

COA No. 29458-7-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

SERAFIN GARANDARA-MEDINA, Appellant.

---

BRIEF OF APPELLANT

---

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## I. ASSIGNMENTS OF ERROR

A. The court erred by denying appellant Serafin Garandara-Medina's motion to sever the two charges of attempted second degree murder and intimidating a witness.

B. Mr. Garandara-Medina received ineffective assistance of counsel, who failed to renew the motion to sever pursuant to CrR 4.4(a)(2).

C. The State's evidence was insufficient to support the conviction on the charge of intimidating a witness.

### Issues Pertaining to Assignments of Error

1. Did the court err by denying the motion to sever when Mr. Garandara-Medina suffered substantial prejudice, requiring reversal, by having the charges tried together? (Assignment of Error A).

2. Did Mr. Garandara-Medina receive ineffective assistance of counsel, who did not renew the motion to sever as required by CrR 4.4(a)(2)? (Assignment of Error B).

3. Was the State's evidence insufficient to support a finding of guilt as to the charge of intimidating a witness? (Assignment of Error C).

## II. STATEMENT OF THE CASE

Serafin Garandara-Medina (whose true name is Gandara-Medina [1/12/10 RP 8]) was charged by information on November 15, 2009, with one count of attempted second degree murder against Diana Salgado. (CP 216). He was finally charged by third amended information on September 28, 2010, with one count of attempted second degree murder while armed with a deadly weapon and one count of intimidating a witness. (CP 141-142).

A CrR 3.5 hearing was held regarding the admissibility of Mr. Garandara-Medina's confession to stabbing Ms. Salgado. (8/17/10 RP 16-410. Determining the statement was admissible, the court found he had been given his *Miranda* rights several times in Spanish, had understood them, and had voluntarily waived them. (8/17/10 RP 40-41). The court subsequently entered written CrR 3.5 findings and conclusions. (CP 7-8).

The defense moved to sever the two charges. (CP 137). After hearing argument and reviewing the briefs, the court denied the motion to sever as there was no unfair prejudice. (9/28/10 RP 13).

Diana Salgado met Mr. Garandara-Medina on August 3, 2008, on the phone. (10/21/10 RP 28). After talking over several

weeks, she agreed to meet him in person. (*Id.* at 29). Mr. Garandara-Medina was from Portland. (*Id.*). They had a long distance relationship for about a year. (*Id.* at 30). He told her he had one child from a one-night stand, but she found differently. (*Id.*). Mr. Garandara-Medina had a family and a wife/significant other in Portland. (*Id.* at 29, 31, 32). Ms. Salgado confronted him after driving to Portland. (*Id.* at 31). She then drove home to Pasco. (*Id.*).

Mr. Garandara-Medina later went to Ms. Salgado's home and tried to talk to her. (10/21/10 RP 32). She told him he could not be trusted and to leave. (*Id.*). He said he would rather see her dead than be with someone else. (*Id.* at 33). Ms. Salgado, however, did not believe he would hurt her. (*Id.*). She eventually took him back. (*Id.* at 34). In early November, 2009, Mr. Garandara-Medina moved in with her. (*Id.*). She said his personality changed as he became very possessive of her. (*Id.* at 35).

On November 20, 2009, Ms. Salgado went to work at 7 a.m. (10/21/10 RP 37). Her shift at the Quality Inn in Kennewick was from 7 to 3. (*Id.* at 37, 38). Ms. Salgado was working late and was not home when she was supposed to be. (*Id.* at 36). After she

came back from taking a male co-worker to a bank as it was pay day, Mr. Garandara-Medina was at the hotel to confront her. (*Id.* at 37-39). He was mad and told her to go home. (*Id.* at 39). He pulled her by the hair and they drove home in their respective cars. (*Id.* at 40). About 6:10 p.m., Ms. Salgado arrived at her apartment at 1712 W. Court St., Apt. D, in Pasco. (*Id.*).

