91337-4

THE SUPREME COURT OF THE STATE WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO MENDOZA-GOMEZ,

Appellant.

PETITION FOR REVIEW
BY FRANCISCO MENDOZA-GOMEZ

Francisco Mendoza-Gomez #367237
Washington State Penitentiary
1313 North 13th Ave Echo/East-211-1
Walla Walla, Wa. 99362

Supreme Court Cause Number #91337-4 - State of Washington v. Francisco Mendoza-Gomez Court of Appeals NO. 70506-7-1

A. IDENTITY OF PETITIONER

Francisco Mendoza-Gomez, petitioner here and appellant below, requests this Court grant review of the decision designated on Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Mendoza-Gomez requests this Court grant review of the decision of the Court of Appeals, No. 70506-7-1 (January 20th, 2015). A copy of the decision is attached as Appendix-A.

C. ISSUES PRESENTED FOR REVIEW

1. In a non-capital case, it is error to inform jurors the death penalty is not a issue. It makes jurors less careful during deliberations and more likely to convict. At appellant's trial, his attorney failed to object and jurors were told the death penalty was not an option. Where defense counsel failed to object or move for a mistrial after disclosure, did appellant receive ineffective assistance of counsel?

2. Does the conclusion of the Court of Appeals that Mendoza does not establish that his counsel's performance was deficient and because Mendoza has not shown that he suffered any prejudice as a result of the alleged deficiency conflict with decisions by this Court and the United States Supreme Court that have held that under the circumstances of a attorney's failure to object to the jurors being told that the current case is in fact not a death penalty case falls below prevailing professional normans and that the attorney's performance is deficient?

3. Does the deficient performance by Mr. Mendoza's trial

attorney of not requesting a mistrial allowing the trial to move forward with a poisoned juror deny Mr. Mendoza the constitutional right to a fair trial?

D. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Francisco Mendoza, Agalega Pua, Amalia Cervantes, and Eric Tharp with multiple offenses in connection with the September 30th, 2011, abduction of of Juan Morneo-Zuazo. CP 1-10. Pua's and Cervantes' cases were severed from those of Mendoza and Tharp, who were tried together. 2RP 11. That trial ended in a mistrial when prosecutors, while examining Tharp, improperly impeached him using evidence they had failed to disclose. 18RP 83-108.

BY the time of Mendoza's retrial, Pua and Tharp had pled guilty. 20RP 6. Cervantes had also gone to trial and been convicted of several offenses. Jurors hung in Cervantes' case, however, on Conspiracy to Commit Murder in the First Degree. 20RP 9. Mendoza and Cervantes were then joined for their retrials. 20RP 70-71. Both Mendoza and Cervantes were tried for Conspiracy to Commit Murder in the First Degree. Mendoza also was tried for Kidnapping in the First Degree and Assault in the Second Degree. The conspiracy and kidnapping charges included a firearm sentencing enhancement; the assualt included a deadly weapon enhancement. Cp 421-423.

Jurors convicted Mendoza and Cervantes as charged. CP 457-462. The Honorable Bill Bowman sentenced Mendoza, including enhancements, to 386 months. CP 527. Mendoza timely filed his Notice of Appeal. CP 538-550.

On January 20th, 2015, Division I of The Washington State Court of Appeals filed a Unpublished Opinion affirming Mr. Mendoz a's convictions. See Appendix-A. Mr. Mendoza now request review of Division I decision.

SUBTANTIVE FACTS

Just after 5:00 p.m. on September 30, 2011 Hossam Gayed was working as a cashier at a Shell gas station in Federal Way when he saw Juan Moreno come crashing through the front doors. Moreno jumped over the counter and sought refuge behind it. 29RP 18-21. Two men, one of whom appeared Samoan and was armed with a black gun, pursued Moreno into the store, where they punched and kicked him before exiting and fleeing in a black Acura SUV driven by a woman. 29RP 22-25; 30RP 64-65, 122.

Based on surveillance footage from the gas station, eyewitne ss accounts, and additional investigation, police identified the two attackers as Agalega Pua and Eric Tharp, and identified the driver of the SUV as Amalia Cervantes. 300RP 61-67, 85-89, 99-105, 118-124; 34RP 27-44, 51-68.

Tharp and Cervantes were located and arrested together on October 12. 34RP 67-68. Pua was arrested the following day and, based on information he provided, police suspected Mendoza was arrested at his place of employment, without incident, on Jan 3rd, 2012. 34RP 91-93, 129.

What happened leading up to the incident at the Shell station was a matter of great dispute. The stories varied widely depending on when they were told and by whom.

Jaun Moreno initially told an investigating police officer and, later, a detective that the three people in the Acura SUV

had picked him up while he stood on Pacific Highway South waiting for a friend. He was forced at gunpoint to enter the vehicle and robbed of his wallet and cell phone before he was able to make his escape at the Shell station. 31RP 116-117; 32RP 13-18, 29-41. Moreno expressly denied Mendoza's involvement. 34RP 124. It was not until July 2012 - ten months after the incident - that Moreno changed his story to the one he presented at trial. 32RP 18-19; 34RP 46-48, 50.

