

FILED

MAY 24 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29458-7-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

SERAFIN GARANDARA-MEDINA

Appellant.

**APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY**

BRIEF OF RESPONDENT

**SHAWN P. SANT
Prosecuting Attorney**


by: **Brian V. Hultgren, #34277
Deputy Prosecuting Attorney**

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Pasco, WA 99301
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A. COUNTERSTATEMENT OF ISSUES

1. **When the court denies a defendant's motion to sever charges prior to trial and a defendant does not renew that motion at time of trial, does that defendant waive his or her right to appeal the issue of severance?**
2. **Did the court abuse its discretion by refusing to the grant the Appellant's motion, made prior to trial, for severance of the charges of Attempted Murder in the Second Degree and Intimidating a Witness?**
3. **Did the Appellant receive ineffective assistance of counsel when his trial counsel failed to renew his motion to sever under CrR 4.4(a)(2) at the time of trial?**
4. **Could any rational trier of fact have found that the State proved the essential elements of the crime of Intimidating a Witness beyond a reasonable doubt?**

B. RESPONSE TO STATEMENT OF THE CASE

Serefin Garandara-Medina (hereinafter Appellant) was found guilty by jury verdict on October 25, 2010, of Attempted Murder in the Second Degree with a Deadly Weapon Enhancement and Intimidating a Witness. (CP 37-39). Judgment and Sentence was entered on October 26, 2010. (CP 14-30). Appellant now appeals. (CP 12-13).

The Appellant's summary of the testimony presented at the trial is substantially correct. However, the State would make the following additions and corrections to the Appellant's "Statement of the Case."

The victim, D.S. (D.O.B. 1/18/1986), began a dating relationship with the Appellant on August 3, 2008. (RP 29). This dating relationship continued for over a year. (RP 30). In November of 2009, the Appellant moved to Pasco from Portland and moved in with the victim. (RP 34). After moving in the Appellant began to behave very possessively. (RP 35). He began to spy on the victim at work and become angry when she smiled at customers. (RP 35). The Appellant told the victim that her smile was his and that she was not allowed to smile at anyone else. (RP 35).

On November 20, 2009, at 7:00 a.m., the victim went to work at the Quality Inn, located in Kennewick, Washington. (RP 37). Due to work running long and taking a friend on an errand, the victim ended up leaving work and not coming back to the hotel to finish her duties until several hours after she was due home. (RP 37-39). When the victim arrived back at the hotel, the Appellant appeared and angrily confronted her about not being home on time.

(RP 39). He told the victim that he would not forget or forgive her for what she had done. (RP 39). The Appellant told her he would see the victim at home and then sped off in his car with the victim's two young children in the back seat. (RP 39-40). The victim following him in her vehicle. (RP 39-40).

Once the two arrived at their home in Pasco, Washington, the Appellant and the victim proceeded to their room upstairs. (RP 41). The victim told the Appellant that his behavior at her workplace was not acceptable and that he would need to move out. (RP 41). At that time, the Appellant told the victim he would not forgive her, pulled a knife out of his pocket, and stabbed her in the neck. (RP 41-42). After the initial stabbing, the victim fought with the Appellant over the knife as he attempted to stab her repeatedly. (RP 43). Eventually, the victim was able to talk the Appellant out of continuing the assault and take the knife from him. (RP 43, 47).

The Appellant then took the victim to Lourdes Medical Center, after she promised not to alert police. (RP 48-49). At the hospital, the victim received treatment and gave a statement to police. (RP 50). Dr. Underhill, the treating physician, discovered that the knife wound to the neck had just missed her carotid artery and her jugular and that she bore a defensive wound on her hand.

(RP 140-141). The victim was later flown to Harbor View Hospital in Seattle, Washington for further treatment. (RP 142).

Police took the Appellant into custody and transported him to the Pasco Police Station. (RP 19, 126). At the police station, Detective Cavazos of the Pasco Police Department made contact with the Appellant and interviewed him. (RP 154). During the interview, the Appellant confessed to grabbing the victim, pulling her head back by her hair, and stabbing her in the throat with the knife. (RP 156-161). This confession was freely and voluntarily given under Miranda. (CP 7-8). The Appellant was charged with Attempted Murder in the Second Degree on November 25, 2009. (CP 216).

