

No. 41467-8-II (41477-5-II)
COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

FILED
MAY 17 2011
CLERK OF COURT
BY: *[Signature]*
TOLSON

STATE OF WASHINGTON,

Respondent,

vs.

DARRYL ANTHONY HENDERSON,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-00581-3
The Honorable Thomas Felnagle, Judge
The Honorable Elizabeth Martin, Judge

OPENING BRIEF OF APPELLANT

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PM 5-17-11

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR	1
II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR	2
III. STATEMENT OF THE CASE	4
A. PROCEDURAL HISTORY	4
B. SUBSTANTIVE FACTS	9
1. <i>Video Recording of the Pine Street Bar Incident</i>	9
2. <i>State's Eyewitness Testimony</i>	11
3. <i>Defense's Eyewitness Testimony</i>	14
IV. ARGUMENT & AUTHORITIES	16
A. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT DURING HIS QUESTIONS REGARDING GANGS AND DURING HIS CLOSING ARGUMENTS	16
1. <i>Facts Related to Prosecutorial Misconduct</i>	16
2. <i>Argument and Authorities Related to Prosecutorial Misconduct</i>	26
B. HENDERSON WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS DEFENSE ATTORNEY FAILED TO OBJECT TO GANG EVIDENCE AT TRIAL, FAILED TO OBJECT TO PROSECUTORIAL MISCONDUCT IN CLOSING, AND FAILED TO REQUEST CURATIVE INSTRUCTIONS	35
1. <i>Failure to Object to Gang Evidence and to Prosecutorial Misconduct in Closing, and Failure to Request a Curative Instruction</i>	36
2. <i>Failure to Propose a Limiting Instruction</i>	38

C. HENDERSON'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED WHEN THE STATE FAILED TO ELECT WHETHER THE ACT OF TAKING THE WALLET OR THE ACT OF TAKING THE MOTOR VEHICLE WAS THE BASIS FOR THE CONSPIRACY TO COMMIT ROBBERY AND ROBBERY CHARGES, AND WHEN THE TRIAL COURT FAILED TO GIVE THE JURY A UNANIMITY INSTRUCTION.....	41
D. HENDERSON WAS ENTITLED TO A LESSER INCLUDED OFFENSE INSTRUCTION DEFINING FOURTH DEGREE ASSAULT.....	44
E. THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE DEPRIVED HENDERSON OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL	48
F. THE TRIAL COURT VIOLATED DOUBLE JEOPARDY BY ENTERING JUDGMENT AND SENTENCE ON TWO CONSPIRACY CONVICTIONS BASED ON ONLY ONE UNIT OF PROSECUTION.....	49
V. CONCLUSION	49

TABLE OF AUTHORITIES

CASES

WASHINGTON STATE

<u>In re Pers. Restraint of Davis</u> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	36
<u>In re PRP of Pirtle</u> , 136 Wn.2d 467, 965 P.2d 593 (1998).....	26
<u>State v. Aaron</u> , 57 Wn. App. 277, 787 P.2d 949 (1990).....	39
<u>State v. Adams</u> , 91 Wn.2d 86, 586 P.2d 1168 (1978)	39
<u>State v. Aumick</u> , 126 Wash.2d 422, 894 P.2d 1325 (1995)	45
<u>State v. Berlin</u> , 133 Wn.2d 541, 947 P.2d 700 (1997)	45, 47
<u>State v. Bryant</u> , 89 Wn. App. 857, 950 P.2d 1004 (1998).....	27
<u>State v. Campbell</u> , 78 Wn. App. 813, 901 P.2d 1050 (1995)	38
<u>State v. Charles</u> , 126 Wn.2d 353, 894 P.2d 558 (1995)	47
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978)	26
<u>State v. Cienfuegos</u> , 144 Wn.2d 222, 25 P.3d 1011 (2001).....	39
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984)	48
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10 (1991).....	41, 43
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984)	27
<u>State v. Davis</u> , 60 Wn. App. 813, 808 P.2d 167 (1991)	46
<u>State v. Griswold</u> , 98 Wn. App. 817, 991 P.2d 657 (2000)	39
<u>State v. Henderson</u> , 100 Wn. App. 794, 998 P.2d 907 (2000).....	27

<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991)	27
<u>State v. Holland</u> , 77 Wn. App. 420, 891 P.2d 49 (1995)	42
<u>State v. King</u> , 75 Wn. App. 899, 878 P.2d 466 (1994)	43
<u>State v. Kiser</u> , 87 Wn. App. 126, 940 P.2d 308 (1997)	42
<u>State v. Knapstad</u> , 107 Wn.2d 346, 729 P.2d 48 (1986)	7
<u>State v. Leavitt</u> , 49 Wn. App. 348, 743 P.2d 270 (1987).....	36
<u>State v. Mierz</u> , 127 Wn.2d 460, 901 P.2d 286 (1995).....	35
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984)	41
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	26
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	27
<u>State v. Scott</u> , 151 Wn. App. 520, 213 P.3d 71 (2009).....	38
<u>State v. Stein</u> , 144 Wn.2d 236, 27 P.3d 184 (2001)	28
<u>State v. Suarez-Bravo</u> , 72 Wn. App. 359, 864 P.2d 426 (1994) ..	27
<u>State v. Thomas</u> , 109 Wn. 2d 222, 743 P.2d 816 (1987).....	36, 39
<u>State v. Warden</u> , 133 Wn.2d 559, 947 P.2d 708 (1997)	45
<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994).....	46
 FEDERAL	
<u>Kennedy v. Lockyer</u> , 379 F3d 1041 (9th Cir. 2004)	30
<u>Mak v. Blodgett</u> , 970 F.2d 614 (9th Cir. 1992).....	48
<u>Mitchell v. Prunty</u> , 107 F.3d 1337 (9th Cir.1997)	29

<u>Santamaria v. Horsley</u> , 133 F.3d 1242 (9th Cir.1998)	29
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	35, 36
<u>United States v. Avila</u> , 465 F.3d 796 (7th Cir. 2006).....	31
<u>United States v. Davis</u> , 154 F.3d 772 (8th Cir. 1998)	27
<u>United States v. Frederick</u> , 78 F.3d 1370 (9th Cir. 1996)	48
<u>United States v. Garcia</u> , 151 F.3d 1243 (9th Cir.1998).....	29, 30
<u>United States v. Hankey</u> , 203 F.3d 1160 (9th Cir.2000)	29, 30
<u>United States v. Melchor-Lopez</u> , 627 F.2d 886 (9th Cir. 1980)....	30
<u>United States v. Roark</u> , 924 F.2d 1426 (8th Cir. 1991).....	38

OTHER AUTHORITIES

BLACKS LAW DICTIONARY, 6th Ed. (1992)	46
ER 105.....	38
ER 404(b)	38
RAP 2.5(a).....	42
RAP 10.1(g)(2)	49
RCW 9A.36.041(1)	46
U.S. Const. amd. VI.....	35
Wash. Const. art. I, § 22 (amend. x)	35

I. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct when he asked improper questions of his prosecution witnesses in order to elicit irrelevant, inadmissible and overly prejudicial testimony regarding gangs and gang membership.
2. The prosecutor committed misconduct by introducing evidence of the Hilltop Crips gang that exceeded the trial court's pre-trial orders.
3. The prosecutor committed misconduct by attempting to inflame the passions and prejudices of the jury by painting the defendants as violent and murderous gang members.
4. The prosecutor committed misconduct by arguing to the jury that gang membership proved participation in a general conspiracy and agreement to assist in criminal activity.
5. Henderson was denied effective assistance of counsel when his defense attorney failed to object to gang evidence at trial, failed to object to prosecutorial misconduct in closing, and failed to request curative and limiting instructions.
6. Henderson was denied his right to a unanimous jury verdict on the charges of conspiracy to commit robbery and robbery, when the State failed to elect which of two takings formed

the factual basis for the robbery, and the trial court failed to instruct the jury that it must be unanimous as to which of the two takings was proved beyond a reasonable doubt.

