

Court of Appeals of State of Washington
Division II

NO: 44870-0-II

State of Washington
Respondent,

V.
Jose German,
Appellant, Pro-se
RAP 10.13

Appeal From Superior Court of the
State of Washington For Pierce County
The Honorable John R. Hickman, Judge

PRO-SE Brief of Appellant

Jose German - Pro-se
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Assignments of error

- #1 - Trial court abused its discretion in ordering defense counsel "pre-trial" not to use any analogies or commonly known cases to relate or argue case to jury
- #2 - Trial counsel not requesting severance or mistrial for arising conflicts amounted to ineffective assistance
- #3 - Trial counsel not requesting lesser included instruction for Assault 2^o (Brandishing or unlawfully displaying firearm) amounted to ineffective assistance
- #4 - Trial counsel not challenging a warrant based on an illegal search amounts to ineffective assistance.
- #5 - Trial counsel not addressing/objectioning to Prosecutor's misconduct in statement of "Truth" in closing was ineffective assistance
- #6 - Trial Court abused its discretion by not admonishing prosecutors statement of "Truth" to jury's duty to convict.
- #7 - Appellate counsel filing frivolous brief on non-issues while ignoring valid issues that have merit, denied defendant right to effective counsel on direct appeal

Issues pertaining to assignments of error

- #1 - Did trial courts abuse of discretion ordering defense counsel "pre-trial" not to argue similar cases to jury prejudice defendants right to fair trial
- #2 - Did trial counsel not requesting a severance of trials or mistrial prejudice defendants' right to fair trial.
- #3 - Did trial counsel not requesting a lesser included offense deny defendant right to effective assistance
- #4 - Did trial counsel not objecting to warrant, allowing unlawfully obtained evidence used in trial, prejudice defendants right to fair trial, effective assistance
- #5 - Did trial counsel not objecting to prosecutor's prejudicial statements of the jury's duty to find "Truth" amount to ineffective assistance of counsel
- #6 - Did trial court abuse its discretion by failing to admonish prosecutor's prejudicial comment of "Truth" by correcting it with a curative instruction, or verbally correcting it.
- #7 - Did appellate counsel filing a frivolous brief prejudice defendants right to direct appeal

Statement of the case - Procedural History -
Mr German was charged with two counts of 2^o assault, one count of second degree vehicle prowl, and one count of first degree unlawful possession of a firearm, CP 59-61. His co-defendant MR. Urrieta was charged with a misdemeanor car prowl.

- Facts of case -

On April 22, 2012, Mr Noah Frampton and MR Frank James were working security at Charley's Pub in Fircrest, RP 167, 293-94. That night they gave conflicting eye witness statements as to what either saw. RP 197 (opposed to) RP 332, They gave slightly conflicting descriptions RP 193-94 (opposed to) RP 307, MR James claims it was Frampton who said something to the two suspects RP 200^{A+} 23-25 (opposed to) Frampton saying James said something RP 303^{A+} 20-25 They both agree that one of the two men brandished a Firearm but did not point it at either of them, RP RP 202^{A+} 13,14 (AND) RP 334^{A+} 25. While one eye witness identified Defendant Urrieta - RP 195 at 24, 25 - RP 196^{A+} 1-11 and again RP 201^{A+} 17-20 (as opposed to) Frampton identified Mr German RP 327. There were No prints on the gun RP 583^{A+} 16-24, However the prosecutor, not the jury, decided MR. German was guilty and charged his co-defendant with the role of being

the non-involved and charged MR German as the main perpetrator of the crimes.

Police were dispatched. Officer Roberts saw two Mexicans working on their car RP 230,253 He approached both Mexicans with his gun drawn saying "Whats up fellas?" RP 233 They ran into their apartment where officer Roberts kicked down the door and shot both unarmed Mexicans in the back RP 239-250

- Argument -

1[#] Trial Court abused its discretion by ordering defense counsel "Pretrial" not to use analogies or commonly known criminal cases to relate or argue case to jury.

