NO. 46589-2-II

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

STATE OF WASHINGTON, Respondent

v.

ANGELINO LUCIANO PENA, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00417-8

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

A. ANSWERS TO ASSIGNMENTS OF ERROR

I. MR. PENA WAS NOT DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

II. MR. PENA'S ATTORNEY DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE PROPOSED A LESSER OFFENSE JURY INSTRUCTION.

III. MR. PENA WAS NOT PREJUDICED BY HIS ATTORNEY'S PERFORMANCE.

IV. THIRD DEGREE ASSAULT WAS ONLY AVAILABLE AS A LESSER OFFENSE TO FIRST DEGREE ASSAULT.

V. DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE WHEN HE CHOSE NOT PROPOSE AN INSTRUCTION FOR THIRD DEGREE ASSAULT.

VI. THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED EVIDENCE OF THE INVESTIGATING OFFICER'S JOB TITLE AND SOME FACTS OF THE ARREST.

VII. THE TRIAL COURT DID NOT ERR BY ALLOWING A REFERENCE TO THE GANG TASK FORCE.

VIII. THE TRIAL COURT DID NOT ERR BY ALLOWING A REFERENCE TO THE GANG TASK FORCE.

IX. MR. PENA WAS NOT PREJUDICED BY THE ADMISSION OF EVIDENCE REGARDING THE GANG TASK FORCE.

B. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Clark County Prosecuting Attorney's office charged Angelino Pena by second amended information with Attempted Murder in the Second Degree and Assault in the First Degree for an incident that happened on or about January 26, 2013. CP 58-59. Each charged offense also contained a firearm enhancement. CP 58-59. The case proceeded to a jury trial before The Honorable David Gregerson on June 30, 2014, and ended with a jury verdict on July 2, 2014. RP 111-473. Mr. Pena proposed, and the jury was instructed on, the lesser degree offense of Assault in the Second Degree, but the jury convicted Mr. Pena as charged. CP 85, 117, 124-128; RP 471. The trial court sentenced Mr. Pena to a total of 330 months prison after vacating the Attempted Murder in the Second Degree charge since that charge merged with the Assault in the First Degree, which carried the higher penalty. CP 174-183; RP 490-91. Mr. Pena then filed a timely notice of appeal. CP 130.

II. STATEMENT OF FACTS

On or about January 26, 2013, Neil Hill was at an Econo Lodge Hotel in downtown Vancouver with Vincent Burnett, Levi Blomdahl, and Elena Espinoza. RP 111-13, 135. The four of them were smoking heroin at

the hotel when Ms. Espinoza asked Mr. Hill to go pick up Angelino Pena and bring him back to the hotel. RP 113-15, 137, 147.

When Mr. Hill picked up Mr. Pena, Mr. Pena informed Mr. Hill that he would shoot him in the stomach if he (Mr. Hill) got pulled over by the police. RP 115. When Mr. Pena was making this threat to Mr. Hill, he had a handgun out and pointed it at Mr. Hill with the gun only five or six inches from Mr. Hill's body. RP 115-17, 124. Mr. Pena seemed drunk. RP 124, 126. During the ride, Mr. Pena had a bullet in the chamber and kept popping bullets out of the side. RP 116. Mr. Hill was scared for his life. RP 117.

In addition to threatening to shoot Mr. Hill, Mr. Pena told Mr. Hill that he was going to shoot Ms. Espinoza because she kept calling him (Mr. Pena). RP 117-18. When Mr. Hill arrived at the Econo Lodge, he dropped off Mr. Pena and left. RP 117. He "didn't want to go back" into the hotel room because Mr. Pena "had a gun and told me to get out of there." RP 117. Mr. Pena also told Mr. Hill something like "you didn't see me here" and "you're a smart guy. Don't make me find you." RP 119, 125. When Mr. Hill left, however, his fear for himself turned into concern for his friend Mr. Blomdahl as he "tried calling Levi a bunch of times." RP 118, 132. When Mr. Hill finally got a hold of Mr. Blomdahl his fright was

evident when he told him to be careful and get out of there because Mr. Pena was going to the room with a gun. RP 118, 138.