7. The trial court erred when it refused to give Henderson's proposed fourth degree assault instruction as a lesser included offense of robbery.
8. The cumulative effect of the errors in this case deprived Henderson of his due process right to a fair trial.
9. The trial court violated Henderson's double jeopardy protections by entering judgment and sentence on two conspiracy convictions based on only one unit of prosecution.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the prosecutor commit reversible misconduct by introducing inadmissible and prejudicial evidence of gang culture and criminal activity for the purposes of arguing Henderson's propensity for criminal activity and for arguing that any gang member is part of a general conspiracy to participate in any criminal activity of other gang members?
(Assignments of Error 1, 2, 3, & 4)
2. Was Henderson deprived of his right to effective assistance

of counsel when his trial attorney failed to object to the inadmissible and overly prejudicial gang evidence, failed to object to the prosecutor's improper statements in closing argument, and failed to request a curative instruction? (Assignments of Error 5)

3. Was Henderson denied his right to effective assistance of counsel where the prosecutor asserted that his gang evidence would be limited, and presented for the specific purpose of establishing the gang motivation aggravator, but counsel failed to propose a jury instruction expressly stating the limited purpose for which gang evidence could be considered? (Assignment of Error 5)
4. Was appellant denied his right to a unanimous jury verdict on the charges of conspiracy to commit robbery and robbery, when the prosecutor told the jury that it could find a robbery based on either the theft of a wallet or the theft of a vehicle, and the trial court failed to instruct the jury that it must be unanimous as to which of two takings was proved beyond a reasonable doubt? (Assignment of Error 6)
5. Did the trial court err when it refused to give Appellant's proposed fourth degree assault instruction as a lesser

included offense of robbery where, as charged and prosecuted in this case, Appellant could not have legally or factually committed robbery without also committing fourth degree assault? (Assignment of Error 7)

6. Did the cumulative effect of prosecutorial misconduct, ineffective assistance of counsel, and denial of an instruction on the lesser included offense of assault, deprive Henderson of his due process right to a fair trial? (Assignment of Error 8)
7. Where the evidence established at most only one agreement, did the trial court violate Henderson's double jeopardy protections when it entered judgment and sentence on two conspiracy convictions based on only one unit of prosecution? (Assignment of Error 9)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On February 8, 2010, the State filed separate Informations charging Darryl Anthony Henderson, Deandre Lamar Beck, and 30 other men, with conspiracy to commit murder and/or robbery and/or drive-by shooting and/or burglary and/or theft and/or possession of stolen property and/or identity theft and/or trafficking in stolen

property and/or theft of a motor vehicle and/or unlawful delivery of a controlled substance and/or unlawful possession of a controlled substance with intent to deliver and/or unlawful possession of a firearm. HCP 76-78; BCP 1-2.¹ The State alleged that the men were members or associates of the Hilltop Crips gang and, as members or associates, conspired over a two year charging period to commit any or all of the listed crimes. HCP 77-78, 82; BCP 2.

The State also charged Henderson and Beck each with one count of robbery in the first degree (RCW 9A.56.190, .200), and one count of theft of a motor vehicle (RCW 9A.56.020, .065), arising out of a July 22, 2009 incident occurring in the parking lot of the Pine Street Landing Bar in Tacoma. HCP 78-79, 85-86; BCP 3. The State alleged that Henderson and Beck committed these three crimes in order to maintain or advance their positions within the gang (RCW 9.94A.535). HCP 77-79; BCP 2, 6-7.

The State also charged three other men, Trevor Green, Curtis Hudson, and Brandon Starks, with conspiracy, robbery, and theft of a motor vehicle arising out of the Pine Street incident. HCP

¹ Citations to the trial record will be as follows. Citations to clerk's papers in Henderson's case will be to "HCP", and clerk's papers in Beck's case will be to "BCP." Citations to the pretrial and sentencing proceedings will be to the date of the proceeding. Citations to the trial proceedings, labeled Volume 1 thru Volume 5, will be to the volume number.

76, 80, 85-86, BCP 1. The State charged the remaining 27 men with the broad conspiracy charge, and individually with various crimes arising out of 22 separate incidents. HCP 80-101.

During a pretrial status conference, the defense complained that it was unable to formulate a defense or bring proper pretrial motions because the State had provided approximately 4500 pages of pretrial discovery, but had not specified which items applied to which defendants, or specified which crimes each defendant had conspired to commit. 04/16/10 RP 46-47, 48, 54, 57-58; 05/06/10 RP 42.

The State asserted, under its general conspiracy theory, that all the evidence applied to all of the defendants. 05/06/10 RP 15-16, 41-42. The prosecutor explained its general conspiracy theory as follows: the defendants belong to the Hilltop Crips gang; the gang exists solely for the purpose of committing crimes in order to make money; the defendants knew and understood this when they agreed to join the gang; gang members frequently meet and discuss committing criminal acts; thus, all criminal acts undertaken for monetary gain by any gang member is part of a conspiracy. 05/06/10 RP 15-16.

Based on the prosecutor's assertions, the defendants filed

Knapstad² motions, asking the court to dismiss the conspiracy charge against each defendant because gang membership alone cannot establish an agreement to commit any crime ever committed by any gang member. HCP 177-201; 05/21/10 RP 7. The trial court denied the motion in part and granted the motion in part. HCP 253-55; 05/21/10 RP 46. It did not dismiss the conspiracy charge outright, but it limited the scope of the charge. 05/21/10 RP 44-46; HCP 254; BCP 10.

Specifically, the trial court ruled that the State could not proceed under its generalized theory; however, it could proceed on conspiracy charges as they related to other specific criminal charges. 05/21/10 RP 44-46. For Henderson and Beck, this meant that the State could only proceed on conspiracy charges relating to the Pine Street robbery and vehicle theft charges. HCP 254; BCP 10.

The trial court subsequently ordered that the defendants should be grouped according to incident, and severed the various groups for trial. 05/26/10 RP 83-84; 06/01/10 RP 63-64. The defendants alleged to have been participants in the Pine Street incident, including Henderson and Beck, were grouped together

² State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

and scheduled for a joint trial. 06/01/10 RP 64.

The State subsequently amended the Informations to charge Henderson and Beck with conspiracy to commit first degree robbery (RCW 9A.56.190, .200, RCW 9A.28.040), first degree robbery (RCW 9A.56.190, .200), conspiracy to commit theft of a motor vehicle (RCW 9A.56.020, .065, RCW 9A.28.040), and theft of a motor vehicle (RCW 9A.56.020, .065). HCP 258-60; BCP 12-14. The State alleged that all four crimes were committed in order to maintain or advance their positions in the Hilltop Crips gang (RCW 9.94A.535). HCP 258-60; BCP 12-14.

Before trial, Henderson and Beck objected to the proposed testimony of the prosecution's gang expert witness, Detective John Ringer, on the grounds that his expertise was based on hearsay statements made by unknown individuals, and it was also unnecessary, cumulative, inflammatory and prejudicial. RP1 64-65, 69-71. The trial court denied the defense motion, ruling that Det. Ringer's testimony was admissible. RP1 73-74.

