

NO. 41439-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

DEONDRE POSEY,

Appellant.

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DENVER

FILED  
COURT OF APPEALS  
DIVISION II

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

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APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Martin Newsome Jones made comments about Anthony Smith that included calling Smith a “cornball.” Deondre Posey told Smith about Jones’s comments. Later, when Smith complained to Jones about “stupid” things he heard Jones said about him, Posey allegedly fired one shot from a gun that hit Jones. At Posey’s trial, the prosecution insisted that it needed to introduce evidence that Posey was a gang member, and expert testimony about how gang members behave, because “cornball” was a term of great disrespect to his gang.

But at trial, the witnesses uniformly testified that “cornball” had no particular gang meaning. During the incident, no one mentioned being in a gang. No one wore gang clothes or flashed gang signs. In fact, Jones, Posey, and the people present when Jones was shot were members of the same gang and Posey got along well with all of them.

Even though the evidence did not support the prosecution’s claim that the word “cornball” was a gang term that mandated a violent reaction if used, the jury learned about many violent acts perpetrated by other members of Posey’s gang in unrelated incidents. The extremely prejudicial nature of the evidence

admitted under a misguided theory predicated on the meaning of the word “cornball” was a significant part of the State’s case and its admission denied Posey a fair trial.

**B. ASSIGNMENTS OF ERROR.**

1. The court erred by refusing Posey’s request for an evidentiary hearing before admitting ER 404(b) evidence based on the disputed probative value of the evidence.

2. The court improperly admitted unduly prejudicial evidence of gang membership and characteristics without accurately weighing its lack of probative value.

3. The improperly admitted evidence of gang membership and characteristics denied Posey a fair trial.

4. The court disregarded its obligation to independently determine Posey’s offender score as required by statute.

5. The court untenably denied Posey’s request for a short continuance to contest the prosecution’s calculation of his offender score.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.**

1. Evidence that a person is affiliated with a violent gang is extremely prejudicial and may not be used to imply propensity to commit violent acts based on membership alone. Here, the

prosecution introduced evidence that Posey was a member of a gang, other members of the same gang routinely committed senseless violence against innocent bystanders, and Posey was required to react violently under his gang's rules any time he felt disrespected, even though there was little evidence that the shooting at issue was prompted by gang affiliation. Was the gang-related evidence elicited by the prosecution far more prejudicial than probative?

2. By statute, the judge presiding at sentencing must calculate the offender's criminal history, including whether prior offenses should be treated as same criminal conduct. The judge misunderstood this requirement at Posey's sentencing hearing, and refused to consider whether his prior convictions were the same criminal conduct even though those convictions appeared to meet the criteria for such consideration. Did the court improperly refuse to exercise its discretion to determine whether prior convictions were the same criminal conduct?

D. STATEMENT OF THE CASE.

While Martin Newsome Jones was sitting outside, "lounging," and talking to others, he was approached by Anthony Smith. 4RP 467. Smith was accompanied by Deondre Posey,

Steven Lovelace, and Christopher Sims. 4RP 467. Lovelace was Jones's cousin.<sup>1</sup> 5(p.m.)RP 613. Jones knew everyone, including Posey, who he "chilled with," and who "was good to me." 4RP 465, 467. Everyone, including Jones, was a member of the Hilltop Crips, a gang of over 400 people based in the Hilltop area of Tacoma. 5(p.m.)RP 599, 631-32; 6RP 717.

Jones and Smith previously had a "dispute over something real minor," according to Jones. 4RP 469. The dispute involved Smith's brother, who had "socked" Jones about five days earlier. 4RP 470, 472-73. The dispute did not involve Posey. 4RP 469. After the dispute, Smith and Jones had "squashed a resolution" and "were friends." 4RP 473. Jones explained that "squashed" meant they had ended the problem and talked out the dispute. 4RP 474.

Smith was upset because he heard from Posey that Jones had been talking about him and his brother. 5(p.m.)RP 601. Posey had heard Jones say that Smith's brother "had tried to rob his house and I [Smith] was a cornball and all that other type of stuff." 5(p.m.)RP 601. This made Smith mad because he thought

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<sup>1</sup> Lovelace was referred to as "Spud," at times.

he and Jones had resolved their conflict, and “everything was supposed to be squashed and why is he going around still talking stuff.” 5(p.m.)RP 602. Smith decided he would confront Jones and, “If he’s talking stuff, everything’s not squashed. We can fight.” 5(p.m.)RP 602.

When Smith confronted Jones and said, “what’s up with the stupid stuff I’m hearing?,” Jones said others were just trying to start something. 5(p.m.)RP 605. Smith countered that Posey would not have had any reason to know about the dispute between Smith and Jones unless he heard Jones talking about it. Id. Then, according to Smith, “that’s when Jokie<sup>2</sup> pulled the gun out.” 5(p.m.)RP 606. Jones panicked when he saw the gun and Liam Hines, Jones’s friend, jumped in and grabbed Posey’s arm. 5(p.m.)RP 607. Smith claimed Posey was aiming the gun at Jones before Hines tried to grab it. Id.

