SUPREME COURT NO. 91423-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE GERMAN,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION THREE

Court of Appeals No. 44870-0-II
Pierce County No. 12-1-01472-0

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, JOSE GERMAN, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the February 3, 2015, unpublished decision of Division Two of the Court of Appeals affirming his convictions of second degree assault with a firearm enhancement, second degree vehicle prowling, and first degree unlawful possession of a firearm.

C. ISSUES PRESENTED FOR REVIEW

1. Where the State failed to establish that exigent circumstances justified the warrantless entry of German's home or that a warrant would have been sought absent the unlawful entry, must the evidence subsequently seized from the home be excluded?

2. The jury's role is to determine whether the State has proved the charged offense beyond a reasonable doubt, not to divine "the truth" of the allegation. Nonetheless, the jury was instructed to return a guilty verdict if it had "an abiding belief in the truth of the charge." Did this instruction confuse the jury's constitutional function and the prosecutor's burden so as to require reversal?

3. German seeks review of the assertions of error in his statement of additional grounds for review.

D. STATEMENT OF THE CASE

On April 22, 2012, Noah Frampton and Frank James were working security at Charley's Pub in Fircrest. RP 167, 293-94. While patrolling the parking lot, they noticed a Chevy Malibu with its dome light on. They checked the doors and found they were unlocked, then went inside to tell the DJ so he could make an announcement in the bar. RP 192, 298. A short time later, Frampton and James saw two men standing next to the Malibu. RP 193.

James and Frampton got the men's attention, asking what they were doing, and the men started to walk away. RP 198-99, 301. One of the guards called out to the men, telling them not to come back. RP 200, 302. The men turned around, and the one wearing the hat pulled a semiautomatic handgun from his waistband, cocked it, waved it in the air, and said "what did you say?" RP 200-01, 209, 302-05, 308, 334. Frampton and James backed away, and the men left. RP 202-03, 305. Frampton then called 911. RP 202, 306.

Two Fircrest police officers were dispatched to the scene. While en route to Charley's they started driving the area looking for the suspects, thinking they might still be on foot. RP 227. The officers had a description of one white male and one Hispanic male wearing white t-shirts and blue jeans. They had no approximate age and no other

particulars. RP 228. Since neither of the officers had seen the suspects, Officer Norling headed to Charley's to contact the reporting party, while Officer Roberts continued his search. RP 228-29.

Roberts drove into the parking lot of the Fircrest Family Townhomes, a few blocks away from Charley's. RP 229-30. He saw two men, Jose German and Manuel Urrieta, wearing white shirts and blue jeans. One was standing in front of the car looking under the hood, and the other was leaning into the passenger side of the car. RP 230, 253. Roberts stopped his car and stepped out, drawing his gun. RP 232, 241. He called out something like, "what's up fellas?" RP 233. German and Urrieta immediately ran toward their apartment. RP 233. Roberts chased them, shouting "police, stop." RP 234. German and Urrieta entered their apartment and slammed the door. RP 239. Roberts kicked the door in and entered as well. RP 239. Using his flashlight Roberts saw German and Urrieta standing by the sliding glass door and told them to show him their hands. RP 242-43. When they did not comply, he fired three rounds, wounding both men. RP 245-46, 250.

After they were shot German and Urrieta managed to move outside, but they fell to the ground in the grass just off the patio. RP 249-50, 278. Roberts followed and stood between them until backup arrived,

yelling that he would kill them if they moved. RP 251. A fire department medic unit arrived and took German and Urrieta to the hospital. RP 636.

Several law enforcement officers responded to the scene of the shooting. RP 692. At least one of them walked through the entire apartment to make sure no one else was inside. RP 633. The scene was then secured, and the officers waited outside several hours while a search warrant was obtained. RP 488, 695.

In searching the apartment, police located a 9 mm semiautomatic handgun in a corner of the living room on the side of a sofa, two body armor panels under a loveseat, four boxes of 9 mm ammunition and a gun cleaning kit in the cabinet above the refrigerator, a hammer in the kitchen sink, and letters addressed to German. RP 502, 504, 534, 537, 541-42, 543, 564. Police found a black baseball hat on the ground in front of the car where German had been standing when Roberts arrived, and they found some tax documents in German's name inside the car. RP 493, 499. A forensics technician lifted one latent fingerprint from the gun but later determined it was not of comparison value. RP 580, 583.

