70506-7

70506-7

NO. 70506-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO MENDOZA-GOMEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BILL BOWMAN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DAVID SEAVER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUE PRESENTED

To prevail on a claim of ineffective assistance, a defendant must affirmatively demonstrate that his counsel's performance was deficient and that there is a reasonable possibility that this deficiency altered the outcome of the proceedings. Failure to satisfy either prong defeats a claim. Here, the defendant contends that his trial counsel provided ineffective assistance because she failed to object or seek a mistrial when counsel for his co-defendant informed the venire, in response to a question asked by a potential juror during voir dire, that the defendants did not face capital punishment. Although such an advisement is typically disfavored, Washington's appellate courts have recognized that there may be tactical reasons why defense counsel could, as was the case here, choose to have this information imparted to potential jurors. Moreover, the defendant fails to prove prejudice whatsoever, instead treating it as a given fact without adequate support. Under these circumstances, has the defendant failed to establish ineffective assistance?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Francisco Mendoza-Gomez (hereinafter Mendoza), was charged along with Amalia Cervantes-Castillo (hereinafter Castillo), Agalega Pua, and Eric Tharp with several charges arising out of a series of incidents that occurred on or shortly after September 30, 2011. CP 1-10. Initially, Mendoza and Tharp were tried together, following severance of Pua's and Castillo's cases. 6/19/12 RP 11. Mendoza's and Tharp's trial ended in a mistrial due to prosecutorial error, and their cases were scheduled for a new fact-finding. 8/8/12 RP 83-108.

Before the retrial, Tharp pleaded guilty to amended charges. 7/12/2013 RP 6. Mendoza's case was then joined with Castillo's, and the two were prosecuted together on charges of Conspiracy to Commit First Degree Murder.[1] CP 421. Mendoza was also tried for first-degree kidnapping and second-degree assault. CP 422-23. By jury verdicts rendered on April 26, 2013, Mendoza was

[1] By this point, Castillo had already been convicted at a separate trial on charges of kidnapping, unlawful possession of a firearm, and possession of methamphetamine. 7/12/2013 RP 9. The jury at her first trial was unable to reach a unanimous verdict as to the charge of conspiracy to commit first-degree murder. 7/12/2013 RP 9. Hence, the retrial with Mendoza occurred.

convicted on all counts. 4/26/2013 RP 2-6. Castillo was also found guilty on the conspiracy charge. 4/26/2013 RP 4-5.

2. SUBSTANTIVE FACTS

On the afternoon of September 30, 2011, Tawney Eckert and her husband, Taylor, arrived at the Shell gas station located at 1520 S. 348th St. in Federal Way after being given a lift there by a stranger, following mechanical difficulties with the Eckerts' vehicle. 4/11/2013 RP 98-99. As they entered the station parking lot, the Eckerts noticed a black Acura SUV parked nearby. 4/11/2013 RP 99, 118. The SUV pulled up to the front of the station's convenience store as Taylor Eckert noticed a commotion inside the store. 4/11/2013 RP 118. Suddenly, two men bolted from the store and jumped into the SUV, which sped away. 4/11/2013 RP 100, 118. Taylor noticed that one of the men, a Samoan, was holding a gun. 4/11/2013 RP 122. Another bystander heard the driver of the SUV, a woman, yell to the two men that they needed to go just as they exited the store. 4/11/2013 RP 62-63.

The Eckerts entered the store, and found Juan Moreno, also known as Isais Lozano, lying on the floor behind the cash register. 4/11/2013 RP 105, 118. Moreno had gashes on his forehead and jaw and was bleeding significantly. 4/11/2013 RP 105-07, 124.

Tawney, a trained paramedic, began to treat Moreno's injuries while her husband spoke by phone with a 911 emergency dispatcher. 4/11/2013 RP 105, 108.

Federal Way Police Department officers responded to the Shell station and spoke to the clerk, Hossam Gayed, who was working there that afternoon. 4/11/2013 RP 82. Gayed testified that he had been behind the cash register when a man crashed through the front door of the store and leapt over the counter; the man was followed by a larger, Samoan man in hot pursuit. 4/10/2013 88-90. Gayed, fearing that he was going to be robbed, hid inside an interior office, behind a door he locked. 4/10/2013 RP 91. From inside the office, he heard a man screaming and yelling. 4/10/2013 RP 93. When he came out of the office, he saw the first man who had raced into the store on the ground, bleeding severely and being treated by Tawney Eckert. 4/10/2013 RP 93-94.

