90154-6

Court of Appeals No. 42603-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

MARSELE KENITH HENDERSON,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 08-1-05882-6
The Honorable John A. McCarthy, Presiding Judge

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I. ASSIGNMENTS OF ERROR

1. Mr. Henderson's right to a fair trial was violated by the erroneous admission of gang-related evidence.

2. The trial court erred in allowing gang evidence to be introduced.

3. The trial court erred in admitting the gang evidence without conducting the requisite on-the-record 404(b) analysis.

4. The trial court erred in overruling Mr. Henderson's objection to the State cross-examining Mr. Henderson about gang evidence where gang evidence was not discussed during direct examination.

II. ISSUES PRESENTED

1. Did the trial court err in permitting the introduction of gang-related evidence where such evidence was irrelevant yet highly prejudicial? (Assignments of Error Nos. 1, 2, and 3)

2. Did the trial court err in failing to conduct the requisite 404(b) analysis on the record prior to admitting the gang-related evidence for purposes of establishing Mr. Henderson's motive? (Assignments of Error Nos. 1, 2, and 3)

3. Did the trial court err in permitting the State to cross-examine Mr. Henderson about gang-related issues where gang-related issues were not the subject of the direct examination of Mr. Henderson? (Assignments of Error Nos. 1 and 4)

4. Did the admission of the gang-related evidence violate Mr. Henderson's right to a fair trial? (Assignments of Error Nos. 1, 2, 3, and 4)

III. STATEMENT OF THE CASE

Factual and Procedural background.

On November 16, 2008, Mr. Philip Johnson was shot at a party at a Boys' and Girls' Club and died of his wounds that night. RP 1148, 1157. Mr. Johnson was a close friend of Mr. Marsele Henderson. RP 1146. Upon learning that Mr. Johnson had been shot, Mr. Henderson and several other individuals, including Mr. D'Orman McClarron, went to the Boys' and Girls' Club where Mr. Johnson had been shot and then to the hospital where Mr. Johnson had been taken. RP 1148-1149, 1151,1152. When Mr. Henderson left his house, he was carrying a .45 caliber pistol that belonged to Mr. Johnson. RP 1151. At the hospital, Mr. Henderson's understanding was that Mr. Johnson was going to recover. RP 1153. From the hospital, Mr. Henderson and Mr. McClarron went to a party at 5620 South Yakima. RP 1154.

Later that same evening, Victor Schwenke was shot and killed while working as a security guard at the party Mr. Henderson and Mr. McClarron went to after leaving the hospital. RP 123-124, 133, 181-185, 544. When police arrived at the scene, witnesses told police that the person who had shot Mr. Schwenke had left the scene in a vehicle. RP 136. Police recovered 18 shell casings from the scene of the shooting at the Yakima address, but all the shell casings were 9mm, a caliber of bullet

that cannot be fired from a .45 caliber gun. RP 139, 406-408, 514, 613-627, 686, 689-690. The casings had been fired from two different guns. RP 686.

Police also saw damage from bullets to the exterior of the home located at 5620 South Yakima as well as bullet holes in several vehicles parked in the street. RP 272, 283, 290.

Police ultimately arrested Mr. Marsele Henderson for shooting Mr. Schwenke. RP 534-536.

On December 12, 2008, the State charged Mr. Henderson with committing two crimes: (1) murder in the first degree under circumstances manifesting an extreme indifference to human life while Mr. Henderson or an accomplice was armed with a firearm and with the aggravating factory that the murder was committed to obtain, maintain, or advance his position in a gang; and (2) unlawful possession of a firearm. CP 1-2.

On June 20, 2011, Mr. Henderson moved to exclude any evidence that Mr. Henderson is or was a member of a gang without the State first making an offer of proof and the court ruling on the admissibility of such evidence. CP 31-32. Mr. Henderson also moved to exclude evidence as to any prior crimes, wrongs, or acts of Mr. Henderson pursuant to ER 404(b) unless there was a prior hearing and court order admitting such evidence. CP 31-32. Also on June 20, 2011, Mr. Henderson waived his

right to a jury trial on the unlawful possession of a firearm count. CP 33-34.

