

CLERK OF SUPERIOR COURT  
STATE OF WASHINGTON

NO. 40984-4II

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

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STATE OF WASHINGTON,

Respondent,

v.

BRYANT MORGAN

Appellant.

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

The Honorable James Orlando, Judge

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BRIEF OF APPELLANT

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LISE ELLNER  
Attorney for Appellant  
WSBA# 20955

LAW OFFICES OF LISE ELLNER  
P.O. Box 2711  
Vashon, WA 98070

pm 3-30-11

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Mr. Morgan of attempted murder in the first degree as a principal where there was no evidence of actual participation in the shooting

2. There was insufficient evidence to convict Mr. Morgan of attempted murder in the first degree as an accomplice where there was no evidence that Mr. Morgan assisted in any manner.

3. There was insufficient evidence of possession of a firearm.

4. Mr. Morgan was denied his right to a fair trial by the introduction and use of irrelevant and prejudicial associational evidence of gang affiliation.

5. The state was relieved of proving all essential elements of murder in the first degree where the “to convict” jury instruction failed to allege the essential element of premeditation.

6. The trial court erred by denying the motion for dismissal of the illegal possession of a firearm charge where there was no evidence, constructive or actual possession of a firearm.

7. Mr. Morgan was denied his right to a fair trial and the presumption of innocence when the prosecutor impermissibly permitted a police witnesses to comment on Mr. Morgan’s right to remain silent.

8. Mr. Morgan was denied his right to a fair trial by prosecutorial misconduct.

9. The trial court abused its discretion by permitting Detective Ringer to comment on evidence as a “fact witness” to matters he had no personal knowledge.

10. The trial court erred in permitting Detective Ringer to testify as an expert on gangs when he has no expertise in gangs outside of the Tacoma area and all of his gang expertise was derived from hearsay.

11. Mr. Morgan was denied his right to a constitutional trial by a jury when detective Ringer invaded the province of the jury with his opinion that Mr. Morgan was guilty because he was a gang member.

12. Cumulative error denied Mr. Morgan his right to a fair trial.

Issues Pertaining to Assignment of Error

1. Did the state fail to present sufficient evidence to convict Mr. Morgan of attempted murder in the first degree?

2. Did the state fail to prove beyond a reasonable doubt possession of a firearm?

3. Was Mr. Morgan denied his right to a fair trial by the introduction and use of irrelevant and prejudicial associational evidence of gang affiliation?

4. Was the state relieved of proving all essential elements of murder in the first degree where the “to convict” jury instruction failed to allege the essential element of premeditation?

5. Did the trial court err by denying the motion for dismissal of the illegal possession of a firearm charge where there was no evidence, constructive or actual possession of a firearm?

6. Was Mr. Morgan denied his right to a fair trial and the presumption of innocence when the prosecutor impermissibly permitted a police witnesses to comment on Mr. Morgan’s right to remain silent?

7. Was Mr. Morgan denied his right to a fair trial by prosecutorial misconduct during closing argument attacking defense counsel and bolstering the state witness’ credibility?

8. Did the court abuse its discretion by permitting the state to introduce 404(b) gang evidence which the state used to establish propensity and guilt by association?

9. Did the trial court abuse its discretion by permitting Detective Ringer to comment on evidence as a “fact witness” to matters he had no personal knowledge?

10. Did the trial court err in permitting Detective Ringer to testify as an expert on gangs when he has no expertise in gangs outside of the Tacoma area and all of his gang expertise was derived from hearsay?

11. Was Mr. Morgan denied his right to a constitutional trial by a jury when detective Ringer invaded the province of the jury with his opinion that Mr. Morgan was guilty because he was a gang member?

12. Was Mr. Morgan denied his right to a fair trial by cumulative error?

B. STATEMENT OF THE CASE

1. Procedural Facts

Mr. Morgan was charged by amended information with attempted murder in the first degree contrary to RCW 9A.32.030(1)(a) and unlawful possession of a firearm contrary to RCW 9.41.010(2) and RCW 9.41.040(1)(a). CP 294-296. The trial court's "to-convict jury instruction on attempted murder failed to contain the element of premeditation. CP 407. The trial court denied Mr. Morgan's motion to dismiss the charges for insufficient evidence. CP 219-305, 335, 1471, 1474-147, 1478, 1479. Mr. Morgan was convicted as charged following a jury trial, the honorable James Orlando presiding. CP 434-447. This timely appeal follows. CP 448-460.

2. Substantive Trial Facts

a. Summary

Randall Embry was identified as shooting Tyrick Clark after closing hours at McCabe's Bar and Grill. Mr. Embry, Mr. Morgan and Mr. Parker were charged and convicted of attempted first degree murder and

unlawful possession of a firearm. The only evidence of a connection between these men was their presence of at McCabe's along with one hundred or so other people, and several undated MySpace photographs depicting Mr. Morgan with Mr. Embry and Mr. Embry with Mr. Parker. RP 131, 132, 554, 560, 620-622, 694, 706, 725, 726, 728, 778, 1895. There was no direct evidence that the instant case was gang motivated or related to gang matters. Mr. Morgan, Mr. Embry, Mr. Parker, and three state's eyewitnesses: Mr. Clark, Mr. Hudson and Mr. Hernandez are or were gang members. RP 581, 900, 907, 935-941, 1007.

Contrary to the evidence the prosecutor theorized that the instant case was a gang case because Mr. Parker was allegedly involved in a physical altercation where Mr. Clark punched Mr. Parker in the lip on New Year's Eve, almost two months prior to the instant shooting. The state believed that Mr. Parker asked Mr. Embry to shoot Mr. Clark to redress his busted lip from the prior fight. The state theorized that Mr. Embry was asked to do the shooting because Mr. Clark did not know Mr. Embry. RP 10-11, 18-21, 38, 586? 634. The state agreed that it was not possible for Mr. Clark, Mr. Morgan and Mr. Parker to have planned to shoot Mr. Clark prior to February 23, 2009 because Mr. Clark did not plan to go out to McCabe's until late the evening of February 23, 2009. RP 644.

During the evening at McCabe's, neither Mr. Parker, Mr. Morgan nor Mr. Embry avoided Mr. Clark. RP 416-417. Moreover, the shooter did not try to hide his face when he shot Mr. Clark and he did not run a way, but rather took his time. RP425-430, 514. There were approximately one hundred people milling about outside McCabe's when the shooting occurred. RP 326.

b. Tyrick Clark

Tyrick Clark did not have any plans to go out to McCabe's Bar and Grill on February 23, 2009. RP 644. Spur of the moment he decided he wanted to go out and called his friend Nicole Crimmins. RP 11, 644. Mr. Clark did not have any sense of trouble brewing while he was at McCabe's. RP 646. Inside the club, Mr. Clark did not remember seeing a person wearing a red hoody near Andre Parker who is also known as "Drip". RP 647, 785, 786. Mr. Clark said that he had seen some of the defendant's together at the bar but not all of them, and Mr. Clark had never seen Mr. Morgan or Mr. Embry before the night of February 23, 2009. RP 695-696.

Mr. Clark lost consciousness several minutes after being shot on February 24, 2009 and did not regain consciousness again until March 22, 2009. RP 559. When he awoke, Mr. Clark remembered the incident and identified Mr. Embry as the shooter from a photo montage presented by

Tacoma Police detectives. RP 554, 560, 620-622. Mr. Clark needed surgery to survive the gunshot wounds. RP 750.

After officer Thiry showed Mr. Clark the video from McCabe's, Mr. Clark was able to identify Mr. Morgan and Mr. Clark as having been present at the club. RP 1165-1167. Mr. Clark did not identify Mr. Morgan as having been involved in the shooting. RP 1169. Mr. Clark could not remember ever seeing Mr. Morgan with Mr. Parker, but he remembered seeing Mr. Embry and Mr. Morgan in the same area in the club. RP 694, 706, 725-726, 728.

Mr. Embry was alone when he shot Mr. Clark. RP 616-617, 716, 723, 725-728. Mr. Clark remembered that Mr. Embry wore a hat and white beads in his hair; he was certain that the shooter too had white beads in his hair. RP 668-670. On the ground before losing consciousness, Mr. Clark saw someone alone enter the passenger side of the car. He was not sure if this person was the shooter. RP 617, 619. Mr. Clark saw Mr. Embry shoot him and saw a car drive past the police away from McCabe's. RP 615.

Mr. Clark gave the detectives an accurate and detailed interview and knew that Mr. Morgan was not present in the shooting area or near Messrs. Parker or Embry. RP 716, 723, 725-728.

c. Officer Stanely

Officer Stanley who was working as an off duty security officer at

McCabe's bar and grill heard gun shots near McCabe's. RP 245-246, 249-250. After calling dispatch, officer Stanley left the parking lot in his marked patrol car, turned southbound on 27<sup>th</sup> street across Pacific Ave. He saw a person, later identified as Tyrick Clark lying in the street with Nicole Crimmins leaning over him. RP 250-251,254. It was very dark outside and not well lit. Officer Stanley did not see Mr. Clark until he was right near him with his headlights illuminating Mr. Clark. RP 304, 308.

According to officer Stanley, Ms. Crimmins was incoherent with rage or fright. RP 263. Ms. Crimmins told officer Stanley that the shooter was a black male wearing a fancy white hoody and that he got into a white Caprice with the license plate 698 YNT. Ms. Crimmins changed her story and said the car was a silver Ford Escort. RP 266, 268, 313, 391. During her own testimony, Ms. Crimmins said that she was only able to obtain a partial license plate with the last three digits. RP 506.

d. Nicole Crimmins

Ms. Crimmins testified that she went to the club with her friend Mr. Clark and that inside the club she did not notice any hostilities or confrontations. RP 416-417. Ms. Crimmins left the club with Mr. Clark and his cousin Telon Walker. RP 412, 419. After exiting the club, Ms. Crimmins and Mr. Clark walked arm-in-arm towards Mr. Clark's car. RP 423, 429, 611. Ms. Crimmins did not see anyone until the shooter

approached. After Mr. Clark was shot he told Ms. Crimmins to get the license plate number, so she within a few feet of the shooter who was standing next to the car. RP 426.