Shortly after the incident, the victim's brother arranged to have the Appellant's car towed away from the victim's apartment complex in Pasco. (RP 147). While that case pended in Franklin County Superior Court, the victim received a letter. (RP 53). That letter threatened the victim and alluded to the Appellant's pending charges (RP 86). The letter had been written in Spanish and was translated for the jury:

Tell your brother that what they did to my car was not a good idea, and soon they will receive word from me, because it appears that they want to really know me

well. Ok. I'll make them happy. But it's just that it's not worth crying over, and hold on tight, because the game is just beginning, and may the best one win. May you guys might think that since I'm in here I can't do anything. Ha ha ha. You know I dreamed that you were crashing and you were left without hands, and you know that without hands you're just worth nothing. Ok then. Enjoy it while you can, because your days are numbered. And if you think of leaving the state, I remind you that nobody can hide from death. And more, if they give me a lot of time here, I will get you where it hurts most, and I am not playing around. You know very well. So I – so think about your judgment, my dear. Remember that they are watching you. Ok? I love you, even if you are a – if you, fah. You already know.

(RP 86-87). The translator clarified that a more accurate translation for the word “judgment,” taking into account a misspelling, would be “statement” or “declaration.” (RP 87-88).

The envelope of the letter listed the Franklin County Corrections Center as the return address. (RP 53). A Franklin County Corrections clerk testified that the Appellant had been present in the jail at the time the letter was sent. (RP 94). That clerk also testified the jail did not have the resources to check every letter individually and an inmate could write whatever name they wanted to on a letter. (RP 93). Normally inmates were limited to postcards but any letter could be sent from the jail if the inmate simply claimed it was legal mail. (RP 95). The clerk did not

indicate any special marking had to be made on an envelop for it to be sent as legal mail. (RP 90-95).

The letter was addressed to "Daniela Sanchez" and sent to the victim's address where she had lived with the Appellant. (RP 53). The victim recognized the name on the envelope because the Appellant used to call her "Daniela." (RP 53). She explained that when the two had first talked on the phone, prior to meeting, she had told him her name was "Daniela" to protect her identity. (RP 53-54). Later, after they begin dating, the victim told the Appellant her real name, but he continued to call her Daniela." (RP 53-54). The victim recognized "Sanchez" because it was her maiden name. (RP 53-54).

Because of the letter, the State added a charge of Intimidating a Witness to the charging document. (CP 151-152). In response to this new charge, the Appellant filed a motion to sever the charges. (CP 137-140). State's filed a memorandum in opposition to the Appellant's motion to sever. (CP 110-136). The trial court denied that motion, ruling that the four Russell factors weighed in favor of keeping the counts together. (10/12/2010 RP 13).

C. RESPONSE TO ARGUMENT

1. **When the court denies a defendant's motion to sever charges prior to trial and that defendant does not renew that motion at trial that defendant's right to appeal the issue of severance is waived.**

Under CrR 4.3(a) two offenses can be joined for trial if they are of similar character or are based on a series of acts connected together. In the present case, the charges of Attempted Murder in the Second Degree and the charge of Intimidating a Witness are based on a series of acts connected together. This connection is formed because following the attempted murder of D.S., the Appellant then attempted to intimate D.S. into silence regarding that case. These charges also share the same victim, the same witnesses, and the same physical evidence. Based on these connections the State filed an amended information, which alleged both charges in a single charging document.

The Appellant in this case made a pretrial motion to sever the two counts and had the motion denied. The Appellant did not renew his motion to sever the two counts during the course of the trial pursuant to CrR 4.4(a)(2). Under CrR 4.4(a)(2) if a defendant does not renew their motion to for severance, that issue is waived. This waiver includes the right to argue the motion to sever on

appeal. State v. Henderson, 48 Wash.App. 543, 551, 740 P.2d 329 (1987). Based on that waiver, the Appellant's assignment of error "A" should be disregarded.