On June 20, 2011, a hearing was held to address the motions in limine filed by the parties. RP 11-42. The State objected to Mr. Henderson's motions regarding 404(b) evidence and gang evidence. RP 22. The State argued that gang related evidence was required in this case because the State's theory was that the shooting of Mr. Schwenke was done in retaliation for the shooting of Mr. Johnson. RP 22. The State's theory was that Mr. Johnson was a Hilltop Crip, that Mr. Henderson was a Hilltop Crip, and that the defendant and other Hilltop Crips went out looking for members of the 96th Street Murderville Folk gang members and that members of the 96th Street Murderville Folks gang had been at the party on Yakima prior to Mr. Henderson's arrival there. RP 22-23. The State argued that gang evidence was required because the State intended to introduce evidence of a third shooting which occurred after the shooting of Mr. Schwenke, evidence that the same gun was used in the third shooting and the shooting of Mr. Schwenke, and evidence that Mr. Hendrson's cell phone was in the area of the third shooting and Mr. Schwenke's shooting. RP 23-24. The State argued that gang evidence was admissible as evidence of motive since the State intended to introduce

evidence that immediately prior to the shooting somebody made a statement to the effect of, "This is Crip" or "What's up, cuz?" RP 24-25.

Mr. Henderson objected to the admission of evidence of the third shooting on the grounds that it was not relevant to any issue before the jury, more prejudicial than probative, and did not meet any of the ER 404(b) exception to admissibility of other prior bad acts. RP 25-26. Mr. Henderson also requested that the State make an offer of proof as to what gang evidence it would seek to introduce at trial and how it intended to offer such evidence. RP 26.

The trial court ruled that evidence regarding the third shooting would not be admissible until the State provided the court more information about the shooting. RP 26. With regard to the gang evidence in general, the trial court indicated that it wished to review recent appellate decisions about the admissibility of gang evidence before making a ruling, but that it intended to inform the jury that one of the charges had a gang aggravator. RP 27-28. In response, the State indicated that it did not intend on calling a gang expert and moved to dismiss the gang aggravator from the murder charge. RP 28-29.

On June 20, 2011, a 3.5 hearing was held to determine the admissibility of Mr. Henderson's statements to police on December 11,

2008. RP 42-62. The trial court held that the statements were admissible. RP 62.

On June 21, 2011, the State argued to the court that evidence of the third shooting was admissible to prove the identity of the person who killed Mr. Schwenke. RP 67. Mr. Henderson objected to the evidence on grounds that the State could not meet its burden under ER 404(b) of establishing that Mr. Henderson was the person who did the shooting at the third shooting. RP 70. Mr. Henderson argued that the State was attempting to use the third shooting as propensity evidence that Mr. Henderson had shot Mr. Schwenke. RP 71-72. Mr. Henderson also objected to the evidence of the third shooting on the basis that it was more prejudicial to Mr. Henderson than it was probative of any issue before the jury. RP 72. The trial court agreed with Mr. Henderson and excluded evidence of the third shooting. RP 76.

Mr. Henderson's trial began on June 21, 2011. RP 87.

At trial, witnesses gave varying descriptions and identifications of the person who shot Mr. Schwenke. Joshua Adams was a resident of 5620 South Yakima and one of the individuals who organized the party there on November 16, 2008. RP 181-185. Mr. Adams testified that Mr. Henderson and another man had tried to gain entry to the party but had been denied entry because of what they were wearing. RP 221-222. Mr.

Adams described the man who was with Mr. Henderson as a tall, skinny, light-skinned male. RP 222. Mr. Adams said the light-skinned male was wearing a white beanie and a white hoodie. RP 229. Mr. Adams said Mr. Henderson was shorter, darker, chubbier, and wearing a blue shirt. RP 301-302, 305-307. Mr. Adams identified the tall light-skinned male as the one who shot Mr. Schwenke. RP 306, 312.

