

**Court of Appeals No. 42027-9-II**

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

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**KEVIN FRANKLIN,**

**Defendant/Appellant.**

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**BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 09-1-02724-4  
The Honorable John R. Hickman, Presiding Judge**

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**Sheri Arnold, WSBA No. 18760  
Attorney for Appellant  
P.O. Box 7718  
Tacoma, Washington 98417  
(253) 759-5940**

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**I. ASSIGNMENTS OF ERROR**

1. The State presented insufficient evidence to convict Mr. Franklin of any crime.
2. The State presented insufficient evidence to establish the aggravating factor that the crimes were committed for the benefit of a criminal street gang.
3. Mr. Franklin was denied his right to a fair trial where the trial court improperly admitted irrelevant yet highly prejudicial evidence.

**II. ISSUES PRESENTED**

1. Did the State present sufficient evidence to convict Mr. Franklin of drive-by shooting where the only way the jury could find Mr. Franklin acted as an accomplice is if the jury made impermissible propensity inferences? (Assignment of Error No. 1)
2. Did the State present sufficient evidence to convict Mr. Franklin of unlawful possession of a firearm where the State presented insufficient evidence to establish that Mr. Franklin was ever in actual or constructive possession of any firearm? (Assignment of Error No. 1)
3. Did the State present sufficient evidence to convict Mr. Franklin of assault where the only way the jury could Mr. Franklin was an accomplice is if the jury made impermissible propensity inferences? (Assignment of Error No. 1)
4. Did the State present sufficient evidence to permit the jury to find that the crimes were committed with the intent to benefit a criminal street gang where such a conclusion by the jury could only be

based on improper propensity inferences?  
(Assignment of error No. 2)

5. Did Mr. Franklin receive a fair trial where the trial court improperly admitted irrelevant yet highly prejudicial gang evidence? (Assignment of Error No. 3)

### **III. STATEMENT OF THE CASE**

#### *A. Factual Background*

Around May 24, 2009, Curtis Hudson was with his biological brother, Jerome Kennedy, at a 7-11 when some girls started fighting. RP 925-926. Other people were present at the 7-11 and began fighting as well. RP 926-927. Mr. Hudson began fighting with Mr. John Morris and Mr. Kennedy punched Mr. Morris. RP 927. Other people began fighting and in the ensuing melee Mr. Kennedy's gold necklace was taken. RP 928. Mr. Morris left the 7-11 with Mr. Kennedy's necklace. RP 928. Members of the Young Gangster Crips (YGC), Hilltop Crips (HC), and Eastside Gangster Crips (EGC) street gangs were present at the fight. RP 925-927. Mr. Morris was a YGC and Mr. Kennedy was associated with the EGCs. RP 924-927. Mr.

Kevin Franklin was not at the 7-11 during this fight. 3-7-11 RP 163<sup>1</sup>, RP 1172-1173.

During the week following the fight, Mr. Morris and Mr. Kennedy were having problems because Mr. Kennedy was trying to get his necklace back. RP 928-929.

Around 12 a.m. on May 30, 2009, Mr. Franklin went to the 54<sup>th</sup> Street Sports Bar with his girlfriend, Ms. Crystal Jenkins. RP 1629-1630. When Mr. Franklin left the bar around 1:50 in the morning, he discovered that someone had broken into his car, stolen his CD player, and slashed his tire. RP 1630-1632. Mr. Franklin did not know who had broken into his vehicle, but suspected that it was a female who wanted to fight Ms. Jenkins. RP 1632-1633.

Mr. Franklin stayed awake until 4 or 5 am on May 30, 2009. RP 1634. During the day of May 30, 2009, Mr. Franklin was upset about his vehicle being broken into, so he stayed home “altered his mind” by “indulging in substances” all day. RP 1634. Mr. Franklin had no plans to go out that evening but Mr.

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<sup>1</sup> The volumes of the transcript of the proceedings containing the pretrial hearings are not numbered continuously between the volumes. Reference to these volumes will be made by giving the date of the pre-trial hearing followed by the page number.

Kennedy called Mr. Franklin and asked him if he wanted to go out. RP 1634-1635. Mr. Franklin agreed and was picked up around midnight by a white Ford Explorer driven by Mr. Conrad Evans. RP 1635-1636. Mr. Kennedy was also in the Explorer. RP 1635. The Explorer belonged to Portia Steverson, Mr. Evans' girlfriend at the time. RP 486-488, 1216-1217.

The men picked up Mr. Desmond Johnson and ended up going to the Friendly Duck. RP 1635-1636. As the men drove to the Friendly Duck, Mr. Franklin was drinking E&J brandy and was becoming intoxicated. RP 1636.

The men arrived at the Friendly Duck around 12:45 a.m. and continued to drink the brandy. RP 1175-1176, 1637-1638. Between 1:32 and 1:39 a.m., Mr. Franklin exchanged text messages with Ms. Jenkins. RP 1318-1320, 1640-1643. The texts were between Mr. Franklin and "Lady Monster," but "Lady Monster" was Ms. Jenkins. RP 1640-1641. Mr. Franklin texted Ms. Jenkins that he was "handlin' this," "handlin' business," and that he had "just got jacc't and now it's time to give some1 the blues" in response to Ms. Jenkins' queries as to what Mr. Franklin was doing. RP 1320. Mr. Franklin's response that he

just got jacked and it was time to give someone the blues referred to having his car broken into the night before and finding out who had stolen his property and discussing with that person what had happened with Mr. Franklin's property. RP 1641-1642. The texts had nothing to do with the incidents that happened later that night. RP 1642.

While the men were at the Friendly Duck, Mr. Kennedy received a call from Mr. Kyle Ragland. RP 1154. Mr. Ragland is Mr. Kennedy's sister's baby's father. RP 1154. Mr. Ragland told Mr. Kennedy that he was trapped in and couldn't get out and he was worried because it looked like someone in the car in front of him had retrieved a pistol from the trunk of the car in front of Mr. Ragland's car. RP 1155. After the call, the men went to the 54<sup>th</sup> Street bar. RP 1155-1157, 1240, 1640. Mr. Franklin was seated in the rear driver's side seat of the Explorer and was intoxicated by the time the men arrived at the 54<sup>th</sup> Street bar. RP 1157, 1177, 1248, 1640.

When the men got to the 54<sup>th</sup> Street bar, they stayed in the Explorer and circled the parking lot looking for Mr. Hudson and Mr. Ragland. RP 1157. The men in the Explorer were trying to

see why Mr. Ragland couldn't get out. RP 1157. Mr. Hudson or Mr. Ragland told Mr. Kennedy that they were trapped at the 54<sup>th</sup> Street bar by a car. RP 1158. Whoever spoke to Mr. Kennedy told Mr. Kennedy that it looked like Mr. Morris had retrieved a gun from the trunk of the car that was trapping whoever spoke to Mr. Kennedy at the 54<sup>th</sup> Street bar. RP 1158.

Nothing bad happened at the 54<sup>th</sup> Street bar and nobody even got out of the Explorer. RP 1242. The 54<sup>th</sup> Street bar closed at 2 a.m. RP 1263. Around 2:03 or 2:04 a.m., Mr. Evans and the other men left the 54<sup>th</sup> Street bar and Mr. Evans was going to drive people home. RP 1242, 1644. Mr. Evans was driving the Explorer, Mr. Franklin was seated behind Mr. Evans on the driver's side of the vehicle, Mr. Kennedy was in the front passenger seat, and Mr. Johnson was in the rear passenger side seat. RP 509, 1141, 1215-1217.

As the Explorer left the 54<sup>th</sup> Street bar, Mr. Franklin passed out in the back seat of the Explorer from his drug and alcohol use throughout the day. RP 1645. The Explorer was behind the vehicle Mr. Morris was riding in. RP 1159.

Around 2 a.m. on May 31, 2009, Jeremy Berntzen was dropping a friend off at home in the vicinity of the intersection of Cedar and 56<sup>th</sup> st. RP 200-203. Mr. Berntzen's friend, Mr. Ben Grossman was following Mr. Berntzen to give Mr. Berntzen a ride home after Mr. Berntzen had dropped off the third man. RP 203. Mr. Berntzen was standing outside the vehicle he had been driving when he observed the Ford Explorer in which Mr. Franklin was a passenger following another car at a high rate of speed on Cedar Street. RP 204-205. As the Explorer drove east on 56<sup>th</sup> Street and turned onto North Cedar, a person leaned out of the passenger side of the vehicle and fired a gun. RP 205-212, 382-383. The Explorer was following another dark colored vehicle. RP 205, 252-253. Mr. Berntzen didn't see where the Explorer went but did see the first car turn onto 54<sup>th</sup> Street and travel in the direction of Oakes Street. RP 209.