2. **In any event, the court did not abuse its discretion by refusing to grant the Appellant's motion, made prior to trial, for severance of the charges of Attempted Murder in the Second Degree and Intimidating a Witness.**

Even if the Appellant had renewed the motion timely at trial he still would not have been entitled to relief based on the merits of the motion. When making such a motion a defendant bears "the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh concern for judicial economy." State v. Bythrow, 114 Wash 2d. 713, 718, 790 P.2d 154 (1990). The Appellant's motion was denied by the trial court. The trial court's ruling is now "reversible only where it constitutes a manifest abuse of discretion." State v. Russell, 125 Wash.2d 24, 63, 882 P.2d 747 (1994). The Appellant bears "the burden of demonstrating such abuse." Id.

Counts should never be joined together for the purpose of unduly embarrassing or prejudicing a defendant or for denying a defendant a substantial right. State v. Smith, 74 Wash.2d 744,

754-55, 446 P.2d 571 (1969). In determining whether the joinder of charges causes undue prejudice the court should consider four factors: “(1) the strength of the State’s evidence on each count; (2) the clarity of the defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.” Russell, 125 Wash.2d at 63, 882 P.2d 747 (1994). “In addition, any residual prejudice must be weighed against the need for judicial economy.” Id.

An examination of the four factors laid out in Russell indicates very little, if any, prejudice followed from filing the count of Intimidating a Witness along with the charge of Attempted Murder in the Second Degree.

(a) The strength of the State’s evidence on each count

The purpose of judging the strength of the State’s case is to avoid a situation where “a jury may cumulate the evidence of various crimes charged and find guilt when, if considered separately, it would not so find.” Smith, 74 Wash.2d 744, 755, 446 P.2d 571 (1969). Put simply, the factor analyzes whether the State will prop up a weaker charge using evidence from a stronger

charge. In this particular instance, except for judicial economy, the State did not benefit from having the two charges tried together.

The Appellant concedes that the State's case in Count One is strong. As shown by the evidence the State outlined in their original Plaintiff's Memorandum in Opposition to Defendant's Motion for Severance of Offenses and in the evidence present at trial; the State had a great deal of proof that the Appellant committed Count One, Attempted Murder in the Second Degree. This evidence included physical evidence, statements of witnesses and the victim, and a full confession from the Appellant.

Due to the large amount of evidence available for the charge of Attempted Murder, any other charge's evidence would likely pale in comparison. Less evidence was available for Count Two because the State did not have the liberty of seeking a statement from the Appellant. This does not mean the State did not have a strong case for Count Two, Intimidating a Witness. The Appellant in this case, does not dispute the fact that an actual threat was made to a witness in a pending case. The letter, addressed to the victim, makes multiple threats regarding the victim's "judgment" or testimony. These, less than veiled threats, obviously attempt to intimidate the victim into not pursuing the charges.

The Appellant argues that a lack of motive is the primary flaw in the State's case against the Appellant on Count Two. He suggests that because the Appellant had given a full confession, he would not care if the victim testified against him. This might be the case if the Appellant planned to meekly plead guilty and accept his sentence. He did not do so. The Appellant defended himself vigorously with pretrial motions and at trial. One of the pretrial motions laid out the Appellant's theory that he had not given a true statement of guilt, but instead had actually been coerced into confessing by police officers. Using this theory, the Appellant took the case all the way through trial arguing his innocence. If the jury had accepted the Appellant's explanation for his confession, the Appellant still would have been faced with the testimonial evidence offered by the victim. Clearly, the Appellant planned to proceed to trial and had a motive to silence the victim and improve his chances.

(b) The clarity of the Defenses to each Count

The concern of the second factor focuses on the problem with conflicting defenses. An example of this would be a general denial on one count of homicide and a self-defense claim on the other count. Russell, 125 Wash.2d at 65, 882 P.2d 747 (1994).

