

NO. 28618-5-III

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Court of Appeals  
Division III  
State of Washington

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIBERTO GONZALES,

Appellant.

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BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes several assignments of error. These can be summarized as follows;

1. Did the trial court err when it refused to allow trial counsel to withdraw?
2. Did the trial court err when it instructed the jury it had to be unanimous?
3. Did the trial court err when it imposed a firearms enhancement based on the answer to the special verdict?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

- 1) The court did not err when it denied the motion to withdraw.
- 2-3) These allegations have been settled by State v. Nunez, 174 Wn.2d 707, \_\_\_ P.3d \_\_\_ (2012)

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

**RESPONSE TO ASSIGNMENT OF ERROR ONE – THE COURT DID NOT ERR WHEN IT DENIED COUNSELS MOTION TO WITHDRAW.**

The Sixth Amendment to the United States Constitution guarantees a criminal defendant effective assistance of counsel, free from any conflict

of interest in the case. Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); see also State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). See RPC 1.7(a) But the RPC "does not embody the constitutional standard for effective assistance of counsel on appeal." State v. White, 80 Wn.App. 406, 412-13, 907 P.2d 310 (1995), review denied, 129 Wn.2d 1012 (1996). In order to establish a Sixth Amendment violation, Gonzalez must show that an actual conflict of interest adversely affected his attorney's performance. See Dhaliwal, 150 Wn.2d at 571, "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." citing Mickens v. Taylor, 535 U.S. 162, 172 n.5, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). Although Gonzalez need not demonstrate that the outcome of the trial would have been different but for the conflict, the "mere theoretical division of loyalties" is insufficient to establish a Sixth Amendment violation. Mickens, 535 U.S. at 171; see also State v. Fualaau, 155, *infra*. A conflict adversely affects counsel's performance if "some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." State v. Regan, 143 Wn.App. 419, 428, 177 P.3d 783(2008)

(internal quotation marks omitted) (quoting United States v. Stantini, 85 F.3d 9, 16 (2d Cir. 1996)), review denied, 165 Wn.2d 1012 (2008).

The actions of the trial court in denying the motion to withdraw was discretionary and therefore appellant must demonstrate to this court that the trial court abused that discretion.

Gonzalez indicates that his attorney Mr. Banda was “from the outset” asking for security. The problem with this statement as can be seen from the pages cited, PR 160-62 is that Mr. Banda could just as easily been asking for security because he was worried for his client. There is nothing to indicate he, Banda, was afraid of afraid of Gonzalez.

The State can find nothing in the report of proceedings at 252, 259, 331 which indicate anything which would indicate a problem between Banda and appellant. And at 354-358 it is the States position that appellant was obviously engaging his attorney in conversation and participating in his defense. There is nothing here which would demonstrate any acrimony. Appellant cites as indicative of the court discussing the possible need to restrain appellant RP 558-576, once again the State is at a loss to find anything in this section of the VRP which would indicate that there was anything occurring other that Mr. Banda effectively representing appellant.

PR 439-443 there is a conversation between the court, Banda and Gonzalez. It is clear that Gonzalez differs in his belief as to how the trial should be conducted but when asked by his attorney specifically if he wants to fire him the response is “That’s possible. Yes.” (RP 443) So even when asked directly by the man whom appellant now says did not act on his behalf if he wanted him fired he did not say yes, he said that’s possible.

The following conversation sums this relationship up;

**MR. BANDA:** If I want to impeach, Your Honor, I can bring back that witness, I can introduce that phone call, I can lay a foundation. It's my strategy, it's my tactic, Your Honor. I know what I'm doing here.

**THE COURT:** Well, let's --

**MR. BANDA:** And I understand my client's concern, he's scared, but that's why I'm the attorney, that's why I make the decision as to what witnesses I bring in or which ones I don't bring in, what questions I'm going to ask, what are things that are going to hurt me – or hurt him, not me, hurt us, actually, and those are my decisions, Your Honor, and --

**THE COURT:** Well, with regard to the witness, Cynthia Douglas, Cindy, I think what we'll do is we'll just delay your consideration on that because she can be recalled, and that witness can be questioned again. And we'll go over this, we'll have some more time to go over this again.