Moreno's revised story was that he know Mendoza from a local bar where the two men played cards and pool. 31RP 35-37. In September 2011, Mendoza invited Moreno to his home. During that visit, Moreno met Chelia, who was Mendoza's sister-in-law (married to Mendoza's brother). 31RP 38-40; 34RP 93; 37RP 19-20. Moreno was attracted to Chelia and wanted to see her again. 31RP 41.

Approximately on week later, on September 30th, Moreno stopped by the home again to "talk with (Chelia) and have a frienship." 31RP 42. While Moreno was visiting with Chelia, Mendoza and Cervantes arrived. 31RP 46. According to Moreno, Mendoza appeared angry and Cervantes said to Moreno, "you are in trouble." 31RP 48-50. Two Samoan men arrived shortly thereafter - one of whom was Agalega Pua - and spoke to Mendoza. 31RP 52-53; 34RP 61-62. Pua, who was armed with a silver pistol, and the second Samoan man forced Moreno into a car driven by a Hispanic man Moreno did not know. 31RP 54-63.

According to Moreno, he was taken to an apartment at a different location, where he was in the company of several Samoan men, including Pua. 31Rp 64, 69-71. Moreno sat on a couch for 20 to 30 minutes before Mendoza and Cervantes arrived. 31RP

72. Mendoza pulled out a black .45 pistol, which he handed to Pua, who put on blue latex gloves. 31RP 76-81. Mendoza then retrieved an aluminum bat, told Moreno he had "screwed up" and swung the bat toward Moreno's feet. 31RP 81-85. Moreno attempted to defend himself, resulting in the bat hitting his hand and breaking a finger. 31RP 84-88.

According to Moreno, he was then forced into the black Acura SUV. 89-90. Cervantes was driving and Pua sat in the back seat with Moreno, holding the .45. 31RP 91-95. Moreno asked Cervantes to let him go, and she responded that she had been told to kill him and was going to do so. 31RP 96. They drove to another apartment, where they picked up Eric Tharp, who sat in the front passenger seat. 31RP 98-103. The SUV was having transmission problems, so Cervantes drove to a nearby Wal-Mart, where Tharp purchased transmission fluid. 30RP 38-43; 31RP 101-105. Cervantes kept the doors locked while Tharp was gone. 31RP 103. Tharp returned and attempted to put fluid in the transmission but could not do so without a funnel. 31RP 105-106.

Tharp got back in the SUV, and Cervantes drove to the nearby Shell station. 31RP 106. Tharp obtained a funnel and poured the fluid into the transmission. 31RP 106-107. As before, Cervantes locked the SUV's doors when Tharp left the vehicle. 31RP 107. When Tharp got back in, however, Cervantes forgot to lock the doors. As she started to pull away, Moreno opened the rear door and ran into the gas station. 31RP 108-109. He jumped over the counter, but Pua and Tharp followed him, beating him while he lay on the floor. 31RP 109-110.

Moreno claimed he initially lied - saying he was abducted on Pacific Highway South - because he did not want his girlfriend to find out he had visited another woman. 31RP 114-116. By the time of trial, Moreno had been convicted in California on a drug charge, was under an immigration hold, and faced possible deportation. 31RP 29. Although he had not been promised anything in exchange for his testimony, he had asked for assistance with his immigration issues and prosecutors told him they would try and help. 31RP 29; 32RP 20-21, 66-67.

Mendoza did not testify at trial, but participated in a lengthy interview with police officers following his arrest. 34RP 92-93; exhibit 134. Mendoza explained that Moreno had been having a affair with his brother's wife. He admitted paying $300.00 to have Moreno - who had threatened to harm him Mendoza - taken away and beat up. 34RP 93-95; exhibit 134 at 13, 15-38, 42-57, 77-83, 101-102, 106. He denied a plan to kill Moreno. 34RP 133-134; exhibit 134, at 49-50. And he denied providing a firearm to anyone. Exhibit 134, at 45-46.

Cervantes testified at trial and also refuted the notion of a plan to kill Moreno. 37RP 61. According to Cervantes, Mendoz a had a long known that his sister-in-law was having a affair. 37RP 20. On September 30th, 2011, she received a phone call from Mendoza, who sounded scared and said someone wanted to beat him up. He asked her to come over. 37RP 21-24. Cervantes, along with Pua and another friend, headed directly to the apartme nt. 37RP 21, 24-25. When they arrived, Mendoza and Moreno were arguing. Moreno denied any wrongdoing with Chelia and refused

to leave the premises. Cervantes eventually left with Mendoza to run errands. 37RP 25-29.

According to Cervantes, about a half hour later, she and Mendoza ended up at the Traveler's Choice Motel, where Cervantes had a room, and were surprised to see Moreno there. 37RP 31-32, 36. No one had any guns out and no one was preventing Moreno from leaving. 37RP 32. Mendoza and Moreno began to argue again. 37RP 32-33. Mendoza grabbed a small aluminum bat that was already in the room and struck Moreno. 37RP 34-36. Mendoza immediately stopped the attack, however, when Cervantes told him to. 37RP 36.