While she was running towards the car taking down the license plate and calling 911, Ms. Crimmins observed the shooter standing at the back of the car “doing something” for about a minute. There was no one else near the shooter and he did not appear to be in a rush. RP 514. Ms. Crimmins never lost sight of the shooter. RP 426, 437, 439, 441. Ms. Crimmins could not identify the other occupants of the car but determined from the shadows that others were in the car. RP 440.

Even though the shooter had his hoody up and zipped, Ms. Crimmins could see the eyes and face of the shooter and later in her testimony described the shooter’s hoody as black and white with silver. RP 429-430. Mr. Clark told Ms. Crimmins that he did not know the shooter, but had seen him in the club. RP 435-436. Officer Stanley did not see any cars leave the area, but Nicole Crimmins who was leaning over Mr. Clark, saw a car drive away immediately after the shooting. RP 256, 259, 449. Video footage from McCabe’s showed a car driving off from the shooting area seconds before the shots were fired. RP 1370.

Ms. Crimmins told officer Thiry that the shooter dispensed six shots, turned around, walked east bound on 27<sup>th</sup> street towards Pacific and

from 50 feet before reaching Pacific turned southbound and entered a car. RP 374. Ms. Crimmins stated that the shooter got into the rear driver side of the car. RP 384, 400.

Several weeks after the shooting, Ms. Crimmins viewed a photo montage of suspects and a separate one for their clothing. RP 457-458. Ms. Crimmins was not able to positively identify the shooter but recognized the pattern on the hoody the shooter wore. RP 457-459.

e. Telon Walker

Telon Walker, Mr. Clark's cousin went to McCabe's with friends and saw his cousin Mr. Clark on February 23, 2009. RP 752-754. Mr. Walker, contrary to the video evidence showing a calm conversation between Mr. Clark and someone else at the bar, testified that the conversation was heated. RP 757, 1440. Detective Ringer the lead detective on the case agreed that Mr. Walker was incorrect in his impression that the conversation between Mr. Clark and someone else was heated. Id.

Outside the club after closing, Mr. Walker gave Mr. Clark his phone number and they separated. Mr. Clark went up the hill and Mr. Walker went to look for his ride. RP 761-762. Mr. Walker heard gunshots and saw Ms. Crimmins, but did not see Mr. Clark. Mr. Walker walked in the direction of Ms. Crimmins and arrived at the same time the police arrived,

several minutes after hearing the gunshots. RP 762-765.

Although right next to Ms. Crimmins and Mr. Clark, Mr. Walker testified that he did not see his cousin but was able to see a person with a dark hoody get into the passenger side of a lighter 4-door sedan some distance away. RP 767-768. Mr. Walker also testified that “someone ducked in real quick before the other guy got in the car and he looked like he was wearing a red hoody.” RP 769. Mr. Walker admitted that he could not identify the person or his clothing because he could not see him in the dark, but testified that this person got into the back seat on the driver’s side. RP 769, 772. Ms. Crimmins saw the shooter get into the car on the rear driver’s side as well. RP 384, 400.

Weeks later, Detective Ringer presented Mr. Walker with a photo montage and video footage showing Mr. Parker, Mr. Morgan and Mr. Embry from the night of the shooting at McCabe’s. RP 781-783. After watching the video, Mr. Walker was able to recognize Mr. Morgan and Mr. Embry as people he saw at McCabe’s. RP 776, 781-783, RP 1104-1106. Mr. Walker was not able to identify the person he saw get into the car. RP 779-780.

Mr. Walker could not identify the dark sweatshirt either. “I had a problem between two of them”. It was really dark up hill, so I could not be really certain about, you know, exactly what the clothing looked

like.....general idea of what sweatshirt looked like”. Id. Mr. Walker selected two sweatshirts that could possibly have been worn by the dark figure he saw after shots were fired. RP 802. There was more than one person at the club wearing a red hoody. RP 772.

During all of his many prior interviews with the detectives and defense counsel, Mr. Walker never said anything about a guy in a red sweatshirt getting into the car with the shooter. RP 798. At the scene immediately after the shooting, Mr. Walker told officer Wallin that he did not see anything but just heard gunshots. RP 813-815.

During later interviews, Mr. Walker told the detectives that he had only seen Mr. Morgan a couple of times but did not know him or Mr. Embry, but had known Mr. Parker for a few months. RP 785-797. Mr. Walker stated that during the evening of the shooting, he had seen Mr. Parker, Mr. Morgan and Mr. Morgan at McCabe’s and they seemed to be having a good time. RP 779.

f. Curtis Hudson

Curtis Hudson is a gang member facing life in prison. Several weeks before this case was called for trial, Mr. Hudson decided to testify for the state with the hopes of receiving a reduced sentence for himself. RP 900, 935-941.

Right before the trial in the instant case began Mr. Hudson for the

first time told Detective Ringer that he was at McCabe's the night of the shooting and had arrived with his friend Manuel Hernandez who drove that night. RP 899. Mr. Hudson did not see any shots fired but heard them after he left the club. RP 909-910.

During the evening, Mr. Hudson saw Messrs. Morgan, Embry and Parker at the club the night of the shooting along with a number of Mr. Hudson's "associates". RP 900-906. Mr. Hudson described Mr. Morgan and Mr. Embry as Federal Way Hoover Crips. RP 907. During the evening there were no altercations, but at some point, without being able to hear the conversation, Mr. Hudson believed that T-Loc, a Young Gangster Crip was talking with Mr. Parker about a "beef" between these two men. RP 908-910.

Mr. Hudson stated that after McCabe's closed, Mr. Hernandez was standing next to him in the east side of the McCabe's parking lot when they both heard the shots fired. RP 929-930. From the parking lot in the dark night, Mr. Hudson initially testified that he saw a person with a red sweater running down Commerce Street with a heavy set white woman, previously identified as Ms. Crimmins running after him. RP 918, 931. Mr. Hudson admitted that he did not see the clothing on the person running down the street, but rather that he just remembered from the club, that Mr. Morgan had worn a red and gold hoody. RP 933. Mr. Hudson,

further admitted that although he had given the police twelve or thirteen different statements, he had never before said that the person running wore a red and gold hoody. RP 934.

Ms. Crimmins and Mr. Clark were the only people near the shooter. Mr. Clark was certain that Mr. Embry was the shooter and both Mr. Clark and Ms. Crimmins were certain that no one else was in the area and the shooter was wearing a black and white hoody with silver designs. RP 426, 429, 430, 437, 439, 440, 441, 554, 560, 616, 617, 723, 725-728.

g. Manuel Hernandez

Manuel Hernandez, Mr. Hudson's close friend, and a gang member like Mr. Hudson, pleaded guilty to dozens of crimes and was facing life imprisonment when he decided a few weeks before this case went to trial to testify for the state with the hopes of reducing his sentence. RP 963-964, 984-985, 1007.

Mr. Hernandez, saw Mr. Embry at the bar wearing a dark coat but he never saw Mr. Morgan. RP 965-969. Mr. Hernandez observed what he perceived to be an argument between Deuce, Drip and some other "black guy". RP 969. The video of this conversation distinctly shows that these men were not engaged in an argument. RP1440.

After the club closed, Mr. Hernandez heard gunshots coming from south 27<sup>th</sup> street. Mr. Hernandez initially testified that he saw a light

skinned man with a 5 point star on his neck, wearing a dark coat running from the shooting scene. RP 975. Mr. Hernandez later admitted that the man running was too far away to see a tattoo. RP 993. Mr. Hernandez said that Mr. Embry was wearing a dark coat and was running with a gun. RP 975-976. Mr. Hernandez saw another person running in the area who could have been running to get away from the gun shots or could have been running with Mr. Embry. RP 979-981. After shots were fired many people were running on both sides of 27<sup>th</sup> to get away from the shooting. RP 979, 982, 1014.

Mr. Hernandez did not know the direction taken by the shooter, or if anyone else ran with the shooter. RP 1005, 1015. During the interview with Detective Ringer, Mr. Hernandez was only 60% certain that the person he saw running was Mr. Embry because Mr. Hernandez only took a “quick glance” and just saw someone running. RP 1019.

h. Renae Campbell

Renae Campbell from the forensic department of the Tacoma Police Department testified that after analysis she was able to determine that the four bullet shell casings retrieved from the shooting scene were ejected from the same weapon. RP 1189.

i. Stolen Car

Christine Borland

Mr. Parker called Christine Boland a girlfriend of his on the night of the shooting and told her his brown Chevy Impala rental car had been stolen at McCabe's. RP 1041-1042. Mr. Parker asked Ms. Boland to pick him up at a location near Hwy 512. RP 1-24-1026, 1036.