**MR. BANDA:** Your Honor, I know -- and I'm -- we see how the trial progresses, we see how this all ends in the end and then I make any decisions about any rebuttal evidence or -- but that's then, and I believe my client here wants me to start arguing things that I would argue in closing arguments in the middle of a trial, which makes no sense.

(RP 451-52)

Once again with regard to RP 150-156 cited by appellant as a portion of the trial were the court discusses restraining the defendant the State can not after review of that portion of the record find a single indication that the court addresses restraint. Even if the court discussed restraint the State is at a loss to understand how the defendant's problem with a potential witness has any impact what-so-ever on the ability of his attorney to work in an effective manner.

It would be the position of the State that the colloquy between the parties at RP 496-98 is indicative of the fact that Mr. Banda and Gonzalez were in fact working well together. This was obviously a situation which had caused even the security personal to be concerned and yet at the end of the conversation Mr. Banda tells the court that he has now had occasion to address this and all is fine:

**THE COURT:** ....Now another aspect of this is, it's understandable, I think, that Mr. Gonzalez would be concerned about some of this evidence that's coming in, including Mr. Lopez' testimony. It's understandable. Mr. Gonzalez, it's been brought 1 to my attention that some of the security people are worried about the situation here and that the Court might be asked to impose certain restraints. Do you understand that?

**MR. GONZALEZ:** I don't, 'cause I'm not -- I mean, I'm not -- I done nothing.

**MR. BANDA:** I talked to my client --

**THE COURT:** You haven't done anything, that's true.

**MR. GONZALEZ:** I mean, I don't plan on -- to doing

anything, so I don't see why you guys --

**MR. BANDA:** I talked to my --

**MR. GONZALEZ:** -- (inaudible).

**MR. BANDA:** -- client a while ago, Your Honor.

Excuse me. I talked to my client a while ago. He has looked like he's calmed down, says it's fine now.

**THE COURT:** Okay. But as I said, it's understandable that you would be upset, but I need to know if you're going to be all right.

**MR. GONZALEZ:** I've been all right.

**THE COURT:** You have been, and I complimented you and I'll continue to compliment you. In my presence you've been very respectful and your behavior's been fine. Okay. If you tell me that -- or if I know -- if anybody says to me that I have to be concerned about it, then you understand I have to take steps to deal with that. You understand that?

**MR. GONZALEZ:** Yes, I do.

**THE COURT:** Okay. Does anybody else want to say anything about this particular subject?

**MR. BANDA:** Can I have a moment with my client --

**THE COURT:** Absolutely.

**MR. BANDA:** -- one more time, Your Honor?

(RECESS TAKEN, 10:59 TO 11:02)(JURY ABSENT)

**THE COURT:** All right. Mr. Banda, did you have a chance to talk to Mr. Gonzalez just now?

**MR. BANDA:** I have, Your Honor. Understandably so, my client is very stressed --

**THE COURT:** Sure.

**MR. BANDA:** -- and --

**THE COURT:** Perfectly understandable.

**MR. BANDA:** -- and he had a little moment of maybe anxiety there, not that he is -- he still maintains his innocence, but a witness that we thought was not going to be here, you know, so it threw him off a little bit and a little concerned, but he said he's calm now, it's passed.

**THE COURT:** I understand that, Mr. Gonzalez, I understand that completely.

**MR. BANDA:** He was a little shocked. But -- and, of course, but he says as the moment's passed, he's fine. He's going to be a gentlemen throughout the

trial, as he has been so far, so.

**THE COURT:** And that's exactly my observation. And I hope we'll continue to have that, but it's perfectly understandable that he would be upset if he found out certain things, you know. But I hope that we'll all be able to keep good control, so we'll be able to carry on in this trial. If it turns out that we don't have that control, then the Court has to take other steps and the security people are available to do that. I think Mr. Gonzalez understands that, he seems to have a good understanding of how to conduct himself in court because he's done that throughout, and I appreciate that. Okay.

