

65406-3

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COA NO. 65406-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANA KARY AYALA-BUSTOS,

Appellant.

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

The Honorable Ronald L. Castleberry, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issues Pertaining to Assignments of Error.....	1
B. <u>STATEMENT OF THE CASE</u>	1
1. Procedural Facts.....	1
2. Trial.....	3
C. <u>ARGUMENT</u>	14
1. THE LACK OF A LIMITING INSTRUCTION FOR GANG ASSOCIATION EVIDENCE REQUIRES REVERSAL.....	14
a. <u>Ayala-Bustos Had The Right To A Limiting Instruction For The ER 404(b) Evidence</u>	14
b. <u>The Court's Failure To Give A Limiting Instruction Allowed The Jury To Consider The Evidence For An Improper Propensity Purpose</u>	16
c. <u>In the Alternative, Defense Counsel Provided Ineffective Assistance In Not Requesting A Limiting Instruction</u>	17
2. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY PROPOSING AN INSTRUCTION THAT WRONGLY STATED THE JURY MUST REACH A UNANIMOUS DECISION IN ORDER TO ANSWER "NO" ON THE SPECIAL VERDICT.....	29
D. <u>CONCLUSION</u>	36

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

1000 Virginia P'ship v. Vertecs,
158 Wn.2d 566, 146 P.3d 423 (2006)..... 32

State v. Bashaw,
144 Wn. App. 196, 182 P.3d 451 (2008),
reversed, 169 Wn.2d 133, 234 P.3d 195 (2010). 32

State v. Bashaw,
169 Wn.2d 133, 234 P.3d 195 (2010)..... 30-34

State v. Asaeli,
150 Wn. App. 543, 208 P.3d 1136 (2009)..... 18

State v. Bacotgarcia
59 Wn. App. 815, 801 P.2d 993 (1990)..... 15, 18, 22, 28

State v. Barragan
102 Wn. App. 754, 9 P.3d 942 (2000)..... 25

State v. Bennett
161 Wn.2d 303, 165 P.3d 1241 (2007)..... 21

State v. Bowen
48 Wn. App. 187, 738 P.2d 316 (1987)..... 21, 28

State v. Britton,
27 Wn.2d 336, 178 P.2d 341 (1947)..... 20

State v. Burkins
94 Wn. App. 677, 973 P.2d 15 (1999)..... 16, 20

State v. Cienfuegos,
144 Wn.2d 222, 25 P.3d 1011 (2001) 25

State v. Donald
68 Wn. App. 543, 844 P.2d 447 (1993)..... 17, 25

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Foxhoven</u> 161 Wn.2d 168, 163 P.3d 786 (2007).....	16
<u>State v. Goldberg,</u> 149 Wn.2d 888, 72 P.3d 1083 (2003).....	30-32
<u>State v. Golladay,</u> 78 Wn.2d 121, 470 P.2d 191 (1970).....	33
<u>State v. Gore,</u> 101 Wn.2d 481, 681 P.2d 227 (1984).....	32
<u>State v. Grisby</u> 97 Wn.2d 493, 647 P.2d 6 (1982).....	24
<u>State v. Halstien</u> 122 Wn.2d 109, 857 P.2d 270 (1993).....	15
<u>State v. Holmes,</u> 43 Wn. App. 397, 717 P.2d 766 (1986).....	22
<u>State v. King</u> 75 Wn. App. 899, 878 P.2d 466 (1994).....	18
<u>State v. Kylo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	24, 30, 32
<u>State v. Lough</u> 125 Wn.2d 847, 889 P.2d 487 (1995).....	15
<u>State v. Martin,</u> 73 Wn.2d 616, 440 P.2d 429 (1968).....	22, 34
<u>State v. Morgan,</u> 123 Wn. App. 810, 99 P.3d 411 (2004).....	31

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Myers</u> 133 Wn.2d 26, 941 P.2d 1102 (1997).....	20
<u>State v. Oswalt,</u> 62 Wn.2d 118, 381 P.2d 617 (1963).....	20
<u>State v. Perkins,</u> 14 Wn. App. 27, 538 P.2d 829 (1975).....	34, 35
<u>State v. Price,</u> 126 Wn. App. 617, 109 P.3d 27 (2005).....	25
<u>State v. Reichenbach</u> 153 Wn.2d 126, 101 P.3d 80 (2004).....	28
<u>State v. Rodriguez,</u> 121 Wn. App. 180, 87 P.3d 1201 (2004).....	21, 34
<u>State v. Roswell</u> 165 Wn.2d 186, 196 P.3d 705 (2008).....	24
<u>State v. Russell</u> 154 Wn. App. 775, 225 P.3d 478, <u>review granted</u> , 169 Wn.2d 1006, 234 P.3d 1172 (2010).....	16, 17
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	16
<u>State v. Scott,</u> 151 Wn. App. 520, 213 P.3d 71 (2009).....	14, 18
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	17, 22, 29, 34

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Townsend,
142 Wn.2d 838, 15 P.3d 145 (2001)..... 33

State v. Wade
98 Wn. App. 328, 989 P.2d 576 (1999)..... 15, 21

State v. Yarbrough,
151 Wn. App. 66, 210 P.3d 1029 (2009)..... 24, 25

FEDERAL CASES

Albrecht v. Horn,
485 F.3d 103 (3d Cir. 2007) 27

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)..... 17, 29

United States v. Roark,
924 F.2d 1426 (8th Cir. 1991) 19

OTHER STATE CASES

Commonwealth v. Billa,
521 Pa. 168, 555 A.2d 835 (Pa. 1989)..... 23, 24, 27, 28

People v. Contreras,
144 Cal. App.3d 749, 192 Cal. Rptr. 810 (Cal. Ct. App. 1983) 19

People v. Parrott,
40 Ill. App.3d 328, 352 N.E.2d 299 (Ill Ct. App. 1976)..... 19

People v. Rivera,
145 Ill. App.3d 609, 495 N.E.2d 1088 (Ill. Ct. App. 1986)..... 19

