NO. 42964-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ALFRED JOSEPH SANCHEZ, Appellant

Appeal from the Superior Court of Thurston County
The Honorable Christine Pomeroy
Pierce County Superior Court Cause No. 09-1-00591-9

Corrected BRIEF OF APPELLANT

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pm 12/17/12

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A. ASSIGNMENTS OF ERROR:

1. The trial court erred when it admitted Mr. Sanchez's statements to Olympia Police.

    a. Former (1)
    b. Former (2)

2. Mr. Sanchez is entitled to a new trial because trial counsel failed to provide constitutionally effective assistance.

3. The State failed to prove beyond a reasonable doubt that Mr. Sanchez committed the crime of first degree assault.

4. The trial court's findings of fact and conclusions of law following bench trial fail to support its conclusion that Mr. Sanchez committed the crime of assault in the first degree while armed with a deadly weapon.

    a. The trial court erred when it entered the following findings of fact: nos. 3, 5, 6, 7, 8, 9,.10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27.

    b. The trial court erred when it entered conclusions of law nos. 5, 6, 7, 8, 9.

5. The trial court abused its discretion when it denied Mr. Sanchez's motion for new trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. A criminal defendant is denied his constitutional protections under the Fifth Amendment to the United States Constitution and Article 1, section 9 of the Washington Constitution when the trial court admitted statements made strict under orders of his military commander.

2. When a criminal defendant is in a custodial setting, his statements to police are not admissible at trial absent proof

that the statements are made knowingly, intelligently, and voluntarily.

3. When a suspect in a criminal case is ordered by his military commanders to give a statement to local authorities, his statement cannot be voluntary.

4. When a suspect in a criminal case is ordered by his military commanders to present himself physically at one location and then directly proceed into an interview with local law enforcement officials, that suspect has no ability to make decisions regarding his own interactions with local enforcement.

5. Where the orderly administration of justice requires compliance with procedural rules, this court may not review the issue of the voluntariness of a suspect's statement to police due to lack of findings.

6. Given the specificity of the issues, Mr. Sanchez anticipates that belated entry of findings will prejudice his ability to make the arguments about the involuntary and coerced statements to police.

7. A criminal defendant is entitled to effective assistance from counsel under the Sixth Amendment to the United Sates Constitution and Article 1, section 22 of the Washington Constitution.

8. Trial counsel is ineffective when failing to have a strategy for the admission of evidence items which can only buttress the defense theory that the victim misidentified the defendant as the assailant.

9. Trial counsel is ineffective for advising her client to waive the jury in where there is no tactical or strategic reason to do so.

C. STATEMENT OF THE CASE:

1. Procedural history:

On April 3, 2009, the State of Washington filed an information in Thurston County Superior Court cause 09-1-00591-9 charging ALFRED JOSEPH SANCHEZ, hereinafter Mr. Sanchez, with the crimes of first degree assault while armed with a deadly weapon or did by any force or means likely to produce great bodily harm assault another and thereby inflict great bodily harm, alleging also that the crimes were committed with a special deadly weapon enhancement, count I; first degree burglary while armed with a deadly weapon with a special deadly weapon enhancement, count 2; and first degree assault. CP 7.

Prior to the first trial, the State filed an amended information alleging that Mr. Sanchez acted with another individual John Melville in the commission of these crimes. CP 8-9.

The jury trial ended with a hung jury, 6-6. CP 309, 311, 312, 332.

On April 28, 2011, the court entered an order directing dismissal of the charge of first degree burglary. CP 363.

Prior to the retrial, Mr. Sanchez informed the court that he intended to waive the jury. 2RP 17. The court required a written waiver from him. 2RP 18; CP 540.

The court accepted the waiver and the same court that had presided over the jury trial heard the bench trial.

At the conclusion of the bench trial, the court entered findings of fact and conclusions of law supporting its verdict. CP 706-709.

The court sentenced Mr. Sanchez within the standard range to 93 months plus the 24 month deadly weapon enhancement in the Department of Corrections. CP 724-734.

Mr. Sanchez timely filed this appeal. CP 710-720.

There were two trials in this case.

The first trial was a jury trial, lasting from October 12, 2010 through November 5, 2010. PTRP 5-1947. This trial resulted in a hung jury with a reported split of 6-6, PTRP 1945. CP 202-226.

2. CrR 3.5 hearing.

On October 11, 2010, the court convened a CrR 3.5[1] hearing to determine the admissibility of statements made by Mr. Sanchez the

[1] CrR 3.5 CONFESSION PROCEDURE (a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at

night of the alleged incident. PTRP 15. Police were interested only in the events related to the stabbing that had occurred. PTRP 15. Other assaults had occurred that night but police believed those assaults were peripheral to the stabbing. PTRP 15.

Trial counsel offered the declaration of First Sergeant Bernard Folino who was Mr. Sanchez's commanding officer on March 28, 2009. CP 40. Folino was unavailable to testify at the CrR 3.5 hearing because he was out of state at a military training academy CP 44.

Folino swore that on March 28, 2009, he commanded Mr. Sanchez, Jason Britt, Brandon Craft, James Elmer, Thomas Gallagher,

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this hearing. (b) Duty of the Court to Inform Defendant. It shall be the duty of the court to inform the defendant that" (1) he may, but need not, testify at the hearing on the circumstanced surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to this credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. (c) Duty of Court to Make a Record. After the hearing, the court hall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore. (d) Rights of Defendant When Statement if Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cr5oss-examinie the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary he3aring on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he3shall be subject to cross examination to the same extent as would any other witness; and, (4) I the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession is view of the surrounding circumstances, as they see fit.

John Melville, Alex Robillard, Wesley Sims, Andrew Thomas, and Abraham Zenker. CP 40.

During the early morning hours, Folino learned that local law enforcement officers wanted to speak to these men about a bar fight in Olympia. CP 41. He instructed the Staff Duty NCO to have those individuals present and ready to speak to law enforcement when they arrived. CP 41. Staff Duty NCO also ordered the men into uniform. CP 41.

Folino then spoke directly to the men. CP 41. He instructed each member under investigation to appear before police and relate the events of the evening. CP 42. The soldiers had no choice whether or not to appear and cooperated in the investigation. CP 42. He ordered them to do so. CP 42. During the entirety of his tenure of First Sergeant of B Company, Second Ranger Battalion, Folino had never known a single man in his unit to fail to follow one of his direct orders. CP 42. The young men are well trained to follow orders exactly without questions or hesitations. CP 42. This training typically saves their lives and is second nature to them. CP 42. He ordered them to do whatever the police wanted them to do, including giving them a statement. CP 41. Folino did not ever advise the men of their constitutional rights, including Miranda. CP 41. Folino did not do so

because he never considered that the men would ever even have the option of not cooperating with local law enforcement. CP 41. Folino averred that the military is obligated to follow command structures and to facilitate and cooperate with law enforcement. CP 40-41.

After the interviews with the police, Folino recommended to these soldiers that they might want to make appointments with JAG. CP 42. Prior to meeting with JAG, there would have been no way for these soldiers to refuse to cooperate with Folino's direct order. CP 42. This is so because he had personally commanded each soldier to give a statement to local law enforcement and answer any questions. CP 42. None of these soldiers had any belief that participation was voluntary because Folino did not present their participation as optional. CP 42. They were ordered to speak to law enforcement that is why they did. CP 42.

Dets. Costello and Fayette of the Olympia Police Department [OPD] interviewed Mr. Sanchez in the Fort Lewis Ranger barracks on March 28, 2009. PTRP 7, 9, 16-17. Costello did not recall how Mr. Sanchez was dressed at that time. PTRP 17. Although Mr. Sanchez was not in custody, Costello "probably" identified himself as a police

officer, exchanged pleasantries, and before anything substantive was done, advised Mr. Sanchez of his Miranda[2] rights. PTRP 17.

Costello orally advised Mr. Sanchez of his constitutional rights and obtained his oral waiver thereof. PTRP 17-18. The initial portion of that interview was not taped because of OPD police "to figure out what they [subject of interview] are going to say before we record it." PTRP 19.

During the unrecorded portion of the interview, Costello may well have "said something about Joey being a little guy because he's smaller in frame than the other people involved in this scenario." PTRP 40. Costello believed that Mr. Sanchez had committed the stabbing before he ever talked to him. RP 40.

Although police readvised Mr. Sanchez of his constitutional rights on the recorded statement, they failed to make a complete advisement:

> You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to an attorney of your own choosing, and to have him or her present before or during questioning or making any statements. If you cannot afford an attorney, you are entitled to have one appointed for you by the court without cost to you and to have him or her present or during questioning

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2 *Miranda v. Arizona*, 384 U.S. 436 (1966)

> or the making of any statement. You have the right to exercise any of the above rights at any time before or during any questioning or the making of any statements. Do you understand each of these rights that I've explained to you?

PTRP 24.

Mr. Sanchez was free to go after that interview. PTRP 34.

Costello next contacted Mr. Sanchez at OPD station on March 31, 2009. PTRP 36, 58 Police intended to arrest him for the stabbing. PTRP 36.

At that time. Mr. Sanchez informed police that he had talked to an attorney and that he had decided not to talk to police. PTRP 36-37. Costello "may have spoken a bit further" to Mr. Sanchez who stated that he wanted to talk to his attorney. PTRP 27.

Mr. Sanchez was given a cell phone and the opportunity to talk to speak privately to his attorney. RPTP 37. Mr. Sanchez's attorney then spoke briefly to police, who arrested Mr. Sanchez. PTRP 37.

United States Army Sgt. Folino who was responsible for arranging Mr. Sanchez's meeting with OPD detectives on March 31, 2009, did not consider that meeting to be voluntary. PTRP 79.

Mr. Sanchez testified at the CrR 3.5 hearing. PTRP 84. He explained that in the early morning hours of March 28, 2009, he was ordered to the barracks, instructed to dress in his uniform, and

cooperate with police. PTRP 85. Mr. Sanchez was on duty at that time and the orders came from his superior, a staff sergeant. PTRP 84-85. In compliance with orders, Mr. Sanchez spoke to police. PTRP 86.

Although Mr. Sanchez acknowledged that OPD detectives read his constitutional rights and that he understood them, he believed that he already had been ordered to make a statement by his superior officer and that he had no choice in the matter. PTRP 89.