The jury found Henderson and Beck guilty of all four charges, but did not find that the crimes were gang-motivated. HCP 293-300; BCP 15-18; RP5 862-67. The trial court sentenced Henderson within his standard range to 156 months of

confinement. HCP 354, 357; 11/17/10 RP 3, 9. Henderson timely appealed, and his appeal was consolidated with Beck's appeal. HCP 364-65.

B. SUBSTANTIVE FACTS

1. *Video Recording of the Pine Street Bar Incident*

On July 22, 2009, Vincent Ligon went to a bar called Pine Street Landing in Tacoma, and during a fight in the parking lot outside the bar, his car keys were taken from him and his car was stolen. 2RP 123, 125. All of this was recorded on video surveillance, but police did not know the identities of the participants. 2RP 153, 155; Exh. P8.

In September of 2009, the Tacoma Police Department's gang taskforce arrested a Hilltop Crip gang member named Curtis Hudson. 2RP 210. Hudson was offered a deal on the many charges he faced, in return for viewing videos of several unsolved crimes and identifying the participants. 2RP 210. Hudson identified five individuals from the Pine Street bar video—himself, Trevor Green, Brandon Starks, Darryl Henderson, and Deandre Beck, who were then charged in connection with the incident. 2RP 222.

The video shows the following: Ligon arrives at the bar's

parking lot in his white Pontiac Lemans at 12:26 A.M., shakes hands with Beck, then goes into the bar. 2RP 162, 163-64; Exh. P8. Eight minutes later, when Ligon exits the bar, a group of men are standing near his car, talking and looking at the vehicle. 2RP 164, 165-66; Exh. P8. In that group are individuals later identified as Trevor Green, Brandon Starks, Darryl Henderson and Deandre Beck. 2RP 165-66; Exh. P8.

Ligon walks to his car, and Henderson can be seen either pushing or punching Ligon once. 2RP 168-69; Exh. P8. Ligon turns and walks away. 2RP 168-69; Exh. P8. Henderson is then seen returning to and standing with a group of men. 2RP 169; Exh. P8. Ligon approaches Henderson and there is a verbal confrontation, then Henderson begins hitting Ligon. 2RP 172; Exh. P8. In the midst of the fight, others from Henderson's group also hit Ligon. 2RP 172; Exh. P8. Green bends down towards Ligon, then he gets into Ligon's car and drives away. 2RP 172-3; Exh. P8. As the car exits the parking lot, the fight ends and everyone in the parking lot leaves. 2RP 173; Exh. P8. Henderson and Beck can be seen leaving in Henderson's van. 2RP 175; Exh. P8.

Ligon called the police after the incident and filed a stolen vehicle report. 2RP 123, 125. However, at the time of trial, he

testified that he could not remember details from that night because he had been intoxicated. 2RP 121. He told police that somebody told him that the Hilltop Crips would know where his car was. 2RP 126. Ligon suffered minor injury from the fight, but did not need to go to the hospital. 2RP 126-27. He eventually recovered his car, minus the rims and the stereo. 2RP 128. Ligon's keys were in the car when it was recovered. 2RP 128.

2. *State's Eyewitness Testimony*

Hudson, who is also an admitted Hilltop Crip gang member, testified at trial as part of a deal made with the State to reduce his potential sentence from 22 years down to 21 months. 3RP 329, 362. In Hudson's version of events, he saw Henderson in the parking lot of the Pine Street Bar. 3RP 346-47. He testified that Henderson said, "I need these rims," which Hudson took to mean that Henderson wanted the rims on Ligon's car. 3RP 346-47.

According to Hudson, he then asked Starks whether he would steal the car because he knew that Starks had a reputation as someone who has a talent for stealing cars. 3RP 347. But Starks said he could not steal Ligon's car because it had an alarm system. 3RP 347.

Hudson testified that he, Henderson, Starks, and Green next

discussed whether to beat up Ligon so they could get the keys to take the car, and Henderson said he would “knock out” Ligon. 3RP 347, 348. Hudson assumed that Green got the keys from Ligon’s pocket during the ensuing fight, because he saw him start the car and drive away. 3RP 350-51

Brandon Starks also agreed to testify for the prosecution in exchange for a reduction in his charges. 3RP 270. Starks’ deal with the State resulted in all but one of the charges against him being dismissed and his sentence reduced from potentially 14 years down to time served. 3RP 270, 298.

Starks testified that he is an active member of the Hilltop Crips. 3RP 268. He said that the Hilltop Crips have hundreds of members. 3RP 268. Starks said he knows of Henderson and Beck, but they are not in his “clique” in the gang. 3RP 269.

Starks admitted that he had stolen cars before. 3RP 279. He said in the past, when he had committed car theft, he and two others would beat up the owner and then take the car. 3RP 279. The participants would then split the proceeds. 3RP 280-81. According to Starks, this car was stolen in an “identical manner” to prior thefts he had participated in with unnamed others. 3RP 296. But these prior thefts were not committed with Beck or Henderson.

3RP 296, 3RP 311.

Starks testified that Hudson called him on July 22nd and asked him to come to the Pine Street Bar. 3RP 281. When he arrived, he approached Hudson, who was standing with Henderson. 3RP 282. Hudson asked Starks if he knew how to steal Ligon's car. 3RP 283. Starks said he told Hudson that he did not want steal the car. 3RP 283. Starks did not remember telling the police that Henderson said, "Fuck that. We're taking this shit. [Ligon's] a bitch." 3RP 286. Starks testified that Henderson never made that statement, and never said that he wanted to steal Ligon's car. 3RP 285, 286.

While Starks talked outside with Hudson, Henderson went inside the bar. 3RP 284. When Henderson came out, he was angry, and eager for a fight. 3RP 284. It appeared that Henderson had an altercation with someone inside the bar, and Henderson told Starks that he "was going to knock some dude out." 3RP 284. Ligon eventually came out of the bar and Starks tried to tell everyone that Ligon owned the car they had talked about, but no one was listening. 3RP 284. Then Henderson approached Ligon and punched him. 3RP 284.

After the first punch, Ligon walked back to his friends, and

Starks, Hudson, and Green went over to Henderson to ask what was going on. 3RP 285. Henderson was angry and said, "I missed it," "F**k that, he's going down." 3RP 288. Then, according to Starks, Henderson walked toward Ligon's group and Starks and the others followed. 3RP 288. Henderson punched Ligon again and they started fighting. 3RP 285. Starks "jumped in" to the fight. 3RP 285. He saw Beck punch Ligon once. 3RP 285. Starks said Green took Ligon's keys, while Starks took or tried to take Ligon's wallet.³ 3RP 285, 289, 295. Green went to Ligon's car and drove it away. 3RP 290.

Everyone immediately left the scene because security guards were there telling them that the police were coming. 3RP 290. Starks said there was no discussion during or directly after the fight. 3RP 292.

3. *Defense's Eyewitness Testimony*

Green pleaded guilty as originally charged without receiving any benefit from the State, and testified for the defense. 4RP 645. According to Green, Starks and Hudson planned to steal Ligon's car, but were not sure how to accomplish the task because they

³ Initially, Starks said Green took the wallet, but Starks later testified that he had taken the wallet himself. 3RP 285, 289. However, there is no mention of a stolen wallet in the police report. 2RP 125.

could not force entry, so they called off the plan. 4RP 624, 628-29, 460. Green said that neither Henderson nor Beck were part of any conversation or plan to steal the car. 4RP 629. When he later saw Henderson fighting Ligon, Green took the opportunity to steal Ligon's keys. 4RP 630. Green said there was no plan to steal the keys, but when the opportunity arose, he took it. 4RP 631.