TABLE OF AUTHORITIES (CONT'D)

Page

OTHER STATE CASES (CONT'D)

People v. Williams,
16 Cal.4th 153, 66 Cal.Rptr.2d 123 (Cal. Ct. App. 1997) 19

RULES, STATUTES AND OTHER AUTHORITIES

ER 105 16

ER 404(b)..... 14-17, 20-22, 24, 25, 27

Laws of 1997 ch. 266 § 1 19

RCW 9.94A.535(3)(s)..... 1

RCW 28A.600.455(2)..... 18

U.S. Const. Amend. VI 17, 29

Wash. Const. Art. I, § 22 17, 29

WPIC 160.00 31

A. ASSIGNMENTS OF ERROR

1. The court erred in failing to give a limiting instruction for ER 404(b) evidence.
2. Appellant received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Did the trial court err in failing to give a limiting instruction for gang association evidence, which allowed the jury to consider that evidence for an improper propensity purpose? In the alternative, was defense counsel ineffective in failing to request a limiting instruction?
2. The court wrongly instructed the jury that it needed to be unanimous in order to answer the special verdict form. Was defense counsel ineffective in proposing this defective instruction?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged 16-year-old Ana Kary Ayala-Bustos with second degree murder Antonio Marks, alleging the aggravating circumstance that she committed the offense to maintain her gang position. CP 92; RCW 9.94A.535(3)(s). Ayala-Bustos was tried alone, the others charged in the crime having already pleaded guilty to second degree

murder. 1RP¹ 355. The jury received instruction on the lesser offense of second degree assault, but convicted Ayala-Bustos of murder and returned a special verdict in support of the aggravating circumstance. CP 52-53; CP 30-31; Supp CP __ (sub no. 39, Verdict Form A, 3/16/10).

The man who stabbed Marks, Marco Castillo, received a standard range sentence of 160 months in addition to a 24-month weapon enhancement. Supp CP __ (sub no. 50, State's Sentencing Memorandum, 4/27/10). Those who kicked Marks all received the low end of the standard range (120 months), except for Ayala-Bustos, who received 150 months confinement. CP 17; 4RP 7. The trial court rejected Ayala-Bustos' equal protection argument based on disparate sentencing.² CP 27-29; 4RP 12-14. This appeal follows. CP 1-13.

¹ The verbatim report of proceedings is referenced as follows: 1RP - 12/17/09, 2/8/10, 2/9/10; 3/8/10; 3/9/10; 3/10/10, 3/12/10 (four consecutively paginated volumes); 2RP - 3/15/10; 3RP - 3/16/10; 4RP - 4/27/10.

² The prosecutor argued the difference in sentence was justified in part because Ayala-Bustos, unlike the other defendants, was found to have committed the offense to maintain her gang position. 4RP 5. The prosecutor also argued Ayala-Bustos lacked remorse. 4RP 4-5. At sentencing, defense counsel told the court Ayala-Bustos had expressed remorse in private. 4RP 7-8. The court held Ayala-Bustos' failure to express remorse directly to the court against her. 4RP 12. Nothing in the record shows the other defendants expressed any remorse.

2. Trial

The event at issue took place near City Hall in Sultan. Ex. 81; 1RP 152. 1RP 152. James Howe lived on Fourth Street and heard voices coming from a group of kids outside late at night. 1RP 152-55. At one point, Howe heard someone say "You motherfucker." 1RP 155. He looked out the window and saw six people outside. 1RP 156. One male, later identified as Antonio Marks, was wearing a jersey with the number "13." 1RP 156. A group of five others were present, standing in the street. 1RP 156. Howe saw a "smaller person"³ from that group move back towards the bus stop while the other members of the group moved toward and surrounded a "body" or "something." 1RP 157-60, 164. Howe then saw members of the group appear to hit "something." 1RP 159. Then he saw a body appear. 1RP 158-59. Three people kicked Marks. 1RP 159, 166. The people then began to move away from the body. 1RP 160. Howe did not keep track of the smaller person's movements after she moved toward the bus stop. 1RP 160-61. But he did not see the smaller person head toward the group again. 1RP 165-66. Howe's wife call 911. 1RP 161. Howe then went into the street and saw the male wearing the

³ The prosecutor acknowledged Ayala-Bustos was this person. 2RP 115-16.

number "13" jersey lying there with blood on his face and under his shirt. 1RP 162-63.

A video camera pointed onto Fourth Street. 1RP 171. The video, which lacked an audio component, shows an altercation between the male later identified as Marks and five others. Ex. 2. The video shows Marco Castillo knocked Marks to the ground and repeatedly punched him in the head. Ex. 2. The other members of the group kicked Marks as he lay on the ground. Ex. 2. Marco Castillo appears to stab Marks with a knife after the others were in the process of departing, although the video is not clear whether Marco also stabbed Marks before then. Ex. 2.

An emergency medical technician (EMT) arrived and saw six stab wounds on Marks. 1RP 175. The EMT considered those wounds life threatening. 1RP 175. Marks did not have a radial pulse and was unconscious. 1RP 175-76. The prognosis at the scene was that Marks was most likely not going to live. 1RP 178. His stomach was distended, which meant he was bleeding inside. 1RP 178. Marks later died. 1RP 184.

Forensic pathologist Carl Wigren conducted an autopsy. 2RP 28. There were contusions on Marks' face. 2RP 30. The patterned abrasions on his face were consistent with being kicked. 2RP 54-55. There was also a contra coup contusion on the back of his head. 2RP 34-35. Such

contusion indicated a forceful impact against a hard surface, probably from falling backward and hitting the ground. 2RP 35-36, 57. There was bleeding in the soft tissues of the scalp and below the thin membranes of the brain (subarachnoid hemorrhage). 2RP 31-33. There was some minor swelling in the brain as a result of the subarachnoid hemorrhage. 2RP 39. The subarachnoid hemorrhage indicated blunt force injury. 2RP 33. Brain swelling can be life threatening. 2RP 40. Wigren did not mention any brain swelling or identify a contra coup injury in his autopsy report. 2RP 66-67, 69-70.