Posey and Hines wrestled over the gun for about 30 seconds. 4RP 483; 5(p.m.)RP 609. Smith said he was trying to calm Jones. Id. Hines told Posey, “we shouldn’t be fighting. We’re all homies here.” 5(p.m.)RP 609-10.

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<sup>2</sup> Jokie is Posey’s nickname. 4RP 465.

Jones thought the gun went off as Hines and Posey struggled. 4RP 496. According to Smith, Posey reached over Hines, around Smith, and “let a shot at” Jones. 5(p.m.)RP 610. After firing one shot, Posey ran. 5(p.m.)RP 611.

When the police arrived, Smith, Lovelace, and Sims were still there – they stayed because they did not want the police to think they were responsible for the shooting. 5(p.m.)RP 612, 614. They helped Jones, who got a ride to the hospital from a neighbor. 5(p.m.)RP 612. The bullet hit Jones’ spine and he did not know whether he would regain the ability to walk. 4RP 464, 483.

Jones said he was astonished when Posey pulled out a gun. 4RP 468, 492. He was surprised that Smith seemed upset with him about his comments and had never had problems with Posey in the past. 4RP 476, 492. Jones did not think Posey said anything before the shooting, although he may have said, “let’s stop lying, you know what you did.” 4RP 480.

Hines testified at trial but denied seeing Jones get shot. 5(a.m.)RP 573. He said he prefers to “let God handle stuff.” 5(a.m.)RP 576. Another friend, Corey Jagers, was nearby on an upper staircase but he hid when he saw someone pull out a gun.

5(a.m.)RP 523, 527. He described the person with a gun but he did not watch the shooting occur. 5(a.m.)RP 532.

At trial, Detective John Ringer testified over Posey's objection about how the Hilltop Crips gang operated based on his extensive experience. 2RP 35-39; 6RP 714-18. Ringer offered examples of various instances where "gangster Crips" reacted to perceived slights with extreme violence. 6RP 733-35. He explained that a person maintains his reputation in a gang by committing drive-by shootings, armed robberies, burglaries, or other crimes. 6RP 731. He identified Posey as a member of the Crips, along with Smith, Jones, Lovelace, and Sims. 6RP 738-39. He described Jones as a Crip who had fallen out of good graces and was seen as weak. 6RP 738. He also said it was possible that shooting another gang member could elevate a member's status in the gang and it would give the person a reputation as someone who can be counted on to shoot. 6RP 739-40.

Posey was convicted of attempted first degree murder and unlawful possession of a firearm in the first degree. CP 187, 189. Although the State alleged Posey shot Jones in order to elevate or maintain the status of his membership in a gang, the jury did not find the State proved this aggravating factor. CP 113-14, 188, 190.

He received a standard range sentence of 400 months in prison.

CP 196, 199.

Relevant facts are discussed in further detail in the pertinent argument section below.

E. ARGUMENT.

1. EVIDENCE THAT POSEY WAS A GANG MEMBER AND WAS MOTIVATED BY GANG AFFILIATION WAS NOT SUFFICIENTLY PROBATIVE OF THE CHARGED CRIME TO BE ADMITTED AND ITS PREJUDICIAL EFFECT DENIED POSEY A FAIR TRIAL

Before trial, the prosecution insisted that the shooting was motivated by the peculiar gang-member understanding of the word “cornball,” and therefore it was necessary to offer evidence that Posey was a member of a gang, give examples of violent, senseless acts perpetrated by other members of his gang in which Posey was not involved, and offer expert testimony about the violence inherent in gang culture. Posey objected, explaining that testimony would not show “cornball” had any particular meaning for gang members or that the shooting was gang-motivated, and gang affiliation was extremely prejudicial without being material to the case. Posey’s pretrial objections proved true at trial. There was little or no evidence that the shooting could be understood only

through the prism of gang membership and gang culture. The erroneous admission of evidence about gang culture and Posey's gang affiliation unduly prejudiced his right to a fair trial.

a. Gang evidence is highly inflammatory and admissible only in narrow circumstances. Evidence of an accused person's gang affiliation is extremely prejudicial. State v. Asaeli, 150 Wn.App. 543, 578-79, 208 P.3d 1136, rev. denied, 167 Wn.2d 1001 (2009). A person is constitutionally guaranteed the right to associate with whomever the person chooses and cannot be criminally punished for that association alone. State v. Scott, 151 Wn.App. 520, 526, 213 P.3d 71 (2009), rev. denied, 168 Wn.2d 1004 (2010); U.S. Const. amend. I;<sup>3</sup> Const. art. I, §§ 4, 5.<sup>4</sup> Under ER 404(b), a person's wrongful conduct or even innocuous traits displayed on other occasions are inadmissible unless the court identifies "a significant reason" for admitting the evidence and

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<sup>3</sup> The First Amendment provides, Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<sup>4</sup> Article I, section 4, provides in part, that "[t]he right . . . of the people peaceably to assemble for the common good shall never be abridged."

Article I, section 5, provides, "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

determines that the relevance of the evidence outweighs its prejudicial effect. Scott, 151 Wn.App. at 527.

