

No. 42027-9-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

DESMOND RAY JOHNSON,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 09-1-02725-2  
The Honorable John Hickman, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. Desmond Johnson was denied his constitutional right to a fair trial when the State's gang expert gave improper opinion testimony that indirectly but clearly constituted a comment on Johnson's guilt.
2. The State improperly elicited testimony that invaded the province of the jury to determine witness credibility and the guilt or innocence of the defendant.
3. Desmond Johnson was denied his right to a fair trial where the trial court admitted irrelevant yet highly prejudicial gang evidence.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. When the State's gang expert testified that gang members are dishonest with law enforcement "almost 100 percent of the time," did the expert give improper opinion evidence, and in so doing invade the province of the jury to determine matters of witness credibility and guilt, thereby denying Desmond Johnson his constitutional right to a fair trial?  
(Assignments of Error 1 & 2)
2. Did Desmond Johnson receive a fair trial where the trial court admitted irrelevant yet highly prejudicial gang evidence?

(Assignment of Error 3)

### III. STATEMENT OF THE CASE

#### A. PROCEDURAL HISTORY

The State charged Desmond Ray Johnson with one count of drive-by shooting (RCW 9A.36.045); one count of unlawful possession of a firearm (RCW 9.41.040); one count of first degree assault (RCW 9A.36.011); and one count of assault in the second degree (RCW 9A.36.021). (CP 176-78) The State also alleged that these crimes were aggravated because Johnson committed the offenses in order to benefit a criminal street gang. (CP 176-78)

Johnson and co-defendant Kevin Wayne Franklin were tried together. The jury found Johnson guilty of drive-by shooting, unlawful possession of a firearm and first degree assault. (CP 124, 126, 128; TRP 1922-25)<sup>1</sup> The jury did not reach a verdict on the charge of second degree assault or on the gang aggravator allegation, so the trial court declared a mistrial on those matters. (TRP 1920)

The trial court sentenced Johnson within his standard range to 138 months of confinement. (TRP 1952-53; CP 145, 148) This

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<sup>1</sup> The transcripts containing the trial proceedings, labeled Volume I through Volume XVII, will be referred to as "TRP." The remaining unnumbered volumes will be referred to by the date of the proceeding contained therein.

appeal timely follows. (CP 167)

B. SUBSTANTIVE FACTS

In late May of 2009, a physical altercation occurred between a large group of individuals at a Tacoma 7-11 store. (TRP 926, 1129) Curtis Hudson and his half-brother, Jerome Kennedy exchanged blows with Johnny Morris. (TRP 924-25, 927-28) The fight eventually ended, but not before Morris left with a gold chain and medallion belonging to Kennedy. (TRP 928, 1140) In the weeks that followed, Kennedy was upset with Morris because he refused to return the chain. (TRP 929, 1129, 1141)

On the night of May 30-31, 2009, Kennedy went out drinking at a bar called the Friendly Duck with his friend, Conrad Evans. (TRP 1142, 1237-38) Evans was driving his girlfriend's white Ford Explorer SUV. (TRP 1142, 1216) Desmond Johnson and Kevin Franklin were with them. (TRP 1137, 1237-38)

While they were at the Friendly Duck, Curtis Hudson called Kennedy from a nearby bar called the 54th Street Bar & Grill, where Morris and his friends were also hanging out and drinking. (TRP 1130, 930-31) Kennedy, Evans, Franklin and Johnson left the Friendly Duck and drove in the white Explorer to the 54th Street Bar & Grill, just as the crowd was letting out for closing time. (TRP 939,

940, 1157)

Evans drove the Explorer, while Kennedy sat in the front passenger seat, Franklin sat in the rear driver's side seat, and Johnson sat in the rear passenger side seat. (TRP 1157, 1647) The men drove past the 54th Street Bar & Grill and circled the block, but did not go inside. (TRP 1157)

Hudson and his friends, Marcus Jenkins and Kyle Ragland, got into Ragland's dark-colored Oldsmobile Cutlass and began to leave. Morris and his friends also prepared to leave in their dark-colored sedan. (TRP 965, 1263-64) The three cars ended up in a line waiting to exit the alley beside the bar. Morris' car was directly in front of Ragland, who was directly in front of the Explorer. (TRP 940, 943)

One by one, each vehicle reached the street and turned left out of the alley, with Morris' vehicle in the lead. (TRP 944, 1159) At the next intersection, Morris turned right and Evans' Explorer followed. (TRP 944-45) According to Jenkins, someone in Evans' car called Hudson and told them to leave, so Ragland' Cutlass turned left and drove away. (TRP 944-45, 965, 966, 1270)

As Morris' car and the Explorer drove down Cedar Street, one or more occupants of the Explorer opened fire on Morris' car.