There was significant internal damage from the multiple stab wounds to the abdomen. 2RP 36-37. The bowel was perforated, but the most significant injury was the transaction of the main artery leading from the heart, which feeds vital organs. 2RP 37-38. Half of Marks' total blood volume was in the abdominal cavity. 2RP 38-39. Wigren opined the stabber was probably straddling Marks. 2RP 38. Wigren did not find defense wounds on Marks and inferred Marks was probably knocked unconscious when he hit the ground. 2RP 42-43.

Wigren concluded the cause of death was cranial cerebral injuries due to blunt force trauma of the head and multiple stab wounds to the trunk. 2RP 41. The blunt force trauma and the stab wounds were not independent causes of death; both were contributory. 2RP 41-42. The

brain trauma and the stab wounds would both cause death if left untreated. 2RP 75. People can survive brain trauma with appropriate treatment. 2RP 75. Wigren conceded on cross examination that emergency room staff at Harborview did not a laparotomy (incision to determine source of blood) because Marks had already bled to death. 2RP 71.

Police investigating the scene found a knife in a nearby storm drain with Marks' blood on it. 1RP 187, 354. Police arrested Marco Castillo, who admitted he was the stabber. 1RP 194-95. Marks' blood was found on Marco Castillo's jeans and his brother Adolfo Castillo's shoe. 1RP 353-54.

Ayala-Bustos did not testify at trial. A recorded interrogation police conducted after arrest was admitted as an exhibit. Ex. 81; Pre-Trial Ex. 3.⁴ The interrogation started at about 11:15 p.m. and ended at 12:45 a.m. Ex. 81; Pre-Trial Ex. 3 at 1, 69.

Ayala-Bustos was 16 years old. Ex. 81; Pre-Trial Ex. 3 at 2. Her boyfriend was Jaime Santana. Ex. 81; Pre-Trial Ex. 3 at 8. Ayala-Bustos knew Marco Castillo, Adolfo Castillo and Ivette Rico. Ex. 81; Pre-Trial

⁴ Ex. 81 is the audio recording of the interrogation. There was no written transcript for this recording admitted as an illustrative exhibit at trial. A transcript of the recording was admitted as Pre-Trial Ex. 3. Undersigned counsel has listened to Ex. 81 and compared it with Pre-Trial Ex. 3. The transcript is accurate in all respects relevant to this brief. When citing to facts contained in the police interview, this brief references Ex. 81 and, as an aid to facilitate review, the relevant page number on Pre-trial Ex. 3.

Ex. 3 at 23. Santana was in a gang called Brown Pride Soldiers. Ex. 81; Pre-Trial Ex. 3 at 29-30. Ayala-Bustos was also a member of that gang. Ex. 81; Pre-Trial Ex. 3 at 30, 65.

Earlier that day before the altercation, she and others had gathered at Marco Castillo's house to hang out. Ex. 81; Pre-Trial Ex. 3 at 27-29. Antonio Marks showed up sometime later that night. Ex. 81; Pre-Trial Ex. 3 at 31. She did not know Marks ("Speedy"), except that he was "Joanna's" boyfriend. Ex. 81; Pre-Trial Ex. 3 at 25. She had never seen him before that night. Ex. 81; Pre-Trial Ex. 3 at 66. She did not know if Marks was a gang member: "I don't know nothing about him." Ex. 81; Pre-Trial Ex. 3 at 32, 62-63.

Marks and Marco argued over something, but she did not know what the argument was about. Ex. 81; Pre-Trial Ex. 3 at 32-34. Adolfo Castillo, Marco's brother, did not intervene because "it wasn't his problem." Ex. 81; Pre-Trial Ex. 3 at 34. Marks and Marco appeared to resolve their differences. Ex. 81; Pre-Trial Ex. 3 at 33. Marks subsequently left the house. Ex. 81; Pre-Trial Ex. 3 at 33.

Ayala-Bustos, Marco, Adolfo, Santana and Rico took a walk sometime later. Ex. 81; Pre-Trial Ex. 3 at 35-36. They encountered Marks at a bus stop. Ex. 81; Pre-Trial Ex. 3 at 37. Marks started yelling "stuff" at Marco. Ex. 81; Pre-Trial Ex. 3 at 37. Ayala-Bustos agreed

Marks was "poppin' off." Ex. 81; Pre-Trial Ex. 3 at 37. Marks said something like "what you wanna fight me." Ex. 81; Pre-Trial Ex. 3 at 37-38. Marco said he did not want to fight. Ex. 81; Pre-Trial Ex. 3 at 38. Marks kept goading Marco until he relented and hit Marks. Ex. 81; Pre-Trial Ex. 3 at 38. "[T]hen we got in and that was it." Ex. 81; Pre-Trial Ex. 3 at 38.

Ayala-Bustos acknowledged she was present during the altercation. Ex. 81; Pre-Trial Ex. 3 at 26. She said "they were just fighting and whatever happened, happened, I don't know." Ex. 81; Pre-Trial Ex. 3 at 26. Ayala-Bustos kicked Marks in the stomach. Ex. 81; Pre-Trial Ex. 3 at 27, 39. Marks was probably unconscious. Ex. 81; Pre-Trial Ex. 3 at 42. She did not see any blood. Ex. 81; Pre-Trial Ex. 3 at 52. She did not see Marco pull a knife and did not know he stabbed Marks. Ex. 81; Pre-Trial Ex. 3 at 64. Ayala-Bustos and Santana went to Santana's house after the fight. Ex. 81; Pre-Trial Ex. 3 at 49-50.

Ayala-Bustos said the altercation did not have anything to do with gang membership. Ex. 81; Pre-Trial Ex. 3 at 63. The argument caused the fight. Ex. 81; Pre-Trial Ex. 3 at 63. Ayala-Bustos said she kicked Marks because she wanted to, not because the others were doing it. Ex. 81; Pre-Trial Ex. 3 at 43. It was her decision. Ex. 81; Pre-Trial Ex. 3 at 54. She was angry because he was mouthing off. Ex. 81; Pre-Trial Ex. 3 at 44.

