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NO. 41467-8-II (Consol.)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DEANDRE BECK, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Beck of conspiracy to commit robbery and conspiracy to commit theft of a motor vehicle without sufficient evidence that Beck was part of an agreement to steal the car.
2. The trial court erred by convicting Beck of first degree robbery and theft of a motor vehicle without sufficient evidence that Beck had any knowledge that others planned to steal the car.
3. The trial court erred by denying Beck's motion to dismiss where there was insufficient evidence to support the convictions.
4. The prosecutor committed flagrant and ill-intentioned prosecutorial misconduct by arguing to the jury that gang membership proved participation in a general conspiracy and agreement to assist in criminal activity.
5. The prosecutor committed flagrant and ill-intentioned prosecutorial misconduct by attempting to inflame the passions and prejudices of the jury by painting the defendants as violent and murderous gang members.
6. The prosecutor committed flagrant and ill-intentioned prosecutorial 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.

7. The prosecutor committed flagrant and ill-intentioned prosecutorial misconduct by introducing evidence of the Hilltop Crips gang that exceeded the trial court's pre-trial orders.
8. Beck was deprived of 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.
9. Beck was deprived of effective assistance of counsel was denied his right to effective assistance of counsel when his trial attorney failed to request a limiting instruction informing the jury that it could only consider gang evidence for a limited purpose.
10. The trial court erred when it refused to give the defense's proposed fourth degree assault instruction as a lesser included offense of robbery.
11. Beck 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 was the 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

12. The cumulative effect of the errors in this case deprived Beck of his due process right to a fair trial.
13. The trial court violated double jeopardy by entering judgment and sentence on two conspiracy convictions based on only one unit of prosecution.
14. The trial court erred by failing to sentence the two conspiracy convictions as the same criminal conduct.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by convicting Beck of Conspiracy to commit Robbery, Conspiracy to Commit Theft of a Motor Vehicle and Robbery and Theft of a Motor Vehicle where there is no evidence that Beck knew of any plan to take the car and took no part in the theft and his participation was limited to the fight?
2. Did the prosecutor commit reversible prosecutorial misconduct by introducing evidence of gang culture and criminal activity to argue to the jury that Beck's gang membership demonstrates a propensity for criminal activity and that any gang member is part of a general

conspiracy to participate in any criminal activity of other gang members?

3. Was Beck was deprived of 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, failed to request a curative instruction and failed to request a limiting instruction?
4. Did the trial court err by rejecting the defense's proposed instruction on the lesser-included offense of assault because the evidence supported an argument that beck was part of the fight, but had no knowledge of a plan to take the car?
5. Was Beck 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 was the 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?
6. Did the cumulative effect of the errors in this case deprive Beck of his due process right to a fair trial?

7. Did the trial court violate double jeopardy by entering convictions and judgment on two counts of conspiracy based on only one unit of prosecution?
8. Did the trial court err by refusing to treat the all three convictions as the same criminal conduct where they shared the same intent, same victim and were committed at the same time and place?

III. STATEMENT OF THE CASE

FACTS OF THE CASE:

On July 22, 2009, Vincent Ligon went to a bar called Pine Street Landing in Tacoma, and while he was fighting outside in the parking lot, 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.

Ligon called the police that night and filed a stolen vehicle report.¹ 2RP 123, 125. 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. His keys were in the car when it was recovered. 2RP 128.

¹ However, at the time of trial, he testified that he could not remember details from that night because he had been intoxicated. 2RP 121.

The video shows the following. See Supp. Desig, Exh. 8. Ligon arrived at the bar in his white Pontiac Lemans. 2RP 162. The parking lot was full of people talking in groups. Ligon got out of the car, shook hands with Beck in a friendly way, then went into the bar. 2RP 163-64. Eight minutes later, Ligon left the bar. 2RP 164. There were five or six men standing near Ligon's car, talking and looking at the vehicle. 2RP 165-66. In that group were individuals later identified as Trevor Green, Brandon Starks, Darryl Henderson and Deandre Beck. 2RP 165-66. Ligon walked to his car, and Henderson can be seen either pushing or punching Ligon once. 2RP 168-69. Ligon turned and walks away. 2RP 168-69. Henderson stood with ten individuals. 2RP 169. Beck was in another group away from Henderson, but walked over to Henderson and the others. 2RP 170. Ligon returned to confront Henderson and they began to have a verbal confrontation. 2RP 172. Henderson began fighting with Ligon. 2RP 172. In the midst of the fight, others from the group watching also hit Ligon. 2RP 172. Green can be seen bending down to Ligon, then he went to Ligon's car and drove it away. 2RP 172-3. As the car drove away, the fight ended and everyone in the parking lot left. 2RP 173. Henderson can be seen leaving in his van—Beck left with him. 2RP 175.