An accused person's right to a fair trial is a fundamental part of due process of law. United States v. Salerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 22. Erroneous evidentiary rulings violate due process if they deprive the defendant of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Dowling v. United States, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (the introduction of improper evidence deprives a defendant of due process where "the evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice.'").

Compliance with state evidentiary and procedural rules does not guarantee compliance with the requirements of due process. Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9<sup>th</sup> Cir. 1991); citing Perry v. Rushen, 713 F.2d 1447, 1453 (9<sup>th</sup> Cir. 1983), cert. denied, 469 U.S. 838 (1984). Due process is violated where evidence was admitted that renders the trial fundamentally unfair. Walters v. Maass, 45 F.3d 1355, 1357 (9<sup>th</sup> Cir. 1995); Colley v. Sumner, 784 F.2d 984, 990 (9<sup>th</sup> Cir. 1986); see State v. Miles, 73

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

b. ER 404(b) prohibits evidence of prior conduct to prove the accused’s propensity to commit the charged crime. ER 404(b) bars the admission of “other crimes, wrongs, or acts” to prove a person acted in conformity therewith.<sup>5</sup> It includes prior acts that are unpopular, disgraceful, or even traits of personality; it is not limited to past criminal acts. State v. Everybodytalksabout, 145 Wn.2d 456, 466-68, 39 P.3d 294 (2002). Evidence of prior conduct “is inadmissible to show that the defendant is a dangerous person or a ‘criminal type’ and is thus likely to have committed the crime for which [the defendant] is presently charged.” Id. at 466 (quoting State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)).

Before admitting evidence of other acts under ER 404(b), a trial court must (1) find that a preponderance of evidence shows that the act occurred; (2) identify the purpose for which the

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<sup>5</sup> ER 404(b) provides:

evidence is being used; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). The court must place its ER 404(b) analysis on the record, including its weighing of the prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

Generalizations about how people in gangs act cannot prove a person's criminal culpability. State v. Bluehorse, 159 Wn.App. 410, 429, 248 P.3d 537 (2011). A prosecutor's argument that an accused person is a gang member and was "doing what some gang members do, which is retaliate and shoot at and hit sometimes other people with firearms," is a generalization predicated on gang membership that is not proof of an individual's motive. Id. at 429-30. In Bluehorse, the court ruled that without evidence of gang motivation at the time of the incident, such as flashing gang signs or announcing animus aimed at a rival gang,

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Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

the allegation that the shooting was gang-motivated is not sufficiently established. Id. at 430.

Like any group with which a person may affiliate, be it a church choir or golf club, affiliation with a gang does not mean that a person knows all other members, agrees with what they do, or is criminally culpable for their actions. Scott, 151 Wn.App. at 525. Yet because of the broad negative and violent connotation of being affiliated with a gang, gang membership is necessarily prejudicial and admissible only if dictated by ER 404(b). Scott, 151 Wn.App. at 526; Asaeli, 150 Wn.App. at 576-77; see United States v. Irvin, 87 F.3d 860, 865 (7<sup>th</sup> Cir. 1996) (“Gangs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict. Guilt by association is a concern whenever gang evidence is admitted.”).

In Scott and Asaeli, the prosecution persuaded the court to admit evidence of the defendants' gang affiliation to show their motives in shootings, but in both cases, the trial testimony fell short of the proffer. Scott, 151 Wn.App. at 528; Asaeli, 150 Wn.App. at

574. In Scott, the prosecutor argued that the assault would be inexplicable without evidence of gang affiliation, gang membership showed a connection between the co-defendants, and provided the reason for the complainant's initial reluctance to identify the perpetrators. 151 Wn.App. at 527-28. It was admitted for motive and res gestae. Id. But "the actual testimony presented fell far short of proving the connection between gang affiliation and the crime." Id. at 528. No one testified that gang membership prompted the assault, even though there was evidence of the defendant's gang membership, gang rivalry, and other gang-related efforts to intimidate the State's witnesses. Id. at 524-25. The nexus between the offense and gang affiliation was insufficient based on the trial testimony and therefore it should not have been admitted. Id. at 528.

In Asaeli, the prosecution claimed gang membership provided the necessary motive for the crime. 150 Wn.App. at 578. This Court ruled the gang evidence was improperly admitted, and in fact, there was insufficient evidence that the defendants were motivated by gang membership. While the State's proffer, if true, might have provided a basis to admit evidence of gang membership and gang culture, the testimony actually given at trial

did not show that the shooting was motivated by gang membership. Id. at 578-79.

A similar scenario arose in Posey's trial. Posey asked for an evidentiary hearing before admitting gang-related evidence because, based on his investigation, the State's witnesses would not contend that the incident was gang-motivated, committed for the purpose of elevating gang status, or predicated on the extreme undesirability of being called a "cornball" as a gang member. 2RP 39, 65-69, 98, 104, CP 119-120, 122-24. The court declined Posey's request for an evidentiary hearing and admitted the evidence based on the prosecution's description of why it was necessary. 2RP 104. Posey's expectation of the evidence proved correct. No witness testified that "cornball" carried a particular meaning to gang members that the members of the public would not understand.

