

NO. 44157-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

BALDEMAR LAZARO, JR.,

Appellant.

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

The Honorable Nelson Hunt, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the State to introduce evidence related to Mr. Lazaro's gang affiliation.

2. Mr. Lazaro was denied his right to effective assistance of counsel when his trial attorney failed to request an instruction informing the jury that it could only consider gang evidence for limited purposes.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the State fails to establish any nexus between the alleged crime and the defendant's gang affiliation, does the trial court commit reversible error by allowing introduction of evidence of the defendant's gang affiliation? (Assignment of Error 1).

2. Was Mr. Lazaro denied his right to effective assistance of counsel where his trial attorney moved to exclude gang evidence due to its prejudicial nature, and where the evidence was admitted only for the limited purpose of showing motive, but counsel failed to propose a jury instruction expressly stating the limited purpose for which gang evidence could be considered? (Assignment of Error 2).

C. STATEMENT OF THE CASE

1. Procedural history:

Baldemar Lazaro, Jr. was charged by information filed in Lewis County Superior Court on April 17, 2012, with assault in the second degree

against Braulio Mora, contrary to RCW 9A.36.021. Clerk's Papers [CP] 1-3.

No pretrial motions regarding CrR 3.5 or 3.6 were made.

Mr. Lazaro was tried by a jury, the Honorable Nelson Hunt presiding. Report of Proceedings (RP) (8/9/12) at 11-141.¹

Prior to trial, Mr. Lazaro objected to testimony regarding gang affiliation. RP (8/9/12) at 3-6. The court denied the motion to exclude the testimony, finding that it was admissible to show motive under ER 404(b). RP (8/9/12) at 6-7.

Mr. Lazaro was convicted of second degree assault as charged. CP 61; RP (8/9/12) at 137.

At sentencing, the court imposed a standard range sentence of 70 months. CP 96; RP (10/31/12) at 28.

Timely notice of appeal was filed October 31, 2012. CP 107. This appeal follows.

2. Trial testimony:

On August 24, 2011, while a resident at Green Hill School in Lewis County, Washington, Baldemar Lazaro was involved in a fight with Braulio

¹The record of proceedings consists of three volumes: RP (June 21, 2012, June 28, 2012, August 2, 2012) hearings; RP (August 9, August 10, 2012), jury trial; RP (September 13, 2012, September 25, 2012, October 11, 2012, October 24, October 25, 2012, hearings; and RP (October 31, 2012), sentencing.

Mora. RP (8/9/12) at 18, 19.

Mr. Mora was called as a witness but would not take the oath. He said that he “was not going to say anything” and that he did not “want to charge anybody with anything.” RP (8/9/12) at 12-15. The State proceeded with its second witness, Richard Hughes, a residential counselor at Green Hill. RP (8/9/12) at 15.

Over defense objection, Mr. Hughes stated that Mr. Lazaro and Mr. Mora are affiliated with two rival gangs that originated in California. RP (8/9/12) at 21, 23, 24. He stated that Mr. Lazaro is affiliated with a gang called the Nortenos and that Mr. Mora is a member of a gang called the Surenos. RP (8/9/12) at 22, 23.

On August 24, 2011, Mr. Hughes took six Green Hill residents, including Mr. Lazaro and Mr. Mora, into a recreation yard after having been on “lock down” earlier that day. RP (8/9/12) at 24, 27. Mr. Hughes stated that after the group was let outside, Mr. Lazaro and Mr. Mora went across the yard “and face[d] off with each other and started fighting.” RP (8/9/12) at 28. Mr. Hughes called for help using his radio. RP (8/9/12) at 29. He stated that they were mutually fighting each other and Mr. Lazaro got Mr. Mora on the ground and continued to hit him. RP (8/9/12) at 30, 31. Mr.

Hughes pulled Mr. Lazaro off him. RP (8/9/12) at 31, 32. He then saw Mr. Lazaro kick Mr. Mora, who was still sitting on the ground, across the face. RP (8/9/12) at 30, 32, 33. He stated that Mr. Lazaro then got on top of Mr. Mora and started to punch him eight to ten more times. RP (8/9/12) at 30, 35.

Mr. Lazaro was put in restraints and taken to his room. RP (8/9/12) at 36-37. Mr. Mora was taken to Green Hill's health center and then taken to Providence Hospital in Centralia. RP (8/9/12) at 37.