Cervantes testified that she wanted Moreno to leave and offered to give him a ride. This was her idea and Mendoza was not telling her what to do. 37RP 36-37. She and Pua then left with Moreno in the SUV, which belonged to Mendoza 37RP 37. The plan was to drop Moreno in Tacoma, where his cousin lived. 37RP 41-43.

Just about the time the car's transmission started to act up, Cervantes received a call from Tharp, who lived in the vicini ty and told her to stop by. 37RP 43-44. They picked up Tharp, who diagnosed the problem. From there, they stopped at Wal-Mart and then the Shell station. 37RP 45, 52-53. According to Cervante s, the SUV's doors were never locked. 37RP 47, 54.

As they started to leave the Shell, Moreno unexpectedly ran from the SUV and Pua chases him. Because Cervantes could not leave without Pua, she told Tharp to go get Pua and he did. Both men eventually ran back out and got back in the SUV. Cervant

es did not know what had happened. 37RP 55-60. Just as she had told police when questioned, she denied there was a plan to assualt Moreno, much less kill him, and she never received any payment for what happened to Moreno. 36RP 35; 37RP 61-63.

When police located and arrested Cervantes and Tharp, they were traveling in a Jeep. 34RP 69; 37RP 64. Inside that vehicle, police found the two firearms (the silver handgun and the black .45) associated with Moreno's abduction. 32RP 61-62, 88, 112; 34RP 69-70, 153-157. Cervantes denied any knowledge of these firearms or other firearms found in the vehicle, except a handgun she had obtained after September 30th, which she was carrying in her purse. 37RP 64-65, 99-107.

Cervantes is dating, and has a child with, Pua's older brother, Aigaleli Pua, who was incarcerated when the crimes were committed in this case. 32RP 73-74; 34RP 51-54; 37RP 13. In an attempt to impeach Cervantes, prosecutors read a transcript of a taped jail telephone call between the two the day after the crimes. 34RP 56-57. Cervantes denied she had been referring to the incident at Shell. 37RP 67.

By trial, Pua had traded a guilty plea to reduce charges (the State dropped the Conspiracy to Commit Murder charge) for testimony against Mendoza and Cervantes. 33RP [redacted] 14, 23. And he was no longer claiming, as he told detectives when first arrested, that he had merely been asked to beat up Moreno. 34RP 75-78, 110-111, 120-121.

Instead, Pua's testimony was similar to a statement he later gave police. See 34RP 78; 36RP 37-42. According to Pua,

on September 30, Cervantes called him and said a car was coming by to pick him up. 32RP 77-78. He was then driven to the apartmen t where Moreno had been found with Chelia. 32RP 78-80. Once there, Cervantes handed him the silver gun and told him to watch Moreno, which he did. 32RP 85-89. At Cervantes' direction, Pua then took Moreno at gunpoint to the car in which he had arrived. 32RP 90-92. According to Pua, Cervantes said that Mendoza wanted Moreno killed. 32RP 90.

Moreno was driven to the Traveler's Choice Motel and taken inside one of the rooms. 32RP 93-94. Cervantes and Mendoza arrive shortly thereafter, along with Mendoza's brother. 32RP 103. Pua watched as Mendoza struck Moreno with the bat, injuring Moreno's fingers. 32RP 105-107. According to Pua, Cervantes told him to take Moreno to the Acura. She also gave Pua the black .45, which Mendoza had given to her, and told Pua that Mendoza said to use one bullet. 32RP 110-113; 33RP 13-14. Pua then put on the blue gloves to avoid leaving prints in the SUV. 32RP 113-114.

For events that followed, Pua's testimony largely mirrored that of Moreno. Cervantes told Moreno he was going to be killed. 32RP 118-119. The group picked up Tharp, stopped at Wal-Mart for transmission fluid, and ended up at the Shell station, where Pua and Tharp beat Moreno after he fled the SUV. 32RP 119-129. According to Pua, he and Tharp were each paid $300.00 plus some drugs for their participation. 32RP 131-132.

Danyale Pasley also testified for the prosecution. 35RP 35. Her testimony did not match what she initially had told police. 35RP 54. Pasley testified that she knew all four defendan

ts. 35RP 36-39. She had previously owned the black Acura SUV, but had traded it to Mendoza in September 2011. 35RP 39-40. According to Pasley, on September 30, Cervantes called her, said the Acura had been stolen, and indicated that Pasley should call the police and report the vehicle stolen from her own drivew ay. 35RP 43-44. Cervantes called back, however, within a few minutes and told Pasley to never mind because the matter had been taken care of. 35RP 45.

According to Pasley, Cervantes then asked her to come down to a hotel so that everthing could be explained to her. 35RP 45-46. Pasley went to the hotel and spoke with Cervantes. 35RP 46. She also claimed that Mendoza was there, in an adjoining room, although she only saw him from behind and did not speak with him. 35RP 46-47, 60, 64-65. Cervantes told her about a a "hit" on a man having a affair with Mendoza's sister-in-law. Cervantes said she had driven the vehicle, along with Pua and Tharp, and intended to take the man to some woods, where he would be "finished off." 35RP 50-51. Pasley also testified that, some time later, Mendoza apologized to her for getting her involv ed and said Mexico was "mad at him" for putting out a hit on someone without permission. 35RP 47, 63-64.

E. ARUGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO DEMAND A MISTRIAL ONCE JURORS WERE INFORMED THE CASE DID NOT INVOLVE THE DEATH PENALTY.

The law is well established in Washington. "The question of the sentence to be imposed by the court is never a proper

issue for the jury's deliberation, except in capital cases." State v Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). Consequen tly, in a non-captial case, it is error to tell jurors the death penalty is not involved. State v. Townsend, 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001); State v. Murphy, 86 Wn.App. 667, 668, 671, 937, P.2d 1173 (1997). review denied, 134 Wn.2d 1002, 953 P.2d 95 (1998).

This is a "strict prohibition" that "ensures impartial juries and prevents unfair influence on a jury's deliberations." Townsend, 142 Wn.2d at 846. Specifically, "if jurors know that the death penalty is not involved, they may be less attentive during trial. less deliberative in their assessment of the eviden ce, and less inclined to hold out if they know that execution is not a possibilty." Townsend, 142 Wn.2d at 847.

This prohibition applies even when a juror asks if the penalty might apply. In State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035, 128 S. Ct. 2430, 171 L. Ed.2d 235 (2008), the Supreme Court rejected the notion that when a juror expressly asks about the death penalty, it is approp riate to instruct jurors it does not apply. The trial judge had reasoned this would benefit the defense because those concern ed about the penalty would naturally be pro-defense and remove themselves from consideration if they were not assured of the penalty's absence. State v. Mason, 127, Wn. App. 554, 573, 126 P.3d 34 (2005). Citing Townsend, the Supreme Court found this unpersuasive and faulted the trial court for revealing this information. Mason, 160 Wn.2d at 929-930.

Despite this clear prohibition, Mendoza's jury was informed

the case did not involve the death penalty. 26RP 109. In response Following a reading of the charges and hardship excusals, and in the presence of the entire prospective panel, one of the jurors indicated he would be uncomfortable sitting on the case if it involved the death penalty. 26RP 110. In response, counsel for Cervantes stated, "we are not dealing with a death penalty case," to which the juror responded that he would have no problem serving. 26RP 111. Counsel for Mendoza took no action to prevent, or in response to, this revelation. This was is ineffective.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Review is de novo. State v. Rafay, 168 Wn. App. 734, 775, 285 P.3d 83 (2012), review denied, 167 Wn.2d 1023, 299 P.3d 1171, cert. denied, 134 S. Ct. 170, 187 L. Ed. 2d 117 (2013).

Both requirements are met here.

No reasonable attorney would have allowed jurors to learn that the death penalty did not apply. IN Townsend, defense counsel failed to object when the court informed jurors of this fact. Addressing that failure, the Supreme Court recognized that, considering the longstanding prohibition against revealing that

information, the failure to object fell below prevailing professi onal norms. Townsend, 142 Wn.2d at 847. The Court also rejected any argument that revealing this information was part of a legiti mate strategy:

> There was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such instructions, if any, would only increase the likelihood of a juror convic ting the petitioner.

Townsend, 142 Wn.2d at 847.

In State v. Hicks, 163 Wn.2d 477, 181 P.3d 831, cert. denied , 555 U.S. 919, 129 S. Ct 278, 172 L. Ed. 205 (2008), the Supreme Court again found deficient performance where defense counsel permitted the court and prosecutor to inform jurors the death penalty did not apply and then referenced the penalty's absence themselves. Hicks, 163 Wn.2d at 482-483. Citing Townsend and Mason, the Hicks Court repeated the applicable rule: "in response to any mention of capital punishment, the trial judge should state generally that the jury is not to consider sentencing." Hicks, 163 Wn.2d at 478 (emphasis added).

Similarly, in Mendoza's case, his attorney performed deficie ntly by failing to object to the disclosure. There was no legitim ate strategy to informing jurors of this fact. Compare Rafay, 168 Wn. App. at 779-782 (defense legitimately agreed jurors should be told penalty did not apply where subject of penalty a critical aspect of defense trial strategy and clearly this was a deliberate, considered, and strategic choice). Moreover, following disclosure, counsel should have immediately moved

for a mistrial, which would have been granted. See State v. Gilchrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) (mistrial necessary where nothing short of a new trial would ensure defenda nt is tried fairly).

Mendoza suffered prejudice. There is a reasonable probabilit y that the mistake affected the jury's verdict on Conspiracy to Commit Murder in the First Degree. "A reasonable probability is a probability sufficient to undermine confidence in the outcom e." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)(Quot ing Strickland, 466 U.S. at 693-94).