Before trial, the prosecutor contended that gang evidence was admissible under ER 404(b) because the "cornball" term was the motive for the shooting, and "cornball" is "a very disrespectful Crips term." 2RP 44. In addition to introducing evidence about the gang membership of those involved, the prosecution claimed it needed testimony from an expert witness, Detective Ringer, to

explain cornball “is derogatory” and it “leads to violence” based on how a gang member defines that word. 2RP 52. It claimed expert testimony about gang membership was necessary because gang members “live under certain rules” that must be explained. 2RP 53. The court accepted this argument and ruled the evidence admissible under ER 404(b) as motive, premeditation, and res gestae, because the word cornball is otherwise innocuous and the jury would not otherwise understand its meaning to a gang member and how it would incite violence. 2RP 104-06.

But if the court had granted Posey the hearing he requested, it would have learned the word “cornball” does not carry a particular meaning known only to gang members.

Complaint Jones said, “I don’t really know what a cornball is. It just slipped out my tongue.” 4RP 471. He viewed the word as “senseless” and he “wasn’t worried” about using it. 4RP 476. “Cornball shouldn’t cause a problem,” Jones said. 4RP 488. Although Jones did not admit he was a Crip, he said Crips are “my family” and the State’s expert Ringer said Jones was a Crip. 4RP 485, 487; 6RP 738. Smith also testified that Jones was a Crip. 5(p.m.)RP 599. As a Crip, Jones would be aware of the dangers of

using certain words, and he did not believe his reference to cornball should have caused a problem.

Corey Jagers lived in the Hilltop area but was not himself a known Crips member. 5(a.m.)RP 522; 6RP 738. He was talking with Jones when the incident started and was an acquaintance of Smith's. 4RP 469; 5(p.m.)RP 604. Jagers heard the word cornball mentioned during the incident but said, "I don't know what a cornball is. I never heard it as a bad word for gangs." 5(a.m.)RP 569.

Smith, who instigated the argument with Jones, said about the word cornball, "I don't know what that means," and "I don't know the meaning of it." 5(p.m.)RP 635. Smith thought it was a "strange word" and did not "sound nice but it doesn't have any special meaning." Id.

When pressed by the prosecutor, Smith agreed that cornball was disrespectful, but he said that at the time he did not take it as disrespectful itself. 5(p.m.)RP 602. Smith was more upset about the idea that Jones might be saying negative things about him when he and Jones had just "squashed" their disagreement and reconciled. Id. He had not heard the word cornball before. Id.

Even gang expert Ringer had not heard of cornball as a derogatory gang term. When asked if he had ever heard cornball in the context of gangs before this case, Ringer say he had “not necessarily [heard this word] in the context of gangs.” 6RP 739. He thought it was a word he might use with his child, as a way to call him goofy. Id. At most, Ringer thought it could be disrespectful based on the way it was used or how it was said, but it would not be considered a problematic word with a special gang meaning, like some other words. Id.

The reason the State insisted that it needed to introduce evidence of Posey’s gang membership and gang culture in its case in chief was to explain how a gang member would feel after being called cornball. 2RP 44, 77. The court’s ruling admitting the evidence rested on the idea that the violent reaction to the meaning of the innocuous word cornball is not part of the jurors’ common understanding. 2RP 104-05. Yet at trial, the witnesses did not claim the word “cornball” would incite violence and vengeance based on how gang members interpreted the word. Thus, the premise of the State’s request to admit Posey’s gang affiliation was erroneous, thereby rendering the evidence about gang violence far

more prejudicial than probative. See Asaeli, 150 Wn.App. at 578 n.36.<sup>6</sup>

c. There was no nexus between the word cornball, Posey's gang membership, and violence perpetrated by other gang members. There must be a sufficient nexus between gang membership and the charged crime for it to be admissible under ER 404(b). Scott, 151 Wn.App. at 526.

Because Posey was not reacting to someone calling him a cornball, there was no need to introduce evidence about Posey's gang membership to explain the meaning of the word cornball or how gang members like Posey respond to it. 2RP 40, 44, 104-05. There was an insufficient nexus between Posey's membership in a gang and the word cornball to be probative of Posey's motivation at trial.

The prosecutor tried to draw out the connection to Posey by explaining that since a gang member would react violently to being called a cornball, a gang member would react with equal violence if he was accused of lying about someone else using the word

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<sup>6</sup> The prosecutor expressly disavowed the need for gang evidence based on an acting in concert theory that he had made in his trial brief. 2RP 77-81; CP 132-33, 137. He conceded that there would not be evidence that Posey was acting at Smith's behest or with any other gang member. 2RP 81.

cornball. RP 53, 63. The prosecution's piling of inferences to make the shooting inexplicable absent evidence of gang culture and gang membership fails when viewed in light of the trial testimony.

First, no one involved in the incident or the State's gang expert agreed that the word cornball "is a very disrespectful Crips term," as the prosecutor had claimed. 2RP 44.