Mr. Mora was treated by Dr. Paula Godfrey, an emergency physician, at Providence Hospital. RP (8/9/12) at 69. She stated that he had three fractures of the bone below the eye socket, and bruising on the right side of his face. RP (8/9/12) at 71.

Mr. Lazaro's counsel rested without calling any witnesses. RP (8/9/12) at 83.

D. ARGUMENT

- 1. TESTIMONY REGARDING GANG AFFILIATION WAS INADMISSIBLE BECAUSE IT WAS UNFAIRLY PREJUDICIAL, IRRELEVANT, AND IMPROPER PROPENSITY EVIDENCE UNDER ER 404(B).**

The evidence of Mr. Lazaro's and Mr. Mora's alleged gang affiliation was inadmissible because the State produced no evidence that the assault was connected to gang activity.

The appellate court reviews trial court evidentiary decisions for abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 578, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Evidence of criminal gang affiliation is inadmissible in a criminal trial when it merely reflects a person's associations. *Dawson v. Delaware*, 503 U.S. 159, 166-167, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992); *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009). There must be a connection between the crime and the organization before the evidence becomes relevant. *Delaware*, 503 U.S. at 166, 168; *Scott*, 151 Wn. App. at 526. A trial court may not admit gang affiliation evidence unless evidence exists of a nexus between the crime and gang membership. *Scott*, 151 Wn. App. at 526; *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995).

It is well established that a defendant must only be tried for those offenses actually charged. Consistent with this rule, evidence of other bad

acts must be excluded unless shown to be relevant to a material issue and more probative than prejudicial. *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982).

The admissibility of gang affiliation is measured under the standards of ER 404(b). *State v. Boot*, 89 Wn. App. 780, 788-790, 950 P.2d 964 (2009). Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to commit crimes. Evidence of other crimes or bad acts may be admissible under ER 404(b), however, as proof of premeditation, intent, motive, and opportunity:

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.

ER 404(b); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Bad acts under ER 404(b) include “acts that are merely unpopular or disgraceful.”• *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

Gang affiliation falls within the definition and is treated accordingly. *See State v. Scott*, 151 Wn. App. 520, 526-27, 213 P.3d 71 (2009) (admission of gang evidence measured under the standards of ER 404(b)).

Before such evidence may be admitted, the trial court must first identify the purpose for which the evidence is being admitted. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Next, the court must determine that the proffered evidence is logically relevant to prove a material issue. *Powell*, 126 Wn.2d at 262. The test is whether such evidence is relevant and necessary to prove an essential fact of the crime charged. *Saltarelli*, 98 Wn.2d at 362; *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984).

Evidence is logically relevant if it tends to make the existence of the identified fact more or less probable. *Saltarelli*, 98 Wn.2d at 361-62.

Finally, assuming the evidence is logically relevant, the court must determine whether its probative value outweighs any potential prejudice. *Saltarelli*, 98 Wn.2d at 362-63; *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983); ER 403.

In this case, the State sought to introduce evidence of gang affiliation for the purpose of establishing a motive. However, prior to admitting the gang affiliation evidence, the trial court failed to engage in the required ER 404(b) three-part analysis, or any apparent analysis, on the record. It is not clear if the court conducted any weighing of the probative value versus the

obvious prejudicial impact of this testimony. RP (8/9/12) at 6-7. In the absence of any analysis of what the gang affiliation evidence would consist of, the purpose of its admission as well as its relevance, the admission of the gang evidence was in error.

Moreover, the gang affiliation evidence was not probative of, or even relevant to the crime, other than the contention by the State that because Mr. Lazaro and Mr. Mora are apparently from rival gangs, the fight **must** have been gang related. No evidence existed that the fight occurred due to gang affiliation or in response to either Mr. Lazaro's or Mr. Mora's gang activities. Instead, dozens of reasons unrelated to gang membership could explain why the fight occurred.

In short, the State made no connection between gang culture and Mr. Lazaro's acts and made no connection with the crime for which he was accused. In cases in which there is no connection made between a defendant's gang affiliation and the charged offense, admission of gang evidence is prejudicial error. *See Scott*, 151 Wn. App. at 527, 528 (citing *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136, 1155-1156 (2009)).