In the absence of informing jurors this was not a death penalty case, Mendoza had a legitimate chance of acquittal, or at least a hung jury as in the first trial of Cervantes, who in the co-defendant in the instant case, who was also charged with Conspiracy to Commit Murder in the First Degree which is based on the same exact facts and discovery in the instant case. Cervantes is being retried for the Conspiracy charge in the instant case as the co-defendant of Mendoza. The evidence for Conspiracy charge, in isolation, in far from overwhelming. Again, Cervantes' first trial resulted in a deadlocked jury on this very charge. 20RP 9. Mendoza explained to the police that the only plan was to assualt Moreno, not kill him. 34RP 93-95, 133-134; exhibit 134 at 22-23, 37-38, 42-57, 77-83, 91-98, 106. So did Pua, initially. 34RP 75-78, 110-111, 120-121. And Cervante s also denied a plan to kill. 37RP 61-63.

Jurors were provided the option of convicting on the lesser charge of Conspiracy to Commit Assault in the Second Degree. CP 485-486, 488-491. This is what defense counsel encouraged

jurors to do. 39RP 60-61, 64, 77-80. But once jurors were informe d they need not give this case the care and thoughtful reflection appropriate to the most serious cases, the chance of conviction on the greater offense increased and the chance of conviction on the lesser offense, or even outright acquittal, diminished.

> Court of Appeals ruling that there is at least "two legitima te tactical reasons exist for declining to object to the venire being informed that the case did not involve the Death Penalty is based off the Courts theory and made on a assumtion and is error of the Court to make decisions in a Direct Appeal on evidence that is not part of the record.

In the Division I opinion the Court ruled on the two prong test of the Strickland standard to prove ineffective assistance of counsel finding that either prong was satisfied. See Appendix A. That either prong was NOT satisfied.

In order to prove that Mendoza Counsel performance was deficient he must prove that his counsels performance was deficie nt. The Court admits that it is error for the jury to be informed that the case to be deliberated is in fact not a death penalty case. See Appendix A. It also recognizes that it is deficient of a defense counsel to not object to this disclosure. See Append ix A. But this failure to object is not error if it is a legitima te trial strategy or tactic itmay not be used as a basis for ineffective counsel claim. The Court ruled that there were two reason that the failure to object was a trial stratey on it's own theory that Mendoza's Counsel was favorable impressed by the panel of prospective jurors. And second that Counsel knew that is was error not to object to the disclosure and want to preserved this issue for Mendoza on appeal. Clearly this is error of the Court of Appeals and clearly defense counsels state

of mind concerning trial strategy or tactics are not part of the trial record. Direct Appeals are decided solely from information in the trial record.

Moreover, it was determined by this very court that there "There was no possible advantage to be gained by defense's counsel's failures to object to the comments regarding the death penalty. On the contrary, such instructions, if anything, would only increase the likelihood of a juror convicting the petitioner. Petitioner has carried his burden of establishing deficient performance."

State v. Townsend, 142 Wash.2d 838 (2001).

Clearly this ruling is in direct conflict with a Supreme Court decision concerning this specific issue. Also in direct conflict of the Washington State Rules of Appeal in regard to decisions of the Court of Appeals in a Direct Appeal be based on the trial court record.

Under the second prong of the Strickland test, a defendant must demonstrate that the deficient performance prejudiced the defense such that there is "a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." State v. Lord, 117 Wash.2d 829, 883-84, 822 P.2d 177 (1991)(quoting State v. Strickland, 466 U.S. at 694, 104 S.Ct. 2052).

Here in the instant case Mendoza's co-defendant Amalia cervantes's first trial ended in a mistrial for the alleged offense of Conspiracy to Commit Murder in the First Degree. This trial is the second trial for MS. Cervantes with the same set of facts to prove the Conspiracy charge. Had not the jury been disclosed that they need not have to pay as close attention to the evidence by the disclosure that the instant case is in

not a death penalty case Mr. Mendoza would have had a reasonable probability that the jury would of aquitted or hung as in the first trial of his co-defendant, Amalia Cervantes.

In the Court of Appeals decision the Court based it's ruling on the notion that there was sufficient evidence to convict on the Conspiracy Charge and the jury outcome was not affected by the disclosure. See Appendix-A. This ruling is misplaced .

In the instant case all evidence relied on upon by the jury is highly circumstancial. There is no direct testimony linking Mr. Mendoza to a conspiracy to murder until the state relied on a witness, Mr. Pua, who does not understand enough spanish to understand the conversation between Mr. Mendoza and Ms. Cervantes. Furthermore, this testimony only changed to inplim cate Mr. Mendoza only after the state offered hima deal. And even then his statements are a perception of what he perceived what was happening or being said because he did not understand spanish. Further, the only person who had any direct conversation with Mr. Medoza is MS. Cervantes, who in fact testified to the opposite of what Mr Pau testifed to. That infact there wasn no plan in fact to murder Mr. Moreno just assualt him and she testified as a eyewitness to the assualt of Mr. Moreno by Mr. Mendoza. Even the victim, Mr. Moreno, changed his story from robbery to alleged murder plot and lied to detectives under oath. Here, every aspect or part of evidence relied upon by the jury is a "he said, she said" form from admitted liars. Who themselves admitted to lying under oath. SEE Appendix A.

