

NO. 67113-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN CERVANTES,

Appellant.

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court exercised sound discretion in admitting a witness's prior statement as a recorded recollection when the witness could not remember critical details of the incident and when the totality of the circumstances indicated that the statement was accurate.

2. Whether trial counsel's decision to stipulate that a witness had an insufficient recollection of events was a legitimate trial strategy when the witness's memory problems prevented her from testifying truthfully and accurately. If not, whether Cervantes has failed to show any prejudice when the trial court did not rely on the recorded recollection in reaching its verdict.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Juvenile respondent Jonathan Cervantes was charged by amended information with assault in the second degree and intimidating a witness. CP 22-23. The case proceeded by way of a bench trial. The trial court found Cervantes guilty of assault in the second degree, but found him not guilty of intimidating a witness.

CP 38-41. The court imposed a standard-range disposition.

CP 32-34.

2. SUBSTANTIVE FACTS.

On May 9, 2010, Oscar Daza-Flores got off work a little after 10:00 p.m. 3RP¹ 50. His girlfriend, Carolina Camacho, picked him up and they drove from the Subway in Lake City to El Rinconsito, a restaurant in SeaTac. 3RP 51. On the way into the restaurant, Daza-Flores saw Christian Cervantes; the two had been friends a few years prior. 3RP 55. Christian² was with his brother, Jonathan Cervantes, and two girls; the four were dressed up as if they were going out. 3RP 57-58. Although Christian had talked about Cervantes, Daza-Flores had never met him before. 3RP 59. Daza-Flores did not speak to Cervantes on the way into the restaurant. 3RP 58.

After the couple went into the restaurant, Daza-Flores realized that he did not have his wallet, and went outside to retrieve

¹ The verbatim report of proceedings consists of six volumes: 1RP (3/21/2011); 2RP (3/22/2011); 3RP (3/28/2011); 4RP (3/29/2011); 5RP (3/30/2011); and 6RP (4/29/2011).

² To avoid confusion, Christian Cervantes will be referred to simply as Christian. This is consistent with the verbatim report of proceedings.

it from Camacho's car; Camacho followed close behind. 3RP 60. Cervantes stood in between Daza-Flores and the car and swung a metal baton at Daza-Flores. 3RP 63. Although Daza-Flores tried to dodge the blow, Cervantes hit Daza-Flores in the ear with the baton. 3RP 63. Daza-Flores asked Cervantes what his problem was, to which Cervantes responded, "You are a snitch," and hit him again. 3RP 63. Daza-Flores realized that he was bleeding. 3RP 72. Camacho was screaming and appeared scared by the assault. 3RP 72. She told Cervantes to drop the baton, saying, "Stop being a pussy and fight like a man." 3RP 72.

Cervantes dropped the baton and charged at Daza-Flores with his fists up in a fighting position. 3RP 72, 75. Daza-Flores raised his hands in order to guard his face. 3RP 76. Although he did not want to fight, Daza-Flores began to swing back in order to defend himself. 3RP 76.

Cervantes, who was bigger than Daza-Flores, picked him up and tried to ram him into a van. 3RP 77. The two fell to the ground as they continued to struggle. 3RP 77-78. The commotion drew one of the security employees out of the Monte Carlo Casino, which was next door to El Rinconsito, but he did not intervene. 3RP 78. After seeing the security guard, Cervantes said, "Let me go, let me

go, you are bleeding, you are bleeding." 3RP 78. Cervantes then stopped assaulting Daza-Flores, who ran to the car. 3RP 81.

As Camacho drove Daza-Flores to the hospital, he called 911. 3RP 82. Daza-Flores was "bleeding everywhere" and noticed that a small chunk of his ear was missing. 3RP 82. He received three stitches to a cut on his head and more to repair his ear. 3RP 83. He also required several weeks of physical therapy for a shoulder injury sustained during the assault. 3RP 91.