Second, the incident was not about Posey believing he was being disrespected as a gang member. Jones did not think Posey said anything during the incident in which he was shot. 4RP 479. At most, he may have said, "stop lying, you know what you did." 4RP 480. Jones was astonished that he was shot, did not understand or expect it, and did not see it coming. 4RP 468, 479. He said, "I don't know why I got shot." 4RP 492. Although he had problems with Smith in the past he had not had problems with Posey. 44RP 492. Jones thought that Smith was responsible for what happened, not Posey. 4RP 496 ("Smith is the cause of everything"; "Smith is the one that's controlling [the incident], he's the one").

Third, during the incident, no one was alleged to have flashed gang signs, spoken of gang allegiances, or displayed gang

colors. Cf. State v. Saenz, 156 Wn.App. 866, 870, 874, 234 P.3d 336 (2010) (gang affiliation relevant where fight between members of rival gang and defendant yelled gang's name before shooting). The incident did not involve retaliation for a rival gang, or any overt references to gang membership.

Fourth, as further evidence that the shooting was not provoked by gang affiliation, all participants were alleged to be in the same gang. Smith stated he "wasn't thinking" that the fight had anything to do with gang membership or increasing status in the gang. 5(p.m.)RP 652. And after the shooting, rather than follow the gang code of not talking to the police, Smith and his acquaintances stayed at the scene and spoke to police. Id. at 614. Although he did not initially implicate Posey to authorities, this reluctance was more out of self-interest than due to a gang code. 5(p.m.)RP 616. Then Smith testified at trial against Posey.

Finally, the prosecution insisted it was not alleging that Posey was working in concert with Smith. 2RP 77-81; CP 132-33, 137. It was not alleging that Smith directed Posey to shoot Jones or asked for Posey's assistance. 2RP 81. Whatever disagreements Jones and Smith had, Posey was not involved in them and they did not form part of Posey's intent or motive.

The link between the incident and Posey's purported gang-motivated intent to kill was specious at best. See Scott, 151 Wn.App. at 526 (nexus required between gang membership and incident). The court's failure to appreciate the lack of probative value of gang evidence, stemming from its refusal to hold an evidentiary hearing to resolve the disputed nature of the evidence, led to the introduction of extremely prejudicial evidence of propensity for violence based on gang affiliation alone.

d. The jury heard testimony about gang violence that had nothing to do with whether Posey shot Jones or Posey's specific intent. As part of the State's desire to paint Posey as motivated by his gang affiliation, the State insisted it needed to show how Crips react to any perceived tarnishing of their reputations, and it elicited evidence about unrelated acts of gang violence, perpetrated by others. 2RP 52.

Gang expert Ringer detailed his credentials as intimately familiar with the operation of the Hilltop Crips gang, which had been his longtime focus as a police officer. 6RP 714-15, 719. He said he was "much more knowledgeable about the Hilltop" area than any other place. 6RP 719. He speaks to members of Tacoma gangs every week, in particular members of the Hilltop

Crips, and he verifies all the information he receives from gang members to ensure its accuracy. 6RP 722-23. Ringer said he knew Posey was a Crip member, along with Smith and Jones, although Jones had “fallen out of good graces” within the Crips. 6RP 738. Ringer did not explain when Jones fell out of the gang’s good graces.

Based on his familiarity with the Hilltop Crips, Ringer testified how gang members behave. He explained that a person who is a member of a gang such as the Crips is likely to be involved in drive-by shootings, robberies, burglaries, or drug sales. 6RP 724, 731. Gang members are expected “jump in on your side” and there “will be consequences” if they do not. 6RP 729. A person who does not “put in the work” by engaging in criminal acts, such as strong arm robberies or shootings will be “beat down” and held accountable. 6RP 728. A person who is willing to “hop in the car” and “do a jack or a home-invasion robbery” will be “easily manipulated and forced to participate in things.” 6RP 729. “Violence” was necessary for a person to maintain a reputation for being in the Hilltop Crips. 6RP 731.

Ringer gave as an example an incident where one Hilltop Crips member *did not* join in a fight to help another member of his

gang because he had relatives in the rival gang, and in retaliation, his own gang shot him. 6RP 732-33. Another member of his own gang, the Hilltop Crips, "open[ed] fire on him point blank" because he did not assist in the fight. 6RP 733.

In another incident involving what Ringer described as "young gangster Crips," a stranger inadvertently bumped a Crips member in a bar and they fought. 6RP 734-35. The "next thing you know" the stranger "gets shot in the face and loses an eye" because he had argued with this young Crips member. 6RP 735. Such situations occur "very frequently" in Ringer's experience. Id.

As another example of the frequency of violent acts perpetrated by gang members, Ringer said that "little things like words, throwing up the wrong sign, that is a challenge that gets someone killed." 6RP 735. One time, a girl waved to somebody on the street and "a carload of gang members" saw it, "thought that she was throwing up a sign and opened fire and killed her." 6RP 735-36. In sum, Ringer said that a gang member is expected to respond if you are disrespected by anybody, even by a fellow gang member, as well as commit violent acts when requested. 6RP 731, 740.

Ringer's testimony unequivocally painted members of the Hilltop Crips as possessing an extreme propensity for violence based on mere membership. He told horrific stories of senseless violence perpetrated by "young gangster Crips." Posey himself could be considered a "young gangster Crip" because he was 23 years old at the time of trial and Ringer asserted that Posey was a Hilltop Crip. CP 206. According to Ringer, any person in good standing with the Crips would be prone to violence and required to act violently. 6RP 729, 731, 740. Since Posey was a known Crips member, presumably in good standing, he would be a person who had committed senseless violence in the past and would be likely to do so in the future.