The person firing the guns was Mr. Kennedy. RP 1141, 1232. Mr. Kennedy had a .40 caliber gun in one hand and a .38 caliber gun in the other hand and was firing them simultaneously. RP 1152. Mr. Kennedy already had the guns on him when he first got into the Explorer and still had the guns

when he started shooting. RP 1142, 1151. Mr. Kennedy had purchased the firearms weeks prior to the shooting. RP 1143. During the shooting Mr. Franklin was asleep in the back seat of the Explorer. RP 1152-1153. Mr. Franklin had nothing to do with Mr. Kennedy's shooting. RP 1152. Mr. Kennedy shot at Mr. Morris' vehicle because Mr. Morris had taken Mr. Kennedy's necklace, not because of any gang-related issue. RP 1129-1130, 1139-1141, 1150, 1179-1180. Mr. Franklin was not woken up by the shooting. RP 1177-1179, 1644-1645.

Mr. Grossman was inside of his pickup truck and was parked on Cedar Street when the shots were fired from the Explorer. RP 251-255. Bullets struck Mr. Grossman's truck in three places. RP 260-261. Mr. Grossman believed that the shots were fired from the passenger side window of the Explorer. RP 254-255. Mr. Grossman saw no shots fired from the driver's side of the Explorer. RP 264, 268.

Darlene Esqueda lived on South 54<sup>th</sup> Street and saw the vehicles travelling from Cedar. RP 311-313. Ms. Esqueda saw someone stick their arm out of the second vehicle and fire a gun. RP 311-313. The arm with the gun came out of the passenger

side of the second vehicle. RP 318-319, 321-323. When the vehicles reached 54<sup>th</sup> Street the vehicle split and each vehicle went a different direction. RP 315.

Just after 2 a.m. on May 31, 2009, Tacoma Police Officer Chris Martin was on duty parked at 56<sup>th</sup> Street and Birmingham when he heard gunshots from the east. RP 363-364. Officer Martin advised dispatch that he had heard gunshots about the same time that dispatch relayed that gunshots had been heard in the area of 56<sup>th</sup> and Cedar. RP 366. Officer Martin responded to 56<sup>th</sup> and Cedar within 30 seconds of hearing the shots and was flagged down by Mr. Berntzen. RP 366-369. Mr. Berntzen provided Officer Martin with a description of the Explorer and Officer Martin broadcast that description. RP 370-371. Officer Martin was at the scene for several minutes before he received a report of officers locating a possible suspect vehicle. RP 371.

The first thing Mr. Franklin remembered after passing out at the 54<sup>th</sup> Street bar was hearing gunshots and being tossed around the Explorer as the Explorer crashed on the entrance to I-5 at 56<sup>th</sup> and Tacoma Mall Boulevard. RP 1644-1646. The Explorer then drove to a Chevron. RP 1646.

Tacoma Police Officer Nicholas Jensen was on patrol with his partner, Officer Johnson, and was traveling westbound on 74<sup>th</sup> Street when he observed a Ford Explorer matching the description of the Explorer that had been involved in the shooting. RP 493-494. The Explorer was driving fast, cut across lanes, and had debris hanging underneath it as if it had gone off-road. RP 495. Officer Jensen radioed dispatch while Officer Johnson turned their vehicle around. RP 495. The Explorer turned in to a Chevron gas station. RP 495.

Officer Jensen also observed a tannish-brown mid-1970s Oldsmobile Cutlass at the Chevron parked getting gas. RP 499-502. The rear driver's side passenger of the Explorer immediately exited the Explorer and got into the rear of the Cutlass through the passenger door. RP 501. The front passenger of the Explorer also got into the Cutlass. RP 501. The driver of the Cutlass got out of the Cutlass and walked over to the Explorer and spoke to the occupants of the Explorer. RP 501. The rear passenger seat passenger of the Explorer put something in the garbage. RP 505. Officer Jensen observed that there were branches and brush under the Explorer and that the

right rear tire was chewed up and almost gone and the right rear wheel was running on the rim. RP 583-586.

Officer Jensen watched the individuals at the gas station and called for backup. RP 506. Officer Jensen observed Mr. Desmond Johnson holding a bag from Burger King and saw Mr. Johnson drop something into a garbage can. RP 505, 517-519. Mr. Johnson also entered the store at the Chevron and put a black nylon bag containing unused bullets on a shelf. RP 534, 624-625. Police later located a black holster and a .38 caliber revolver in the store. RP 535, 595-597.

When the backup arrived, police swarmed the Chevron and arrested everyone, handcuffing them and placing them in patrol vehicles or on the sidewalk. RP 508. Mr. Franklin was in the rear seat of the Cutlass and Mr. Kennedy was in the front seat. RP 509. The owner of the tan Cutlass was determined to be Madre Combs. RP 509.

Officer Jensen did a "protective sweep" of the Explorer and the Cutlass at the Chevron and discovered a .40 caliber handgun on the floor of the Cutlass, tucked under the front passenger seat. RP 512-514. Officer Jensen could see the grip

of the gun and the barrel was pointed to the rear of the vehicle. RP 514-515. Based on how the handgun was positioned, Officer Jensen believed the front passenger put it there. RP 588. The police discovered a latent fingerprint on the handgun but it did not match Mr. Franklin. RP 656-657, 668-671. The bag Mr. Johnson was holding contained three or four .38 caliber shell casings. RP 520.

Officer Martin began responding as backup to the gas station at 72<sup>nd</sup> and Hosmer where suspect vehicle had been spotted but Officer Martin was diverted en route to 74<sup>th</sup> and Oakes where an officer had reported almost being struck by a vehicle that crashed and was discovered to contain the victim of a homicide. RP 374-376.

Police recovered eight .40 caliber bullet casings spread out on the 5400 block of Cedar Street. RP 438-453. No fingerprints were recovered from the shells. RP 457-459.

Tacoma Police Officer Brett Terwilliger transported Mr. Berntzen to a location across the street from the Chevron where the Explorer was stopped and Mr. Berntzen identified the

Explorer as the vehicle involved in the shooting at 56<sup>th</sup> and Cedar. RP 473-475.

Tacoma Police Officer Spangler responded to the Chevron as backup. RP 589-590. Officer Spangler took custody of Mr. Franklin. RP 592. Mr. Franklin was sitting in the rear driver's side seat of the Cutlass at the Chevron. RP 593. Officer Spangler informed Mr. Franklin of his constitutional rights and Mr. Franklin agreed to speak to Officer Spangler. RP 593. Mr. Franklin told Officer Spangler that he had been picked up in the Cutlass and was on his way to a party and that he didn't know what was going on. RP 593-594.

Mr. Franklin was transported to a police station and placed in an interview room. RP 1382. Later that morning, Mr. Franklin was interviewed by Tacoma Police Detective John Ringer. RP 1374, 1382. Mr. Franklin told Det. Ringer that he had been picked up in the white Explorer and that the other three men were already inside. RP 1383. Mr. Franklin said that he knew Mr. Kennedy well but did not know Mr. Johnson or Mr. Evans very well. RP 1383. Mr. Franklin told Det. Ringer that he was picked up around midnight and that the men went to the

Friendly Duck restaurant. RP 1383. Mr. Franklin said that he and the other men left the Friendly Duck around 2 a.m. and drove to the 54<sup>th</sup> Street pub where they parked in a back lot. RP 1384. Mr. Franklin told Det. Ringer that the men left the parking lot at 2:03 or 2:04 in the morning and that he was seated in the back seat behind the driver. RP 1384. Mr. Franklin said that Mr. Kennedy was seated in the front passenger seat. RP 1385.

Mr. Franklin told Det. Ringer that he was very drunk and that he passed out as the men left the 54<sup>th</sup> Street Bar and Grill. RP 1386. Mr. Franklin said that the next thing he remembered after leaving the 54<sup>th</sup> Street pub was hearing gunshots while the Explorer was getting onto the freeway and the vehicle losing control, going into a ditch, and coming back up onto the freeway. RP 1385-1387. Mr. Franklin said that the Explorer sustained a flat tire and that the men took the first exit off of the freeway and went immediately to the gas station where they parked. RP 1385. Mr. Franklin said that he saw Mr. Combs' vehicle at the pumps so he got out of the Explorer and into Mr. Combs' vehicle. RP 1385.

At the end of the interview, Det. Ringer confiscated a neatly folded blue bandana from Mr. Franklin's person and placed it into evidence. RP 1388.

Forensic testing revealed that the .38 caliber shell casings found outside the Chevron had been fired from the handgun found inside the Chevron and the .40 caliber shell casings found on Cedar Street had been fired from the .40 caliber handgun found in the Cutlass at the Chevron. RP 827-865.

Tacoma Police Forensic Specialist Paul Depoister went to the I-5 on ramp at 56<sup>th</sup> Street and Tacoma Mall Boulevard and saw damage to the foliage consistent with a vehicle passing through the ditch and out again. RP 635-637.

*B. Procedural Background*

On June 1, 2009, Mr. Franklin was charged with one count of being an accomplice to drive-by shooting and one count of unlawful possession of a firearm in the first degree. CP 176-177. On November 9, 2009, the charges against Mr. Franklin were amended to add one count of assault in the first degree and one count of assault in the second degree. CP 180-182. All four charges were charged with the aggravating factor that the crimes

were committed maintain or advance Mr. Franklin's position in a gang. CP 180-182. The assault charges were also charged with firearm enhancements. CP 180-182.

On December 15, 2009, Mr. Franklin filed notice that he would assert the defense of voluntary intoxication. CP 183.