There is many different versions of what happen in the instant case. Several different versions by the victim, Mr. Moreno and Mr. Pua. Both who are admitted liars and were offered help with their pending leagal matters. With so many versions of what acually happened, Mr. Mendoza should of been given the right to a fair and impartial jury whos standard of viewing the evidenc e had been altered. Further recognizing that Mr. Mendoza's co-denfendant, Alamia Castillo-Cervantes, first trial ending in a mistrial establishes that, with the same facts being used, that Mr. Moreno had the same probability to have his jury acquit him for the Conspiracy to Commit First Degree Murder charge. And that with the jury being more likely to convict based on ruling in State v. Townsend it can not be saind that under these circumstances that Mr. Moreno was not denied his Constitutional Right to a fair trial.

The Court of Appeals ruling that Mr. Mendoza did not prove the first prong and second prong of the Strickland Test to prove Ineffective Assistance of Counsel is misplaced and raises a significant question of under the federal and state constitutions and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(1),(3), and (4), this Court should accept review.

F. CONCLUSION

THe Court of Appeals incorrectly ruled that Mr. Mendoza failed to show that he was deprive of a fair trial and failed to prove both prongs of the "Strickland" test to prove Ineffectiv e Assistance of Counsel. For the foregoing reasons, this Court

should accept review.

Respectfully Submitted,

Francisco Mendoza
WSP-Echo/East-211-1
1313N. 13th Ave
Walla Walla, WA. 99362
DOC [redacted] 367237

3-19-15
Date

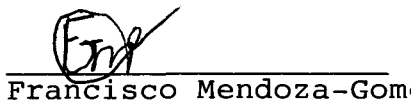
DECLARATION

I, Francisco Mendoza, do by declare that under the laws of the State of Washington, that the foregoing is the truth to the best of my knowledge.

Further, Francisco Mendoza motion the Supreme Court to accept this Petition for review without a Table of Contents and Table of Authorities pursuant to RAP 1.2.

Due to the limitation of 20 pages I was not able to include either section in this petition due to the many versions of of evidence that was necessary to include in the Statement of Case. There is a co-defendant, victim, and two other people's versions of what happened and some of these people have several different versions changing depending on the circumstances and dates. There is at least 10+ versions in totality. This being the case I was also limited in including more argument and citati ions need for my argument.

Under the current circumstances I ask this Court to accept this petition "as is" and at it's limit of 20 pages + Appendix-A.



Francisco Mendoza-Gomez

3-19-15
Date

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FRANCISCO MENDOZA-GOMEZ, Appellant.	DIVISION ONE No. 70506-7-I UNPUBLISHED OPINION FILED: January 20, 2015

DWYER, J. — Following a jury trial, Francisco Mendoza-Gomez (Mendoza) was convicted of conspiracy to commit murder in the first degree, kidnapping in the first degree, and assault in the second degree. On appeal, Mendoza contends that, because his trial attorney failed to interpose an objection or request a mistrial after his co-defendant's counsel informed the venire during jury selection that the trial did not involve the death penalty, he was deprived of his right to the effective assistance of counsel. Because Mendoza does not establish that his counsel's performance was deficient and because Mendoza has not shown that he suffered any prejudice as a result of the alleged deficiency, we affirm.

I

On the afternoon of September 30, 2011, Tawney Eckert and her husband, Taylor, arrived at a Shell gas station in Federal Way. As they entered the station parking lot, the Eckerts noticed a black Acura SUV parked nearby. The SUV pulled up to the front of the station's convenience store as Taylor

noticed a commotion inside the store. Suddenly, two men bolted from the store and jumped into the SUV, which sped away. Taylor noticed that one of the men, who appeared to be of Samoan descent (the Samoan man), was holding a gun. Another bystander heard the driver of the SUV, a woman, yell to the two men that they needed to go as they exited the store.

The Eckerts entered the store, and found Juan Moreno-Zuazo (Moreno) lying on the floor behind the cash register. Moreno had gashes on his forehead and jaw and was bleeding significantly. Tawney, a trained paramedic, began to treat Moreno's injuries while her husband spoke with a 911 emergency dispatcher.

Federal Way Police Department officers responded to the Shell station and spoke to the clerk, Hossam Gayed, who was working there that afternoon. 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 in hot pursuit by a larger, Samoan man. Fearing that the store was about to be robbed, Gayed hid in an interior office, behind a locked door. From inside the office, he heard a man screaming and yelling. When he came out of the office, he saw the man who had raced into the store first lying on the ground. He was bleeding severely from the head and neck and was being treated by Tawney.

Moreno described the events leading up to his dramatic entrance into the gas station store at trial. He testified that he paid a visit to a SeaTac apartment in the mid-afternoon of September 30 to see a woman named Cheila. Moreno

had met Cheila at the apartment a few days prior while visiting Mendoza but did not know that she was Mendoza's sister-in-law. Moreno and Cheila were speaking when, without notice, Mendoza arrived at the apartment, accompanied by Amalia Cervantes-Castillo (Castillo).

Mendoza, who appeared to be angry, demanded to speak with Cheila privately. Castillo remained with Moreno and told him that he was in trouble. About 10 minutes later, two men, including the Samoan man, arrived at the apartment and spoke to Castillo. The Samoan man then walked up to Moreno, pointed a handgun at his torso, and pushed him toward a waiting vehicle. Moreno was driven at gunpoint to a Tukwila motel, where he was escorted into a room.