Green said that when he got the keys, he drove the car and to Hudson's garage. 4RP 636-37. Then, he said that he, Starks and Hudson split the proceeds from what they took from the car. 4RP 637-38. Green said that neither Henderson nor Beck received any proceeds from the theft. 4RP 637-38.

Henderson testified on his own behalf, and said that he had been drinking that night and had fought with Ligon, but had no idea that anyone was planning to steal the car. 3RP 433, 438. Henderson remembered admiring the rims on the white car, along with other cars in the lot that night, as they talked outside, but he was not planning to steal them. 3RP 437-38.

Henderson said he and Ligon had an argument inside the bar and they met outside to fight. 3RP 436-37. Before Ligon came out, Henderson bet his friends he could knock Ligon out in one punch. 3RP 444. After the first punch, his friends came up to ask

what was going on and Henderson felt they would “back him up.” 3RP 446. Henderson said he never asked for, nor received any money from the auto theft. 3RP 448-49.

Henderson acknowledged that he had been a Hilltop Crips member since he was 11 years old, but, said that he had not been active in the gang for some time. 2RP 188-89.

IV. ARGUMENT & AUTHORITIES

A. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT DURING HIS QUESTIONS REGARDING GANGS AND DURING HIS CLOSING ARGUMENTS

The prosecutor committed misconduct when he repeatedly elicited inadmissible, irrelevant and prejudicial evidence during his questioning of prosecution witnesses, and when he misled the jury about the law during closing arguments.

1. *Facts Related to Prosecutorial Misconduct*

Relying on both State and Federal law, the defense moved under Knapstad to dismiss the general conspiracy charge against Henderson. BCP 177-81, 147, 148. Following a hearing on the motion, the trial court specifically ruled that the State could not prosecute the conspiracy charges based on the general idea that individuals agree to commit a crime simply by becoming a member of a gang. 05/21/10 RP 44-46; HCP 254. The trial court’s ruling

was based primarily on Federal case law holding that gang membership alone is not a crime, and cannot prove a conspiracy. 05/21/10 RP 44-45. Thus, all of the parties were on notice that the State could not rely on gang membership alone to prove the conspiracy charges in this case.

During a hearing on pretrial motions in limine, the prosecutor explained what type of gang evidence he planned to introduce and for what purpose, stating:

As it relates to Detective Ringer, I do intend -- I might as well make an offer of proof now, so counsel can make their objection, if they think I'm going outside of what would be appropriate for 404(b). I do intend to offer their attendance at these meetings . . . around the time of this incident, what happens at that meeting and the significance of that, the hierarchy of the gang structure and what it means to work in accordance with a gang.

I don't intend to offer specific instances of either Mr. Beck or Mr. Henderson prior to the incident . . . but their attendance at those meetings and how the gangs operate are, I think, relevant for purposes of proving that aggravating factor.

That's the limit I intend through my case in chief and substantive evidence[.]

1RP 54-55

Henderson and Beck expressed their concern to the court that Detective Ringer's testimony would be cumulative because other witnesses like Hudson could testify to gang activity and

culture. 1RP 69. They also objected to Detective Ringer's testimony regarding the history of gangs in California and Tacoma and the supposed reduction in gang-related crime in Tacoma after the arrests of the original 30 defendants in this case, as unnecessary to prove that the charged crimes were committed for the purpose of furthering their gang status, and as being unduly prejudicial. 1RP 69-70. And finally, the defense argued that "the real problem with all of this is that it's going to inflame the passions of the jury. They're all members of the community. They rely on Detective Ringer to keep them safe, and he's up there talking about how scary the gangs are. It just underlines and underscores and turns this into a gang case, instead of a robbery case." 1RP 71.

In response, the prosecutor declared that he did not plan to present evidence of the extended history of gangs. 1RP 71. The prosecutor then told the court:

What I want to ask Detective Ringer about is specific to the statutory language that these defendants are charged with. That's under 9.94A.535(3)(s), that the defendant committed the offense to obtain or maintain his or her membership, or to achieve his or her position in the hierarchy of the organization . . . to advance his position.

Now, what I intend to offer through the detective is, how does the gang work? Now, if you are a gang member and you do certain acts, for instance, commit a robbery, steal a car, part the car

out and sell the parts of it, which the allegations in this case are, does that advance you in the hierarchy of the gang? Under his expertise, I suspect he's going to say, "Yes. The more work you do . . . the more work you do for the gang, the more apt you are to be advanced within the gang." This is completely relevant to the aggravating circumstances charged in each of the four counts.

So I don't intend to get into the history of the gang, whether or not . . . the community is much safer after the arrest. I don't intend to offer any of that. I intend to offer his expertise with regard to the gangs in which these two defendants have claimed affiliation to and what is expected of gang members in that gang and what it means when you do certain things and how it impacts your standing within that gang. That's all I intend to ask the Detective, because that's all I think is really relevant in this case.

1RP 72-73. With these representations made to the court, the case proceeded to trial.

The State called Detective Tom Ringer as an "expert" on the Hilltop Crips. 2RP 207. The prosecutor began by asking Detective Ringer to describe his job with the South Sound Gang Task Force. Ringer testified that:

In that capacity, myself and the coworkers target violent gang members for prosecution, federal prosecution, primarily, but sometimes state prosecution, try to target those individuals we believe are going to be the ones doing the homicides, doing the shootings and try to get them off the streets before they do those for gun charges, drug charges, or a variety of charges.

2RP 207. He told the jury that he used informants to tell him where

gang members hide guns and cocaine in their cars. 2RP 229-30.

Then, after describing his arrest of Hudson, Starks and Beck, the prosecutor asked Ringer to describe his interactions with gang members to the jury. Ringer testified that gang members shoot at police officers. 2RP 229. He said that wherever gang members “hang out,” there is a lot of crime: “It’s only a matter of time before those outfits [where members hang out] are closed down by law enforcement because of the violence and the homicides, and then a new place springs up.” 2RP 242.

Ringer testified that to become a member of a gang, most potential members have to fight each other or commit a drive-by shooting. 2RP 234-35. He stated that unless a member moves away, death is the only way to openly leave a gang—otherwise the other members will threaten or assault the member until he returns. 2RP 235.

Ringer was asked to describe how gang members gain status in the gang and he told the jury that gang members commit drive-by shootings, “home-invasion” robbery and other crimes to gain status in the gang. 2RP 235-36. He said that murder gives a member “greatly enhanced” status. 2RP 236. Not content to leave the jury with this general description, Ringer goes on:

You prove your worth by joining the crew and going in at gunpoint and taking down the occupants of the house and robbing them; maybe putting in work by shooting somebody; it might involve shooting somebody and killing somebody and going away to prison, but your status is greatly enhanced.

2RP 236. Ringer testifies that stealing and stripping a car is “common” low-level “work” for Hilltop Crips members. 2RP 236.

The prosecutor then asks Ringer to describe to the jury what the gang “expectations” are for any gang members present when other members commit a crime.

Q: You talked about the expectations of the individuals who are present when other gang members want to commit a crime. Hypothetically speaking, if an individual like in the Pine Street case was present, but didn’t want to steal this car, would they be expected to at least participate in the events leading up to the theft of the car?

A: In this situation here, probably not forced to because the situation doesn’t require so many people to be—you know, to gain control. But if the victim suddenly starts getting the better of the three or four individuals involved, the other individuals had better step up and get him under control for the gang’s sake. If they don’t, if they stand by and things go bad, there is a price to pay.