After Mr. Parker was arrested some days later at 35<sup>th</sup> St. and Union, detective Ringer was called to that location. RP 1234-1235. Mr. Parker admitted to detective Ringer that he filed a missing car report at 3:00am stating the car was stolen between 1:20-1:30 am on February 24, 2009. Mr. Parker explained that he did not file the missing car report until 3:00am because he needed time to contact Enterprise Rental to obtain the vehicle identification number. RP 1240. Mr. Parker told Mr. Ringer that the car was stolen from in front of Ms. Borland's apartment. Mr. Parker said that he was at McCabe's that evening by himself and that he had a quiet evening shaking hands not talking too much. RP 1239. Mr. Parker indicated that he did not give men rides, but rather just had ladies in the car. Id.

j. 54<sup>th</sup> Street Bar and Grill Incident

Mr. Clark, his girlfriend and a friend went to the 54<sup>th</sup> Street Bar and Grill on New Year's Eve, 2008. RP 573. Mr. Parker was present with others that night including some gang members when a fight erupted. Mr. Clark hit Mr. Parker in the mouth and Little Peezo hit Mr. Clark on the

head. Mr. Parker's friends and other men and women fought until the fight broke up. RP 578-580, 702-703. Mr. Clark has been an active member of the Young Gangster Crips. RP 581. Mr. Clark knew that the fight was not a gang fight but rather just a fight. RP 586. Mr. Clark was not sure how or why the fight started. RP 586. Later in January, Mr. Clark spoke with Mr. Parker and Little Peezo, and was still angry with Little Peezo. RP 597-598. Mr. Clark told detective Ringer the fight was over girls. RP 1242. Mr. Clark and Little Peezo agreed to fight after Little Peezo healed from his current injuries. RP 597.

Mr. Clark denied telling Detective Ringer that he spoke with Parker about the 54<sup>th</sup> street fight and had revolved their hostilities. RP 634. Mr. Morgan was not present at the 54<sup>th</sup> Street Bar and Grill on New Year's Eve and was not in any manner connected with the fight that occurred that evening. RP 648. Ms. Crimmins was at the 54<sup>th</sup> street Bar and Grill on New Year's eve and she never saw Mr. Parker involved in the fight, rather she saw him after with a split lip. RP 494.

k. John Ringer

John Ringer, a Tacoma Police Detective was assigned as the lead detective in the instant case. RP 1229, 1233. The defense objected to detective Ringer testifying as a gang expert because all of his "expertise" was based on hearsay learned from talking to confidential informants,

complainants, accused persons and other gang members and the facts of the case were straightforward enough that an expert was not necessary to assist the jury. RP 184, 187, 1286-1288, 1294, 1296, 1408. Detective Ringer admitted that he never investigated a case involving Hoover Crips and Hilltop Crips working together, yet he nonetheless opined that these two groups were friendly and worked together. RP 1263-1264, 1396.

Moreover, detective Ringer admitted that he did not have any expertise on Seattle Gangs, but rather had experience from working with Tacoma gangs. RP 1294, 1296. Over objection, detective Ringer testified that he has seen gang cases where seemingly insignificant incidents can quickly escalate into violence. RP 1387. When asked to recollect such an occasion, detective Ringer was only able to discuss a 1990 incident where a female waived her hand out of a car and another car returned gunfire believing the female to be throwing gang signals. RP 1907.

While detective Ringer described himself as a gang expert, he has never written any articles or papers for publication for peer review, he does not have a degree in social anthropology and works almost exclusively in the Tacoma area with Tacoma gangs, rather than in a broader area. RP 1394-1395, 1413-1414.

Detective Ringer interviewed Mr. Parker, Mr. Embry and Mr. Morgan. Mr. Parker admitted to being a Hilltop Crip for a long time when

he was young. RP 1243. Mr. Morgan stated that he was an active member in the Five Deuce Hoover Crips out of Seattle and that he was at McCabe's on February 23, 2009 but that he was loaded and could not remember anything. RP 1258-1260. Mr. Embry stated he was a Hoover Crip and that he was chasing women when seen jogging away from McCabe's. RP 1269, 1366, 1772.

When asked why he was jogging away from McCabe's that night, Mr. Morgan responded "it is what it is" and also said "you will be able to put it together". RP 1261. Mr. Morgan told detective Ringer that he could not cooperate because of the code of conduct he was raised with. RP 1261. Mr. Morgan told detective Ringer that he would take his chances and go to trial. Mr. Ringer described Mr. Morgan as "articulate, intelligent and personable." RP 1261. After watching parts of the McCabe's video Mr. Morgan said, "can't do anything with that." RP 1262.

m. Gang Evidence 404(b)

The prosecutor introduced this case to the judge as a chance incident that occurred at McCabe's. RP 11. The trial court initially ruled that gang evidence would not be admissible stating that "while there certainly may be some connection here between the gang activity and this crime, it's a very scant showing." The court further held, "I can't find

probative value"... "to outweigh the extreme prejudice. RP 50-51. The trial court never held by a preponderance of the evidence that being a gang member was misconduct. RP 177-178.

The trial court reversed its ruling suppressing gang evidence after the trial court viewed Exhibit #6, a series of undated photographs taken from Mr. Parker and Mr. Embry's MySpace account depicting Mr. Morgan and Mr. Embry together with others throwing gang signs and Mr. Parker with Mr. Embry and others throwing gang signs. RP 1295, 1302-1304, 1408. Picture # 1 depicted Mr. Morgan and Mr. Embry, and other gang members. Picture #2 shows Mr. Morgan with Mr. Embry and others. RP 1302-1304. Picture #3 showed Mr. Embry, Mr. Parker and others. Picture #4 shows Mr. Parker, Mr. Embry and Isaiah Campbell. Picture # 5 showed Mr. Morgan, Mr. Embry and others. RP 1304. There were no photographs of Mr. Morgan and Mr. Parker together.

The trial court stated:

while there may not be a direct loyalty or allegiance between the Hoover gang or Hilltop Crips, I think the inference here is there was a close enough of connection [sic]that would encourage, at the request of Mr. Parker, two known associates to commit allegedly a significant assault against the victim in this case.

And I think without that, the State is left with really the inability to establish any kind of motive of this other than the assault that occurred upon Mr. Parker as a previous occasion that was a relatively trivial assault.....

I think in cases such as this, we are putting the jury in

a very difficult position by only giving them a very small piece of the puzzle without giving the balance of it to them and giving them a reason to understand why this degree of assault would have occurred upon this victim in this case.

RP 134-135.

The trial court allowed the gang evidence under res gestae, motive, plan and preparation to –to show close association. “I think the case law points out retaliation of violence and gang violence is relatively common experience in this, and I think it does tip the balancing in favor of admissibility...,despite the substantial prejudice”. RP 133-134.

Detective Ringer informed the jury that gang members often drive each other’s cars, share guns, and work together. RP 1393. Detective Ringer opined that the defendants worked together as gang members even though he had no knowledge of Mr. Morgan other than on hearsay obtained from confidential informants who identified the people in Exhibit # 6 and the McCabe’s video. RP 1292-1293. There were no photographs of Mr. Morgan and Mr. Parker together. Ex. 6.

n. The McCabe’s Security Video  
and Photographs

Over defense objection detective Ringer was permitted to narrate the McCabe’s video as a “fact witness” even though the video was self-explanatory and detective Ringer had no personal knowledge of the

persons depicted in the video. RP 1332-1333.

The court limited detective Ringer's comments on the video to identifying the participants. RP 1286-1288, 1291, 1306, 1311, 1333-1334. Detective Ringer violated this order many times. The court sustained all but one objection. First Mr. Ringer commented that Mr. Embry entered the club with others but was not interacting with them; second Ringer began narrating rather than just identifying the players and, third Ringer speculated regarding whether Mr. Morgan and Mr. Embry were visible in a certain scene. RP 1305, 1306, 1339, 1355. The court overruled an objection to detective Ringer narrating another portion of the video showing car lights visible and then disappearing. RP 1344.

There were no video scenes involving Mr. Morgan and Mr. Parker conversing together inside or outside McCabe's. RP 1338-1365. At times, Mr. Morgan and Mr. Parker were visible on the video screen at the same time but they were not interacting with each other. *Id.*

After closing, the video depicted Mr. Parker and Mr. Morgan exit together; Mr. Parker left Mr. Morgan and met up with Mr. Lovelace who exited the club with two women. Mr. Morgan walked toward the far end of the McCabe's parking lot while Mr. Parker walked back toward the McCabe's entrance. Later Mr. Morgan walked east and interacted with Mr. Embry for a few seconds. RP 1345, 1362-1365, 1429. Mr. Morgan and

Mr. Embry then jogged off towards 27<sup>th</sup> and Pacific. RP 1366. Mr. Morgan and the other co-defendants never left McCabe's before closing and all of the men who entered McCabe's were searched for weapons. RP 1568, 432-1433.

o. Comment on Right to Remain Silent

Over defense objections, Detective Ringer was permitted to testify about Mr. Morgan's interview comments implicating his right to remain silent. Mr. Ringer testified to Mr. Morgan's comments that he could not cooperate because of the code of conduct he was raised with and would have to take his chances in trial. RP 1261.

p. Randall Embry

Mr. Embry testified in his own defense and informed the jury that he did not shoot Mr. Clark, that he drove to McCabe's on February 23, 2009 in a white Ford Explorer and that he left before shots were fired. RP 1498-1499, 1518. The video depicts a car leaving before the shooting. RP 1370. Detective Ringer was permitted to testify that Mr. Embry told him he did not do anything and would not tell him if he did because of his code of conduct not to implicate others. RP 1772-1773

C. ARGUMENTS

1. MR. MORGAN WAS DENIED DUE PROCESS WHERE THE TRIAL COURT FAILED TO DELINEATE IN THE "TO CONVICT"

INSTRUCTION THE ESSENTIAL ELEMENTS OF  
PREMEDITATION.

The “to convict” jury instruction in Mr. Morgan’s case failed to list the essential element of “premeditation”. CP 397. The “to convict” instruction number 15, the “yardstick”<sup>1</sup> provided in Mr. Morgan’s case delineated the elements of attempted first degree as follows:

- (1) That on or about the 24<sup>th</sup> day of February, 2009, the defendant or an accomplice did an act that was a substantial step toward the commission of murder in the first degree;
- (2) That the act was done with the intent to commit murder in the first degree; and
- (3) That the act occurred in the State of Washington.