On February 18, 2010, Mr. Franklin filed a motion to sever his trial from those of his then-codefendants Messrs. Johnson, Kennedy, and Evans. CP 184-185. On June 25, 2010, Mr. Franklin filed a motion to dismiss the case pursuant to *State v. Knapstad* and a memorandum in support of the motion. CP 186-269.

On January 10, 2011, the State filed its response to Mr. Franklin's motion to sever the trials of the defendants. CP 270-274. On January 14, 2011, the State filed a second and lengthier response to Mr. Franklin's motion to sever. CP 275-289.

On February 4, 2011, Mr. Franklin filed a declaration of Jerome Kennedy wherein Mr. Kennedy declared that Mr. Franklin had passed out in the back seat of the Explorer at the 54<sup>th</sup> Street Sports Bar and did not wake up until the Explorer ran

off the road as it was entering the on-ramp to I-5 at South 56<sup>th</sup> Street. CP 290-291.

On February 7, 2011, the charges were amended to change the victim of the drive-by shooting charge from Mr. Grossman to “a human being.” CP 292-294.

On February 14, 2011, the charges against Mr. Franklin were amended again, this time to change the charged gang aggravator on all charges from a violation of RCW 9.94A.535(3)(s) to a violation of RCW 9.94A.535(3)(aa). CP 298-300. On February 14, 2011, the State also filed its response to the defendants’ *Knapstad* motions. CP 301-309. On February 14, 2011, Mr. Franklin stipulated that evidence indicating that he had a prior felony conviction was admissible at trial. 2-14-11 RP 15. Also on February 14, 2011, a hearing was held regarding the defendants’ *Knapstad* motions. 2-14-11 RP 16-38. The trial court denied the motion. 2-14-11 RP 38.

On February 28, 2011, a CrR 3.5 hearing was held to determine the admissibility of the defendants’ statements to police. 2-8-11 RP 12-102. The trial court held that Mr.

Franklin's statements to the police were admissible. 2-28-11 RP 98-99.

On March 1, 2011, the trial court denied Mr. Franklin's motion to sever. 3-1-11 RP 46. Also on March 1, 2011, Mr. Franklin joined in the motions in Limine filed in Mr. Evans' case, Pierce County Superior Court cause number 09-1-02723-6. 3-1-11 RP 55. The State agreed with motions in Limine numbers 1-9, 11, 12, 17, 18, 20-27. 3-1-11 RP 57-58.

Motion in limine #10 was a motion to prohibit the State and/or its witnesses from referring to, or introducing evidence of, alleged prior bad acts of the defendant. CP 612-622. Argument on this motion was the first time the admissibility of gang related evidence was argued before the court. 3-1-11 RP 63-71. The trial court reserved ruling on the issue of the admissibility of gang-related evidence. 3-1-11 RP 71.

There were two motions in Limine numbered 15. CP 612-622. The second motion in limine #15 was a motion to exclude all testimony regarding alleged gangs where such evidence inadmissible and unfairly prejudicial. CP 612-622. The trial court reserved ruling on this motion. 3-1-11 RP 77.

On March 1, 2011, findings of fact and conclusions of law regarding the 3.5 hearing held on February 28, 2011, were entered by the trial court. CP 310-314.

On March 2, 2011, Mr. Franklin filed a notice that he was adopting Mr. Johnson's motion and brief relating to suppression of evidence recovered from the cell phones of the defendants. CP 315-316, 319-338. On March 2, 2011, Mr. Franklin also filed a notice that he was adopting Mr. Evans' motion and brief relating to suppression of evidence taken from the cell phones. CP 317-318.

On March 3, 2011, the State filed a trial memorandum regarding evidence of prior disputes and of gang affiliation. CP 340-353. In this memorandum, the State sought admission of evidence of the defendants' purported gang affiliation, evidence of an alleged gang-related fight that had occurred roughly one week prior involving members of different gangs and during which Mr. Kennedy's neck chain was taken by Mr. John Morris, and evidence of text messages between Mr. Franklin and his girlfriend regarding Mr. Franklin "handlin' business" shortly after 1:30 a.m. on May 31, 2009. CP 340-353. The State argued

that this gang-related evidence was admissible for three reasons: (1) as “res gestae” of the charged offenses and as “inextricable from the charged offenses as it provides proof of the offenses’ history as well as an immediate context for the events”; (2) as evidence of ill will and prior disputes between the victim and the defendant; and (3) the gang-related evidence was “critical” to understanding why the defendants would join in the crimes. CP 340-353.

Also on March 3, 2011, the State filed a response to the defendants’ motion to suppress the cell phone data. CP 354-364.

On March 7, 2011, a hearing was held regarding the motions to suppress the evidence retrieved from the defendants’ cell phones as well as the admissibility of gang related evidence under ER 404(b), including allowing Det. Ringer to testify as a gang expert.” 3-7-11 RP 116-188. The trial court denied the motion to suppress the evidence discovered in the defendants’ cell phones. 3-7-11 RP 144. The trial court found that evidence of the fight at which Mr. Kennedy’s neck chain was stolen was admissible as res gestae of the charged crimes and that it was admissible to show motive. 3-7-11 RP 163-164. The trial court

did order that a limiting instruction be given that neither Mr. Franklin nor his codefendant, Mr. Johnson, were present at the fight where Mr. Kennedy's chain was taken. 3-7-11 RP 163-164.

At the March 7, 2011, hearing the State also argued that "gang monikers" or nicknames should be admissible in the case to describe the participants in the case. 3-7-11 RP 164-170. Over defense objection, the trial court allowed the State to use the nicknames of the various parties on the basis that that was how the parties referred to each other. 3-7-11 RP 170.

The State next argued that evidence of "gang status and rivalries" was admissible to prove the motive and intent of the participants and because the crimes "just do[n't] make sense" without such evidence. 3-7-11 RP 170-180. The trial court held that this evidence was admissible. 3-7-11 RP 180.

The State then argued that the "gang artifacts" and other gang-related issues- bandannas, tattoos, cell phone contacts, the use of nicknames, spelling eccentricities, gang-related nickname titles such as "Little" "Big" and "Tiny," the role of respect with regards to gangs, how gangs respond with violence to challenges

to status- all required the “expert” testimony of Det. Ringer to assist the jury in understanding the evidence. 3-7-11 RP 182-184. The trial court held that Det. Ringer could not testify as a gang expert until his testimony had qualified him as such, but, should Det. Ringer be demonstrated to be a gang expert, Det. Ringer could testify as to all of the areas the State indicated. 3-7-11 RP 186.

Jury trial began on March 7, 2011. RP 195. The first information presented to the jury was Ms. Franklin’s stipulation that he had previously been convicted of a felony defined as a serious offense and that at all times relevant to the charges was not permitted to possess a firearm. RP 196.

At trial, the State presented evidence of a drive-by shooting between two vehicles and a subsequent crash of one of the vehicles vehicle and death of the driver of that vehicle in the area of the intersection of 74<sup>th</sup> and Oakes Street that occurred almost immediately after the gunfire on Cedar Street. RP 752-771. Defense counsel objected to the relevance of the evidence of this other homicide since neither Mr. Franklin nor his codefendant Mr. Johnson were involved in the second homicide

and argued that the evidence was highly prejudicial but irrelevant to any issue before the jury. RP 772-778.

The State responded “but for the action of [the defendants]” the victim of the other shooting would have been alive. RP 773. The State indicated that it tried to come up with a theory under State law as to how it could hold Mr. Franklin and Mr. Johnson accountable for the murder but it couldn’t. RP 773. However, the State still believed that Mr. Franklin and Mr. Johnson “absolutely had involvement in the homicide” and that the defendants had started a chain reaction that ended in the homicide of the driver of the other vehicle. RP 773. The State argued that it could not “tell the story” and the evidence did not make sense without “the complete picture” of the events to include the other shooting. RP 775. The trial court overruled the objections of the defendants and held that the evidence of what happened on Oakes street was admissible because “the State does have a right to indicate how this relates to what occurred at the Chevron station since it seems to be an involved story with a lot of different individuals involved in three separate cars.” RP 778-779.

At trial, the State moved to introduce evidence that Ms. Steverson, the owner of the Explorer and the then-girlfriend of the driver of the Explorer, reported the Explorer stolen on the morning of the gunshots on Cedar Street. RP 786-788. The State argued that the evidence that Ms. Steverson reported the Explorer stolen was relevant and necessary to demonstrate that the shooting was a planned gang-related event. RP 786. The State's theory was that the participants in the crimes had contacted Mr. Combs prior to the shooting and told him to meet the Explorer at the Chevron because the plan was to abandon the Explorer at the Chevron and have Ms. Steverson report the Explorer as stolen. RP 786-788. The State argued that it was the prosecutor's experience in almost ten years experience prosecuting gang cases that gang members will use a car that is reported stolen to commit crimes and then abandon the car in order to create an alibi. RP 786-788. The State argued to the court that it needed the fact that Ms. Steverson had reported the Explorer stolen to argue to the jury that the shooting was an event planned and executed by gang members. RP 788, 813-816. The State indicated that Det. Ringer would testify that

abandoning the vehicle and reporting it stolen was a common scheme or plan that had happened in the past. RP 813-816.

