

FILING
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  _____

DEPUTY

NO. 36317-8-II

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

STATE OF WASHINGTON,

RESPONDENT

-v-

CHANARA SOEUN,

PETITIONER

BRIEF OF PETITIONER

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I. Assignments of Error

Assignments of Error

1. The trial court and counsel erred in failing to hold a hearing under CrR 3.5 concerning the defendant's statements.
2. The defense counsel was ineffective as he failed to move for a mistrial based upon violation of a pre-trial ruling in regards to the mention of GANG activity.

Issues Pertaining to Assignments of Error

1. Did the court commit reversible error in failing to hold a CrR 3.5 hearing and enter written findings, was the error prejudicial to the defendant, and was counsel's performance deficient in failing to object to the admission of those statements?
2. Did the prosecution violate a pre-trial order which prohibited any mention of Gang affiliation during the trial, was this prejudicial and was counsel for the defendant deficient by failing to move for a mistrial?

II. STATEMENT OF THE CASE

Chanara Soeun was charged by information with Robbery First Degree, Assault Third Degree, And Theft First Degree (CP 1) The case commenced on April 10, 2007. The parties addressed pre-trial issues. The first of which was whether the state could elicit information regarding the defendant's gang affiliation and the nature of prior police contacts by Det. Bair . (RP7-12). The court ruled that the testimony was limited to the fact that Det. Bair knew the defendant and that he was selected as part of a photo montage. (RP 12). There was to be no gang mention.

The second pre-trial issue was that of a hearing under CrR 3.5. The parties agreed that the only statement of the defendant to be offered was a statement to Det. Bair as to where the defendant lived. (RP 56), and that the state would not elicit any other information . (RP 57).

The state proceeded to introduce eye witnesses including the wife of the victim, Carrie Adamson, who identified the defendant from a photo montage as the person who robbed and assaulted her husband. (RP128-130.) Kayla Adamson, the daughter of the victim then testified. Kayla Adamson was 10 years old and the defense attorney did not raise an issue of her competency. (RP140). Kayla Adamson could not identify the defendant from a photo montage by Det. Bair (RP167) , but did identify the defendant in court as the person who committed the crimes. (RP 168-9).

Eli Adamson, the victim then testified as to the robbery, his injuries, and the photo montage in which he selected the defendant as the person who committed the crimes. (RP 214-219). The photo montage which was admitted was one in which all of the suspects except the defendant were in jail clothing. (RP 222).

Det. Bair then testified as to his training and experience. He testified that he was assigned to the Gang Unit, and that The cases he is assigned are gang related, and that this case was assigned to him based upon that criteria. (RP 292). The court allowed the state to ask questions about Det. Bair's prior contacts with the defendant. (RP 299). Det. Bair then was asked about his initial meeting with the defendant and about the defendant's responses to those questions. (RP 234). Included in those questions were the defendant's denial of being involved, and an alibi that he was working. (RP 325). Det. Bair also gave testimony as rebuttal as to statements of the defendant. (RP 432-435). The court did not hold a 3.5 hearing at any point during the proceedings. (RP 396-397).

The defendant was convicted of all charges and sentenced to a term of 60 months. This appeal followed.

III. ARGUMENT

At a CrR3.5 hearing to determine the admissibility of an out of court statement by a defendant, the judge must inform the defendant that (1) he may, but need not testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement, and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. *CrR3.5*. Where the claim of error is raised through ineffective assistance of counsel, the defendant must demonstrate prejudice. *State v. Williams*, 137 Wn. 2d 746, 753-754, 975 P. 2d 963 (1999). Prejudice is not established if the admissibility of the statements was undisputed or the defendant

testified at trial consistent with the admitted statements. State v. Lopez , 67 Wn. 2d 185, 189-90, 406 P. 2d 941 (1965). A defendant claiming ineffective assistance of counsel must show deficient and prejudicial performance. State v. Studd, 137 Wn. 2d 533, 551, 973 P. 2d 1049 (1999). If the performance at issue is a legitimate trial tactic or strategy, it cannot serve as the basis for a claim of ineffective assistance of counsel. Studd at 551.

In the present case, the defendant did not have a 3.5 hearing as counsel prior to the trial agreed to a narrow admission of his statements, namely, his address. The statements elicited from Det. Bair during the trial clearly went to issues such as the alibi defense, defendant's knowledge of the accident and crime, his movements on the day in question, and issues which touched directly on his credibility. There was no inquiry as to the voluntary nature of these statements offered by the state. The error is of constitutional magnitude and should be corrected by this court. State v. Alexander, 55 Wn. App. 102, 776 P. 2d 984 (1989).

In the present case, the trial court had ruled *in limine* the issue of any gang affiliation could not be raised. However, during the direct testimony of Det. Bair, the following response was made:

Q: At that time could you give the jury just a little background information about how cases get assigned to you?

A: I'm currently assigned to the Criminal Investigation Gang Unit, and the way cases get to me is after an offense occurred, which is usually a violent offense, such as a drive-by shooting or gang related incident, our supervisor reads those reports first, and based upon the elements in a case will assign those to the detective that possibly might know the most about the case given its background. In this case, this one was given to me based on that criteria. (CP 292).

The court had previously ruled that any gang evidence was not admissible under 404(b), Defense counsel did not object to the statements. The issue presented here is whether these remarks, when viewed against the court's ruling, were prejudicial and denied the defendant a fair trial, and whether there should have been a motion for a mistrial or for a curative instruction to the jury.

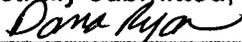
In the present case, counsel's failure to move for a mistrial after the court's ruling was deficient as it fell below an objective standard of reasonableness and was also prejudicial. State v. Thomas, 109 Wn. 2d 222, 225-6, 743 P. 2d 816 (1987). It was a serious irregularity given the court's prior rulings, and was not cured by a later instruction. State v. Weber, 99 Wn. 2d 158, 659 P. 2d 1102 (1983),

IV .CONCLUSION

This case should be remanded for a new trial.

November 26, 2007

Respectfully submitted,



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STATE OF WASHINGTON

COURT OF APPEALS
DIVISION TWO STATE OF WASHINGTON

STATE OF WASHINGTON)
Respondent)
v.)
CHANARA SOEUN)
Petitioner)

No. 36317-8-II
Affidavit of Service of
Brief of Petitioner

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

DANA RYAN , UPON OATH, STATES,

**Than on the 26th day of Nov , 2007, I served upon the Pierce
County Prosecuting Attorney, 930 Tacoma Ave S. Room 936, a copy
of the Brief of Petitioner in this matter by personal service.**

*I declare under penalty of perjury and under the Laws of the State of Washington that the foregoing
Is a true and correct statement .*

Signature



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