As a part of their deals with the State, both Starks and Hudson testified for the prosecution in this trial. 3RP 270. Starks' deal with the

State resulted in all but one of the charges against him being dismissed and his sentence went from potentially fourteen 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 the prior theft he had participated in with unnamed others. 3RP 296. These prior thefts were not committed with Beck or Henderson. 3RP 296, 3RP 311.

According to Starks, on July 22, Hudson called him and asked him to come to Pine Street. 3RP 281. When he arrived, he went over to 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 declined to steal the car. 3RP 283. Hudson was the one talking about stealing the car. 3RP 283. Henderson was just with Hudson. 3RP 284. It was only the three of them together during the discussion. 3RP 284.

Starks testified that Beck was not in on the discussion—but he was in the parking lot. 3RP 287. He saw Beck outside, but never talked with him—he said Beck was “doing his own thing.” 3RP 283.

Starks said while he talked with Hudson, Henderson went inside the club. 3RP 284. When Henderson came out, he was angry, spoiling for a fight. 3RP 284. Starks said it appeared that Henderson had had an altercation with someone inside and he said he “was going to knock some dude out.” 3RP 284. Then, Henderson walked over and punched Ligon. 3RP 284.

After the first punch, Ligon went over to his friends and Starks, Hudson, and Green walked over to Henderson to ask what was going on. 3RP 285. Henderson was angry and said, “I missed it,” “Fuck that, he’s going down.” 3RP 288. Starks did not remember Beck being nearby at that time. 3RP 288.

Then, according to Starks, Henderson walked toward Ligon’s group and Starks and the others followed. 3RP 288. Henderson then 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. 3RP 285. Green went to Ligon’s car and drove it away. 3RP 290.

There was no discussion during or directly after the fight. 3RP 292. Starks said everyone immediately scattered and left because there had been a fight and security was there telling them that the police were coming. 3RP 290.

Starks testified that he earned \$100 for his part in the car theft. 3RP 389. Starks said that Henderson asked him for some of the money, and he gave him around \$30. 3RP 390. Starks testified that Beck never asked for, nor did he get, any of the proceeds from the theft of the car. 3RP 310.

Hudson also testified as a part of a deal he made with the State to reduce his potential sentence from 22 years down to 21 months. 3RP 362. Hudson had a different version of events. Hudson said he had arrived at the Pine Street Landing around 10 p.m. that night. 3RP 342. He went there with Green. 3RP 343. There were a lot of people there. 3RP 344.

Hudson said that he and Henderson talked about the rims on the White car. 3RP 346-47. He said that Henderson said, "I need these rims or these beads," which he took to mean that Henderson wanted them. 3RP 347.

According to Hudson, he then asked Starks about whether he would steal the car because he knew that Starks had a reputation as

someone who stole cars a lot. 3RP 347. Starks said he could not steal the car because it had an alarm system. 3RP 347.

Hudson said then, he, Henderson, Starks, and Green discussed beating up Ligon so they could get the keys to take the car. 3RP 347. Henderson said he would knock out Ligon. 3RP 348. There was no discussion about who else would be involved in the fight. 3RP 351. According to Hudson, the only people in on the “plan” were Hudson, Henderson, Starks and Green. 3RP 367. Hudson said Beck was not around during this discussion. 3RP 348.

Later, Hudson was told that Henderson had punched Ligon. 3RP 349. Hudson went over and saw Henderson and Starks fighting with Ligon. 3RP 350. He saw Beck punch Ligon. 3RP 350.

Hudson assumed that Green got the keys from Ligon’s pocket, because he saw him start the car and drive away. 3RP 350-51. Hudson said this was part of the plan. 3RP 350. Then, everybody left because they knew the police were coming. 3RP 352.

Green then called Hudson to ask where to take the car—Hudson told Green to take it to Hudson’s garage. 3RP 351. Hudson took the rims, “beads out and stuff” from the car. 3RP 353-54. Hudson got the rims, and Starks and Green took the “beads and TVs and stuff.” 3RP 354. Hudson earned \$250 from the rims. 3RP 354. Then, Hudson took the stripped

vehicle to a local Burger King and left it there. 3RP 354. According to Hudson, Henderson did not get anything from the car. 3RP 359. Hudson agreed with Starks that Beck did not get a share of the proceeds from the car. 3RP 360.