But Ringer's testimony was not probative of the charged incident. He agreed that "cornball" is not a word known to incite violence among Crips, thus undercutting the very reason the State insisted it needed the detective's expert testimony. He described gang members as facing severe retaliation if they do not aid their fellow gang members, yet this scenario did not occur during the incident charged. 6RP 733. No one aided Posey. He claimed gang members "rarely act alone," but the State accused Posey of acting alone. 2RP 78-80; 6RP 733. Smith was trying to calm

Jones and stood between Jones and Posey, seemingly blocking Posey from shooting. 5(p.m.)RP 609-10, 654. Smith told Posey to stop, and he was not trying to bring Posey into his argument with Jones. Id. at 653. Afterward, Posey fled while Smith and his cohorts remained at the scene and spoke to police. Then Smith testified against Posey at trial. Id. at 655. The failure of his fellow gang members to support him before or after the fight shows that the shooting was not premised on gang affiliation.

e. Ringer's testimony about gang status would not have been admitted in the State's case-in-chief if the court had correctly analyzed the inadmissibility of ER 404(b) evidence.

Although the prosecution charged Posey with the sentencing enhancement of using the crime to elevate status in a gang, it did not intend to introduce that evidence in its case-in-chief unless the court ruled that the gang evidence was admissible under ER 404(b). CP 113-14. The State agreed that if the court found the gang evidence was relevant only for the aggravating factor of committing a crime for the purpose of enhancing gang membership status, it would wait until the jury reached a verdict on the charged offense and then ask the jury to consider the separate question of gang status in a bifurcated proceeding. 2RP 100-01. The State

was not trying to inject gang evidence into the case unless the court admitted the evidence for purpose of showing Posey's motive. Id. Accordingly, the evidence pertaining to whether Posey's shooting would elevate his status as a Hilltop Crip would not have influenced or prejudiced the jury against Posey had the court correctly analyzed the probative value and prejudicial effect of gang evidence under ER 404(b).

f. The extremely prejudicial nature of the erroneously admitted gang testimony requires reversal. Before trial, Posey encouraged the court to find a less prejudicial way to admit the necessary evidence without drawing out the gang membership and affiliation of Posey. 2RP 107, 111. He offered alternatives, such as saying that on-the-street, a person may act violently if called a cornball or if sufficiently disrespected, but the prosecution insisted it was necessary to "tie the defendant to the gang" because it needed to show he was "a member of that small minority of people who would kill for that kind of thing." 2RP 107, 110. Because the evidence did not show Posey's actions were motivated by his gang affiliation, the evidence tying Posey to a violent gang served the impermissible purpose of showing him to be a member of a

dangerous aggressive group of people and led to his conviction for attempted premeditated murder.

The prejudicial effect of membership in a violent gang is well-established. See Kennedy v. Lockyer, 139 F.3d 1041, 1055 (9<sup>th</sup> Cir. 2004) (“Our cases make it clear that evidence relating to gang involvement will almost always be prejudicial”); see also United States v. Garcia, 151 F.3d 1243, 1245-46 (9<sup>th</sup> Cir. 1998) (general characteristics of gang do not prove specific intent to act on certain occasion and is contrary to fundamental principle barring guilt by association).

“An error is prejudicial if, ‘within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’” State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), as amended (Jul. 19, 2002) (internal quotation marks omitted). Here, the gang evidence was not “of minor significance” and cannot be characterized as harmless. Id.

The prosecution’s closing argument boiled down to the claim that Posey’s gang membership required him to act violently and predisposed him to have the premeditated intent to kill, as opposed to the lesser offense of attempted intentional murder for which the jury was also instructed. 6RP 801-02; CP 169-70. “He’s a Hilltop

Crip. He knows the rules. The other individuals that he chooses to associate with, they know the rules, and among the rules are when you're confronted, when you are disrespected, . . . you need to act appropriately, considering the rules." 6RP 801. In essence, the State claimed that because he is a gang member and he had a gun, he was prepared to kill anyone who disrespected him.

The prejudicial effect of the improperly admitted evidence is demonstrated by the verdict convicting Posey of having the premeditated intent to kill, even though the incident occurred as an unplanned confrontation between others and a single shot was fired as Posey struggled for control of the gun. Absent evidence of Posey's gang's propensity for violence, it would be far less likely that the jury would have convicted Posey of an attempted premeditated murder. The unduly prejudicial nature of the evidence is reflected in the prosecution's agreement to bifurcate the question of gang membership for purposes of the aggravating factor unless the court ruled the evidence was independently admissible to prove the predicate offense. 2RP 100-01. Any reasonable juror would be indelibly affected by evidence that Posey was a dangerous gangster and part of a group that reacted with

extreme violence routinely. Consequently, the erroneously admitted evidence tainted the fundamental fairness of the trial.

