

65406-3

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NO. 65406-3-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANA CARY AYALA-BUSTOS,

Appellant.

N

BRIEF OF RESPONDENT

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I. ISSUES

(1) Was the trial court required to give a limiting instruction on “bad act” evidence, when no such instruction was requested?

(2) Was defense counsel ineffective for:

(a) Making a tactical decision not to seek a “limiting instruction” on gang evidence or

(b) Proposing a jury instruction that complied with a recent decision from this court concerning unanimity on special verdicts?

II. STATEMENT OF THE CASE

Shortly after midnight on June 17, 2010, there was a confrontation near Sultan City Hall between Antonio Marks and a group consisting of Marco Castillo, Adolfo Castillo, Jaime Michel, Ivette Rico, and the defendant, Ana Ayala Bustos. The ensuing altercation was observed by a witness and also captured on a surveillance video. Following a verbal argument, Marco Castillo hit Marks and knocked him unconscious. The five people started kicking him. Marco Castillo then stabbed Marks. 3 RP 154-61; ex. 2; see 3/15 RP 116-18 (prosecutor’s argument describing video), 103-05 (defense counsel’s argument describing video). According to medical testimony, Marks died from a combination of blunt force trauma to the head and stab wounds. 3/15 RP 41. Marks’s

clothing and tattoos identified him as a member of the South Land Villains, a street gang. 3 RP 156, 277-78, 287; 4 RP 334, 343.

Following her arrest, the defendant gave a taped statement to police. Ex. 81.¹ She said that they had encountered Marks at the bus stop. He was “yelling stuff” and offering to fight. An argument started between Marks and Marco Castillo. Marco hit him and he went down. The others, including the defendant, kicked him while he was on the ground. Pre-trial ex. at 37-39. The defendant said that she kicked Marks because she was “kinda angry.” Id. at 43-44. She admitted that she was a member of the Brown Pride Soldiers, another street gang. Id. at 30.

In the statement, the defendant said that she wasn’t too concerned about Marks’s death “[c]uz I don’t know him.” When asked whose fault it was that he was dead, she answered, “His own fault. Ha.” She was then asked if she and her group could have walked away. She answered, “It’s kinda hard if someone’s just like oh, nah, neh, nah nah.” Pre-trial ex. 3 at 45-46.

¹ A transcript of this tape was introduced at a pre-trial hearing, but not at trial. Pre-trial ex. 3. For the convenience of the court, this brief will identify relevant portions of the tape by citing to exhibit 3.

At trial, a police officer testified about the organization, culture, and identifying signs of street gangs and their members. 4 RP 330-43, 349-50. To gang members, other gang members are their “family.” “If something occurs you’re expected to support the gang in whatever way they ask.” This includes helping them in a physical altercation. Also, “[t]he concept of respect is the key component of gang-life style.” If someone disrespects a gang member, the typical response is some sort of physical violence. 4 RP 338-39.

The defendant was charged with second degree murder. The information alleged the aggravating factor that the murder was committed to obtain or maintain membership or advance position in the hierarch of an organization. 1 CP 92-93. At the beginning of trial, defense counsel filed a motion in limine seeking exclusion of all the expert testimony concerning gangs. 1 CP 70-72. Prior to ruling on this motion, the court heard testimony from the witness as an offer of proof. 2 RP 78-123. The court ultimately denied the motion to exclude, but it imposed several limitations on the scope of the evidence. 2 RP 128-33.

The jury found the defendant guilty and answered “yes” to the aggravating factor. 1 CP 31. At sentencing, however, the State

did not seek an exceptional sentence. Based on a standard sentence range of 123-220 months, the prosecutor recommended a mid-range sentence of 175 months' confinement. Sent. RP 3. The defense recommended a sentence of 123 months. Sent. RP 7. The court sentenced the defendant to 150 months' confinement. Sent. RP 13-14; 1 CP 17.