Because the State failed to prove the offense was gang-related, the court erred by admitting any evidence related to gang affiliation. The

evidence simply established that Mr. Lazaro was in a gang, and therefore the jury was free to conclude he was a bad person and likely to commit crimes.

The court's introduction of the highly prejudicial evidence that Mr. Lazaro was a gang member, and all the evidence related to gang activity, was reversible error. Mr. Lazaro is entitled to a new trial.

2. **MR. LAZARO WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO REQUEST A LIMITING INSTRUCTION.**

Effective assistance of counsel is guaranteed by both the United States and Washington State constitutions. U.S. Const. and VI; Wash. Const. art. I, Â§ 22 (amend. x); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

The test for ineffective assistance of counsel has two parts: (1) the defendant must show that defense counsel's conduct was deficient, *i.e.*, that it fell below an objective standard of reasonableness; and (2) such conduct must have prejudiced the defendant, *i.e.*, there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would have been different. *State v. Thomas*, 109 Wn. 2d 222, 225-26, 743 P.2d 816

(1987) (adopted test from *Strickland*). A “reasonable probability” means a probability “sufficient to undermine confidence in the outcome.”• *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case.”• *Strickland*, 466 U.S. at 693.

As argued in Section 1, *supra*, evidence of other bad acts “is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). Evidence of a defendant’s affiliation with gangs is not automatically precluded from admissibility under this rule. There are limited exceptions in which a jury may consider gang evidence for a non-propensity purpose. *See State v. Campbell*, 78 Wn. App. 813, 821-22, 901 P.2d 1050 (1995) (evidence properly admitted to show premeditation, motive, and intent). Where evidence of other misconduct, however, such as gang affiliation, is admitted under ER 404(b), it should be accompanied by a limiting instruction under ER 105 directing a jury to disregard the propensity aspect of the evidence and focus solely on its proper purpose. *State v. Griswold*, 98 Wn. App. 817, 825, 991 P.2d 657 (2000).

Here, the trial court admitted the gang evidence for the purpose of explaining the motive for the fight. RP (8/9/12) at 6-7. Unfortunately, the jury was never told that they could consider the gang evidence for the limited purpose of motive only.

An attorney's failure to propose an appropriate jury instruction can constitute ineffective assistance. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001). An attorney's failure to request a jury instruction that would have aided the defense constitutes deficient performance. *See Thomas*, 109 Wn.2d at 226-29 (failure to propose voluntary intoxication instruction). Legitimate trial strategy or tactics generally cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

Defense counsel moved to exclude testimony regarding Mr. Lazaro's alleged gang affiliation. RP (8/9/12) at 3-6. Inexplicably, after the trial court made its ruling the evidence admissible, counsel failed to request an instruction to the jury that jurors would only consider the evidence for the narrow purpose for which it was admitted. This was not done for legitimate trial strategy and was therefore ineffective.

In addition, Mr. Lazaro suffered significant prejudice from this omission. Mr. Lazaro's role in the fight was not as the instigator; there was no testimony that Mr. Lazaro started the fight. Mr. Hughes testified that the fight initially was "mutual." RP (8/9/12) at 30, 31. But the State's witness testified that Mr. Lazaro was a member of the Nortenos, that Mr. Mora was in the Surenos, and that these are rival gangs. Without a limiting instruction, the jurors were free to convict Mr. Lazaro not because they were convinced beyond a reasonable doubt that he committed second degree assault but because he was painted as the type of dangerous gang member who was capable of such a terrible act. The jury was free to base its determination of guilt on Mr. Lazaro's character. This is the exact result that ER 404(b) seeks to avoid.

E. CONCLUSION

Based on the foregoing arguments, Baldemar Lazaro, Jr. respectfully requests this Court reverse and dismiss his conviction.

DATED: April 30, 2013.

Respectfully submitted,
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STATUTES

RCW 9A.36.021

Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

CERTIFICATE OF SERVICE

The undersigned certifies that on April 30, 2013, that this Appellant's Opening Brief was sent by JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a true and correct copy was hand delivered to Sara Beigh, Lewis County Prosecutor and a copy was mailed by U.S. mail, postage prepaid, to Baldemar Lazaro, Jr., c/o Green Hill School, 375 SW 11th, Chehalis, WA 98532.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on April 30, 2013.

Peter B. Tiller

PETER B. TILLER

TILLER LAW OFFICE

April 30, 2013 - 3:42 PM

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