate count, but arising out of the same incident. CP 296-97. Both the assault and unlawful possession of a firearm verdicts were required to be unanimous. CP 285 (jury instruction no. 11); CP 290 (jury instruction no. 16). The jury was properly instructed to be unanimous when they reached its verdict for murder, and for the unlawful possession of a firearm, and it returned guilty verdicts on both counts.

Defendant is unable to show that the jury's finding on the special verdict would have been different under a different instruction where the jury's special verdict was consistent with their guilty verdict for unlawful possession of a firearm. Because defendant is unable to demonstrate prejudice, any error in the jury instruction was harmless.

6. THE COURT PROPERLY DENIED THE MOTION FOR A MISTRIAL.

The party who asserts juror misconduct bears the burden of showing that the alleged misconduct occurred. *State v. Hawkins*, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). Substantial deference is due the trial court's exercise of its discretion in handling situations involving potential juror bias or misconduct. See *Hawkins*, 72 Wn.2d at 567 (holding that trial court did not abuse its discretion); *Tracey v. Palmateer*,

341 F.3d 1037, 1044 (9th Cir. 2003); *United States v. Aiello*, 771 F.2d 621, 629 (2d Cir. 1985); *United States v. Webster*, 750 F.2d 307, 338 (5th Cir. 1984), *cert. denied*, 471 U.S. 1106, 105 S. Ct. 2340, 85 L.Ed.2d 855 (1985), *United States v. Kelly*, 722 F.2d 873, 881 (1st Cir. 1983), *cert. denied*, 465 U.S. 1070, 104 S. Ct. 1425, 79 L.Ed.2d 749 (1984).

Moreover, the determination of whether misconduct has occurred lies within the discretion of the trial court. *State v. Havens*, 70 Wn. App. 251, 255-56, 852 P.2d 1120, *review denied*, 122 Wn.2d 1023 (1993). Not all instances of juror misconduct merit a new trial; there must be prejudice. *State v. Barnes*, 85 Wn. App. 638, 668-669, 932 P.2d 669 (1997).

It is well-settled in Washington that while juror affidavits or testimony may be used to establish jury misconduct involving outside influences, such evidence may not be used to contest the thought processes involved in reaching a verdict. *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1962); *Hendrickson v. Konopaski*, 14 Wn. App. 390, 393, 541 P.2d 1001 (1975). Testimony may not be considered if “the facts alleged are linked to the juror’s motive, intent, or belief, or described their effect upon him”; however, it may be considered if “that to which the juror testifies can be rebutted by other testimony without probing a juror’s mental processes.” *State v. Crowell*, 92 Wn.2d 143, 146, 594 P.2d 905 (1979) (quoting *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651,

379 P.2d 918 (1962)). Evidence concerning the mental processes of jurors, including their expressed opinions and when they made up their minds, inheres in the verdict. *State v. Aker*, 54 Wash. 342, 345-46, 103 P. 420 (1909); *Hosner v. Olympia Shingle Co.*, 128 Wash. 152, 154-55, 222 P. 466 (1924); *see also, State v. Hall*, 40 Wn. App. 162, 169, 697 P.2d 597 (1985) (third party's impression that juror had made up mind before end of trial inheres in verdict).

The law of Washington on this subject is consistent with the common law and federal law. The “near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict”. *Tanner v. United States*, 483 U.S. 107, 117, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987), citing 8 J. Wigmore, EVIDENCE § 2352, pp. 696-697 (J. McNaughton rev. ed. 1961). The only exceptions to the common-law rule were in situations in which an outside influence was alleged to have affected the jury. *Mattox v. United States*, 146 U.S. 140, 149, 13 S. Ct. 50, 36 L.Ed.917 (1892) (testimony of jurors describing how they heard and read prejudicial information not admitted into evidence was admissible), *Parker v. Gladden*, 385 U.S. 363, 365, 87 S. Ct. 468, 17 L.Ed.2d 420 (1966)(testimony from jurors showing non-juror or third party influence admissible), *Remmer v. United States*, 347 U.S. 227, 228-230, 74 S. Ct.