Green also testified, but for the defense. His testimony was that he, Starks and Hudson planned to steal Ligon's car, but were not sure how to accomplish it because they could not force entry. 4RP 624, 628-29. Then, Green said the plan was "off." 4RP 640. Green said that neither Henderson nor Beck were part of the conversation or plan. 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. They had been planning to enter the car with a screwdriver and force the ignition, but they knew that would be difficult with this kind of car. 4RP 639.

Green said that when he got the keys, he took the car and drove it 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 testified that neither Henderson nor Beck received anything from the proceeds of the theft. 4RP 637-38.

Both Henderson and Beck conceded that they had been involved in the fight with Ligon. 2RP 226; 5RP 828. The dispute in this case centered on whether there Henderson and Beck had knowledge of the theft before it was committed.

Henderson testified that he had been drinking that night and had fought with Ligon, but he had no idea that anyone was planning to steal the car. 3RP 433, 438. 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.

PROCEDURAL FACTS:

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 1-2.² The State alleged that the men were members or associates of the Hilltop Crips gang, and as members conspired over a two year charging period to commit any or all of these listed crimes. HCP 77-78, 82; Beck CP 2.

The trial court granted the defendants' *Knapstad*³ motions, limiting the scope of the conspiracy charges. 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 based on gang membership; however, it could proceed on conspiracy charges as they related to other specific criminal charges and the trials should be severed accordingly. 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 incident, along with robbery and theft. HCP 254; BCP 10.

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

² 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.

³ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

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.

Beck and Henderson were tried together by jury trial. After the State rested, Beck moved to dismiss all four counts because the evidence was insufficient to show that Beck had knowledge of the planning of the auto theft. 3RP 394. The court denied the motion. 3RP 398.

Beck and Henderson were both convicted on all charges, but the jury did not find that the crimes were committed for a gang purpose. 5RP 863-67.

At Beck's sentencing, the court ruled that the theft conviction merged with the robbery conviction and therefore sentenced only on the remaining two conspiracy charges and robbery in the first degree. RP 11/9/10 14. The court rejected Beck's motion that the current convictions be treated as the same criminal conduct. RP 11/9/10 15.

Beck was subsequently sentenced within the standard range. BCP 63, 66. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY CONVICTING BECK OF CONSPIRACY TO COMMIT ROBBERY, CONSPIRACY TO COMMIT THEFT OF A MOTOR VEHICLE AND ROBBERY AND THEFT OF A MOTOR VEHICLE WHERE THERE IS NO EVIDENCE AT ALL THAT BECK KNEW OF ANY PLAN TO TAKE THE CAR AND TOOK NO PART IN THE THEFT, ONLY IN THE FIGHT.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Beck was charged with being part of the conspiracy to take Ligon's car, which formed the core of all four charges—conspiracy to commit robbery, robbery, conspiracy to commit theft of a motor vehicle and theft of a motor vehicle. BCP 10.

A. There is insufficient evidence to support a conviction against Beck for conspiracy to commit first degree robbery.

The criminal conspiracy statute, RCW 9A.28.040(1), provides:

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the

performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

A person commits first-degree robbery when he unlawfully takes personal property from another by the use of force, violence, or fear of injury to that person and inflicts bodily injury. RCW 9A.56.190, BCP 28, 29.

Moreover, the jury was instructed that the use of force must be for the purpose of obtaining or retaining possession of another person's property, rather than merely preceding the theft. BCP 32. Thus, for the jury to convict Beck of conspiracy to commit robbery in the first degree, it had to find that he, "with intent that conduct constituting the crime of robbery in the first degree be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement." BCP 33, 36.

One of the few facts that all three witnesses to the alleged agreement to steal Ligon's car agree on is that Beck was neither part of the conversation nor nearby when the matter was discussed. 3RP 284, 283, 287, 347-48, 351, 422, 438, 4RP 628-29. There was no testimony at all to indicate that Beck had any knowledge of or involvement in a theft.

Merely being involved in the fight is not enough to show that Beck was guilty of conspiracy to commit robbery. Beck had be part of an agreement to commit the crime charged—first degree robbery. *See State*

v. *Stein*, 144 Wn.2d 236, 248, 27 P.3d 184 (2004). The evidence shows that Beck hit Ligon at least once during the fight with Henderson. 3RP 285, 350. But, without knowledge that this fight was part of a plan to steal the vehicle, there is no proof that Beck had the required knowledge or agreement to commit first degree robbery.