CP 397 (Jury instruction 15).

First degree murder as charged in the instant case under RCW 9A.32.030(1)(a); provided in relevant part as follows:

- (1) A person is guilty of murder in the first degree when:
  - (a) With a **premeditated** intent to cause the death of another person, he or she causes the death of such person or of a third person;

(Emphasis added) RCW 9A.32.030(1)(a).

The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld.” State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Thus, “a ‘to convict’ [ jury] instruction

must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010)<sup>2</sup>, citing, State v. Smith, 131 Wn. 2d 258, 263, 930 P. 2d 917 (1997), quoting, State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). The jury may not be required to look to other instructions to supply a missing element from a “to convict” jury instruction. Smith, 131 Wn. 2d at 262-63. “An instruction purporting to list all of the elements of a crime must in fact do so.” Smith, 131 Wn.2d at 262-263, quoting, Emmanuel, 42 Wn. 2d at 819-820.

An accused is denied his right to a constitutional trial when the trial court fails to delineate in the “to convict” instruction all of the essential elements of the crime charged. Smith, 131 Wn.2d at 262-263; Emmanuel, 42 Wn.at 821.

In Emmanuel the defendant admitted the homicide and the court provided a “to convict” instruction defining murder in the second degree that omitted the terms “excusable or justifiable”. This was held reversible error. Emmanuel, 42 Wn.2d at 820-821. In Smith, the Supreme Court

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<sup>1</sup> State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010)

<sup>2</sup> In Seibert, a controlled substance case, the narcotic was not an essential element because it did not increase the maximum sentence. Sibert, 168 Wn.2d at 311.

reversed the Court of Appeals, where the “to convict” instruction read “‘crime of Conspiracy to Commit Murder in the First Degree’ rather than the required, ‘crime of Murder in the First Degree’ since First Degree Murder was the subordinate crime of the alleged conspiracy.” Smith, 131 Wn.2d at 262.

The Court in Smith, citing to Emmanuel, supra, reiterated that “jurors are not required to supply an omitted element by referring to other jury instructions.” Smith, 131 Wn2d at 263. As in Smith, supra, and Emmanuel, supra , the omission of the essential element of premeditation impermissibly relieved the state of proving all essential elements of murder in the first degree. This was reversible error.

a. Missing Element Not Harmless Error

An instructional error is presumed to have been prejudicial unless it affirmatively appears that it was harmless. Smith, 131 Wn.2d at 264-265, citing, State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). “A harmless error is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case.*” (Emphasis in original) Wanrow, 88 Wn.2d at 237, 559 P.2d 548. Once an error is established to be prejudicial, it is the State's burden to show that it was harmless. State v. Burri, 87 Wn.2d 175, 182, 550 P.2d 507 (1976).

In finding the error prejudicial and reversible error in Smith, the Court made clear that even when other instructions supply the missing element, when the “to convict” instruction omits an element it is not possible to “conclude that the erroneous instruction ‘in no way affected the outcome of the case.’”. Smith, 131 Wn.2d at 264-265. The reviewing Courts “assume that the jury relied upon the “to convict” instruction as a correct statement of the law.” Id.

In Mr. Morgan’s case, under Smith and Emmanuel, the error of omitting the premeditation element in the “to convict” instruction, the instruction relied on by the jury to contain all essential elements, was not harmless and the conviction must be reversed and the matter remanded for a new trial.

2. BRYANT MORGAN WAS CONVICTED OF ATTEMPTED MURDER IN THE FIRST DEGREE BASED ON INSUFFICIENT EVIDENCE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

- a. Summary

The facts at their worst do not establish beyond a reasonable doubt, by reasonable inference or directly, the elements of attempted murder in the first degree. The facts establish Bryant Morgan was present at McCabe’s Bar and Grill on February 23, 2009 and exited the bar at closing time on February 24, 2009. That Mr. Morgan wore a red hoodie the night of the

shooting, that other people wore red hoody's that night at McCabe's, that Mr. Morgan at some point during the evening spoke with many patrons including Mr. Embry. RP 694, 706, 725, 726, 728, 772, 802.

No witness testified to the nature of any of the conversations that took place at McCabe's but one of the state's witnesses testified that Mr. Morgan and others appeared to be having a good time inside McCabe's. RP 779. After the bar closed, and that after milling about outside after closing, Mr. Morgan and Mr. Embry jogged off towards 27<sup>th</sup> street. RP 1261, 1366. Mr. Morgan was too loaded to remember what occurred that night. RP 1259, 1260. Mr. Embry said he was chasing women. RP1259, 1366, 1772.

Mr. Clark and Ms. Crimmins identified Mr. Embry as the shooter from one foot away and both were certain that no one else was in the area and no one else entered the car that drove away with the shooter. RP 514, 668-670.

Mr. Hudson and Mr. Hernandez, both gang members facing life in prison, turned state's witnesses several weeks before trial. RP 900, 1007. Officer Stanley, the police officer on duty at McCabe's informed the jury that it was pitch black where the shooting occurred and that nothing was visible until officer Stanley illuminated the street with his patrol car headlights. RP 304, 308.

Mr. Hudson who was in front of McCabe's some distance away from the shooting initially testified that he saw someone with a red hoody duck into the get-away car. RP 918, 931, 933, 934. Mr. Hudson later admitted that he did not actually see anyone running with a red sweater and did not see anyone with a red hoody duck into a car, but rather he simply remembered that Mr. Morgan wore a red sweater inside the club sweater. 933-934. Mr. Hudson could not see the person who ducked inside the car and had no idea of his identity. Id. Witnesses admitted that there was more than one person at McCabe's that night wearing a red hoody. RP 802.

Mr. Hernandez saw many people running towards their cars in the direction of 27<sup>th</sup> street to get away from the gun shots; he could not determine if anyone was running with Mr. Embry. RP 979-981.

b. Standard of Proof

When determining questions of insufficient evidence to establish a crime, the appellate Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Asaeli, 150 Wn. App. 543, 567, 208 P.3d 1136 (2009); State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Due process requires the government prove every element of a crime upon which a

defendant is convicted beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct.1068, 25 L.Ed. 2d 368 (197).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “In determining the sufficiency of the evidence, circumstantial evidence is as reliable as direct evidence.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) . The appellate Court will defer to the trier of fact on any issue that involves “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

c. Attempted First Degree Murder

Mr. Morgan was charged directly and as an accomplice with attempted murder in the first degree by taking a substantial step toward the commission of that crime with premeditated intent to kill Mr. Clark. CP 297-280. To prove Mr. Morgan was an accomplice to Mr. Clark's murder, the State had to prove beyond a reasonable doubt that Mr. Morgan (1) with premeditation took a substantial step toward the commission of attempted first degree murder, (2) knew his actions would promote or facilitate the crime of premeditated first degree murder, (3) was present and ready to assist in some manner, and (4) was not merely present at the scene with

some knowledge of potential criminal activity. RCW 9A.08.020(3). RCW 9A.32.030(1)(a).

Premeditation as instructed in Mr. Morgan's case means:

thought over beforehand. When a person, after any deliberation forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than just a moment in appoint of time. The law requires some time, however long or a short, in which a design to kill is deliberately formed.

CP 392-427 (Jury instruction 12). The accomplice liability instruction provided:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 392-427. Attempt as instructed in Mr. Morgan's case provides in relevant part:

A person commits the crime of attempted murder in the first degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

CP 392-427 (Jury instruction #9)

Aside from the fact that the omission of the element of premeditation from the “to convict” instruction renders the conviction invalid as discussed in the previous argument, there was no evidence of premeditation.

The prosecutor, Mr. Clark and Ms. Crimmins agreed that there was no plan to go to McCabe’s the night of the shooting. RP 644. No witness overheard a conversation between Mr. Morgan and anyone else. RP 757, 908-910, 1440. During the evening, Mr. Morgan was observed standing in the vicinity of Mr. Embry, but there were no prolonged interactions. RP 694, 706, 725, 726, 728. From video evidence after the club closed, Mr. Morgan was observed talking for a few seconds to Mr. Parker outside the club and he was later observed jogging with Mr. Embry in the direction of Mr. Parker’s car shortly before Mr. Embry shot Mr. Clark. RP 1345, 1363, 1364, 1429.

Mr. Morgan was not identified as being present when Mr. Embry shot Mr. Clark and the only witnesses to suggest that a second unidentified person, entered the getaway car, contradicted Mr. Clark and Ms.

Crimmins. RP 514, 616, 617, 723, 725-728, 769, 772. Furthermore, two these witnesses, Mr. Hudson and Mr. Hernandez were facing life in prison when they produced testimony about the possibility of someone else being near the car after the shooting. RP 935-941, 963-964. Both Mr. Hudson and Mr. Hernandez admitted that it was too dark to identify anyone or their clothing near the get-away car. RP 918, 931, 933, 934, 975. Mr. Hernandez only had a “quick glance” at the car and admitted it was too dark to identify a person. RP 933, 975

Mr. Walker, like Mr. Hudson also initially lied about seeing a person wearing a red hoody get into the car, but later admitted that he could not see what the person was wearing. RP 769, 772.

There was evidence that many gang members were present at McCabe’s the night of the shooting and many patrons had some familiarity with each other, but there was no fighting or trouble brewing that night between any of the patrons. RP 416, 417, 581, 694-696, 900-910, 935-941, 1007. There was no evidence that Mr. Morgan thought over beforehand or in any manner planned to participate in the shooting of Mr. Clark.

