IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL ANTHONY MEE, Appellant.	No. 40344-7-II PART PUBLISHED OPINION

Van Deren, J. — Michael Anthony Mee appeals his convictions for first degree murder by extreme indifference[1] and unlawful possession of a firearm. In the published portion of this opinion we discuss Mee's argument that the trial court abused its discretion by denying his motion to exclude evidence of his gang affiliation. In the unpublished portion, we address Mee's argument that the trial court abused its discretion by (1) instructing the jury that it had to be unanimous in order to answer "no" to the question on the firearm enhancement special verdict form, (2) denying defense counsel's request to question the jury about alleged juror misconduct, and (3) denying his motion for a mistrial based on the alleged juror misconduct. We hold that the trial court abused its discretion in finding the gang-related evidence more probative than

[1] RCW 9A.32.030(1)(b) provides, "A person is guilty of murder in the first degree when . . . [u]nder circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person."

prejudicial under ER 403 and in admitting it as evidence of motive but, because the error was harmless in the context of overwhelming untainted evidence that Mee fired toward Crystal Roberts' home when he knew that people were present both inside and outside the house at a birthday party, and that a bullet struck Tracy Steele, killing him, we affirm Mee's convictions.

BACKGROUND

On May 9, 2008, Tracy Steele celebrated his 32nd birthday with his fiancée, at his fiancée's home in Tacoma, Washington. Steele left his fiancée's home that evening with his fiancée's aunt, Crystal Roberts, to attend another party at Roberts' home in Tacoma. Roberts invited only family members to her party. D'Andre Sullivan, father of Roberts' children, also lived in the home. Roberts described the party's atmosphere as normal with "[m]usic, food, [and] everybody . . . just having a good time." Report of Proceedings (RP) at 506. The atmosphere changed, however, when uninvited guests Charles Pitts and Jason Greer arrived.[2] Pitts and Sullivan had known each other since they performed music together when they were younger. According to Roberts, Pitts was a "troublemaker" and a member of the Lakewood Hustler Crips gang. RP at 507.

Roberts believed that Greer left the party after a couple of minutes but that Pitts stayed.[3] Pitts' behavior toward the party guests was disrespectful, calling Roberts' sister a "tall A-S-A-B-I-T-C-H," and telling Roberts that one of her children did not look like the father. RP at 509. Roberts told Pitts to leave, and Pitts asked Sullivan if he could use Sullivan's telephone to call for

[2] Pitts' nicknames were "Shotty" and "Big Shotty." RP at 297. Greer's nicknames were "Scram" and "Gutter." RP at 506, 874.

[3] Greer testified that he did not leave the party until later that evening.

a ride.

Mee, who referred to himself as "Little Shotty," showed up at Roberts' house driving Tanya Satack's car. A teenage male who went by the name "Little Shotty Deuce" and three females, including Satack, were in the car with Mee. Mee stopped the car in a manner that caused Sullivan to confront Mee and tell him not to disrespect the neighborhood. Mee responded that he "wasn't scared of anyone," and he uttered the terms "'cuz'" and "'loc.'"[4] RP at 517.

About 15 minutes after Mee appeared at Roberts' house, four women in a second vehicle drove up. The women in the second car asked Mee why he was there with those "white bitches." RP at 879-80. Mee argued with the women in the second car and told them to leave; Sullivan also told them to leave.

While Mee and Sullivan were talking, Mee put his hands on Sullivan's chest. Upon seeing this, Sullivan's stepbrother, DeShawn Henry, ran out of the house and hit Mee. A fight broke out and at some point Steele hit Mee. Pitts did not become physically involved in the fight but repeatedly told everyone, "[T]hose are my little homeboys." RP at 529. As the fight ended, Mee yelled at the top of his voice that he was going to come back. He left with the people who had come with him but Pitts stayed at Roberts' house. Shortly after Mee left the party, he called Greer and told him that someone had "jumped" him and that "Shotty just let him do it and didn't do anything." RP at 951.