III. ARGUMENT

A. ABSENT A REQUEST, A TRIAL COURT IS NOT REQUIRED TO GIVE A LIMITING INSTRUCTION.

The defendant argues that the trial court was required to give a limiting instruction on gang evidence, even though no such instruction was requested. This argument is based on this court's decision in State v. Russell, 154 Wn. App. 775, 225 P.3d 478 (2010) (Russell I), rev'd, ___ Wn.2d ___, 249 P.3d 604 (2011) (Russell II). After the defendant's brief was filed in the present case, the Supreme Court handed down a contrary decision. According to the Supreme Court, "[a] trial court is not required to sua sponte give a limiting instruction for ER 404(b) evidence, absent a request for such a limiting instruction." Russell II ¶ 12. Since no limiting instruction was requested in the present case, the trial court was not required to give one.

B. THE DEFENDANT HAS FAILED TO ESTABLISH THAT HIS TRIAL COUNSEL WAS INEFFECTIVE.

The defendant's only other argument is a claim of ineffective assistance of counsel. To establish this, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance resulted in prejudice. State v. Grier, 171 Wn.2d 17 ¶ 40, 246 P.3d 1260 (2011); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To establish deficient performance, the defendant must show that the challenged acts were "outside the broad range of professionally competent assistance." Strickland, 466 U.S. at 690. The purpose of the constitutional guarantee of effective assistance is "not to improve the quality of legal representation," but "simply to ensure that criminal defendants receive a fair trial." Any effort to set out detailed rules for counsel's conduct would interfere with the constitutionally protected independence of counsel. Id. at 689.

To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "The assessment of

prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.” Id. at 695. Applying these standards, the defendant has failed to show either deficient performance or prejudice.

1. Trial Counsel Acted Properly With Regard To Seeking Limitations On The Evidence Concerning Gangs.

a. Counsel could reasonably decide that a “limiting instruction” on gang evidence would unduly emphasize damaging aspects of that evidence.

The defendant first claims that counsel was deficient in failing to seek a “limiting instruction” with regard to gang evidence. Counsel took several steps to limit the State’s evidence on this subject. She filed a pre-trial motion to exclude most of it. CP 69-74; 2 RP 63-74, 125-28. The court granted this motion with respect to some portions of the State’s proffered evidence. 2 RP 128-33. During the testimony of the State’s gang expert, defense counsel repeatedly objected and sought limitations on the scope of the testimony. 4 RP 328-30, 340-41, 344-37. It is thus clear that defense counsel was conscious of the dangers of the gang testimony and familiar with the law limiting such testimony. This court must presume that she made a strategic choice not to seek a specific limiting instruction. “[S]trategic choices made after

thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” Strickland, 466 U.S. at 690.

The defendant claims that there was no valid reason for not seeking a limiting instruction under the circumstances of the present case. This court rejected a similar claim in State v. Yarborough, 151 Wn. App. 66, 210 P.3d 1029 (2009). In that case, a gang member was accused of murdering a member of a rival gang. The State introduced evidence of the defendant’s gang affiliation. Id. at 78-79 ¶¶ 15-16. It also introduced expert testimony concerning the organization of gangs, the behavior of gang members, and signs by which gang members can be recognized. Id. at 79-80 ¶¶ 19-20.

In all of these respects, Yarborough is similar to the present case. The State introduced similar evidence here and used it for a similar purpose. As in the present case, there is no likelihood that the jury in Yarborough would have overlooked the defendant’s gang membership. Nonetheless, this court held that defense counsel’s failure to seek a limiting instruction on gang evidence was “a legitimate trial strategy not to reemphasize damaging evidence.” Yarborough, 151 Wn. App. at 90-91 ¶ 46.

The defendant's argument fails to recognize that a "limiting instruction" is inherently double-sided. It tells jurors that they may not consider evidence for a particular purpose – but it also tells them that they *may* consider it for a different purpose. See WPIC 5.30, Evidence Limited as to Purpose; Brief of Appellant at 20 n. 8 (quoting example of limiting instruction on gang evidence). The first part helps the defendant by precluding some potential uses of the evidence. The second part helps the State by specifically allowing other uses. Every "limiting instruction" is thus also an *enabling* instruction.

Given this reality, defense counsel must always weigh the benefits of the instruction against the detriments. The Appeals Court of Massachusetts has pointed this out, in the context of instructions limiting the use of prior convictions as impeachment:

In the abstract it is easy to postulate that the limiting instruction, intended to confine the probative force of prior convictions to a single question, must always be of value to a defendant thereby impeached. But the single question ... is sometimes the structural support for his defense. In this circumstance, the defendant's counsel might well reason that the technical effect of the instruction would be of little practical value to the defendant and that his purposes would be better served by downplaying the prior convictions.