Q: Right. Have you seen the video of this incident, obviously?

A: Many times, yes.

Q: In the video, we see people standing around Mr. Ligon getting attacked?

A: Yes.

Q: Do you recall those individuals?

A: Yes.

Q: Would that be consistent with individuals making sure that if something goes wrong, there is backup there?

A: If the individuals standing around are gang members—not all of the individuals standing around are gang members.

Q: Yes.

A: Definitely. If things start going bad, they better step up and step in and get involved.

2RP 239.

Ringer is asked again if the crime in this case is “consistent with your training and experience on how [the Hilltop Crips] would go about stealing a vehicle from somebody.” Ringer replies:

A: In a situation like this, at a club, this kind of behavior is repeated time after time, where a victim is targeted, might have just a gold chain on and somebody says, “Hey, that chain has a lot of value to it, so they’ll snatch it. If the person tries to get it back, they might be on the bottom pile of three or four individuals. The person isn’t going to snatch one on one. They’re going to have backup close by there, same thing on vehicle thefts.

There’s other incidences that are very similar. They target a victim. One particular one, they chitchat with the victim, one guy shakes the hand, holds on to the hand and suddenly the guy is being assaulted and beat down. While he’s being

beat down, somebody is going in his pocket taking his keys out, taking his wallet, snatching his chain. You can see the person run to the car. As soon as the car leaves the lot, everybody scatters.

Q: Is what you saw on the tape consistent with your training and experience in regard to these sorts of incidents?

A: Yes.

2RP 239-40.⁴

The prosecutor continues this line of questioning with Green. He asks Green repeatedly whether being a member of a gang means that you must participate in criminal activity of other members. Green denied that gang members commit crimes for the benefit of the group. 4RP 658, 674. Green also denied that a gang member would automatically be prepared to participate in any crime occurring in his presence:

Q: If you are out with a group of other gang members, Mr. Green, and something happens, aren't you supposed to come to the aid of your fellow gang members?

A: That's what I recall, but I don't recall other people going by them—them type of rules are, having a communication or gathering of those rules.

Q: Well, it's understood, isn't it? How do you know what's supposed to happen?

⁴ Interestingly, both Starks and Hudson testified that there is no gang procedure for stealing vehicles, only what an individual might do when stealing a car. 3RP 279, 348.

A: Because I've heard of gangs. I've heard of Crips and Bloods. That's what they do.

....

Q: Well, you would agree, then, if you're familiar with the gang and you're part of the gang, that if you're committing a crime and there are other Hilltop Crip members there, you're supposed to help each other, right?

A: Maybe.

Q: It wouldn't make sense not to, right?

....

A: I mean, it's common sense.

Q: And gang members are loyal to one another aren't they?

4RP 660-61.

In closing argument, the prosecutor used the gang evidence he had successfully put before the jury to argue impermissibly that if the defendant's admit they are "bangers," or active gang members, then they are guilty of conspiracy: "they're involved in this criminal activity on a regular basis, they don't have a defense."

5RP 771. Specifically, he told the jury:

They don't have a defense if they're acknowledging: Hey, we're bangers with Green, Starks and Hudson, right? Because Green, Starks and Hudson all say there was a conspiracy. So if they were bangers with those guys, then there's no issue for you to decide. So first they have to say they're not bangers.

5RP 771.

Then, the prosecutor argued further to the jury that the “expert,” Detective Ringer, “told you” that if “you’re in the gang; you’re part of the conspiracy before there’s ever a plan.” 5RP 785.

Specifically, he told the jury:

Now take that [video], take what you just saw, take the testimony of Starks and Hudson and consider it in light of what Detective Ringer told you. Right? He’s an expert in Hilltop Crips. He’s been on a bike driving up on the Hilltop since he was first an officer. Right? You heard about his training and experience as it relates to Hilltop Crips, how the gangs work, how they execute things, what’s expected of them. Right? You’re in the gang; you’re there for anything that goes down. Right?

Isn’t what you saw there consistent with what he told you? Right? He told you about this sort of—this sort of attack and theft of motor vehicles happening on 54th Street in the same exact manner, right?

Just a coincidence here that they execute, a group of Hilltop Crips, the exact same sort of theft and robbery? Or when you join the gang, you get this stuff, right? You know what’s going to happen. You’re a part of the conspiracy before there’s ever a plan, right? If this goes down, I’m in. Because if I’m not in, there’s repercussions.

But in this instance you have more than that just initial conspiracy you’re part of the gang you’re in for. You have actual evidence they conspire to commit these acts in both the form of the testimony and in the form of the direct evidence on the video.

5RP 784-85.

The prosecutor then continued this argument that being a gang member means being part of a conspiracy to commit any crime other members commit:

Detective Ringer and I believe Mr. Hudson indicate that when you're there with other Hilltop Crip members and they commit crimes, you're in or you're out. If you're out, there's problems. Right?

5RP 793.

2. *Argument and Authorities Related to Prosecutorial Misconduct*

A prosecutor has a duty to see that those accused of a crime receive a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. Charlton, 90 Wn.2d at 664. A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

To prevail on a claim of prosecutorial misconduct, a defendant has the burden of showing both improper conduct and its prejudicial effect. In re PRP of Pirtle, 136 Wn.2d 467, 481, 965 P.2d 593 (1998). The prejudicial effect of the misconduct is

determined by a review of the cumulative effect of misconduct, the strength of untainted evidence of guilt, and the curative actions taken by the court. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994); United States v. Davis, 154 F.3d 772, 784 (8th Cir. 1998).

Absent a proper objection, a defendant must show that the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). However, the cumulative effect of repeated instances of misconduct may be so flagrant that no instruction can erase the error. State v. Henderson, 100 Wn. App. 794, 805, 998 P.2d 907 (2000).

A prosecutor who attempts to elicit improper testimony or attempts to pursue an improper line of questioning may be guilty of misconduct. See State v. Suarez-Bravo, 72 Wn. App. 359, 864 P.2d 426 (1994). A prosecutor's misstatement of the law during closing argument may also be prosecutorial misconduct. See State v. Bryant, 89 Wn. App. 857, 874, 950 P.2d 1004 (1998). "The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

The Prosecutor in this case committed misconduct when he argued to the jury that being a gang member made Beck and Henderson automatically guilty of conspiracy. It is clear that this was the Prosecutor's intention from the beginning of the trial—he developed this argument throughout his questioning of witnesses, especially Detective Ringer and Mr. Green. He repeatedly argued that their membership in a gang negates any defense to conspiracy or accomplice liability. The Prosecutor also attempted to use gang evidence to paint the defendants as dangerous criminals who have to be locked up before they murder police officers or other citizens. These arguments are contrary to the law and were calculated to inflame the passions and prejudice of the jury.

The question of a general conspiracy theory based on gang membership has not yet been specifically addressed in Washington. However, as noted by the defense during the Knapstad hearing (05/21/10 RP 49; HCP 178), it is well established that Washington law requires knowledge of the particular crime committed in order to find a defendant liable as a co-conspirator or accomplice. See State v. Stein, 144 Wn.2d 236, 245-46, 27 P.3d 184 (2001) (relying on State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000) and State v. Cronin, 142 Wn.2d 568, 14 P.3d 752

(2000)).