450, 98 L.Ed.654 (1954) (testimony on bribe offered to juror admissible).
See also Smith v. Phillips, 455 U.S. 209 (1982) (juror in criminal trial had submitted an application for employment at the District Attorney's office).
In situations that did not fall into this exception for external influence, however, the Supreme Court adhered to the common-law rule against admitting juror testimony to impeach a verdict. *Tanner v. United States*, 483 U.S. at 117 (court upholds lower court's refusal to consider juror affidavits or to hold evidentiary hearing on whether jurors were engaged in drinking and drug use during recesses of trial); *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L.Ed.1300 (1915) (testimony of jurors as to how damages were calculated inadmissible); *Hyde v. United States*, 225 U.S. 347, 384, 32 S. Ct. 793, 56 L.Ed.1114 (1912) (testimony of jurors inadmissible to show matters which essentially inhere in the verdict itself).

A trial court faces a delicate situation when the allegations of potential misconduct stems from a dispute between jurors as the dispute might stem from a disagreement about the case. *United States v. Symington*, 195 F.3d 1080, 1086 (9th Cir. 1999). *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). This is because a trial judge must not compromise the secrecy of jury deliberations. *Symington*, 195 F. 3d at 1086.

The common law principle was essentially codified in the Federal Rules of Evidence 606(b). *See also United States v. Casamayor*, 837 F.2d 1509, 1515 (11th Cir. 1988) (“the alleged harassment or intimidation of one juror by another would not be competent evidence to impeach the verdict under Rule 606(b)”); *United States v. Barber*, 668 F.2d 778, 786-87 (4th Cir. 1982). Evidence that a juror had been threatened by the jury foreman held inadmissible to impeach verdict under Rule 606(b). Even though Washington did not adopt the equivalent of the federal rule, as explained above, the standard in Washington remains essentially the same.

In *State v. Aker*, 54 Wash. 342, 345-346, 103 Pac. 420 (1909), the court held that juror affidavits may not be considered to show that, during a recess taken in the prosecution’s case in chief, jurors went back into the jury room and commented about the defendant’s guilt. The court also forbade use of a juror’s affidavit to show that he assented to a guilty verdict because of intimidation by other jurors. *Aker*, 54 Wash. at 345-346.

Public policy forbids inquiries into the jury’s private deliberations; the mental processes by which jurors reach their conclusion are all factors inhering in the verdict. *State v. Havens*, 70 Wn. App. 251, 256, 852 P.2d 1120 (1993); *State v. Jackman*, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989).

Nor does due process require a new trial every time a juror has been placed in a potentially compromising situation, as it is “virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.” *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L.Ed.2d 78 (1982). Rather, “[w]hen a trial court is presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting that jury, due process requires that the trial court take steps to determine what the effect of such extraneous information actually was on that jury.” *Williams v. Bagley*, 380 F.3d 932, 945 (6th Cir. 2004).

If a juror communicates with a third person about an ongoing trial, this constitutes misconduct; it warrants a new trial only if such communications prejudice the defendant. *State v. Murphy*, 44 Wn. App. 290, 296, 721 P.2d 30, *review denied*, 107 Wn.2d 1002 (1986), *see State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). At a minimum, a juror must discuss the pending case with a non-juror to create misconduct. *State v. Brenner*, 53 Wn. App. 367, 372, 768 P.2d 509 (1989).

The United States Supreme Court has stated that the remedy for allegations of juror partiality based on unauthorized juror contacts is a hearing in which the defendant has the opportunity to prove actual juror bias. *Smith*, 455 U.S. at 215, (citing *Remmer v. United States*, 347 U.S.

227, 229, 74 S. Ct. 450, 98 L.Ed.654, 1954-1 C.B. 146 (1954). A **Remmer** hearing is required “in all cases involving an unauthorized communication with a juror or the jury from an outside source that presents a likelihood of affecting the verdict.” **United States v. Rigsby**, 45 F.3d 120, 123 (6th Cir.), *cert. denied*, 514 U.S. 1134, 115 S. Ct. 2015, 131 L.Ed.2d 1013 (1995).

A **Remmer** hearing is not constitutionally required in every circumstance where allegations of jury misconduct are raised. **Rigsby**, 45 F.3d at 124. The trial court enjoys wide discretion in determining the amount of inquiry, if any, that is necessary to respond to such allegations. **United States v. Logan**, 250 F.3d 350, 378 (6th Cir.), *cert. denied*, 534 U.S. 895, 122 S. Ct. 216, 151 L.Ed.2d 154 (2001); *see also*, **Rigsby**, 45 F.3d at 124-25; **United States v. Olano**, 62 F.3d 1180, 1192 (9th Cir. 1995), **United States v. Romero-Avila**, 210 F.3d 1017, 1024 (9th Cir. 2000) (district courts are not required to hold evidentiary hearings each time there is an allegation of jury misconduct).