Mr. Blomdahl stayed, however, and noticed that when Mr. Pena entered he seemed like he had been drinking and was carrying a gun. RP 139, 149. Mr. Blomdahl was scared because of Mr. Hill's phone call and Mr. Pena's demeanor, which Mr. Blomdahl described as "kind of upset" and "belligerent." RP 140, 149. Mr. Blomdahl saw Mr. Pena smoke what appeared to be a joint in the hotel room. RP 149. At some point, Mr. Blomdahl observed Mr. Pena accusing Mr. Burnett of something related to Mr. Pena's brother. RP 140. Those two were having some kind of disagreement when Mr. Pena "made Vince, like, hold the gun and was being really weird." RP 141.

At some point after that, Mr. Blomhdahl heard a gunshot, opened his eyes, and saw that Mr. Burnett had fallen over and was laying on the floor in front him with blood coming out of his face. RP 141-42, 152. Mr. Blomdahl also saw Mr. Pena directly after the gunshot. RP 142. Mr. Pena went from sitting in a chair to standing up, and it looked like he was putting the gun in his pocket or waistband. RP 142, 155. Mr. Blomdahl panicked, jumped up, and started grabbing his stuff when Mr. Pena asked him what he was doing and where he was going. RP 144. Initially, Mr. Pena did not want anyone to leave the hotel room, but a couple minutes

later he turned around, went for the door, and "told everyone to scram." RP 144-45.

Mr. Burnett was left in the room by Mr. Pena, Mr. Blomdahl, and Ms. Espinoza. It was not until about 11:00 a.m. when Ms. Espinoza returned to the Econo Lodge to pick up her belongings with her mother, Phyllis Espinoza, that 911 was called. RP 253-54, 256, 260-61, 264. Ms. Espinoza entered the room, exited, and asked her mother to come inside. RP 258-59. Phyllis[1] entered and noticed running water and blood along the sink handles before hearing moaning from within the bathroom. RP 259, 261. Phyllis pushed her way into the door because it was stuck and made entry into the bathroom where she noticed Mr. Burnett on the floor with a "hole in his head" and "a tremendous amount of blood and matter" all in the bathroom. RP 260-62. Mr. Burnett was "[l]ethargic, in and out, [and] mumbling." RP 261. Phyllis overheard Mr. Burnett being asked if he knew who shot him and that he replied "yes." RP 265. She also heard him being asked if the person who shot him was female and he replied "no" before responding "yes" when asked if the shooter was male. RP 265-66. Mr. Burnett then said "homey" and "homeless" and began to drift out of consciousness. RP 265.

[1] No disrespect is intended in referring to Phyllis Espinoza as Phyllis, rather it is to avoid confusion with her daughter who heretofore has been referenced as Ms. Espinoza.

Ms. Espinoza refused to cooperate with the prosecution claiming a complete lack of memory of the night. RP 273-76. The State admitted into evidence her Statement of Defendant on Plea of Guilty for Rendering Criminal Assistance in which her statement was "on or about January 26, 2013, I used deception with intent to obstruct the apprehension of Angelino Pena in Clark County, Washington." RP 274-75, 427.

Mr. Burnett remembered very little of that night due to his injuries, but did remember that Mr. Pena was present in the hotel room, Mr. Pena had a gun on him that night, and that the two had good and bad conversations that night, some relating to family. RP 163-65, 167. Mr. Burnett did not remember who shot him. RP 161.

A number of officers testified regarding their roles in the case. The police investigation essentially showed that where Mr. Pena was purportedly sitting at the time Mr. Burnett was shot was consistent with the location of where a spent shell casing was found and where a cigarette butt with Mr. Pena's and another person's DNA on it was found. RP 206-08, 231-32, 235, 240-41, 250-51, 299-300, 303, 306. When the police attempted to arrest Mr. Pena, he refused to exit the residence in which he was located despite announcements to leave by the police over a PA system. RP 186, 352. Mr. Pena did not exit the residence until the police

deployed a NFDD (Noise, Flash, Distraction Device) into the residence. RP 186.