And as argued below (10/25/10 RP 35; HCP 80-81), it is also well-settled in Federal law that evidence of gang membership may not be introduced, as it was here, to prove intent or culpability. See Mitchell v. Prunty, 107 F.3d 1337, 1342-43 (9th Cir.1997), *cert. denied*, 522 U.S. 913, 118 S.Ct. 295, 139 L.Ed.2d 227 (1997) (reversing the conviction and holding that evidence of membership in a gang cannot serve as proof of intent, because, while someone may be an “evil person,” that is not enough to make him guilty under California law), *overruled on other grounds by Santamaria v. Horsley*, 133 F.3d 1242, 1248 (9th Cir.1998); *see also United States v. Garcia*, 151 F.3d 1243, 1244-46 (9th Cir.1998) (reversing the conviction and stating that it would be contrary to the fundamental principles of our justice system to find a defendant guilty on the basis of his association with gang members).

The Ninth Circuit has held that testimony regarding gang membership “creates a risk that the jury will [probably] equate gang membership with the charged crimes.” United States v. Hankey, 203 F.3d 1160, 1170 (9th Cir.2000) (internal quotations and citations omitted). The Court further held that where, as here, “gang” evidence is proffered to prove a substantive element of the

crime (and not for impeachment purposes), it would likely be “unduly prejudicial.” Hankey, 203 F.3d at 1170. In sum, the use of gang membership evidence to imply “guilt by association” is impermissible and prejudicial. Garcia, 151 F.3d at 1246; see also Kennedy v. Lockyer, 379 F.3d 1041, 1055-56 (9th Cir. 2004).

Federal Courts of Appeals have also consistently held that gang membership does not establish participation in a criminal conspiracy:

There can be no conviction for guilt by association, and it is clear that mere association with members of a conspiracy, the existence of an opportunity to join a conspiracy, or simple knowledge, approval of, or acquiescence in the object or purpose of the conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient to make one a conspirator. Miller v. United States, 382 F.2d 583, 587 (9th Cir. 1967); United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974); United States v. Cloughessy, 572 F.2d 190, 191 (9th Cir. 1977); United States v. Richardson, 596 F.2d 157, 162 (6th Cir. 1979); United States v. Collins, 552 F.2d 243, 245 (8th Cir.), *cert. denied*, 434 U.S. 870, 98 S.Ct. 214, 54 L.Ed.2d 149 (1977); United States v. Hassell, 547 F.2d 1048, 1053 (8th Cir.), *cert. denied*, 430 U.S. 919, 97 S.Ct. 1338, 51 L.Ed.2d 599 (1977); United States v. Quintana, 508 F.2d 867, 881 (7th Cir. 1975).

United States v. Melchor-Lopez, 627 F.2d 886, 891 (9th Cir. 1980).

The prosecution’s argument that gang membership could establish agreement to a conspiracy was specifically rejected in United

States v. Avila, in which the court held:

The government has confused gang membership with membership in a conspiracy, forgetting that “to join a conspiracy ... is to join an agreement, rather than a group.” United States v. Townsend, 924 F.2d 1385, 1390 (7th Cir.1991); see also United States v. Gibbs, 182 F.3d 408, 430 (6th Cir.1999); United States v. Garcia, 151 F.3d 1243, 1246 (9th Cir.1998); United States v. Robinson, 978 F.2d 1554, 1563 (10th Cir.1992). One might join a golf club because it had a nice dining room and swimming pool, yet never play golf. And one might join a gang to feel like a big shot or to obtain immunity from being beaten up by gang members, without participating in the gang's criminal activities. The Latin Kings who were charged with Avila, and with whom he would have been tried had he not pleaded guilty, were convicted of conspiring to sell drugs, including crack, but there is no evidence that Avila was a member of that conspiracy. For that matter, there is no evidence that the Latin Kings conspired to retaliate against the murderer of Avila's brother.

465 F.3d 796, 798 (7th Cir. 2006).

This case may be the first time in Washington that the State has attempted to argue that gang membership alone establishes an agreement to a conspiracy. However, the law of this case is consistent with well-established federal law. The trial court specifically rejected the State's argument of a general conspiracy during pre-trial proceedings. 5/21/10 RP 44-46. Furthermore, the prosecutor's pre-trial representations to the court concerning how gang evidence would be used in this case misled the court and the

defense into believing the prosecutor would abide by that ruling.

When the prosecutor told the jury that once he proved Beck and Henderson were gang members, “they don’t have a defense,” 5RP 771, the prosecutor committed misconduct by misrepresenting the law to the jury. He repeated this misconduct over and over, telling the jury that the “expert” testimony proves that if “you’re in the gang; you’re part of the conspiracy before there’s ever a plan.” 5RP 784-5. He asked Ringer and Green whether being a gang member means you are required to assist in any criminal activity of other members, again setting up the impermissible argument of gang membership establishing agreement to a conspiracy. 2RP 239, 4RP 660-61.

The prosecutor’s argument that gang membership alone established Beck and Henderson’s guilt in a conspiracy was sufficient to establish prosecutorial misconduct in this case because it was a clear misrepresentation of the law to the jury. However, the prosecutor also committed misconduct when he elicited testimony calculated to inflame the passions and prejudices of the jury by inducing Detective Ringer to testify that gang members that he targets (like the defendants), are “those individuals we believe are going to be the ones doing the homicides, doing the shootings”

(2RP 207), that gang members commit violent crimes like drive-by shootings or home-invasion robberies in order to join the gang (2RP 234-35), that they commit murders and robberies to gain status (2RP 236), and that shooting someone will “greatly enhance” a member’s status within the gang (2RP 234-36).

The prosecutor also committed misconduct when he attempted to circumvent the limitations of inadmissible ER 404(b) evidence by arguing that evidence of prior crimes committed by other Hilltop Crips gang members establishes propensity to commit the same crime by any other Hilltop Crips gang member. The prosecutor asked Detective Ringer to give his “expert” opinion of whether the car theft in this case was committed in a way that is somehow a signature of the Hilltop Crips. 2RP 239-40. The prosecutor asked Starks to describe prior car thefts he has committed, and asks whether this is the “method,” “same sort of thing,” and “identical manner” of car theft Hilltop Crips members use, even though neither Henderson nor Beck had been part of these alleged prior thefts. 3RP 279, 289, 296, 311. Then in closing, the prosecutor argued that the method of prior thefts proves that Beck and Henderson, as fellow gang members, were knowing participants in this car theft. 5RP 785. This argument

violates ER 404(b)'s prohibition on use of a "propensity" argument.

Not only is the misconduct obvious in this case, it is clear that the misconduct was flagrant and ill-intentioned because it was directly contrary to the trial court's pretrial ruling that gang membership alone cannot establish a conspiracy, and directly contrary to established law. Moreover, the prosecutor represented to the trial court that he would limit the gang evidence to establishing a gang purpose, then goes far beyond that purpose time and again.

The prejudice of the gang evidence and the prosecutor's impermissible arguments to the jury cannot be overestimated. There was conflicting testimony regarding whether or not Henderson discussed or agreed to steal Ligon's car. But the jury was told they did not have to find beyond a reasonable doubt that Henderson discussed or agreed to steal Ligon's car; they only had to find that he was a member of a gang. And Henderson, as a member of the Hilltop Crips, was painted as a violent criminal who must be taken off the streets before he commits a terrible crime. No limiting instruction could have eliminated the prejudice of this misconduct.

Moreover, although the conspiracy charges are most

affected by this argument, it also prejudices the verdicts on the underlying crimes of robbery and theft of a motor vehicle because the sole issue in these charges was whether Henderson knew he was assisting in the theft of a motor vehicle when he participated in the fight. By arguing to the jury that Henderson's membership in the gang established his knowledge and participation in the plan, the prosecutor again misled the jury into believing that gang membership established his guilt as an accomplice.