The concern in those situations would be one defense cutting against the other. One might doubt a general denial of a homicide when the same individual claimed self-defense on another charge. There was no danger of this in the present case. The Appellant claimed general denials to both counts. A defendant denying complete culpability on each count is not embarrassed by presenting separate defenses. State v. Sanders, 66 Wash.App. 878, 885, 833 P.2d 452 (1992).

(c) The Court's Instructions to the Jury

The State indicated prior to trial it had no objection to the jury in this case being instructed that they must consider the conviction instruction on each count separately pursuant to WPIC 3.01. The Appellant did not offer such an instruction at trial and it was not given to the jury. The lack of the instruction did not cause any significant prejudice to the Appellant under the specific circumstances of the case.

The main purpose of WPIC 3.01 is to assist the jury in compartmentalizing evidence of separate crimes when the evidence would be limited or not admissible in all charges. Bythrow, 114 Wash.2d at 720-721, 790 P.2d 154 (1990) citing U.S. v. Johnson, 820 F.2d 1065, 1071 (9th Cir.1987). The Court

anticipated instances where two charges did not share common evidence but “[w]hen the issues are relatively simple and the trial lasts only a couple a days, the jury can be reasonably expected to compartmentalize the evidence. Id. When the evidence in a case is admissible to prove all the charged counts, the importance of such an instruction is diminished or limited.

Division One has suggested that WPIC 3.01 be limited further on a permanent basis in State v. Bradford, 60 Wash.App. 857, 808 P.2d 174 (1991). In that case, the trial court faced the following question from its jury: “[c]an the jury consider knowledge gained from one count when deliberating on the other count[?] We are speaking of knowledge only, not evidence.” Id. at 860. The trial court responded: “[t]he jury is free to determine the use to which it will put evidence presented during trial.” Id. The defendant in that case argued that such a response improperly minimized or contradicted WPIC 3.01. Id. at 861. The court rejected that argument, stating that because there was cross admissible evidence “[t]he jury was to decide each count separately and was free to consider any evidence relevant to count 1 in deciding count 1. It was free to consider any evidence relevant to count 2 in deciding count 2.” Id. In making this ruling the court acknowledged

that WPIC 3.01 might need to be revised so that it explicitly refers to determining each count separately and does not read as limiting a jury from considering evidence that is relevant on multiple counts. Id.

In leaving out WPIC 3.01 the court properly allowed the jury to consider cross admissible evidence. Had WPIC 3.01 been given the jury may have improperly believed they could not consider evidence as being relevant to both counts. By not receiving WPIC 3.01, the court avoided confusion about their ability to use the cross admissible evidence for both counts.

(d) The Admissibility of the Evidence if the Charges were not Joined

When discussing the issue of cross admissibility and joinder, the Supreme Court states

[e]ven where evidence of one count would not be admissible in a separate trial of the other count, defendant's proposition that severance is required in every case is erroneous. In order to support a finding that the trial court abused its discretion in denying severance, the defendant must be able to point to specific prejudice.

State v. Bythrow, 114 Wash.2d 713, 720, 790 P.2d 154 (1990).

In any event, the evidence of Attempted Murder in the Second Degree and the evidence of Intimidating a Witness were

cross admissible in both cases. Division One considered a severance issues and cross admissibility in a case with nearly identical facts in State v. Sanders, 66 Wash.App. at 880-82, 833 P.2d 452 (1992). In that case a defendant named Sanders was charged with three counts of statutory rape of his stepdaughter, A. After getting out of jail, he paid to have the whole family, including A. move to California. Id. The case ended up being dismissed because the State could not locate A. Id. When the State finally located A. and re-filed charges against Sanders, they added counts of witness tampering to the information. Id. On appeal the Sanders court stated “[r]egarding the cross admissibility of the evidence, the fact of a rape charge would be relevant in a separate trial on the witness tampering to show why the tampering had occurred.” Id. at 885. In the same manner, evidence of the Attempted Murder charge would be admissible at trial for Intimidating a Witness to show why the defendant sought to intimidate the witness. This relates directly to motive under ER 404(b).