Prior to the second encounter with OPD on March 31, 2009, Mr. Sanchez spoke to an Army lawyer. PTRP 91. That officer instructed Mr. Sanchez to invoke his constitutional rights and explained them to him. PTRP 92.

During argument on the admissibility of the statements, trial counsel argued that Mr. Sanchez was under military orders to provide the first statements wherein he admitted being at the bar, drinking underage, and also kicking in the door. PTRP 96-97. Mr. Sanchez, an E3, had been ordered to do so by his sergeant, an E8. PTRP 96.

Midway during this argument, the State announced that it had filed an amended information that it had not served on Mr. Sanchez. PTRP 97. The court granted the State's motion to file the amended information. PTRP 99; 8-9.

The court heard argument regarding the admission of the recorded statement made in the barracks. PTRP 99. The court concluded that Mr. Sanchez was not in custody when the statement was made, that police advised Mr. Sanchez of his constitutional rights, that Mr. Sanchez understood his constitutional rights and gave a statement to Det. Costello. RP 99. The court concluded that this noncustodial statement would be admitted at trial. PTRP 99.

The court also found that Mr. Sanchez's statement to police was not incriminating. PTRP 97. The State agreed, "I agree it's not an inculpatory statement. It's an exculpatory statement, and the defendant's trying to minimize his involvement and is denying any involvement in the stabbing which was the subject matter of the investigation. It's relevant because as it turns out some of the statements in the taped statement were untrue. But there's nothing in that statement that's an admission." PTRP 98.

The court failed to enter findings of fact and conclusions of law as required by CrR 3.5. ***Passim***.

Mr. Sanchez objected to the State's use of a knife that it had purchased after the incident to use as demonstrative evidence of the knife actually used. PTRP 101. The State intended to use the knife as substantive evidence, claiming that is was exactly the same as the

knife used in the stabbing. PTRP 101-102. The court initially granted Mr. Sanchez's motion. PTRP 102.

In a motion in limine, Mr. Sanchez asked the court to require the State to show photos from the bar's security system in real time. PTRP 112-113. That system took 30 frames per second but stored only 15 frames per second. PTRP 113. Playing the security video without accounting for the nano-second broken frames would be deceptive and unfairly prejudicial to Mr. Sanchez. PTRP 113. The court deferred ruling on this until it saw the video. PTRP 113. The court stated that any video would have to be shown at real time. PTRP 113-114.

Trial counsel wanted to admit discovery received from the State which contained text messages from unavailable witnesses who had fled the State. PTRP 118. These messages stated, "Hey, I broke this blank guy's jaw", over and over and over again; "There comes a time in every young man's life when he's accused of a stabbing." PTRP 118. This declarant had been in the military at the time these statements were made but subsequently was discharged and fled the State. PTRP 118. Based on the discovery provided by the State, trial counsel determined that the declarant, "Thomas", likely had started

the entire event. Trial counsel could not locate him and asked the court to admit the documents under ER 904[3] as authentic. PTRP 118.

Because ER 904 applies only to civil cases and for other reasons as well, the court deferred ruling on this issue, PTRP 119.

Trial counsel also moved to suppress the second photomontage shown to the alleged victim because it was procedurally flawed and therefore too suggestive. PTRP 120, 121. RP 6. Det. Fayette testified that she showed two photomontages to the alleged victim, Mr. Merten.

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[3] RULE ER 904
ADMISSIBILITY OF DOCUMENTS
(a) Certain Documents Admissible. In a civil case, any of the following documents proposed as exhibits in accordance with section (b) of this rule shall be deemed admissible unless objection is made under section (c) of this rule:(1) A bill, report made for the purpose of treatment, chart, record of a hospital, doctor, dentist, registered nurse, licensed practical nurse, physical therapist, psychologist or other health care provider, on a letterhead or billhead; (2) A bill for drugs, medical appliances or other related expenses on a letterhead or billhead; (3) A bill for, or an estimate of, property damage on a letterhead or billhead. In the case of an estimate, the party intending to offer the estimate shall forward a copy to the adverse party with a statement indicating whether or not the property was repaired, and if it was, whether the estimated repairs were made in full or in part and attach a copy of the receipted bill showing the items of repair and amounts paid; (4) A weather or traffic signal report, or standard United States government table; (5) A photograph, x-ray, drawing, map, blueprint or similar documentary evidence; (6) A document not specifically covered by any of the foregoing provisions but relating to a material fact and having equivalent circumstantial guaranties of trustworthiness, the admission of which would serve the interests of justice. (b) Notice. Any party intending to offer a document under this rule must serve on all parties a notice, no less than 30 days before trial, stating that the documents are being offered under Evidence Rule 904 and shall be deemed authentic and admissible without testimony or further identification, unless objection is served within 14 days of the date of notice, pursuant to ER 904(c). The notice shall be accompanied by (1) numbered copies of the documents and (2) an index, which shall be organized by document number and which shall contain a brief description of the document along with the name, address and telephone number of the document's author or maker. The notice shall be filed with the court. Copies of documents that accompany the notice shall not be filed with the court. (c) Objection to Authenticity or Admissibility. Within 14 days of notice, any other party may serve on all parties a written objection to any document offered under section (b), identifying each document to which objection is made by number and brief description. (1) If an objection is made to a document on the basis of authentication, and if the court finds that the objection was made without reasonable basis, the offering party shall be entitled to an award of expenses and reasonable attorney fees incurred as a result of the required proof of authentication as to each such document determined to be authentic and offered as an exhibit at the time of trial. (2) If an objection is made to a document on the basis of admissibility, the grounds for the objection shall be specifically set forth, except objection on the grounds of relevancy need not be made until trial. If the court finds that the objection was made without reasonable basis and the document is admitted as an exhibit at trial, the court may award the offering party any expenses incurred and reasonable attorney fees. (d) Effect of Rule. This rule does not restrict argument or proof relating to the weight to be accorded the evidence submitted, nor does it restrict the trier of fact's authority to determine the weight of the evidence after hearing all of the evidence and the arguments of opposing parties.

RP 9-10. The first photo montage was made with a photocopy of an out-of –state license photo or a military ID with other photos from similar sources. RP 9-10. The detective described this montage as "not a very good montage." RP 9. Mr. Merten was unable to identify any one in this montage. RP 11-12.

Det. Fayette prepared a second montage using digital photos three days later. RP 12. 13. When Mr. Merten looked at this montage he identified Mr. Sanchez as his assailant. RP 15.

The court suppressed the second montage (where Mr. Merton identified Mr. Sanchez) because it was too suggestive. RP 23. This was so because the background behind Mr. Sanchez in the photograph differed markedly from the background in the other photos. RP 2324.

(b) Relevant Facts from Second Trial

The retrial commenced on October 31, 2011. 2RP 17.

Mr. Sanchez informed the court that he intended to waive the jury at retrial. RP 2RP 17. The trial court expressed its concern that it could not decide the aggravating exceptional factor of a deadly weapon. RP 24-25.

Trial counsel sought to waive the jury because "we're now two years out from trial and all of the military witnesses who were there

that night are gone. So we don't even know if Melville [the codefendant] himself is going to be here." RP 21.

Trial counsel argued: "The court had an opportunity to hear all of those witnesses watch them testify. In seems to me that in order to accurately portray this story, why, we'd be reading 10,15 transcripts into the record, and it's my concern that we'd lose the jury, quite frankly , just reading testimony into the record. And, of course, the jury not having seen those witnesses or being able to see how big they are, how they presented themselves, how they testified, it would be very difficult for them to judge the credibility of a reading.

There may be a basis for the court to simply find that the defendant can't get a fair trial because so many of his witnesses are now missing . . . So I am very concerned that if we have a jury trial, it will be highly prejudicial against Mr. Sanchez to not have those witnesses available for the jury's scrutiny, and for that reason, with a lot of discussion and client well understands that he's pulling – putting his future in the hands of one person. I've explained to him that there's no such thing as a hung judge. It will either be a guilty or a not guilty verdict.... A lot of what the court is going to be considering now is going to be legally technical evidence anyway. So it because of that that we respectfully ask the court to accept our jury waiver." RP 22.

The State, of course, objected to the trial court's evaluation of the credibility of witnesses in the second trial based on testimony taken in the first trial. RP 23. The State argued that "it would be very necessary for the court to only consider evidence produced at this trial." RP 23.

The court asked Mr. Sanchez if he understood that he had a constitutional right to a jury trial and that he could waive that right have right to have his case heard by a judge. RP 24. The court informed Mr. Sanchez that this was "very unusual." RP 24. Mr. Sanchez stated that he understood that. RP 24. Mr. Sanchez also averred that he understood that a jury needed to determined whether he committed the offense with a deadly weapon unless he waived the right to a jury on that specific issue. RP 24-25.

The court then accepted Mr. Sanchez's waiver of his right to trial by jury. RP 25; CP 540.

Upon request of the State, the court engaged in further colloquy with the defendant regarding the length of his discussions with counsel about the waiver of this right. RP 26. Mr. Sanchez stated that the discussions had begun about two months ago. RP 26. In response to a question from the court asking how long he had

"weighed" it with his attorney. Mr. Sanchez stated about "a month or two." RP 26.

The court later affirmed with Mr. Sanchez that he knew he was waiving a constitutional right to have 12 disinterested people decide his case as well as whether the State had proved the aggravating factors RP 25.

The court ordered that prior to the submission of any transcripts into the record for the court's consideration as testimony, the proponent would need to establish the unavailability of the witness unless the parties agreed to it. RP 47, 48.

The court then permitted the parties to re-argue the same motions in limine from the first trial. RP 50-68.

During pretrial motions, the State informed the defendant that the codefendant Mr. Melville was deployed in Afghanistan and that the State was working with the military to try to have him returned to testify at trial. RP 59. The State also related that it would explore having Mr. Melville testify via live video. RP 59.

The court interrupted the State's opening to arraign Mr. Sanchez on the third amended information to which Mr. Sanchez entered a not guilty plea. RP 83-84; CP 391.

At trial, Mr. Sanchez repeatedly objected to security videos taken at Charlie's for the reason that the timeline stamp on the stamp could not be ascertained to be reliable and that the original recording equipment should have been taken for trial use. RP 453, 454. That objection was overruled. RP 453, 454.

During trial, the State sought to admit testimony from military witnesses in Afghanistan by videoconferencing. RP 875. Mr. Sanchez opposed such testimony noting that such testimony was admissible only upon agreement of the parties. RP 875. Mr. Sanchez noted substantive objections: there was no way to guarantee a continuous feed; no way to make objections that would interrupt the witness's testimony; no guarantee of the criminal defendant's constitutional right to face-to-face confrontation. RP 877. Mr. Sanchez also noted that the State's motion was made necessary by the State's failure to properly the military witnesses prior to their departure from the country. 5RP 886.

The trial court denied Mr. Sanchez's motion finding that the technology was reliable and that the use thereof would not violate any of Mr. Sanchez' rights. RP 885, 887, 888; 6RP 1024. The trial court had ordered a demonstration of the equipment and determined that it was workable, reliable, and permitted the sharing of documents. RP

1024. The trial court conceded that the State had failed to properly subpoena the military witness but did not find that failure to be fatal. RP 1025-1026. The trial court concluded that Mr. Sanchez's constitutional right to confront witnesses would not be violated and that meaningful cross-examination could occur. RP 1027-1028.

Trial counsel asked to submit in lieu of live testimony transcripts of the prior testimony of the these witnesses: Officer Lindros, Jason Britt, Brandon Craft, Tom Gallagher, Brandon McClure, Wesley Sims, Justin Spangler, Abraham Zenker, Dr. John Cramer. RP 1029. Trial counsel moved to admit these transcripts as substantive evidence on the assertion that these witnesses were unavailable. RP 1029-1030.

Trial counsel offered that the following witnesses were unavailable:

1. Officer Lindros: was being called up for military service and was no longer with the Olympia Police Department. RP 1032-1033. The prosecutor corrected defense counsel, noting that Mr. Lindros was not in the military but was on a personal leave to Cambodia. RP 1033. The prosecutor agreed that this witness was unavailable. RP 1033.

2. Jason Britt. Defense counsel argued that he was deployed but that she could not say where "for national security reasons." RP 1033. The prosecutor agreed that this witness was unavailable. RP 1034.

3. Brandon Craft. The parties agreed that this witness was unavailable. RP 1034.

4. Tom Gallagher. The parties agreed that this witness was unavailable. RP 1034.

5. These individuals also were deployed in Afghanistan and were unavailable: Brendan McClure, Wesley Sims, Justin Spangler, Abraham Zenker. RP 1035. The parties agreed that these witnesses were unavailable. RP 1034-1035.

6. Dr. John Cramer. Trial counsel argued that he was unavailable because 'he's in New York and he wasn't going to be back until December." Trial counsel argued that Dr. Cramer, a professor emeritus from the University of Washington, was their unpaid expert and needed to be accommodated. RP 1035. The prosecutor contested this showing of unavailability. RP 1036. The court took this matter under advisement. RP 1037-1038. However, the court informed the parties that it was inclined to take this testimony via deposition or prior testimony. RP 1038. The court noted that in a bench trial "it might be a little different in terms of the demeanor of witnesses." RP 1039. The court ultimately determined that Dr. Cramer was unavailable.

RP 1215.

The State presented via transcript testimony from the following witnesses: Officer Lindros, Andrew Zenker, Wesley Sims, and Thomas Gallagher. RP 1463.

During the testimony of Det. Costello, who took a taped statement from Mr. Sanchez at U.S. Army Ranger barracks, Costello

gave his opinion that Mr. Sanchez was "probably not telling the truth." RP 1370. Trial counsel failed to interpose an objection. RP 1370.

Costello then elaborated, "Oftentimes people that aren't telling the truth won't make eye contact with you, they display some level of shaking, looking away, talking low, the tone of their voice, the volume of their voice is low, so sometimes their voice cracks, things like that." RP 1370. Trial counsel failed to interpose an objection. RP 1370.

Costello described Mr. Sanchez as nervous, shaking, and with a cracking voice. RP 1369-1370. Trial counsel did not object to Costello's opinion testimony that Mr. Sanchez was a liar. 7RP 1370.

Nevertheless, even when Costello attempted to trick Mr. Sanchez into thinking that a witness had identified him as the stabber, Mr. Sanchez without hesitation denied it. RP 1380-1381.

During cross-examination of Det. Fayette, trial counsel inquired why she had failed to take photos of injuries she reportedly saw on Mr. Sanchez's hand: "So help me understand here. Either there was something to photograph and you didn't do your job or there was nothing to photograph ---" RP 1847. The prosecutor objected to the statement "and you didn't do your job" and the court sustained. RP 1847.

When the State rested, Mr. Sanchez made a motion to dismiss for the State's failure to prove a prime facie case of assault in the first degree. RP 1860. Mr. Sanchez argued that he was nowhere near the scene of the assault when it occurred. RP 1862. Based on cell phone records and other time records from security cameras, he was not in the area when any assault occurred. RP 1863. He was at least a ten minute walk away from the area where any assault occurred. RP 1863. He had no transportation of his own and he made his first cell phone call to a taxi. RP 1863.

Merten, the individual who was stabbed, was intoxicated at least twice the legal limit. RP 1865. Merten was consistently described as the least drunk of the individuals in his group, RP 1865. Mr. Sanchez also was intoxicated. RP 1865.

Most of the men at the scene that night were white and most were similarly dressed. RP 1865. Many of them were in the military and had the same short hair cuts. RP 1865.

No witness testified that Mr. Sanchez was at the fight in the street. RP 1866.

When police stopped the Durango that was reported to have been driven away with the assailants and conducted a show-up with

the eyewitnesses, Mr. Sanchez was not in the Durango group. RP 1901.

The State countered that it had met the requirements for a prima facie case because it had established that Merten had been stabbed, that after the stabbing Merten saw Mr. Sanchez by a car and then observed him running away with something shiny in his hand, and that the court could infer that Mr. Sanchez stole a knife from Charlie's kitchen that "matches the wound that was inflicted in Brad Merten's back." RP 1878-1879.

The court denied Mr. Sanchez's motion for dismissal for the State's failure to prove a prima facie case in its case in chief. RP 1882.

The defense presented a case. RP 1899.

During closing arguments, the prosecutor argued that the court should use Mr. Sanchez's statement not for impeachment, as he had stated would be his sole use of them at trial, but rather as substantive evidence:

> "And then finally we have the inconsistent statements that the defendant makes to law enforcement when they finally do contact him and question him about this crime, and I'll talk more about those inconsistencies as I get through this portion of the closing." RP 2766.

The prosecutor played Mr. Sanchez's taped statement to police to emphasize and set up his argument regarding the inconsistent statements. RP 2817-2830. The prosecutor then devoted the remainder of his closing argument to using Mr. Sanchez's taped statement to argue to the court about what a liar Mr. Sanchez is and how his inconsistent statements affirmed that he was guilty. ***Id.***

The State lacked any direct evidence that Mr. Sanchez ever took any knife, placed any knife in his back pocket, or stabbed Merten. All of the circumstantial evidence the State argued against Mr. Sanchez was equally applicable to codefendant Melville. The State conceded that there was no clear photograph of Mr. Sanchez with any knife. RP 2803-2810. Instead, the State urged the court to consider that in the blurry and grainy pictures Mr. Sanchez appeared to have something shiny in his hands; that when walking in the kitchen, he appeared to have "stutter stepped" in the vicinity of he knives; that he appeared at one point to be thrusting this extremely well-sharpened knife into his back pocket; that he must have had a can of pepper spray; that he would not have held his cell phone in that manner that he held any of the objects depicted in the security video. Id. The knife taken from

Charlie's was so sharp that "it would shave the hair off your arm." RP 2814.

At the conclusion of the evidence and closing arguments, the court found Mr. Sanchez guilty as charged of the crime of assault in the first degree with a deadly weapon. RP 2950-2955.

The court entered findings of fact and conclusions of law. CP 706-709.

The trial court sentenced Mr. Sanchez within the standard range to 93 months in the Department of Corrections with the additional 24 month deadly weapon enhancement. CP 724-734.

Mr. Sanchez timely filed this appeal. CP 710-720.

4. Trial testimony:

On March 28, 2009, Mr. Sanchez, accompanied by a group of fellow soldiers from Fort Lewis went to Olympia to socialize at Charlie's Tavern. RP 82. All of these individuals were Rangers assigned to the 2nd Battalion at Fort Lewis. RP 104.

Mr. Sanchez and his friend were asked for proof of identification as a means of checking age before they were allowed to enter Charlie's. Testimony of Thomas Gallagher from Jury Trial Bench Trial, RP 782, admitted via transcript at bench trial RP 1463.

Once inside Charlie's, Mr. Sanchez and his friends socialized, shared some drinks, and danced. RP 261. Although some of his associates appeared to argue with other customers at the bar, Mr. Sanchez had no words with anyone, did not get angry at anyone, and did not push anyone. Testimony of Wesley Sims from Jury Trial admitted at Bench Trial RP 1463. Mr. Sanchez was observed laughing and having a good time. RP 1463.

Brad Merten worked as a bartender at Pints and Quarts, a bar in Olympia in March 2009. RP 259. On March 28-29, 2009, he socialized at Charlie's Tavern with his friends Mike Johnson, Eddie Wamboldt, and Sean McDowell in the late evening hours. RP 259, 260, 262. Merten drank a couple of beers and a couple of shots of Jagermeister that night. RP 263. Ultimately medical tests would affirm that he was very intoxicated and that his blood alcohol was more than twice the legal limit of .08. RP 230.

Throughout the night, words were exchanged between Mr. Sanchez's friends and Merten's friends who had arrived at Charlie's after Mr. Sanchez and his friends arrived. Merten and his friends had been talking outside Charlie's when they argued with some men about the military and also about the identity of the person who had broken the back door of Charlie's. RP 268-273. Mr. Sanchez's companions

were loud braggarts. RP 956. At trial, Merten identified Mr. Sanchez as one of the individuals involved in the argument. RP 273.

However, in fact Mr. Sanchez, although present, was "fairly quiet." RP 956; RP 1272. When he did speak, Mr. Sanchez was quiet and well-spoken. RP 1279. At times Mr. Sanchez appeared to be very scared of the group outside. RP 1280.

Mr. Sanchez had not provoked any one at Charlie's. RP 1312. Mr. Sanchez did not provoke any one outside of Charlie's. RP 1312.

Mr. Byles, the co-owner and manager of Charlie's came out of the bar and escorted the men inside the bar. RP 275; RP 417. Byles could not recall when the fight began however one of his staff informed him that the backdoor had been damaged RP 457; RP 458. Byles recalled that an individual named Melville was asked to leave the bar. RP 458. Byles took Melville's ID and made a copy of it because Melville had damaged property at Charlie's. RP 459. Byles subsequently realized that Mr. Sanchez had been the individual who kicked in the door. RP 459.

Mr. Sanchez paid for the door with a credit card which was time stamped 1:14:11 on March 11, 2009. RP 465, 466. Exhibit 203 showed Mr. Byles at the Visa machine running the card at 01:12:48 a.m. RP 536-537. Likewise, the time shown for printing the approval

code on the credit card could be delayed if, for example, the phone line was busy at first and needs to redial. RP 534. This time delay could have been as long as a minute 23 seconds although the witness thought it was closer to a minute. RP 535.

At some point, all of the men found themselves outside. More hostile words were exchanged in an argument that lasted no longer than twenty minutes. RP 958. During that argument between the two groups of men, Michael Johnson told Jason Britt, "Hey, you rein in your guys and I'm rein in mine" and "I'll get my guys out of here, we'll leave." RP 1237.

As all of the men ran away from Charlie's, Jason Britt, who was in Mr. Sanchez's group yelled "red shirt, red shirt" at Michael Johnson, who was with Merten and who wore a red shirt. RP 960-961; RP 1222, 1290. Mr. Johnson did not see Mr. Sanchez involved in the physical fight. RP 960-968. Sean McDowell and Eddie Walmboldt had a problem with Melville and Jason. RP 1291. Oscar Elmer wanted to fight Johnson. RP 1291.

Mr. Sanchez had left the area and was frantically making cell phone calls. During the early morning hours of March 28, 2009, Mr. Sanchez was on his phone almost continuously. His first call was made at 1:24 a.m., followed by calls made at 1:25 a.m.; 1:26 a.m.; 1:27

a.m.:1:28 a.m.; 1:29 a.m., 1:33 a.m.; 1:34 a.m.; 1:35 a.m.; 1:36 a.m.; 1:37 a.m. (to 411); 1:41 a.m . (to 411),;an incoming call at 1:46 a.m.; 1:49 a.m.; 1:51 a.m.; 1:56 a.m.; 1:57 a.m.; 1:58 a.m.; 2:00 a.m.; 2:01 a.m; 2:03 a.m,; 2:04 a.m.; 2:04 a.m.; 2:05 a.m.: incoming call from taxi driver Bell at 2:05. RP 1644-1645.

After the men exited the bar, they chased Merten and his group and began the physical fight during which Merten felt he was punched. RP 282. Merten turned around, saw an individual he days later believed to be Mr. Sanchez, asked him if he had punched him, and Mr. Sanchez ran away. RP 282-283.

Thomas Gallagher testified that Mr. Sanchez was not in the immediate area of the altercation but that John Melville was there. Gallagher also noted that Melville was enraged because he had been punched in the face in a fight and that within seconds after the fight, a guy yelled that he had been stabbed. Thomas Gallagher Jury Trial Testimony RP 79-792, 795, admitted via transcript at bench trial RP 1463.

Eddie Wambolt described the man running with Merten as about 6'2", 200 lbs., white male, wearing a black shirt with a yellow design on the front. RP 2576-2577. This individual was determined to be AndrewThomas. RP 2578-2579.

Benjamin Foley, an employee at Sizizis coffee shop, witnessed the altercation. RP 2048-2049. He saw groups of people moving in one direction. RP 2049. The second group followed the first group be about a minute. RP 2050. A couple of minutes later Foley observed a shirtless man doing a "gangsta lean" walk in the opposite direction [away from the groups]. RP 2050-2052. The shirtless man was identified to be Mr. Sanchez's co-defendant John Melville. RP 277. When Foley looked more closely at what was going on, he heard yelling and saw a man lying down and getting help from people coming out of Charlie's. RP 2052. The injured man was at the corner of Chestnut Street and 4th Avenue. RP10 2053.

Merten realized that he was bleeding and was taken to the hospital. RP 288-289, 302. Olympia paramedic/firefighter Leo responded to the reported stabbing on March 24, 2009, at Charlie's Tavern. RP 156-158. He contacted Brad Merten, who appeared to have a 2" stab wound in his back. RP 158-159. Merten was in "immediate life threat" and he was taken to the hospital. RP 160, 165.

Dr. Hansen, an emergency room physician at Providence St. Peter Hospital in Olympia, treated Merten when he arrived. RP 181-182. A chest tube was inserted into Merten's lung to inflate its partial collapse. RP 184-185. Dr. Hansen's subsequent examination

determined that Merten had sustained a laceration to the liver as well as a fractured rib. RP 187.

Dr. Hansen could not opine with reasonable medical certainty that the laceration was caused by a stab wound rather than some type of penetration. RP 206. The doctor measured the penetration as 3.3" in width and at least a minimum of 6" in depth. RP 204, 224.

Merten was admitted to the hospital for observation and given pain killers. RP 190-191.

That same morning Dr. Hansen treated an individual named Mr. Walbolt for a broken jaw. RP 198-199.

Merten's blood alcohol at time of treatment in the hospital surpassed the level required for a DUI violation in this state. RP 2899.

Olympia Police Officer Robert Krasnican interviewed Merten at the hospital. RP 241. Merten is 5'11". RP 2069. Merten provided inconsistent descriptions about his assailant. Merten one time described the individual whom he believed to have inflicted his injury as a white male, 5'6' to 5'7', average build, wearing a North Face jacket with a zipper and a black ball cap. RP 242; RP 2070. Merten also moments later described his assailant as possibly wearing a pullover or a button-up shirt, and insisted that he had not seen any zipper. RP 2070. Merten also had described his assailant has having

gel in his hair, thus making it a little spiky. RP 390; RP 2070; RP 411. Merten also stated that he did not see his assailant's hands as because they were down at his side. RP 2071. However Merten thought he saw something shiny in his hands. RP 2071.

Co-defendant John Melville was wearing a black button up collared shirt, had short dark spiky gelled hair, and was dark complexioned. RP 1070-2071.

Merten initially believed that he had been punched in the back by someone he had earlier seen in Charlie's Tavern. RP 242. Of course, Mr. Sanchez, Melville, and their companions from Fort Lewis had all been at Charlie's earlier that night.

After the altercation Olympia Police Department Officer Malone appeared at the scene, spoke to witnesses, and learned that the Fort Lewis group had left in a Dodge Durango. Malone saw such a car and, as he approached it, he was contacted by several employees from Charlie's who yelled "That's them. That's them." RP 93.

The Durango did not have its headlights on, drove in reverse, backed a short distance, and then took off. RP 95. Malone gave chase in the patrol car, lights flashing. RP 95. Police stopped the Durango and identified the occupants as Abraham Zenker, Wesley Sims,

Andrew Thomas, Stephanie Anderson, John Melville, and James Elmer, RP 103.

After the stabbing, police pulled over a black Durango and lined up five individuals in handcuffs. RP 804-805. Wamboldt, who had witnessed the altercation and been involved in it, did not identify any of the individuals as Mr. Sanchez. RP 804-805, 810-812. He identified Melville as the individual who sucker-punched him in the face and broke his jaw. RP 816-817. Michael Johnson, another eyewitness to the altercation, could not identify Mr. Sanchez as one of the assailants. RP 981.

Wambolt never saw Mr. Sanchez fighting. RP 857. Wambolt in fact had a civil conversation with him. RP 857-858.

Another member of Merten's party, Sean McDowell, was present at Charlies's and also at the subsequent altercation, including the stabbing. RP 895-896, 906, 912, 914. McDowell did not see Mr. Sanchez there that night and therefore did not see him fighting. RP 934.

Malone did not take any blood samples from the individuals he originally arrested. RP 142. Malone did not examine the interior of their car for the presence of blood nor did he impound the car or take

items of clothing. RP 142. He took no photos of the car or the individuals. RP 142-143.

During the police investigation, security videos from some of the many cameras at Charlie's were taken into evidence and reviewed. Mr. Byles, the co-owner and manager of Charlie's, testified that the time on the video machine was not accurate and was about a minute off. RP 534.

The time on the video security clip, exhibit 196, showed Mr. Byles running out of the bar at 1:23:43. RP 549. This was at least a difference more than one minute. RP 550. When Mr. Byles ran out of the bar, he ran into Merten. RP 550.

Aaron Webb, another Charlie's employee, was observed on the video at work on 1:24:31. RP 682. He worked at the front door at that time. RP 683. Although he heard commotion in the street, he did not hear anyone screaming "I've been stabbed, I've been stabbed." RP 683-684. Webb would have responded to render aid had he heard such screams. RP 684.

Based on cell phone records, Mr. Sanchez began making a series of cell phone calls at 1:24 a.m. RP 1643. Between 1:24 a.m. and 2:05, Mr. Sanchez was almost continuously on his cell phone. RP 1643-1645. Exhibit 96. Mr. Sanchez called for a taxi cab after he was

unable to reach any of his friends for a ride back to the base. RP 702. That call was made at 1:39 a.m. RP 702.

Milton Bell, a taxi cab driver, picked up his fare, Mr Sanchez, in Olympia at 2:16 a.m. and dropped him off in DuPont at 2:29 a.m. RP 713. Mr. Bell recalled that Mr. Sanchez wore tan pants and a brown jacket. RP 719. There was no blood on Mr. Sanchez's clothing. RP 743.

When Mr. Bell picked up Mr. Sanchez, he observed that Mr. Sanchez was polite, cooperative, did not appear to be concealing anything on his person. RP 738-739. Mr. Sanchez did not look as if he had been fighting. RP 741. At no time during his transaction with Mr. Sanchez did Mr. Bell feel any concern for his personal safety. RP 744.