The Samoan man, Agalega Pua, testified that he had been sleeping in a room at a Tukwila motel on the afternoon of September 30 when he was awoken by a phone call from Castillo, his older brother's long-term romantic partner. Castillo told Pua that a car would be coming to pick him up at his motel. When the car arrived, Pua was driven to Castillo's location, at the SeaTac apartment. Castillo told Pua that Moreno had been caught in a compromising situation with the wife of Mendoza's brother. She gave Pua a handgun and told him to keep watch on Moreno. Castillo talked to Mendoza then returned and told Pua that Mendoza had directed her to kill Moreno.

At Castillo's direction, Pua took Moreno at gunpoint to a waiting car, which transported them back to Pua's Tukwila motel room. A few minutes later, Mendoza and Castillo arrived, along with Mendoza's brother, and spoke angrily

with Moreno. Mendoza was armed with a .45 caliber handgun and a baseball bat. Mendoza swung the bat at Moreno's head. Moreno's hand was injured after he raised it to block the impact to his skull.

Mendoza spoke to Castillo and then gave his .45 caliber pistol to Pua. Castillo told Pua to take Moreno to a waiting black Acura SUV with her. Once inside the vehicle, Castillo told Pua that they were going to kill Moreno. She also informed Moreno, in Spanish, that she had been ordered to kill him. Castillo then drove the SUV to pick up a friend, Eric Tharp, in Federal Way. When Tharp got into the car, he suggested that Fort Lewis, in Tacoma, would be a suitable place to dispose of Moreno. The SUV began to experience mechanical trouble, and Tharp suggested that they stop at a nearby Walmart for "oil."[1] Upon returning to the SUV, Tharp realized that 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. At the gas station, Tharp obtained a funnel and poured the "oil" into the SUV. Castillo, who had kept the vehicle's doors locked throughout this time, unlocked the doors so that Tharp could enter. Castillo neglected to re-lock the doors before beginning to drive away. Moreno seized the opportunity to escape, running from the car into the gas station store. Pua and Tharp both chased after Moreno. Once they caught him, they beat and kicked him. They then returned to the car, which drove away.

[1] In actuality, the vehicle required transmission fluid, which Tharp purchased.

Pua testified that he received a few hundred dollars and a small amount of methamphetamine from Mendoza for his efforts. Pua explained that Mendoza was upset with him because Moreno had survived.

Castillo and Tharp were stopped while driving together on October 12, 2011 and arrested. A search of the vehicle recovered a number of firearms and a notebook entitled "Maty's little book." "Maty" is Castillo's nickname. On one page, dated September 30, 2011, the following entry was made: "Today I start a new beginning with Chaparro." "Chaparro" is Mendoza's nickname.

Mendoza did not testify in his defense. Castillo testified in her case in chief. She claimed that Mendoza had phoned her on the afternoon of September 30 because he had discovered Moreno with his sister-in-law and Moreno had threatened to beat him up. She told the jury that she removed Mendoza from the scene to avoid any conflict and that they were surprised when they visited Pua later that afternoon at his motel room and found Moreno there. 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.

Castillo claimed not to understand why Moreno bolted from the SUV at the gas station or why Pua chased after him. She testified that she directed Tharp to bring Pua back to the car and that she drove away, leaving Moreno behind, once they returned. Castillo denied that Mendoza had directed her to kill Moreno. She did admit, however, that she worked for Mendoza, for example, managing his fleet of vehicles, which included the black Acura SUV.

Mendoza, Castillo, Pua, and Tharp were charged with several offenses arising out of this series of events. Initially, Mendoza and Tharp were tried together, following severance of Pua's and Castillo's cases. Mendoza's and Tharp's trial ended in a mistrial due to prosecutorial error, and their cases were scheduled for a new trial. Before the retrial, Tharp pleaded guilty to amended charges. Mendoza's case was then joined with Castillo's, and the two were prosecuted together on charges of conspiracy to commit murder in the first degree.[2] Mendoza was also tried for kidnapping in the first degree and assault in the second degree.[3] By jury verdicts rendered on April 26, 2013, Mendoza was convicted on all counts. Castillo was also found guilty on the conspiracy charge.

II

Mendoza contends that he was denied the effective assistance of counsel. This is so, he asserts, because his trial attorney failed to interpose an objection or take any other action after his co-defendant's counsel informed the venire during voir dire that the trial did not involve the death penalty. We disagree.

We apply the two-part test from Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to determine whether a defendant had constitutionally sufficient representation. State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001). First, the "'defendant must show that counsel's

---

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

[3] The conspiracy and kidnapping charges included a firearm sentencing enhancement; the assault included a deadly weapon sentencing enhancement.

performance was deficient.'" Cienfuegos, 144 Wn.2d at 226 (quoting Strickland, 466 U.S. at 687). To establish deficient performance, a defendant must "demonstrate that the representation fell below an objective standard of reasonableness under professional norms." State v. Townsend, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001). Second, the "'defendant must show that the deficient performance prejudiced the defense.'" Cienfuegos, 144 Wn.2d at 227 (quoting Strickland, 466 U.S. at 687). "Proving that counsel's deficient performance prejudiced the defense 'requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" State v. Hicks, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting Strickland, 466 U.S at 687). 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.