A detective said Ayala-Bustos smiled during police interrogation when told Marks was dead. 1RP 300. One detective said she had a nonchalant attitude and laughed when told she was under arrest for murder. 2RP 23-24. The actual recording allowed for different inferences, including the inference that this 16 year old girl was nervous, as shown by tittering, mumbling and covering her mouth throughout the interrogation. Ex. 81.⁵ Ayala-Bustos did not know Marks was dead until police told her during interrogation. Ex. 81; Pre-Trial Ex. 3 at 47. She did not know what to think. Ex. 81; Pre-Trial Ex. 3 at 47.

Ayala-Bustos was wearing a blue shirt on the night of the altercation. Ex. 81; Pre-Trial Ex. 3 at 32-58. She acknowledged blue was a "BPS" color. Ex. 81; Pre-Trial Ex. 3 at 62. Ayala-Bustos had a three-dot arrangement tattooed near her left elbow dots and some unidentifiable tattoos on her hands. 1RP 264-65; 2RP 77. She left a blue backpack at Santana's house. Ex. 81; Pre-Trial Ex. 3 at 56-57. The three-dot arrangement and "BPS" appeared on the backpack. 1RP 305-07, 315-16.

⁵ At one point, she asked if she could remain silent and said "I don't talk." Ex. 81; Pre-Trial Ex. 3 at 27. The detectives continued their interrogation. Id. The trial court credited a detective's testimony at a CrR 3.5 hearing that he only heard her say "main silent." CP 76. The court ruled police did not have a legal duty to stop interrogation or clarify Ayala-Bustos' intention at that point. CP 77.

Marco Castillo had a "BPS 13" tattoo on his leg. 1RP 216, 225-26. A tattoo on his back read "United We Stand." 1RP 216, 225. There was a three-dot arrangement tattooed on his arm. 1RP 221-223. Marco's belt buckle had "13" on it. 1RP 276-77. Adolfo Castillo had "BPS" tattoos. 1RP 232, 245-46. Jaime Santana had a "BPS" tattoo. 1RP 262-64. A sheriff's deputy was familiar with the "Brown Pride Soldiers" said he had had seen Marco Castillo, Adolfo Castillo and Rico in the past wearing distinctively colored clothing and displaying bandanas out of the back pocket. 2RP 7-8. He saw Marco and Adolfo Castillo wearing jerseys with the number "13" on them. 2RP 8.

Marks wore a baby blue number "13" jersey and a long belt on the night of the altercation. 2RP 12-13. The numbers "1" and "3" were on Marks' shoes. 1RP 181, 252-53. He had a "13" tattoo on his stomach. 1RP 278; 2RP 59. There was a "X3" tattooed on one of his fingers. 1RP 287; 2RP 51-52. "SLV" was tattooed on his fingers. 1RP 287; 2RP 51-52.

Snohomish County Sheriff's Office Deputy Beau Beckner testified as a gang expert. 1RP 324-51. He told the jury that gangs have a hierarchy. 1RP 329. The Mexican Mafia were at the top of that hierarchy. 1RP 331. The Surenos occupied the next rung in the hierarchy. 1RP 330-31. Different gang cliques occupied the lower rungs. 1RP 331. The Brown Pride Soldiers and the South Land Villains were two such street

level cliques in the area. 1RP 333-34. The clique itself has a hierarchy, consisting of the leader, a lieutenant, and various underlings, recruits and kids who were being groomed for membership. 1RP 337-38.

Beckner testified there was gang activity in area schools. 1RP 325-28. The schools provided a fertile ground for gang recruitment, even at the elementary school level. 1RP 336. Kids were groomed for membership. 1RP 338.

Criminal street gangs identify themselves through signs, symbols, colors, handshakes, language, nicknames and so forth. 1RP 331. Clothing, colors and tattoos were important identifiers. 1RP 331-32, 335.

Beckner had been called as a gang consultant to Sultan High School in the 2006/2007 school year. 1RP 341-42. He saw gang related graffiti consisting of "BPS 13" in the area of the school. 1RP 342. He saw Rico and Adolfo Castillo at the school wearing clothing consistent with someone in the Sureno gang family. 1RP 342-43.

The Surenos use the color blue to identify themselves. 1RP 333. The Brown Pride Soldiers generally wear blue. 1RP 333. Based on a photograph of the backpack retrieved from Jaime Santana's room, Beckner identified a bandana in the front mesh pocket. 1RP 349. Beckner said a bandana is like a membership card for a gang member. 1RP 349. Beckner

thought the bandana was navy blue, although it could have been brown.

1RP 350. The backpack was light blue. 1RP 350.

The Mexican Mafia and the Surenos use the number "13" to identify themselves. 1RP 332, 333-34. The Brown Pride Soldiers and South Land Villains both used the number "13" to express allegiance to the Mexican Mafia. 1RP 333-34. The letter "M," which identified the Mexican Mafia, is the thirteenth letter of the alphabet. 1RP 333.

It is very common for the clique's initials to be tattooed. 1RP 335. It is common for the Brown Pride Soldiers to use the initials "BPS." 1RP 334. A three-dot arrangement is also common. 1RP 335. The three dots stand for "mi vida loca," or "my crazy life." 1RP 335. It is a reference to the gang lifestyle. 1RP 335. The three-dot arrangement was specifically associated with the Sureno umbrella gangs. 1RP 335.

According to Beckner, gang members are considered family. 1RP 338. "If something occurs, you're expected to support the gang in whatever they ask." 1RP 338. If a gang member is in trouble or there is a physical altercation, fellow gang members are expected to help. 1RP 339.

Beckner explained to the jury that the concept of respect was the key component of gang life-style, and included the desire to obtain, earn and keep respect between cliques. 1RP 339. Different gang cliques did not necessarily get along; their relationship was subject to change if one

group felt disrespected by the other. 1RP 334-35. If someone disrespects a clique, the typical reaction is violent recourse. 1RP 339.

