

NO. 40929-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ADRIAN TROY ABRAM,

Appellant.

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STATE OF WASHINGTON  
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DIVISION TWO

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Elizabeth P. Martin

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REPLY BRIEF OF APPELLANT

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*PM 6-7-2011*

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT IN FAILING TO REQUEST A JURY INSTRUCTION LIMITING THE USE OF 404(B) EVIDENCE AND ABRAM WAS PREJUDICED BY THE DEFICIENT PERFORMANCE.

In State v. Russell, 154 Wn. App. 775, 784, 225 P.3d 478 (2010), this Court followed the Washington Supreme Court's conclusion in State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007), that when ER 404(b) evidence is admitted, "a limiting instruction must be given." However, upon review, the Supreme Court determined that "the Court of Appeals relied on cases where the issue of reversible error for failure to give a limiting instruction was not before the court. Their reliance on the dictum in these cases is mistaken. State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011)(citations omitted). The Court held that "[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." Id. at 124.

Nonetheless, contrary to the State's argument, reversal is required because Abram was denied his constitutional rights to effective assistance of counsel and a fair trial where defense counsel failed to request a jury instruction limiting the use of highly prejudicial evidence of prior acts of domestic violence. Unlike in State v. Yarborough, 151 Wn. App. 66, 210

P.3d 1029 (2009), and the cases cited therein, the record substantiates that defense counsel's failure to request the instruction was not a matter of trial strategy.

During pretrial motions, defense counsel agreed with the State that if Larkins recanted, evidence of prior incidents of domestic violence would be admissible under State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). However, defense counsel argued that there are limitations to such evidence. 1RP 18-19. When the court ruled that the evidence would be admissible, defense counsel reiterated that the court and the parties must determine the limitations of the evidence. 1RP 20-21. The court responded that it would "leave it to counsel to work out whether there is or is not a limiting instruction that goes with that. There was one I see upheld in Magers. . . . We'll address that issue when we get to jury instructions." 1RP 21. Inexplicably, when the trial court reviewed the jury instructions with defense counsel and the prosecutor, there was no discussion about a limiting instruction and the court did not give a limiting instruction. 3RP 524-534; CP 49-74.

In light of defense counsel's argument that there must be a limitation to the 404(b) evidence, and the fact that he was aware of the Supreme Court's approval of a limiting instruction given by the trial court in Magers, it is evident that counsel's failure to request an instruction was

an omission, not trial strategy. Furthermore, the record substantiates that Abram was prejudiced by counsel's failure to request a limiting instruction because the court instructed the jury that it "must consider all of the evidence" and therefore it was required to consider the prior acts of domestic violence when determining whether Abram committed the crimes of intimidating a witness and tampering with a witness. CP 50.

Reversal is required because defense counsel's failure to request a limiting instruction constitutes deficient performance and Abram was prejudiced by the deficient performance which allowed the jury to improperly consider evidence of prior acts of domestic violence as propensity evidence. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should reverse Mr. Abram's convictions and remand for a new and fair trial.

DATED this 7<sup>th</sup> day of June, 2011.

Respectfully submitted,

  
VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Adrian Troy Abram

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7<sup>th</sup> day of June, in Kent, Washington.

  
VALERIE MARUSHIGE  
Attorney at Law  
WSBA No. 25851

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