Both Camacho and Daza-Flores gave statements to the police and identified Cervantes as the assailant. 3RP 143-45. In the weeks leading up to trial, Daza-Flores received threats related to testifying. 3RP 95, 153.

King County Detective Chris Johnson interviewed Cervantes by phone on May 25, 2010. 3RP 148. Cervantes admitted to hitting Daza-Flores with a stick and told Johnson he could not remember where he put the stick after the fight. 3RP 151.

Mario Escobar-Flores was the security supervisor at the Monte Carlo Casino. 4RP 47. Although he did not see how the fight started, he saw Cervantes and Daza-Flores struggling in the parking lot. 4RP 51-52, 57. He reported seeing a bottle in

Daza-Flores's hand and saw Cervantes holding a "metal stick."
4RP 52, 57.

Kellie Wernecke was with Cervantes in the parking lot on May 9, 2010, and testified on his behalf. 4RP 11. Although she saw both Cervantes and Daza-Flores "throwing punches," she admitted that she was not paying attention when the two first encountered each other and did not see the beginning of the fight. 4RP 18, 20, 30.

At trial, Cervantes claimed that Daza-Flores came out of the restaurant and asked him, "Why are you talking shit?" 4RP 68. Cervantes said that Daza-Flores looked "tensed up" and had a bottle in his hand, which Cervantes believed was made of glass. 4RP 69-70. He claimed that he thought Daza-Flores was going to hit him with the bottle. 4RP 73. Cervantes said that he found a stick or small branch on the ground and held it in a defensive position, but testified that he never used the stick in the fight. 4RP 73.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE UNDER ER 803(a)(5).

Cervantes claims that the trial court erred when it admitted a transcript of Camacho's police interview as a recorded recollection. Because the State established the foundation required under ER 803(a)(5), the trial court properly exercised its discretion in admitting the statement. In addition, because the trial court did not rely on Camacho's statement when it found Cervantes guilty, any alleged error is harmless.

a. Relevant Facts.

At the time of the assault, Camacho had been dating Oscar Daza-Flores for several months; their relationship ended a few months after the assault. 1RP 51-52. At trial, Camacho claimed that she could not remember much of what happened on May 9, 2010.³ Camacho remembered picking up Daza-Flores at work at a Subway "up north," and driving to El Rinconsito in SeaTac.

³ Carolina Camacho acknowledged that she did not want to testify at trial. 1RP 51. In fact, the State called Camacho as its first witness because the prosecutor was concerned that they might lose her cooperation. 1RP 35.

1RP 52-53. Although she remembered seeing Cervantes, Christian, and their friends on the way into the restaurant, she did not remember anyone exchanging words. 1RP 59-60. Once Daza-Flores realized that he had forgotten his wallet, they headed back to retrieve the wallet from the car. 1RP 62. When asked to explain what happened next, Camacho said, "That's when they confronted each other, and that's when they started to fight." 1RP 63.

Camacho repeatedly said that she did not remember how the "fight" started or who approached who first, explaining that "it was too long ago." 1RP 64, 65, 68, 69. Camacho said that Cervantes was holding a stick in his hand, but that she was not sure whether it was a branch from a tree, or whether it was some sort of manufactured object. 1RP 65. Camacho remembered that Cervantes hit Daza-Flores in the ear with the stick. 1RP 65-66. Camacho remembered hearing the word "snitch," but was not sure who said it. 1RP 68. When asked what happened after Cervantes hit Daza-Flores with the stick, Camacho replied, "I was just so blurry in my head, it is--I just remember them fighting, and then broke up, then we left." 1RP 69. Camacho did not remember the two fighting against a car. 1RP 71.