**Mr. Gonzalez,** did you want to ask me anything about this?

**MR. GONZALEZ:** No.

**THE COURT:** Okay. Thank you very much. I took some time here because I want to be very careful that we don't do anything that's inappropriate.

The supplemental report of proceedings is of great import. This fourteen page section of the trial directly discusses the action of the trial court attorney and the fact that at times an attorney and his client will disagree but in the end it is the job of the attorney to run the case. This is brought up by the judge speaking directly to Gonzalez regarding the issue of whether or not he has the right to run the trial. He does not. He did work with his attorney and he may have had a disagreement or two with this attorney but in the end it is clear that there was effective representation by counsel. The court and counsel both discuss this issue directly with Gonzalez and they both state they will get him a copy of that case.

In this case the trial court took the proper action when it reviewed the claims of appellant and determined that his attorney could continue to effectively represent him. The case law indicates where the error occurs is when the court does not make this inquiry. Holloway v. Arkansas, 435 U.S. 475, 484, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). The court's failure to take these steps deprives defendant of the guarantee of assistance of counsel. Holloway, 435 U.S. at 484, 98 S.Ct. 1173. Our Supreme Court has stated the rule as follows: "[A] trial court commits reversible error if it knows or reasonably should know of a particular conflict [of interest] into which it fails to inquire." In re Personal Restraint of Richardson, 100 Wash.2d 669, 677, 675 P.2d 209 (1983).

There is nothing in RP 750-52 as cited by appellant except discussion of the fact that Lopez would testify. Once again there is nothing in the record cited by appellant that would cause this court to consider there was no longer a working relationship between Gonzalez and Mr. Banda. The same with holds true with RP 773-803 also cited by appellant, it just contains the testimony, truthful testimony of a very reluctant testimony of Mr. Lopez.

It is clear the court was making sure that EVERYONE from the gallery to Mr. Gonzalez was calm about the activities in the court this is the job of the court. There is nothing here which would indicate anything

other than the fact that appellant was not happy that a witness whom he had intimidated in to silence was now going to tell the truth. The court asked for and received a promise from Gonzalez that he would continue to “behave” as he had so far throughout the trial. Appellant couches this section of the trial as apparently indicative of the failure in the working relationship between counsel and client and the level the court had to go to, to insure there was nothing which disrupted the trial. (RP 767-71)

The trial court considered and reconsidered the actions of the appellant and after having watched the entire trial and having polled each juror to insure that they were capable of continuing to sit and act in a fair and impartial manner stated the following:

THE COURT: ...Secondly, there was a request for a mistrial. There was a request for Defense counsel to either be --to withdraw -- to be allowed to withdraw or to accede to the Defendant's request that his services be terminated and a new lawyer be installed. **I felt at the time that all of those motions had no merit, that a lot of this was instigated by the Defendant to undermine the trial, and it's common for lawyers and their clients to disagree. In this situation, Mr. Gonzalez expressed severe disagreement with Mr. Banda about the conduct of the trial, and that's understandable, but I found no basis at the time nor do I find it now for there to have been any effort to either substitute counsel at that point, terminate counsel, cause a mistrial, or that there was some serious effort to 1 introduce evidence.**

None of what I heard amounted to some reasonable basis to introduce witnesses. In fact, I tried to give the Defendant and Mr. Banda every opportunity to try to

do that either before we started the trial with jury selection or during the trial. I mean, Mr. Knittle was objecting throughout as far as not getting any notice about anything, and, of course, he's entitled to notice, but, you know, we try to be somewhat flexible about that. I just -- didn't seem to me that anything that was presented -- and I think Mr. Banda explained during the trial that there was no logic to some of what was being requested by the Defendant or was either -- it was actually counterproductive, so -- or the Court would not allow it. In any event, I may consider some further findings on that, but I don't find any of that as a basis for us not to go forward. So, Mr. Knittle –  
(RP 1031-34, emphasis mine.)