Therefore, the prosecutorial misconduct in this case deprived Henderson of his due process right to a fair trial and all of his convictions must be reversed.

B. HENDERSON WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS DEFENSE ATTORNEY FAILED TO OBJECT TO GANG EVIDENCE AT TRIAL, FAILED TO OBJECT TO PROSECUTORIAL MISCONDUCT IN CLOSING, AND FAILED TO REQUEST CURATIVE INSTRUCTIONS

Effective assistance of counsel is guaranteed by both the United States and Washington State constitutions. U.S. Const. amd. VI; Wash. Const. art. I, § 22 (amend. x); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

The test for ineffective assistance of counsel has two parts: (1) the defendant must show that defense counsel's conduct was

deficient, i.e., that it fell below an objective standard of reasonableness; and (2) such conduct must have prejudiced the defendant, i.e., there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would have been different. State v. Thomas, 109 Wn. 2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from Strickland). A “reasonable probability” means a probability “sufficient to undermine confidence in the outcome.” State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case.” Strickland, 466 U.S. at 693.

1. *Failure to Object to Gang Evidence and to Prosecutorial Misconduct in Closing, and Failure to Request a Curative Instruction*

To establish ineffective assistance of counsel for failure to object to the admission of evidence, Henderson must show that (1) the failure to object fell below prevailing professional standards; (2) the objection would have likely been sustained by the trial court; and (3) the result of the trial would have likely been different if the disputed evidence had been excluded. In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

As discussed above, the majority of the gang testimony was

inadmissible, and the closing arguments improper, under both State and Federal law. Accordingly, any objection likely would have been sustained by the trial court.

The State's evidence and closing statements painted all gang members as violent and dangerous criminals. The closing arguments encouraged the jury to find Henderson guilty by association, not by the evidence presented about the charged incident. The prosecutor's arguments allowed the jury to convict Henderson without finding that he actually knew about or agreed to take the vehicle, and thereby relieved the State of its burden of proving every element of the crime. There is no conceivable legitimate trial strategy in allowing this inadmissible and improper testimony and closing arguments to be presented to the jury. Trial counsel's failure to object or request a curative instruction fell below professional standards.

The lack of objection or curative instruction in this case is "sufficient to undermine confidence in the outcome" of this trial. The jury heard inadmissible and highly prejudicial testimony about gang members, and were misled about how they could consider the evidence. It is likely that absent trial counsels' deficient performance, the verdicts would have been different. Therefore,

Henderson's convictions should be reversed.

2. *Failure to Propose a Limiting Instruction*

Evidence of other bad acts "is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). Evidence of a defendant's affiliation with gangs is not automatically precluded under this rule. There are certain limited circumstances under which a jury may consider gang evidence for a non-propensity purpose. See State v. Campbell, 78 Wn. App. at 821-22, 901 P.2d 1050 (1995) (evidence properly admitted to show premeditation, motive, and intent).

But as a number of courts have recognized, gang evidence is inherently prejudicial. And when a jury may have considered this evidence for an improper purpose, a new trial is the only sufficient remedy. See State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71 (2009); United States v. Roark, 924 F.2d 1426, 1430-34 (8th Cir. 1991) (gang affiliation causes jurors to "prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged.").

Therefore, where evidence of other misconduct, such as gang affiliation, is admitted under ER 404(b), it should be accompanied by a limiting instruction under ER 105 directing a jury

to disregard the propensity aspect of the evidence and focus solely on its proper purpose. State v. Griswold, 98 Wn. App. 817, 825, 991 P.2d 657 (2000); State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (pointing out “vital importance” of a limiting instruction to stress limited purpose of evidence).

Legitimate trial strategy or tactics generally cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). But an attorney’s failure to request a jury instruction that would have aided the defense can constitute deficient performance. State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001); Thomas, 109 Wn.2d at 226-29.

In this case, the prosecutor proposed the gang evidence for the limited purpose of establishing its theory that gang members are expected to commit and assist in the commission of crimes, so Henderson and Beck committed the offenses to maintain or advance their membership or position in the Hilltop Crips gang. 1RP 72-72. Unfortunately, the jury was never told that they could consider the gang evidence for this limited purpose only.

Defense counsel expressed its concern that the gang evidence would be overly prejudicial and turn the trial into a “gang

case, instead of a robbery case.” 1RP 69-71. But counsel failed to ensure that jurors would only consider the evidence for the narrow purpose for which it was proposed and admitted. This was not the result of legitimate tactics; it was the result of inattention and was therefore ineffective.

Henderson suffered significant prejudice from this inattention because, as argued in detail above, the prosecutor introduced a significant amount of testimony describing in great detail the violent behavior of an average gang member, and describing how Hilltop Crips commit car thefts in a manner identical to the theft in this case. Then the prosecutor specifically and repeatedly argued in closing that the jury could consider the gang testimony for completely improper purposes.

Without a limiting instruction, the jurors were free to convict Henderson not because they were convinced beyond a reasonable doubt that he conspired and agreed to steal Ligon’s car or wallet, but simply because he was a Hilltop Crip. The jury was free to base its determination of guilt on the general picture that the State painted of Hilltop Crips gang members. This is the exact result that ER 404(b) forbids, and that the trial court sought to prevent with its pretrial Knapstad ruling. Trial counsel’s failure to propose a limiting

instruction was ineffective, and requires reversal of Henderson's convictions.

C. HENDERSON'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED WHEN THE STATE FAILED TO ELECT WHETHER THE ACT OF TAKING THE WALLET OR THE ACT OF TAKING THE MOTOR VEHICLE WAS THE BASIS FOR THE CONSPIRACY TO COMMIT ROBBERY AND ROBBERY CHARGES, AND WHEN THE TRIAL COURT FAILED TO GIVE THE JURY A UNANIMITY INSTRUCTION

A criminal defendant may be convicted only if a unanimous jury concludes he or she committed the criminal act charged in the information. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)). And if the State presents evidence of multiple acts that could form the basis of a particular charged count, the State must elect which of the acts is relied on, or the court must instruct the jury to agree on the specific act. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991) (citing State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)).

Robbery requires the theft of personal property from another person. HCP 310, 313. Henderson did not personally take any of Ligon's personal property. So to prove that Henderson acted as accomplices to the robbery, the State had to prove that he solicited, commanded, encouraged, or requested that the other men commit

the robbery, or that he aided or agreed to aid his friends in the planning or commission of the robbery. HCP 320, 324-25; BCP 38, 40-41. To prove that Henderson conspired to commit the robbery, the State had to prove that he agreed the robbery should be performed. HCP 319.

In its rebuttal closing argument, the prosecutor made the following statement to the jury about the evidence establishing the robbery:

They're also accomplices to the robbery for the theft of [Ligon's] wallet that Mr. Starks took as well. So there's two separate ways of committing these offenses and they committed it in two separate ways. Right? Because Mr. Starks was clearly acting as an accomplice when he took the wallet. You can commit robbery in the first degree without actually committing the theft of the vehicle.