The State questioned Camacho about the statement that she gave to Detective Johnson, which Camacho had reviewed prior to testifying. 1RP 80. Four days after the assault, Johnson visited Camacho at work. 1RP 78. Johnson interviewed Camacho in his car. 1RP 78. Camacho remembered consenting to having the interview recorded, and acknowledged that she told Johnson what happened outside the restaurant. 1RP 79. When asked whether reviewing her statement would help her to refresh her memory about certain details, Camacho said, "I don't think it will." 1RP 79. Camacho could not remember whether the statement was an accurate statement, but agreed that she gave it at a time when her memory was fresh. 1RP 80-81.

Although the trial court initially declined to admit Camacho's statement under ER 803(a)(5), it allowed the State to lay additional foundation for a recorded recollection. 1RP 83-84. The State confronted Camacho with specific details, which she had testified she could no longer remember, but were included in her interview. Camacho insisted that the transcript did not help to refresh her memory, and that reading the transcript was "like reading a book." 1RP 85. For instance, even after reading her statement, Camacho could not remember that Christian Cervantes had spoken to them

on the way into the restaurant. 1RP 85-88; Ex. 4 at 1. She did not remember that Cervantes approached Daza-Flores as they were returning to the car, or that the stick in Cervantes's hand was a black, metal stick. 1RP 89-91. Likewise, she did not remember that Cervantes called Daza-Flores a snitch, or that Cervantes hit Daza-Flores twice. 1RP 91-92.

After Camacho insisted that she had forgotten many details of the assault, the State again moved to admit the transcript under ER 803(a)(5). 2RP 21-22. Trial counsel objected that the evidence was cumulative. 2RP 24. Counsel acknowledged that Camacho had not disavowed the statement and that she did not claim that the statement was inaccurate. 2RP 25, 27-28.

The trial court's colloquy on the issue focused primarily on whether the accuracy prong had been satisfied. Initially, the court appeared to believe that because Camacho did not remember the statement, she had disavowed it. 2RP 29-32. However, after some discussion, the court eventually stated, "I don't see anything that would be contrary to the notion that the statements, when made, that these statements are trustworthy." 2RP 37. The court ruled that portions of the transcript satisfied ER 803(a)(5), and read those portions of the transcript into the record. 2RP 4-9; Ex. 4.

b. Standard Of Review.

The admission of statements under ER 803(a)(5) is reviewed for an abuse of discretion. State v. White, 152 Wn. App. 173, 183, 215 P.3d 251 (2009). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. Id. at 183-84.

Although hearsay is generally inadmissible, ER 803(a)(5) provides an exception to the hearsay rule for:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Admission of a recorded recollection is proper when the following factors are met: (1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness' memory; and (4) the record reflects the witness' prior knowledge accurately. State v. Alvarado, 89 Wn. App. 543, 548, 949 P.2d 831 (1998). Cervantes

argues that the evidence did not meet the second and fourth prongs of the test.

c. **Camacho's Insufficient Recollection Prevented Her From Testifying Truthfully And Accurately.**

Cervantes first argues that Camacho did not have an insufficient recollection of the event in order to satisfy the second prong of ER 803(a)(5). Cervantes's argument fails because Camacho was unable to remember critical aspects of the assault. Therefore, Camacho could not testify fully and accurately, and her statement was properly admitted as a recorded recollection.

To support his argument that Camacho did not have an insufficient recollection, Cervantes relies on State v. Chavez, 134 Wn. App. 657, 142 P.3d 1110 (2006). Although the facts of Chavez are distinguishable, the discussion of ER 803(a)(5) is limited to the unpublished portion of the opinion. Cervantes's reliance on Chavez is improper. GR 14.1(a). Because Cervantes cites no other authority to support his argument that Camacho did not have an insufficient recollection, this Court should decline to review his challenge to the second prong of the recorded recollection test.

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Even if Cervantes did provide adequate authority to support his argument, the trial court properly found that Camacho could not remember events which were in her statement, even after having the opportunity to refresh her recollection. CP 36.