Gayed provided the responding officers with video taken by the station's surveillance cameras. 4/10/2013 RP 99. The video, which was played to the jury, showed one man enter the store to obtain paper funnels, used to pour fluids into vehicles. 4/10/2013 RP 101. Shortly after, the in-store camera recorded Moreno's panicked entry into the store, followed by two men, one a Samoan

and the other a male with a shaved head; the two caught Moreno and proceeded to beat, kick, and, possibly, pistol-whip him before fleeing. 4/11/2013 RP 88-89.

Moreno testified that he had paid a visit to a Seatac apartment in the mid-afternoon of September 30, 2013, to visit a woman named Cheila. 4/15/2013 RP 42-43. Cheila was the sister-in-law of Francisco Mendoza, a man whom Moreno knew socially. 4/15/2013 RP 34, 40. Moreno had met Cheila a few days earlier while visiting Mendoza, but did not know what Cheila's relationship to Mendoza was. 4/15/2013 RP 40. He returned on the 30th to spend more time with Cheila, whom he found attractive; Moreno had not told Mendoza of his plans to visit Cheila, who was married to Mendoza's brother. 4/15/2013 RP 41; 4/24/2013 RP 26.

While Moreno was speaking to Cheila, Mendoza arrived without notice, accompanied by Amalia Castillo. 4/15/2013 RP 45-46. Mendoza appeared to be angry, and demanded to talk privately with Cheila. 4/15/2013 RP 47-49. Castillo remained with Moreno, and told him that he was in trouble. 4/15/2013 RP 49-50.

About ten minutes later, a Samoan and another man arrived outside the apartment and spoke to Castillo. 4/15/2013 RP 52-53. The two men spoke to Castillo in English, which Moreno does not

understand. 4/15/2013 RP 52-54. The Samoan man then walked up to Moreno, pointed a handgun at Moreno's torso, and pushed Moreno toward a waiting vehicle. 4/15/2013 RP 57, 59, 61-62. Moreno was driven at gunpoint to a Tukwila motel, where he was brought by the Samoan into a room. 4/15/2013 RP 63-64, 68-69.

The Samoan man, Agalega Pua, testified that he had been sleeping in the room at the Tukwila motel on the afternoon of September 30th when he was awakened by a phone call from Castillo. 4/16/2013 RP 77. Castillo, who was the common-law wife of Pua's older brother (then incarcerated at King County Jail), told Pua that she needed his help, and that a car would be coming to the motel to collect him. 4/16/2013 RP 76. When the car arrived, Pua was driven to Castillo's location, at the Seatac apartment. 4/16/2013 RP 81.

Castillo told Pua that Moreno had been caught in a compromising situation with the wife of Mendoza's brother. 4/16/2013 RP 85. She gave Pua a handgun and told him to keep watch on Moreno. 4/16/2013 RP 84. Castillo talked to Mendoza, and then returned to Pua; she told Pua that Mendoza had directed her to kill Moreno. 4/16/2013 RP 90.

At Castillo's direction, Pua took Moreno at gunpoint to a car that transported them back to Pua's Tukwila motel room. 4/16/2013 RP 92-93. A few minutes later, Castillo and Mendoza arrived, along with Mendoza's brother. 4/16/2013 RP 100, 103. They spoke angrily to Moreno in Spanish, and Mendoza was armed with a .45 caliber handgun and a baseball bat. 4/16/2013 RP 104-06. Mendoza swung the bat at Moreno's head; Moreno was struck in his hand when he raised it to block the impact to his skull. 4/16/2013 RP 106-07.

Mendoza spoke to Castillo, and then gave his .45 caliber pistol to Pua. 4/16/2013 RP 109-11. Castillo told Pua to take Moreno to a waiting black Acura SUV with her. 4/16/2013 RP 110-11. Once inside the vehicle, Castillo told Pua that they were going to kill Moreno. 4/15/2013 RP 119. She also informed Moreno, in Spanish, that she had been ordered to kill him. 4/15/2013 RP 96.