She went upstairs to the bedroom. (10/21/10 RP 40). Mr. Garandara-Medina, very mad, was there first. She came up after him. (*Id.* at 41). She wanted her house key back. (*Id.*). He said he would never forgive her, pulled out a knife, and attacked her. (*Id.*). Mr. Garandara-Medina grabbed her and pulled her back to the bed. Ms. Salgado said he got the knife from his pocket or somewhere in his pants. (*Id.* at 41-42). He stabbed her in the neck while she was on her back on the bed. He was right above her right side. She grabbed the knife. (*Id.*). Ms. Salgado did not yell for help, but was just pleading with him and saying she loved him. (*Id.* at 44-46).

Her two daughters came to the door and started banging on it. (10/21/10 RP 47). Although Ms. Salgado talked to them through the door, they were not OK with that. (*Id.*) She asked Mr. Garandara-Medina if he could open the door and he did a little bit.

(*Id.*). Just before, she actually got the knife from him and would not give it back. (*Id.*). Ms. Salgado ran out and called for the kids. (*Id.*). He came out after her and said he would take her to the hospital. He wanted the knife. She said no and threw it into a bush. (*Id.* at 47-49). Mr. Garandara-Medina did take Ms. Salgado to the hospital, where he told the desk nurse she had a neck wound. (*Id.* at 49). She received treatment and was then flown to Harborview in Seattle for further treatment of her injuries. (*Id.* at 51). Although she had tried to hurt herself with a knife in her childhood, she did not stab herself in the neck on November 20, 2009. (*Id.* at 57).

In February 2010, Ms. Salgado received a letter from the Franklin County Jail. (10/21/10 RP 52). It was addressed to Daniela Sanchez at 1712 W. Court St., Apt. D. (*Id.* at 53). She said Sanchez was her maiden name and Daniela was the alias she had given Mr. Garandara-Medina the first time they talked on the phone. (*Id.*). The return address had the name Daniel Castro along with Franklin County Jail. (*Id.* at 54; CP 114). After reading the letter, she felt sick and scared for her and her family. (10/21/10 RP 54). Ms. Salgado gave the letter to the prosecuting attorney. (*Id.* at 55).

Detective William Parramore was involved in the investigation of the stabbing and processed the scene after getting a telephonic search warrant for the apartment. (10/21/10 RP 58-59). Another detective found the knife inside a bush. (*Id.* at 68).

Officer Brad Gregory arrested Mr. Garandara-Medina at the hospital. (10/21/10 RP 19). He took a statement from Ms. Salgado. (*Id.* at 17).

Detective Ismail Cano transported Mr. Garandara-Medina to the police station. (10/21/10 RP 125). The detective gave him his *Miranda* rights in Spanish. (*Id.* at 126). He had no conversation with Mr. Garandara-Medina during the transport. (*Id.* at 130).

Detective Raul Cavazos gave him his *Miranda* rights in Spanish again at the station. (10/25/10 RP 153). Mr. Garandara-Medina waived his rights and wanted to talk. (*Id.* at 154). His confession essentially tracked Ms. Salgado's version of the events. (*Id.* at 156-164). He regretted doing what he did. (*Id.* at 167).

On February 5, 2010, Detective Kirk Nebeker met with Ms. Salgado, who brought the letter, postmarked February 1, 2010, she received from the Franklin County jail. (10/21/10 RP 121). It was in Spanish. (*Id.* at 123). The detective knew Spanish and was bilingual. (*Id.* at 121). Based on the contents of the letter, he

contacted Ms. Salgado's brother, Salvador Rodriguez Sanchez.

(*Id.* at 123).

Court interpreter Jeff Adams translated the letter into English. (10/21/10 RP 84). The letter read:

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. Maybe 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 – [FU], fah. You already know. (*Id.* at 86-87).

After the incident on November 20, 2009, Salvador Rodriguez had Mr. Garandara-Medina's car towed away from the apartment. (10/25/10 RP 147).

Karen Clements, a records clerk for Franklin County, was on mail duty in February 2010. (10/21/10 RP 90, 92). There was no "Daniel Castro" in the Franklin County Jail that month. (*Id.* at 94). But Mr. Garandara-Medina was. (*Id.*). Only orange postcards were

allowed to be mailed out from the jail, unless it was “legal mail.” (*Id.* at 95). This mail policy was in effect in February 2010. (*Id.*).

Mr. Garandara-Medina testified in his own behalf. (10/25/10 RP 168-187). He said Ms. Salgado stabbed herself in the neck. (*Id.* at 174). He only said he did it so she would not have to spend 3-4 months in jail for trying to harm herself. (*Id.* at 180). At that point, Mr. Garandara-Medina was willing to take the blame for something he had not done. (*Id.* at 181).

No exceptions or objections were taken to the court’s instructions. (10/25/10 RP 190). The jury convicted Mr. Garandara-Medina of attempted second degree murder, with a special finding of being armed with a deadly weapon, and intimidating a witness. (10/25/10 RP 206-207; CP 337-39). He was sentenced within the standard range. (CP 16, 21). This appeal follows. (CP 12).

### III. ARGUMENT

A. The court erred by denying Mr. Garandara-Medina’s motion to sever the two charges of attempted second degree murder and intimidating a witness.

Joinder of offenses is deemed “inherently prejudicial.” *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). CrR 4.4(b)

requires severance of offenses when it will “promote a fair determination of the defendant’s guilt or innocence of each offense.” See *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Moreover, when an accused shows that the manifest prejudice of joinder outweighs concerns for judicial economy, severance should be granted. *State v. MacDonald*, 122 Wn. App. 804, 814-15, 95 P.3d 1248 (2004), *rev. denied*, 153 Wn.2d 1006 (2005). Although a court’s decision on a motion to sever is usually reviewed for an abuse of discretion, joinder simply cannot be used to prejudice a defendant and, if he can demonstrate substantial prejudice, reversal is required. *Ramirez*, 46 Wn. App. 226. That is the case here.

A defendant may be prejudiced by joinder in several ways: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime charged; or (3) the jury may cumulate the evidence of the crimes charged and find guilt when, if considered separately, it would not. *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984). The court

may, however, look to factors that could mitigate this inherent prejudice:

(1) the strength of the State's evidence on each count, (2) clarity of defenses to each count, (3) the court properly instructs the jury to consider the evidence of the crime *and* (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined. (emphasis in original). 36 Wn. App. at 750.

Here, the strength of the State's evidence on count 1 was strong. But the evidence on count 2 was weak because there was no reason for Mr. Garandara-Medina to try to intimidate Ms. Salgado into changing her testimony. The State already had his confession. This factor is in his favor.

The defenses may be general denials, but they are clear and distinct because the offenses are such that a defense to one is not a defense to the other. Mr. Garandara-Medina was embarrassed and confounded in presenting separate defenses as the use of this single trial invited the jury to cumulate evidence to find guilt by inferring a criminal disposition. *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). This factor also favors severance.

The court did not instruct the jury that guilt or innocence should be considered separately for each count. (CP 40-62). This factor favors severing the charges.

If tried separately, evidence of intimidating a witness would not be admissible on the attempted second degree murder charge because Mr. Garandara-Medina had confessed to the stabbing so there was no reason for him to try to intimidate Ms. Salgado into changing her testimony. In these circumstances, witness intimidation neither shows a guilty conscience nor circumstantial evidence of guilt. *State v. Sanders*, 66 Wn. App. 878, 833 P.2d 452 (1992), *rev. denied*, 120 Wn.2d 1027 (1993). Accordingly, all the factors favor severance and demonstrate Mr. Garandara-Medina suffered substantial prejudice.

