

65406-3

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COA NO. 65406-3-1

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

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STATE OF WASHINGTON,

Respondent,

v.

ANA AYALA BUSTOS,

Appellant.

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FILED  
SUPERIOR COURT  
2011 JUN 15 PM 4:01

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

The Honorable Ronald L. Castleberry, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE LACK OF A LIMITING INSTRUCTION FOR GANG ASSOCIATION EVIDENCE REQUIRES REVERSAL.

The State claims defense counsel made a conscious decision not to request a limiting instruction and therefore counsel's decision cannot be considered deficient. Brief of Respondent (BOR) at 6-7. The record does not show why counsel failed to request a limiting instruction. Assuming it was a conscious decision, the tactical nature of a decision does not insulate it from a claim that the decision was deficient. State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). The touchstone remains whether counsel's decision is legitimate. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009).

The State asserts counsel could reasonably decide the adverse use of a limiting instruction would have outweighed its potential benefits, theorizing such instruction would have enabled the prosecutor's argument and "authorized" the inference that Ayala Bustos was motivated by gang membership to participate in the crime. BOR at 8-9. That assertion fails to recognize instruction constraining the use of gang evidence to its proper evidentiary purpose gives no meaningful advantage to the State. The prosecutor argued gang membership was motive for the crime and the jury was free to consider that argument under the instructions that were in fact

given. See CP 34 (Instruction 1: "The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law."). That a prosecutor could have pointed to the limiting instruction as "authorization" for the argument is insignificant. Given lack of objection to closing argument on this point, jurors in this case had no indication that the argument was anything but authorized under the instructions that were otherwise given by the trial court.

The State did not need a limiting instruction to "enable" the inference that motive for the crime was gang-related because the prosecutor was able to make that argument in the absence of a limiting instruction. But without a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). This means jurors are given free reign to treat bad act evidence as propensity evidence in the absence of instruction telling them not to do so. That is the significant point here. To jurors, propensity evidence is logically relevant. State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986). A juror's natural inclination is to reason the accused is likely to have reoffended by acting in conformity with his or her character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990).

In light of this reality, it makes little sense to claim the absence of a limiting instruction was not prejudicial because such instruction would not have restricted the prosecutor's argument. BOR at 9. Prejudice derives from the jury using the evidence for an improper propensity purpose. Jurors are naturally inclined to do this, regardless of the State's argument.

The State claims State v. Yarborough is indistinguishable. BOR at 7; State v. Yarbrough, 151 Wn. App. 66, 210 P.3d 1029 (2009). Yarborough cited to prior cases holding failure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence. Yarbrough, 151 Wn. App. at 90. The court then disposed of Yarborough's challenge in the following cursory manner: "Yarbrough does not attempt to distinguish these cases. We presume, therefore, that Yarbrough's trial counsel decided not to request a limiting instruction on the gang-related evidence as a legitimate trial strategy not to reemphasize damaging evidence." Id. at 91.

In other words, the appellate court in Yarborough was not going to make an argument for appellate counsel as to why it should distinguish prior case law on the issue. See In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (it is not the function of an appellate court to construct arguments for counsel). Ayala Bustos, in the opening brief, distinguishes

those cases. See Brief of Appellant at 24-28. The particular record before this Court shows the absence of a legitimate tactical reason not to request a limiting instruction.

Finally, the State's argument suggests the failure to request a limiting instruction for gang evidence can never be considered illegitimate. The question of whether counsel's performance was ineffective is not amenable to any per se rule and turns on the facts of an individual case. State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001).

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the conviction and remand for a new trial.

DATED this 15<sup>th</sup> day of June 2011.

Respectfully Submitted,

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15<sup>TH</sup> DAY OF JUNE 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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33010 SE 99<sup>TH</sup> STREET  
SNOQUALMIE, WA 98065

**SIGNED** IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF JUNE 2011.

x *Patrick Mayovsky*