Castillo then drove the SUV to pick up a friend, Eric Tharp, in Federal Way. 4/16/2013 RP 119-20. When Tharp got in, he suggested that Fort Lewis, in Tacoma, would be a suitable place to dispose of Moreno. 4/16/2013 RP 121.

The SUV began to experience mechanical trouble, and Tharp suggested that they stop at a nearby Walmart for "oil."

4/16/2013 RP 123. (In actuality, the vehicle required transmission fluid, which Tharp purchased at the Walmart.) Upon returning to the SUV, Tharp realized he did not have a funnel to pour the fluid into the vehicle's receptacle, and directed Castillo to drive to the Shell station across the street. 4/16/2013 RP 126.

At the gas station, Tharp obtained a funnel and poured the "oil" into the SUV. 4/16/2013 RP 127. Castillo, who had kept the vehicle's doors locked throughout this time, unlocked the doors so Tharp could enter. 4/16/2013 RP 125, 128. Castillo began to drive away, neglecting to lock the doors again, and Moreno seized the opportunity to escape. 4/16/2013 RP 128.

Moreno ran into the station's store, and Pua and Tharp chased after him. 4/16/2013 RP 129. According to Pua, he and Tharp beat and kicked Moreno, and then returned to the SUV to flee the scene. 4/16/2013 RP 129.

Pua testified that he received a few hundred dollars and a small amount of methamphetamine from Mendoza-Gomez for his efforts. 4/16/2013 RP 132. Pua explained that Mendoza-Gomez was upset with him, however, because Moreno had survived. 4/17/2013 RP 42-43.

Through information developed in their investigation in the days following the incident at the Shell station, Federal Way Police Department detectives distributed a bulletin for area law enforcement officers, requesting that they look out for Tharp and Castillo. 4/22/2013 RP 13-14. King County Sheriff's Office Detective Benjamin Wheeler spotted Tharp driving a Jeep Cherokee on the evening of October 12, 2011, in Federal Way, and stopped him; inside the car, in the front passenger seat, was Castillo. 4/22/2013 RP 15.

Castillo and Tharp were arrested and a search of the vehicle was conducted. Along with a number of firearms, investigators found, in the Jeep's front passenger seat area, a notebook entitled "Maty's little book." 4/18/2013 RP 152. "Maty" is Castillo's nickname. 4/22/2013 RP 37. On one page, dated September 30, 2011, the following entry was made: "Today I start a new beginning with Chaparro." 4/22/2013 RP 152. "Chaparro" is Mendoza-Gomez's nickname. 4/15/2013 RP 34.

Mendoza did not testify in his defense, and his attorney rested Mendoza's case-in-chief without calling any witnesses. 4/24/2013 RP 108. Castillo testified in her case-in-chief, and claimed that Mendoza had phoned her on the afternoon of

September 30, 2011, because he had discovered Moreno with his sister-in-law and that Moreno had threatened to beat him up. 4/24/13 RP 21-22. She told the jury that she removed Mendoza from the scene to avoid any conflict, but that they were surprised when they visited Pua later that afternoon at his motel room and found Moreno there. 4/24/13 RP 31. Castillo testified that Moreno and Mendoza began to argue, and that Mendoza struck Moreno with a bat; Castillo claimed that she interceded and offered to give Moreno a ride to Tacoma to prevent further fighting. 4/24/13 RP 35-36.

Castillo claimed to not understand why Moreno bolted from the SUV at the gas station, or why Pua chased after him. 4/24/13 RP 56, 93-94. She directed Tharp to bring Pua back; when he did as asked, she drove them from the scene, leaving Moreno behind. 4/24/13 RP 56-58.

Castillo denied ever being directed by Mendoza to kill Moreno, or that she was the author of the entry in her notebook. 4/24/13 RP 61, 66. She did admit, however, that she worked for Mendoza, helping him operate his drug-dealing business and managing his fleet of vehicles, including the Acura SUV. 4/24/13 RP 84-85, 89.

C. ARGUMENT

1. MENDOZA WAS NOT DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL

The sole issue presented in this appeal is Mendoza's contention that he was deprived of the effective assistance of counsel when his trial attorney failed to object or request a mistrial after counsel for co-defendant Castillo, in response to a concern expressed by a venire member during jury selection, informed the venire member that the trial did not involve the death penalty. Mendoza asserts that there could be no justifiable basis for his counsel's inaction, and that this prejudiced him to such an extent that the only appropriate remedy is reversal of his convictions. Mendoza's claim should be rejected.