Prior to trial German moved to suppress evidence discovered inside his apartment. RP 93. He argued that Roberts' warrantless entry was unlawful, and the evidence subsequently seized from the apartment should be excluded as fruit of the poisonous tree. RP 117. The State

argued that the entry was justified by exigent circumstances. It submitted police reports and a transcript of an interview Roberts gave after the shooting. CP 163-215. The court decided the motion based on these documents. RP 118-19.

The police reports indicate that the initial dispatch regarding the suspects stated that either a white male and a Hispanic male or two Hispanic males had been seen prowling cars near the parking lot of Charley's pub, located at 6520 19th Street. CP 169, 171. The men were wearing white t-shirts and blue jeans, and one of them waved a handgun at security staff. Id. They were last seen walking southbound away from Charley's. CP at 171. A short time later dispatch advised that shots had been fired at 6468 19th Street. CP 169.

In his interview after the shooting, Roberts stated that he was driving a marked patrol car and wearing a uniform. CP 196, 208. He and Officer Norling were dispatched to a reported intimidation with a weapon at the parking lot of Charley's Bar. The suspects were described as a white male and a Hispanic male wearing white shirts and blue jeans. They had been interrupted during a vehicle prowl, and one of them waved a firearm around. They left on foot heading southbound away from Charley's. CP 199.

Roberts said he arrived in the area relatively quickly and started driving around looking for the suspects. When Norling went to contact the reporting party, Roberts proceeded to the Fircrest Family Townhomes in the 6400 block of 19th Street, about one block over and one block back from Charley's. After driving around the entire apartment complex, he saw two Hispanic males in the parking area of building 6468. CP 199-200. The men were wearing white shirts and blue jeans. Neither was wearing a hat. CP 203.

One man was standing in front of a car with the hood up, the other was standing in the doorway of the car. When Roberts pulled up, the two men looked at him with a "deer in the headlight look." CP 200. As soon as Roberts opened his car door, the men took off running. They ran to the end apartment, and Roberts followed, yelling for them to stop. Roberts explained that he thought these men matched the description of the suspects from Charley's, and he knew that one of the suspects was reported to have a handgun. When he saw the men enter the apartment and slam the door, he did not know if it was their apartment. Roberts believed that people in Fircrest leave their doors open all the time, and he was concerned that people inside the apartment could be in danger. CP 200-01. So he kicked the door in and entered the apartment. He saw the men standing at the back door, and he yelled at them to show their hands.

When they did not comply, Roberts fired three rounds at them. The men went through the back door, and Roberts followed. CP 201. Roberts did not see either of the men with a gun after the shooting. CP 168. Roberts reported on his radio that shots were fired and two suspects were down. CP 212. Other officers arrived within a minute or two. They checked the apartment and did not find anyone else inside. CP 211.

After reviewing these facts, the court concluded that exigent circumstances justified the warrantless entry, and it denied German's motion to suppress evidence subsequently found in the apartment. RP 128-31.

At trial the State presented testimony from Frampton and James, Roberts, and the officers involved in the investigation. The parties also stipulated that German had previously been convicted of a serious offense and was not permitted to possess a firearm. RP 163.

German's girlfriend testified that German and Urrieta lived with her at the apartment where the shooting occurred. RP 709-10. The car parked in front of the apartment, where Roberts first saw German, belonged to German. RP 714.

The jury returned guilty verdicts and found German was armed with a firearm during the assault. CP 95-101. The court imposed the statutory maximum sentence of 120 months, and German appealed. CP

143-44, 158. On appeal, German argued that evidence seized following the unlawful entry of his apartment should have been suppressed and the court's reasonable doubt instruction undercut the State's burden of proof. German also filed a Statement of Additional Grounds for Review. On February 3, 2015, the Court of Appeals issued an unpublished opinion affirming German's convictions.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. WHETHER EVIDENCE SHOULD HAVE BEEN SUPPRESSED BASED ON THE UNLAWFUL ENTRY OF GERMAN'S RESIDENCE IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT.

With very few exceptions, both the state and federal constitutions prohibit nonconsensual entry and search of property without a warrant. State v. Cardenas, 146 Wn.2d 400, 405, 47 P.3d 127 (2002); U.S. Const. amend. IV; Wash. Const. art. I, § 7. A warrantless entry is unreasonable as a matter of law unless the State establishes that one of a very narrow set of exceptions to the warrant requirement applies. State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009); Cardenas, 146 Wn.2d at 405. Exigent circumstances may excuse the warrant requirement if the demand for immediate investigatory action makes it impracticable for the police to obtain a warrant. Cardenas, 146 Wn.2d at 405. This Court has identified six factors to consider in determining whether exigent circumstances exist:

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably.