The prosecutor argued Ayala-Bustos' motive for her conduct that night was her membership in the Brown Pride Soldiers. 2RP 87-88. "As far as they were concerned they were part of the infamous Serranos [sic], people not to be trifled with or fooled with." 2RP 88. According to the prosecutor, Beckner had taught the jury that the key to gang life is respect and that disrespect is usually met with physical confrontation. 2RP 89. Ayala-Bustos and the others attacked Marks because he had disrespected the Brown Pride Soldiers. 2RP 89. "The Brown Pride Soldiers decided they were going to send a message by severely injuring Antonio or killing him. They were going to send a message that they weren't to be trifled with, that they weren't just a small town gang, that they were worthy of their affiliation with the Serranos [sic]." 2RP 90. Ayala-Bustos joined in the attack because she did not want to break the gang code. 2RP 91.

The defense theory was that Ayala-Bustos was not guilty of murder because she was not an accomplice to any action that caused Marks' death, whether it be the stabbing or the head injury. 2RP 92, 101-02. The contra coup head injury that Wigren contended contributed to death was caused by Marks falling backward and hitting his head on the ground after Marco punched him. 2RP 101. Ayala-Bustos did not know

Marco was going to stab Marks. 2RP 92. Marco stabbed Marks at the very end of the altercation. 2RP 92. The defense further argued the incident was not gang-related. 2RP 108-09. Ayala-Bustos' conduct during the police interrogation was explainable as that of nervous teenager acting like one in a stressful situation. 2RP 98-99.

C. ARGUMENT

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

The trial court erred in failing to instruct the jury it could only consider ER 404(b) evidence for a proper purpose. In the alternative, Ayala-Bustos' counsel was ineffective in failing to request a limiting instruction.

a. Ayala-Bustos Had The Right To A Limiting Instruction For The ER 404(b) Evidence.

Admission of gang affiliation evidence is measured under the standards of ER 404(b). State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71 (2009). ER 404(b) prohibits admission of character evidence to prove the person acted in conformity with that character on a particular occasion.⁶ "ER 404(b) forbids such inference because it depends on the

⁶ ER 404 provides in relevant part: "(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular

defendant's propensity to commit a certain crime." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). Prior misconduct is inadmissible to show the defendant is a "criminal type" and is likely to have committed a crime for which charged. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). In other words, ER 404(b) prohibits admission of evidence simply to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

The jury heard a great deal of gang association evidence, including evidence that Ayala-Bustos was a gang member, as well as argument on the role gang membership allegedly played in this case. 1RP 181, 183, 196, 216, 221-23, 225-26, 232, 245-46, 252-53, 262-65, 276-78, 287, 306-07, 315-16; 324-51, 2RP 7-8, 12-13, 51-52, 59, 77, 87-92; Ex. 81. A juror's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). For this reason, an explanation should be made to the jury of the purpose for which ER 404(b) evidence is admitted, and the court

occasion, except: . . . (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

should give a cautionary instruction that it is to be considered for no other purpose. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). A defendant has the right to have a limiting instruction explaining the limited purpose of that evidence to the jury. ER 105.⁷ Defense counsel, however, did not request a limiting instruction for the gang evidence. No one mentioned a limiting instruction issue during colloquy on jury instructions. 1RP 360-72; 2RP 83.

b. The Court's Failure To Give A Limiting Instruction Allowed The Jury To Consider The Evidence For An Improper Propensity Purpose.

The purpose of a limiting instruction is to prevent the jury from basing its verdict on a "once a criminal, always a criminal" reasoning that ER 404(b) is designed to guard against. State v. Burkins, 94 Wn. App. 677, 690, 973 P.2d 15 (1999). "[A] limiting instruction must be given to the jury" if evidence of other crimes, wrongs, or acts is admitted. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). A limiting instruction must be given even if the defense does not ask for one. State v. Russell, 154 Wn. App. 775, 777, 784-85, 225 P.3d 478, review granted,

⁷ ER 105 provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

169 Wn.2d 1006, 234 P.3d 1172 (2010). Under Russell, the trial court erred in failing to give a limiting instruction for the ER 404(b) evidence.

c. In the Alternative, Defense Counsel Provided Ineffective Assistance In Not Requesting A Limiting Instruction.

In the alternative, defense counsel was ineffective in not requesting a limiting instruction for the gang evidence. See, e.g., State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993) (failure to request limiting instruction waived error). Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. A defendant demonstrates prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been different. Id. A reasonable

probability is a probability sufficient to undermine confidence in the outcome. Id.

Regardless of whether fault lay with the trial court or defense counsel, the lack of limiting instruction prejudiced Ayala-Bustos. There is no reason to believe the jury did not consider evidence of other crimes as evidence of Ayala-Bustos' propensity to commit the charged crime. The jury is naturally inclined to treat evidence of other bad acts in this manner. Bacotgarcia, 59 Wn. App. at 822.

A gang, by legal definition and common understanding, is a group involved in criminal activities. See RCW 28A.600.455(2) (defining a gang as "a group which: (a) Consists of three or more persons; (b) has identifiable leadership; and (c) on an ongoing basis, regularly conspires and acts in concert mainly for criminal purposes."). "The law has long recognized that evidence of prior crimes is inherently prejudicial to a defendant in a criminal case." State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994). Evidence of gang affiliation is no exception. Scott, 151 Wn. App. at 526 (citing State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136, 1155-1156 (2009)).

Revulsion attaches when an accused's street gang membership is revealed at trial: "It is common knowledge that there is a deep, bitter, and widespread prejudice against street gangs in every large metropolitan area

in America." People v. Rivera, 145 Ill. App.3d 609, 617-18, 495 N.E.2d 1088 (Ill. Ct. App. 1986) (quoting People v. Parrott, 40 Ill. App.3d 328, 331, 352 N.E.2d 299 (Ill Ct. App. 1976)). That unremarkable observation was made over 20 years ago. Now gangs have invaded small towns like Sultan and their local school systems, as shown by the facts of this trial. 1RP 325-28, 336, 338; see also Laws of 1997 ch. 266 § 1 (Legislature finding measures needed to combat violent gang activities on school campuses).