To show that trial counsel provided constitutionally ineffective assistance, a defendant must show that his attorney's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances, and that there is a reasonable probability that, but for the attorney's incompetence, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); see also Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Reversal of the outcome of a trial court

proceeding is required only where the defendant demonstrates *both* deficient performance and resulting prejudice. Strickland, 466 U.S. at 687.

Mendoza's claim of ineffective assistance pertains to the following discussion between co-defendant Castillo's counsel and a venire member during that attorney's first round of questioning during the voir dire stage of the trial, with the entire venire present in the courtroom:

> MS. CRUZ: I'd like to hear from you. Was it religious views or philosophical views that make you feel that you would not be able to sit on this particular jury with these charges?
>
> JURY PANELIST 9: It was unclear to me as to whether this was –
>
> MS. CRUZ: Can I have you speak into the mic.
>
> JURY PANELIST 9: It was unclear to me whether there was a death penalty involved.
>
> INTERPRETER: I didn't hear, something involved.
>
> JURY PANELIST 9: Death penalty. If that were the case, I would be uncomfortable.
>
> MS. CRUZ: In this particular case, we are not dealing with a death penalty case. Does that change it?
>
> JURY PANELIST 9: I have no problem.
>
> MS. CRUZ: You have no problem sitting on the jury then?

JURY PANELIST 9: That's correct.

4/8/2013 RP 110-11. The transcript does not indicate in any way that Mendoza's counsel either interjected herself into this conversation in order to lodge an objection, or that she later requested a mistrial or any instruction from the court to the venire directing them to disregard any sentencing consequences during their consideration of the evidence presented at trial. Jury Panelist 9 was shortly thereafter excused by the trial court for cause due to his claimed "nervousness" and fear that he could not be fair. 4/8/2013 RP 116.

Great judicial deference is accorded to counsel's performance, and the analysis begins with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689-90; McFarland, 127 Wn.2d at 335. To overcome this presumption, a defendant must establish that his attorney's conduct fell below an objective standard of reasonableness under prevailing professional norms, when evaluated against the entire record of the case. State v. Lopez, 107 Wn. App. 270, 275, 27 P.3d 237 (2001). The presumption of competence of counsel requires the defendant to show the absence of any valid tactical or strategic reason for the

challenged action in order to sustain the defendant's burden. State v. McNeal, 145 Wn.2d 352, 362-63, 37 P.3d 280 (2002).

Here, Mendoza's counsel correctly notes that Washington's appellate courts have regularly discouraged informing prospective jurors that the trial for which they may be selected does not involve potential capital punishment. See, e.g., State v. Mason, 160 Wn.2d 910, 929, 162 P.3d (2007); State v. Townsend, 142 Wn.2d 838, 840, 15 P.3d 145 (2001). These reviewing courts have expressed concern that if jurors know that the death penalty is not involved, they will be less attentive during the presentation of evidence and less inclined to hold the State to its burden of proof during their deliberations. Townsend, 142 Wn.2d at 846-47.

However, the appellate courts have expressly refused to impose a bright-line rule that defines an attorney's failure to object to the imparting of such information to the venire as *per se* deficient performance. See State v. Mason, 160 Wn.2d 910, 930, 162 P.3d 396 (2007); State v. Rafay, 168 Wn. App. 734, 777-78, 285 P.3d 83 (2012), rev. denied, 176 Wn.2d 1023 (2013), and cert. denied, 134 S. Ct. 170 (2013). There may, in fact, be legitimate strategic tactical reasons why defense counsel would want jurors to know about the impossibility of imposition of the most drastic form of

potential punishment on their clients. See Rafay, 168 Wn. App. at 781.

In the instant case, one can posit several reasonable justifications for Mendoza's counsel's silence. First, it must be noted that the stigma associated with being charged with a capital crime is obvious, insofar as it is common knowledge that, particularly in this state, the death penalty is typically reserved for the most abhorrent crimes. Mendoza's counsel could, quite sensibly, have felt that it would reflect more favorably upon her client for the jury to learn that the State did not believe his actions warranted the harshest punishment, regardless of the fact that the charges against him would not allow for such a sentence under the law.