Trial counsel for Mr. Franklin and Mr. Johnson objected to the introduction of this evidence because it was irrelevant, was more prejudicial than probative, and the State's theory as to why the vehicle was reported stolen was entirely speculative. RP 788-789. The trial court held that the State could introduce evidence regarding the report of the Explorer as being stolen but that Det. Ringer could not testify about falsely reporting vehicles stolen as being something gangs commonly do. RP 823.

The State also moved at trial to introduce evidence that the guns involved in the case did not belong to anyone in the vehicle. RP 995. The State argued that it didn't want to imply that Mr. Franklin or Mr. Johnson had stolen the guns, but the State wanted to introduce evidence that one of the guns had last been seen by the registered owner of the gun ten years ago and the other gun had never been registered. RP 995. The State argued that this evidence was admissible to permit the jury to understand the nature of the investigation and to explain the history of the handguns. RP 995-996. Counsel for Mr. Franklin

joined counsel for Mr. Johnson's objection to the evidence of the history of the guns as more prejudicial than probative because the jury would draw the inference that the defendants stole the guns. RP 999-1000. The State called the defendants' objection comical and argued that since the jury already knew that Mr. Franklin couldn't lawfully possess the guns, allowing the jury to make the inference that the guns were stolen would not prejudice the defendants. RP 1001. Mr. Franklin objected and argued that the prejudice was that the jury could infer that Mr. Franklin unlawfully possessed the guns and obtained the guns unlawfully. RP 1001. The trial court overruled the defense objections and permitted the State to introduce the evidence about the history of the guns. RP 1001.

During trial, the State moved to introduce evidence involving a fight that occurred on September 26, 2009. RP 1013. The State asserted that the fight occurred at a residence known to police be associated with the East Side Gangster Crips and that Mr. Franklin, Mr. Johnson, Mr. Kennedy, and Mr. Combs were all present at the scene when the police arrived. RP 1013. During contact with Mr. Franklin, police saw Mr. Franklin's

tattoos. RP 1013-1014. The State argued that the relevance of the evidence was to establish that the individuals knew each other and that “the earlier event on May 31 was not simply a fleeting encounter of unknown individuals who ended up in a car together,” to establish that Mr. Franklin had a tattoo that said “Monster” across his stomach and a tattoo of the letters “EGC” across his back and another tattoo of “ES” on his neck area. RP 1013-1014. The State’s theory was that the presence of the men at the “known gang house” combined with Mr. Franklin’s EGC tattoo established that the men knew each other in a gang context. RP 1013-1014.

Defense counsel for Mr. Johnson and Mr. Franklin objected to the evidence, arguing that it occurred after the events in question and was irrelevant and cumulative of other evidence that was going to be presented. RP 1015-1016. The trial court held that the evidence of the fight was admissible “as to identification as to the tattoo and what he had on his body to associate him with the allegation that this was gang related.” RP 1016, 1022.

At trial, the State introduced evidence that Mr. Franklin's phone had texts between Mr. Franklin and Ms. Jenkins sent between 1:32 and 1:39 a.m. on the morning of the shooting where Mr. Franklin texted Ms. Jenkins that he was "handlin' this," "handlin' business," and that he had "just got jacc't and now it's time to give some1 the blues." RP 1320. The State also introduced a picture of Mr. Franklin from Mr. Franklin's phone which showed Mr. Franklin's tattoo of "EGC." RP 1321.

Det. Ringer testified that he believed Mr. Franklin was a member of the Eastside Gangster Crips on the basis of Mr. Franklin's tattoos and the fact that Mr. Franklin had a blue bandanna. RP 1495.

During Det. Ringer's testimony the State moved to introduce evidence of more texts between Mr. Franklin and "Lady Monster" which the State believed showed that Mr. Franklin earned his money through the prostitution of "Lady Monster." RP 1545-1546. The State argued that the defense could not portray Mr. Franklin as "nongang, you know, hard-working, employed individual when the opposite is factually true." RP 1546. Mr. Franklin objected to the evidence being

introduced on the basis that the State had not proved that Mr. Franklin was a gang member at the time the texts were sent, that the texts did not suggest that Mr. Franklin was a pimp, RP 1546-1547, 1549. The trial court held that the texts were admissible because Mr. Franklin had questioned Det. Ringer about Mr. Franklin having a full-time job at the time of the shooting and that the inference from Mr. Franklin's cross-examination of Det. Ringer was that Mr. Franklin was not in a gang and was living a law-abiding life. RP 1548, 1556. Mr. Franklin made a standing objection to the introduction of evidence regarding the alleged prostitution related texts. RP 1558.

On March 22, 2011, Mr. Franklin filed proposed jury instructions. CP 369-377. The State also filed a set of proposed jury instructions on March 22, 2011. CP 378-436.

On March 23, 2011, the State filed a set of proposed supplemental jury instructions. CP 437-451.

On March 25, 2011, the jury sent out a request for clarification of instruction number 9, the accomplice liability instruction, regarding the words "a crime" and "the crime." CP 454-455. The jury sought more explanation of the phrases

“knowledge of a crime” and “knowledge of the crime of drive by shooting.” CP 454-455. The trial court instructed the jurors to review the instructions as given. CP 454-455.

On March 30, 2011, the jury sent out a note indicating that it had reached a verdict on three of the four counts but was unable to reach a unanimous agreement as to one count. CP 460-461.

On April 4, 2011, the jury informed the court that it had reached a verdict for three of the four counts, was unable to reach a verdict on the fourth count, and that further deliberations would be futile. CP 464-465.

On April 4, 2011, the trial court’s instructions to the jury were filed. CP 471-514.

The jury found Mr. Franklin guilty of drive-by shooting, guilty of unlawful possession of a firearm in the first degree, and guilty of assault in the first degree. CP 516, 518, 525. The jury found that all crimes were committed to benefit a criminal street gang and that Mr. Franklin was armed with a firearm during the commission of the first degree assault. CP 515, 517, 520.

On April 18, 2011, Mr. Franklin filed a pro-se motion for new trial. CP 527-547.

On April 19, 2011, the State filed a motion in support of the jury's verdict, asking the court to accept the jury's verdict and proceed to sentencing. CP 554-560.

On April 22, 2011, Mr. Franklin filed another pro-se motion for new trial. CP 562-571.

Also on April 22, 2011, the findings of fact and conclusions of law regarding the CrR 3.6 suppression hearing were filed. CP 572-583.

Mr. Franklin received a sentence of 200 months total confinement. CP 584-597.

Notice of appeal was timely filed on April 22, 2011. CP 598. Also on April 22, 2011, Mr. Franklin filed a third pro-se motion for new trial. CP 599-603.

On April 27, 2011, the trial court entered an order finding that post-verdict investigation into the jury's decision was unnecessary on the basis of juror #3's post-verdict revelation that the presiding juror had misrepresented juror #3's verdict. CP 604-605.

#### IV. ARGUMENT

1. **Mr. Franklin's right to a fair trial was violated by the trial court erroneously admitting gang-related evidence under ER 404(b) for purposes of establishing the res gestae of the crimes and Mr. Franklin's intent.**

Both the United States Constitution and the Washington State Constitution article I, section 22, guarantee the criminal defendant a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wn.2d 506, 22 P.3d 791 (2001).

- a. *The trial court abused its discretion in ruling that the gang-related evidence was admissible under ER 404(b).*

A trial court's ruling under ER 404(b) will not be disturbed absent a manifest abuse of discretion such that no

reasonable judge would have ruled as the trial court did. *State v. Mason*, 160 Wn.2d 910, 933-934, 162 P.3d 396 (2007). A trial court's balancing of whether or not a piece of evidence is more prejudicial than probative under ER 403 is reviewed for abuse of discretion. *In re Detention of Halgren*, 156 Wn.2d 795, 802, 132 P.3d 714 (2006).

A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime. *See State v. Holmes*, 43 Wn.App. 397, 400, 717 P.2d 766 ("once a thief always a thief" is not a valid basis to admit evidence), *review denied*, 106 Wn.2d 1003 (1986).

Substantial prejudicial effect is inherent in ER 404(b) evidence. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995).

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

Whether evidence of a defendant's other bad acts should be admitted at trial is governed by ER 404(b), which provides:

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

*State v. Stanton*, 68 Wn.App. 855, 860, 845 P.2d 1365 (1993).

[B]efore admitting evidence of other wrongs under ER 404(b), a trial court must (1) find that a preponderance of evidence shows that the misconduct occurred; (2) identify the purpose for which the evidence is being introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. In doubtful cases, the evidence should be excluded.

*State v. Baker*, 89 Wn.App. 726, 731-732, 950 P.2d 486 (1997), *review denied* 135 Wn.2d 1011, 960 P.2d 939 (1998).

"In weighing the admissibility of the evidence to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court considers (1) the importance of the fact that the evidence intends to prove, (2) the strength of inferences necessary to establish the fact, (3) whether the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction.” *State v. Kendrick*, 47 Wn.App. 620, 628, 736 P.2d 1079, review denied 108 Wn.2d 1024 (1987). “Gang affiliation, standing alone and without more detailed information about that gang’s activities and the victims’ participation, [has] little evidentiary weight.” *State v. Ferguson*, 131 Wn.App. 855, ¶45, 129 P.3d 856, review denied 158 Wn.2d 1016, 149 P.3d 377 (2006).

Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association. Therefore, evidence of criminal street gang affiliation is not admissible in a criminal trial when it merely reflects a person’s beliefs or associations. There must be a connection between the crime and the organization before the evidence becomes relevant.

Washington courts likewise have recognized the need for this connection before admitting evidence of gang membership. Accordingly, to admit gang affiliation evidence there must be a nexus between the crime and gang membership.

*State v. Scott*, 151 Wn.App. 520, 526-527, 213 P.3d 71 (2009), review denied 168 Wn.2d 1004, 226 P.3d 780 (2010) (internal citations omitted).

As will be discussed below, the trial court's erroneous admission of gang-related evidence deprived Mr. Franklin of a fair trial since the gang-related evidence was both highly prejudicial and inadmissible under ER 404(b).

The State's theory of the case was that Mr. Kennedy was angered by the theft of his chain during the fight at the 7-11 by Mr. Morris and that he lost face in the gang community as a result. 3-1-11 RP 63-70. In response, according to the State, Mr. Kennedy gathered his gang associates on the night of May 31, 2009, and pursued a car occupied by Mr. Morris, intending to shoot at Mr. Morris in retribution for the theft of the necklace. 3-1-11 RP 63-70.

In support of this theory, the State moved pre-trial to admit evidence of the fight at the 7-11, evidence of the defendant's gang associations, and purported expert testimony regarding gang culture under ER 404(b) as *res gestae* of the charges in this case, as evidence of ill will and prior disputes, and as evidence critical to the understanding why Mr. Franklin would join in the crimes. CP 340-353.

The trial court found that evidence of the fight at which Mr. Kennedy's neck chain was stolen was admissible as *res gestae* of the charged crimes and that it was admissible to show motive. 3-7-11 RP

163-164. At the March 7, 2011, hearing the State also argued that evidence of “gang status and rivalries” was admissible to prove the motive and intent of the participants and because the crimes “just do[n’t] make sense” without such evidence. 3-7-11 RP 170-180. The trial court held that this evidence was admissible. 3-7-11 RP 180.

As will be discussed below, the trial court’s ruling admitting this evidence was an abuse of discretion because (1) the evidence of the fight at the 7-11 was not evidence of any prior bad act of Mr. Franklin, (2) the State failed to demonstrate that the gang evidence it sought to introduce was probative of any of the defendants’ intent or motive, without relying on the prohibited propensity inference, (3) the res gestae exception was inapplicable to the gang related evidence offered by the State, and (4) all gang-related evidence was more prejudicial to the defendants than it was probative of the identified purpose for its admission.

- i. The evidence of the fight at the 7-11 and all evidence relating to other individuals’ gang relations was inadmissible under ER 404(b) as prior bad acts of Mr. Franklin.

Under ER 404(b), “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes,

such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” The plain language of ER 404(b) makes clear that ER 404(b) renders prior bad acts *of the defendant* admissible for purposes other than proving action in conformity therewith.

It was undisputed that Mr. Franklin was not present during the fight at the 7-11. Thus, since Mr. Franklin was not involved in the fight, evidence of the fight is not admissible against him under ER 404(b). Similarly, gang evidence related to anybody except Mr. Franklin would be inadmissible under ER 404(b) against Mr. Franklin since, like the fight at the 7-11, evidence of other individuals’ gang involvement (such as street names, tattoos, or clothing) is not evidence of a prior bad act of Mr. Franklin.

To be admissible against a defendant under ER 404(b), evidence of a prior bad act must be evidence of a prior bad act of the defendant, not somebody else. Because evidence of the fight and evidence of other individuals’ gang involvement was not evidence of a prior bad act of Mr. Franklin, the trial court abused its discretion in admitting such evidence against Mr. Franklin under ER 404(b) since the evidence did not meet the applicable legal standard for admissibility.

- ii. The State failed to demonstrate that the gang

evidence it sought to introduce was probative of any of the res gestae of the crime or the motive or intent of Mr. Franklin without relying on the prohibited propensity inference.

*1. Intent.*

Mr. Franklin was charged with drive by shooting, first degree unlawful possession of a firearm, and first degree assault against Mr. Grossman. CP 298-300.

It was undisputed that Mr. Franklin was present in the Explorer when the shots were fired. However, no evidence presented by the State suggested that Mr. Franklin was the shooter. In fact, every witness who was present in the Explorer during the shooting and who testified at trial testified that Mr. Franklin was not the shooter. RP 1147-1148, 1232, 1248, 1252. Indeed, the State even conceded that it did not think that Mr. Franklin fired the guns. 3-1-11 RP 66. Thus, in order to establish Mr. Franklin's guilt of the crime of drive-by shooting, the State argued that Mr. Franklin was guilty as an accomplice.

Under RCW 9A.08.020(3),

A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it.

Jury instruction number 9 contained the language of RCW 9A.08.020(3)(a) verbatim. CP 471-514.

The State must prove that the accomplice acted with knowledge that his or her actions promoted or facilitated the commission of the crime.

*State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000).

Washington case law has consistently stated that physical presence and assent alone are insufficient to constitute aiding and abetting. Presence at the scene of an ongoing crime may be sufficient if a person is 'ready to assist'....

... Even though a bystander's presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt. It is not the circumstance of 'encouragement' in itself that is determinative, rather it is encouragement plus the intent of the bystander to encourage that constitutes abetting. We hold that something more than presence alone plus knowledge of ongoing activity must be shown.

*In re Welfare of Wilson*, 91 Wn.2d 487, 491-492, 588 P.2d 1161 (1979)

(citations omitted) (quoted with approval in *State v. Everybodytalksabout*,

145 Wn.2d 456, 472, 39 P.3d 294 (2002), and *State v. Rotumo*, 95 Wn.2d

931, 933-34, 631 P.2d 951 (1981)); *State v. Ferreira*, 69 Wn.App. 465,

471, 850 P.2d 541 (1993) ('A person's physical presence and assent alone are insufficient to establish accomplice liability. He must knowingly aid or agree to aid.') (citations omitted).

RCW 9A.08.020 does not define "aid." However, the Washington Criminal Pattern Jury Instructions define "aid" in the context of accomplice liability as "all assistance whether given by words, acts, encouragement, support, or presence." WPIC 10.51. Jury instruction 9 given to the jury in this case contained this language. CP 471-514.

Thus, to demonstrate that Mr. Franklin was an accomplice to the drive-by shooting and the assault, the State had the burden of demonstrating that he was present in the Explorer with the intent to encourage the shooting. The State sought to prove Mr. Franklin's intent by introducing under ER 404(b) general evidence of gang behavior coupled with the "expert" opinion of Det. Ringer as to gang motivations.

When the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged offense. That a prior act "goes to intent" is not a magic password whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in its name.

*State v. Wade*, 98 Wn.App. 328, 334, 989 P.2d 576 (1999) (emphasis in original).

In *Wade*, a police officer on patrol observed Wade walking away from a vehicle. The officer stopped his patrol car, got out, and invited Wade to talk to the officer. Wade refused and walked away. As Wade walked away, the officer saw Wade fumbling in his pocket and then saw a plastic baggy-type wrapper drop to the ground. After the baggy dropped, Wade began running. The officer recovered the baggie which contained nine rocks of cocaine. Wade was later found and arrested.

At trial on a charge of possession of a controlled substance with intent to deliver, the State moved in limine to admit two prior drug dealing acts committed by Wade fourteen and ten months prior to the current prosecution. The trial court allowed the evidence to be admitted as evidence of intent under ER 404(b). Wade objected to the admission of the evidence again during trial, but the trial court again ruled the evidence was admissible as evidence of intent. Mr. Wade was found guilty and appealed.

The Court of Appeals found that the trial court had erred in admitting the evidence of Wade's prior acts of dealing drugs and reversed Wade's conviction on grounds that the State presented insufficient evidence that Wade intended to deliver the drugs. *Wade*, 98 Wn.App. at 332-342, 989 P.2d 576.

In reaching its ruling, the *Wade* court engaged in an in depth analysis of how evidence of prior bad acts may properly be used to support an inference of intent in a later case and how prior bad acts can be improperly used to establish intent through a propensity inference:

The inquiry here is whether it is legally appropriate to infer from Wade's past acts intent to deliver in the present act. Wigmore describes the nature of this inference as at least a three-step process because "an act is not evidential of another act"; there must be an intermediate step in the inference process that does not turn on propensity. "[I]t cannot be argued: Because A did an act last year, therefore he probably did the act X as now charged." WIGMORE ON EVIDENCE § 192, at 1857.

When the State seeks to prove the element of criminal intent by introducing evidence of past similar bad acts, the State is essentially asking the fact-finder to make the following inference: Because the defendant was convicted of the same crime in the past, thus having then possessed the requisite intent, the defendant therefore again possessed the same intent while committing the crime charged. If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current case.

**Use of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant. To use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves.** Wigmore calls this the "abnormal factor" that ties the acts together. WIGMORE, § 302. Once this connection is established, then other reasonable inferences, such as intent or motive, can logically flow from introduction of the prior acts.

In *State v. Holmes*, the defendant was charged with burglary; the State sought to introduce previous theft convictions to show intent in the charged act. *State v. Holmes*, 43 Wn.App. 397, 717 P.2d 766 (1986). The court held that before prior acts can be admitted to show intent, the prior acts "must have some additional relevancy beyond mere propensity." *Holmes*, 43 Wn.App. at 400-401, 717 P.2d 766. **This additional relevancy turns on the facts of the prior acts themselves and not upon the fact that the same person committed each of the acts. Otherwise, the only relevance between the prior acts and the current act is the inference that once a criminal always a criminal.** It is the facts of the prior acts, not the propensity of the actor, that establish the permissive inference admissible under ER 404(b).

Using Wade's prior bad acts to prove current criminal intent, however, is tantamount to inviting the following inference: Because Wade had the same intent to distribute drugs previously, he must therefore possess the same intent now. ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime. This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence. Eric D. Lansverk, Note, Admission Of Evidence Of Other Misconduct In Washington To Prove Intent Or Absence Of Mistake Or Accident: The Logical Inconsistencies Of Evidence Rule 404(b), 61 Wn. L.Rev. 1213 (1986). For this reason, we do not generally allow propensity, or character evidence, to establish a basis for criminal conviction.

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Here, the trial court admitted evidence of Wade's prior offenses to prove intent. Wade offered no defense; nor did he claim mistake, inadvertent possession, or

misidentification. The trial court relied on the past acts having occurred within the preceding one and a half years and in the same geographic location in Tacoma.

But the facts of the charged offense here differ significantly from the facts of the previous offenses. The prior acts included police observation of Wade trafficking in drugs and selling drugs to an undercover police officer. Here, Wade simply saw an officer, emptied the contents of his pocket and ran. That the prior acts occurred in the same general geographic location as the charged act does not support an inference here of intent to deliver.

**The only reasonable inference to be drawn from Wade's prior acts is as follows: Because the previous convictions are for the same type of crime, including the requisite intent, Wade was predisposed to have that same intent on the current occasion. Such evidence and inference merely establish Wade's propensity to commit drug sale offenses. No matter how relevant such propensity evidence may be, ER 404(b) requires exclusion, absent other permissible purposes. We thus conclude that the trial court erred in admitting Wade's prior acts to prove intent.**

*Wade*, 98 Wn.App at 335-337, 989 P.2d 576 (emphasis added).

This case is like *Wade* in that the only way the State's gang-related evidence was relevant to establishing Mr. Franklin's intent was if the fact finder drew prohibited propensity inferences. There were absolutely no similarities between any of the gang-related evidence and the shooting on Cedar Street. Indeed, the State was not even alleging any specific acts, but was, instead, alleging only that the defendants were gang members

and that gang members, as a class were people who banded together to commit crimes, were violent, used gang names to confuse police, and responded with violence to challenges. RP 1458-1459, 1461-1466, 1475, 1480. Det. Ringer also testified about how reputation and street credibility is very important to gangs and gang members and that gang members respond to challenges to their street credibility with heightened levels of violence in order to maintain their street credibility. RP 1483-1485. Det. Ringer went so far as to testify that,

if [a gang member] is disrespected, the very nature of the gang demands that you strike back, that you prove your worth. If a rival gang member comes through and throws up a sign and yells out his set in your territory, you can't let it rest because it shows that you're weak. It shows that you're weak as an individual and that you're weak as a gang...And if you are asked to step up and retaliate one of those situations and you don't, it shows you're weak. You're going to be checked...So if you're a gang member and I disrespect you and you don't respond back, I view you as weak and that's a reflection on your gang as well.

RP 1488.

Det. Ringer testified that the response to disrespect was usually disproportionate to the act of disrespect. RP 1488. He also testified that, "On this situation here, a little offense can result in a tragic retaliation. A lot of times it's misdirected as to who gets it. A lot of times the innocent people are the ones who are victims of that." RP 1488-1489. Det. Ringer

testified that the taking of Mr. Kennedy's necklace was a serious sign of disrespect to both Mr. Kennedy as well as Mr. Kennedy's gang and that Mr. Kennedy would "have to" respond to it. RP 1499. The clear meaning of Det. Ringer's testimony was that Mr. Kennedy and the men in the Explorer were retaliating for the theft of Mr. Kennedy's necklace, but the actions of the men culminated in the death of the innocent victim of the homicide at 74<sup>th</sup> and Oaks.

If the State's argument as to the admissibility of the gang-related evidence to show the defendants' intent is represented as a syllogism, it becomes patently clear that the trial court in this case made the same error as the trial court in *Wade* in finding that the evidence was admissible based on an impermissible propensity inference:

<b>MAJOR PREMISE</b>	<b>MINOR PREMISE</b>	<b>CONCLUSION</b>
Gangs members work together and respond to minor problems with higher levels of violence	Mr. Franklin and the other defendants were all gang members	Therefore, Mr. Franklin intended his presence in the Explorer to assist in the drive-by shooting since the street credibility of his fellow gang member had been challenged

It is impossible to reach the conclusion in the above syllogism without making the prohibited propensity inference that, since Mr.

Franklin was in a gang, he intended his presence in the Explorer to assist in the shooting on Cedar Street. This is precisely the improper logic identified by the *Wade* court as reversible error.

The State's argument for admissibility of the gang evidence to prove intent in this case was even more improper than in *Wade* since the prior bad acts were not even tied to Mr. Franklin specifically, but were generalized assertions about all gang members. The gang-related evidence was not evidence of any of the parties acting in concert on previous occasions to shoot any other person. Rather, the gang-related evidence was simply that the defendants were in gangs, gang members in general were violent and retaliatory, and gang members in general work together. The State failed to identify any similarity in facts between the shooting on Cedar Street and the fight at the 7-11 or Mr. Franklin's membership in a gang or any other person's membership in a gang or the generalized behavior of gang members as a class. The only way this non-specific and generalized information about gangs becomes relevant to Mr. Franklin's intent on the night of the shooting is if the fact finder were to make propensity inferences.

The gang-related evidence did nothing more than demonstrate Mr. Franklin's beliefs and associations. The State demonstrated no specific

connection, nexus, or factual similarity between the gang evidence in this case and the shooting on Cedar Street. The trial court abused its discretion in admitting any gang-related evidence for purposes of showing intent since the only way such evidence became relevant to demonstrating Mr. Franklin's intent is if the fact finder made the impermissible propensity inferences barred by ER 404(b). The trial court's ruling was based on untenable factual and legal bases since the State never established a factual link between the gang-related evidence and the current charges and, therefore, never established the relevance or admissibility of the evidence to show intent.

## 2. *Motive*

Again, as with intent, plan, and preparation, the trial court engaged in the same improper reasoning in finding that the gang-related evidence was admissible under ER 404(b) to demonstrate the motive of any of the defendants. Again, the State failed to establish any prior acts of Mr. Franklin or any other gang related evidence which indicated that Mr. Franklin had a motive to shoot at the other car on Cedar Street. As with intent, the trial court abused its discretion in finding that the gang-related evidence was admissible under ER 404(b).

The State failed to establish the necessary nexus or “abnormal factor” linking any of the individuals’ membership in a gang with Mr. Franklin’s intent or motive in engaging in any activity. Accordingly, the trial court abused its discretion in admitting the gang-related evidence under ER 404(b).

3. *Even if the evidence of the fight at the 7-11 and evidence of other individuals’ gang involvement was considered to be a prior bad act of Mr. Franklin, such evidence was not admissible under ER 404(b) as res gestae of the charged crimes.*

“Under the res gestae or ‘same transaction’ exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.” *State v. Lillard*, 122 Wn.App. 422, 432, 93 P.3d 969 (2004), *review denied* 154 Wn.2d 1002, 113 P.3d 482 (2005). “Unlike most ER 404(b) evidence, res gestae evidence is not evidence of unrelated prior criminal activity but is itself a part of the crime charged.” *State v. Sublett*, 156 Wn.App. 160, 196, 231 P.3d 231, *review granted* 170 Wash.2d 1016, 245 P.3d 775 (2010).

Under the res gestae exception, evidence of other crimes or misconduct is admissible to complete the crime story by establishing the immediate time and place of its

occurrence. Where another offense constitutes a link in the chain of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible in order that a complete picture be depicted for the jury.

*State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003), *review denied* 151 Wn.2d 1039, 95 P.3d 758 (2004).

Like other ER 404(b) evidence, *res gestae* evidence must be relevant for a purpose other than showing propensity, and it must not be unduly prejudicial. *State v. Lane*, 125 Wn.2d 825, 834, 889 P.2d 929 (1995).

The fight at the 7-11 occurred a week prior to the shooting on Cedar Street. The fight at the 7-11 was, therefore, **NOT** part of the “immediate time and place” of the shooting on Cedar Street. Further, evidence of the actions of other people involving gangs and involving the fight at the 7-11 is evidence of unrelated potentially criminal activity. Finally, as with the intent and motive exceptions to ER 404(b) discussed above, the gang-related evidence in this case was not relevant unless the jury engaged in impermissible propensity inferences.

As with admitting the gang related evidence to establish Mr. Franklin’s intent and motive, the trial court abused its discretion in admitting the gang related evidence as *res gestae* of the charged crimes

since the evidence did not meet the applicable legal standard of admissibility as res gestae evidence.

- iii. The gang-related evidence was far more prejudicial to Mr. Franklin than it was probative of any issue in the case.

Substantial prejudicial effect is inherent in ER 404(b) evidence. *Lough*, 125 Wn.2d at 863, 889 P.2d 487. Therefore, prior bad acts are admissible only if their probative value is substantial. *Lough*, 125 Wn.2d at 863, 889 P.2d 487.

Evidence of gang affiliation is considered prejudicial. *State v. Asaeli*, 150 Wn.App. 543, 208 P.3d 1136, 1155-1156, review denied 167 Wn.2d 1001, 220 P.3d 207 (2009). “Gang affiliation, standing alone and without more detailed information about that gang's activities and the victims' participation, [has] little evidentiary weight.” *Ferguson*, 131 Wn.App. at ¶45, 129 P.3d 856.

Washington courts have recognized the highly prejudicial nature of evidence that a defendant is in a gang. *E.G. Asaeli*, 150 Wn.App. 543, 208 P.3d 1136, 1155-1156.

Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association. Therefore, evidence of criminal street gang affiliation is not admissible in a criminal trial when it merely reflects a person's beliefs or

associations. There must be a connection between the crime and the organization before the evidence becomes relevant.

Washington courts likewise have recognized the need for this connection before admitting evidence of gang membership. Accordingly, to admit gang affiliation evidence there must be a nexus between the crime and gang membership.

*Scott*, 151 Wn.App. at 526-527, 213 P.3d 71 (2009).

The gang-related evidence in this case consisted of evidence that Mr. Franklin and numerous other individuals involved in the case were possibly gang members, that gangs engaged in criminal activity, and that potential gang members other than Mr. Franklin were involved in a fight at a 7-11 a week prior to the shooting on Cedar Street.

Since it was undisputed that the shots were fired from the Explorer and that Mr. Franklin was present in the Explorer when the shots were fired, the only issues before the jury were whether Mr. Franklin was present in the Explorer with the intent to assist the shooting and the assault and whether or not Mr. Franklin possessed a firearm on the night of the shooting. Evidence that Mr. Franklin or other people were in gangs and evidence that people other than Mr. Franklin had been involved in a fight a week prior to the shooting was irrelevant as to Mr. Franklin's intent on

the night of the shooting and whether or not Mr. Franklin possessed a firearm.

*b. The introduction of the gang-related evidence deprived Mr. Franklin of a fair trial.*

As discussed at length above, the gang-related evidence was highly prejudicial to Mr. Franklin while at the same time irrelevant unless the jury made impermissible propensity inferences.

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” *Miles*, 73 Wn.2d at 70, 436 P.2d 198.

Not only did the introduction of the gang-related evidence inflame and prejudice the jury against Mr. Franklin, but, given the generalized nature of the gang related evidence, the only inference which the jury could draw from the gang-related evidence was that Mr. Franklin had a propensity to commit violent crimes because they were gang members. This inference is specifically prohibited by ER 404(b), and, as recognized in *Wade*, is an improper basis for a criminal conviction and requires the vacation of the conviction. *Wade*, 98 Wn.App at 335-337, 989 P.2d 576.

The trial court erred in admitting the gang-related evidence and the admission of such evidence deprived Mr. Franklin of a fair trial.

**2. The State presented insufficient admissible evidence to establish that Mr. Franklin committed any crime.**

The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence most favorably to the State, any rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt. *State v. Prestegard*, 108 Wn.App. 14, 22, 28 P.3d 817 (2001), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In determining whether the “necessary quantum of proof exists.” the reviewing court must be convinced that “substantial evidence” supports the State’s case. *Prestegard*, 108 Wn.App. at 22-23, 28 P.3d 817, *citing State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). “Substantial evidence is evidence that ‘would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.’” *Prestegard*, 108 Wn.App. at 23, 28 P.3d 817, *quoting State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). “Substantial evidence” cannot be based upon “guess, speculation, or conjecture.” *Prestegard*, 108 Wn.App. at 23, 28 P.3d 817.

It is the jury's function to weigh evidence, determine witness credibility, and decide disputed questions of fact; however, the jury's

findings must be supported by substantial evidence in the record. *State v. Snider*, 70 Wn.2d 326, 327, 422 P.2d 816 (1967). Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972), *cited in Hutton*, 7 Wn.App. at 728, 502 P.2d 1037.

Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Mr. Franklin was charged with drive by shooting, first degree unlawful possession of a firearm, and first degree assault against Mr. Grossman. CP 298-300. All crimes were charged with the aggravating factor that the acts were committed to benefit a criminal street gang and the assault charge had a firearm enhancement. CP 298-300. For the reasons stated below, the evidence presented by the State was insufficient to establish that Mr. Franklin committed any crime or to establish the gang aggravating factor for any count.

*a. The State presented insufficient evidence to support*

*a finding that Mr. Franklin was an accomplice to the drive-by shooting.*

Under RCW 9A.36.045(1),

A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

The State's theory of the case was that Mr. Kennedy was angered by the theft of his chain during the fight at the 7-11 by Mr. Morris and that he lost face in the gang community as a result. In response, according to the State, Mr. Kennedy gathered his friends on the night of May 31, 2009, and pursued a car occupied by Mr. Morris, intending to shoot at Mr. Morris in retribution for the theft of the necklace.

As stated above, no evidence indicated that Mr. Franklin was the shooter and the State conceded that he was not. In order to establish Mr. Franklin's guilt of the crime of drive-by shooting, the State argued that Mr. Franklin was guilty as an accomplice. The pertinent standards to establish accomplice liability were set out above in section 1(a)(ii)(1).

To establish that Mr. Franklin was an accomplice to the drive-by shooting, the State relied entirely on the argument that because Mr.

Franklin was in a Crip gang, and because gang members commit crimes, and because Crip gang members assist other Crip gang members in committing crimes and in retaliating against disrespect, that the jury could infer that Mr. Franklin intended his presence in the Explorer to aid the shooter. Put another way, the State's argument was that the fact that Mr. Franklin was in a gang meant that the jury could infer that his presence in the Explorer during the shooting was proof that Mr. Franklin was present in the Explorer with the intent to aid in the shooting rather than simply someone present when the shooting occurred. However, Washington law does not permit such an inference to be drawn from the bare fact of gang membership alone.

In *State v. Bluehorse*, 159 Wn.App. 410, 248 P.3d 537 (2011), the court held that generalized characterizations about gang motivations behind drive by shootings offered by "expert" police witnesses were an insufficient basis to support a finding that a drive-by shooting was committed to obtain or maintain an individual's gang membership or status as contemplated by RCW 9.94A.535(3)(s).<sup>2</sup> *Bluehorse*, 159 Wn.App at 423-431, 248 P.3d 537.

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<sup>2</sup> Under RCW 9.94A.535(3)(s), the court may impose a sentence above the standard range if the State establishes the aggravating factor that "the defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group."

More specifically, the *Bluehorse* court held that generalized assertions by “experts” about gang behavior were insufficient to support a finding of Bluehorse’s motive with regard to the drive-by shooting:

The only specific evidence regarding Bluehorse's potential retaliatory motive appears to be Francis's making gang signs in response to Bluehorse doing the same. But according to Francis, these encounters took place during the five to six month period from August 2006 through January 2007, approximately six months before the July 5, 2007, shooting. The State presented no evidence that Bluehorse announced a rival gang status contemporaneously with the shooting or that he had recently confronted and been disrespected or provoked by rival gang members, which would, according to Bair and Frisbee, give rise to a contemporaneous gang requirement or desire to retaliate. Further, the State presented no evidence that Bluehorse made any statements that he wanted to advance his position in a gang or committed the drive-by shooting for reasons related to gang status. Bluehorse testified that he was not a gang member, despite his family's gang connections. Thus, unlike in *Yarbrough*, *Monschke*, *Johnson*, and *Smith*, the State presented no evidence showing that Bluehorse committed the July 5 shooting for reasons related to obtaining or maintaining gang membership or advancing in the gang.

The evidence supports an inference that Bluehorse was involved in this drive-by shooting, but without evidence relating to Bluehorse's motivation, the gang sentencing aggravator would be intolerably broadened by allowing it to attach automatically whenever an aspiring or full gang member is involved in a drive-by shooting based on the detectives' generalized gang testimony; thus relieving the State of its burden to prove beyond a reasonable doubt that the specific defendant charged with a drive-by shooting sought to obtain, maintain, or advance his gang

membership under RCW 9.94A.535(3)(s) and RCW 9.94A.537(3).

We conclude that substantial evidence did not establish Bluehorse's motivation to obtain, maintain, or advance gang membership by being involved in the July 5 drive-by shooting. Thus, we hold that the evidence does not support the jury's special verdict that he committed the July 5 shooting to advance or maintain his status in a gang and that imposition of the exceptional sentence was clearly erroneous.

*Bluehorse*, 159 Wn.App at 430-431, 248 P.3d 537.

This case is like *Bluehorse* in that the State relied on the broad generalizations of the police "experts" to argue that Mr. Franklin was an accomplice to the shooting on the basis of his gang membership alone. The State presented no specific evidence of Mr. Franklin's motive on the night of the shooting. Viewing all evidence in the light most favorable to the State and drawing all reasonable inferences from the evidence in the light most favorable to the State, the evidence introduced at trial established only that Mr. Franklin was present in the Explorer when the shots were fired. As recognized by the court in *Bluehorse*, such evidence is insufficient to support an inference as to Mr. Franklin's intent or motive.

*b. The State presented insufficient evidence to establish that the crimes were committed with the intent to benefit a criminal street gang.*

Under RCW 9.94A.535(3)(aa), a trial court may impose a sentence above the standard range if the jury finds the aggravating factor that “The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.”

The State introduced a large amount of evidence that nearly all individuals involved in the events in this case were gang members or gang associates, and that gangs and gang members commit crimes, and even that gang members, in the abstract, commit crimes which enhance the reputation or influence of their gang or otherwise profit the gang. However, the State presented no evidence that the shooting on Cedar Street, Mr. Franklin’s alleged possession of a firearm, or the assault on Mr. Grossman provided any such benefits to the various gangs represented by the occupants of the Explorer. Instead, the State relied on the jury making the inference that just because Mr. Franklin and the other alleged participants were allegedly gang members then any criminal activity engaged in by Mr. Franklin and the other alleged participants must benefit their respective gangs. Similar to the inference that the jury could infer Mr. Franklin intended to aid the drive-by shooting by being in the

Explorer, Washington law does not support the inference that any crime committed by a gang member benefits that individual's gang.

As with the evidence of Mr. Franklin's intent with regards to whether or not he was an accomplice and as with the evidence presented by the State in *Bluehorse*, the evidence presented by the State was insufficient to support the jury's finding that Mr. Franklin committed the crimes "with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership."

*c. The State presented insufficient evidence to establish that Mr. Franklin unlawfully possessed a firearm.*

Under RCW 9.41.041(1)(a), "A person...is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his...possession, or has in his...control any firearm after having previously been convicted...of any serious offense as defined in this chapter."

Knowing possession is an essential element of the crime of unlawful possession of a firearm. *State v. Anderson*, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000).

Possession may be actual or constructive. *State v. Echeverria*, 85 Wn.App. 777, 783, 934 P.2d 1214 (1997). A jury can find a defendant constructively possessed a firearm if the defendant had dominion and control over it or over the premises where the firearm was found. *Echeverria*, 85 Wn.App. at 783, 934 P.2d 1214. A vehicle is a “premises” for purposes of this inquiry. *State v. Mathews*, 4 Wn.App. 653, 656, 484 P.2d 942 (1971). One can be in constructive possession jointly with another person. *State v. Morgan*, 78 Wn.App. 208, 212, 896 P.2d 731, *review denied*, 127 Wn.2d 1026, 904 P.2d 1158 (1995).

Close proximity alone is not enough to establish constructive possession; other facts must enable the trier of fact to infer dominion and control. *State v. Spruell*, 57 Wn.App. 383, 388-89, 788 P.2d 21 (1990). The ability to reduce an object to actual possession is an aspect of dominion and control. *Echeverria*, 85 Wn.App. at 783, 934 P.2d 1214. No single factor, however, is dispositive in determining dominion and control. *State v. Collins*, 76 Wn.App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995). The totality of the circumstances must be considered. *Collins*, 76 Wn.App. at 501, 886 P.2d 243.

Here, there was no substantive evidence presented that Mr. Franklin was the shooter or that he ever had actual possession of any guns

on the night of the shooting. In fact, Mr. Kennedy testified at trial that he brought the guns with him and Mr. Kennedy never had possession of the guns. The only evidence presented at trial that suggested Mr. Franklin ever had actual possession of any firearms was Mr. Kennedy's statements to Det. Ringer that Mr. Franklin had handed Mr. Kennedy one of the guns prior to the shooting. RP 1419, 1423. However, this evidence was admitted for impeachment purposes only, not as substantive evidence. RP 1418, 1445-1446. Accordingly, it can be considered for no purpose other than judging Mr. Kennedy's credibility and cannot be used to support a factual finding that Mr. Franklin possessed a firearm.<sup>3</sup>

The State also presented insufficient evidence to establish that Mr. Franklin ever was in constructive possession of the firearms. There was certainly sufficient evidence to establish that Mr. Franklin was in the Explorer at the same time that the guns were in the Explorer and was, therefore, in close proximity to the guns. But there was not sufficient evidence to establish that Mr. Franklin even had dominion and control

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<sup>3</sup> A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with her testimony in court, even if such a statement would otherwise be inadmissible as hearsay. *State v. Clinkenbeard*, 130 Wn.App. 552, 569, 123 P.3d 872 (2005). Impeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed in such evidence. *Clinkenbeard*, 130 Wn.App. at 569, 123 P.3d 872. Consequently, the State may not use impeachment as a guise for submitting to the jury substantive evidence that would otherwise be inadmissible. *Clinkenbeard*, 130 Wn.App. at 569-70, 123 P.3d 872.

over the guns or over the vehicle in which the guns were located. Mr. Franklin was not the driver of the Explorer and by all evidence introduced at trial was unaware of the guns before and during the shooting and was never in a position to reduce the guns to his immediate possession.

With regards to Mr. Franklin's presence in the vehicle at the Chevron in which the .40 caliber gun was found, the evidence presented at trial was that Mr. Franklin entered the vehicle first and got in the back seat and that the gun was found under the front passenger seat of the vehicle and placed in such a manner that it was obvious that the front passenger had placed it there. Thus, Mr. Franklin did not transport the handgun to Mr. Combs' vehicle and the handgun entered Mr. Combs' vehicle after Mr. Franklin did. As with the Explorer, Mr. Franklin did not have dominion or control over Mr. Combs' vehicle at the Chevron and was not in a position to reduce the .40 caliber handgun to his possession once the handgun was present in the vehicle.

The State presented insufficient evidence to establish that Mr. Franklin was ever in actual or constructive possession of a firearm on May 31, 2009.

*d. The State presented insufficient evidence to convict Mr. Franklin of assaulting Mr. Grossman.*

Under RCW 9A.36.011(1)(a), “A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.”

The assault of Mr. Grossman occurred when the bullets fired from the Explorer struck Mr. Grossman’s truck while Mr. Grossman was sitting in it. However, as discussed above, there was no evidence that Mr. Franklin was the shooter, and the State relied on an accomplice liability argument to establish Mr. Franklin’s guilt on the charge of assaulting Mr. Grossman. Also as discussed above, under ER 404(b) and *Bluehorse*, broad generalizations from police experts about gang behavior are an insufficient basis to support a finding of an individual’s motive or intent. As with the drive-by shooting charge, the State presented insufficient evidence to convict Mr. Franklin of assault.

## **VI. CONCLUSION**

The trial court erred in admitting the gang related evidence as evidence of *res gestae* of the crimes or of Mr. Franklin’s motive or intent. The evidence was not relevant or admissible without the assumption that the jury would make the impermissible propensity inference that Mr. Franklin was guilty of the crimes charged simply because he was a gang

member. The admission of this evidence violated Mr. Franklin's right to a fair trial due to the highly prejudicial nature of gang evidence.

Further, the State used the broad negative generalizations of gang behavior testified to by the police officers to argue to the jury that Mr. Franklin was guilty of all crimes. As recognized in *Bluehorse*, generalizations about gang behavior such as the ones in this case are not a sufficient basis upon which to rest a finding of guilt. Since a finding that Mr. Franklin was guilty requires a finding that he committed the crimes based on the broad generalizations about gang behavior, the State presented insufficient evidence to convict Mr. Franklin of drive-by shooting and assault.

The State also presented insufficient evidence to establish that Mr. Franklin had actual or constructive possession of any firearm on May 31, 2009.

For the reasons stated above, this court should vacate Mr. Franklin's convictions and remand for dismissal with prejudice.

DATED this 9<sup>th</sup> day of December, 2011.

Respectfully submitted,

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Sheri Arnold, WSBA No. 18760  
Attorney for Appellant

**Certificate of Service:**

The undersigned certifies that on December 9, 2011, she delivered by e-mail to the Pierce County Prosecutor's Office, [pcpatcecfi@pierce.wa.us](mailto:pcpatcecfi@pierce.wa.us), and by United States mailed to appellant, Kevin Franklin, DOC # 872978, Clallam Bay Corrections Center Post Office Box 1830 Eagle Crest Way, Clallam Bay, Washington 98326-9723, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on December 9, 2011.

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Norma Kinter

# ARNOLD LAW OFFICE

**December 09, 2011 - 4:50 PM**

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