

No. 41807-0-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MELCHESTER PHILLIPS, JR.,
Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

Mr. Phillips's trial counsel was ineffective when he failed to seek a limiting instruction regarding the jury's use of testimony that Mr. Phillips assaulted the State's most important witness, G.R. See Appellant's Brief at 25-30. Mr. Phillips maintains no tactical reason underpinned his attorney's failure to ask for a limiting instruction. In his brief, he distinguishes certain precedent with the fact that the parties in this case did not discuss such an instruction, while the parties in the prior cases had. Appellant's Brief at 27-28.

The State counters by pointing out that the parties did discuss a limiting instruction regarding the testimony of another witness, Officer Munson. Brief of Respondent at 27. Thus, it argues, defense counsel "was clearly aware that he was entitled to a limiting instruction similar to WPIC 4.64.01." *Id.*

Mr. Phillips does not dispute that trial counsel, like any other criminal attorney, was generally aware of the existence of limiting instructions. However,

the limiting instruction the State points to had nothing to do with evidence of prior bad acts. Instead, it concerned impeachment of the State's key witness, G.R., with his out-of-court statements. 4VRP 268-69; 3VRP 264-65. By contrast, in the cases discussed in Appellant's Brief, the record revealed trial counsel opted to forgo a limiting instruction specifically regarding prior bad acts testimony. See State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (2005) (court provided limiting instruction regarding testimony about one prior bad act; counsel did not seek similar instruction regarding four others); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (trial court had offered limiting instruction regarding prior bad act; defense counsel did not propose one). It was under those circumstances that the Court found counsel had deliberately considered and rejected a limiting instruction regarding the prior bad acts evidence.

Here, by contrast, nothing in the record indicates trial counsel considered a limiting instruction

regarding the prior bad acts evidence. The fact that a limiting instruction was given regarding impeachment of a witness with out-of-court statements does nothing to establish that counsel similarly considered and rejected a limiting instruction for G.R.'s prior bad acts testimony. Accordingly, unlike in Price and Barragan, here the record does not establish trial counsel made a tactical decision to forgo a limiting instruction regarding the prior bad acts testimony, and trial counsel provided ineffective assistance of counsel.

II. CONCLUSION

For all of these reasons, and the reasons set forth in Appellant's Brief, Melchester Phillips, Jr., respectfully requests this Court to reverse his convictions.

Dated this 7th day of November 2011.

Respectfully submitted,

/s/ Carol Elewski
Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 7th day of November, 2011,
I caused a true and correct copy of Appellant's Reply
Brief to be served, by e-filing, on:

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and, by U.S. Mail, on:

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/s/ Carol Elewski
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ELEWSKI, CAROL ESQ

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