That same evening, Marjorie Morales was drinking liquor in the garage of Hokeshina Tolbert's house in Tacoma with Tolbert, Dan Bluehorse, Jose Cota Ancheta, and Jesus Cota

[4] Trial testimony revealed that "[c]uz" and "[l]oc" are terms unique to Crip gang members. RP (Dec. 10, 2009) at 80. "Cuz" is generally a term Crip gang members use to refer to other Crip gang members, and "loc" is a term meaning crazy. RP at 517.

Ancheta.[5] When they started drinking, they were looking at and passing around a rifle. Mee came to Tolbert's house later that evening with the others who had been in the vehicle at Roberts' home. Mee was the only one who got out of the car. Mee told the people in the garage that he "got jumped by some people." RP at 723. Mee and the drinking group then discussed how they would retaliate; some wanted to go to Roberts' party and fight, but Mee indicated that he wanted to go and shoot. Bluehorse told Tolbert to get the rifle. According to Tolbert, he grabbed the rifle from the garage, set it down in the yard, and Mee picked it up. According to Jose and Morales, Tolbert or Bluehorse handed the rifle to Mee.

Mee, Jesus, Bluehorse, and Morales got into Morales' car with Jesus driving. Jose sensed that something bad was going to happen and began to walk away down an alley but Morales' car quickly caught up to him, and Jesus told him to get in. Tolbert got into Satack's car and told Satack to follow Morales' car. Both cars headed toward Roberts' home.

As they approached Roberts' home in the vehicle, Jesus turned the car lights off. Jesus stopped the car in front of Roberts' home, and Mee leaned out the window with the rifle and shot two or three times. After the last shot, Jesus drove back to Tolbert's house. Satack lost sight of Morales' car before it got to Roberts' home and, after hearing gunshots nearby, turned her car around and drove away. Moments later, Satack saw Morales' car and followed it back to Tolbert's home.

Steele, Sullivan, Pitts, and others were outside Roberts' house when Mee fired the rifle. When he heard the gunshots, Sullivan ran into the house and yelled for everyone to get down.

[5] Tolbert is an admitted member of the Native Gangster Crips. Bluehorse admits that he was a member of the Native Gangster Crips. Jesus and Jose Cota Ancheta are brothers. We refer to Jesus and Jose Cota Acheta by their first names for clarity. Jose admits that he was a member of the Native Gangster Crips; Jesus did not testify at Mee's trial.

Everyone in the house took cover and Roberts shoved her children under a bed. A little while later, Sullivan heard a knock at the door. When he answered the door, he saw Steele. Steele ran into the house, shook his head, went to the bathroom, and collapsed. Roberts could see that Steele had been shot.

Steele died from internal bleeding as a result of the gunshot wound. The State charged Mee with first degree murder by extreme indifference and unlawful possession of a firearm.

Before trial, the State filed a motion for an order allowing it to admit gang-related evidence under ER 404(b). Specifically, the State sought to introduce evidence that Mee was a member of the Lakewood Hustler Crips and that other individuals involved in the shooting were members of the Native Gangster Crips. The State also sought to admit evidence of the gang names of various individuals involved in the shooting incident, gang-related slang terminology, typical gang-member behaviors and expectations, and the culture of not cooperating with the police because of gang membership or fear of retaliation from gang members.

The State argued that the gang-related evidence was admissible at trial to prove motive, res gestae, knowledge, and identity. Specifically, the State indicated that it sought to introduce the gang-related evidence for the following reasons: (1) some witnesses only knew Mee and other individuals involved in the shooting by their "street names" or nicknames; (2) Mee may have intended to shoot fellow Lakewood Hustler Crips gang member Pitts because Pitts did not come to Mee's aid when Mee was beaten at the party; (3) some people in the vehicle with Mee were wearing gang-related bandanas when the shooting occurred; (4) some witnesses were reluctant to cooperate with police because they did not want to be a "snitch[ ]," and because Pitts threatened a witness about testifying at trial; (5) to explain how Mee knew where to obtain a gun; (6) to

explain why the shooting was a group effort as opposed to Mee acting alone; (7) to "present the accurate truthful story to the jury"; (8) to "dispel some sort of misunderstanding that the Crips are all on the same side"; and (9) to show Mee's possible motive in targeting Pitts for failing to assist him at Roberts' house, as gang rules required. RP at 82-85, 90. Mee objected to the admission of gang-related evidence, arguing that the evidence was not relevant and was unduly prejudicial.