5RP 844-45. By making this statement, the prosecutor told the jury that it could convict Henderson on the basis of *either* the theft of the wallet *or* the theft of the vehicle. 5RP 844-45. But the State did not elect which of these "two separate ways" it was relying upon to prove robbery and conspiracy to commit robbery, and the trial court did not give the jury a unanimity instruction.⁵

⁵ This issue may be raised for the first time on appeal because failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error. RAP 2.5(a); State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

If there is no election and no instruction, the resulting constitutional error is harmless only if no rational trier of fact could have had a reasonable doubt that each incident established the crime beyond a reasonable doubt. Crane, 116 Wn.2d at 325. The rationale for this protection in multiple acts cases stems from possible confusion as to which of the acts a jury has used to determine a defendant's guilt. State v. King, 75 Wn. App. 899, 902, 878 P.2d 466 (1994). In this case, a rational juror could have had a reasonable doubt as to either alternative.

First, the evidence presented by the State to prove conspiracy and accomplice liability regarding the theft of the car was contradictory. While there was testimony that Henderson was involved in discussing the idea of stealing the car, other testimony indicated that Henderson merely stood by as others discussed stealing the car, while Henderson testified he had no idea that anyone planned to steal the car. 3RP 285, 286, 347, 348, 433, 438; 4RP 629, 631. Based on this record, a reasonable juror could have doubted that the State's evidence proved beyond a reasonable doubt that Henderson conspired or agreed to assist in stealing the car.

Second, the record contains absolutely no evidence that the

men ever discussed or mentioned Ligon's wallet before, during, or after the incident. The State presented no evidence to show that Henderson asked Starks to take Ligon's wallet, or had any idea that Starks would take Ligon's wallet. Without such evidence, Henderson cannot be convicted of conspiring to take the wallet and cannot be liable as an accomplice to the taking of the wallet. A rational juror would have had a reasonable doubt as to this alternative as well.

Because any rational trier of fact would have had a reasonable doubt that Henderson conspired or acted as an accomplice to the taking of both the vehicle and the wallet, the lack of either prosecutorial election or a unanimity instruction was not harmless. Henderson's convictions for conspiracy to commit robbery and robbery should be reversed.

D. HENDERSON WAS ENTITLED TO A LESSER INCLUDED OFFENSE INSTRUCTION DEFINING FOURTH DEGREE ASSAULT

Henderson requested that the trial court instruct the jury on the crime of fourth degree assault as a lesser included offense of first degree robbery. 4RP 684-85; HCP 276-28. The trial court denied the request and refused to give the defense's proposed lesser included offense instruction. 5RP 727-30.

Each party may have instructions embodying its theory of the case if evidence supports that theory. State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997). Courts apply a two-part test to determine when a lesser included offense instruction is appropriate. Berlin, 133 Wn.2d at 545 (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). First, each of the elements of the lesser offense must be a necessary element of the offense charged (the legal prong). Berlin, 133 Wn.2d at 545-46. Second, the evidence must affirmatively establish an inference that the lesser crime was committed (factual prong). State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

The lesser included offense analysis is applied to the offenses “as charged and prosecuted, rather than to the offenses as they broadly appear in statute.” Berlin, 133 Wn.2d at 548. Both the legal prong and the factual prong are satisfied here.

When analyzing the legal prong in this case, the test is whether first degree robbery, as charged and prosecuted, could have been committed without also committing fourth degree assault. State v. Aumick, 126 Wash.2d 422, 426-27, 894 P.2d 1325 (1995). The State alleged that Henderson (principally or as an accomplice) took personal property from Ligon by “use or

threatened use of immediate force, violence or fear of injury[.]” HCP 258-59, 324-25. The State prosecuted its case on the theory that Henderson used actual force to obtain Ligon’s personal property. 5RP 783-84, 794, 844, 848. And the prosecutor specifically referred to Henderson’s actions during the robbery as an “assault.” 5RP 844.

Fourth degree assault is any assault that does not amount to first, second or third degree assault. RCW 9A.36.041(1). Fourth degree assault may be committed in several different ways, including by an “unlawful touching.” State v. Davis, 60 Wn. App. 813, 821, 808 P.2d 167 (1991); State v. Wilson, 125 Wn.2d 212, 217-18, 883 P.2d 320 (1994).

The word “force” is defined as “[p]ower, violence, compulsion, or constraint exerted upon or against a person[.]” BLACKS LAW DICTIONARY, 6th Ed. (1992) at 644. Thus, the use of unlawful force against another person is necessarily an unlawful touching. Accordingly, Henderson could not have committed a robbery by use of force or violence without also committing an assault by unlawful touching. It is not possible, as charged and prosecuted in this case, to commit the greater offense of robbery without also committing the lesser offense of fourth degree assault.

The legal prong of the lesser included offense test is met.

Next, to satisfy the factual prong of the lesser included offense test, the evidence must permit a jury to rationally find a defendant guilty of the lesser offense and to acquit him or her of the greater. Berlin, 133 Wn.2d at 551. “ ‘It is not enough that the jury might simply disbelieve the State's evidence.’ ... ‘Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given.’ ” State v. Charles, 126 Wn.2d 353, 355, 894 P.2d 558 (1995) (quoting State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)).

Hudson testified that Henderson merely stood by as others discussed taking the car. 3RP 285, 28. Green testified that there was no plan to take Ligon's keys or car, and that he did so only because the opportunity presented itself. 4RP 630, 631. Henderson testified that he had no idea that anyone was planning to take the car, and his only intent was to fight Ligon. 3RP 433, 438. This is all affirmative evidence that, if believed, establishes that Henderson only committed assault and did not act as an accomplice to the taking of the car, and therefore is not guilty of robbery.

The lesser charge of fourth degree assault was legally and factually consistent with the evidence actually presented to prove robbery. Accordingly, Henderson was entitled to a fourth degree assault instruction, and his robbery conviction should be reversed.

E. THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE DEPRIVED HENDERSON OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL

The combined effects of error may require a new trial even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the Federal and State constitutions. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996). In this case, all of the errors, including the prosecutorial misconduct, ineffective assistance of counsel, and refusal to give an instruction on the lesser included offense of assault, combined to produce an unfair trial for Henderson, and his convictions should be reversed even if the court should find that the errors do not individually require reversal.

F. THE TRIAL COURT VIOLATED DOUBLE JEOPARDY BY ENTERING JUDGMENT AND SENTENCE ON TWO CONSPIRACY CONVICTIONS BASED ON ONLY ONE UNIT OF PROSECUTION

Pursuant to RAP 10.1(g)(2)⁶, Henderson hereby incorporates by reference the arguments, authorities and attachments set forth as ISSUE 6 of co-appellant Beck's opening brief. The claimed error and prejudice discussed in co-appellant Beck's brief applies equally to Henderson in his case, as he was also convicted and sentenced on both conspiracy to commit first degree robbery and conspiracy to commit theft of a motor vehicle. HCP 353, 357.

V. CONCLUSION

In this case, the prosecutor committed misconduct when he repeatedly elicited inadmissible, irrelevant and prejudicial evidence during his questioning of Detective Ringer, and when he misled the jury about the law during closing arguments. Trial counsel's failure to object or request a curative or limiting instruction in response to this misconduct was ineffective. In addition, the absence of a unanimity instruction deprived Henderson of his right to a unanimous jury verdict, and the absence of a lesser included

⁶ RAP 10.1(g)(2) allows a party in a consolidated case to "adopt by reference any part of the brief of another" party.

offense instruction denied Henderson the right to instructions embodying his theory of the case. All of these errors, individually or combined, deprived Henderson of his right to a fair trial, and require that his convictions be reversed.

DATED: May 17, 2011

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM
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Attorney for Darryl A. Henderson

CERTIFICATE OF MAILING

I certify that on 05/17/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Darryl A. Henderson, DOC# 759380, H2-A-06, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

BY: *[Signature]*
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