Evidence of gang association deflects the jury's attention from the immediate charges and causes it to prejudge a person with a disreputable past. United States v. Roark, 924 F.2d 1426, 1434 (8th Cir. 1991). Juries associate gangs with criminal activity and naturally allow inferences regarding a gang member's character to influence deliberations in the absence of limiting instruction on how to use such evidence. Evidence of a defendant's gang membership creates a risk that the jury will improperly infer the defendant has criminal propensities, acted in accordance with such propensities, and was therefore guilty of the charged offense. People v. Williams, 16 Cal.4th 153, 193, 66 Cal.Rptr.2d 123 (Cal. Ct. App. 1997).

For this reason, it is vital that a limiting instruction be given to the jurors to prevent jurors from doing just that.⁸ The purpose of a limiting instruction is to prevent the jury from basing its verdict on a "once a criminal, always a criminal" reasoning that ER 404(b) is designed to guard against. Burkins, 94 Wn. App. at 690. 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). Failure to give a limiting instruction allows the jury to consider bad acts as evidence of propensity, giving rise to the danger that the jury will convict a defendant because she has a bad, criminal-type character.

"A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v.

⁸ For an example of a limiting instruction on gang evidence, see People v. Contreras, 144 Cal. App.3d 749, 755 n.2, 192 Cal. Rptr. 810 (Cal. Ct. App. 1983) ("Evidence has been introduced that the defendant is a member of a particular gang. [¶] Such evidence, if believed, was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. [¶] Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: [¶] The identity and motive of the person who committed the crimes, if any, of which the defendant is accused. [¶] The existence or nonexistence of a bias or interest of any witness. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose.").

Oswalt, 62 Wn.2d 118, 122, 381 P.2d 617 (1963) (quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). The ER 404(b) evidence in this case cannot be considered trivial because it pervaded the trial.

The jury's consideration of the evidence without limiting instruction cannot be considered academic because such evidence stripped the presumption of innocence from Ayala-Bustos by allowing the jury to use the forbidden inference that she was a criminal-type with a propensity to commit crime. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." Wade, 98 Wn. App. at 336. Evidence of other misconduct and criminality strips away the normal presumption of innocence. Bowen, 48 Wn. App. at 195. "The presumption of innocence is the bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The jury's consideration of ER 404(b) evidence without limiting instruction distorts the fact-finding process and undermines the burden of proof, rendering its result unreliable.

The prejudice prong of a claim of ineffective assistance of counsel is comparable to harmless error analysis. State v. Rodriguez, 121 Wn.

App. 180, 187, 87 P.3d 1201 (2004). "When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial." State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968). Such a conclusion is no different than a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d 226.

A juror's natural inclination is to reason that a person previously involved in criminal activities or other bad acts is likely to have reoffended. Bacotgarcia, 59 Wn. App. at 822. To jurors, propensity evidence is logically relevant. State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986). Propensity evidence, however, is not legally relevant. Id. The admission of the ER 404(b) evidence without limiting instruction prejudiced Ayala-Bustos because it allowed the jury, in finding her guilty, to follow its natural inclination to infer she had criminal propensities and therefore likely reoffended in the manner charged by the State. The lack of a limiting instruction undermines confidence in the outcome.

The jury was given instructions on second degree assault as a lesser offense to the second degree murder charge on which Ayala-Bustos

was convicted. CP 52-53; 1RP 362-69. The defense argued Ayala-Bustos was not guilty of murder because she was not an accomplice to the stabbing and the cause of death could not be attributed to anything Bustos did. 2RP 92, 101-02. The prosecutor, in accepting Ayala-Bustos was entitled to lesser offense instructions on second degree assault, conceded one could reasonably believe Ayala-Bustos only committed second degree assault and was not an accomplice to murder. 1RP 367-68. Jurors were more likely to discount Ayala-Bustos' defense to the murder charge when faced with evidence that she was a gang member. The lack of limiting instruction may have tipped the scale in favor of conviction for murder rather than the lesser offense of second degree assault.

The gang evidence should not have been admitted without restriction and without the court's clear and complete instruction to the jury to consider it only for its limited evidentiary purpose and, with a caution not to be prejudiced or biased against the defendant in this case because of her gang affiliation. Commonwealth v. Billa, 521 Pa. 168, 182, 555 A.2d 835 (Pa. 1989). Given the inherently inflammatory and extensive nature of the gang evidence, this Court cannot say with any reasonable certainty that the jury would have returned the same verdict of second degree murder had it been properly instructed.

Defense counsel was deficient for failing to ensure the trial court gave a proper limiting instruction that would have prevented the jury from considering Ayala-Bustos' gang membership as evidence of her propensity to commit the crime charged. Prejudice created by evidence of misconduct is countered with a limiting instruction from the trial court. State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). "[J]urors are presumed to follow instructions." State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). In light of the presumption that jurors follow instructions, it was not a legitimate tactic to fail to propose a proper limiting instruction. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). . Allowing the jury to convict Ayala-Bustos on the basis of bad character did nothing to advance or protect her defense.

Where ER 404(b) evidence is only briefly or vaguely referenced, "trial counsel might reasonably decline to request a limiting instruction from the court where it was felt the prejudice was minimal and that an instruction might serve to emphasize what might have gone relatively unnoticed by the jury." Billa, 521 Pa. at 183. In a given case, therefore, the failure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence. State v. Yarbrough, 151 Wn. App. 66, 90-91, 210 P.3d 1029

(2009) (no deficiency for not requesting limiting instruction on gang evidence), (citing State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (2005); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); Donald, 68 Wn. App. at 551).

Yarbrough and the cases it relies upon cannot be read as establishing a per se rule that counsel is not ineffective in failing to request limiting instruction for ER 404(b) evidence. 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).