Second, Mendoza's attorney may have simply liked this panel of venire members and did not wish to have them excused and replaced by a group of potential jurors she might find more problematic. The conversation between Jury Panelist 9 and counsel for co-defendant Castillo, reprinted supra, occurred at the conclusion of that attorney's first round of voir dire, which took place after the State's first round and after the general questions posed by the trial court. By that point, Mendoza's counsel had a

basis upon which to assess the merits, as she saw them, of this venire, and may have simply made the tactical decision that the risk of then (or later, after the conclusion of voir dire) requesting a mistrial outweighed moving forward with the existing group of potential jurors.

Finally, Mendoza's trial attorney may have made the strategic decision to remain silent on this subject with the expectation that she could see how the trial transpired and then attempt to use these events as the basis for reversal on appeal if she was dissatisfied with the trial's outcome. It is Mendoza's obligation, under well-established case law, to show the utter absence of any legitimate strategic or tactical reasons for his attorney's failure to object or seek a mistrial. He fails to do so here, instead resting on the general proposition that discussions of capital punishment in non-capital cases are generally disfavored by Washington's appellate courts.

Furthermore, even where a defense attorney's failure to object or seek mistrial may amount to deficient performance, reversal of the defendant's conviction is not required unless the second prong of the Strickland test is also satisfied. State v. Howland, 66 Wn. App. 586, 594-95, 832 P.2d 1339 (1992). A

defendant must *affirmatively* prove prejudice; he must show that there is a reasonable probability that the result of the proceeding would have been different had his attorney not erred. State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (defining a "reasonable probability" as a probability sufficient to undermine confidence in the outcome). This Court must examine the entire record of the trial to determine the impact of defense counsel's error. Id. at 595.

Mendoza makes little effort to identify specific prejudice, instead simply suggesting that the evidence on the charge of conspiracy to commit murder "was far from overwhelming." Brief of Appellant, at 18. It is hard to fault Mendoza in this regard, given the vague, hazy form of harm that the Townsend court initially suggested would occur if a jury on a non-capital case somehow learned that the death penalty was not a potential punishment.[2]

In any event, Mendoza cannot demonstrate the necessary quantum of injury. Mendoza's culpability as to the conspiracy

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[2] As has likely been suggested before to this Court by other attorneys, the Townsend court's conclusion necessarily implies that jurors who have no reason to believe that a case to which they were assigned involved the death penalty (e.g., a drug possession or theft case) approach their responsibilities more cavalierly than a jury seated on a capital case would, and that it might be worthwhile to allow jurors on non-capital cases – the *vast* majority of criminal cases prosecuted in Washington courts – to believe that all defendants may be subject to execution, lest the jurors exercise insufficient care in their duties.

charge was dependent on a single determination: whether he formed an agreement with Castillo (and, through her, Pua and Tharp) to *kill* Moreno, as Moreno and Pua testified and as the abundance of the State's evidence established, or to merely *beat* him, as Mendoza asserted during his post-arrest interview with police, a transcript of which was read to the jury.[3]

In other words, this was not a case in which the identity of the culprit was at issue and dependent on trace evidence or recollections of distant events, or a matter of diminished capacity or arguable self-defense or consent. Rather, the victim of a terrifying series of events testified to his abduction and planned elimination by gunshot at Mendoza's direction following his discovery of the victim in a compromising position with Mendoza's sister-in-law, and his testimony was corroborated by one of Mendoza's henchmen and significant physical and video evidence. It is dubious to argue, under these circumstances, that there is a reasonable probability that the jury would have implicitly accepted Mendoza's explanation and acquitted him of the charge of conspiracy to commit murder if

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[3] The reading of the transcript to the jury was itself not transcribed, but merely noted at 4/22/2013 RP 110. The State has requested that the transcript itself be transmitted to this Court as Supp. CP __ (State's Ex. 134). Mendoza's trial counsel argued in closing that her client admitted only to wanting to hurt Moreno, as opposed to ending his life. 4/25/2013 RP 78.

only they had not been relieved of a hypothetical, mistaken belief that he might be subjected to capital punishment.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Mendoza's convictions and deny his appeal.

DATED this 27th day of June, 2014.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: _____
DAVID SEAVER, WSBA# 30390
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. FRANCISCO MENDOZA-GOMEZ, Cause No. 70506-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

C Brame
Name

6/27/14
Date

Done in Seattle, Washington