Jose Martinez also lived at 5620 South Yakima and saw Mr. Henderson and the tall light-skinned male outside the party. RP 322-324, 329-330. Mr. Martinez also described Mr. Henderson as having been wearing a blue shirt on the night of the shooting. RP 333-334. Mr. Martinez testified that he told Mr. Henderson that Mr. Henderson could not enter the party without paying the entry fee and Mr. Henderson responded by pulling a gun from his waist and saying, "I have my entry fee." RP 333. After the shooting, Mr. Martinez told the police that the gun he saw in Mr. Henderson's possession appeared to be a .45. RP 382-383, 392-393.

Mr. Martinez saw the last two shots that were fired and identified the shooter as the tall light-skinned man who was with Mr. Henderson, not Mr. Henderson. RP 351-352. In fact, Mr. Martinez identified the light skinned man as an individual who was sitting in the back of the courtroom on the day of trial, and was explicit that Mr. Henderson was not the light-

skinned person he had seen shooting. RP 330-332, 351-352. However, upon redirect examination, Mr. Martinez recanted his trial testimony and agreed with the State that he had told police that the shooter was the shorter dark-skinned man and that what he had told police was correct. RP 390-391.

Cassandra Modeste was at the party when the shooting occurred. RP 426-427. Ms. Modeste testified that immediately after the shooting a tall light-skinned man she had gone to high school with ran past her and jumped over a fence. RP 437-438. Ms. Modeste identified the light-skinned man as Mr. D'Orman McClarron and testified that Mr. McClarron was with a shorter dark-skinned man. RP 445-446. Ms. Modeste testified that she didn't see a gun in Mr. McClarron's hands, but she also testified that she didn't see the shooting and didn't see the shorter dark-skinned man who had been with Mr. McClarron in the courtroom. RP 458, 466-467.

Reynold Taii was working security at the party at the Yakima house. RP 730. Mr. Taii saw the two men who were involved in the shooting of Mr. Schwenke. RP 749-750. Mr. Taii described one of the men involved as a tall light-skinned man who he recognized as Mr. McClarron. RP 749-750. Mr. Taii described the other man he saw as a dark-skinned skinny fellow who matched the description of Mr.

Henderson but who Mr. Taii could not positively identify as Mr. Henderson. RP 751-752. Mr. Taii testified that he saw a "dark body" but that he did not see Mr. Henderson. RP 752.

Jamilah Adjepong was also present at the party at the time Mr. Schwenke was shot. RP 846. Ms. Adjepong testified that she saw Mr. McClarron with Mr. Henderson and saw Mr. Henderson shooting at the house, but she also testified that she had been drinking and taking drugs that night and really didn't remember what the shooter looked like. RP 855-857, 872, 875-876.

Mr. McClarron testified that he was present with Mr. Henderson at the party, but that Mr. Henderson was the one who shot Mr. Schwenke. RP 928-938. Mr. McClarron testified that he was testifying pursuant to an agreement with the State and that if he didn't testify at Mr. Henderson's trial then the State would charge him with first-degree murder. RP 954.

Nakeshia Brooks was at the party, saw Mr. Henderson at the party, and saw a person in the street shooting, but could only describe the shooter as a "black African-American." RP 101-1011, 1013-1014, 1019.

During the testimony of Mr. McClarron, Mr. Henderson objected to the State asking Mr. McClarron whether or not his agreement with the State was an agreement that he would testify truthfully or be charged with

the murder of Mr. Schwenke. RP 927. An off-the-record sidebar was held and the trial court ultimately overruled the objection. RP 927-928.

Kerry Edwards testified that he was at the party at the house on Yakima when he received a phone call informing him that Mr. Johnson had been shot. RP 549. Mr. Edwards testified that he drove to the Boys' and Girls' Club where Mr. Johnson was shot and then drove to the hospital where Mr. Johnson had been taken. RP 549. Mr. Edwards testified that he saw Mr. Henderson and Mr. McClarron at the hospital. RP 550-553. Mr. Edwards testified that he and Mr. Henderson learned Mr. Johnson had died while they in the hospital waiting room and that Mr. Henderson was shocked, upset, and appeared mad. RP 556. Mr. Edwards testified that Mr. Henderson said, "You guys are just going to sit here and do nothing" and then left with Mr. McClarron and Mr. Lewis Davis in a maroon Toyota Camry. RP 557-558.