"[I]t is error to inform the jury during the voir dire in a noncapital case that the death penalty is not involved." Hicks, 163 Wn.2d at 487; accord Townsend, 142 Wn.2d at 840; see also Shannon v. United States, 512 U.S. 573, 579, 114 S. Ct. 2419, 129 L. Ed. 2d 459 (1994) ("It is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'" (footnote omitted) (quoting Rogers v. United States, 422 U.S. 35, 40, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975))); State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960) ("The question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases."). There is no "distinction between a court

or counsel-initiated and a juror-initiated discussion of the inapplicability of the death penalty." Hicks, 163 Wn.2d at 487; accord State v. Mason, 160 Wn.2d 910, 929, 162 P.3d 396 (2007). "[I]n response to any mention of capital punishment, the trial judge should state generally that the jury is not to consider sentencing." Hicks, 163 Wn.2d at 487.

Moreover, "[c]onsidering the long-standing rule that no mention be made of sentencing in noncapital cases," defense counsel's performance will be deemed deficient for informing the jury that a case does not involve the death penalty or failing to object when another actor makes similar reference, *unless* "counsel's performance is the result of legitimate trial strategies or tactics." Townsend, 142 Wn.2d at 847; see also Mason, 160 Wn.2d at 930 (acknowledging the possibility that "there are legitimate strategic and tactical reasons why informing a jury about issues of punishment would advance the interest of justice and provide a more fair trial"); State v. Rafay, 168 Wn. App. 734, 781, 285 P.3d 83 (2012) (holding that it was a legitimate strategy to inform the venire during voir dire that the case did not involve the death penalty). We are mindful of the risk, identified by our Supreme Court, that "if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Townsend, 142 Wn.2d at 847. Yet, "[w]e must presume that defense counsel [was] well aware of [this concern]," and that she "[was] in the best position to assess such concerns in light of [her] own voir dire and trial strategies." Rafay, 168 Wn. App. at 781.

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 jury selection, 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.

Mendoza's counsel did not interpose an objection during or after this exchange, nor did she later request a mistrial or an instruction from the court directing the venire to disregard any sentencing consequences when considering the evidence presented at trial.

Beginning with the first part of the Strickland test, Mendoza must prove that his counsel's performance was deficient. There is a strong presumption that trial counsel's performance was adequate, and exceptional judicial deference must be given when evaluating counsel's strategic decisions. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective

assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). We have previously recognized that "there might be legitimate tactical reasons in a noncapital case to inform the jury that the case does not involve the death penalty." Rafay, 168 Wn. App. at 777. The presumption of adequate representation is not overcome if there is any "conceivable legitimate tactic" that can explain counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

In this case, at least two legitimate tactical reasons exist for declining to object to the venire being informed that the case did not involve the death penalty. First, it is conceivable that Mendoza's attorney may have been favorably impressed by this panel of prospective jurors. The conversation between Jury Panelist 9 and Mendoza's co-defendant's attorney took place toward the end of that attorney's first round of voir dire, after the trial court had posed general questions and after the State's first round of questioning. Thus, Mendoza's counsel had a basis upon which to assess the venire. It is easily conceivable that counsel may have made the tactical determination that the risk of requesting a mistrial, which would have caused the existing venire to be replaced, possibly by a panel she found more problematic, outweighed the risk of moving forward with the existing panel. Second, it is conceivable that Mendoza's counsel made the strategic decision to remain silent rather than interposing an objection with the expectation that, because she did not invite the error, the exchange between Jury Panelist 9 and the co-defendant's attorney could form

the basis of a later appeal if Mendoza was convicted at trial.[4] This is, of course, exactly what happened. Mendoza has not established deficient representation.

Under the second part of the Strickland test, Mendoza must also prove that he was prejudiced by his counsel's allegedly deficient performance. This requires the defendant to prove that, but for counsel's deficient performance, there is a "reasonable probability" that the outcome would have been different. Cienfuegos, 144 Wn.2d at 227; see also 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).

There is no showing that Mendoza was deprived of a fair trial or that the trial outcome likely would have differed. There is no indication that the jurors failed to take their duty seriously. Moreover, there is abundant evidence in the record to support Mendoza's conviction, making a guilty verdict likely even if the jury had not been informed that the case was noncapital. Here, the victim of a terrifying series of events testified to his abduction and planned execution by gunshot at Mendoza's direction. The victim's testimony was corroborated by one of Mendoza's henchmen and significant physical and video evidence. Under these circumstances, there is not 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 only they had not been relieved of a

[4] In its merits briefing, the State also suggests that, given the stigma of being charged with a capital offense, Mendoza's counsel could 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.

hypothetical, mistaken belief that he might be subjected to capital punishment. Mendoza establishes neither deficient performance nor prejudice.

Affirmed.

We concur: