IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29458-7-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
SERAFIN GARANDARA-MEDINA,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Brown, J. — Serafin Garandara-Medina appeals his attempted second degree murder and witness intimidation convictions related to his stabbing of and later threats to Diana Salgado. He contends: (1) the trial court erred in denying his severance motion; (2) his counsel was ineffective for failing to renew that motion at trial; and (3) insufficient evidence supports his witness intimidation conviction. We affirm.

FACTS

On November 20, 2009, Mr. Garandara-Medina and his girl friend, Ms. Salgado, argued over his jealous suspicions at her home. Ms. Salgado asked him to leave and return his key. Mr. Garandara-Medina told Ms. Salgado he would never forgive her, pulled a knife out of his pocket and attacked her. He grabbed her, pulled her to the bed, and stabbed her in the neck. Eventually, after struggling, Ms. Salgado was able calm Mr. Garandara-Medina. He then took her to Lourdes Medical Center after she promised not to alert police. At the hospital, Ms. Salgado received treatment and gave a statement to police.

Police arrested Mr. Garandara-Medina and took him to the Pasco Police Station. The officer who transported Mr. Garandara-Medina gave him his *Miranda*[1] rights in Spanish. At the police station, Detective Raul Cavazos again gave Mr. Garandara-Medina his *Miranda* rights in Spanish. He waived his rights and confessed to grabbing Ms. Salgado, pulling her head back by her hair, and stabbing her in the throat with the knife. His statements were ruled admissible after a CrR 3.5 hearing and are not challenged here. On November 25, the State charged Mr. Garandara-Medina with one count of attempted second degree murder.

In February 2010, Ms. Salgado received a letter from the Franklin County Jail.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The return address had the name Daniel Castro. It was addressed to Daniela Sanchez and sent to Ms. Salgado's home address. Ms. Salgado said Sanchez was her maiden name and Daniela was the alias Ms. Salgado had given Mr. Garandara-Medina the first time they talked on the phone. Ms. Salgado gave the letter to the prosecuting attorney.

The translated letter reads:

> 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,[2] my dear. Remember that they are watching you. Ok? I love you, even if you are a — if you, fah. You already know.

Report of Proceedings (RP) (Oct. 21, 2010) at 86-87. Based on the contents of the letter, Detective Kirk Nebeker contacted Ms. Salgado's brother, Salvador Rodriguez Sanchez. After the November 20 incident, Mr. Rodriguez Sanchez had Mr. Garandara-Medina's car towed away from Ms. Salgado's apartment. The State amended the charges to add a

[2] The translator clarified that a more accurate translation for the word "judgment," taking into account a misspelling, would be "statement" or "declaration." RP (Oct. 21, 2010) at 87-88.

count of intimidating a witness that Mr. Garandara-Medina unsuccessfully moved to sever. The court ruled the four *Russell*[3] factors weighed in favor of keeping the counts together.

At trial, Karen Clements, a records clerk on mail duty for Franklin County Jail, testified no "Daniel Castro" was in the Franklin County Jail in February 2010, but Mr. Garandara-Medina was there. She related 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. Normally, inmates were limited to postcards but any letter could be sent from the jail if it was "legal mail." RP (Oct. 21, 2010) at 95.

Mr. Garandara-Medina elected to testify. Apparently, claiming he had been forced to falsely confess, he related Ms. Salgado stabbed herself in the neck.

The jury found Mr. Garandara-Medina guilty of attempted second degree murder, with a special finding of being armed with a deadly weapon, and intimidating a witness. Judgment and sentence were entered on October 26, 2010. Mr. Garandara-Medina was sentenced within the standard range. He appealed.

[3] *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

ANALYSIS

A. Severance

The issue is whether the trial court erred by denying Mr. Garandara-Medina's motion to sever the two charges of attempted second degree murder and intimidating a witness.

We review a trial court's denial of a motion to sever counts for abuse of discretion. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). But if a defendant's pretrial motion for severance was overruled and he fails to renew the motion, the issue is waived on appeal. CrR 4.4(a)(2). Here, Mr. Garandara-Medina failed to renew his motion to sever. Accordingly, Mr. Garandara-Medina waived this issue, leading us to the next issue.

B. Assistance of Counsel

The issue is whether trial counsel was ineffective for failing to renew the motion to sever at trial after the court denied the motion pretrial.

We review a challenge to effective assistance of counsel de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). A defendant possesses the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We presume counsel was effective.

State v. McFarland, 127 Wn.2d 322, 335, 889 P.2d 1251 (1995). To prove ineffective assistance of counsel, Mr. Garandara-Medina must show (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). "If an ineffective assistance claim can be resolved on one prong of this test, the court need not address the other prong." *State v. Staten*, 60 Wn. App. 163, 171, 802 P.2d 1384 (1991).

As to the first prong, "a claim of deficient performance cannot be based on matters of trial strategy or tactics." *State v. Weber*, 137 Wn. App. 852, 858, 155 P.3d 947 (2007) (citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001)). "The defendant must therefore show an absence of legitimate strategic reasons to support the challenged conduct." *State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831 (1998).

The procedural posture of this case suggests a legitimate reason for counsel not to move the court to sever—the trial court had already denied the motion, reasoning: "I have had a chance to review the briefs of counsel and it seems to this court that it is not appropriate to sever these counts. The four factors weigh in favor of keeping the counts together. I do not feel it would be unfair prejudice." RP (Sept. 9, 2010) at 13.

As the State argues, a renewed motion to sever would not have been granted

because it was properly denied in the first instance. CrR 4.3(a) permits two or more offenses to be joined in a single charging document when the offenses: "(1) Are of the same or similar character, even if not part of a single scheme or plan; or (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." Mr. Garandara-Medina did not assign error to the joinder. Even so, "[o]ffenses properly joined under CrR 4.3(a), however, may be severed if 'the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.'" *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990) (quoting CrR 4.4(b)).

A defendant seeking severance bears the burden of demonstrating a trial on multiple counts "would be so manifestly prejudicial as to outweigh the concern for judicial economy." *Id.* at 718. "In determining whether the potential for prejudice requires severance, a trial court must consider (1) the strength of the State's evidence on each count; (2) the clarity of 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." *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). The trial court determined the four factors weighed in favor of keeping the counts together.

Regarding the evidence strength of each count, Mr. Garandara-Medina concedes the State's evidence on the attempted second degree murder count was strong, but he argues the evidence on the witness intimidation count was weak. Considering the admissible evidence for the witness intimidation charge, we disagree. If the witness intimidation charge had been tried separately, the stabbing evidence would be cross-admissible for motive. ER 404(b). And the stabbing evidence would be admissible to prove the elements of intimidating a witness.[4] *See* RCW 9A.72.110. The State must prove the victim is a "witness" in order to meet an offense element. *Id*. To prove

[4] RCW 9A.72.110 partly provides:

> (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;
>
> . . . .
>
> (c) Induce that person to absent himself or herself from such proceedings; or
>
> . . . .
>
> (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(27).
>
> (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.

someone is a witness the State must 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." *Id*. Here, the official proceeding was the pending attempted second degree murder trial. The attempted second degree murder evidence would be cross-admissible in the witness intimidation trial. Admissible evidence included the letter, the translator's clarifications, and the record clerk's testimony.

Mr. Garandara-Medina argues the witness intimidation evidence would not have been admissible in a separate trial for the attempted second degree murder charge. Again, we disagree. Mr. Garandara-Medina concedes the State's evidence on the attempted second degree murder charge was strong considering his confession. And a defendant's attempt to get a key witness to be absent from trial demonstrates a motive or intent to avoid trial, which is circumstantial evidence of guilt. *State v. Sanders*, 66 Wn. App. 878, 886, 833 P.2d 452 (1992). Overall, the cross-admissibility of evidence weighs in favor a joint trial for judicial economic reasons.

Regarding the clarity of defenses as to each count, Mr. Garandara-Medina admits the defenses to both counts may be general denials, but, citing *Russell*, he argues he was "embarrassed and confounded in presenting separate defenses." Br. of Appellant at 10. The *Russell* court explained "[t]he likelihood that joinder will cause a jury to be confused

as to the accused's defenses is very small where the defense is identical on each charge." *Russell*, 125 Wn.2d at 64-65 (citing *State v. Hernandez*, 58 Wn. App. 793, 799, 794 P.2d 1327 (1990)). But the State acutely responds, "[a] defendant denying complete culpability on each count is not embarrassed by presenting separate defenses." Br. of Resp't at 12 (citing *Sanders*, 66 Wn. App. at 885).

Finally, regarding jury instructions, the court did not instruct that guilt or innocence should be considered separately for each count. But Mr. Garandara-Medina did not ask the court to provide such an instruction.

Considering the *Russell* factors together, we conclude the court properly denied Mr. Garandara-Medina's initial severance motion and likely would have done the same if counsel had renewed the motion. Accordingly, failure to renew the motion was not deficient performance. While our deficient performance discussion suggests a lack of prejudice because Mr. Garandara-Medina fails in proving the first ineffective assistance prong, we need not further address prejudice.

C. Intimidation Evidence Sufficiency

The issue is whether sufficient evidence supports Mr. Garandara-Medina's intimidating a witness conviction.

Evidence is sufficient to support a conviction if, viewed in the light most favorable

to the State, it would permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of the State's evidence and requires that all reasonable inferences be drawn in the State's favor and interpreted most strongly against the defendant. *Id.* Circumstantial evidence is equally as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To prove the intimidating a witness charge, the State must show beyond a reasonable doubt that Mr. Garandara-Medina, by use of threat against a current or prospective witness, attempted to influence the testimony of that person or to convince the person to absent himself or herself from proceedings. RCW 9A.72.110.

Mr. Garandara-Medina does not dispute the letter was a threat to Ms. Salgado to absent herself from the proceedings, but he disputes the evidence was sufficient to prove that he was the one who sent the letter. The letter was postmarked from the Franklin County Jail. Mr. Garandara-Medina was at the jail at the time the letter was sent. Ms. Clements testified that unless it was "legal mail," only orange postcards were allowed to be mailed out of the jail. Mr. Garandara-Medina argues that because the letter received by Ms. Salgado was not on an orange postcard and it was not marked "legal mail," it could not have been sent from the jail. However, Mr. Garandara-Medina's argument

assumes that legal mail is specifically marked as "legal mail" on the envelope when the jail sends it out. That fact is not in evidence. The sole testimony on the subject given by Ms. Clements is that mail other than orange postcards can be sent from the jail if it is legal mail. RP (Oct. 21, 2010) at 95. She did not indicate that any special marking had to be made on an envelope for it to be sent as legal mail. As the State responds, the jury is free to infer that Mr. Garandara-Medina "used this loophole to send out the letter." Br. of Resp't at 27. And Ms. Clements related the jail did not have the resources to check every letter individually.

Moreover, the letter writer identified himself as Mr. Garandara-Medina. The letter writer refers to specific case facts, mentioning his anger about Ms. Salgado's brother having his car towed. The letter is addressed to Ms. Salgado using a nickname known solely to Mr. Garandara-Medina. Viewed in the light most favorable to the State, with all reasonable inferences drawn in the State's favor and interpreted most strongly against Mr. Garandara-Medina, the evidence sufficiently supports the jury finding of the essential elements of intimidating a witness beyond a reasonable doubt.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW

2.06.040.

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Brown, J.

WE CONCUR:

_____ _____
Kulik, C.J. Sweeney, J.