In the early morning hours of March 28, 2009, Joey Sanchez arrived in DuPont at the residence of several of his platoon members. RP 100-101. This was in no way unusual since Joey liked to hang out there and often just dropped in. RP 108. Brandon McClure, one of the residents, observed that Joey had been drinking but he did not appear to be drunk. RP 102. His speech was normal as was his coordination. RP 105. Joey's clothing was clean and he did not appear to have any cuts or blood on his person. RP 102. As Joey entered the residence,

McClure was leaving to drive to Olympia to pick up Jason Britt who had been at Charlie's Tavern. RP 104.

When OPD detectives contacted Mr. Sanchez at the U.S. Army Ranger barracks on March 28, 2009, Fayette noticed that he had a small cut on his right hand. RP 1619, 1620. Fayette described this injury as "a paper cut." RP 1787. Police did not ever photograph this cut. RP 1621, 1622, 1623, 1624.

On Monday, March 30, 2009, when George Sego, the kitchen manager at Charlie's, worked his usual shift, he noted that the 4.5" knife was missing. RP 755. Sego described the knife as having a 4" blade and a 3" or 3.5" handle. RP 762. This small knife was used for slicing and had been present in the kitchen on Friday March 27, 2009. RP 752-752. The knife was never found. RP 755-756. That knife was regularly sharpened and was described as "so sharp it would shave the hair off your arms." RP 867. If Mr. Sanchez had held this knife and jammed it into his back jeans pocket, then logically he would have had cuts on his hand and at a minimum on his jeans.

The subject of the knife was a major issue at trial. Detective Lafayette testified that she looked for a knife at the scene on March 28, 2009, but did not find one. RP 1551. Later on, she spoke to employees at Charlie's who showed her "a larger version of the missing knife",

which she photographed. RP 1552. Someone at Charlie's had purchased a set of knives which contained an knife identical to that which was missing from Charlie's after March 28, 2009. RP 1558-1559.

Det. Lafayette then went out and purchased a set of knives that were similar to those used at Charlie's and from which the missing knife had come. RP 1559, 1561. After putting the knife on the magnetic strip, Det. Lafayette removed it, put it in the back pocket of her jeans and wore it for a couple of hours. RP 1565-1566. No one noticed the knife and apparently it did not injure the detective. Id.

6. Experts

Grant Fredericks, a forensic video analyst retained by the State, noted that Mr. Sanchez was talking on his cell phone at the beginning of the security tapes. RP 1124. Mr. Sanchez was not engaged in any threatening conduct. RP 1128. Although Fredericks believed that he saw something in Mr. Sanchez's hand, he agreed that he could well have seen a military flashlight, rather than a can of mace or pepper spray as he initially believed. RP 1140-1141. That object also was consistent with a cell phone . RP 1181.

Fredericks did not see a knife in Mr. Sanchez's hand. RP 1210.

Fredericks had never examined the security system at Charlie's and did not know if the time was accurate. RP 1173-1175. The use of 15 frames from the 60 frames per minute that the security system removes the amount of data and degrades the image quality. RP 1196. There was no evidence before the court of the activity that occurred during the other 45 seconds in each minute. RP 1197.

In the same photo sequence, Melville could be observed reaching for something. RP 1126. Given the location of the cameras and the grainy nature of the photos, the placement of the date and time stamps on the photos was somewhat obscured. RP 1125-1126.

On April 19, 2009, Fred Doughty, a licensed private investigator, obtained Mr. Sanchez had worn that night during the incident, including an Arizona baseball cap with a Sun Devils emblem on it, a North Face jacket, a pair of pants with a belt, and a pair of Skechers or Vans tennis shoes. RP 2096,2088, 2092. These clothes ultimately were given to Kay Sweeney, a defense expert. RP 2092, 2093.

Kay Sweeney, an expert witness in forensics including wound analysis, directionality, and blood spatter, examined the evidence and circumstances of this case. RP 2396-2399; 2403-2482. In the case of a stabbing such as this one, Mr. Sweeney would have expected the

perpetrator to received cuts on the inside of the hand as well as possibly on the little finger. RP 2393. There likely also would be blood transfer evidence not only on the victim's clothing but also on the perpetrator's clothing. RP 2392-2393. The perpetrator likely would have blood on his sleeve, the front of his pants, and his shoes. RP 2395. This blood would not necessarily be visible to the naked eye. RP 2395. A forensic scientist would conduct a microscopic analysis of the clothing and shoes. RP 1296.

Further, because the perpetrator likely would have cut and would have transferred his own blood onto the victim's clothing, a forensic scientist would have conducted DNA testing on that blood. RP 2397. This typing would have been helpful in identifying the perpetrator. RP 2397.

Mr. Sweeney examined Mr. Sanchez's jeans [when he allegedly carried the knife in his back pocket] and found no cuts or defects. RP 2398-2399; RP 2403-2305. He examined Mr. Sanchez's Vans shoes and found no blood or cuts on them. RP 2405. Mr. Sweeny examined the North Face jacket and saw no cuts, blood, stains, or deposits. RP 2407. He also examined Mr. Sanchez's baseball cap and found nothing whatsoever on it. 13RP 2407.

Mr. Sweeney also examined the clothing that Merten wore when he was stabbed that had been collected by paramedics. RP 2410-2411. There was no hoodie. RP 2411. Mr. Sweeney saw at least two large blood deposits on Merten's pants, at least one of which showed that Merten was upright at the time. RP 2413-2414. Mr. Sweeney noted two defects in the t-shirts – one horizontal defect approximately 2.5 inches; one vertical defect, maybe a little longer than the horizontal defect. RP 2416-24 17. Both shirt defects had blood stains above them that were possibly transfers from the collection process. RP 2417. However Mr. Sweeney could not state with reasonable scientific certainty that the blood stains were transfer stains. RP 2418.

The placement and nature of the holes compelled Mr. Sweeney to conclude that Merten was involved in a struggle with someone who was pulling on his shirt at the time he was stabbed. RP 2420. Mr. Sweeney opined that there were at least three people present during the stabbing: Merten and two others. RP 2475.

Mr. Sweeney also examined the knife that the State offered into evidence as identical to the knife used in this case. RP 2421. That knife had a 5" blade, inconsistent with Merten's 6.5" wound. RP 2422. Sweeney testified that had the knife been jammed into Merten's body 6.5", then 1.5" of the handle would have had to enter the body. RP

2422. Likewise, the hand of the stabber would have entered Merten's body, which would have caused the cut/would to be stretched and torn. RP 2473. Further, given the amount of force required to inflict the wound, the perpetrator likely would have had injury to his hand. RP 2461.

The State performed no testing whatsoever on any of the clothing. RP 2418.

Thomas Sandor, an expert witness in media/computer consulting, viewed the security videos in this case and compared them with actual measurements of Charlie's. RP 1938-1939, 1943, 1945. He reviewed the Charlie's security system which had 16 cameras and noted that it had problems with interval at which photos were captured as well as the lens themselves. RP 1946-1949. These resulted in grainy and blurred images. RP 1948-1949.

Sandor's accurate and up-dated floor plan showed Charlie's kitchen as it was on March 28, 2009. RP 1951.

Based on his measurements from the middle of the floor mat which upon which Mr. Sanchez was believed to have walked, the placements of permanent kitchen equipment [the fryer] and the magnetic knife strip above it, as well as the security tape showing what police believed were Mr. Sanchez's shoes, Sandor concluded that Mr.

Sanchez would have been approximately 49" away from the knives. RP 1961-1968.

Sandor also previously had testified as an expert in the analysis or composition of photos. RP 1971. He was the author of numerous scholarly articles including "*A Simplified Explanation of the Operation and Interconnectivity of Surveillance Cameras and DVRs*" as well as "*The History, Background, and Explanations of the Art of Photographic Relative Image Measurement and Comparative Evaluation Techniques.*" RP 1986-1987.

He used a program called Premier Pro which is Adobe imaging software. RP 1971-1972. He examined some still frames that other witnesses had suggested showed Mr. Sanchez's holding a knife. RP 1974-1975.

Sandor concluded that the object believed to be a knife could not have been a knife. This conclusion was based on the lighting in the photograph which failed to show the expected normal contrast what should have been the mirror like shine to the knife blade and the darker different skin texture. 2RP 1974-1975, 1976.

In addition, Sandor measured a "real" knife the size of the knife believed to have been used in this incident and then compared it to the "knife" image on the security tape and still frames. RP 1976-

1977. There was "an enormous difference" in size, thus indicating that the two objects could not be the same. RP 1977.

Dr. Mark Reinitz, a professor in memory and perception at the University of Puget Sound, testified as an expert. RP 2581. He testified that because human attention is fragmented, human memories likewise are incomplete. RP 2587. Further, where a person's initial first impression is weak or poor, that impression is more likely to change over time. RP 2591-2592. In addition, human memory changes as people discuss with others about what has happened. RP 2593. Put another way, the poorer the initial perception, the more likely it will change over time. RP 2593-2594. People's memories also are more unreliable after perceiving stressful events. RP 2596-2597. A sudden traumatic event cause catastrophic memory impairment. RP 2597.

Dr. Reinitz also testified that alcohol has three major effects on memory. RP 2627. The first is that alcohol affects the muscles of the eye such that the two eyes don't move together and causes defects in vision, such as double vision. RP 2627. Perception vision thus is poor. RP 2627. A more important effect of alcohol is that it interferes with the process of storing memories and the more alcohol consumed, the poorer memory storage becomes. RP 2627. Finally, the third effect is

that people who are under the influence of alcohol simply notice less. RP 2628. In sum, not only do they notice less, they are less able to perceive it accurately and less able to accurately store it in their memory.

D. LAW AND ARGUMENT:

To convict Mr. Sanchez of first degree assault as charged in this case, the State had to prove beyond a reasonable doubt and the court had to so find:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(c) Assaults another and inflicts great bodily harm. RCW 9A.36.011.

Inherent in those elements, the State was required to prove beyond a reasonable doubt and the court had to so find that Mr. Sanchez acted intentionally. A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.080.010(1)(a).

Further, the State had to prove beyond a reasonable doubt and the court had to so find that Mr. Sanchez intended to inflict great

bodily harm. **Great bodily harm**" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ. RCW 9A.04.110(4)(c).