The facts and law set forth in State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136 (2008) are closely on point. In Asaeli, a multiple co-defendant first degree murder case, the evidence established that Vaielua went to a bar with his codefendants, that he was present at the park where

the shooting took place, that he drove Williams, the person who approached Blaac Fola (the deceased) and asked him to fight, and that Vaielua was aware that some members of the group he was with were was trying to locate Fola. As Williams, sought out Fola, and challenged him to a fight, Asaeli, believing Fola was going to shoot Williams, shot Fola and killed him. Vaielua was standing nearby talking to a friend of Fola's. Asaeli, 150 Wn.2d at 568-70.

The Court held that this evidence failed to show that Asaeli was planning to kill Blaac or that Vaielua was present at the scene with more than mere knowledge of some potential interaction with Fola. Asaeli 150 Wn2d at 568.

At best, this evidence is sufficient to suggest that Vaielua and the others agreed to meet at the park after the bar closed and that Vaielua may have known that someone from his group was trying to locate Fola. But the record contains no evidence, direct or indirect, establishing that Vaielua was aware of any plan, by Asaeli, Williams, or anyone else, to assault or shoot Fola.

Asaeli, 150 Wn.2d at 568-569.

Mr. Vaielua like Mr. Morgan was accused of being a gang member. Mr. Vaielua like Mr. Morgan was out at a club the night of the shooting. In the Asaeli case, the victim, like Mr. Clark in this case, was involved in an altercation with one of the co-defendants prior to the shooting. In both cases neither defendant was present or involved in the

earlier incident. In both cases the state proposed the same theory that the shootings were part of some sort of gang retaliation for the prior incident. Asaeli, 150 Wn. App. at 569-570. In Asaeli, based on insufficient evidence, the Court reversed Mr. Valieua's conviction for murder and remanded for dismissal with prejudice. Asaeli, 150 Wn. App. at 569-570.

In Mr. Morgan's case, the evidence is similar but less persuasive than the evidence deemed insufficient in Asaeli. Mr. Morgan was present at the bar, but not at the shooting. There was no evidence that Mr. Morgan had any knowledge that Mr. Parker or Mr. Embry were looking for Mr. Clark. There was also no evidence that Mr. Morgan had any knowledge that Mr. Embry was going to shoot Mr. Clark. The evidence established only that Mr. Morgan jogged off in the direction of Mr. Parker's car alongside Mr. Embry. And before the shooting Mr. Morgan exchanged a few unknown words with Mr. Embry.

The witnesses all ultimately agreed that no one saw a person wearing a red hoody enter Mr. Parker's car or standing near Mr. Embry after the shooting. Officer Stanley corroborated that it was too dark to see anything, and Mr. Clark and Ms. Crimmins both of whom were only feet away from Mr. Embry and Mr. Parker's car, were certain that there was not a second person near the car Mr. Embry entered after the shooting. RP514, 617, 619.

Mr. Morgan's presence at McCabe's, his presence outside McCabe's and his jogging off towards 27<sup>th</sup> Street with Mr. Embry was insufficient evidence to prove Mr. Morgan's complicity in the shooting. There was also no evidence of premeditation or that Mr. Morgan had any knowledge that Mr. Embry was going to shoot Mr. Clark. Rather as in Asaeli, Mr. Morgan was merely present in the area. Asaeli, 150 Wn. App. at 569-570. Based on insufficient evidence, this Court must reverse and remand for dismissal with prejudice.

3. BRYANT MORGAN WAS CONVICTED  
OF ILLEGAL POSSESSION OF A  
FIREARM BASED ON INSUFFICIENT  
EVIDENCE TO ESTABLISH GUILT  
BEYOND A REASONABLE DOUBT

There was no evidence of possession of a firearm and a firearm was never produced at trial. Rather, the forensic witness testified that spent shells were ejected from a single gun. RP 1198. No one saw or described a gun, the gun was never located in the get-away car, and Mr. Morgan was not identified as ever being present in the car or of handling a gun.

Mr. Morgan's half time motion to dismiss the charge for lack of evidence of possession of a gun was denied by the court stating that there "could be circumstantial evidence of constructive possession". RP1471, 1478-1479.

Armed with a firearm under RCW 9.41.040 provides in relevant part:

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

Possession may be either actual or constructive. State v. Callahan, 77 Wash.2d 27, 29, 459 P.2d 400 (1969). Actual possession occurs when the contraband is in the personal custody of the person charged. State v. Staley, 123 Wash.2d 794, 798, 872 P.2d 502 (1994). The State did not argue that Mr. Morgan had actual possession of the gun. Rather the State theorized that Mr. Morgan could have been near the gun if the gun was in the car and if Mr. Morgan was also in the car. Possible proximity to the gun is insufficient to prove constructive possession. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

Constructive possession requires a showing that the defendant had dominion and control over the contraband or over the premises where the contraband was found. Echeverria, 85 Wn. App. at 783. "The ability to reduce an object to actual possession is an aspect of dominion and control." *Id.* In establishing dominion and control, the totality of the

circumstances must be considered and no single factor is dispositive. State v. Alvarez, 105 Wn. App. 215, 221, 19 P.3d 485 (2001); State v. Bradford, 60 Wn. App. 857, 862-63, 808 P.2d 174 (1991).

In Echeverria, the Court reversed a conviction for unlawfully possessing a "throwing star". The throwing star was found underneath the driver's seat, not in plain view. The Court explained the reversal, as being based on the fact that "[c]lose proximity alone is not enough." Echeverria, 85 Wn. App. at 784.

Mr. Morgan's possession of a firearm charge is far more speculative than the possession of a throwing star in Echeverria, because in Mr. Morgan's case there was only speculation that Mr. Morgan and/or the gun were ever in the car. In Echeverria, the state's argument that Echeverria was in constructive possession of the throwing star in the car because he was the driver, failed. Here, no one was able to ever place Mr. Morgan or the gun in the car.

In Callahan, and Spruell, the Courts held that despite temporary or passing of the control contraband and close proximity to the drugs, this evidence was not sufficiently substantial to support a finding of constructive possession. Callahan, 77 Wn.2d at 31-32 (Callahan admitted handling drugs); Spruell, 57 Wn. App. at 384-89 (Spruell's fingerprints were on a plate containing cocaine).

Echeverria, Callahan and Spruell make clear that constructive possession is not established with proximity to the contraband or even proximity with momentary physical handling. In Mr. Morgan's case there was neither proximity, momentary or transient possession, or any other evidence of possession; there was only speculation, which is insufficient to establish directly or by reasonable inference that Mr. Morgan illegally possessed a gun on February 24, 2009. For this reason, this Court must reverse the conviction and remand for dismissal with prejudice.

4. THE ADMISSION OF ASSOCIATIONAL MEMBERSHIP IN A GANG VIOLATED MR. MORGAN'S FIRST AMENDMENT RIGHT TO A FAIR TRIAL AND WAS AN ABUSE OF DISCRETION UNDER ER 404(b).

The state sought to introduce irrelevant gang evidence to shore up a weak case against Mr. Morgan. Mr. Morgan may be a gang member, but the state failed to provide evidence that the instant case was a gang case or that being a gang member was relevant to the crime.

a. Gang Evidence Inadmissible Under The First Amendment and ER 404(b).

Evidence of prior bad acts is presumptively inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). This includes "acts that are merely unpopular or disgraceful." State v. Halstien, 122 Wn.2d

109, 126, 857 P.2d 270 (1993) (quoting 5 Karl B. Tegland, *Washington Practice: Evidence* sec.114, at 383-84 (3d ed.1989)). To admit such evidence, a trial court must determine: (1) the prior bad act occurred by a preponderance of the evidence; (2) the evidence is offered for an admissible purpose; (3) it is relevant to prove an element or rebut a defense; and (4) the evidence is more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). “Preponderance of the evidence means that considering all the evidence, the proposition asserted must be more probably true than not.” State v. Ginn, 128 Wn.App. 872, 878, 117 P.3d 1155 (2005).

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) is designed ‘to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.’” State v. Ra, 144 Wn.App. 688, 701-702, 175 P.3d 609, review denied, 164 Wn.2d 1016, 195 P.3d 88 (2008), citing, Foxhoven, 161 Wn.2d at 175, State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). The decision to admit or deny admission of ER 404(b) evidence is reviewed for abuse of discretion. Lane, 125 Wn.2d at 831. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel.

Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A trial court may admit such evidence for other legitimate purposes “such as proof of motive, plan, or identity.” State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

Evidence is relevant if it has any tendency to make the existence of any material fact more or less probable. ER 401. But even relevant evidence is inadmissible if the danger of unfair prejudice substantially outweighs its probative value. ER 403.

The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). In determining whether the probative value of evidence outweighs its unfair prejudice, a court should consider the availability of other means of proof and other factors. Powell, 126 Wn.2d at 264. When evidence is unduly prejudicial, ‘the minute peg of relevancy is said to be obscured by the dirty linen hung upon it.’ State v. Turner, 29 Wn.App. 282, 289, 627 P.2d 1324 (1981). A trial court should resolve doubts as to admissibility in favor of exclusion. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Because of the grave danger of unfair prejudice, evidence of gang affiliation is inadmissible unless the State establishes a sufficient nexus between the defendant's gang affiliation and the crime charged. Dawson v.

Delaware, 503 U.S. 159, 165-168, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992); accord, State v. Scott, 151 Wn.App. 520, 526-527, 213 P.3d 71 (2009); State v. Campbell, 78 Wn.App. 813, 822, 901 P.2d 1050, review denied, 128 Wn.2d 1004, 907 P.2d 296 (1995).

Evidence of gang membership is inadmissible when it proves no more than a defendant's abstract beliefs. Dawson v. Delaware, 503 U.S. at 165-168 (gang membership inadmissible to prove abstract belief because it is protected by constitutional rights of freedom of association and freedom of speech); Campbell, 78 Wn.App. at 822, 901 P.2d 1050.