Cardenas, 146 Wn.2d at 406. Not all factors need be present, but the totality of the circumstances must establish the need to act quickly. Smith, 165 Wn.2d at 518; Cardenas, 146 Wn.2d at 408.

The Court of Appeals upheld the trial court's conclusion that exigent circumstances justified the warrantless entry of German's home. Opinion, at 5-6; RP 128-30. The Court of Appeals noted that the officers were investigating a crime of violence, and the security guards had been threatened with a gun. It concluded Roberts reasonably believed the suspect to be armed, and he reasonably believed German and Urietta were guilty because they matched the description of the suspects. The court further noted that German and Urietta were found a short distance from Charley's in the direction the suspects had fled, they appeared to be engaged in car prowling, and they fled when challenged. Roberts knew they were on the premises and had reason to believe they would flee if not swiftly apprehended. Although the entry was not peaceable, the court found the circumstances justified the type of entry. Opinion, at 5-6.

These circumstances do not justify the warrantless entry of German's home. While it is true that the officer was investigating an offense involving a weapon and that one the suspects in that offense was armed, Roberts did not have strong reason to believe that the suspects were on the premises. Roberts certainly had reason to believe that German and Urrieta entered the apartment. The problem is that the circumstances did not support his assumption that German and Urrieta were the suspects. Roberts never saw a gun, and he had not seen the suspects at the scene of the crime. He had only a general description of white or Hispanic males in white t-shirts. No age or other identifying characteristics were provided. Roberts' assumption that these men were involved based on their race and nondescript clothing was unreasonable and did not justify the warrantless entry into their apartment.

The State also argued in the trial court that the entry was justified because there was a potential that people inside the apartment might be at risk. Danger to the arresting officer or to the public can be exigent circumstances justifying a warrantless entry. State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983). The Court of Appeals did not address this argument. The facts here do not establish such a danger, however.

This Court upheld a warrantless search under this theory in Smith. There, police responded to information that a stolen tanker truck

containing 1000 gallons of anhydrous ammonia, an extremely toxic chemical, could be found on an abandoned property. Smith, 165 Wn.2d at 514. The truck was located within 75 feet of a house. Police surrounded the house, knocked on the door, and announced their presence. While securing the house, one of the officers looked through a window and saw a rifle in the living room. About ten minutes after the police knocked, two people came out of the house and were detained. The officers looked into the open door of the house and saw that the rifle was no longer in the living room. The detectives were concerned that a person with the missing gun would shoot the tank of anhydrous ammonia, causing a grave health risk, or that such person could fire directly at the officers. Thus, officers entered the house to perform a safety sweep. Smith, 165 Wn.2d at 515, 518. This Court concluded that the presence of the stolen tanker truck filled with an extremely dangerous chemical and the missing firearm presented a legitimate safety threat to officer and public safety to constitute an exigent circumstance justifying the warrantless search. Smith, 165 Wn.2d at 518.

Unlike in Smith, where the officers had seen a gun but could no longer account for it and there was tanker full of anhydrous ammonia within firing range of the house, here there was no basis to fear for public safety. Roberts had not seen German or Urrieta with a firearm, and his

conclusion that they were the suspects he was looking for was based on a very general physical description. His only explanation for believing there was a threat was his assumption that German entered someone else's apartment because people in Fircrest do not lock their doors at night, ignoring the obvious, and correct, conclusion that German was able to enter the apartment because he lived there. Roberts' string of illogical assumptions did not justify breaking the door down and entering the apartment.

"'[T]he exigent circumstances doctrine is applicable only within the narrow range of circumstances that present a real danger to the police or the public or a real danger that evidence ... might be lost.'" Counts, 99 Wn.2d at 62 (quoting United States v. Bulman, 667 F.2d 1374, 1384 (11th Cir.1982)) (finding no exigent circumstances justified entering house to arrest suspect where police could have maintained surveillance while obtaining warrant). No such danger existed here, and the warrantless entry was unlawful.

Evidence obtained in violation of the privacy protections of the Fourth Amendment or article I, section 7 must be excluded. State v. Ruem, 179 Wn.2d 195, 313 P.3d 1156 (2013) (citing State v. Afana, 169 Wn.2d 169, 179–80, 233 P.3d 879 (2010)). This exclusionary rule applies "up to the point at which the connection with the unlawful search becomes

so attenuated as to dissipate the taint." Murray v. United States, 487 U.S. 533, 536-37, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). Thus, evidence is excluded unless the State establishes that the evidence was obtained by lawful means wholly independent of the unlawful action. State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). Because the State has not demonstrated that the police would have sought a warrant for German's apartment absent Roberts' unlawful entry, the independent source doctrine does not apply. See Murray, 487 U.S. at 543. The proper application of these principles is an issue this Court should review. RAP 13.4(b)(3).

2. WHETHER THE "ABIDING BELIEF" INSTRUCTION UNDERCUTS THE STATE'S BURDEN OF PROOF IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

A jury's role is to test the substance of the prosecutor's allegations, not to simply search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); see also State v. Berube, 171 Wn. App. 103, 120, 286 P.3d 402 (2012) ("...truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt misstates the jury's duty and sweeps aside the State's burden."). In fact, it is the jury's job "to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

By equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the jury instruction blurs the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Emery. The presumption of innocence may, in turn, be diluted or even "washed away" by such confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. Id.

In Bennett, this Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" as it was inaccurate and misleading. Bennett, 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in all future cases. Id. at 318. The pattern instruction reads as follows:

> *[The] [Each]* defendant has entered a plea of not guilty. That plea puts in issue every element of *[the] [each]* crime charged. The *[State] [City] [County]* is the plaintiff and has the burden of proving each element of *[the] [each]* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully

considering all of the evidence or lack of evidence. *[If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]*

WPIC 4.01.

The Bennett Court did not comment on the "belief in the truth" language. More recent cases demonstrate the problem with such language, however. In Emery, the prosecutor told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges" is that the defendants are guilty. Emery, 174 Wn.2d at 751. The Court noted that these remarks misstated the jury's role, but because they were not part of the court's instructions, and the evidence was overwhelming, the error was harmless. Id. at 764 n.14.

In Pirtle, the Court held that the "abiding belief" language did not "diminish" the pattern instruction defining reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). The Court ruled that "[a]ddition of the last sentence [regarding an abiding belief in the truth] was unnecessary but not an error." Id. at 658. The Pirtle Court did not address, however, whether this language encouraged the jury to view its role as a search for the truth. Instead, it looked at whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. Id. at 657-58.

Pirtle concluded that this language was unnecessary but not necessarily erroneous. Emery now demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language fosters confusion about the jury's role and serves as a platform for improper arguments about the jury's role in looking for the truth. Emery, 174 Wn.2d at 760.

German objected to addition of this last sentence in the court's instruction defining the prosecution's burden of proof and proposed an instruction without the improper language. RP 731-34; CP 82. This "belief in the truth" language inevitably minimizes the State's burden and suggests that the jury should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan v. Louisiana, 508 U.S. 274, 281-82, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993). "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." Emery, 174 Wn.2d at 757 (quoting Sullivan, 508 U.S. at 281-82). Moreover, appellate courts have a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318.

This Court should hold that instructing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" misstates the State's burden of proof, confuses the jury's role, and denies the accused the right to a fair trial by jury as protected by the state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art. I, §§ 21, 22. Review is appropriate under RAP 13.4(b)(3).

3. GERMAN'S ASSERTIONS OF ERROR IN HIS STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW SHOULD BE REVIEWED BY THIS COURT.

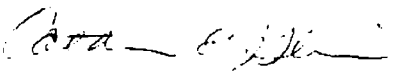
German filed a statement of additional grounds for review, which the Court of Appeals rejected as meritless. Opinion, at 8-14. German asks this Court to grant review on those grounds and reverse his convictions.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse the Court of Appeals' decision.

DATED this 5th day of March, 2015.

Respectfully submitted,



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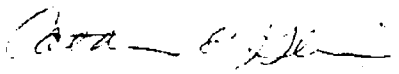

Catherine E. Glinski
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOSE R. GERMAN,

Appellant.

No. 44870-0-II

UNPUBLISHED OPINION

MELNICK, J. — Jose German appeals from his jury trial convictions for assault in the second degree with a firearm enhancement, vehicle prowling in the second degree, and unlawful possession of a firearm in the first degree. German argues that evidence seized from his home pursuant to a search warrant should have been excluded at trial because it was the fruit of an unlawful entry by police, and the trial court erred by giving the jury an "abiding belief" instruction. In his statement of additional grounds (SAG), German further argues that the trial court abused its discretion by not allowing him to refer to a shooting by police in California, that his trial counsel was ineffective for a variety of reasons, that the trial court abused its discretion by failing to admonish the prosecutor for his closing argument, and that his appellate counsel is ineffective for failing to brief ineffective assistance of trial counsel. We reject all of German's claims and affirm the trial court.

FACTS

In early spring 2012, a "string of break-ins" occurred in the parking lot of Charley's Pub in Fircrest. Report of Proceedings (RP) (Feb. 14, 2013) at 296. Charley's hired Frank James and Noah Frampton to patrol its lot. One evening, James and Frampton noticed an unlocked car containing a purse. Ten or fifteen minutes later, James and Frampton saw a pair of men leaning

inside the car. When the men saw James and Frampton, they began to walk away. James told them not to come back.

The two men turned around and shouted an obscenity. One of the two pulled out a pistol. He said "I have something for you, big boys," cocked the gun, and aimed it in the security guards' direction. RP (Feb. 14, 2013) at 303. James and Frampton retreated and called the police.

Police officers were dispatched to Charley's where James and Frampton described the suspects as a white male and a Hispanic male, both wearing white T-shirts and blue jeans, who had gone southbound, and who were armed. A couple of blocks southeast of Charley's, Officer Christopher Roberts found German and his eventual co-defendant, Manuel Urrieta, leaning into a car that had its hood up. German and Urrieta were wearing white T-shirts and blue jeans. When Officer Roberts called out to the two men, they ran into a nearby apartment and slammed the door.

Officer Roberts believed that German and Urrieta had entered a home which did not belong to them. Officer Roberts kicked down the door and ordered German and Urrieta to show him their hands. When German and Urrieta did not comply, Officer Roberts shot them.

The police called for an ambulance. After checking for other individuals inside the apartment, the police left the premises and waited for a search warrant. Subsequently, the police searched the apartment pursuant to a warrant and discovered a gun, ammunition, and letters addressed to German. Frampton later identified German as the gunman from a photographic montage.

PROCEDURAL HISTORY

The State charged German with two counts of assault in the second degree with a firearm enhancement,[1] one count of vehicle prowling in the second degree,[2] and one count of unlawful possession of a firearm in the first degree.[3]

German moved under CrR 3.6 to suppress the firearm discovered in his residence. He argued that Officer Roberts had entered his home unlawfully and everything that the police discovered thereafter was the fruit of the poisonous tree.[4] Because German agreed that there were no disputed facts, the trial court did not hold an evidentiary hearing. The trial court heard legal argument and then denied German's motion. Based on the undisputed facts the parties presented, the trial court entered the following oral findings of fact:[5] (1) that the police were investigating the crime of assault with a firearm; (2) that the suspects were reasonably believed to be armed; (3) that the police had reasonably trustworthy information, based on eyewitness statements; (4) that there was a strong reason to believe the suspects were still on the property; (5) that the suspects were likely to escape if not apprehended; (6) that the entry was not peaceable but was justified under the circumstances; (7) that the entry was at night; and (8) that the investigation was not part of a planned operation or ongoing investigation.

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[1] RCW 9A.36.021(1)(c); RCW 9.94A.533.

[2] RCW 9A.52.100(1), (2).

[3] RCW 9.41.040(1)(a).

[4] The record on appeal does not contain German's motion or the trial court's order.

[5] The trial court asked the prosecutor to draft written findings of fact and conclusions of law, but these do not appear in the appellate record.

German went to trial. Over German's objection, the trial court instructed the jury that reasonable doubt required "an abiding belief in the truth of the charge." Clerk's Papers (CP) at 107; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3rd ed. 2008). The jury convicted German of all the charged offenses and the enhancement. German appeals.

ANALYSIS

I. MOTION TO SUPPRESS

German argues that the firearm seized pursuant to the search warrant for his home should have been excluded as the fruit of an unlawful entry by police. The State argues that German failed to preserve the issue because he failed to challenge the search warrant itself. Alternatively, the State argues that Officer Roberts's warrantless entry was permitted under the doctrine of exigent circumstances. As the State points out, German does not challenge the search warrant itself. In fact, it has not been made a part of the appellate record. Therefore, we do not review the warrant's legality. To the extent German challenges his arrest, we hold that Officer Roberts both lawfully entered German's residence and arrested German. We affirm the trial court.

"Unchallenged findings of fact entered following a suppression hearing are verities on appeal." *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Neither party assigns error to the findings of fact, so we take them to be true.[6] "We review a trial court's conclusions of law in an order pertaining to suppression of evidence de novo." *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

[6] Although the record on appeal contains no written findings of fact, the trial court entered oral findings of fact. We take the trial court's oral findings as true because neither party disputes the facts in this case.

The state and federal constitutions prohibit warrantless searches of homes unless they fall within a well-delineated exception. *State v. Leach*, 113 Wn.2d 735, 738, 782 P.2d 1035 (1989); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."); WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."). But when the police make a warrantless entry justified by exigent circumstances and evidence is discovered only after a search warrant is issued, then the trial court does not err by admitting the evidence. *State v. Terrovona*, 105 Wn.2d 632, 645, 716 P.2d 295 (1986).

We use six factors to determine whether a warrantless police entry into a home is justified:

> "(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably."

State v. Smith, 165 Wn.2d 511, 518, 199 P.3d 386 (2009) (quoting *State v. Cardenas*, 146 Wn.2d 400, 406, 47 P.3d 127, 57 P.3d 1156 (2002)). This totality of the circumstances test does not require that each factor be satisfied. Circumstances may still be exigent and justify a warrantless search even if they do not satisfy every one of the elements listed above. *Smith*, 165 Wn.2d at 518. All warrantless entries of a home are presumptively unreasonable, and the State bears the "heavy burden" of proving that exigent circumstances necessitated the entry. *State v. Hinshaw*, 149 Wn. App. 747, 754, 205 P.3d 178 (2009).

Here, the unchallenged findings of fact support the trial court's conclusion that Officer Roberts lawfully entered German's home without a warrant. Officer Roberts was investigating a crime of violence. James and Frampton had been threatened with a gun. Officer Roberts reasonably believed the suspect to be armed, because moments before he had been seen with a

gun. Officer Roberts had reasonably trustworthy information to believe that German and Urrieta were guilty, because they matched the description of the individuals who had threatened James and Frampton. Furthermore, German and Urrieta were found a short distance south of Charley's, the direction that the suspects had fled. German and Urrieta were also engaged in the same conduct that the suspects had been; they were prowling a car and retreated when challenged by a third party. Officer Roberts knew that German and Urrieta were on the premises, because he saw them run into the apartment. German and Urrieta were likely to escape if not swiftly apprehended; they could have exited through the back of the apartment. It is also worth noting that Officer Roberts believed German and Urrieta had entered someone else's apartment, and posed a danger to whomever might be inside.

It is true that Officer Roberts's entry was not peaceable, but "it is not necessary that every factor be met to find exigent circumstances, only that the factors are sufficient to show that the officers needed to act quickly." *Cardenas*, 146 Wn.2d at 408. Here, the unchallenged findings of fact clearly indicate that Officer Roberts reasonably believed German and Urrieta were the suspects in a crime of violence, that they posed a continuing danger, and that he needed to act quickly in order to apprehend them. We hold that Officer Roberts's entry was justified by exigent circumstances, and the search warrant for German's apartment was not the fruit of an unlawful entry. Because German does not challenge the search warrant, the firearm discovered pursuant to the warrant is admissible under *Terrovona*, and we affirm the trial court. *See* 105 Wn.2d at 645.

II. ABIDING BELIEF INSTRUCTION

German argues that the trial court erred by instructing the jury using the "abiding belief" language because it misstated the jury's role as a search for the truth.[7] We reject German's claims and affirm the trial court.

Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). It is reversible error to instruct the jury in a manner that would relieve the State of this burden. *Pirtle*, 127 Wn.2d at 656. We review a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole. *Pirtle*, 127 Wn.2d at 656.

The instruction at issue here has never been held to be improper. To the contrary, our Supreme Court has directed that trial courts use the instruction given in this case. *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

German argues that this instruction improperly suggests that the jury's role is to determine the truth, rather than to test the State's evidence. *See State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) ("The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'") (quoting *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009)). The instruction here does not tell the jury to find the truth; it tells the jury to acquit the defendant *unless* the government convinces the jury of the truth of the charge. The purpose of the "abiding belief" language is not to recast the government's burden, but to underscore the certainty that the jury must have in order to convict the defendant. *Victor v. Nebraska*, 511 U.S. 1, 14-15, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994); *Hopt v. Utah*, 120 U.S.

[7] The court used the standard WPIC 4.01 "Beyond a Reasonable Doubt" instruction.

430, 439, 7 S. Ct. 614, 30 L. Ed. 708 (1887) ("The word 'abiding' here has the signification of 'settled and fixed,'-a conviction which may follow a careful examination and comparison of the whole evidence."). Although the "abiding belief" language may not add substantively to WPIC 4.01, neither does it "diminish the definition of reasonable doubt." *Pirtle*, 127 Wn.2d at 658.

The trial court properly instructed the jury.

III. STATEMENT OF ADDITIONAL GROUNDS

German alleges several additional errors in his SAG. We reject his claims and affirm the trial court.

A. Pretrial Order Against Analogies

German asserts that the trial court abused its discretion by barring him from referring to an incident in which the police shot two innocent people in California. We disagree.

Prior to trial, the State moved to exclude any "comparisons, analogies to any incident that has occurred other than the one in question." RP (Feb. 13, 2013) at 132. Specifically, the State sought to prevent German from referring to "these officers that apparently shot and killed two, as it turns out, innocent people down in Southern California." RP (Feb. 13, 2013) at 132. The trial court granted the motion, ruling that "I don't see any analogy between what occurred in this recent case down in California with the pick-up truck that was being shot and what occurred in this particular case. . . . The focus should be on what occurred in this particular case, and I think that this can be argued without making references to a highly-charged situation down in California, which nobody really knows what occurred or why the officer shot, what provoked him." RP (Feb. 13, 2013) at 138-39.

We review a trial court's ruling restricting the scope of argument for abuse of discretion. *State v. Hughes*, 118 Wn. App. 713, 726, 77 P.3d 681 (2003). A trial court abuses its discretion only when "no reasonable person would take the view adopted by the trial court." *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

German complains that he was not allowed to rely on analogies while the prosecution was allowed to analogize to fictional scenarios, such as police procedural shows on television. German also makes unsubstantiated claims that the prosecutor analogized Officer Roberts's shooting of German and Urrieta to "hunting." SAG at 3. But a reasonable judge could have permitted the prosecution's analogies while barring German's because German sought to make use of a real, highly charged, and irrelevant situation. Officer Roberts was not involved in the shooting that German sought to reference. Nor were the circumstances of the shooting known with any certainty. Furthermore, the California shooting was a high-profile media case. For German to raise this case in his argument to the jury would have invited speculation and created a risk that the jury would make a decision based not on the facts before them, but on what they believed happened elsewhere. The trial court did not abuse its discretion by limiting German's argument to his actual facts. We reject German's claim.

B. Ineffective Assistance of Trial Counsel

German asserts that his trial counsel was ineffective for failing to request severance or a mistrial, failing to request a lesser included instruction, failing to challenge the search warrant, and failing to object to the prosecutor's closing argument. We reject his claims.

1. Standard of Review

Ineffective assistance of counsel is a mixed question of law and fact that is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Ineffective assistance of counsel may be analyzed for the first time on appeal if the defendant can show a manifest constitutional error. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a)(3).

To establish ineffective assistance of counsel, the defendant must prove both that the attorney's performance was deficient and that the deficiency prejudiced the defendant. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). An attorney's performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance prejudices a defendant if there is a "reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862.

There is a strong presumption that counsel's performance was reasonable. *Kyllo*, 166 Wn.2d at 862. Counsel's performance is not deficient if it can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863.

2. Severance/Mistrial

German asserts that his counsel should have moved for severance or a mistrial owing to a conflict with his co-defendant, Urrieta. "Separate trials have never been favored in this state." *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982) (quoting *State v. Herd*, 14 Wn. App. 959, 963 n.2, 546 P.2d 1222 (1976)). The trial court has broad discretion to grant or deny a severance, and the defendant bears the burden to come forward with sufficient facts to warrant the exercise

of discretion in his favor. *Emery*, 174 Wn.2d at 752. We do not disturb a trial court's decision to grant or deny a severance absent a manifest abuse of discretion. *Emery*, 174 Wn.2d at 752. Even if German's counsel had moved for severance, it is unlikely German would have received it.

German argues that he and Urrieta should have been tried separately because Urrieta's theory at trial was that German was the main perpetrator. But we "set a high bar for granting severance," and it is not enough that the co-defendants implicate each other. *State v. Sublett*, 176 Wn.2d 58, 69, 292 P.3d 715 (2012). Rather, "[t]he conflict must be so prejudicial that the two defenses are irreconcilable, such that the jury will unjustifiably infer that the conflict alone demonstrates that both defendants are guilty." *Sublett*, 176 Wn.2d at 69. In contrast, if "[t]he jury could have believed either or neither defendant," then severance is not warranted. *Sublett*, 176 Wn.2d at 69.

Here, the jury could have believed either or neither of German's and Urrieta's stories. In fact, the jury acquitted Urrieta, indicating that they believed him and not German. The jury did not infer that the conflict demonstrated both German's and Urrieta's guilt, and German was not entitled to severance. German's counsel was not ineffective for making a motion that would have been denied.

Nor was German entitled to a mistrial. "The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried." *Emery*, 174 Wn.2d at 765. As the above analysis shows, German was not prejudiced by his joint trial with Urrieta. Any motion for a mistrial would have been futile, and German's counsel was not ineffective for failing to make the motion. We reject German's claim.

3. Lesser Included Instruction

German asserts that his counsel should have moved for an instruction on the lesser included offense of unlawful display of a weapon.[8] The Washington Supreme Court has held that the "all or nothing" approach is a legitimate trial tactic, and that it is not ineffective assistance to fail to request a lesser included offense instruction. *State v. Grier*, 171 Wn.2d 17, 20, 44, 246 P.3d 1260 (2011).

Furthermore, any error by counsel was not prejudicial because German was not entitled to this lesser included offense instruction. A trial court must give a lesser included offense instruction when two elements are met: First, each element of the lesser offense must be an element of the charged offense, and second, the evidence must support an inference that the lesser crime was committed *instead* of the charged offense. *State v. Karp*, 69 Wn. App. 369, 375-76, 848 P.2d 1304 (1993).

A charge of assault in the second degree requires the State to prove that German used a deadly weapon to "'put[ ] another in apprehension of harm.'" *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995) (quoting *State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972)). In contrast, unlawful display of a weapon only requires that a person "carry, exhibit, display, or draw any firearm . . . or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons." RCW 9.41.270(1).

The evidence does not show that German committed unlawful display of a weapon *instead of* assault in the second degree. German not only displayed the gun, but pointed it at James and Frampton and said that the gun was "for" them. RP (Feb. 14, 2013) at 303. German not only

[8] RCW 9.41.270.

intimidated the two men, but put them in apprehension of harm. A motion for a lesser included instruction would have been futile, and German's trial counsel was not ineffective for failing to request it.

4. Search Warrant

German asserts that his trial counsel should have challenged the search warrant for his apartment. Where a search warrant is issued, the defendant bears the burden of challenging the warrant and establishing that the search was unlawful. *State v. Hopkins*, 113 Wn. App. 954, 958, 55 P.3d 691 (2002).

German offers no reason why the warrant was invalid, other than Roberts's warrantless entry into the apartment. As described above, Roberts's warrantless entry was justified by exigent circumstances. No evidence was discovered in the interim between Roberts's warrantless entry and the issuance of the search warrant. For the reasons we have previously explained, we reject his claim.

5. Failure to Object

German asserts that his trial counsel was ineffective for failing to object to the prosecutor's argument referencing the "abiding belief" instruction. We reject his claim.

As discussed above, the "abiding belief" instruction properly states the nature of the government's burden. WPIC 4.01, at 85. The instruction does not minimize the government's burden, or recast the jury's role as a search for the truth. Accordingly, the prosecutor's argument was proper and counsel's objection would have been futile. German's claim fails.

C. Prosecutorial Misconduct

German asserts that the trial court abused its discretion by failing to admonish the prosecutor's argument referencing the "abiding belief" instruction. As described above, the

"abiding belief" instruction was not improper, and the prosecutor did not commit misconduct by referencing that instruction. The trial court did not abuse its discretion, and German's claim fails.

D. Ineffective Assistance of Appellate Counsel

German asserts that his appellate counsel was ineffective for raising frivolous issues and failing to raise the issues German raises in his SAG. To prevail on an ineffective assistance of appellate counsel claim, the appellant must demonstrate merits of issues that counsel failed to argue or argued inadequately. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 314, 868 P.2d 835 (1994), *cert. denied*, 513 U.S. 849 (1994). As discussed above, all of German's SAG issues are without merit. Thus, we hold that German's appellate counsel did not render ineffective assistance by failing to raise those issues in the appellant's brief.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Melnick, J.

Melnick, J.

We concur:

Worswick, J.

Worswick, J.

Bjorgen, A.C.J.

Bjorgen, A.C.J.