1. THE TRIAL COURT ERRED WHEN IT ADMITTED MR. SANCHEZ'S STATEMENTS TO POLICE.

   a. This court should dismiss this case for the court's failure to enter findings of fact and conclusions of law regarding its ruling on the CrR 3.5 ruling.

   b. Assuming arguendo that this court finds that the trial court's oral ruling is sufficient for review, that ruling does not support the conclusion that Mr. Sanchez's statement was admissible.

2. THE TRIAL COURT'S FAILURE TO FOLLOW CrR 3.5(c) WARRANTS A REMAND FOR ENTRY OF PROPER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

After a hearing to determine the admissibility of a defendant's statements the trial court must enter written findings of facts and conclusions of law. CrR 3.5(c). Written findings and conclusions are mandatory. ***State v. Cunningham***, 116 Wn. App. 219, 227, 65 P.3d 325 (2003). The trial court and the prevailing

party share the responsibility to see that appropriate findings and conclusions are entered. ***State v. Vailencour***, 81 Wn. App. 372, 378, 914 P.2d 767 (1996) (regarding analogous CrR 6.1 (d), which requires entry of written findings of fact and conclusions of law after bench trial).

Here, the trial court held a hearing to determine whether to admit Mr. Sanchez's statements to police. The trial court admitted the statements but did not enter written findings of fact and conclusions of law. PTRP 15

The purpose of written findings and conclusions is to promote efficient and precise appellate review. ***State v. Cannon***, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); see ***State v. Head***, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (written findings necessary to simplify and expedite appellate review). The absence of written findings and conclusions prohibits effective appellate review.

Although the trial court entered oral findings, those findings are not a suitable substitute. A court's oral opinion is not a finding of fact.

State v. Hescock, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999).

Rather, a court's oral opinion is merely an expression of the court's informal opinion when rendered. Head, 136 Wn.2d at 622. An oral opinion is not binding unless it is formally incorporated in the written findings, conclusions and judgment. ***Id.***, citing ***State v. Mallory***, 69 Wn.2d 532,533,419 P.2d 324 (1966).

a. At a minimum, this court must remand this matter back to the trial court for entry of written findings of fact and conclusions of law.

A trial court's failure to enter written findings and conclusions requires remand for entry of the required findings. ***Head***, 136 Wn.2d at 624. Here, because the trial court failed to enter written findings and conclusions, remand is the appropriate remedy.

b. Where the trial court's ruling is insufficient to permit appellate review, this court should not consider the merit of Mr. Sanchez's argument.

While failure to enter written findings and conclusions under ***CrR 3.5*** is error, this court in ***State v. Smith***, 68 Wash. App. 201, 842 P.2d 494 (1992), held that such error is harmless if the court's "oral opinion is so clear and comprehensive that written findings would be a mere formality."

Despite that rule, in fact a trial court's oral ruling alone has been held inadequate to establish finality. ***State v. Collins***, 112 Wn.2d 303, 305, 771 P.2d 350 (1989) This is so because individual trial judges' styles of ruling vary. Many judges will think out loud along the way to reaching the final result. It is only proper that this thinking process not have final or binding effect until formally incorporated into the findings, conclusions, and judgment.112 Wn.2d at 308. A formal, signed, written journal entry or final written court order is required to establish finality. ***Id.***

In this case, the trial court's oral ruling failed to address the central disputed fact in the hearing. That is, whether Mr. Sanchez agreed to speak to police only because his commanding officer ordered him to do so and the effect of that order on him. RP 41-42. Further, the court failed to consider that Mr. Sanchez's contact with police that night was by no means voluntary. He had been ordered to put on his uniform, appear at the barracks, and submit to an interview with police. RP 41-42. He was given no other option. After Sgt. Folino gave orders to Mr. Sanchez, both Sgt. Folino and Mr. Sanchez knew these orders would be followed to the letter. There was no element of voluntariness present.

In this case, the central issue at the CrR 3.5 hearing was whether Mr. Sanchez's will was overborne by his commanding officer's directive that he make a statement to Olympia Police Department detectives when they arrived at the U.S. Army Ranger barracks.

Given the declaration of First Sergeant Bernard Folino, Mr. Sanchez's commanding officer, as well as Mr. Sanchez's general understanding of the consequences of disobedience of a lawful general order, Mr. Sanchez reasonable believed that he had no option but to give a statement.

Further, the trial court may well have been influenced by the State's argument that the statements were not inculpatory and would not be used that way at trial. PTRP 97. However, that ultimately did not prove true at trial. RP 2950-2955.

For these reasons, this court cannot consider the trial court's ruling absent remand to the trial court for entry of proper findings.

Assuming that is done, then Mr. Sanchez reserves the right to brief the merits of his assignment of error based on those findings.

3. THE TRIAL COURT ERRED WHEN IT ACCEPTED MR. SANCHEZ'S WAIVER OF JURY TRIAL.

The law in Washington requires the trial court to affirm that a criminal defendant is executing a valid waiver when she waives her constitutional right to trial by jury. ***State v. Pierce,*** 134 Wn. App. 763, 772, 142 P.3d 610 (2006). A defendant may waive the right as long as the defendant acts knowingly, intelligently, voluntarily, and free from improper influences. ***State v. Stegall***, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994). The appellate court will not presume that the defendant waived his jury trial right absent an adequate record showing that the waiver occurred. ***State v. Woo Won Choi***, 55 Wn. App. 895, 903, 781 P.2d 505 (1989) (citing ***Seattle v. Williams***, 101 Wn.2d 445, 451, 680 P.2d 1051 (1984)), *superseded on other grounds as recognized by* ***State v. Anderson***, 72 Wn. App. 453, 458-59, 864 P.2d 1001 (1994).

In examining the record, the court considers whether the defendant was informed of his constitutional right to a jury trial. ***Woo Won Choi***, 55 Wn. App. at 903. The court also must examine the facts and circumstances generally, including the defendant's experience and capabilities. ***Woo Won Choi***, 55 Wn. App. at 903. A written waiver, as CrR 6.1(a) requires, is not determinative but is strong evidence that

the defendant validly waived the jury trial right. ***Woo Won Choi***, 55 Wn. App. at 904. An attorney's representation that his client knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant. ***Woo Won Choi***, 55 Wn. App. at 904. Courts have not required an extended colloquy on the record. ***Stegall***, 124 Wn.2d at 725; ***State v. Brand***, 55 Wn. App. 780, 785, 780 P.2d 894 (1989). Instead, Washington requires only a personal expression of waiver from the defendant. ***Stegall***, 124 Wn.2d at 725.

Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court." CrR 6.1(a).

Washington's rule on jury trial waiver contrasts with the rules for waiving other rights. For example, when a defendant wishes to waive the right to counsel and proceed pro se, the trial court must usually undertake a full colloquy with the defendant on the record to establish that the defendant knows the relative advantages and disadvantages of proceeding pro se. ***Stegall***, 124 Wn.2d at 725. Likewise, the record on a guilty plea must establish a knowing, intelligent and voluntary of important constitutional rights as well as sentencing consequences and an understanding of the waiver's other direct consequences. ***Stegall***, 124 Wn.2d at 725.

The right to jury trial, like the right to remain silent and the right to confront witnesses, is treated differently and is easier to waive. *See* ***Brand***, 55 Wn. App. at 786. The trial strategy of any particular case may perhaps dictate the waiver of one or more of these rights while still preserving to the accused the right to a fair trial. ***Brand***, 55 Wn. App. at 786. For example, competent defendants and experienced counsel may have good reasons to waive a jury trial, believing that their defense would be better understood and evaluated by a judge than by jurors who may be less sympathetic to technical legal contentions. ***Brand***, 55 Wn. App. at 786-87.

In this case, Mr. Sanchez's waiver of his constitutional right to trial by jury was invalid. While he admittedly discussed the issue with counsel, there is no record as to what he and counsel actually discussed. It was incumbent on trial counsel to advise Mr. Sanchez on the extent of his right to trial by jury and the panoply of consequences he waived by waiving trial by jury. There is no record of that.

Although Mr. Sanchez executed a written waiver, that waiver is sufficient. That waiver, for example, failed to inform Mr. Sanchez that he had the right to a unanimous jury. Although Mr. Sanchez previously had a hung jury in this case, he should not be presumed to recall or understand that right months later. Even criminal defendants

who enter multiple guilty pleas on the same day are advised repeatedly of their constitutional rights to assure that their waivers satisfy constitutional requirements.

Mr. Sanchez was not advised that he was giving up the right to participate in jury selection. Further, Mr. Sanchez had given up his statutory right to affidavit one judge because trial counsel elected to try the case before the judge who had already heard the evidence. RCW 4.12.040, .050.

Mr. Sanchez does not claim on appeal that his waiver was somehow involuntary or that he lacked knowledge of its direct consequences. As described above, the record reflects that the court explained to Mr. Sanchez the essence of his jury trial right. Mr. Sanchez never waived his right to be presumed innocent until proven guilty beyond a reasonable doubt or his right to an impartial trier of fact because these rights are inherent in all trials. *See* ***State v. Sanders***, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992) (right to an impartial trier of fact); ***State v. Orange***, 78 Wn.2d 571, 573, 478 P.2d 220 (1970) (right to proof beyond a reasonable doubt). The only right unique to jury trials that the court did not specifically explain to Pierce was his right to participate in juror selection. He does not explain why he might have thought that he could not be involved this part of the

trial. Furthermore, Mr. Sanchez cites no legal authority saying that the court had to inform him of his right to participate in juror selection before he could validly waive his jury trial right. More importantly, he cites no authority saying that the information the court gave him was insufficient.

4. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACTS NOS.3, 6, 9, 10, 13, 14, 19, 20, 21, 24 & 25, FINDING THAT MR. SANCHEZ COMMITTED THE CRIME OF ASSAULT IN THE FIRST DEGREE WHICH ARMED WITH A DEADLY WEAPON.

When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Myles***, 127 Wn.2d 807, 816, 903 P.2d 979 (1995); ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***Myles***, 127 Wn.2d at 816; *Joy*, 121 Wn.2d at 339 (quoting ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

A challenge to the sufficiency of the evidence presented at a bench trial requires the appellate court to review the challenged trial court findings of fact and conclusions of law to determine whether substantial evidence supports the challenged findings and whether the findings support the conclusions. ***State v. Moore***, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). The appellate court reviews challenges to a trial court's conclusions of law de novo. S***tate v. Gatewood***, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

"A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." ***State v. Williams***, 96 Wn.2d 215, 221, 634 P.2d 868 (1981) (internal quotation marks omitted) (quoting ***Leschi Improvement Council v. Wash. State Highway Comm'n,*** 84 Wn.2d 271, 283, 525 P.2d 774, 804 P.2d 1 (1974)). "Where findings necessarily imply one conclusion of law the question still remains whether the evidence justified that conclusion." Id.