(TRP 1159, 1271)

Jeremy Berntzen was driving his friend home shortly after 2:00 that morning and had just gotten out of his car, when he saw a dark colored car and a white Explorer speeding down Cedar Street. He saw someone hanging out of the rear passenger side window of the Explorer, shooting a gun at the smaller dark-colored car in front of it. When the vehicles reached a "T" at the end of the block, they sped off in different directions. (TRP 209)

Benjamin Grossman was trailing Berntzen in his own car and also saw the smaller car followed by the white Explorer traveling quickly down Cedar Street. (TRP 250, 252) He heard and saw a gun being fired from the rear passenger side of the Explorer. (TRP 254-55, 264) Several bullets struck Grossman's car, but he was not injured. (TRP 256, 260)

Raina Proske lives on Cedar and also heard the gunshots. (TRP 277) Afterwards, when she went outside to investigate, she saw that several bullets had struck her camper. (TRP 280-81, 284, 903-04)

As Tacoma Police Officer Nicholas Jensen responded to the dispatch reporting shots fired from a white Explorer, he saw a white Explorer speeding past him. (TRP 493-94) He saw the Explorer

pull into a Chevron gas station, so Jensen stationed himself in his patrol vehicle behind the Chevron to observe the situation while he waited for backup. (TRP 495-96) He watched as the four men got out of the Explorer. He testified that Kennedy exited from the front passenger seat and Franklin exited from the rear drivers' side seat, and both men walked directly to a beige Oldsmobile Cutlass that was already parked at the Chevron station. (TRP 500, 502, 503, 504, 509) Evans exited from the driver's seat and Johnson exited from the rear passenger seat, and both walked into the Chevron mini-market. (TRP 504, 509)

Jensen saw Johnson throw a Burger King bag into a trash can outside the market before entering the store. (TRP 516-17, 519) Surveillance cameras from inside the store also showed Johnson putting things onto shelves inside the market. (TRP 534, 534)

At the same time, Ragland, Hudson and Jenkins were driving down Oakes Street, when Morris' vehicle approached from behind and Morris opened fire. (TRP 754-55, 945, 947, 948) One of the bullets from Morris' gun struck and killed Ragland. (TRP 755, 766)

Additional officers eventually arrived at the Chevron station

and took the four men plus Madre Combs, the driver of the beige Cutlass, into custody. (TRP 506, 508, 509) Officers then brought Berntzen to the Chevron station, and he positively identified the Explorer as the vehicle he saw speeding down Cedar Street. (TRP 218, 474-75)

The officers recovered the Burger King bag from the trash can, and found several spent .38 caliber shell casings inside. (TRP 519, 520, 730-31) Officers also found a nylon bag with unused bullets, a gun holster, and a .38 caliber revolver in the area inside the market where Johnson was seen placing items. (TRP 534, 535, 545, 546, 595, 597, 736-37, 746) A .40 caliber handgun was found under the front passenger seat of the beige Cutlass, where Kennedy had just been sitting. (TRP 502, 509, 514, 682)

Several .40 caliber shell casings were recovered from the east side of Cedar Street, indicating that all shots were fired from the passenger side of the vehicle. (TRP 379, 393, 452, 470) A .38 caliber bullet was recovered from inside Proske's camper, and a .38 caliber bullet fragment was recovered from the tire of Grossman's car. (TRP 405, 461, 904)

The .38 caliber cartridge casings found in the Burger King bag and the .38 caliber bullets found at Cedar Street were all fired

from the .38 caliber handgun found inside the Chevron market. (TRP 859, 861, 863, 868-69) The .40 caliber shell casings found at Cedar Street were fired from the .40 caliber handgun found in Combs' Cutlass. (TRP 865, 870)