Commonwealth v. Hurley, 32 Mass. App. 620, 622-23, 592 N.E.2d 1346 (1992).

Defense counsel's tactical dilemma is illustrated by the prosecutor's closing argument in the present case. That argument focused on how the defendant's gang membership gave her a motive for participating in the murder. 3/15 RP 87-92. This is a permissible use of gang evidence. Yarborough, 151 Wn. App. at 83-84 ¶ 51. If a proper limiting instruction had been given, it would have authorized such an inference. The prosecutor would not have needed to change one word of his closing argument. He could, however, have pointed to the "limiting instruction" as *supporting* that argument. Defense counsel could reasonably decide that this possible adverse use of a limiting instruction would have outweighed the potential benefits of its use. Although other attorneys might have made a different decision, this does not make counsel's actions deficient. The defendant has failed to meet his burden of establishing deficient performance.

b. Since a limiting instruction would not have restricted the arguments that the prosecutor made, the absence of such an instruction was not prejudicial.

The defendant has also not shown that any deficient performance by counsel resulted in prejudice, for several reasons.

First, any limiting instruction would have been of minimal value. As discussed above, a proper instruction would have told the jurors that they *could* consider the defendant's gang membership in determining whether she had a motive for committing the crime. See Yarborough, 151 Wn. App. at 83-84 ¶ 51. "Evidence of the existence of a motive ... is often of much importance in determining whether the defendant committed the crime." State v. Richardson, 197 Wash. 157, 84 P.2d 699 (1938). Thus, it was permissible for the jury to infer that because the defendant was a gang member, it was more likely that she committed the crime. A limiting instruction would not have prevented this inference.

Second, no one at trial argued that the defendant's gang membership demonstrated her bad character. The prosecutor's closing argument was based on the defendant's motive, not her character. 3/15 RP 87-9. Again as already pointed out, a limiting instruction would have reinforced this argument, not contradicted it.

Third, the State's case was strong. The victim was videotaped participating in the fatal assault. She also admitted her participation to police. Ex. 81; pre-trial ex. 3 at 38-40. In view of all of these facts, there is no reasonable likelihood that a "limiting instruction" would have altered the result. Even if counsel could be

considered deficient in failing to propose one, the defendant cannot show that this resulted in prejudice.

2. Trial Counsel Acted Properly In Proposing A Unanimity Instruction That Had Been Specifically Approved By This Court.

a. Relying on established law is not deficient performance.

The other alleged deficiency of trial counsel was proposing an instruction that did required the jury to be unanimous in order to answer the “enhancement” question “no.” In determining whether counsel’s performance was deficient, this court is required to make “every effort ... to eliminate the distorting effects of hindsight.” Strickland, 466 U.S. at 689. The defendant’s argument largely ignores this requirement. It is heavily based on the Supreme Court’s decision in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) (Bashaw II), rev’g 144 Wn. App. 196, 182 P.3d 451 (2008) (Bashaw I). The Bashaw II decision was handed down on July 1, 2010, almost four months after the trial in the present case. The decision thus has no bearing at all on the propriety of counsel’s actions.

At the time of trial, counsel could have known the following:

1. The Supreme Court had held that defendants have no right to a non-unanimous verdict, even when a jury had voted 11-1

to acquit. State v. Noyes, 69 Wn.2d 441, 445-46, 418 P.2d 471 (1966).

2. The Supreme Court subsequently considered the proper procedure after a jury returns a “no” answer to a special verdict, in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). There, polling of the jury revealed that the “no” answer was not unanimous. The trial court ordered further deliberations, which culminated in a “yes” verdict.

In analyzing this situation, the Supreme Court pointed to the following jury instruction that had been given in that case:

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 have a reasonable doubt as to the question, you must answer “no.”