The reviewing court must consider the evidence in the light most favorable to the State. ***State v. Rempel***, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). Evidence is sufficient to support a conviction if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of

the crime proven beyond a reasonable doubt. ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Findings of Fact 3 :

a. The trial court erred when it entered FOF no. 3, holding finding that Merten's injuries, without immediate medical intervention, were life threatening.

Although paramedic believed Merten's injuries were "immediate life threatening" and transported him to Providence Hospital, Dr. Hansen admitted him for observation. 2RP 190. Dr. Hansen did not believe the injuries created a probability of death. His opinion determined that Merten had sustained a collapsed lung, laceration to the liver as well as a fractured rib. 2RP 187.

Dr. Hansen could not opine with reasonable medical certainty that the laceration was caused by a stab wound rather than some type of penetration. 2RP 206. The doctor measured the penetration as 3.3" in width and at least a minimum of 6" in depth. 2RP 204, 224.

Merten was admitted to the hospital for observation and given pain killers. 2RP 190-191.

Further, the State failed to adduce any evidence that Merten sustained any bodily injury that caused "significant permanent loss or impairment or the function of any bodily part of organ." *Passim.*

Because this finding of fact was essential to both alternates of first degree assault as charged by the State in this case, Mr. Sanchez's convictions must be reversed on the insufficiency of this finding alone.

Dr. Lucas Hansen, the ER physician, did not testify that Merten's injuries would be likely life threatening because it was "pretty unlikely" that he would develop a "tension pneumothorax" which was the condition that would render such a wound fatal. RP 196.

Findings of Fact 6:

b. The trial court erred when it entered FOF no. 6, finding that the missing knife appears consistent with the width of the stab would received by Mr. Merten.

Dr. Hansen testified that the width of the "stab" wound was approximately 1.9 inches. The knife blade was significantly smaller than this. RP 445.

The State alleged that the knife that had been used was "so sharp it would cut the hair off your arms." Nevertheless, the State tried to explain the extra width and ragged nature of the stab wound by arguing that the perpetrator must have struggled when inserting the knife into Merten. RP 2419-2420.

Had the State bothered to examine Merten's clothes, perhaps the State's might have been able to bolster its argument, but then, likely not.

At any rate, the State cannot have it both ways. Either Mr. Sanchez stabbed Merten with an incredibly sharp and dangerous knife which would easily slide into human flesh or he used a dull knife which he had to force into Merten's flesh.

Either way, the evidence does not support the factual finding that the missing knife appears consistent with the width of the stab wound.

Tnis factual finding was essential to the State's case because the State tied Mr. Sanchez to the assault by asserting that he stole a knife from the kitchen at Charlie's Tavern prior to the fight. The State then argued that the size of the knife "matched" the size of the stab wound, thus confirming its theory that Mr. Sanchez was the perpetrator.

There is not sufficient evidence to support this finding of fact.

Dr. Lucas Hansen, the emergency room physician who treated Merten, testified that the width of the stab wound was approximately 3.3 inches. RP 204. He also testified that the length of the stab wound was at least a minimum of six inches in penetration. RP 224.

Findings of Fact 9:

c. The trial court erred when it entered FOF no. 9, finding that the surveillance video shows the defendant in the kitchen and his left hand going up to where the knives are stored and where the missing knife is described as being earlier in the evening. The video then shows a knife going into the defendant's back left pocket. The video further shows that as the defendant enters the tavern from the kitchen, he is pulling down the left side of his shirt.

There is insufficient evidence to sustain this finding. As noted, the surveillance video at most shows Mr. Sanchez's lower leg and shoes as he walks in the kitchen. RP 1107.

The State's evidence that the surveillance video "shows his left hand going up to where the knives are stored" is based on conjecture and wishful thinking and not the type of evidence used in criminal cases. The State's evidence ignores the placement of the magnetic strip for the knives above the fryer, which is behind the floor mat. RP 445. The State's evidence ignores the distance from the middle of the floor mat (best approximation of where Mr. Sanchez was standing) to the magnetic strip of about 41", not including the upward reach. There were many knives on the magnetic strip. RP 444. The State failed to prove whether the knife is question was a knife was in a location that could be grabbed from that location. Further, the magnetic strip held the knives pretty tightly. Det. Fayette testified that

some force was required to remove the knives from the magnetic strip. RP 1562

In addition, the knife was very sharp, "sharp enough to cut hair off you arm." RP 867. Any fool who would put this type of knife down his back pants pockets would suffer at a minimum some torn trousers and at a maximum some severe physical discomfort and injury. Mr. Sanchez did not evince either.

The portion of the factual finding that Mr. Sanchez pulled the left side of his shirt down as he exited the tavern is simply not relevant in any way.

Findings of Fact 10:

d. The trial court erred when it entered FOF no. 10, that the defendant did take the missing knife from the kitchen.

This factual finding rests on FOF 5 and 9, both of which are argued above. Those arguments are incorporated herein.

Findings of Fact 13:

e. The trial court erred when it entered FOF no. 13, that Thomas Gallagher confirms the defendant's presence "at this time" and this his testimony was credible.

This finding is too vague to be argued. However Mr. Sanchez submits that due to its vagueness, it should be stricken. It simply

cannot be determined at what time Mr. Gallagher confirmed Mr. Sanchez to be present. This finding thus eludes appellate review.

Findings of Fact 14:

f. The trial court erred when it entered FOF no. 14, that the defendant was the only one not accounted for when once the fight started. All of the other participants were either fighting or leaving.

Mr. Sanchez was trying to leave and making efforts to find a ride back to the base. This is corroborated by his phone records and his testimony. 2RP 1541-1542.

The State may not have liked the evidence regarding his whereabouts but he was "accounted for."

Findings of Fact 19:

g. The trial court erred when it entered FOF no. 19, that the Merten describes his attacker as having a medium build, being 5'8", weighing approximately 155 pounds, wearing a black hat and black jacket, and identifies him as the Defendant. In August of 2009, in an interview with Mr. Fred Doughty, Mr. Merten described the stabber as having felled hair.

The trial court failed to resolve Merten's inconsistent descriptions of his assailant's clothing. These descriptions were given at the same time as the description which the trial court elected to find credible.

Findings of Fact 20:

h. The trial court erred when it entered FOF no. 20, that "the victim's testimony and identification of defendant as his attacker was credible."

Again, the trial court failed to resolve Merten's inconsistent descriptions of his assailant's clothing, even though these inconsistent descriptions were given proximate in time.

Further, as the court found in FOF 22, Merten did not even see his assailant. He concluded that Mr. Sanchez must have been the assailant because he believed that he saw Mr. Sanchez behind a nearby car and that Mr. Sanchez was holding something shiny, although he could not tell what that was.

Merten however could not identify Mr. Sanchez in any photo montages shown to him within days of the event.

Findings of Fact 21:

i. The trial court erred when it entered FOF no. 21, that "Dr. Reinitz testified that memory expands and reduces given time, place, manner, and alcohol."

Dr. Reinitz testified to many things, but this reductionist sentence does not do it justice. To the extent that the trial court relied on it to determine credibility of any witness, and there is no finding that the trial court did so, this finding is simply irrelevant.

Findings of Fact 24:

j. The trial court erred when it entered FOF no. 24, that "the entire fight from start to finish, including the stabbing and the chase, occurred within two to three minutes, from approximately 1:22 to 1:25 a.m."

This ignores the phone record evidence that Mr. Sanchez was on his telephone at 1:24 a.m. and therefore not involved in any of these activities. RP 1644-1645.

Findings of Fact 25:

k. The trial court erred when it entered FOF no. 25, the portion of which states that " [the defendant] was picked up by a cab far away in a desolate place, a darkened alley in a residential neighborhood, approximately one mile away."

There is no evidence to support the trial court's finding that the defendant was picked up by the cab in "a desolate place, a darkened alleyway in a residential neighborhood, approximately one mile away."

Wilton Bell, the cab driver, recalled picking up Mr. Sanchez is the residential area east of downtown Olympia. RP 704-705. When Mr. Bell "cruised" down Bigelow Street, he saw Mr. Sanchez, stopped for him, and let him into the cab. RP 715-716.

Mr. Bell did not see where Mr. Sanchez had come from, but thought it might have been an alley or a driveway. RP 736-737. When

he visited the location with a defense investigator he could not say with accuracy where he believed Mr. Sanchez had been in terms of an alley or a driveway. ***Id.***

At any rate, the record does not support the finding Mr. Sanchez was picked up by the cab in a desolate, darkened alleyway, etc. Mr. Bell picked up Mr. Sanchez on a public street in an Olympia residential neighborhood. Although the unsupported finding of fact makes Mr. Sanchez appear to be in hiding after the alleged stabbing, the record does not affirm that he was in hiding at all, but rather only that he was waiting for a taxi ride.

Rest of Challenged Findings of Fact:

The appellate court reviews the trial court's challenged conclusions of law after a bench trial to determine whether they are supported by the findings of facts, which have been found to be supported by substantial evidence. ***State v. Hovig***, 149 Wn. App. 1, 8, 202 P.3d 318, *review denied*, 166 Wn.2d 1020 (2009).

5. THE TRIAL COURT'S CONCLUSIONS OF LAW ARE NOT SUPPORTED BY THE CHALLENGED FINDINGS OF FACT

a. The trial court erred when it entered COL nos. 5, 6, 7, 8, 9, all of which go to the legal sufficiency to sustain the conviction.

The State failed to prove the elements of the crime charged under either prong:

1. State failed to prove identity of the assailant. No photo montage picks. Discrepant descriptions of assailant at hospital.