The trial court ruled that the gang-related evidence was admissible to establish Mee's motive. The trial court noted that the State's offer of proof, if supported by the evidence at trial, would establish Mee's gang status and other gang evidence by a preponderance of the evidence, thus supporting its admission. The trial court concluded that it was unnecessary to conduct an evidentiary hearing at that time, but it noted that if the evidence at trial did not conform to the State's offer of proof, it would entertain the possibility of a mistrial.

Several witnesses testified that they knew Mee only by his nickname "Little Shotty" and that they knew other individuals involved in the shooting only by their nicknames. Tolbert testified about gang nicknames, indicating that "Big A would be—the person who started the name. Little A would be the person that is under them . . . and then it keeps going smaller and smaller, baby, deuce." RP (Dec. 10, 2009) at 75. Tolbert also testified that gang members are expected to assist a fellow gang member in a fight and that failing to assist a fellow gang member results in a loss of respect. Jose testified that a gang member's failure to assist a fellow gang member in a fight would result in the member having to fight members of their own gang. Jose further testified that a gang member who failed to support a fellow gang member in a fight would lose respect, while a gang member who assisted a fellow gang member in a fight would gain respect. Based on Jose's and Tolbert's testimony, the State indicated that it did not need to call

its expert gang witness.

Mee timely appeals his convictions for first degree murder by extreme indifference and challenges the special verdict unanimity instruction. He also challenges the trial court's denial of his request to question a juror during deliberations and denial of his motion for a mistrial based on juror misconduct.

ANALYSIS

Gang-Related Evidence

Mee contends that the trial court abused its discretion by allowing the State to admit gang-related evidence in violation of ER 404(b). Specifically, Mee argues that the trial court abused its discretion by admitting the gang-related evidence under the motive exception to ER 404(b) because motive is not an element of first degree murder by extreme indifference. Mee also contends that the trial court abused its discretion by failing to exclude the gang evidence under ER 403. Following our decision in *State v. Yarbrough*, 151 Wn. App. 66, 210 P.3d 1029 (2009), we hold that a trial court may, under appropriate circumstances, admit ER 404(b) gang evidence to establish a defendant's motive for committing first degree murder by extreme indifference. But because the gang-related evidence here had little probative value and was highly prejudicial, we also hold that the trial court abused its discretion by admitting the gang-related evidence.

We review a trial court's decision to admit evidence of other crimes or misconduct for an abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

Evidence of other crimes, wrongs, or acts is not admissible to prove character or

conformity with it, but it may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). Before a trial court may admit evidence of other crimes or misconduct, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) determine whether the evidence is relevant to a material issue, (3) state on the record the purpose for which the evidence is being introduced, and (4) balance the probative value of the evidence against the danger of unfair prejudice. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). "ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)). ER 404(b) must be read in conjunction with ER 403. *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). "ER 403 requires exclusion of evidence, *even if relevant*, if its probative value is substantially outweighed by the danger of unfair prejudice." *Smith*, 106 Wn.2d at 776.

A. Reliance on the State's Offer of Proof To Establish the Fact of Misconduct

As an initial matter, Mee contends that the trial court abused its discretion by ruling that the ER 404(b) gang evidence was admissible without conducting an evidentiary hearing to determine whether the State could prove its claimed gang evidence and its relevance by a preponderance of the evidence. We disagree because the trial court relied on the State's offer of proof to establish the admissibility of the gang-related evidence and instructed counsel that the State's evidence during trial must support the offer of proof that the conduct occurred or face a

mistrial.