Once arrested, Detective Erik Zimmerman questioned Mr. Pena. RP 353-54. Mr. Pena first responded that he did not know what Detective Zimmerman was talking about regarding an incident at the Econo Lodge and claimed to have never been there. RP 354. When Detective Zimmerman asked Mr. Pena if it would refresh his memory if he told him that he was with Ms. Espinoza, Mr. Pena said "I'm pretty sure that I was . . . never there and never with Elena Espinoza." RP 355. Mr. Pena made no additional statements and chose not to testify at trial. RP 355, 367.

C. ARGUMENT

I. MR. PENA DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That said, a defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when

considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

a) Deficient Performance

The analysis of whether a defendant's counsel's performance was deficient starts from the "strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 217, 211 P.3d 441 (2009) ("Judicial scrutiny of counsel's performance must be highly deferential.") (quotation and citation omitted). Thus, "given the deference afforded to decisions of defense counsel in the course of representation" the "threshold for the deficient performance prong is high." *Grier*, 171 Wn.2d at 33. This threshold is especially high when assessing a counsel's trial performance because "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Id.* (quoting *Kyllo*, 166 Wn.2d at 863); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) ("[T]his court will not find ineffective assistance of

counsel if the actions of counsel complained of go to the theory of the case or to trial tactics." (internal quotation omitted)).

On the other hand, a defendant "can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's'" decision. *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Accordingly, a defense counsel's decision "to not request an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal." *Hassan*, 151 Wn.App. at 281 (citation omitted); *See also Grier*, 171 Wn.2d 17; *State v. Breitung*, 173 Wn.2d 393, 398-400, 267 P.3d 1012 (2011). For example, where "a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy." *Breitung*, 173 Wn.2d at 399-400 (quoting *Hassan*, 151 Wn.App. at 220).

Here, Mr. Pena complains that his counsel's decision to not propose a lesser offense instruction of Assault in the Third Degree

constitutes deficient performance.[2] Brief of Appellant at 5-6. This complaint stems from Mr. Pena's assertion that his "primary theory of defense" at trial was that he shot Mr. Burnett but that the shooting was essentially accidental. *Id.* at 5, 11, 14. Mr. Pena's counsel did propose and the jury was instructed on the lesser degree offense of Assault in the Second Degree. CP 83, 117.

In his closing argument, before mentioning intent, Mr. Pena argued that (1) "[t]he State hasn't met its burden on anything"; (2) the evidence placing Mr. Pena in the room at the time the victim was shot was "somewhat questionable"; (3) "there was evidence about guns being racked and stuff, . . . but do we know that it's Mr. Pena doing that? I submit beyond a reasonable doubt, we don't know that"; (4) even if the jury was "satisfied that [Mr. Pena] was in the room, how do we know that the gun was in his hand" when Mr. Burnett was shot; and (5) "this next standing hurdle is who shot him [(Mr. Burnett)] of the people that were there? And I submit the State hasn't met that" burden. RP 444-51. Following these arguments, Mr. Pena turned to arguing that the State had

[2] Mr. Pena argues that *State v. Powell,* 150 Wn.App. 139, 156, 206 P.3d 703 (2009) provides that a defense counsel provides ineffective assistance by failing to propose a jury instruction necessary to his/her client's defense. But *Powell* is easily distinguishable from the facts here. In *Powell* the defendant's trial counsel argued in closing that the defendant was not guilty on the basis of a statutory defense but failed to propose the approved jury instruction for that defense. Consequently, the law given to the jury did not allow it to acquit the defendant based on the applicable defense.

failed to prove an intentional act and that there was a lack of motive evidence. RP 451-453. In summing up the evidence, Mr. Pena's counsel argued, amongst other things:

> If you find that Mr. Burnett [sic] must be held to account in your mind for the overall circumstances of what's gone on here, if you truly believe he's a person here, truly believe that he held the gun beyond a reasonable doubt, *I submit again neither of those have been proved.* But if you were to get there, then you could possibly get to the assault in the second degree based on a reckless conduct. . . . [O]n the Assault 1 and certainly not on the attempted murder. They're not even close to the type of proof that I submit is required to find a person guilty of those kind of heinous and very serious charges. . . . "[W]e just don't have exclusionary evidence about that they can say definitively whether Ms. Espinoza or Mr. Pena actually pulled the trigger.