2. No evidence of intent.

3. No proof of "great bodily harm" – medical testimony is dispositive here.

This court must reverse and remand the case entry of an order of dismissal with prejudice where there is insufficient evidence to support the conviction. ***State v. DeVries***, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

6. TRIAL COUNSEL FAILED TO PROVIDE CONSTITUTIONALLY EFFECTIVE REPRESENTATION TO MR. SANCHEZ.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution protect the **right** to **effective assistance** of counsel in criminal cases. ***Strickland v. Washington***, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Thomas***, 109 Wn.2d 222, 229,

743 P.2d 816 (1987). To prevail on an ineffective assistance of counsel claim, the defendant must show not only deficient performance on the part of counsel but also prejudice. ***Strickland***, 466 U.S. at 687; ***Thomas***, 109 Wn.2d at 226.

A defendant claiming ineffective assistance of counsel must show that counsel's performance was objectively deficient and resulted in prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Courts strongly presume that counsel's representation was effective. ***Id.*** at 335. To demonstrate deficient performance, a "defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." ***Id.*** at 336.. The failure to show either deficient performance or prejudice defeats a defendant's claim. ***McFarland***, 127 Wn.2d at 334-35.

a. Trial counsel was ineffective for failing to argue for the admission of the second.. photo montage which the trial court excluded because it was impermissibly suggestive and made Mr. Sanchez's photograph stand out from the other photographs.

In ***State v. Pacheco***, 70 Wn. App. 27, 42-43; 851 P.2d 734 (1993), overruled on other grounds, 125 Wn.2d 183 (1994), the court rejected the appellant's contention that his conviction should be reversed because he received ineffective assistance of counsel where

his trial counsel had failed to present the video deposition of Donald Posey. Appellant claimed that this was a strategic or tactical error. However, the court rejected his claim because the deposition contained both exculpatory and inculpatory evidence. Thus, defense counsel's decision not to present the video testimony at trial may be characterized as a "tactical decision."

This case stands in marked contrast to ***Pacheco***. Here there was no strategic or tactical reason for not arguing to admit to present evidence regarding the . second photo montages. This was classic exculpatory evidence in an identification case.

The first photo montage was shown to Merten shortly after the stabbing while he ws hospitalized. At that time Merten could not identify Mr. Sanchez as the shooter. A few days later Det. Libby then showed Merton a second photo montage which she admitted was flawed because it was too suggestive in that emphasized Mr. Sanchez's photograph more than the others! Because Mr. Sanchez's photograph so obviously stood out, Merten could identified him as the assailant. This evidence was relevant and exculpatory because it showed that Merten had no real independent recollection and had to "impermissibly reminded" of the identity of his assailant.

There was no legitimate or tactical reason for moving to exclude either photo montage. The admission of either and/or both photo montage would have substantially bolstered Mr. Sanchez's defense of misidentification.

The central issue in this case concerned the State's ability to prove that Mr. Sanchez was the individual was stabbed Merten. That is, the key issue was the identity of the perpetrator. Thus, Merten's identification or misidentification of Sanchez was the central issue for the defense.

Merten had been given several opportunities to identify Mr. Sanchez via photo montage and he had been unable to do so. He ultimately was able to do so but only after he had seen photos of Mr. Sanchez in the media.

b. Trial counsel was ineffective for advising Mr. Sanchez to waive the jury where the first jury had hung 9-3.

There is simply no legitimate tactical reason for advising Mr. Sanchez to waive the jury in this case.

In this case, trial counsel failed to provide effective assistance of counsel when he advised Mr. Sanchez to waive his constitutional right to trial by jury. The constitutional right to jury trial is guaranteed under the Sixth Amendment to the United States Constitution and

article I, sections 21 and 22 of the Washington Constitution. In this case, trial counsel advised Mr. Sanchez to permit his case to be decided by the court that had already heard his case when it was tried to a jury. In that trial Mr. Sanchez was charged with the same crimes based on exactly the same facts and supported by the same evidence. The jury in that case hung. In this case, trial counsel advised Mr. Sanchez to waive the jury apparently under the gross misimpression that the trial counsel could consider evidence from the first trial in the second trial. RP 20-23.

In ***United States v. Cowden***, 545 F.2d 257 (1st Cir. 1976), the court affirmed the trial court's decision not to recuse itself from defendant's jury trial although the tial court already presided over the two jury trials of the codefendants. The court held that on these facts there was no reason to question the trial court's impartiality.

The instant case stands in marked contrast to Cowden. Here the trial court decided the merits of Mr. Sanchez's case after presiding over his jury. The trial court obviously knew the verdicts in that case.

Any competent counsel would have had no strategic or tactical reason for advising his client to waive the jury and to permit the trial court to decide this case. Any competent counsel would have been able to foresee the risk that the risk that the trial court, whether consciously

or unconsciously, would consider evidence from the prior trial when "deliberating" on Mr. Sanchez's case.

Trial counsel's reasons for waiving the jury were ill-considered. First, trial counsel wanted the court to consider the evidence regarding witness credibility from the first trial. Trial counsel wanted the court to do this because many of the witnesses were unavailable for the retrial and would be "testifying" through transcripts. 2RP20-23.

a. Trial counsel was ineffective for failing to request a limiting instruction for Mr. Sanchez's statement to police where the prosecutor stated that he intended to use it only for impeachment.

It is well-settled that some evidence may used only for limited purposes. Thus upon the request of a party, the court is required to give a limiting instruction modeled on WPIC 5.30 which provides: "Certain evidence has been admitted in this case for only a limited purpose. This *[evidence consists of and]* may be considered by you only for the purpose of . You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation."

In this case, during the CrR 3.5 hearing, the prosecutor averred that Mr. Sanchez's statements to Dets. Fayette and Costello were not

inculpatory statements. The prosecutor argued that the statements were exculpatory and could only be used to show that some of Mr. Sanchez's statements were untrue. The prosecutor emphasized, "There's nothing in that statement that's an admission."

The prosecutor's argument at the CrR 3.5 hearing thus was that the statements would only be used for impeachment. However during closing the prosecutor argued that Mr. Sanchez's statements were damning evidence and in fact pointed to Mr. Sanchez's statements as some of the strongest evidence against him. RP 2817 - 2831.

Had trial counsel secured a limiting instruction, trial counsel would have succeeded in preventing the use of the statements as substantive evidence.

d. Trial Counsel Was Ineffective For Failing To Pursue Other Suspect Evidence.

Trial counsel has the duty to investigate prior to trial and the failure to conduct a reasonable investigation is considered especially egregious when the evidence that would have been uncovered is exculpatory.

In re Pers. Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). While defense counsel is not required to interview every possible witness, the failure to interview witnesses who may provide

corroborating testimony may constitute deficient performance. ***Id.*** at 739.

This court will find the failure to investigate or to call witnesses prejudicial when the record supports the determination that these witnesses would have been helpful to the defense. ***State v. Jury***, 19 Wn. App. 256, 265, 576 P.2d 1302 (1978).

Further, evidence of "other suspects" is admissible and essential in a general denial and misidentification case if such evidence exists. Before a defendant can introduce other suspect evidence, a proper foundation must be laid; the defendant must prove a "'connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.'" ***State v. Mak***, 105 Wn.2d 692, 716, 718 P.2d 407 (1986) (quoting ***State v. Downs***, 168 Wash. 664, 667, 13 P.2d 1 (1932)).

In this case, trial counsel was well aware that Andrew Thomas had sent text messages early on the case intimating that he was the perpetrator of this assault. RP 1655. That text message read:

> "I guess there's a point in every young man's life when he's a suspect in a stabbing incident." RP 1655.

The text message was contained in discovery provided by the State. PTRP 118. Mr. Thomas had been in the military at the time these statements were made but had since been discharged; he was living in another state. PTRP 118. Trial counsel did not locate him for trial but rather sought to have his statements introduced through an inapplicable civil evidence rule, ER 904. PTRP 118.

There is no doubt that trial counsel was well aware of this witness and his importance to the defense case. The defense in this case general denial and misidentification. Where another individual who was admittedly present at the incident and whose presence is affirmed by other eyewitnesses makes incriminating statements, that individual is a significant witness.

Andrew Thomas was the other suspect who had been at the bar, at the fight, in the car when it was stopped by police. RP 103. He left the state and apparently wanted no involvement in this case. And yet he sent text messages that are so contrary to his interest that they smack of his commission of these crimes.

Trial counsel's failure to investigate the whereabouts of Andrew Thomas and secure him as a trial witness is ineffective assistance of counsel. As this court can ascertain from closing arguments, the issue at trial was identification and the State's proof of

it was weak. The introduction of Thomas's statements, at a minimum, would have raised a reasonable doubt as to whether the State had proved its case.

e. Trial Counsel Was Ineffective For Failing To Offer Andrew Thomas's Statements Under Er 804(B)(3).

ER 804(b)(3) provides for the admission of statements against interest and permits their admission even where the declarant is unavailable as a witness. It provides:

> *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

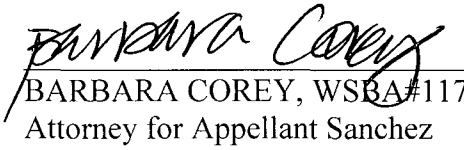
In order to qualify as a statement against penal interest, a declaration need not have been a clear and unequivocal admission of criminal conduct. ***State v. Parris***, 98 Wn.2d 140; 654 P.2d 77 (1982). In this case, Andrew Thomas's statements satisfied the requirements of the rule. Not only did he admit to punching an individual in the jaw – and Mr. Wambolt sustained a broken jaw that night – but also he strongly suggested that he had stabbed someone that same night.

Trial counsel should have argued for their admission as substantive evidence under the rule. These important statements were exculpatory evidence essential to Mr. Sanchez's defense.

E. CONCLUSION:

For the foregoing reasons, Mr. Sanchez respectfully asks this court to reverse his conviction for assault in the second degree while armed with a deadly weapon.

RESPECTFULLY SUBMITTED this 17th day of December, 2012.



BARBARA COREY, WSBA#11778
Attorney for Appellant Sanchez

CERTIFICATE OF SERVICE:
I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: That on this date, I delivered via ABC-Legal Messengers a copy of the Appellant's Opening Brief to Thurston County Prosecutor's Office, 2000 Lakeridge Dr S.W., Building 2, Olympia, WA 98502 and to Appellant, Alfred Joseph Sanchez at DOC#355172, Washington Corrections Center, P.O. Box 900 Shelton, WA 98584

12/17/12

KIM REDFORD, Legal Assistant