"Appellate Courts review the trial courts decision to limit closing argument for abuse of discretion"

312 P.3d 41

"A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court"

STATE V. Demcy 144 WN2d 753

"Thus, we reverse only if the trial court's exercise of discretion was manifestly unreasonable or based on untenable grounds," State V. Lamor 172 Wash 2nd 85,94

The trial court in this case clearly exceeded its authority to use known or familiar cases and analogies to argue and present defense to a jury. RP 139^{at} 5-18 Defense counsel objected to this "Gag order" RP 139^{at} 23-25

Using analogies of known cases to explain difficult or technical legal terms or issues to a jury is an extremely common practice and a fundamental corner stone of the lawyers' strategy to relate their case to a jury. Jurors are "NOT" legal professionals and throughout history courts have used this technique to put cases in layman's terms (Including the prosecutor in this case!) Each generation has a case or cases that stand out for common people like jurors to relate to. Over is the O.J. Simpson trial, or even "to kill a Mocking bird" - which the prosecutor was allowed to use in closing RP 743 A+ 17-25 RP 744 A+ 1-25 - Giving the defense this order pre-trial had a huge negative impact on defense trial strategy and even effected our ability to begin opening statements RP 143 A+ 13-16.

However, the prosecution was given free reign to use analogies not just related to criminal acts but even hunting analogies. Statements during trial like, "Most people think of speeding tickets when they think of firecrest" RP 238 A+ 1-3. Even multiple state's witnesses supported the prosecution's case by referring to other criminal cases. RP 280 A+ 17,18. Again, in closing statements the prosecutor was allowed to relate his theory to the jury through "hunting" analogies. Would reasonable minds conclude it more appropriate to use hunting analogies to describe a situation where white people gun down two unarmed Mexicans

Shooting them in the back, than to allow defense to use commonly known cases of white officers shooting unarmed minorities RP 761, 762

Even Prosecutors expert witnesses testify using TV crime shows to help prove prosecutors theory & case to jury RP 601 A+ 23-25

It is not our belief the prosecutor should of been limited or the trial courts had authority to limit the prosecutions use of such analogies. In fact, we support it. It was the courts ruling to deny defense ability to do the same thing that is unprecedented, unreasonable and put an unfair burden on defense that prejudiced our ability to adequately present our theory to the jury and by any definition, was an abuse of discretion

#2 - Trial counsel not requesting severance of trials or mistrial amounted to ineffective assistance -

"A defendant seeking severance has the burden of demonstrating that a trial involving all counts would be so prejudicial as to outweigh the concern for judicial economy"

CrR 4.4 (b)

"Joinder of offenses carries the potential prejudice if (1) the defendant may have to present separate, conflicting defenses, (2) the jury may infer guilt on one charge from evidence of another, or (3) the cumulative evidence may lead to guilty verdict on all charges, if considered separately, the evidence would not support every charge" CrR 4.4 (b)

307 P.3d 788

P24

In this trial where two people are implicated in a crime and the prosecution only chooses one of the two to stand accused of being the more culpable, the main perpetrator, when the identity of which is known pre-trial to be in question and serious doubt but the co-defendant is exonerated from all wrong doings and only charged with the lesser crime of misdemeanor car prowling, the charging documents alone would give a reasonably effective attorney good reason to request a trial severance when just the reading alone exonerates Defendant Urcieta and implicates Mr. German. This relieves the prosecutor's burden of having a jury determine who was the actual main perp. The only two eye witnesses gave conflicting statements as to who committed these offenses - Mr James identified MR Urcieta RP 195 A+ 24, 25 - 196 A+ 1-11, RP 201 A+ 17-20, RP 209 A+ 4-25. While the other identified MR. German. There were no usable prints on the gun, the shells, the car RP 583 A+ 16-24. The procedure police used to identify which was the main suspect was very flawed RP 184 A+ 10-15, RP 185 A+ 4-6, Even stipulation #2 on RP 163 A+ 1-6, implicated MR. German as the main suspect with the gun. Knowing all this, defense counsel should or reasonably known the prosecutor was using the way he charged these two defendants to implicate MR German and to request a trial severance.