In addition to motive, evidence of the attempted murder case is also required to prove the elements of Intimidating a Witness:

- (1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or

prospective witness, attempts to:

- (a) Influence the testimony of that person;
 - (b) Induce that person to elude legal process summoning him or her to testify;
 - (c) Induce that person to absent himself or herself from such proceedings; or
 - (d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.
- (2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness's role in an official proceeding.

(3) As used in this section:

(a) "Threat" means:

- (i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
- (ii) Threat as defined in *RCW 9A.04.110(25).

(b) "Current or prospective witness" means:

- (i) A person endorsed as a witness in an official proceeding;
- (ii) A person whom the actor believes may be called as a witness in any official proceeding; or
- (iii) A person whom the actor has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child.

(c) "Former witness" means:

- (i) A person who testified in an official proceeding;
- (ii) A person who was endorsed as a witness in an official proceeding;
- (iii) A person whom the actor knew or believed may have been called as a witness if a hearing or trial had been held; or
- (iv) A person whom the actor knew or believed may have provided information related to a criminal investigation or an investigation into the abuse or neglect of a minor child.

(4) Intimidating a witness is a class B felony

RCW 9A.72.130. The State must prove that the victim is a "witness" in order to meet an element of the offense. To prove someone is a witness the State is required to show the victim is a

“person endorsed as a witness in an official proceeding” or a “person whom the actor believes may be called as a witness in any official proceeding.” In this instance, the official proceeding is the State’s charge of Attempted Murder in the Second Degree. The fact the incident had happened, had been charged as a crime in Franklin County Superior Court, and that the victim was a key witness in the case are all facts directly relevant to the elements of Intimidating a Witness.

Even if one deems the Intimidating a Witness charge to be the weaker of the two counts charged, that count is not propped up in any way by the Attempted Murder charge because the Intimidating a Witness charge would be entitled to the value of that evidence anyway. If the motion to sever had been granted, the majority of the evidence still would have been heard in each trial. The Appellant would have gained nothing by a severance, except the ability to force the State to expend extra resources on two separate trials.

From the reverse perspective, evidence of the intimidation of a witness is relevant on the charges of Murder in the Second Degree. The court states that to “analyze the admissibility of the tampering facts in a separate trial on the rape charge, we analogize

to the cases holding that evidence of flight and concealment is admissible as circumstantial evidence of guilt. Sanders, 66 Wash.App. at 885, 833 P.2d 452 (1992). A defendant's attempt to get a key witness to absent himself or herself from trial demonstrates a motive or intent to avoid trial. Id. at 886. In this case, the Appellant's attempt to threaten the victim into silence demonstrates his wish to avoid State's evidence. This is circumstantial evidence of guilt the same as if the Appellant had attempted to flee the State following the Attempted Murder.

The four factors weigh heavily in favor of the trial court's ruling that joinder of the charges did not cause undue prejudice. The Appellant argues that joinder of offenses is inherently prejudicial. However, the Court specifically referred to sex case when making that point. Bythrow, 114 Wash.2d at 718, 790 P.2d 154 (1990). Other charges, such as Intimidating a Witness, do not carry the same inherent stigma of a prior sex offense. When considering the amount of evidence available and the cross admissibility of that evidence, the prejudice to the Appellant in this case can be deemed minimal at most. Such prejudice is not adequate to find the trial court abused its discretion by refusing to grant a motion to sever.

(e) Prejudice weighed against for judicial economy

In addition to showing undue prejudice, a defendant must also demonstrate that the prejudice caused to him by failing to sever the charges does not outweigh the State's interest in judicial economy. Bythrow, 114 Wash.2d at 722, 790 P.2d 154 (1990).

Foremost among these concerns is the conservation of judicial resources and public funds. A single trial obviously only requires one courtroom and judge. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is significantly reduced when the offenses are tried together. Furthermore, the reduced delay on the disposition of the criminal charges, in the trial and appellate process, serves the public.

Id. at 723.