2. THE COURT'S FAILURE TO ACCURATELY ASSESS POSEY'S CRIMINAL HISTORY OR GIVE POSEY ADDITIONAL TIME TO PRESENT EVIDENCE REQUIRES A NEW SENTENCING HEARING

a. The court must impose only sentences authorized by governing law. "It is axiomatic that a sentencing court has no authority to impose a sentence based on a miscalculated offender score." State v. Roche, 75 Wn.App. 500, 513, 878 P.2d 497 (1994); State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). The failure to base a sentence on the proper offender score, and thus, on the crime itself, contravenes the stated purposes of the Sentencing Reform Act (SRA). Ford, 137 Wn.2d at 477-78, 481.

The due process clause of the Fourteenth Amendment protects an individual from a deprivation of liberty in excess of the sentencing court's authority. Hicks v. Oklahoma, 447 U.S. 343, 65 L.Ed.2d 175, 100 S.Ct. 2227, 2229 (1980); State v. Mendoza, 165 Wn.2d 913, 921, 205 P.3d 113 (2009); U.S. Const. amend. 14; Wash. Const. art. I § 3. A person cannot agree to a sentence unauthorized by law. In re Pers. Restraint of West, 154 Wn.2d

204, 213-14, 110 P.3d 1122 (2005) (“[A]n individual cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law.” (quoting In re Pers. Restraint of Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004)); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 870-71, 50 P.3d 618 (2002) (plea bargain does not permit court to impose sentence in excess of what statutes allow).

At sentencing, the State must prove the defendant’s criminal history by a preponderance of the evidence. RCW 9.94A.500; State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986). “Although facts need not be proved beyond a reasonable doubt, fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” Ford, 137 Wn.2d at 481 (federal citations omitted).

b. The sentencing court must determine whether prior offenses encompass the same criminal conduct when calculating the offender score. When imposing a sentence, the court must calculate the individual offender’s criminal history, including considering whether the prior offenses were, or should

have been, treated as same criminal conduct. The scoring of prior crimes is governed by RCW 9.94A.525(5)(a) which provides, in pertinent part:

(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense.... The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a)

(emphasis added).

The statute dictates that a sentencing court “must determine” whether multiple prior convictions that have concurrent sentences encompass the same criminal conduct, unless they have already been found to amount to the same criminal conduct. State v. Torngren, 147 Wn.App. 556, 563, 196 P.3d 742 (2008). The court “has no discretion” to refuse to consider whether prior convictions should be treated as same criminal conduct absent an explicit finding of same criminal conduct by the prior sentencing judge. Id.; see State v. Rinehart, 77 Wn.App. 454, 459, 891 P.2d

735, rev. denied, 127 Wn.2d 1014 (1995) (“the language of the statute appears clear and unambiguous in mandating that the current sentencing court determine whether to count prior offenses, served concurrently, as separate offenses.”); see also State v. Mehaffey, 125 Wn.App. 595, 600, 105 P.3d 447 (2005) (“The current court is required to determine independently whether other concurrently sentenced prior convictions, not previously determined to be same criminal conduct ... are nevertheless same criminal conduct”).

Two offenses encompass the same criminal conduct for purposes of the SRA when they involve the same overarching criminal intent, occur at the same time and place, and involve the same victim. In re Connick, 144 Wn.2d 442, 459, 28 P.3d 729 (2001). RCW 9.94A.589(a) provides in pertinent part:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for purposes of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime . . . .

“Same Criminal Conduct,” as it is used in this subsection, means two or more crimes that require

the same criminal intent, are committed at the same time and place, and involve the same victim . . . .

To determine whether two or more crimes share the same criminal intent for purposes of the SRA, the court looks not at the particular mens rea for the particular offenses, but rather, at the general objective, which may be defined by whether one crime furthered another. Connick, 144 Wn.2d at 459; State v. Garza-Villareal, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993).

c. The sentencing court misunderstood its obligation to determine Posey's criminal history. Posey was previously convicted of three counts of drive by shooting. Posey's attorney explained that those offenses were indistinguishable, they involved the same victim, time, and intent, but they were not counted as same criminal conduct by the prior sentencing court. 10/22/10RP 4, 6, 13. Posey asked the court to determine whether those offenses qualified as same criminal conduct, but the court refused to consider the issue or give Posey more time to gather evidence in support of his sentencing claim. 10/22/10RP 13-15.

The court misunderstood its legal obligation to independently decide the same criminal conduct classification of the prior convictions. The court insisted that if a "mistake" had

occurred when the prior judge sentenced Posey without counting the offenses as same criminal conduct, then Posey's only remedy was to complain to the earlier sentencing judge. 10/22/10RP 14-15. The court ruled that it must "accept the judgment and sentence [from the prior convictions] at face value." Id. The court presumed that when the judge in the prior case did not check the box indicating she was treating the offenses as same criminal conduct, the face of the judgment and sentence established that the offenses were not the same criminal conduct. Id.

The court's refusal to decide whether the offenses should be considered same criminal conduct was an abuse of discretion. Mehaffey, 125 Wn.App. at 600; Rinehart, 77 Wn.App. at 459. The sentencing court may presume prior offenses are not the same criminal conduct if they involved different victims, were sentenced at different times, or were charged in separate cause numbers. Mehaffey, 125 Wn.App. at 601. But none of those criteria apply in Posey's case. Therefore, the court could not simply presume the offenses were not same criminal conduct. Id.