Our Supreme Court has held that in ruling on the admissibility of evidence under ER 404(b), a trial court may rely on the State's offer of proof to establish the fact of misconduct by a preponderance of the evidence. *Kilgore*, 147 Wn.2d at 294-95. The court reasoned:

> Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose and would undoubtedly cause unnecessary delay in the trial process. In our view, these hearings would most likely degenerate into a court-supervised discovery process for defendants. . . . We believe, in the final analysis, that the trial court is in the best position to determine whether it can fairly decide, based upon the offer of proof, that a prior bad act or acts probably occurred.

Kilgore, 147 Wn.2d 294-95. Our Supreme Court has thus approved the procedure the trial court employed here, and Mee does not provide any contrary authority. Accordingly, the trial court did not abuse its discretion in admitting the ER 404(b) evidence in reliance on the State's offer of proof, subject to confirming the proffered evidence during trial.

B. Motive

Mee also contends that the trial court abused its discretion by finding the gang-related evidence relevant to prove motive because motive is not an element of first degree murder by extreme indifference. Because prior case law has established that the State may present evidence of a defendant's motive to commit first degree murder by extreme indifference, we disagree.

To convict Mee of first degree murder by extreme indifference, the State had to prove beyond a reasonable doubt that (1) Mee acted with extreme indifference, an aggravated form of recklessness; (2) he created a grave risk of death to others; and (3) his actions caused the death of a person. RCW 9A.32.030(1)(b); *Yarbrough*, 151 Wn. App. at 82-83 (citing *State v. Pastrana*, 94 Wn. App. 463, 470, 972 P.2d 557 (1999)).

In *Yarbrough*, we held that the trial court did not abuse its discretion by admitting gang-related evidence to prove the defendant's motive for committing first degree murder by extreme indifference, even though motive was not an element of the crime. 94 Wn. App. at 84. We relied on *State v. Boot*, 89 Wn. App. 780, 950 P.2d 964 (1998) in holding that motive may be relevant to prove the crime of first degree murder by extreme indifference, "'[a]lthough the State is not required to prove motive as an element of [aggravated first degree murder], evidence showing motive may be admissible' if 'the evidence is relevant and necessary to prove an essential element of the crime charged.'" *Yarbrough*, 151 Wn. App. at 83 (second alteration in original) (quoting *Boot*, 89 Wn. App. at 789).

Mee acknowledges our decision in *Yarbrough*, which rejected the same argument he raises here. But Mee contends that *Yarbrough* was incorrectly decided, and he requests that we overturn our previous decision, asserting that *Yarbrough* relied on an improper interpretation of previous case law, including *State v. Athan*, 160 Wn.2d 354, 158 P.3d 27 (2007) and *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995). Mee contends that *Athan* and *Powell* stand for the proposition that "where only *circumstantial* evidence exists indicating an accused is guilty of murder, evidence of that accused's motive to kill the victim *may* be admissible in some cases." Opening Br. of Appellant at 29. Mee bases his interpretation on a quote in *Athan*, which reads, "Although motive is not an element of murder, it is often necessary when only circumstantial evidence is available." 160 Wn.2d at 382 (citing *Powell*, 126 Wn.2d at 260).

But Mee reads the quote too broadly and, contrary to Mee's contentions, *Athan* and *Powell* do not support his argument that evidence of motive is irrelevant when the State has direct evidence of the defendant's guilt. As the State correctly points out, the statement quoted in

Athan was in the context of an analysis of the applicability of the state of mind exception to the hearsay rule and did not consider the issue under ER 404(b). 160 Wn.2d at 382-83.

Powell considered the admission of ER 404(b) evidence in a spousal murder case. 126 Wn.2d at 259. There, our Supreme Court stated, "[M]otive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act." *Powell*, 126 Wn.2d at 259. The *Powell* court defined motive as, "'Cause or reason that moves the will . . . An inducement, or that which leads or tempts the mind to indulge a criminal act. . . . the moving power which impels to action for a definite result . . . that which incites or stimulates a person to do an act.'" 126 Wn.2d at 259 (internal quotation marks omitted) (quoting *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)).

Moreover, ER 401 defines "[r]elevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Whether evidence of a defendant's motive tends to make the existence of any consequential fact more or less probable does not depend on direct evidence of the defendant's guilt. Because Mee fails to demonstrate that the rule set forth in *Yarbrough* is incorrect, we decline to overturn it. *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006).