The admission of gang association violated Mr. Morgan's First Amendment right to the freedom association because it was designed to establish guilt by association. Regardless of Mr. Morgan's or any other parties membership in a gang, there was no evidence of a nexus between the crime and gang membership.

In Asaeli, the trial court admitted gang evidence because the state asserted that the shooting was a gang for the victim's behavior the week before his death and was therefore relevant to the issues of premeditation, intent, and motive. Asaeli, 150 Wn. App. at 573, 577. The evidence however failed to establish a connection between gang activity and the shooting. The evidence established that Asaeli wanted to be in a gang and that Williams his cousin was at the same club with Asaeli and the victim,

and had tried to fight with Fola. There was also evidence that Fola was a gang member. Asaeli, 150 Wn. App. at 577. This Court held that the state's theory of gang retaliation without actual evidence of a gang with a gang purpose for the shooting was overly prejudicial and reversible error. Asaeli, 150 Wn.App. at 580.

In Scott, the Court similarly held that the state failed to establish with actual evidence that the gang related evidence admitted at trial was relevant to the crimes charged, rather than just the state's proposition and theory which the state wished to use to establish that Scott was a "bad person". Scott, 151 Wn. App. at 529. In reversing the verdict the Court held that while the state articulated a valid basis for the admission of gang evidence, it failed to produce supporting evidence.

The Court in Scott articulated particular concerns with using gang evidence in a case where the defendant is charged as an accomplice. Scott, 151 Wn. App. at 529. Gang evidence is only admissible if that the person charged was seeking to further the gang's goals to enhance gang status or as retaliation against one's gang. Id. In Scott, the state's failure to connect the gang evidence to support both the stated motive and as a basis for demonstrating concerted activity created reversible error. Scott, 151 Wn. App. at 530-531.

In State v. Bluehorse, 159 Wn. App. 410, \_\_P.3d\_\_ (2011), an

exceptional sentence case based on a gang aggravator, this Court reversed the exceptional sentence where the prosecutor alleged and promised that the case was a gang case but failed to produce sufficient evidence to support its allegations. This Court held that “generalized statements alone also fail to satisfy the State's burden at trial to prove the gang aggravator beyond a reasonable doubt,…” Bluehorse, 159 Wn.App at page 8.

The State failed to present evidence that Bluehorse announced a rival gang status contemporaneously with the shooting or that he had recently confronted and been disrespected or provoked by rival gang members, which would, have triggered a contemporaneous move to retaliate. Moreover, the State failed to present evidence that Bluehorse sought to advance his position in a gang or commit a drive-by shooting to enhance his status as a gang member. In Bluehorse, the State failed to present evidence showing that Bluehorse committed the shooting for any gang related purpose.

In Ra, 144 Wn.App. at 701-702, without ever establishing that the crimes charged: attempted murder and drive by shooting were gang related, the prosecutor questioned the detective about his gang unit and why the case was assigned to him. The prosecutor also questioned a witness Bun about his and the defendant's groups' gang-like behavior. Finally, in closing, the prosecutor argued that Ra belonged to a culture of

violence and that he elevated his status in his group, becoming the 'baddest of the bad,' by carrying a firearm and shooting someone." This Court held that the prosecutor's questions to the witness and argument to the jury were unduly prejudicial where there was no established connection between the crimes and the gang-like behavior. The Court reversed the convictions. Ra, 144 Wn. App. at 701-702.

In United States v. Roark, 924 F.2d 1426, 1434 (9<sup>th</sup> Cir. 1991), the defendant and three others, all of whom were Hells Angels, were charged with conspiracy to manufacturing methamphetamines. Over defense objections, the state introduced evidence that Roark was a member of the Hells Angels motorcycle club, and that club had an "institutional criminality" and involvement in drug manufacturing and distribution. Id. at Roark, 924 F.2d 1430, 1434. The judge gave a strongly worded instruction to disregard the evidence. Roark, 924 F.2d at 1432-33.

"[T]he government improperly inject[ed] the Hells Angels Motorcycle Club into the case, virtually as an uncharged defendant". Roark, 924 F.2d at 1434. The jury was informed that the defendant was a member of the Hell's Angel's motorcycle gang and then heard substantial, damaging testimony about the gang's illicit activities. The trial court observed, the testimony was largely an indictment of the motorcycle gang and "did not go really to the guilt or innocence" of the defendant. Roark,

924 F.2d at 1433 (internal quotation marks omitted). The Court of Appeals held the entire theme of the trial was "guilty by association" that could not be cured by an instruction, and ordered a new trial due to the prosecution's "relentless attempt to convict [the defendant] through his association with the motorcycle club." Roark, 924 F.2d at 1433-1434.

In United States v. Street, 548 F.3d 618 (8<sup>th</sup> Cir. 2008), the Court agreed with the Court in Roark that "even in that situation where a member of a gang allegedly engaged in conduct which conformed to the gang's reputation, it was inappropriate to expose the jury to such evidence because it would be "inherently and unfairly prejudicial" and would "deflect[ ] the jury's attention from the immediate charges and cause [ ] it to prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged." U.S. v. Street, 548 F.3d at 632, quoting, Roark, 924 F.2d at 1433-1434.

In Street, the Court of Appeals concluded similarly to Roark, that the gang reputation evidence had no connection to the murder charges and Street was not a gang member nor ever had been. Street, 548 U.S. at 632-633. Rather, Street's associates were gang members who "occasionally provided Street with precursor chemicals for his drug operation and purchased the finished methamphetamine." *Id.*

In Street, the state did not connect Street to the gang via any

evidence that Street believed in the Forasteros or subscribed to their philosophy, yet argued during its closing that Street's casual associations with a few El Forasteros members was sufficient for the gang's anti-snitch code "to rub off on [him]." Street, 548 U.S. at 632-633.

The Court held that the testimony about "outlaw motorcycle gangs and El Forasteros was excessive, unduly prejudicial, and in great part completely irrelevant to the charged offenses. The district court reversed the convictions finding the admission of evidence reversible error. Street, 548 U.S. at 633.

By contrast in State v. Johnson, 124 Wn.2d 57, 64-66, 73, 873 P.2d 514 (1994), the Supreme Court upheld an exceptional sentence based on a gang aggravating factor where gang motivation was proven beyond a reasonable doubt. The evidence provided that a shooting occurred immediately after members of one gang saw several rival gang members on their territory, that all the individuals involved " 'flashed' " gang signs at each other, and that one gang member ran away and shortly reappeared with Johnson who had a firearm. Johnson, 124 Wn.2d at 70, 78-79.

Similarly, in State v. Smith, 64 Wn.App. 620, 622-23, 825 P.2d 741 (1992), the trial court imposed an exceptional sentence based on a gang aggravating factor where the state proved that the murder was in furtherance of the gang. Smith specifically went out on a " 'mission' " to

commit a drive-by shooting against rival gang members and perceived a “ ‘wave’ ” from one of the victims as a rival gang sign.. Smith, 64 Wn.App. at 623, 624-25.

Again in State v. Yarbrough, 151 Wn.App. 66, 96, 210 P.3d 1029 (2009), the state presented evidence that: (1) Yarbrough was a Crips gang member; (2) Yarbrough perceived the victim as a member of a rival gang; (3) the two gangs had had a previous confrontation four days earlier, during which a Crip threatened to open fire on the rival gang; and (4) Yarbrough shot the victim after uttering, “This is Hilltop Crip, cuz, what you know about that,” an insulting challenge and warning to the rival gang that gunfire might soon erupt. Yarbrough, 151 Wn. App. at 97. Based on this substantive evidence the Court held that the jury could reasonably infer that Yarbrough committed the crime to advance or maintain his position in his gang. Yarbrough, 151 Wn. App. at 97, 210 P.3d 1029.

The nexus apparent in Smith, Johnson and Yarborough is lacking here. In Mr. Morgan’s case, the gang evidence was not relevant or admissible to prove Mr. Morgan’s motive or intent. The State asserted that the shooting was a gang retaliation killing, but there was no evidence to support this theory. The gang evidence was used as propensity by virtue of gang association. This is precisely the kind of logical inference forbidden by ER 404(b). It was particularly prejudicial here where the evidence was

uncontroverted that Mr. Morgan had no prior connection to Mr. Clark, that the Hoover Crips never had an issue with the Young Gangster Crips (Mr. Clark's gang), that Mr. Morgan did not know Mr. Clark and there was no evidence that Mr. Morgan was furthering a gang purpose or that he was furthering his status as a gang member.

The State did not establish a sufficient nexus between Mr. Morgan's gang membership and the crimes charged. The evidence of a prior fight between Mr. Parker and others two months before the shooting and generic information about gangs reacting with violence does not sufficiently establish a link between Mr. Morgan's gang membership and the crimes committed. RP 10-11, 18-21, 38, 50, 51, 131, 132, 490, 580, 586, 587, 590, 634, 638, 895.

In Mr. Morgan's case, as in Bluehorse, supra, Scott, supra, Ra, supra, and Asaeli, supra, the trial abused its discretion by admitting gang evidence contrary to the requirements set forth under 404(b) because there was no connection between gang status and the crime and violated Mr. Morgan's right to a fair trial by permitting guilt by association.

b. Association Evidence Not Harmless Error

Evidentiary errors, such as erroneous admission of ER 404(b) evidence, require reversal when the error, "within reasonable probability, materially affected the outcome." Everybodytalksabout, 145 Wn.2d at 469,

quoting, State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Errors are only harmless if insignificant against the backdrop of all of the evidence presented. Everybodytalksabout, 145 Wn.2d at 469. If the outcome of the trial would have differed without the evidence it is not harmless. Scott, 151 Wn. App. at 528-529; Asaeli, 150 Wn. App. at 579-80; State v. Ra, 144 Wn.App. at 701-702, accord, Street, 548 U.S. at 633.

In Mr. Morgan's case as in Bluehorse, Scott, Asaeli, and Ra, the evidence was not harmless because, within reasonable probability because the evidence materially affected the outcome. Without the prejudicial evidence and testimony, the jury, like the trial court, would have clearly understood that the state did not have a case against Mr. Morgan. RP134-135. Without the offending evidence and testimony in violation of the First Amendment and ER 404(b), there was more than a reasonable probability that the outcome would have differed. For these reasons, reversal and remand for a new trial is required.

5. DETECTIVE RINGER'S GANG TESTIMONY VIOLATED MR. MORGAN'S RIGHT TO A TRIAL BY JURY BECAUSE HE OPINED THAT MR. MORGAN WAS GUILTY WHICH INVADED THE PROVNCNE OF THE JURY.

Detective Ringer's opinion testimony that this was a gang shooting in retaliation for a relatively insignificant fight violated Mr. Morgan's

constitutional right to a jury trial under the federal and state constitutions because detective Ringer testimony about gangs was a comment on Mr. Morgan's guilt by association . It is the jury's responsibility to determine the defendant's guilt or innocence; no witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or by inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Farr-Lenzini, 93 Wn. App. 453, 459-460, 970 P.2d 313 (1999); State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967).

Detective Ringer's opinion invaded the jury's independent determination of the facts and violated Mr. Morgan's constitutional right. State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985). The Court in Farr-Lenzini explained that "the closer the tie between an opinion and the ultimate issue of fact, the stronger the supporting factual basis must be." Farr-Lenzini, 93 Wn. App. at 459-460 (citations omitted).

Under ER 704 a witness may offer an opinion or inference on an ultimate issue that the trier of fact must decide provided that the opinion or inference is otherwise admissible under ER 403, ER 701, and ER 702; Seattle v. Heatley, 70 Wn .App. 573, 578-79, 854 P.2d 658 (1993).

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3 ER 701 provides in relevant part:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b)

In Farr-Lenzini, a trooper testified in an attempting to elude case that the defendant's driving pattern was consistent with a person eluding the police. From the record it was not possible to determine if the trooper was testifying as an expert or lay witness. Farr-Lenzini, 93 Wn. App. at 458, 460, 461. The Court held that the trooper's opinion was inadmissible under ER 702 and ER 701. The trooper was an expert in driving, traffic matters, accident reconstruction but not in assessing people's state of mind, thus under the first prong, the trooper did not qualify as an expert to the matters to which he testified. Farr-Lenzini, 93 Wn. App. at 458, 460, 461, citing, Queen City Farms, Inc. v. Central Nat'l Ins. Co., 126 Wn.2d

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helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 702 provides in relevant part

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

To determine admissibility under ER 702, the court must first determine whether the: "(i) the proffered witness qualify as an expert; and (ii) would the proposed testimony be helpful to the trier of fact." State v. Greene, 92 Wn. App. 80, 96, 960 P.2d 980 (1998); State v. Janes, 121 Wn.2d 220, 235-36, 850 P.2d 495 (1993).

ER 403 provides in relevant part.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

50, 102-104, 882 P.2d 703, 891 P.2d 718 (1994).

The Court also held that the trooper's testimony failed the second prong because it was not helpful to the jury. Farr-Lenzini, 93 Wn. App. at 461. In making this finding the Court determined that whether a person was attempting to elude a police officer did not concern "matters beyond the knowledge of the average layperson" Farr-Lenzini, 93 Wn. App. at 461, quoting, State v. Jones, 59 Wn.App. 744, 750, 801 P.2d 263 (1990).

The Court also held that under ER 701, when the opinion relates to a core element of the crime, the State must prove that the witness has a "substantial factual basis supporting the opinion" and whether there is an alternative explanation for the behavior. Farr-Lenzini, 93 Wn. App. at 462-464. Regardless of whether the prosecutor couches a question asking for an impression versus an opinion, "a police officer's impression of a defendant's conduct can constitute an improper opinion as to the defendant's guilt or innocence." Farr-Lenzini, 93 Wn. App. at 464. The trooper did not have a factual basis for determining that the driver was eluding him even though he followed her in a 4.5 minute high speed chase. *Id.* The error was of constitutional magnitude because it addressed a core issue and the trooper lacked a factual basis.

Detective Ringer's testimony that Hoovers and Hilltop Crips work

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together and gang retaliation for insignificant incidents can be deadly were tantamount to opining that Mr. Morgan was guilty because of his gang membership. However, there was no evidence of Mr. Morgan's gang activity or how his gang membership was related to the shooting. The state could not establish that there was a gang rivalry or that the Hoovers and the Crips worked together or that the shooting was a gang retaliation. Detective' Ringer's gang testimony was as an impermissible comment inferring that Mr. Morgan was guilty by association. Because Mr. Morgan like Farr-Lenzini was denied his right to a constitutional trial, this Court must reverse and remand for a new trial.

6. THE PROSECUTOR AND STATE WITNESS  
COMMENTS ON MR. MORGAN'S RIGHT TO  
REMAIN SILENT DEPRIVED MR. MORGAN  
OF HIS RIGHT TO A FAIR TRIAL.

The United States and Washington Constitutions guarantee the right to remain silent. U.S. Const. amend. V; Wash. Const. art. 1 § 9; State v. Knapp, 148 Wn.App. 414, 420, 199 P.3d 505 (2009). "A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions." State v. Lewis, 130 Wn.2d 700, 705, 927P.2d 235 (1996).

To determine if a comment on the right to remain silent has occurred, the Court must first decide "whether the prosecutor manifestly

intended the remarks to be a comment on that right.’ “ State v. Burke, 163 Wn. 2d 204, 216, 181 P. 3d 1 (2008), quoting, State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991). “A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” Lewis, 130 Wn.2d at 707. The Courts do not consider a prosecutor's statement a comment on a constitutional right to remain silent if “standing alone, [it] was ‘so subtle and so brief that [it] did not “naturally and necessarily” emphasize defendant's testimonial silence.’ “ Crane, 116 Wn.2d at 331, quoting State v. Crawford, 21 Wn.App. 146, 152, 584 P.2d 442 (1978) (second alteration in original). “A remark that does not amount to a comment is considered a ‘mere reference’ to silence and is not reversible error absent a showing of prejudice.”, Burke, 163 Wn.2d at 216.

In Burke, the State Supreme Court reversed the Court of Appeals where the prosecutor imputed to Burke the reasons it believed his father gave for ending the interview as a “sense” that Burke's sexual encounter with J.S. was illegal. The Court held in the affirmative that prosecutor’s intent was to refer to Burke’s silence and that “the jury would “naturally and necessarily” take the comments as referring to the defendant's silence” Burke, 163 Wn . 2d at 216, 223. In Burke, the state used the improperly

presented substantive evidence of guilt for the jury's consideration. Burke, 168 Wn.2d at 223.

In State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985), rev'd on other grounds, 111 Wn.2d 641, 762 P.2d 1127 (1988), during closing argument the deputy prosecutor stated, over objection, that if the defendant had known of any other possible suspects, the jury would have heard of them." This remark violated Mr. Sargent's right to silence by indirectly commenting on his failure to testify. Sargent, 40 Wm. App. at 346, citing, United States v. Buege, 578 F.2d 187, 188 (7th Cir.1978), cert. denied, 439 U.S. 871, 99 S.Ct. 203, 58 L.Ed.2d 183 (1978).

The Court held that the prosecutor directly commented on the defendant's failure to tell about others with possible motives to commit the crime drew attention to the defendant's failure to testify and as such was constitutional error. Sargent, 40 Wn. App. at 347, citing, Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). State v. Messinger, 8 Wn.App. 829, 509 P.2d 382, rev. denied, 82 Wn.2d 1010 (1973), cert. denied 415 U.S. 926, 94 S.Ct. 1433, 39 L.Ed.2d 483 (1974).

In Mr. Morgan's case, over defense objection, detective Ringer was permitted to recount Mr. Morgan's statements after watching the video. According to Detective Ringer, Mr. Morgan also stated "It is what it is".... "You will be able to put it together". Detective Ringer testified that Mr.

Morgan made it “clear that the code he was raised with would not allow him to cooperate or testify against others.” RP 1261-1262.

Detective Ringer testified that in response to being asked about the video, Mr. Morgan stated, “I will take my chances with the court. I have to go all the way, trial, witnesses, everything”.... “ can’t do anything with that but go to trial” , RP 1261-1262.

During closing argument, prosecutor Greer, argued that:

Code of the street is garbage. Code of the street: Don’t cooperate with the police. Shoot people. Kill people. In this scenario, don’t talk to the police about it. Well any criminal, of course, committing an act won’t talk to the police. That makes sense because they are going to jail. They’re going to be held accountable

RP 1598. These comments were intended to refer to Mr. Morgan’s right to remain silent.

Mr. Morgan did not have an obligation to talk to detective Ringer, and detective Ringer’s comments and prosecutor Greer’s argument were a comment on Mr. Morgan’s decision not to talk to detective Ringer. Detective Ringer’s and prosecutor Greer’s comments prejudiced Mr. Morgan because the comments were designed to create the inference that Mr. Morgan’s silence meant that he was guilty. The State thus advanced the link between guilt and the refusal to discuss the shooting. “The implication is that suspects who invoke their right to silence do so because

they know they have done something wrong.”. This is a violation of the right to silence. Burke, 163 Wn.2d at 222.