The Court in State v. Fualaau, 155 Wn.App. 347, 228 P.3d 771 (2010) review denied, 169 Wn.2d 1023, 238 P.3d 503 (2010) set forth the applicable law regarding this allegation a matter with striking similarities to this case. In Fualaau of the court stated the following:

A criminal defendant cannot force the withdrawal of his court appointed attorney and the appointment of a new attorney simply by assaulting his present counsel during the trial. " Substitution of counsel is an instrument designed to remedy meaningful impairments to effective representation, not to reward truculence with delay." People v. Linares, 2 N.Y.3d 507, 512, 780 N.Y.S.2d 529, 813 N.E.2d 609 (2004). Other jurisdictions have refused to recognize a rule of law that would empower criminal defendants to inject reversible error into their trials by threatening their lawyers: We rely in the first instance on our trial courts to determine whether a criminal defendant is represented by an attorney truly laboring under conflicting interests or whether the defendant has simply engineered an apparent conflict in an attempt to delay the ultimate moment of truth, the jury's verdict. People v. Roldan, 35 Cal. 4th 646, 675, 27 Cal.Rptr.3d 360, 110 P.3d 289 (2005).

A defendant's misconduct toward his attorney does not necessarily create a conflict of interest. Where the defendant's actions do not create an actual conflict of interest adversely affecting the attorney's performance, the defendant is not entitled to a new attorney. State v. Dhaliwal, 150 Wash.2d 559, 571, 79 P.3d 432 (2003). However, even in circumstances wherein the defendant's wrongful actions create an actual conflict of interest, the defendant may properly be denied substitution of counsel.

Defendants can forfeit their Sixth Amendment rights by misconduct. *See, e.g., State v. Mason*, 160 Wash.2d 910, 924, 162 P.3d 396 (2007) (defendants who are responsible for a witness's unavailability at trial forfeit their Sixth Amendment right to confront the missing witness). A defendant may forfeit his Sixth Amendment right to counsel by engaging in "egregious misconduct." City of Tacoma v. Bishop, 82 Wash.App. 850, 860, 920 P.2d 214 (1996). Thus, a defendant who threatened his attorney with physical bodily harm and attempted to persuade his attorney to engage in unethical conduct in connection with the case was held to have forfeited his right to the assistance of counsel. United States v. McLeod, 53 F.3d 322, 326 (11th Cir.1995). Forfeiture by misconduct "is grounded in equity-the notion that people cannot complain of the natural and generally intended consequences of their actions." Mason, 160 Wash.2d at 926, 162 P.3d 396. Hence, where a defendant intentionally creates a conflict of interest with his or her attorney, that defendant may be deemed to have forfeited either the right to the assistance of counsel or the right to the assistance of counsel free of the conflict created.

When a defendant misbehaves in a courtroom, the trial judge "must be given sufficient discretion" to determine the appropriate course of action. Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). "No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." *Allen*, 397 U.S. at 343, 90 S.Ct. 1057. Hence, even where the defendant's misconduct causes a conflict of interest with defense counsel, the trial court is not necessarily required to grant the attorney's motion to withdraw, thus necessitating the

substitution of new counsel. Rather, depending upon the circumstances extant, the trial court may require the defendant to proceed pro se or may require the attorney to continue representing the defendant. The trial court is in the best position to consider the appropriate options.

The trial court herein determined not to reward Fualaau's criminal action, taken against his attorney in the midst of the trial. In determining the appropriate course of action, the trial court wisely weighed the need to safeguard Fualaau's Sixth Amendment rights against considerations such as the safety of the witnesses and the frustration of justice attendant to a mistrial. Thus, even had Fualaau's actions created an actual conflict of interest, he would not necessarily have been entitled to the substitution of new counsel.

This case, however, does not present us with a situation in which defense counsel, laboring under a conflict of interest, was forced to continue. In fact, there was no conflict of interest created herein.

A conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant in the context of a particular representation. State v. White, 80 Wash.App. 406, 411-12, 907 P.2d 310 (1995). In this case, the burden is on Fualaau to demonstrate, from the record, that an actual conflict of interest adversely affected his attorney's performance. Mickens v. Taylor, 535 U.S. 162, 173-74, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); Dhaliwal, 150 Wash.2d at 573, 79 P.3d 432. Our Supreme Court has held that even where a defendant " has demonstrated the possibility that his attorney was representing conflicting interests," the defendant nevertheless " failed to establish an actual conflict" where he did not demonstrate how his attorney's conflict of interest affected his attorney's performance at trial. Dhaliwal, 150 Wash.2d at 573, 79 P.3d 432. Although a defendant need not demonstrate that the outcome of the trial would have been different but for the conflict, the defendant must show that " 'some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.' " State v.

Regan, 143 Wash.App. 419, 428, 177 P.3d 783 (2008)  
(internal quotation marks omitted) (quoting United States v. Stantini, 85 F.3d 9, 16 (2d Cir.1996)).  
(Footnotes omitted.)

This court must look to the record to determine whether there was a “complete” breakdown in the ability of Mr. Banda to act as Gonzalez’s attorney. If this court reads the verbatim report of proceedings from page 924 – 935 the answer is clear. There may have been conflict and the defendant may have thrown water at his attorney but, in the end, they communicated and worked together on a singular strategy for the trial. There is a record that they spoke, along with the investigator assigned, apparently at length and the outcome was that the defendant changed his mind about calling certain witnesses and moving for admission of tape recordings. All of which prior to the conversation appellant wanted to have admitted but which Mr. Banda had indicated were not productive nor helpful to the defense strategy. Apparently Gonzalez believed and had been vocal throughout the trial that this testimony was needed and were part and parcel to the allegations that Banda was not effectively representing him. The trial court went to great lengths to allow Banda and Gonzalez to confer and the result of that consultation was Gonzalez deferred to his attorney’s wisdom and strategy. Obviously they were working together and the representation was not completely broken down.

There was at the end an obvious ability for the two to work together on a unified defense.

**RESPONSE TO ASSIGNMENT OF ERROR TWO- THREE;  
THIS ERROR HAS BEEN ADDRESSED BY THE SUPREME  
COURT IN STATE v. NUNEZ.**

Gonzalez contends the trial court erred in instructing the jury on the aggravating factor in violation of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). However this issue was decided in, State v. Nunez, 174 Wn.2d 707, \_\_\_ P.3d \_\_\_ (2012) (Wash. June 7, 2012), wherein our supreme court overruled the nonunanimity rule set forth in Bashaw. The court concluded that the nonunanimity rule in Bashaw "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity." Nunez, supra. In reaching this decision, the court noted that under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the legislature "intended complete unanimity to impose or reject an aggravator." Nunez, 2012 WL 2044377, at \*4 (citing RCW 9.94A.537(3)). The trial court did not err in instructing the jury on the aggravating factor.

IV. CONCLUSION

Assignments of error two and three have been decided by the Washington State Supreme Court. That court determined that the analysis

set forth by Gonzalez is incorrect and therefore those two allegations need no further review by this court.

The decision of the court in denying the motions for a new attorney and or mistrial were not an abuse of discretion.

This appeal should be dismissed.

Respectfully submitted this 1<sup>st</sup> day of November 2012

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DECLARATION OF SERVICE

I, David B. Trefry state that on November 1, 2012, I emailed, by agreement of the parties a copy of the Respondent's Brief to: Mrs. Susan Gasch, Gasch Law Office, [gaschlaw@msn.com](mailto:gaschlaw@msn.com) and to Eriberto Gonzalez #842801 Washington State Penitentiary 1313 North 13<sup>th</sup> Avenue Walla Walla WA 99362

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

DATED this 1<sup>st</sup> day of November, 2012 at Spokane, Washington.

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