The prosecutor tried to argue that because Beck was a gang member and can be seen in the video talking with Henderson, that is sufficient to prove his knowledge of the conspiracy. 5RP 793. However, because all of the other alleged participants testified that Beck was not part of the conspiracy, there is absolutely no evidence to support the prosecution's theory.

Because there is no evidence that Beck knew about or participated in any agreement to commit first degree robbery, his conviction for conspiracy to commit robbery must be reversed for lack of evidence.

B. There is insufficient evidence to support Beck's conviction for first degree robbery.

Beck was also charged as an accomplice to first degree robbery. BCP 10. As argued above, there is no evidence that Beck had any knowledge that there was a plan to assault Ligon in order to steal his car. To prove that Beck was an accomplice to the crime of first degree robbery, the State had to prove that he had knowledge of the crime to be

committed. BCP 38, *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2001). It is not enough that Beck was an accomplice or principal in an assault, in order to convict him as an accomplice in the first degree robbery, the State had to show that Beck knew the fight was part of a robbery. *See State v. Roberts*, 142 Wn.2d 471.

Again, the uncontroverted facts were that Beck was not present for any planning of a robbery and there is no evidence he had any knowledge of it. (see above.) Nothing was said during the fight to indicate it was anything other than what it appeared to be—a bar fight. 3RP 292. Beck did not benefit in any way from the robbery. 3RP 360, 4RP 637-38. There is simply no evidence, direct or circumstantial to support a finding that Beck knowingly aided in the robbery. Without proof of that Beck KNOWINGLY participated in THE crime, that is robbery, there is insufficient evidence to support Beck's conviction for first degree robbery and it must be reversed.

C. There is insufficient evidence to support Beck's conviction for conspiracy to commit theft of a motor vehicle.

In order to convict Beck of conspiracy to commit theft of a motor vehicle, the jury had to find that Beck agreed to steal a motor vehicle. BCP 48. As argued extensively above, there is no evidence that Beck

knew of any such agreement and therefore, this conviction must also be reversed.

D. There is insufficient evidence to support Beck's conviction for theft of a motor vehicle.

Beck was also charged as an accomplice to theft of a motor vehicle.⁴ Thus, again, the jury had to find that Beck knew he was aiding in the crime. It is clear that for the same reason there is insufficient evidence to support first degree robbery, there is also insufficient evidence to support this conviction—there is no evidence that Beck knew of a plan to steal the car and therefore no evidence he knew his participation in the fight would aid in that crime. Consequently, this conviction also lacks sufficient evidence.

ISSUE 2: THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE INTRODUCED EVIDENCE OF GANG CULTURE AND CRIMINAL ACTIVITY TO ARGUE TO THE JURY THAT BECK'S GANG MEMBERSHIP DEMONSTRATES A PROPENSITY FOR CRIMINAL ACTIVITY AND THAT ANY GANG MEMBER IS PART OF A GENERAL CONSPIRACY TO PARTICIPATE IN ANY CRIMINAL ACTIVITY OF OTHER GANG MEMBERS.

The prosecutor committed prosecutorial misconduct in this case when he used gang evidence to argue to the jury that Beck and Henderson guilty of conspiracy solely because they were members of the Hilltop Crips, introduced impermissible propensity evidence that violated ER

⁴ Beck's conviction for theft of a motor vehicle was later merged with the robbery conviction. BCP 10, 11/9/10 RP 14-15.

404(b), and attempted to inflame the passions and prejudices of the jury by painting Beck and Henderson as violent gang members.

1. Pretrial Orders

Prior to trial, the defendants filed *Knapstad*⁵ motions, asking the court to dismiss the conspiracy charges levied against each defendant for crimes in which the defendants had not been linked, specifically objecting to a charge levied solely based on gang membership. HCP 177-201; BSupp. CP, Motion to Opt In (Attachment A), and Memorandum in Support of Motion to Dismiss; 05/21/10 RP 7.

The prosecutor argued a 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.

The trial court denied the motion in part and granted in part. HCP 253-55; BCP 9-11; 05/21/10 RP 45-46. Although the court did not dismiss the conspiracy charge outright, the scope of the charge was

⁵ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

limited. 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.

In the later hearing on motions in limine, there is an extensive discussion of the gang evidence the State proposed to introduce against Beck and Henderson. 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

Based on these representations, Henderson and Beck expressed their concerns about the proposed testimony of Detective Ringer, specifically that it would be cumulative, and 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.