C. ER 403

Although we decline to overturn our decision in *Yarbrough* and we reject Mee's contention that the State may not present ER 404(b) evidence to establish a defendant's motive on a charge of first degree murder by extreme indifference, we hold that, under the facts and evidence presented in this case, the trial court abused its discretion in admitting the gang-related

evidence because the danger of unfair prejudice substantially outweighed its probative value.

Before a trial court may admit prior bad acts evidence under ER 404(b), it must find that the probative value of the evidence substantially outweighs the danger of unfair prejudice under ER 403. *See, e.g.*, *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *Smith*, 106 Wn.2d at 775-76. ER 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

To establish Mee's motive to commit first degree murder by extreme indifference, the State presented testimony from Tolbert, an admitted member of the Native Gangster Crips, that gang members are expected to assist fellow gang members in a fight or risk losing respect. The State presented similar testimony from Jose, an admitted former member of the Native Gangster Crips, that gang members who fail to assist a fellow gang member lose respect and, as a consequence, may be expected to fight members of their own gang. Based on Tolbert's and Jose's testimony regarding the general rules of their "gang culture," the State argued in closing that Mee, an alleged member the Lakewood Hustler Crips, committed first degree murder by extreme indifference because, based on the Native Gangster Crips gang members' understanding of their gang rules, Mee wanted to target Pitts, also an alleged member of the Lakewood Hustler Crips, for Pitts' failure to assist Mee in a fight. The State told the jury:

> Everybody, every aspect, every witness in this case says the same thing. The defendant is upset. He got jumped. Shotty didn't have his back and that's a huge thing in the gang world. In his mind, Shotty had to help him. And the defendant, for street credibility, for every reason that you came to understand after this long explanation and details about the culture out there, he cannot take it. He cannot just go away because then he is the punk and that's not his personality on

> this particular evening, that's not his way of dealing with the situation.
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> It may be foreign to other people, but in that world as you can readily tell, that's all it takes to get . . . Steele killed. And if it's not [Steele] that the gun[is] being fired at, it's [Sullivan], and if it's not [Sullivan], maybe the primary target is . . . Pitts . . . for not assisting. That punk, I'll show him.

RP at 1870-71.

Eyewitnesses to Mee's conduct and evidence from others who participated in the events made it clear that Mee shot a rifle two or three times indiscriminately at a residence where a birthday party was underway with people both inside and outside the home. This evidence was overwhelming and undisputed. Tolbert's and Jose's testimony that, in general, gang members are expected to assist other gang members in a fight or risk losing respect was irrelevant to prove that Mee killed Steele by extreme indifference by firing the gun into the house. The State's evidence of "gang culture" rules was extremely prejudicial because it invited the jury to make the "forbidden inference" underlying ER 404(b): that Mee's gang membership showed his propensity to commit the charged crimes. *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

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." *Foxhoven*, 161 Wn.2d at 175. Thus, the trial court abused its discretion by admitting the gang evidence because the danger of unfair prejudice substantially outweighed the probative value.[6]

[6] In holding that the trial court abused its discretion by admitting the gang-related evidence under ER 403, we briefly address the State's argument that the gang-related evidence was admissible to prove identity, knowledge, and the res gestae of the crime. *See State v. Burkins*, 94 Wn. App. 677, 689, 973 P.2d 15 (1999) (reviewing court may affirm a trial court's ER 404(b) ruling on any correct ground.). Regarding identity, the gang-related evidence was highly prejudicial and had

But we conclude that the trial court's abuse of discretion in admitting the gang-related evidence was harmless in light of the evidence in this case. The erroneous admission of prior bad acts evidence under ER 404(b) "requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial." *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Here, the gang culture evidence did not materially affect the outcome of Mee's trial in light of the overwhelming evidence establishing Mee's guilt. Several witnesses who admitted their participation in the shooting established that Mee (1) got the gun from Tolbert, (2) got in the car with others to drive to the house and shoot, and (3) fired the rifle at Roberts' house where he knew a number of people were at a birthday party, with the result that a bullet struck Steele and killed him. This is overwhelming evidence of Mee's culpability for the charged crimes. And this evidence remains untainted by the trial court's erroneous admission of gang-related evidence. Accordingly, there is no reasonable probability that the jury's ultimate verdict was materially affected by the gang-related evidence, thus, its admission in this case was harmless.