In **Tanner v. United States**, 483 U.S. 107, 116-34, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987), the Supreme Court held that the trial court’s failure to hold a post-verdict hearing, based on certain jurors’ allegations that some jurors consumed alcohol and drugs during recesses of the trial, did not violate the defendant’s Sixth Amendment right to a fair and impartial

jury. The Court distinguished cases involving an “extrinsic influence or relationships” from cases involving an inquiry into the “internal processes of the jury.” *Tanner*, 483 U.S. at 120. This distinction is necessary to preserve “one of the most basic and critical precepts of the American justice system: the integrity of the jury.” *Logan*, 250 F.3d at 379; *see also Tanner*, 483 U.S. at 119-20. The Court found that the defendant’s Sixth Amendment interest in an impartial, “unimpaired” jury was protected by “several aspects of the trial process,” including *voir dire*, and the opportunity for jurors and court personnel to report observable inappropriate juror behavior before a verdict is rendered.

It is generally considered less serious if the misconduct allegation does not involve outside influences or extraneous information. *See United States v. Klee*, 494 F.2d 394, 395-96 (9th Cir. 1974) (district court did not err in denying a mistrial, even though eleven jurors prematurely discussed the case during recesses, and nine of the jurors expressed premature opinions about the defendant's guilt). Claims that do not involve an outside or extrinsic influence, but rather only a potential intra-jury influence, are not subject to a *Remmer* hearing or further inquiry by the trial court. *United States v. Briggs*, 291 F.3d 958, 963 (7th Cir) (affirming district court’s denial of motion for post-verdict hearing based on a juror’s allegations that jurors and the jury foreman behaved improperly during

deliberations, including exerting “extreme and excessive pressure on individuals to change votes”), *cert. denied*, 537 U.S. 985, 123 S. Ct. 458, 154 L.Ed.2d 350 (2002); *United States v. Prospero*, 201 F.3d 1335, 1340-41 (11th Cir.) (district court’s refusal to grant mistrial or an inquiry into alleged misconduct by two jurors engaged in a “heated discussion” away from the other jurors, did not amount to an abuse of discretion and, in fact, would have “invited reversible error” if a contrary decision had been made), *cert. denied*, 531 U.S. 956, 121 S. Ct. 378, 148 L. Ed. 2d 292 (2000); *see also United States v. Yoakam*, 168 F.R.D. 41, 45-46 (D. Kan. 1996) (denying request for investigation based on allegations of juror misconduct obtained from courthouse guard, who overheard two jurors participating in a “heated discussion” concerning their deliberations).

Here, the jury had announced that it had reached a verdict, but due to defense counsel’s schedule conflicts, the court was not able to take the verdict that day and released the jury until the following morning. XI RP 1887, ln. 1-10. After leaving the jury room, one of the jurors returned to retrieve something. XI RP 1887, ln. 11-15. While doing so he commented to the Judicial Assistant that his wife was flipping through channels and saw the prosecutor on a television show. XI RP 1887, ln. 16-22.

The court had the unread verdict sealed without anyone looking at it. XI RP 1887, ln. 1-5. Prior to taking the jury's verdict, the court questioned the juror. XI RP 1898, ln. 25 to p. 1903, ln. 5.

The juror told the court that he recalled saying that he was very impressed with the professionalism throughout the trial, the knowledge, the diligence of the folks. XI RP 1900, ln. 10-13.

When the court told the juror that the Judicial Assistant mentioned that the juror said he may have seen the prosecutor outside the courtroom the juror acknowledged that was true. XI RP 1900, ln. 17-19. The juror stated that he and his wife were watching the History Channel at home. XI RP 1900, ln. 22-24. The Channel aired an announcement or summary about what they were going to be showing during the episode and it was talking about motorcycle gangs in San Bernardino. XI RP 1900, ln. 25 to p. 1901, ln. 5. San Bernardino is where the juror met his wife when he was in the marine corp. XI RP 1901, ln. 1-3.