Even if this for whatever reason wasn't enough to put defense counsel on Notice, after trial began and all the way through the entire trial, a "Co-Counsel" repeatedly and unnecessarily implicated MR. German as the main suspect and continuously sided with prosecution to prove it was in fact MR German who committed the more severe crimes charged. A strategy that did nothing to help his client, Mr Urricta, as he wasn't even charged with any of these crimes and only served to assist the prosecution. Having a "Co-counsel" to prosecute Mr. German was extremely prejudicial and trial counsel not requesting a "Mis trial" based on "Co-counsel" helping the prosecutor identify MR German as the primary suspect and convict him of the more serious crimes was ineffective assistance. IN RP 332 A+ 2-18, "Co-counsel" continuously implicates Mr German. Again in RP 333 A+ 7-13. Again at RP 334 A+ 1-25, and again "Co-counsel" nails home the case against MR German being guilty of the serious offenses charged. RP 448 A+ 14-25, and again in RP 449 A+ 1-24. He even attacks the witness who attempts to exonerate MR German, again acting as an adversary to defense by advocating for the prosecution. A line of questioning the prosecutor picks up with in his re-direct RP 450 A+ 6-10. Then again "Co-counsel" implicates Mr German in RP 513 A+ 2-16

This tactic of attacking, implicating MR German and siding with the prosecution went to such an extreme that "Co-counsel" even began to object to defense for presenting evidence that exonerated MR. German RP 671 And again siding with the prosecutor "I'm not objecting and I'm going the other way. This conflict continued in RP 679 A+ 16-20 and throughout RP 680, 681. This became so blatant even the prosecutor had to point out the miscarriage of justice taking place by "Co-counsel" siding with prosecution to convict Mr German and how Mr German would be entitled to a new trial RP 681 A+ 17-24. We Agree.

This strategy by "co-counsel" pre-ceeded trial, went through trial and even into his closing arguments. RP 766, 767

In state V. Emery 253 P.3d 413, Your court held, "Trial ~~court's~~ counsel's failure to move for a severance of defendants trial..... was reasonable strategy, therefore did constitute ineffective assistance where victim positively identified defendant, evidence corroborated victim's version of events, and DNA linked defendant to crime, and defense strategy was to admit sex acts, but to claim lack of criminal intent and to implicate co-defendant, which could have a more favorable impression on jury, in contrast to co-defendant denial when faced with DNA evidence" 6-Amend

Mr German's case is a stark contrast to this, Conflicting witness, No DNA, No Finger prints, RP 583 A+ 16-24. All the prosecutor had was the way the charges were filed and "Co-counsel" to help convict Mr. German.

#3- Trial counsel Not requesting a lesser included offense (Brandishing or unlawful display of a firearm) amounted to ineffective assistance of counsel.

Through out the entire trial the only one thing the two witnesses could agree upon was the person with the gun "Waived it in the air, Did Not point it at us" RP 202 A+ 13, 14. The other witness agreed RP 230 A+ 17 RP 286 A+ 15-17, RP 334 A+ 25, RP 335 A+ 1, 2. Even the reporting officers all agreed on this fact. One even calling it a case of "Brandishing a gun" RP 437 A+ 5-9 As well as the other officer at RP 668 A+ 15, 16. The elements are present in both crimes. The prosecutor supports this in saying it was the security guards who "Scared off" the defendants RP 753 A+ 3-7

With all the evidence supporting a lesser included offense to the Assault 2^o being a "Brandishing or unlawful display of firearm" trial counsel not requesting an instruction falls short of effective assistance proscribed by Strickland V. Washington 466 US 668 This can not be considered a trial strategy under State V. Kyllö 166 Wash 2d 856, 863 and violates MR German's 6th Amend right to counsel

"Court applies the two prong test" to determine if a defendant is entitled to a lesser included offense instruction. 1st, each element of lesser offense must be necessary element of charged offense, 2nd The evidence must support an inference that the lesser crime was committed" State V. Sublett 176 Wash 2d 58, 83

#4 - Trial counsel not challenging warrant based on illegal search falls below effective assistance.