Mr. Edwards testified that he left the hospital and drove around while talking on the phone with Mr. Henderson. RP 563. Mr. Edwards testified that Mr. Henderson told him that he had shot into a crowd and somebody's body dropped and then told Mr. Edwards to go to William Terry's house. RP 561, 564-565. Mr. Edwards testified that when Mr. Henderson arrived at Mr. Terry's house, Mr. Henderson was hyper and telling people he "laid him down" meaning he made someone die. RP

566-568. Mr. Edwards testified that Mr. Andre Parker was present at Mr. Terry's house and that Mr. Parker told Mr. Henderson to calm down and stop telling people his business because that is how people go to jail. RP 566-570.

The State later stipulated that Mr. Parker had been in jail on the date Mr. Edwards testified Mr. Parker had been at Mr. Terry's house. RP 1136. The State also stipulated that the maroon Toyota Camry that was owned by Mr. Henderson's mother had been destroyed prior to the date Mr. Edwards testified he saw Mr. Henderson leave the hospital in a maroon Toyota Camry. RP 1136.

Mr. Edwards testified pursuant to an agreement with the State. RP 574. Mr. Edwards had been charged with 28 felonies, but pursuant to his plea deal with the State, Mr. Edwards pled guilty to 14 felonies and 14 conspiracies in the summer of 2010 and was released from custody on May 14, 2011. RP 577-586. On cross-examination, it was revealed that Mr. Edwards had written a letter to an individual telling the individual that if the individual did not pay Mr. Edwards money then Mr. Edwards would testify against him. RP 586-588.

At the close of the State's case, Mr. Henderson renewed and "elaborated" on the objection he had made to the State questioning Mr. McClarron about the agreement that he testify truthfully. RP 1039-1040.

Mr. Henderson argued that his objection was that the prosecutor's question to Mr. McClarron constituted improper vouching for Mr. McClarron's credibility and moved for a mistrial. RP 1039-1040. The trial court preliminarily denied the motion for mistrial, but gave Mr. Henderson the opportunity to submit briefing in support of his motion. RP 1048.

Mr. Henderson testified on his own behalf and denied telling Mr. Edwards he had shot someone, denied going to Mr. Terry's house, and testified that it was Mr. McClarron who had shot Mr. Schwenke. RP 1158-1159, 1161-1162.

During cross-examination of Mr. Henderson, counsel for Mr. Henderson objected to the State cross-examining Mr. Henderson about gang-related issues when Mr. Henderson had not been examined regarding gang-related issues on direct examination. RP 1166. The trial court overruled the objection because it was cross-examination. RP 1166.

Mr. Henderson objected to the State's proposed jury instruction on accomplice liability, arguing that it is legally impossible for someone to be an accomplice to a murder committed by extreme indifference to human life. RP 1049-1051. The trial court initially reserved ruling on the objection (RP 1061-1062), but the State ultimately withdrew the proposed accomplice liability instructions. RP 1189-1190.

Mr. Henderson also objected to the trial court not giving Mr. Henderson's proposed instructions on the lesser included offenses of first and second degree manslaughter. RP 1191. The trial court held that the lesser included instructions were not appropriate in this case because they failed the *Workman* test. RP 1191.

On July 8, 2011, the jury found Mr. Henderson guilty of first-degree murder. CP 135. The jury also found that Mr. Henderson was armed with a firearm at the time of the murder. CP 136.

On July 12, 2011, the trial court found Mr. Henderson guilty of unlawful possession of a firearm. RP 1291. On August 19, 2011, the trial court entered an order finding Mr. Henderson guilty of unlawful possession of a firearm. CP 142-146.

Mr. Henderson received a sentence of 608 months confinement. CP 147-159.

Notice of appeal was filed on September 16, 2011. CP 163-175.

IV. ARGUMENT

Mr. Henderson's right to a fair trial was violated by the erroneous introduction of irrelevant yet highly prejudicial gang related evidence.

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).

Pretrial, counsel for Mr. Henderson moved to exclude gang evidence and indicated that he would make more specific objections to the evidence once the State had made an offer of proof. CP 31-32; RP 22-26. The State responded by indicating that it was not going to call a gang expert, dropping the gang motivation aggravating factor, and indicating that the gang evidence would be introduced by lay witnesses and would be introduced to establish Mr. Henderson's motive. RP 28-30. The court granted the State's motion to dismiss the aggravating factor and counsel for Mr. Henderson reminded the court that the issue of gang evidence in general had not been fully dealt with. RP 29-30. The following day, after extensive argument on the admissibility of the third shooting and the court ruling that evidence of the third shooting was inadmissible, the State

reminded the court that it had not fully addressed the admissibility of the general gang evidence. RP 77. The State told the court that it assumed that "the stuff that I have offered...is in?" and the court responded, "Right." RP 77.

A. The trial court erred in admitting gang evidence without first conducting the requisite on-the-record analysis under ER 404(b) or requiring the State to make an offer of proof.

> Before admitting ER 404(b) evidence, a trial court "must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

A trial court is not required to hold an evidentiary hearing and make a formal finding that the State has established that the misconduct has occurred by a preponderance of the evidence where the State makes an offer of proof sufficient to allow the trial court to make such a finding. *State v. Mee*, ---Wn.App.---, --- P.3d ----, WL 1604808, *5 (2012), *citing State v. Kilgore*, 147 Wn.2d 288, 294-295, 53 P.3d 974 (2002).

Here, the State never made an offer of proof regarding the general gang evidence it sought to introduce in this case. The trial court never made a finding that the State had established the existence of any generalized gang evidence by a preponderance. The State did imply that it

sought to introduce the generalized gang evidence as evidence of motive (RP 22-25), but the trial court never weighed the probative value of this unspecified generalized gang evidence against the prejudicial effect such evidence might have.

Even under the relaxed requirements of *Mee* and *Kilgore*, the State did not present the court with sufficient evidence to support the trial court's apparent ruling that "the stuff" the State had had offered was "in." The trial court erred in failing to perform even a rudimentary version of the protocol for admitting evidence under ER 404(b) as evidence of motive.

B. The trial court erred in overruling Mr. Henderson's objection to the State cross-examining Mr. Henderson about gang-related issues where such issues had not been the subject of the direct examination of Mr. Henderson.

Under ER 611(b), "Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Our Supreme Court has recognized that the cross-examination of a witness is generally limited to the scope of the direct examination. *State v. Robideau*, 70 Wn.2d 994, 425 P.2d 880 (1967); *State v. Jeane*, 35 Wn.2d 423, 431, 213 P.2d 633 (1950). Nevertheless, "when, in the direct examination, 'a general subject is unfolded, the cross-examination may develop and explore the various

phases of that subject.'" *Wilson v. Miller Flour Mills*, 144 Wn. 60, 66, 256 P. 777 (1927) (*quoting Bishop v. Averill*, 17 Wn. 209, 217, 49 P. 237 (1897)). The scope of cross-examination lies within the discretion of the trial court. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985). And under ER 611(b), the trial court can grant considerable latitude in cross-examination. *See State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983); *State v. McDaniel*, 83 Wn.App. 179, 184, 920 P.2d 1218 (1996), *review denied*, 131 Wn.2d 1011 (1997).

Based on this theory of cross-examination, our Supreme Court concluded, "[A] defendant may be cross-examined in the same manner as any other witness if he voluntarily asserts his right to testify. Any fact which diminishes the personal trustworthiness of the witness may be elicited if it is material and germane to the issue." *Robideau*, 70 Wn.2d at 998. The United States Supreme Court also held that "a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination." *McGautha v. California*, 402 U.S. 183, 215, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). And "RCW 10.52.040 provides that if the defendant takes the witness stand in his own behalf he shall be subject to all the rules of law relating to cross-examination of other witnesses." *Robideau*, 70 Wn.2d at 997.

During the direct examination of Mr. Henderson, no mention was made of anything to do with gangs. RP 1143-1162. Despite this, counsel for the State immediately began questioning Mr. Henderson about gang-related issues. RP 1162-1166. Counsel for Mr. Henderson objected to the questioning about gangs as being beyond the scope of direct examination, but the trial court overruled the objection stating, "This is cross-examination. Overruled." RP 1166. The State continued cross-examining Mr. Henderson about gang-related issues (RP 1166-1170) and counsel for Mr. Henderson again objected, only to be overruled a second time by the trial court. RP 1170.

The direct examination of Mr. Henderson did not even obliquely reference anything to do with gangs. Despite this, the trial court permitted the State to engage in in-depth cross-examination regarding the purported gang affiliation of Mr. Henderson, the purported gang affiliation of many of the witnesses and other individuals who were related to the shooting of Mr. Schwenke, Mr. Henderson's alleged gang-relationship to Mr. Johnson, and whether or not Mr. Henderson and other purported members of the Hiltop Crips were motivated to shoot at Mr. Schwenke in retaliation for the murder of Mr. Johnson. RP 1162-1170.

That the State was conducting cross-examination does not change the fact that Mr. Henderson was not questioned about anything to do with

gangs on direct examination. Questions regarding anything to do with gangs were not even reasonably related to any topic discussed on direct examination and questions about gang issues were not relevant to Mr. Henderson's veracity. The trial court erred in permitting the State to cross-examine Mr. Henderson about gang-related matters.

C. Mr. Henderson was prejudiced by the introduction of generalized gang related evidence.

It was undisputed at trial that Mr. Henderson was present at the scene when Mr. Schwenke was shot. The central issue in Mr. Henderson's trial was the identity of the shooter. As detailed above, the State's witnesses gave varying descriptions and identifications of the shooter. Many of the State's witnesses had serious credibility issues, such as Ms. Adjepong who admitted she was drunk and couldn't remember what the shooter looked like, and Mr. Edwards who the State stipulated gave testimony contrary to established facts and who attempted to blackmail individuals by threatening to testify against them. Several of the State's witnesses positively identified someone other than Mr. Henderson as the shooter or testified that the person they saw shooting was not Mr. Henderson. Mr. Henderson testified that Mr. McClarron was the shooter.

The jury had the duty to consider all of the evidence at trial and

determine which testimony was credible and what facts were established by the State's evidence. *State v. Walton*, 64 Wn.App. 410, 415–16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992) ("It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence.") The central issue in this case was credibility. The only question before the jury was whether or not the State had proved beyond a reasonable doubt that Mr. Henderson was the person who shot Mr. Schwenke. Thus, under the facts of this case, any evidence which would bias the jury against Mr. Henderson was more prejudicial than usual.

The state argued pretrial that the gang-related evidence it sought to introduce would establish that Mr. Henderson was motivated to shoot at Mr. Schwenke because Mr. Henderson was angered by the death of his fellow gang-member, Mr. Johnson, and believed that members of a rival gang were present at the party on Yakima. RP 22-25. However, the gang evidence introduced at trial fell short of establishing what the State claimed it would establish.

The only witness whose testimony could potentially be interpreted as establishing that Mr. Henderson was motivated to shoot someone at the Yakima Street party in retaliation for the shooting of Mr. Johnson by a rival gang was Mr. Edwards. Mr. Edwards testified that he, Mr.

Henderson, and Mr. McClarron were all members of the Hilltop Crips street gang. RP 547-548, 554-555. Mr. Edwards testified that he, Mr. Henderson, and Mr. McClarron were at the hospital and after they learned of Mr. Johnson's death, Mr. Henderson appeared mad and upset, stated, "You guys are just going to sit here and not do anything," and then left with Mr. McClarren and Lewis Davis. RP 556-557. However, Mr. Edwards lacked any credibility since, as detailed above, Mr. Edwards was testifying pursuant to a plea agreement and the State stipulated that important aspects of Mr. Edwards' testimony were not true. RP 1136.

Mr. Tulifua testified that members of the 96th Street Murderville Folk had stopped by the party 20 to 30 minutes prior to the shooting, but that Mr. Taii spoke with the Folk and asked them to leave and that the Folk came and left calmly and quietly with no hostility. RP 715-717, 726. Mr. Taii stated that the group of Folk were actually friends of his who he let into the party an who decided to leave because it wasn't their kind of party. RP 737. Mr. Taii testified that the Folk left 30 minutes to an hour before Mr. Schwenke was shot. RP 737-738.

Contrary to Mr. Taii's and Mr. Tulifua's testimony, Ms. Adjepong testified that the 96th Street Folk showed up, almost got into a fight, and that the security at the party had to break it up. RP 858-859. However, Ms. Adjepong also testified that the Folk left about an hour before Mr.

Schwenke was shot. RP 859.

Mr. McClarron testified that he never heard Mr. Henderson complain that nobody was going to do anything at the hospital. RP 928. Mr. McClarron testified that when he and Mr. Henderson left the hospital Mr. Henderson was calm and "just chillin'." RP 928. Mr. McCLarron testified that he and Mr. Henderson went to the party on Yakima "just to chill" and that everyone was "cool and chill" in the car on the way to the party. RP 929. Mr. McClarron testified that he didn't see any Murderville Folks at the party. RP 935. Thus, the gang evidence introduced at trial did not support the theory under which the State sought to introduce it-that Mr. Henderson was motivated by his gang membership to shoot someone at the Yakima party. In fact, the testimony of Mr. McClarron, the State's own witness, was contrary to the State's theory of the case.

Ultimately, the jury was left with a miasma of gang related evidence that had been introduced but the relevance of which had not been established and that had not been tied to any specific issue. The jury was aware that gang members were loosely involved with the shooting death of Mr. Schwenke and perhaps Mr. Johnson, but the State failed to provide any testimony, expert or otherwise, clarifying the relevance and purpose of the gang evidence.

In *State v. Mee*, ---Wn.App.---, --- P.3d ----, WL 1604808, *5

(2012), this court recognized that gang-related evidence is inherently prejudicial and gives rise to prejudicial propensity inferences by jurors. *Mee*, ---Wn.App. ---, ---P.3d ----, WL 1604808 *8.

> Simply put, generalized evidence regarding the behavior of gangs and gang members, absent (1) evidence showing adherence by the defendant or the defendant's alleged gang to those behaviors, and (2) that the evidence relating to gangs is relevant to prove the elements of the charged crime, serves no purpose but to allow the State to "suggest[ ] that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged."

Mee, ---Wn.App. ---, ---P.3d ----, WL 1604808 *8, *citing State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

In this case, the jury was asked to make credibility determinations of the witnesses, including Mr. Henderson, to determine whether or not the State had proven that Mr. Henderson was the shooter. The introduction of the gang evidence without any clarification from a lay or expert witness as to the relevance of the gang evidence naturally biased the jury against Mr. Henderson and impacted their determination of his credibility.

Indeed, the State's closing and rebuttal arguments emphasized that this was "a gang case," that Mr. Henderson and Mr. Johnson were both Crips, that many of the people tangentially related to the case were Crips, and that the jury could infer that Mr. Henderson was the shooter form the

fact that he was a Crip. RP 1198-1203, 1259. The State explicitly argued that no member of Mr. Henderson's gang, such as Mr. McClarren, would testify that Mr. Henderson had committed the shooting unless the State had some kind of leverage over the person, like they did with Mr. McClarron. RP 1260. Thus, the State's closing argument specifically tied the credibility of the witnesses to the witnesses' gang membership.

Given the nebulous and nonspecific nature of the gang evidence combined with the State's argument that the jury should base its credibility determinations of the witnesses on their gang affiliation, the erroneous introduction of gang evidence in Mr. Henderson's trial prejudiced Mr. Henderson by biasing the jury against him and preventing the jury from conducting a neutral analysis of the facts. The introduction of this irrelevant gang evidence deprived Mr. Henderson of a fair trial by prejudicing the jury against Mr. Henderson.

VI. CONCLUSION

For the reasons stated above, this court should vacate Mr. Henderson's conviction of first degree murder and remand for a new trial and new evidentiary hearing to determine the admissibility of the gang related evidence.

DATED this 23rd day of May, 2012.

Respectfully submitted,

/s/

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Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on May 23, 2012, she delivered by e-mail to the Pierce County Prosecutor's Office, pcpatcecf@co.pierce.wa.us Tacoma, Washington 98402, and by United States Mail to appellant, Marsele K. Henderson, DOC # 351811, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washington 99362 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 May 23, 2012.

/s/

Norma Kinter

ARNOLD LAW OFFICE

May 22, 2012 - 10:05 PM

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