The court erred by denying the defense motion to sever because nothing in the record shows concerns for judicial economy outweighed the manifest prejudice of joinder. *MacDonald*, 122 Wn. App. at 814-15. The denial of a motion to sever is an abuse of discretion when there is prejudice, as here, and there are no curative instructions. *See State v. Redd*, 51 Wn. App. 597, 603, 754 P2d 1041, *rev. denied*, 111 Wn.2d 1007 (1988). A new trial is required.

B. Mr. Garandara-Medina received ineffective assistance of counsel, who failed to renew the motion to sever as required by CrR 4.4(a)(2).

Defense counsel did not renew the motion to sever at trial after the court denied the pretrial motion. CrR 4.4(a)(2). Failure to do so waives severance. *Id.*

To prove ineffective assistance of counsel, Mr. Garandara-Medina must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A lawyer's performance is deficient when her performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). The appellate court presumes effective assistance of counsel and will reverse only if the defendant can show no legitimate trial tactic or strategy existed for counsel's decision. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1241 (1995).

Here, counsel's failure to renew the motion to sever was conduct falling below the standard of reasonableness for a competent attorney. The record reflects no legitimate trial tactic or

strategy that would justify this inaction. Even so, Mr. Garandara-Medina must still show prejudice by demonstrating the motion would have been granted and that, but for counsel's deficient performance, the reasonable probability that the trial's outcome would have been different. *State v. Standifer*, 48 Wn. App. 121, 125-26, 737 P.2d 1308, *rev. denied*, 108 Wn.2d 1035 (1987).

The trial court erred by denying the motion to sever because the prejudice from joinder was manifest, concerns for judicial economy did not outweigh that prejudice, and the court gave no curative instruction. If the motion had been properly granted, the trial's outcome would have been different. This is ineffective assistance of counsel. Mr. Garandara-Medina must get a new trial.

C. The State's evidence was insufficient to support the conviction of intimidating a witness.

There is no dispute that the intimidation letter was (1) sent from the Franklin County Jail; (2) Mr. Garandara-Medina was in the jail when the letter was sent, but not "Daniel Castro;" (3) unless it was "legal mail," only orange postcards were allowed to be mailed out from the jail; and (4) this policy was in effect in February 2010, when Ms. Salgado received the letter. (10/21/RP 52, 94, 95).

The letter received by Ms. Salgado was not an orange postcard. (CP 114). The envelope was not marked “legal mail.” (*Id.*). Only orange postcards could be sent out at the Franklin County Jail unless it was “legal mail.” The letter could not have been from the jail. It thus could not have been sent by Mr. Garandara-Medina, who was then in the jail, as alleged in the third amended information. The State’s evidence was insufficient to support the conviction of intimidating a witness.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Although credibility determinations are for the trier of fact and not subject to review, the State’s own uncontroverted evidence was that Mr. Garandara-Medina could not have sent the letter and threatened the witness. *State v. Stevenson*, 128 Wn. App. 179, 114 P.3d 699 (2005).

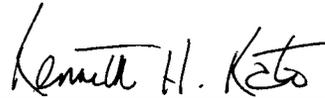
There is no evidence to weigh. No rational trier of fact could have found the essential elements of the crime of intimidating a witness beyond a reasonable doubt. *Green, supra*. The conviction must be reversed and the charge dismissed.

V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Garandara-Medina respectfully urges this Court to reverse his convictions and dismiss the charges or remand for new trial.

DATED this 28<sup>th</sup> day of March, 2011.

Respectfully submitted,

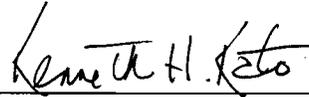


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CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on March 28, 2011, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on Serafin Garandara-Medina, #345075, 1313 N. 13<sup>th</sup> Ave., Walla Walla, WA 99362, and Brian Hultgrenn, Franklin County Prosecutor's Office, 1016 N. 4<sup>th</sup> Ave., Pasco, WA 99301-3706.



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