In holding that the trial court abused its discretion by admitting gang-related evidence, we note that trial courts should be particularly cautious when weighing the probative value of gang-

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little probative value in establishing the identity of Mee or the other participants because evidence of Mee's and the other participants' nicknames is not inextricably tied to their gang-affiliation. The State does not explain in its brief why the gang-related evidence was necessary to establish knowledge but in its motion to admit gang-related evidence at the trial court the State asserted the gang-related evidence was necessary to establish how Mee knew where to find a gun. Even assuming that Mee's knowledge of how to obtain a gun was relevant to any essential element of the charged crimes, the gang-related evidence was highly prejudicial and had little probative value because Mee's knowledge of how to obtain a gun may be inferred by the fact that he did obtain a gun. Finally, although the gang-related evidence was relevant to show the res gestae of the crime, any probative value in the gang-related evidence was outweighed by the danger of unfair prejudice under the facts of this case. Here, the State's evidence from several witnesses was that they saw Mee get in a fight at a party, that he was clearly upset, and that he returned a short time later and fired a rifle from the car, killing Steele. Gang-related evidence was thus not relevant to the elements of this crime.

related evidence against its inherently prejudicial effect. As this case exemplifies, admitting testimony about gangs in general allows the State to argue from that generalized evidence that an individual gang member engaged in the charged criminal conduct because of gang membership. Juries are then encouraged to assume that the defendant adheres to the stereotyped gang actions. Accordingly, the admission of gang evidence may result in a guilty verdict influenced by highly prejudicial propensity evidence, contrary to the principles of a fair trial. That we hold the admission of this evidence did not unfairly prejudice Mee here is entirely dependent on the powerful untainted evidence of his actions related by the other participants in the shooting.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Special Verdict Unanimity Instruction

The jury returned a special verdict finding that Mee was armed with a firearm during the commission of the murder. Mee contends, for the first time on appeal, that the trial court erred by instructing the jury that it had to be unanimous to return a "no" answer on the special verdict firearm enhancement form, citing *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). The State argues that Mee has not preserved this error for appeal by failing to object to the jury instruction at trial. Following our recent decisions in *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011), *petition for review filed*, No. 86903-1 (Wash. Jan. 11, 2012) and *State v. Grimes*, 165 Wn. App. 172, 267 P.3d 454 (2011), *petition for review filed*, No. 86869-7 (Wash. Jan. 3, 2012), we agree with the State.[7]

[7] Division One and Division Three of this court recently held that unanimous "no" special verdict jury instructions held improper in *Bashaw* do not constitute manifest constitutional errors that

> The jury instruction at issue here states in relevant part:
>
> > Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to the question, you must answer "no."
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> Clerk's Papers at 294.

In *Bashaw*, our Supreme Court held a similar instruction requiring jury unanimity improper under our common law, stating, "A nonunanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt." 169 Wn.2d at 145. But our Supreme Court did not address whether a defendant may raise this type of error for the first time on appeal under RAP 2.5(a)(3).[8]

In *Bertrand* and *Grimes*, we held that a defendant may not challenge similar special verdict jury unanimity instructions for the first time on appeal. 165 Wn. App. at 399-403; 165 Wn. App. at 179-91. In so holding, we reasoned that the error was neither constitutional in nature nor manifest—meaning the error did not have "'practical and identifiable consequences' in the trial below." *Bertrand*, 165 Wn. App. at 400 (quoting *Grimes*, 165 Wn. App. at 187). As in *Bertrand*