Id. at 893. In view of this instruction, the Supreme Court held that it was improper to require further deliberations:

Here, the jury performed as it was instructed. It returned a verdict of guilty as to the crime, for which unanimity was required, and it answered “no” to the special verdict form, where under instruction 16, unanimity is not required in order for the verdict to be final. We find no error in the jury’s initial verdict in this case which would require continued deliberations. As instructed in this case, when the verdict was returned, the jury’s responsibilities were completed and the jury’s judgment should have been accepted.

State v. Goldberg, 149 Wn.2d 888, 894, 72 P.3d 1083 (2003). In summarizing its holding, the court said: “In sum, special verdicts do not need to be unanimous in order to be final.” Id. at 895.

3. This court considered the impact of Goldberg in Bashaw I. There, the defendant argued that Goldberg required the jurors to be instructed that they need not be unanimous as to a “no” answer. This court rejected this argument. It pointed out that the analysis in Goldberg was based on the specific language used in the jury instruction in that case. Bashaw I, 164 Wn. App. at 453-54 ¶¶ 13-14.

We do not believe that the [Goldberg] court intended to hold that special verdicts were to have unanimity requirements different from general verdicts. There is no discussion in Goldberg of the pattern instruction. There is no discussion of special verdicts in general or the policy of permitting one juror to acquit on a special verdict. In short, there is simply no indication that either the pattern instructions or the policy of unanimous special verdicts were at issue in Goldberg.

Bashaw I, 164 Wn. App. at 454 ¶ 16. Under Bashaw I, the instruction requested by counsel in the present case was clearly correct.

The defendant now criticizes Bashaw I as contrary to “the Supreme Court’s clear holding in Goldberg.” Brief of Appellant at 32. This criticism is unjustified. Goldberg did not even discuss

what jury instructions should be given with regard to special verdicts – let alone contain any “clear holding” on the subject. This court in Bashaw I did the ordinary job of an appellate court -- it interpreted a Supreme Court decision. The Supreme Court later said that this court was wrong, but this is hindsight. “[C]ounsel’s failure to anticipate changes in the law does not amount to deficient representation.” State v. Brown, 159 Wn. App. 366, 371 ¶ 9, 245 P.3d 776 (2011). Counsel’s reliance on a recent Court of Appeals decision did not constitute ineffective assistance of counsel.

b. Even if counsel’s actions were deficient, the defendant cannot establish prejudice.

i. Since the jurors unanimously found that the aggravating factor had been proved, there is no reasonable probability that the verdict would have been affected by different instructions about what to do if they were not unanimous.

Even if counsel’s performance was somehow deficient, the defendant has failed to demonstrate prejudice. Under the Supreme Court’s subsequent opinion in Bashaw II, jurors should be instructed that they can answer a special verdict “no” if they do not unanimously agree on the answer. Here, however, the jurors answered the question “yes.” Under the instructions, that answer required unanimous agreement. In determining prejudice, the court must assume that the jurors followed this instruction. Since the

jurors were unanimous, an instruction on the consequences of non-unanimity could not have affected the verdict.

As the defendant points out, the Supreme Court held in Bashaw II that a unanimity instruction was not harmless error. The court applied the standard that, to find an error harmless, “we must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” Bashaw II, 169 Wn.2d at 147 ¶ 24. The court believed that a different instruction might have affected the jury’s deliberative process. Consequently, the court was unable to conclude beyond a reasonable doubt that the error was harmless. Id. at 147-48 ¶ 25. Three dissenters would have held the error harmless. Id. at 149-51 ¶¶ 30-39 (Madsen, C.J., dissenting).

In the present case, however, the standard is not “harmless beyond a reasonable doubt” -- it is whether counsel’s purported error affected the outcome of the proceedings “within reasonable probabilities.” The burden of proof is on the defendant, not the State. Strickland, 466 U.S. at 694. Moreover, the court must assume that the jurors conscientiously applied their instructions. Id. at 695. This means that the court must assume that the jury was unanimous. Given this assumption, the defendant cannot establish

any reasonable probability that a different instruction would have led to a different result.