Then the channel went into another thing quickly and talked about different types of gangs in Tacoma and it showed the Tacoma Dome area. XI RP 1901, ln. 6-9. The juror told his wife that was Tacoma on there. XI RP 1901, ln. 9. The story was about white supremacists who went to a place called Hobo Village or something similar and beat up one or two individuals. XI RP 1901, ln. 10-13. The picture that came on next

happened to be of the prosecutor in this case, Greg Greer, who the juror recognized and was surprised to see. XI RP 1901, ln. 14-16; p. 1902, ln. 8-10. The juror was impressed with what he heard, and with the wildness of the crime. XI RP 1901, ln. 15-17. The juror said he watched the episode. XI RP 1901, ln. 21-23. Mr. Greer had also seen the episode and estimated that the total time he was on the show was about 30 seconds. XI RP 1897, ln. 5-8.

When asked, the juror told the court he did not discuss any of what he had seen with the other jurors. XI RP 1901, ln. 24 to p. 1902, ln. 1. He did say something to the other jurors that he had seen Mr. Greer on television that week and he thought it was kind of ironic, but that was all he said about that. XI RP 1902, ln. 5-7. The juror said that when he said that was prior to the knock on the door to announce that a verdict had been reached. XI RP 1903, ln. 7-10.

The court had the juror return to the jury room and not discuss any of their conversation with the other jurors. XI RP 1903, ln. 11-14. The court decided to excuse the juror from deliberations and call in the alternate. XI RP 1911, ln. 16-20.

The court had the juror come back out of the jury room and bring his personal things with him. XI RP 1913, ln. 19 ln. 19-23; p. 1916, ln.

10-13. The court excused the juror from further participation in the process. XI RP 1916, ln. 12-15.

Having had an opportunity to further reflect while waiting in the jury room, the juror reaffirmed that the only thing he had mentioned was that he had seen the prosecutor. XI RP 1918, ln. 15-17. His best recollection was that it happened early in the morning and there might have been only one or two people there because the two or three of them got there early. XI RP 1918, ln. 18-21.

The court denied the defense motion for a mistrial. XI RP 1920, ln. 22.

The court seated the alternate and had the panel return to deliberate anew as to a verdict. XI RP 1925, ln. 18-25; p. 1932, ln. 2-25.

The trial court did not abuse its discretion when it denied the motion for a mistrial and declined to make further inquiries of the remaining jurors.

The court properly inquired into what Juror 5 observed on television and what he said to any other jurors. The testimony of Juror 5 was that he told one or two other jurors he had seen the prosecutor. XI RP 1918, ln. 15-21. Nothing about this statement warranted further discussion, especially where further inquiries of the jury ran the risk of intruding onto the deliberative process.

Instead, the court removed the tainted juror, had an alternate come in and directed the jury to begin deliberations anew with the alternate.

The court even told Juror 5 not to feel bad about what happened, recognizing that any violation of the court's instructions by the juror was inadvertent and unintentional. XI RP 1916, ln. 20 to 1917, ln. 16; p. 1919, ln. 2-16.

The court's action of removing the offending juror and having the jury begin deliberations anew was not an abuse of discretion. Nor was the court's denial of the defendant's motion for a mistrial where the court replaced the juror.

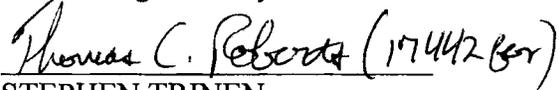
The defendant's claim on this issue should be denied.

D. CONCLUSION.

For the foregoing reasons this Court should affirm the trial court, including both the verdicts and the sentence.

DATED: June 17, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

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.

6-20-11 *Athea*
Date Signature

11 JUN 20 11 2:00 PM
STATE OF WASHINGTON
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Appendix A
Special Verdict Instruction Comparison Chart

Special Verdict Instruction Comparison Chart

This Case – State v. Mee	State v. Bashaw	State v. Coleman	State v. Goldberg
<p>... If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to the question, you must answer “no.”</p>	<p>Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.”</p>	<p>In order to answer any of the questions on the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer for that specific question. If you have a reasonable doubt as to the question, you must answer “no.”</p>	<p>In order to answer the special verdict form “yes” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer “no.”</p>