The court misunderstood its legal obligation to correctly determine Posey's criminal history and resentencing is required. Id.

d. The prosecutor's assertion that the prior convictions were not the same criminal conduct does not constitute dispositive proof. In response to Posey's objection to separately counting Posey's prior convictions for drive-by shooting, the prosecutor offered his personal assurance that the priors were not intended to be treated as same criminal conduct. 10/22/10RP 6, 10. This personal assertion fails as proof of criminal history.

In Mendoza, the Supreme Court ruled that the prosecutor's assertion of criminal history is not evidence of criminal history sufficient to establish such history. Certified copies of prior convictions remain the preferred means of establishing criminal history, or alternatively, the prosecution may offer evidence such as transcripts from prior proceedings. 165 Wn.2d at 921. The prosecutor's claim, based on his personal belief, that the prior convictions were not intended to be treated as same criminal conduct does not amount to proof of that fact. Id.; see also State v. Weaver, 171 Wn.2d 256, 260, 251 P.3d 876 (2011) (holding that prosecutor's declaration about criminal history constitutes insufficient proof).

Although it had been three years since Posey's prior convictions were entered, the earlier case happened to involve the

same prosecutor. The prosecutor recalled that he had reduced Posey's charges as part of a plea in that case, and the parties agreed he would receive a certain sentence. 10/22/10RP 9-10. The prosecutor asserted that implicit in the agreement was that the three drive-by shooting offenses were not counted as the same criminal conduct. Id.

The prosecutor offered no evidence in support of his claim. There was no transcript of the plea hearing or copy of a plea agreement in which Posey expressly agreed the prior offenses were not the same criminal conduct. The prior sentencing judge's failure to check the box on the form to indicate that the crimes were the same criminal conduct does not show that the court actually made such a finding or even considered the possibility. Even the prosecutor seemed to imply that no one raised the issue of same criminal conduct at the earlier sentencing hearing, and therefore it had not been actually litigated. 10/22/10RP 6, 9.

A failure to object to a prosecutor's assertions of criminal history does not constitute the required acknowledgment for purposes of determining criminal history. Mendoza, 165 Wn.2d at 928. A defendant does not "affirmatively acknowledge" criminal history by agreeing to the prosecutor's sentencing

recommendation. Id. “Bare assertions” of criminal history do not substitute for the facts a sentencing court requires. Id. at 929. Consequently, assuming *arguendo* Posey did not raise a same criminal conduct argument when he was sentenced for his prior offenses, he is not barred from seeking consideration of the matter at a later sentencing hearing.

Even a sentence imposed under a plea bargain must be statutorily authorized. In re Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991) (“a defendant cannot agree to be punished more than the Legislature has allowed for”). Posey could not empower the court to impose a sentence that was not authorized by the Legislature. Id.; see State v. Barbar, 171 Wn.2d 854, 870, 248 P.3d 494 (2011) (plea agreement unenforceable if contrary to statute).

The mere fact that Posey’s prior sentence resulted from a plea bargain does not constitute a binding agreement that the convictions would not be counted as the same criminal conduct in the future. Even if Posey could have entered into such an agreement, there was no evidence of any purposeful agreement about same criminal conduct that was part of the earlier plea.

Moreover, as discussed above, the sentencing court has an independent statutory obligation to consider whether prior convictions should be treated as same criminal conduct. Torngren, 147 Wn.App. at 563; Mehaffey, 125 Wn.App. at 601; Rinehart, 77 Wn.App. at 459. The judge at Posey's sentencing hearing believed she was bound by the lack of specific same criminal conduct finding on the judgment and sentence from the prior offenses, and that belief was erroneous.

e. The court's failure to independently determine same criminal conduct requires remand for resentencing. A sentencing judge is required to make an independent finding that the sentence imposed is appropriate and lawful. Breedlove, 138 Wn.2d at 309; see Ford, 137 Wn.2d at 481 (even absent objection by the defendant, sentencing court may impose a sentence only based on sufficiently reliable information).

A miscalculated offender score is a fundamental defect that results in a miscarriage of justice, and violates due process of law. Mendoza, 165 Wn.2d at 927; Goodwin, 146 Wn.2d at 871; Ford, 137 Wn.2d at 881. The court did not afford Posey his fundamental due process rights by sentencing him based on incomplete information and construing the prior judgment as a binding

determination of same criminal conduct. See Ford, 137 Wn.2d at 481; Mehaffey, 125 Wn.App. at 601. A new sentencing hearing is required, at which the court shall permit Posey sufficient time to investigate the factual basis of his prior convictions and competently present any available argument on whether his prior offenses constitute same criminal conduct.

F. CONCLUSION.

For the foregoing reasons, Mr. Posey respectfully requests this Court reverse his convictions and remand the case for a new trial. In the alternative, his sentence should be vacated and the case remanded for a new sentencing hearing.

DATED this 28<sup>th</sup> day of July 2011.

Respectfully submitted,



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