The difference between the harmless error standard and the prejudice standard is illustrated by Grier. There, the defendant claimed that trial counsel was ineffective for failing to seek instructions on a lesser included offense. When the trial court denies a request for a lesser offense instruction, a unanimous verdict on the greater offense does not render the error harmless. State v. Parker, 101 Wn.2d 161, 683 P.2d 189 (1984); cf. State v. Hansen, 46 Wn. App. 292, 297, 730 P.2d 706 (1986) (explaining circumstances under which error may be harmless). On the other hand, when the issue is ineffective assistance of counsel, the analysis is different. In that situation, the existence of a unanimous verdict does demonstrate that “the availability of a compromise verdict would not have changed the outcome of the [defendant’s] trial.” Grier, 171 Wn.2d at 44 ¶ 66.

The same analysis applies here. Under the harmless error standard applied by the Supreme Court, the State cannot prove beyond a reasonable doubt that a unanimity instruction did not affect the jury’s deliberations. But when the defendant bears the burden of establishing prejudice, he cannot prove that the jury’s

unanimous verdict would have been changed by an instruction that required unanimity.

ii. The court's remarks at sentencing show that the sentence was based on factors separate from the aggravating factor.

Furthermore, even if the special verdict had been answered "no," there is no reason to believe that the sentence would have been different. Although the special verdict gave the trial court power to impose an exceptional sentence, the prosecutor did not even request one. The sentence imposed by the court was in the bottom half of the standard range. The court explained this sentence as follows:

In terms of what is appropriate for this defendant, there has been much said about lack of remorse and what she did or did not do during the taped interview. [Defense counsel] asserts that this is a young, unsophisticated 16-year-old girl who simply makes inappropriate remarks and/or gestures. The prosecutor, of course, takes the opposite view, that this is a person who shows simply a cold, callous attitude toward someone who has been killed.

I don't know what goes on in her mind. I don't know what is in her head. But it does seem to me that the average 16-year-old, if they are told that someone they just assaulted in fact had died, would express some sorrow, would express some degree of, for lack of a better term, remorse, and not be as cavalier as she was. Again, I don't know what goes on inside of her heart; and maybe, to [defense counsel] she has expressed all of that. I have not heard it. I have not seen it.

I am not going to sentence her for having gone to trial and exercising her Constitutional right to trial. That would be inappropriate, to add to her sentence for exercising her Constitutional right. But I do recognize some other factors. Of course, as I've said before, in trying to arrive at some semblance of justice or fairness in this situation, I have taken into account what different people did in the scenario.

She was not the stabber. She was not the leader of the gang. But she was a willing participant who has shown, at that time, a complete willingness to jump in and kill this individual and, when told that she had in fact accomplished that, showed little reaction.

She's a person who didn't take advantage of a plea offer when it was offered to her; a plea offer that, at least by some, was overly generous. Nevertheless, she chose to say, no, I don't want to do that. I want to exercise my right to trial; but at the same time, she didn't take advantage of a plea offer that was made.

Then the question is, what is the appropriate sentence. The stabber in the case, Mr. Castillo, received 160 months, plus another 24, for a total of 184 months. I don't think it would be appropriate to sentence her to the equivalent of what Mr. Castillo received. But it does seem to me that a sentence in excess of that which was received by the other participants would be appropriate. As I say, I've thought long and hard in terms of what that number would be, and I know there may be some people who would disagree with it from both sides; but somebody has to make a decision.

So the number that I think would be appropriate, given all of the factors, is 150 months.

Sent. RP 12-14.

The court thus explained the sentence on the basis of the defendant's willing participation in a murder and her "cavalier" attitude towards the crime, as shown in her taped confession. The court also pointed out that some co-defendants received benefits from pleading guilty, but this defendant had chosen not to do so. None of this has anything to do with the jury finding on the aggravating factor.

The court made only one brief reference to the aggravating factor: "[B]efore the prosecutor filed the aggravating circumstances in this trial, all you had to do was sit through the rest of these sentencings and the Affidavits of Probable Cause, and you knew that this was all gang-related in one fashion or another." Sent. RP 11. This remark indicates the court's view that, even apart from the jury finding, there was overwhelming evidence that the killing was gang-related. Of course, "gang related" is not synonymous with "committed to maintain membership or advance position in a gang." This remark does not indicate that the jury finding played any role in the judge's sentencing decision.

In short, even if the finding itself was somehow affected by the lack of a unanimity instruction, there is no reasonable

probability that the finding changed the sentence imposed. For this reason as well, the defendant cannot show prejudice.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on May 13, 2011.

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