I defer to the prosecution to argue this issue. He raised in his brief repeatedly (pro's brief pg 5, 6, 7, 8, 9) If prosecutor's argument is correct, which we believe, and defense counsel should of objected to the warrant, then by prosecutor's own admission, such deficient performance was very prejudicial towards MR German meeting the second prong as it allowed evidence at trial that should of been challenged so as to exclude it or at the very least preserve his right to appeal it at trial.

State V. Thomas 109 Wash 2d 222, 225, 226
Strickland V. Washington 4/66 US 668

USCA Const 6 Amend Wests RCW Const. Art. I § 22

#5 - Trial counsel not objecting to prosecutor's statement to the jury's duty to find the "truth" in closing was ineffective assistance.

Again, I defer to prosecutor's brief pg 15.

to support my argument that trial prosecutor's statements regarding the jury's duty to find the "Truth" was inappropriate and prejudicial towards defendant as it misled jury as to what its duty was and relieved prosecutor of burden of proof to prove beyond reasonable doubt.

"Prosecutor's statement during closing argument asking jury to search the truth is not the jury's job. Question for jury was whether burden of proof had been carried by the party who bore it"

STATE V. Berube 286 P.3d 402, 6 Amend

In prosecutor's closing, he repeatedly misinformed the jury as to the meaning of their jury instruction and their duty RP 746 A+ 11-16. He uses the same "Truth your courts ruled was improper."

#6

Trial court abused its discretion by not admonishing prosecutor's misleading the jury as to their duty to find the "Truth".

For the same reason stated above, the trial court failed to provide a curative instruction or address the jury by informing them that the prosecutor's version of what their duty was to convict as pertain to the instructions was incorrect. Prosecutor made comments in RP 746 A+ 11-16

"Failure to exercise discretion is an abuse of discretion"
165 Wash App 112, 125

#7- Appellate Counsel filing frivolous brief on non-issues, while ignoring or attempting to raise valid issues amounts to ineffective assistance.

"To prevail for ineffective assistance of appellate counsel the petitioner must demonstrate the merit of any legal issue counsel raised inadequately or failed to raise and how he was prejudiced" 6 Amend D'Allesandro in re, 314 P. 3d 744

"Since petitioner has not had a chance to raise issues for judicial review the heightened standard does not apply," State V. Coats 173 Wash 2d at 132

To satisfy this, MR German must show appellate counsel should of known to raise issue for review - Morris 176 Wash 2d at 167

Not only can we show appellate counsel should of known what to raise, we contend counsel should of known what not to raise as it was frivolous. As trial counsel pointed out, the issue raised by appellate counsel regarding jury instruction has already been addressed by your court and our Supreme Court. RP 736 A+ 11, 12. The trial court went as far as to say its been ruled constitutional all the way to the US Supreme Court, RP 736 A+ 13-23

The only other frivolous issue raised by appellate counsel was regarding the illegal search. As pointed

out in prosecutor's brief, this issue should of been addressed originally by trial counsel regarding the warrant issued and if prosecutor is correct, this means appellate counsel should of known to file ineffective assistance for trial counsel not challenging a warrant used to collect evidence used to convict defendant. Was Mr German prejudiced by appellate counsel filing a frivolous brief? Mr. German's Native language is Spanish - not English. He has a limited education. He is not a scholar of law. He is handicapped - A disability that prevents him from writing, he has no use of his writing hand - Even with all this he has managed to raise issues that if argued by competent counsel would have merit before your court. Not doing so has effectively denied him his right to direct appeal.

— Conclusion —

For the reasons stated above, this court should reverse German's conviction and remand for new trial or at minimum, appoint counsel to file an appeal in MR German's behalf

Dated this 15th day of May, 2014

Respectfully submitted,
Jose German
Jose German, Pro-se