The "reemphasis" theory is inapplicable here and cannot be relied on to exonerate counsel's failure to request a limiting instruction. While a defense attorney may frequently choose to forego a limiting instruction for prior bad acts to avoid focusing the jury's attention any further on the acts, here the jury's attention was already highly focused on the gang evidence at issue. This evidence formed a central piece of the State's case because it wanted to prove motive and needed to prove Ayala-Bustos committed the charged crime to maintain her position in the gang in order to obtain the special verdict.

Gang membership and the role it played in the attack was the prosecutor's theme for the case. Multiple witnesses testified about

evidence linking Ayala-Bustos and others to a gang throughout the case. 1RP 181, 183, 196, 216, 221-23, 225-26, 232, 245-46, 252-53, 262-65, 276-78, 287, 306-07, 315-16; 2RP 7-8, 12-13, 51-52, 59. The prosecutor turned Ayala-Bustos into a human exhibit and displayed the gang tattoo on her arm to the jury. 2RP 77. A special expert witness was called to testify at length for the sole purpose of explaining gang culture and indicia to the jury. 1RP 324-51. Detectives raised the gang theme again and again during their interrogation of Ayala-Bustos. Ex. 81; Pre-Trial Ex. 3 at 27, 29-30, 32, 43, 61-66. The prosecutor's entire closing argument was devoted to the gang evidence and the role gang membership played in the charged murder. 2RP 87-92.⁹ The prosecutor repeatedly referenced the gang association evidence in closing argument as it exhorted the jury to find Ayala-Bustos of second degree murder rather than second degree assault and that she committed the murder to maintain her position in the gang. 2RP 87-92.

This is not a case where a limiting instruction raised the specter of "reminding" the jury of briefly referenced evidence. Gang evidence permeated the case. Evidence that Ayala-Bustos was in a gang was not the type of evidence the jury could be expected to forget or naturally

⁹ The prosecutor referenced the Brown Pride Soldiers in his rebuttal argument as well. 2RP 115.

minimize. Therefore the failure to request a limiting instruction cannot be justified on the theory that to so instruct the jury would emphasize damaging evidence that had not already been emphasized. See, e.g., Billa, 521 Pa. at 182-84 (counsel constitutionally ineffective in failing to request a limiting instruction on the jury's consideration of the evidence of the prior sexual assault where such evidence was not briefly referenced but rather formed substantial part of prosecution's case); Albrecht v. Horn, 485 F.3d 103, 127-28 (3d Cir. 2007) (where evidence of spousal abuse was not briefly or fleetingly presented but instead was a substantial portion of the prosecution's case, defense counsel was deficient because he could not reasonably conclude it was strategically preferable to omit the request for a limiting instruction).

As in Billa and Horn, the damaging ER 404(b) evidence here was not presented to the jury by means of a fleeting or vague reference. To the contrary, the evidence was extensive, was emphasized by the prosecutor in its closing argument, and was a substantial component of the State's case. An appropriate limiting instruction, therefore, would not have increased the jury's awareness of the gang membership, but would have placed the limited legal significance of this evidence in proper perspective. Billa, 521 Pa. at 183. As the jury's attention had already been focused upon the gang evidence, the only reasonable strategy would have been to request

the limiting instruction to attempt to minimize or ameliorate the damage by limiting the jury's use or consideration of said evidence. Id.

The presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The record in this case rebuts the presumption of reasonable performance. No legitimate tactic justified the failure to request a limiting instruction. No reasonable attorney could possibly have believed she would be further focusing the jury's attention on this evidence by requesting a limiting instruction. Any professionally competent lawyer would have done what he could to limit the admission and then use of such evidence. Counsel's failure to make such a request had no reasonable basis designed to effectuate her client's interest. Billa, 521 Pa. at 183.

The dispositive question is not whether the jury would consider the gang evidence, but for what purpose they would consider that evidence in the absence of a limiting instruction. Because a jury is naturally inclined to treat evidence of other bad acts as evidence of criminal propensity, the admission of this evidence without a limiting instruction eroded the presumption of innocence and tainted the jury's deliberation. Bowen, 48 Wn. App. at 195; Bacotgarcia, 59 Wn. App. at 822. Reversal of the conviction is required.

2. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY PROPOSING AN INSTRUCTION THAT WRONGLY STATED THE JURY MUST REACH A UNANIMOUS DECISION IN ORDER TO ANSWER "NO" ON THE SPECIAL VERDICT.

Defense counsel provided ineffective assistance in proposing a special verdict instruction that erroneously required the jury to be unanimous in order to answer the special verdict. Strickland, 466 U.S. at 685-86; Thomas, 109 Wn.2d at 229; U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. Vacature of the special verdict and remand for resentencing is required.

Instruction 21 stated in relevant part:

You will also be given a special verdict form for the crime of Second Degree Murder. If you find the defendant no guilty of this crime do not use the special verdict form. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. *Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form.* 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 unanimously have a reasonable doubt as to this question, you must answer "no."

CP 56 (emphasis added).

Instruction 21, in stating all 12 jurors must agree on an answer to the special verdict, was an incorrect statement of the law. In 2003, the Supreme Court held unanimity was not required to answer "no" to whether

the State proved a special finding capable of increasing the sentence. State v. Goldberg, 149 Wn.2d 888, 893, 895, 72 P.3d 1083 (2003). An instruction containing the same improper unanimity requirement was later given in State v. Bashaw, 169 Wn.2d 133, 139, 234 P.3d 195 (2010) ("Since this is a criminal case, all twelve of you must agree on the answer to the special verdict."). A unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. Goldberg, 149 Wn.2d at 893, 895; Bashaw, 169 Wn.2d at 146.

The State proposed Instruction 21. Supp CP __ (sub no. 36, Supplemental Proposed Jury Instructions, 3/12/10). Defense counsel did too. CP 63. The invited error doctrine does not preclude review where, as here, defense counsel was ineffective in proposing the defective instruction. Kyllo, 166 Wn.2d at 861.