In this case, the charges involved the same key witness. The case also used many of the same ancillary witnesses, such as various detectives and police officers. Because much, if not all of the evidence was cross admissible, these witness would have been required to testify multiple times if the charges had been severed. By joining the cases together, a great deal of public resources were conserved. This economy outweighed any small prejudice the Appellant may have experienced because Counts One and Two were tried together.

3. Failure to renew a motion to sever at trial did not make the Appellant's counsel ineffective

The standard of review for ineffective assistance of counsel is de novo. State v. White, 80 Wash.App. 406, 410, 907 P.2d 310 (1995). However, the Supreme Court has underlined the importance of taking a measured and deferential approach to examining a defense counsel's trial strategy:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). 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 the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, 350 U.S. at 101, 76 S.Ct., at 164.

Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984).

In order for the appellant to show he received ineffective assistance of counsel he must satisfy a two-pronged test. State v. McFarland, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). The first step for the appellant is to show that “defense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances...” Id. In considering this factor the courts “engage in a strong presumption counsel’s representation was effective. Id. at 335. Indeed, the burden is on the appellant in this case to demonstrate, based on the available record, that his trial defense counsel was ineffective. Id. The second prong the appellant must satisfy is to make a showing that “defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id.

For the appellant to satisfy the first prong and show there is that deficient representation he must show that there is “no legitimate strategic or tactical reasons” for the trial defense counsel to have made his decision. State v. Rainy, 107 Wash.App 129, 135-36, 28 P.3d 10 (2001). The Appellant argues that there is not a legitimate trial strategy for not renewing a his motion to sever at

trial. This argument relies on the assumption that a renewed motion to sever had merit. If the motion had no merit, Appellant's attorney's failure to raise the motion is not relevant. For example, there may not have been a tactical reason not to make a motion to depose the victim. After all, having the judge deny such a motion would not have harmed the Appellant. If successful, the deposition might have allowed the Appellant to cross examine the victim more effectively. However, under CrR 4.6, the Appellant had no right to depose the victim because the victim had agreed to be interviewed by the Appellant's attorney. Therefore, the Appellant's trial counsel did not make a motion to depose the victim. Similarly, a renewed motion to sever the charges did not have merit. To make such a motion would not have served a purpose.

Not raising an issue because it does not have merit is more than a legitimate trial tactic, it is a requirement under the Rules of Professional Responsibility:

[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue, therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes good faith argument for an extension modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the

proceeding as to require that every element of the case be established.

RPC 3.1. This rule leaves room for a defense attorney not to waive a factual issue, even if the State has uncontroverted evidence, but it prohibits attorneys from asserting a legal issue if there isn't a good faith basis in law and fact. A theoretical issue a law did exist, but it had been previously raised and argued.

As the trial proceeded, none of the evidence offered presented a basis in "fact" for Appellant's trial counsel to renew a motion to sever. During the course of the trial, the evidence offered confirmed the ruling of the trial court on the Appellant's pretrial; severance of the two charges was not appropriate. The evidence at trial exceeded the evidence provided pursuant to the State's pretrial motion. This evidence confirmed the strengths of the State's case on both counts and identified the cross admissibility of the testimony and information under the rules of evidence. A motion to sever would not have been granted. A trial counsel is not required to make a motion that will be futile. See, e.g., James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994) (finding no ineffective assistance where the motion that allegedly should have been made would have been futile).

In any event, the Appellant in this case cannot meet the requirements of showing prejudice:

“[w]here as in this case, counsel’s failure to litigate a motion to sever is the basis of the defendant’s claim, showing prejudice entails demonstrating that the motion should have been granted. Kimmelman v. Morrison, 477 U.S. 365, 1036 S.Ct. 2574, 2583, 91 L.Ed.2nd 305 (1986). In addition, the defendant must show that there is a ‘reasonable probability’ that, but for counsel’s deficient performance, the outcome of the proceeding would have been different. Kimmelman, 106 S.Ct. at 2583; Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

State v. Standifer, 48 Wash.App. 121, 125-126, 737 P.2d 1308 (1987). As laid out in the foregoing section “C(2)” of this appeal, the Appellant did not have a motion that he could win. The five factors used to determine if charges should be severed weighed heavily in favor of denial of a such a motion. Because the motion would not have succeeded, the Appellant was not prejudiced by his attorney’s failure to raise the motion at trial.