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appellants may raise for the first time on appeal under RAP 2.5(a)(3). *State v. Morgan*, 163 Wn. App. 341, 352-53, 261 P.3d 167 (2011), *petition for review filed*, No. 86555-8 (Wash. Oct. 3, 2011); *State v.Nunez*, 160 Wn. App. 150, 158-60, 164-65, 248 P.3d 103, *review granted*, 172 Wn.2d 1004 (2011). But a different panel of Division One of this court reached the opposite conclusion in *State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895, *review granted*, 172 Wn.2d 1004 (2011). Our Supreme Court granted review in *Nunez* and *Ryan*, consolidated the cases for appeal, and heard oral arguments on January 12, 2012. Our Supreme Court stayed a petition for review in *Morgan* pending a final decision in *Nunez* and *Ryan*.

[8] RAP 2.5(a)(3) provides, "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed error[ ] for the first time in the appellate court: . . . manifest error affecting a constitutional right."

and *Grimes*, Mee has not raised a manifest error implicating a specifically identified constitutional right that he may raise for the first time on appeal under RAP 2.5(a)(3). Accordingly, we decline to address the issue.

Juror Misconduct/Motion for Mistrial

During the trial, the prosecutor informed the trial court that he would be appearing on a television show titled, "Gangland" on the History Channel. Based on this information, the trial court instructed the jury not to "view any television programs or anything on the subject matter of this case." RP at 1123.

When the jury indicated that it had reached a verdict, because the defense attorney was unavailable for the verdict reading, the trial court excused the jury for the day and sealed the verdict. Juror 5 returned to the jury room to pick up his personal belongings and mentioned to the judicial assistant that "the prosecutor had his stuff together, and that [juror 5's] wife was flipping through the channels the other night and saw the prosecutor on [television]." RP at 1887. The judicial assistant did not respond to the juror's comments. The following day, the trial court informed the State and defense counsel of juror 5's comments to the judicial assistant.

After an extensive discussion with counsel, the trial court decided to question juror 5 outside the presence of the other jurors. In response to the trial court's questions, juror 5 revealed the following:

> I believe it was last week, we were watching the History Channel at home and they were talking about what they were going to be showing during that episode and it was talking about San Bernardino gangs and that's where I met my wife is in San Bernardino as a marine corp[sman]. And I remember seeing the Hells Angels motorcycles down there and I always thought those are big motorcycles, not necessarily the folks.
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> And then they went onto another thing quickly and they talked about some gang activity, different types of gangs here in Tacoma, and it showed a picture of

> the Tacoma Dome area and I said to my wife, I says, that's Tacoma on there. And it was about a white—I don't know how much you want me to get into this, but white supremacist kind of folks, I guess, that went down to—I want to call it Hobo Village or something, and beat up one or two individuals.
>
> And then the picture that came on there next happened to be one of the people that I've seen in the courtroom and I was surprised to see him [(the prosecutor)] and I was impressed with what I heard and the wildness of the act. And I think I mentioned that—I think that's why I mentioned that, but I had seen that. Seeing that did not prejudice my opinion towards this or against this case in the least.

RP at 1900-1901.

Juror 5 admitted that he watched the episode that featured the prosecutor in Mee's trial. He initially denied that he had discussed watching the show with the other jurors, but quickly corrected himself, stating, "I did say something that I had seen [the prosecutor] on television that week, and I thought it was kind of ironic, but that's all I had said about that." RP at 1902. He did not recall which jurors he had mentioned seeing the prosecutor on television to, but he recalled mentioning it before the jury reached a verdict. The trial court declined defense counsel's request to question the other jurors about what juror 5 had told them, and it also denied defense counsel's motion for a mistrial. The trial court found that juror 5's conduct in watching the television show was misconduct, dismissed him from the jury, and called in an alternate juror, which required that deliberations start over. The reconstituted jury returned verdicts finding Mee guilty of first degree murder by extreme indifference and unlawful possession of a firearm and a special verdict finding that Mee was armed with a firearm during the commission of the murder.

Mee contends that the trial court abused its discretion by refusing to question the entire jury regarding juror 5's misconduct.[9] He argues that the trial court abused its discretion in failing

[9] Neither party challenges the trial court's decision to dismiss juror 5 from the jury for misconduct.

to question the other jurors because juror 5's answers to the trial court's questions were inconsistent about whether he mentioned seeing the prosecutor on television. We disagree.

We review a trial court's decisions regarding investigation of jury problems for an abuse of discretion. *State v. Elmore*, 155 Wn.2d 758, 773-74, 123 P.3d 72 (2005). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). We defer to a trial court's fact-finding function as to credibility and the weight given to the evidence in this circumstance. *See State v. Jorden*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000) (reviewing court defers to the trial court's credibility determinations on matters within the trial court's "'fact-finding discretion'") (quoting *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 753, 812 P.2d 133 (1991)).

Trial courts have a "'continuous obligation'" under RCW 2.36.110 and CrR 6.5 "to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit, even if they are already deliberating." *Elmore*, 155 Wn.2d at 773 (citing *Jorden*, 103 Wn.App. at 227). But when investigating accusations of juror misconduct, the trial court must be cautious in its inquiry to preserve the secrecy of juror deliberations. *Elmore*, 155 Wn.2d at 771.

Regarding the scope of a trial court's investigation of jury issues, our Supreme Court has stated:

> Washington and other courts have granted broad discretion to the trial judge in conducting an investigation of jury problems. *Jorden*, 103 Wn. App. at 229 ("[T]he trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party."); [*United States v.*] *Peterson*, 385 F.3d [127,] 135 [(2d Cir. 2004)] (granting trial court discretion as to whether to conduct further inquiry, but noting that the court must take care not to taint the jury unnecessarily); [*United States v.*] *Edwards*, 303 F.3d [606,] 634 [(5th Cir. 2002)] ("[T]he district court continues to enjoy wide discretion to determine the proper scope of an investigation into whether just cause to dismiss a juror exists as long as the content of the

> deliberations is left undisturbed."). . . .
>
> We emphasize that the trial court retains discretion to investigate accusations of juror misconduct in the manner most appropriate for a particular case.

Elmore, 155 Wn.2d 773-74.

Here, the trial court took appropriate steps to balance its obligations to investigate juror misconduct allegations with the need to preserve the secrecy of jury deliberations. When it discovered that juror 5 may have viewed extrinsic evidence in the form of a television program about gangs that featured the prosecutor in Mee's trial, the trial court limited its inquiry into the subject matter of the program and whether the juror discussed the content of the program with the other jury members. The trial court also instructed the State and defense counsel, over defense counsel's objection, that the trial court alone would question the juror. In so instructing the State and defense counsel, the trial court correctly noted that it was the trial court's province to investigate juror misconduct allegations.

After discovering that the juror did not discuss the content of the program with the other jurors and instead mentioned only that he had seen the prosecutor on television and was favorably impressed by him, the trial court also acted within its considerable discretion by dismissing the juror, declining to question the other jurors about what juror 5 had told them, and requiring the entire jury deliberation process to start over with an alternate juror. Because the trial court's decision was based on its observation of the juror while testifying and its credibility determination, we do not disturb the trial court's conclusion to not question the other deliberating jurors. Unlike the questions directed at juror 5 regarding the content of the extrinsic evidence he had viewed, questioning the remaining jurors about what juror 5 had discussed with them during deliberations

risked intruding into the deliberative process.

Moreover, such questioning was not warranted given juror 5's statement that he did not discuss the program with other juror members apart from mentioning that he had seen the prosecutor on television under questioning by the trial court. The trial court accepted this testimony as true and the trial court's conclusion that such a statement did not prejudice Mee was within its broad discretion.

Because the trial court dismissed juror 5 for misconduct and its denial of Mee's request to question the remaining juror members was within its discretion, we hold that it did not err in denying Mee's motion for a mistrial based on allegations of jury misconduct.

We further hold that, although the trial court abused its discretion in admitting the State's gang evidence, because there was overwhelming untainted evidence that Mee committed the charged crimes, we affirm Mee's convictions.

Van Deren, J.

We concur:

Armstrong, J.

Worswick, A.C.J.