RP 456-58 (emphasis added). He then asked that the jury find Mr. Pena not guilty of *all* the charges to include the lesser offense of Assault in the Second Degree. RP 459.

Based on the defenses, Mr. Pena's counsel actually argued—the State failed to prove he was at the scene of the crime, if he was there the State failed to prove he possessed the gun, if he did possess the gun the State still failed to prove he was the person who shot Mr. Burnett, if he did shoot Mr. Burnett, the State failed to prove it was intentional—his decision to suggest the lesser degree offense of Assault in the Second Degree and forego proposing the lesser degree offense of Assault in the

Third Degree was part of a legitimate trial strategy or tactic to obtain an acquittal. For one, if electing an "all-or-nothing" trial strategy as in *Grier* and *Breitung* is an acceptable trial strategy than it must be acceptable for a trial attorney to attempt to reduce the risk of an "all-or-nothing" strategy by proposing a lesser degree offense, but still arguing for acquittal. Secondly, each of Mr. Pena's trial counsel's arguments was a complete defense to the charges the jury was asked to consider since each charge required the jury to find beyond a reasonable doubt that Mr. Pena intentionally fired the gun. If the jury believed that Mr. Pena accidentally, negligently, or recklessly fired the weapon, it would have to acquit him of all charges.

Additionally, because Mr. Pena's actions after the shooting, where he at first prevented people from leaving the scene before telling them to "scram," did not call 911, and attempted to avoid arrest, did not lend credence to the argument that the shooting was accidental. Proposing the lesser degree offense of Assault in the Third Degree would have undermined Mr. Pena's innocence claim; and where "a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy." *Breitung*, 173 Wn.2d at 399-400 (quoting *Hassan*, 151 Wn.App. at 220). Moreover, the lesser degree offense proposed by Mr. Pena's

counsel aligned much more closely to the evidence produced at trial because of the weapon used and the severity of the injuries Mr. Burnett suffered.[3] Trial counsel could have felt he needed to give the jury a potentially plausible, and palatable, alternative if it was going to find Mr. Pena guilty of a crime, while still allowing him to argue for total acquittal. Thus, Mr. Pena's trial counsel's decision not to propose the lesser degree offense of Assault in the Third Degree did not amount to deficient performance especially "given the deference afforded to decisions of defense counsel in the course of representation." *Grier*, 171 Wn.2d at 33.

b) Prejudice

In order to prove that deficient performance prejudiced the defense, the defendant must show that "counsel's errors were so serious as to deprive [him] of a fair trial. . . ." *Id.* at 33 (quoting *Strickland*, 466 U.S. at 687). In other words, "the defendant must establish that 'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Id.* at 34 (quoting *Kyllo*, 166 Wn.2d at 862). "In assessing prejudice, 'a court should presume, absent challenge to the judgment on grounds of

[3] The Assault in the Second Degree instruction allowed the jury to find Mr. Pena guilty of that charge if Mr. Pena acted intentionally "and thereby *recklessly* inflict[ed] substantial bodily harm." RCW 9A.36.021(1)(a) (emphasis added); CP 117-18. Thus, for example, if Mr. Pena had intentionally shot towards Mr. Burnett intending to scare him rather than injure him, he would have been guilty of Assault in the Second Degree.

evidentiary insufficiency, that the judge or jury acted according to the law' and must 'exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like.'" *Id.* (quoting *Strickland*, 466 U.S. at 694–95).

Moreover, when juries return guilty verdicts, reviewing courts "must presume" that those juries actually found the defendants "guilty beyond a reasonable doubt" of those charges. *Id.* at 41. Thus, "the availability of a compromise verdict would not have changed the outcome of" the trial. *Id.* at 44. Furthermore, when a trial court fails to instruct the jury on an applicable lesser offense, but the jury was instructed on and passed up the opportunity to convict for an intermediate offense, reviewing courts will find the error harmless. *State v. Guilliot*, 106 Wn.App. 355, 368-69, 22 P.3d 1266 (2001); *State v. Hansen*, 46 Wn.App. 292, 296-98, 730 P.2d 706 (1986); *State v. Barriault*, 20 Wn.App. 419, 427, 581 P.2d 1365 (1978) (citing *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963)).

In *Hansen*, the defendant was convicted of first degree rape and first degree kidnapping and the jury was also instructed on the lesser offense of second degree kidnapping. *Hansen,* 46 Wn.App. at 296. The trial court, however, erred by declining to instruct on the additional lesser

offense of unlawful imprisonment. *Id.*[4] In holding the error harmless *Hansen* concluded:

> In the case at bar, the jury was instructed on the intermediate offense of second degree kidnapping. *If the jury believed that [the defendant] was less culpable* because of his drug-induced mental disorder, *logically it would have returned a conviction on the lesser crime* of second degree kidnapping. Second degree kidnapping requires only an intent to abduct. To convict [the defendant] of first degree kidnapping, the jury had to find he intended to abduct the victim with the intent to facilitate the rape. In our view, *the jury's verdict on the highest offense was an implicit rejection of all lesser included offenses* that could have been based upon [the defendant]'s diminished capacity defense.

Id. at 298 (emphasis added). Similarly in *Guilliot* the trial court's error in refusing to give lesser included offense instructions for first and second degree manslaughter was harmless where the jury convicted the defendant of first degree murder and rejected the intermediate offense of second degree murder. *Guilliot*, 106 Wn.App. at 369. *Guilliot* held that if:

> *[i]f the jury believed that [the defendant] was less culpable due to an accident* or his hypoglycemia, *logically it would have returned a verdict on the lesser offense* of second degree murder. But the jury rejected this intermediate offense and elected to convict him on the highest offense. Thus, because the factual question posed by the omitted manslaughter instructions was necessarily resolved adversely to [the defendant] by the jury's rejection of second degree murder, this error does not require reversal.

Id. (emphasis added)

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[4] The defendant in *Hansen* did request the instruction. *Id.*

In almost all material aspects this case is on all fours with *Guilliot*. In both cases, the defendant faced an intentional act crime,[5] the trial courts, upon request, gave the juries the option of convicting the defendants of lesser degree offenses that still required an intentional act,[6] and the defendants argued that their behavior in handling a firearm was reckless or with criminal negligence (as is argued now). *Id.* at 367-68. There, the defendant actually requested a lesser included offense with a criminal negligence *mens rea*.[7] *Id.* Here, Mr. Pena asserts that he was prejudiced because his trial attorney did not request one. Br. of App. at 9. Thus, to the extent that "factual question posed by the omitted manslaughter instructions was necessarily resolved adversely to [the defendant] by the jury's rejection of second degree murder" in *Guilliot*, the same must be true here where the factual question posed by the claimed, omitted instruction was necessarily resolved adversely to Mr. Pena by the jury's rejection of Assault in the Second Degree. Furthermore, that the

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[5] *Compare* RCW 9A.32.030 "(1) A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person" *with* RCW 9A.36.011 "(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm"

[6] *Compare* RCW 9A.32.050 "(1) A person is guilty of murder in the second degree when: (a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person" *with* RCW 9A.36.021 "(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 . . . (c) Assaults another with a deadly weapon"

[7] RCW 9A.32.070 "(1) A person is guilty of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person."

jury also convicted Mr. Pena of Attempted Murder in the Second Degree, which required the State to prove that Mr. Pena intentionally took a substantial step towards the murder of Mr. Burnett, bolsters the fact that the jury rejected any defense theory that the shooting happened as a result of recklessness or negligence. *Hansen*, 46 Wn.App. at 298. Consequently, even if Mr. Pena's trial counsel's performance was deficient when he did not propose the lesser offense of Assault in the Third Degree, that error was harmless, and as a result, his attorney's deficient performance did not prejudice him.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED RELEVANT EVIDENCE OF MR. PENA'S ARREST AND THE LEAD DETECTIVE'S JOB ASSIGNMENT TO BE ADMITTED.

"Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and we review them only for manifest abuse of discretion." *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) ("The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court's view.") (citations omitted). When a trial court's ruling on such matters of evidence is in error, reversal will only be required "if there is a reasonable

possibility that the testimony would have changed the outcome of trial." *Aguirre*, 168 Wn.2d at 361 (citing *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006)).

Here, Mr. Pena complains about the admission into evidence of the fact that Detective Zimmerman was assigned to the "Safe Streets Task Force," a regional gang unit, the fact that Mr. Pena was arrested by a SWAT team, and testimony concerning the vehicle in which Mr. Pena was transported to the police station. Br. of App. at 15-17. The following was the sum total of the testimony regarding Detective. Zimmerman's assignment:

> [STATE] And, Detective Zimmerman, your occupation?
>
> [DETECTIVE ZIMMERMAN] I'm a detective with the Clark County sheriff's office.
>
> [STATE] And are you assigned to any specific unit?
>
> [DETECTIVE ZIMMERMAN] I am. Safe Streets Task Force.
>
> [STATE] What's the Safe Streets Task Force?
>
> [DETECTIVE ZIMMERMAN] It's a regional gang unit.
>
> [STATE] And how long have you been assigned to that unit?
>
> [DETECTIVE ZIMMERMAN] Over two years.
>
> [STATE] So in late January 2013, is that the unit you were assigned to?
>
> [DETECTIVE ZIMMERMAN] That is correct.

RP 347-48.

No argument was put forward by the State linking Detective Zimmerman's assignment and Mr. Pena, and the testimony was part and parcel of the detective's training and experience testimony. RP 347-48, 417-442, 460-65. Moreover, the trial court invited the defense to propose a limiting instruction relevant to this issue. RP 26. Mr. Pena declined that invitation. CP 67-89.

The testimony regarding the SWAT team's involvement with Mr. Pena's arrest that the State initially elicited was similarly minimal and relevant. RP 186. Mr. Pena refused to exit the residence he was in despite requests that he exit and only did exit once "SWAT operators deployed an NFDD, which is . . . a Noise, Flash, Distraction Device." RP 186. Such evidence was relevant to Mr. Pena's consciousness of guilt. Furthermore, it was Mr. Pena's questioning that prompted Detective Zimmerman's brief mention that he only entered the residence after the "SWAT team had cleared the residence to ensure that there was nobody else in there." RP 364.

Moreover, the State's questions regarding the vehicle in which Mr. Pena was transported to the police station were invited by Mr. Pena who first broached the subject and asked the very specific questions that led to answers that he now claims are prejudicial. RP 359, 361. As a result, Mr. Pena cannot now complain to the answers he was given and to which he

did not object. In sum, however, the trial court did not abuse it's discretion in determining that the evidence surrounding Mr. Pena's arrest was relevant, and that Detective Zimmerman's training and experience was relevant; and to the extent any of the evidence was admitted in error there is no reasonable possibility that the exclusion of that testimony would have changed the outcome of trial. This is especially the case because the State did not make impermissible arguments concerning the contested evidence in closing—only speaking about the arrest momentarily—and because Mr. Pena, despite the trial court's invitation, did not feel the need to propose a limiting instruction. The evidence in this case was strong and did not hinge on the contested evidence.

D. CONCLUSION

For the reasons argued above, Mr. Pena's conviction should be affirmed.

DATED this 26th day of May, 2015.

Respectfully submitted:
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