In any event, even if the merits of the underlying severance where not in debate, such a motion still would not have changed the outcome of the proceeding. As shown by the testimony and evidence presented, each count had strong evidence which could have sustained its own conviction. Also, do to the cross

admissibility of the evidence, the jury would have heard the evidence in both cases regardless of whether counts one and two were heard by different juries.

4. Viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of Intimidating a Witness beyond a reasonable doubt.

When determining the evidentiary sufficiency of finding of guilt by a jury, the court does not take into account its own opinion of the evidence. State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). "Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of a fact could have found the essential elements of the crime beyond a reasonable doubt." Green, 94 Wash.2d at 221, 616 P.2d 628 (1980), citing Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed 560 (1979).

To prove Intimidating a Witness, the State must show, beyond a reasonable doubt, that the Appellant, by use of threat against a current or prospective witness," attempted to influence the testimony of that person or to convince them to absent himself or herself from proceedings. RCW 9A.72.110. The Appellant does not dispute that the letter sent to the victim was an attempt to

influence her testimony or an attempt to get her to absent herself from proceedings. He simply disputes that the State sufficiently proved he was the one who sent the letter.

The called Franklin County Corrections clerk, Kasey Clements, as a witness regarding mailing procedures at the jail. Ms. Clements testified that the an inmate could send regular mail out if they "claim" it is legal mail. The Appellant argues that because the envelope in evidence is not marked "legal mail" that it could not have been sent from the Appellant while he was in Franklin County Corrections Center. To make this argument, the Appellant makes an assumption: that legal mail is specifically marked as "legal mail" on the envelope when the jail sends it out. This fact is not in evidence. The only testimony on the subject given by Ms. Clements is that other mail can be sent from the jail if the inmate claims it is legal mail. The jury is free to infer that the Appellant used this loophole to send out the letter, which threatened the victim.

The writer of the letter identifies himself as the defendant in several ways. One, he clearly refers to the facts of the case by mentioning his anger at the victim having her brother arrange for the towing of his car. Two, letter is also addressed to the victim

using a nickname only known to the defendant. Looking at these facts, along with the timing and circumstances of the letter, one can clearly conclude that the Appellant was the writer of the letter. No one else had the motive or inside knowledge of the case to complete such a letter.

It should also be noted that the specific manner of delivery is not an element of Intimidating a Witness. There is not requirement that the State be able to trace the entire lineage of the letter. If the jury is satisfied beyond a reasonable doubt, that the content of the letter sufficiently identifies it as the work of the Appellant, they can be satisfied beyond a reasonable doubt even if they are not sure of the manner in which he, or one of his associates, delivered it. In this instance the letter had specific identifying information, which only the Appellant would have known. This information identifies it as surely as if he had signed and notarized it. In viewing this evidence in a light most favorable to the State, one can easily conclude, beyond a reasonable doubt, that he was the author of the letter.

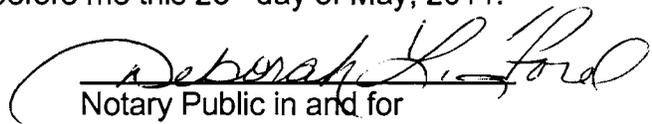
D. CONCLUSION

This case involves cross admissible evidence. If the counts are severed, the same evidence will need to be presented on two

I hereby certify that on the 23rd day of May, 2011, a copy of the foregoing was delivered to Serafin Garandara-Medina, DOC#345075, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99361, and to Kenneth H. Kato, opposing counsel, 1020 North Washington Street, Spokane, Washington 99201-2237 by depositing in the mail of the United States of America a properly stamped and addressed envelope.



Signed and sworn to before me this 23rd day of May, 2011.



Notary Public in and for
The State of Washington,
residing at Kennewick, WA
My appointment expires:
May 19, 2014

cld