The State theorized that Hudson or Ragland called Kennedy at the Friendly Duck specifically to tell him that Morris was at the 54th Street Bar & Grill, and that Kennedy, Evans, Franklin and Johnson came to the 54th Street bar prepared to retaliate against Morris for taking Kennedy's chain. (TRP 931, 939, 967, 1129, 1154, 1157, 1447, 1450, 1451, 1802-04, 1850)

To support this theory, the State presented testimony that all of the men involved, on both sides of the incident, were members or associates of various Crip gang sects, who settle their differences with violence. (TRP 1435-36, 1440, 1487, 1495, 1499) However, the State's gang expert, Detective John Ringer, stated that he would "hesitate to classify" Johnson as a gang member. (RP 1495)

In addition, the State pointed to a text message that Franklin sent to his girlfriend shortly before the shooting, where he stated that he "jus got jacc't and now it's time to give some1 the blues." (TRP 1318, 1320-21, 1850)

To show consciousness of guilt, the State pointed to calls made to Madre Combs just after the shooting as evidence that Combs was supposed to act as a getaway driver for the four men in the Explorer. (TRP 1063-64, 1123, 1227, 1228, 1806, 1807-08) The State also presented testimony that Evans had instructed his girlfriend to report that the Explorer had been stolen in order to deflect blame for the shooting. (TRP 1102, 1107-08, 1237, 1807)

But according to Kennedy, Ragland did not call him at the Friendly Duck to notify him of Morris' presence; rather Ragland called because he felt his car had been purposefully boxed in by several other cars, and that Morris, an occupant of one of the other cars, was armed. (TRP 1155, 1158) Kennedy went to the 54th Street bar simply to assist Ragland (TRP 1155, 1158)

Kennedy testified he was prepared to have a fistfight with Morris, but when he heard that Morris might be armed he felt their conflict might escalate. (TRP 1141, 1158) Although the other men in the Explorer knew Kennedy wanted to fight Morris, they did not know that Kennedy had armed himself and was ready to shoot if necessary. (TRP 1133, 1141, 1148) Kennedy testified that he was the only shooter that night, and that he used both guns to fire at Morris' car. (TRP 1141, 1167, 1172)

Franklin and his girlfriend testified that their texts about being “jacc’t” had to do with the fact that Franklin’s car was broken into and vandalized the night before, and had nothing to do with the dispute between Kennedy and Morris over the gold chain. (TRP 1601, 1602, 1603, 1631-32, 1640-42) Franklin was upset about his car, but he believed the vandalism was directed at his girlfriend and had nothing to do with Kennedy’s dispute with Morris. (TRP 1641-42)

Evans testified that he went to the 54th Street bar simply to see who was there, and that he and his friends never discussed or planned to commit a drive-by shooting. (TRP 1240, 1248) He testified that he was not purposefully following Morris, and that shots were actually fired at his Explorer and the back tire was hit. (TRP 1222, 1230, 1241) Because the Explorer was then no longer drivable, he called Combs so that they could get a ride home. (TRP 1227-28) Evans also testified that only the front passenger, Kennedy, fired a gun from the Explorer. (TRP 1232-33)

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#### IV. ARGUMENT & AUTHORITIES

- A. DETECTIVE RINGER'S TESTIMONY THAT GANG MEMBERS ARE DISHONEST WITH LAW ENFORCEMENT "ALMOST 100 PERCENT OF THE TIME," WAS IMPROPER OPINION EVIDENCE, WHICH INVADED THE PROVINCE OF THE JURY TO DETERMINE MATTERS OF WITNESS CREDIBILITY AND GUILT.

During the trial, the State elicited the following opinion testimony from its "gang expert," Detective John Ringer:

Almost 100 percent of the time, a gang individual, gang member, is not going to be totally honest with law enforcement in an interview. . . . The whole culture of gangs says you don't cooperate with police. You certainly don't talk honestly with the police. . . the gang culture says you don't talk with police, you don't cooperate.

(TRP 1406-07)

Opinion testimony is generally admissible even if it "embraces an ultimate issue to be decided by the trier of fact." ER 704. However, "[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). "An opinion by either an expert or a lay witness on the ultimate question of a defendant's guilt violates his constitutional right to an impartial trial, including the independent determination of the facts by a judge or jury." State v. Read, 100 Wn. App. 776, 781, 998 P.2d 897 (2000) (citing State v. Carlin, 40 Wn. App. 698,

defendant was convicted and the appellate court reversed, stating credibility was a crucial issue on which the victim's and the defendant's testimony conflicted. 64 Wn. App. at 154. The court held: "By stating that he believed [the victim] was not lying, Bennett effectively testified that Alexander was guilty as charged. An expert's opinion as to the defendant's guilt invades the jury's exclusive function to weigh the evidence and determine credibility." 64 Wn. App. at 154.

Similarly here, Detective Ringer testified that gang members lie to law enforcement "[a]lmost 100 percent of the time." (TRP 1406) Detective Ringer thereby told the jury that it cannot and should not believe Johnson's and the other participants' version of events because they are not honest and therefore not credible. Detective Ringer's testimony was a direct opinion on other witnesses' truthfulness, and invaded the fact finding function of the jury. Fitzgerald, 39 Wn. App. at 657; Alexander, 64 Wn. App. at 154.

"Permitting a witness to testify as to the defendant's guilt raises a constitutional issue because it invades the province of the jury and the defendant's constitutional right to a trial by jury. An error of constitutional magnitude is presumed prejudicial[.]" State v.

Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002) (internal citations omitted); State v. Lewellyn, 78 Wn. App. 788, 793-94, 895 P.2d 418 (1995).

Furthermore, an opinion as to the defendant's guilt is particularly prejudicial when a government official, such as a police officer expresses it. Lewellyn, 78 Wn. App. at 794; Black, 109 Wn.2d at 348. This is because the jury is especially likely to be influenced by such authoritative testimony. Carlin, 40 Wn. App. at 703.

Moreover, the prejudice in this case was compounded when, during closing arguments, the prosecutor made statements such as:

[Y]ou've heard so much about gangs and shootings and violence and retribution, those kinds of things. And I believe as a society, to an extent, people become numb to it. Then you're analyzing situations with an understanding that it's acceptable for people not to talk to police, or to lie to police, or to get on the stand and basically commit perjury.

(TRP 1785)

Who told the truth on the stand[?] I mean, that's going to be a tough one for you. Who was telling the truth out there when they were talking to law enforcement, and what parts of what they were saying were true?

(TRP 1796)

Then every single one of these guys did not tell the truth to law enforcement in some respect or another.

(TRP 1807)

The jury in this case had to determine whether or not Johnson, Franklin, Kennedy, Evans and the rest of the men involved were credible and truthful when they either testified or told investigators that there was no prearranged plan to shoot at Morris, and when they testified or told investigators that Johnson was not one of the shooters. But they were told over and over by Detective Ringer and the prosecutor that Johnson, Franklin, Kennedy and Evans are liars.

This testimony was clearly improper and prejudicial to Johnson's right to a determination of guilt by an impartial jury. And the error was compounded by the prosecutor's reference to it during closing arguments. As a result, Johnson was denied his right to a determination of credibility and guilt by the jury alone. Johnson's convictions must therefore be reversed.

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B. JOHNSON'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 CRIME AND JOHNSON'S INTENT.

Pursuant to RAP 10.1(g)(2)<sup>2</sup>, Johnson hereby incorporates by reference the Assignment of Error 3 and Issue 5, and its corresponding arguments and authorities set forth in Section IV.1 of co-appellant Franklin's opening brief. The claimed error and prejudice discussed in co-appellant Franklin's brief applies equally to Johnson in his case, as the same gang and ER 404(b) evidence was admitted against Johnson at trial.

#### V. CONCLUSION

Detective Ringer's testimony that gang members consistently lie to law enforcement was a direct comment on the credibility of Johnson and the other "gang member" witnesses. The testimony directly implied that their version of events was false, and that Johnson was guilty. This testimony was highly prejudicial, invaded the province of the jury, and denied Johnson his right to a fair trial. Furthermore, the trial court erred when it admitted the gang-related evidence to show res gestae of the crimes and

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

Johnson's motive or intent. Therefore, Johnson's convictions should be reversed.

DATED: December 12, 2011

*Stephanie Cunningham*

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WSB #26436

Attorney for Desmond R. Johnson

**CERTIFICATE OF MAILING**

I certify that on 12/12/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Desmond R. Johnson, DOC# 810057, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**December 13, 2011 - 10:36 AM**

## Transmittal Letter

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