IRP 69-71. In addition, Beck made a pre-trial motion to exclude Detective Ringer's "expert testimony" regarding motive, which was denied.⁶ Supp. CP, Defendant Beck's Motions in Limine, pp. 8-9.

In response, the prosecutor declared that:

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

⁶ This motion was stated in terms of a Crawford challenge to the source of Ringer's opinion—hearsay from gang members. Supp. CP, Defendant Beck's Motions in Limine, pp. 8-9.

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.

2. *The Gang Evidence at 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 Ringer described the arrests of Hudson, Starks and Beck, and Henderson, and telling the jury they are all gang members, 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.

Detective Ringer testified that to become a member of a gang, most potential members will 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.

Detective 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, Detective 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 Detective 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.

Detective 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.

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. 4RP 658, 674, 660-61. 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—they 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?

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

Q: Right?

A: But that doesn't mean that's what Hilltop do. That doesn't mean we go out and commit crimes to make our gang bigger or whatever. Whatever you want to call it, sir.

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 wouldn't make sense. I mean, as TV shows these days, gangs, Bloods, Crips, GD's, I mean, TV broadcasts a lot of stuff so who wouldn't know what a gang is about?

Q: Okay.

A: I mean, it's common sense.

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

A: No.

Q: They're not?

A: No.

Q: So you wouldn't have someone's back who had your back.

A: If we was close, maybe, but other than that, it's every man for herself [sic].

4RP 660-61.

3. The State's Closing Argument

In closing argument, the prosecutor used the gang evidence he had successfully put before the jury to argue impermissibly that if the defendants 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 argues 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. He told the jury:

Now take that, 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? Of 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's summary of the evidence against Beck specifically continues this argument that being a gang member means being part of a conspiracy to commit any crime other members commit:

Mr. Beck , the testimony is, has been a gang member for 15 years. Hilltop Crip gang member, right? 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?

We know Mr. Beck was there with other Hilltop Crip members, right? We know they committed crimes, and we know he's in. We know he's acting with them. . . .

5RP 793.

4. *Argument and Authorities Related to Prosecutorial Misconduct*

The Prosecutor in this case committed flagrant and ill-intentioned misconduct when he argued to the jury that being a gang member made Beck automatically guilty of conspiracy to commit theft of a motor vehicle and first degree robbery. It is clear that this was the Prosecutor's plan from the beginning of the trial—he set up this argument throughout his questioning of witnesses, especially in questioning Detective Ringer and Mr. Green. Repeatedly, the Prosecutor attempts 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. 5RP 771, 784-85,

793. He repeatedly argues that their membership in a gang takes away their defense to conspiracy or accomplice liability. 5RP 771, 784-85, 793. This argument is contrary to the law and it was calculated to inflame the passions and prejudice of the jury.

A prosecutor has a duty to see that an accused receives 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, 585 P.2d 142. 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 through 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's attempts to elicit improper testimony, or attempts to pursue an improper line of questioning, can constitute 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); *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984) (prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury). And prosecutorial misconduct arises when the State makes bald appeals to the passion or prejudice of the jurors. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

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.

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, BSupp. CP, Memorandum in Support of Motion to Dismiss), 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)).

It also is well-settled 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.” *Id.* 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).

The 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).

U.S. 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.

United States v. Avila, 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 established agreement to a

conspiracy. However, the law of this case is consistent with the well-established federal law.

The trial court in this case also specifically rejected the State's argument of a general conspiracy based on gang membership. 5/21/10 RP 44-46. The defense's *Knapstad* motions were based on the established federal law. *See* Supp. BCP, Motion to Opt-In, and HCP 148, adopting by reference Motion to Dismiss Count I, filed April 8, 2010, (Attachment A); 5/21/10 RP 43-45. Furthermore, the prosecutor's pre-trial representations to the court of how the 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 repeats 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 asks 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 for 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.

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 drive-by shootings to join the gang, 2RP 234-35, and that they commit murder and robbery to gain status, 2RP 236.

The prosecutor also committed misconduct when he attempts to get around the limitations of excluded ER 404(b) evidence by arguing that evidence of prior crimes committed by other gang members establishes propensity to commit the same crime by any gang member. The prosecutor asks Detective Ringer to give his "expert" opinion that 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 asks 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. In closing, the

prosecutor argues that the method of prior thefts proves that Beck and Henderson, as fellow gang members, were knowing participants in this car theft:

Isn't what you saw [in the video] consistent with what [Detective Ringer] 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.

SRP 785. This argument violates ER 404(b)'s prohibition on use of a “propensity” argument.

Not only is misconduct clear in this case, it is clear it was flagrant and ill-intentioned because it is clear from the beginning of the trial through the closing argument that the prosecutor was setting up this impermissible argument—that gang membership alone establishes agreement to a conspiracy. The prosecutor disingenuously misleads the trial court that he will be limiting the gang evidence to establishing a gang purpose, then goes far beyond that time and again. Then, in closing argument, the prosecutor misleads the jury as to the law.

For Beck, the prejudice of the gang evidence and the prosecutor's impermissible arguments to the jury cannot be overestimated. There is

absolutely no evidence that Beck knew about any discussions planning a car theft and no evidence of his agreement to a conspiracy. In the only part of his closing argument limited to Beck, the prosecutor argues that his gang membership establishes his guilt on the conspiracy charges:

Mr. Beck, the testimony is, has been a gang member for 15 years. Hilltop Crip gang member, right? 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?

We know Mr. Beck was there with other Hilltop Crip members, right? We know they committed crimes, and we know he's in. We know he's acting with them. . . .

5RP 793. 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 those charges was whether Beck knew he was assisting in the theft of a motor vehicle when he participated in the fight. By arguing to the jury that Beck'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.

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

ISSUE 3: BECK WAS 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, FAILED TO REQUEST A CURATIVE INSTRUCTION, AND FAILED TO REQUEST A LIMITING INSTRUCTION.

RAP 10.1(g)(2) provides, in relevant part, that a party in a consolidated case may “file a separate brief and adopt by reference any part of the brief of another.” Pursuant to RAP 10.1(g)(2), Beck hereby incorporates by reference the facts, arguments, authorities and attachments set forth in section IV(B), of co-appellant Henderson’s opening brief. The claimed error and prejudice discussed in co-appellant Henderson’s brief applies equally to Beck in his case. Furthermore, Beck adds the following:

As argued extensively above, the lack of evidence that Beck had any knowledge of, much less participated in any plan to steal the car, his counsel’s failure to object to the prosecutor’s introduction of gang evidence, misconduct in closing argument, and failure to request corrective instructions prejudiced Beck to such an extent that he was not

only deprived of effective assistance of counsel, he was deprived of a fair trial. Consequently, his convictions must be reversed.

ISSUE 4: THE TRIAL COURT ERRED BY REJECTING THE DEFENSE'S PROPOSED INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF ASSAULT BECAUSE THE EVIDENCE SUPPORTED AN ARGUMENT THAT BECK WAS PART OF THE FIGHT, BUT HAD NO KNOWLEDGE OF A PLAN TO TAKE THE CAR.

RAP 10.1(g)(2) provides, in relevant part, that a party in a consolidated case may “file a separate brief and adopt by reference any part of the brief of another.” Pursuant to RAP 10.1(g)(2), Beck hereby incorporates by reference the facts, arguments, authorities and attachments set forth in section IV(D), of co-appellant Henderson’s opening brief. The claimed error and prejudice discussed in co-appellant Henderson’s brief applies equally to Beck in his case. Furthermore, Beck adds the following:

Like Henderson, Beck proposed an assault instruction as a lesser included instruction for robbery. B.Supp. CP, Defense Proposed Instr. There is no testimony that connected Beck to the plan to steal the car. Furthermore, the testimony affirmatively establishes that Beck did not have knowledge of the theft and did not profit from it. 3RP 283, 287, 310, 348, 360, 367, 4RP 629. In fact, practically the only fact the three alleged witnesses to the conspiracy agreed on was that Beck was not a part of it. Therefore, the evidence supported an argument that he was only guilty of

assault, rather than first degree robbery. The defense could not make that argument to the jury without a proper instruction. Therefore, the trial court erred by denying the defense's proposed jury instruction on the lesser-included offense of assault.

ISSUE 5: BECK 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 WAS THE 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.

RAP 10.1(g)(2) provides, in relevant part, that a party in a consolidated case may "file a separate brief and adopt by reference any part of the brief of another." Pursuant to RAP 10.1(g)(2), Beck hereby incorporates by reference the facts, arguments, authorities and attachments set forth in section IV(C), of co-appellant Henderson's opening brief. The claimed error and prejudice discussed in co-appellant Henderson's brief applies equally to Beck in his case.

ISSUE 6: THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE DEPRIVED BECK 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, specifically the prosecutorial misconduct, ineffective assistance of counsel, no unanimity on the taking that constituted the robbery, and refusal to give an instruction on the lesser included offense of assault, combined to enhance the unfair prejudice to Beck, and his convictions should be reversed even if the court should find that the errors do not individually require reversal.

ISSUE 7: THE TRIAL COURT VIOLATED DOUBLE JEOPARDY BY ENTERING CONVICTIONS AND JUDGMENT ON TWO COUNTS OF CONSPIRACY BASED ON ONLY ONE UNIT OF PROSECUTION.

Beck was convicted and sentenced on both conspiracy to commit first degree robbery and conspiracy to commit theft of a motor vehicle. BCP 62-63, 66. At sentencing, the court ruled that the theft of a motor vehicle conviction merged for purposes of double jeopardy with the robbery in the first degree conviction. 11/9/10 RP 9.

The trial court violated double jeopardy in this case by entering judgment and sentence in two counts of conspiracy where there was only one agreement—to take Ligon’s car. Double jeopardy is an issue that can be raised for the first time on appeal. U.S. Const. 5th Amend; RAP 2.5(a)(3); *State v. Adel*, 136 Wash.2d 629, 631-32, 965 P.2d 1072 (1998).

The state and federal constitutions guarantee that no person will be

twice put in jeopardy for the same offense. U.S. Const. amend V; Const. art. I, § 9; *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). When a defendant is charged multiple times for violations of a single statute, the court must determine what unit of prosecution the legislature intended as the punishable act under that statute. *Bobic*, at 261. Double jeopardy protects the defendant from multiple convictions under the same statute for committing just one unit of the crime. *Bobic*, at 261-62.

Criminal conspiracy is defined by statute as an agreement to carry out a criminal scheme, along with a substantial step toward carrying out that agreement. RCW 9A.28.040(1); *Bobic*, 140 Wn.2d at 262; *State v. Williams*, 131 Wn. App. 488, 496, 128 P.3d 98 (2006). The Supreme Court held in *Bobic* that the punishable criminal conduct is the plan, not whatever statutory violations the co-conspirators considered in the course of devising the plan:

“Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.”

140 Wn.2d at 264-65 (*quoting Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 87 L.Ed. 23 (1942)). Multiple conspiracies may be charged only where the facts of the case support multiple criminal

agreements, which is determined by looking to whether the time, persons, places, offenses, and overt acts were distinct. *State v. Walker*, 24 Wn.App. 78, 81, 599 P.2d 533 (1979).

In *Williams*, the court of appeals explained that the nature and extent of the conspiracy lies in “the agreement which embraces and defines its objects.” 131 Wn. App. at 496, quoting *Braverman*, at 317 U.S. at 53. *Williams* held that there was but one criminal conspiracy proved regardless of the fact that it was “left up in the air where, how, and with what degree of force the property transfer would take place,” because “the agreement and the substantial steps contemplated a single criminal enterprise and therefore establish a single criminal conspiracy.” *Williams*, at 497.

In this case, in the light most favorable to the State, the evidence shows only one criminal conspiracy. Hudson and Starks testified that Starks and Hudson, in hearing of Henderson, discussed stealing Ligon’s car. 3RP 283, 3RP 347. Hudson said that the plan was to beat up Ligon so that they could steal his keys and take the car. 3RP 347. Henderson later punched Ligon, they separated briefly, and then Henderson engaged him in a fight with others, during which Green took the keys and then stole the car. 3RP 285, 288, 290, 349, 350-51. Green testified that he, Hudson and Starks planned to steal Ligon’s car, but had not agreed on

how to do it and that he took advantage of Henderson's fight with Ligon to take the car keys. 4RP 624, 628-29, 631. There is no testimony in the record to support finding that there was more than one distinct agreement, plan or conspiracy. At best, the details of the theft had not been fully planned. As in *Williams*, the facts of this case establish only one criminal conspiracy.

Because the facts in this case show only a single criminal conspiracy, the court violated double jeopardy by entering judgment in two convictions and one of the conspiracy convictions must be vacated.

ISSUE 8: THE TRIAL COURT ERRED BY REFUSING TO COUNT ALL THREE CONVICTIONS AS THE SAME CRIMINAL CONDUCT BECAUSE THE THREE OFFENSES SHARED THE SAME OBJECTIVE CRIMINAL INTENT, SAME VICTIM, AND OCCURRED AT THE SAME TIME AND PLACE.

Beck argued at sentencing that all of the convictions should be treated as the same criminal conduct. BSupp.CP, Sentencing Memorandum. The trial court rejected that argument, finding that there were two separate conspiracies and that the two plans were separated by time and that the robbery in the first degree convictions was distinguishable from the conspiracy. RP 11/9/10 15.

If concurrent offenses encompass the same criminal conduct, they are treated as one crime for the purposes of calculating the offender's sentence. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885

P.2d 824 (1994). Same criminal conduct “means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). All three prongs must be met, and the absence of any one prong prevents a finding of “same criminal conduct.” *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). The trial court’s finding on same criminal conduct is reviewed for abuse of discretion. *State v. Freeman*, 118 Wn. App. 365, 377, 76 P.3d 732 (2003).

The relevant inquiry for finding the objective criminal intent is “the extent to which the criminal intent, objectively viewed, changed from one crime to the next. . . . This, in turn, can be measured in part by whether one crime furthered the other.” *State v. Vike*, 125 Wn.2d at 411 (citations omitted). Whether crimes occurred at the same time depends on whether they were committed sequentially as part of a continuous, uninterrupted sequence of events over a short period of time—the statute does not require that the crimes be committed at the exact same moment in time. *See State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

Taking the evidence in the light most favorable to the State, all three of the convictions here—conspiracy to commit robbery, robbery, and conspiracy to commit theft of a motor vehicle—were part of a continuous sequence of events that began and ended with the same objective intent,

that is to steal a car. As set forth above, the evidence shows only one plan or agreement, not more than one. The victim was also the same for all three.

Because these three offenses took place in the same time and place, with the same victim, and the same objective intent, they should have been treated as the same criminal conduct for sentencing purposes. If this court does not reverse the convictions on the grounds stated above, it should remand for resentencing.

V. CONCLUSION

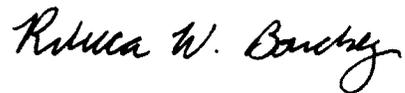
All of Beck's convictions must be reversed for insufficient evidence because there is no evidence whatsoever that Beck had knowledge of any plan to steal Ligon's car. Thus, the State failed to prove agreement for a conspiracy and failed to show knowing aid in the robbery.

Furthermore, the prosecutor's flagrant and ill-intentioned misconduct deprived Beck of a fair trial because the jury was misled by the prosecutor into believing that gang membership alone establishes agreement to a conspiracy. The combined effect of this prosecutorial misconduct, along with ineffective assistance of counsel, denial of the right to present a lesser-included offense instruction, failure to elect the underlying theft for the robbery, combined to create a trial so unfair that it requires reversal of all of the convictions.

If the court does not reverse the convictions on the grounds stated above, the court must still find that one of the conspiracy convictions must be reversed as double jeopardy because the State proved only one unit of prosecution for conspiracy—only one agreement.

Finally, all three of the convictions constituted the same criminal conduct and should have been treated as such by the court. This error would require remand for re-sentencing.

DATED: May 17, 2011



Rebecca Wold Bouchey #26081
Attorney for Appellant

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STATE OF WASHINGTON
BY E

CERTIFICATE OF SERVICE

I certify that on May 17, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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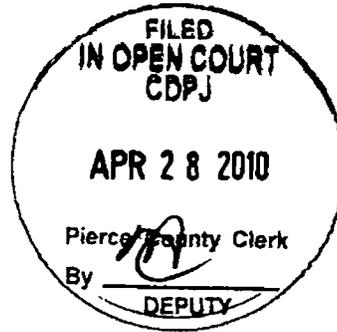
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ATTACHMENT 1:
Motion to “Opt-In”, Filed 4/28/10, Supp. CP
Motion to Dismiss Count I, Filed 4/8/10



10-1-00590-2 34218844 MT 04-30-10



PIERCE COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

DEANDRE LAMAR BECK,
Defendant.

NO. 10-1-00590-2

**MOTION TO "OPT-IN" TO CO_DEFENDANT
BRYANT TERRY'S
MOTION TO INTERVIEW WITNESSES
TO EXCLUDE: ALLEGED
CO-CONSPIRATOR STATEMENTS
AND GANG EXPERT TESTIMONY
AND DECLARATION OF DEFENDANT'S
GANG MEMBERSHIP**

Comes now the Defendant, Deandre Beck, by and through his attorney, Cynthia Macklin, and hereby "OPTS-IN" on Defendant William Norris Terry's above-entitled motions filed by John Cain, attorney for William Norris Terry, State of Washington v. Terry, under cause no.: 10-1-00594-5, for reasons stated therein. Mr. Beck's position in the global case is the same as Mr. Terry's regarding this motion.

Dated this 28th day of April 2010

Cynthia Macklin, WSB# 29979
Attorney for Defendant, Deandre Lamar Beck