The Court in Burke held that the comments on the defendant’s right to silence the error was not harmless because on review, the Court could not conclude beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. Burke, 168 Wn.2d at 222, citing,

In Mr. Morgan’s case, the evidence against Mr. Morgan was very weak and entirely circumstantial and speculative. The state’s use of Mr. Morgan’s refusal to talk about the case improperly allowed the jury to conclude that Mr. Morgan refused to talk because of his guilt. As in Burke, this error was not harmless. For this reason, this Court must reverse the conviction and remand for a new trial.

7. MR. MORGAN WAS DENIED A FAIR TRIAL BY DETECTIVE RINGER’S REPEATED VIOLATIONS OF AN ORDER IN LIMINE PROHIBITING COMMENT ON THE VIDEO, AND BY THE PROSECUTOR’S VOUCHING FOR THE CREDIBILITY OF THE POLICE WITNESSES, AND BY HIS ATTACK ON MR. MORGAN’S RIGHT TO COUNSEL.

c. Violation of Order in Limine

The trial court ordered that detective Ringer could not to narrate

the McCabe's video, but could rather simply describe who was on the camera and describe their obvious actions, such as walking and sitting. RP 123-124. The court agreed to give a limiting instruction informing the jury to interpret what they see and that detective Ringer's testimony is limited to identification. RP 125. The court ruled that detective Ringer was a "fact witness" not an expert when narrating the video, even though he had testified as a gang expert and lacked personal knowledge of the identities of the participants. RP 117, 1131-1133.

Detective Ringer repeatedly violated the order in limine. First, over sustained objection, detective Ringer commented that Mr. Embry was entering club with others but not interacting with them. RP 1306. Second, Ringer began to narrate what he saw in the video beyond identification. RP 1329. The trial court without reversing its earlier ruling stated that detective Ringer was testifying as a "fact witness and not as an expert". RP 1331-1333.

Third, and contrary to the court's order, the court allowed detective Ringer to continue to explain the activity on the video rather than to identify the participants even though the court agreed that the video was the best evidence. RP 1333-1334.

Fourth, the court sustained detective Ringer's continued narration of the video beyond identification. RP 1339. Fifth, after describing that

Mr. White and Mr. Parker were face to face at the bar for 9 minutes, the prosecutor asked detective Ringer if Mr. Embry was visible, to which detective Ringer stated that he uncertain. The court sustained the objection to the speculation. RP 1351-1352, 1355.

Detective's Ringer's gang expertise was used to emphasize the state's perceived gang element in the video.

d. Vouching for the Credibility of Police Witnesses and Attacking Mr. Morgan's Right to Counsel.

During closing argument, Mr. Greer told the jury that:

Law enforcement did a great job investigating this case. The evidence you have is the same evidence that the defense has seen and they're arguing and arguing their position to you. It's the same evidence. The video doesn't lie.

They're all guilty and the state is asking you to hold them accountable for the crimes that they committed.

RP 1614.

When trial counsel fails to object to misconduct at trial, the defendant must show that the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered. State v. O'Donnell, 142 Wn.App. 314, 328, 174 P.3d 1205 (2007); State v. Belgarde, 110 Wn.2d 504, 507, 509-510, 755 P.2d 174 (1988); State v. Dunaway, 109 Wn.2d 207, 221, 743 P.2d 1237, 749 P.2d 160 (1987).

To establish prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's closing remarks were both improper and prejudicial in the context of the total argument and affected the verdict. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), cert. denied, 77 U.S. 3575, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); State v. Stith, 71 Wn. App. 14, 18, 19, 856 415 (1993).

Prejudicial error occurs when it is 'clear and unmistakable' that counsel is expressing a personal opinion." State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), quoting, Sargent, 40 Wn.App. at 344. Arguments that are designed to inflame the passions and prejudice of the jury are improper and prejudicial. State v. Torres, 16 Wn. App. 254, 264-65, 554 P.2d 1069 (1976). Arguments that are based on facts not in evidence and that mislead the jury are equally as improper and prejudicial. State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984); State v. Rose, 62 Wn.2d 309, 312 382 P.2d 513 (1963) (prosecutor called defendant a drunken homosexual).

In Brunno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983), the Court affirmed the reversal of a first-degree murder conviction in California State Court where the prosecutor improperly suggested that a state's witness's consultation with defense counsel caused the witness to

repudiate earlier pro-prosecution statements she had made to government investigators. Brunno, 721 F.2d at 1194. The Ninth Circuit characterized these as follows: “the prosecutor has labeled defense counsel’s actions as unethical and perhaps even illegal without producing one shred of evidence to support this accusations.” Brunno, 721 F.2d at 1194.

The prosecutor in Brunno also attacked “the accused’s claims of innocence by openly hinting to the jury [in closing argument] that accused hired counsel was in some way probative of the defendant’s guilt.” Brunno, 721 F.2d at 1194. The Ninth Circuit found that “the obvious import of [these] comments was that all defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth in an abominable attempt to confuse the jury as to their client’s involvement with the alleged crimes,” Brunno 721 F.2d at 1194.

The Court in Brunno found that the “insidious attacks on Brunno’s exercise of his right to counsel and his attacks on the integrity of defense counsel were error” of constitutional dimensions” that required reversal of the defendant’s first degree-murder conviction. Brunno, 721 F.2d at 1195.

In Reed, supra, the Court addressed similar misconduct and reversed where the prosecutor attempted to influence the jury’s assessment of the defendant’s expert witness testimony by appealing to the jurors’

hometown instincts. In attacking the defendant's diminished capacity defense, the prosecutor remarked:

[W]e've got education down here in the woods.... He had no more ability to tell you what Gordon Reed intended on the day of the crime than the detective.... Are you going to let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?

Reed, 102 Wn.2d at 143.

The Court in Stith held that the prosecutor's comment concerning "incredible safeguards" "not only constituted "testimony" as to facts not in evidence but also indicated to the jury that, if there were any question of the defendant's guilt, the defendant would not even be in court." Id. The Court reversed and remanded for a new trial and held that this "testimony" from the prosecutor " was tantamount to arguing that guilt had already been determined." Id. The Court held that the comments were both "flagrant[]" and "improper". Id.

In Mr. Morgan's case, when prosecutor Greer told the jury that the "law enforcement did a great job", followed by "they are all guilty", he was speaking as an officer of the court informing the jury that the defendants were guilty beyond all doubt because law enforcement did not screw up the case. Mr. Greer used his status as a prosecutor to inform the jury that he personally knew that law enforcement should not be

questioned or evaluated in Mr. Morgan's case, because, he provided his prosecutorial assurance. This was an impermissible expression Mr. Greer's personal opinion about the credibility of the law enforcement witnesses and the guilt of the defendants. State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984).

In Mr. Morgan's case, the prosecutor also impugned the integrity of defense counsel by challenging their legal responsibility to represent their clients. The prosecutor argued to the jury that defendants were guilty and inferred that defense counsel knew they were guilty and thus defense had no right to "argue and argue" their cases. This attacked the right to counsel, the integrity of counsel and suggested, that the video established guilt, and the defense was wasting everyone's time by was arguing against the irrefutability of the state's interpretation of the video. RP 1614

The video did not depict Mr. Morgan committing a crime, nor did the scant circumstantial evidence presented by the state. The prosecutor's arguments were as improper as the arguments in Brunno Reed, and Stith, that were designed to impugn defense counsel.

No curative instruction could have ameliorated the prejudicial impact of these closing remarks in a weak case based entirely on speculative circumstantial evidence. For these reasons, this Court must reverse and remand for a new trial.

8. CUMULATIVE ERROR DENIED MR. MORGAN  
HIS RIGHT TO A FAIR TRIAL

Where multiple errors occur during trial which deny the defendant his right to a fair trial, due process is violated and the defendant is entitled to a new trial. In re Personal restraint of Lord, 123 Wn.2d 269, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994). The cumulative error doctrine applies when there are multiple errors at trial, but none standing alone is sufficient to warrant reversal. State v. Hodges, 118 Wn. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1013, 94 P.3d 960 (2004). State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998); State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997).

The trial court permitted irrelevant and prejudicial gang related testimony, the prosecutor impugned the integrity of defense counsel. Detective Ringer offered his opinion about the contents of the video in violation of the order in limine, the prosecutor bolstered the credibility of law enforcement and offered his opinion on guilt. Under both the cumulative error doctrine and CrR 8.3(b) reversal and remand for a new trial should be ordered.

8. ADOPTION OF CO-COUNSEL'S ARGUEMNTS

Pursuant to RAP 10.1(g)(g)(2), Mr. Morgan adopts and incorporates by reference all relevant facts and legal argument presented in Mr. Parker and Mr. Embry's opening briefs.

D. CONCLUSION

Mr. Morgan did not attempt to commit murder in the first degree or any other crime. The state failed to present evidence of murder or possession of a firearm beyond a reasonable doubt. Mr. Morgan was denied his right to a fair trial when the state was relieved of proving premeditation by its omission of this element from the to convict instruction; by the improper introduction of gang evidence, by commenting on Mr. Morgan's right to silence, and by committing various forms of prosecutorial misconduct.

Mr. Morgan respectfully requests this Court reverse the charges and dismiss with prejudice for insufficient evidence. In the alternative, Mr. Morgan requests reversal and remand for a new trial.

DATED this 30th day of March 2011.

Respectfully submitted

LAW OFFICES OF LISE ELLNER



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Lise Ellner, WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 446, Tacoma, WA 98402 and Bryant Deshaun Morgan Pierce County Jail 940 Tacoma Ave S Tacoma, WA 98402-2168, a true copy of the document to which this certificate is affixed, on March 30, 2011. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature \_\_\_\_\_

11 APR 14 10:01  
STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY

COURT OF APPEALS  
DIVISION II