The Supreme Court had not issued its decision in Bashaw at the time of Ayala-Bustos' trial. Bashaw, however, did not break new legal ground. Goldberg, decided well before Ayala-Bustos' trial, constituted controlling authority. Counsel has a duty to know the relevant law. Kyllo, 166 Wn.2d at 861. And only legitimate trial strategy or tactics constitute reasonable performance. Id. at 869.

The Court in Bashaw easily resolved the unanimity question by relying on Goldberg as clear and binding precedent: "The jury instruction issue in this case is a narrow one: when a jury has unanimously found a defendant guilty of a substantive crime and proceeds to make an additional finding that would increase the defendant's sentence beyond the maximum penalty allowed by the guidelines, must the jury's answer be unanimous in order to be final? *We answered this question in State v. Goldberg, 149 Wash.2d 888, 72 P.3d 1083 (2003), and the answer is no.*" Bashaw, 169 Wn.2d at 145 (emphasis added).

"The rule from Goldberg, then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." Bashaw, 169 Wn.2d at 146. Defense counsel in this case did not take heed of the rule announced in Goldberg. Instead, defense counsel blindly proposed a pattern instruction that conflicted with binding Supreme Court precedent.

That the proposed instruction was based on WPIC 160.00 does not defeat an ineffective assistance claim. Pattern instructions are not immune from judicial scrutiny. State v. Morgan, 123 Wn. App. 810, 820 n.29, 99 P.3d 411 (2004). Such instruction is not immune from competent counsel's scrutiny either. Counsel is deficient in proposing a WPIC where

proper research would have indicated the pattern instruction was flawed. Kyllo, 166 Wn.2d at 868-69. Trial counsel should have objected to WPIC 160.00 rather than propose it because that pattern instruction conflicted with the Supreme Court's holding in Goldberg.

The Court of Appeals erroneous decision in Bashaw, which was on review when Ayala-Bustos' trial occurred, does not alter the conclusion that counsel was deficient. State v. Bashaw, 144 Wn. App. 196, 200-03, 182 P.3d 451 (2008) (holding unanimity required for special verdict), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010). Competent counsel knows a Supreme Court's holding is binding on the Court of Appeals. See 1000 Virginia P'ship v. Vertecs, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (a decision by the Supreme Court is binding on all lower courts in the state). The Court of Appeals errs in not following directly controlling authority by the Supreme Court. 1000 Virginia P'ship, 158 Wn.2d at 578; State v. Gore, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984). Division Three of the Court of Appeals in Bashaw apparently did not feel bound by the Supreme Court's clear holding in Goldberg. The Supreme Court subsequently rectified that plain error. Bashaw, 169 Wn.2d at 145-46. Defense counsel need not have waited for the Supreme Court to reject the Court of Appeals decision because binding Supreme Court authority in the form of Goldberg already existed.

Counsel's deficient performance prejudiced Ayala-Bustos. Given a proper special verdict instruction that did not require unanimity, the jury may have returned a different special verdict. Bashaw, 169 Wn.2d at 147. As in Bashaw, "[t]he error here was the procedure by which unanimity would be inappropriately achieved." Id. As in Bashaw, "[t]he result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction." Id. As articulated by the Bashaw Court, "We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed." Id. at 147-48.

When assessing the impact of instructional error due to defense counsel's deficient performance, reversal is automatic unless the error is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Townsend, 142 Wn.2d 838, 848, 15 P.3d 145 (2001) (quoting State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)).

An error is not harmless when the appellate court is unable to say from the record before it whether the defendant would or would not have

been convicted but for the error. Martin, 73 Wn.2d at 627. Prejudice in an ineffective assistance case is established when confidence is undermined in the outcome. Thomas, 109 Wn.2d at 226. This standard of prejudice is in accord with the definition of reversible error advanced by the Court in Martin. Rodriguez, 121 Wn. App. at 187 (prejudice analysis for ineffective assistance comparable to harmless error analysis). It is also in accord with the prejudice analysis advanced in Bashaw. See Bashaw, 169 Wn.2d at 147-48 ("We cannot say with any confidence what might have occurred had the jury been properly instructed.").

The special verdict, arrived at by means of an instruction that distorted the fact-finding process, should be vacated. Id. at 148. The State may argue Ayala-Bustos has no remedy beyond vacature of the special verdict because the trial court did not impose an exceptional sentence based on the aggravating factor found in the special verdict. That argument would be founded if the record showed the special verdict had no effect on the trial court's determination of the standard range sentence. See State v. Perkins, 14 Wn. App. 27, 33-34, 538 P.2d 829 (1975) (where jury should not have been asked to return special verdict, remand for resentencing not required because "there is no indication that in imposing sentence the trial court gave even the most remote consideration to the jury's special verdict.").

Such is not the case here. Remand for resentencing is an appropriate remedy where the court may have imposed a different sentence in the absence of the special verdict. Perkins, 14 Wn. App. at 33-34. The prosecutor relied on the presence of the special verdict to argue against Ayala-Bustos' sentence did not violate her right to equal protection. 4RP 5. He also based his standard range sentencing recommendation on the assertion that "this was simply gang business," which explained her attitude during the police interview and supposed lack of remorse. 4RP 3-4. Ayala-Bustos' gang membership and the role it played in the offense figured prominently in the trial court's sentencing remarks. 4RP 9-14. This Court should vacate the special verdict finding and remand for resentencing.

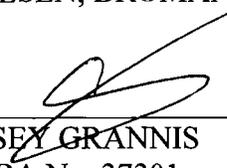
D. CONCLUSION

For the reasons stated, this Court should reverse the conviction and remand for a new trial. In the event this Court declines to do so, the special verdict should be vacated and the case remanded for resentencing.

DATED this 21st day of December 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 65406-3-1
)	
ANA CARY AYALA BUSTOS,)	
)	
Appellant.)	

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 21ST DAY OF DECEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING 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
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] ANA CARY AYALA BUSTOS
ECHO GLEN CHILDREN'S CENTER
33010 SE 99TH STREET
SNOQUALMIE, WA 98065

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF DECEMBER 2010.

x *Patrick Mayovsky*

2010 DEC 21 PM 4:07