Under the second prong of the recorded recollection test, a prior statement is properly admitted if the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony. Alvarado, 89 Wn. App. at 548. Although no published Washington opinion has fully examined this prong, commentators have interpreted the exception broadly enough to apply when the witness recalls the matter in a general way, but cannot remember important details. 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.28, at 83 (5th ed.). This interpretation is consistent with other jurisdictions' interpretation of the identical federal rule. See United States v. Williams, 571 F.2d 344, 349 (6th Cir. 1978) (regardless of the fact that a witness remembered portions of the conversation, once it was established that the witness could not recall critical parts of the conversation, his statement became admissible as a recorded

recollection); United States v. Senak, 527 F.2d 129, 138 (7th Cir. 1975) (allowing admission of recorded recollection when witness remembered part of a conversation, but not all of it); Fed.R.Evid. 803(5).

Although Camacho remembered basic details of the evening of May 9, 2010, she could not remember a number of details. When looking at photographs of El Rinconsito, she did not remember whether there was anything different about the photographs. 1RP 55. She did not remember how many entrances there were to the restaurant, or which door she and Daza-Flores used. 1RP 63. Nor did she remember anything about what Cervantes and his friends were wearing. 1RP 60. Camacho's memory about the assault was even foggier. Although Camacho remembered a fight, she did not remember who started it, explaining it happened "too long ago." 1RP 65. She remembered Cervantes holding a "stick," but could not remember the color or whether it was made of natural or synthetic materials. 1RP 65.

In contrast, Camacho told Detective Johnson that she and Daza-Flores entered El Rinconsito using the door farthest away from Cervantes and his friends. Ex. 4 at 2. She described the object that Cervantes was holding as a thick, black metal stick with

a ball at the end of it. Ex. 4 at 2. Camacho also told Johnson that Cervantes started the fight by holding up the baton, calling Daza-Flores a snitch, and hitting him twice in the ear. Ex. 4 at 2.

Although Camacho remembered basic details of May 9, 2010, she did not remember enough to testify fully and accurately, particularly regarding the key question of whether Cervantes assaulted Daza-Flores first. Therefore, the trial court properly found that the second prong of ER 803(a)(5) was met.

d. **The Totality Of The Circumstances Establish That Camacho's Statement Was Accurate.**

Cervantes also contends that Camacho disavowed her prior statement. Therefore, he argues, the trial court erred when it concluded that the statement accurately reflected Camacho's knowledge of the assault. Cervantes's claim fails because Camacho did not disavow her prior statement and, based on the totality of the circumstances, her statement was accurate.

In the ideal case, a witness would testify that, despite the fact that she did not remember the details contained in the prior statement, she recognizes the statement as accurate. State v. Alvarado, 89 Wn. App. 543, 550, 949 P.2d 831 (1998).

Recognizing that “what is ideal in theory may be some distance from what is possible in practice,” this Court held in Alvarado that the requirement that a recorded recollection accurately reflect the witness's knowledge may be satisfied without the witness's direct verification of accuracy at trial. Id. at 550-51. In such cases, the court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.” Id. at 551-52.

Cervantes claims that Camacho disavowed the accuracy of her statement because she gave testimony that contradicted her prior statement. For example, Cervantes points to the fact that, in her written statement, Camacho described the stick as a metal stick with a ball at the end of it, but during trial testified that she did not remember the stick, and also claimed that she did not see the stick. Similarly, Cervantes notes that Camacho testified that she was not sure “who called who a snitch first,” and she therefore disputed the accuracy of her prior statement that Cervantes called Daza-Flores a snitch. Finally, Cervantes argues that Camacho disputed the

accuracy of her prior statement that Cervantes charged Daza-Flores, when she testified, "I believe that's incorrect...because...I don't remember him charging him."

This Court recently clarified that a witness does not disavow a prior statement merely by giving contradictory testimony at trial. In State v. White, the defendant assaulted his ex-girlfriend, in violation of a domestic violence no-contact order. 152 Wn. App. 173, 177, 215 P.3d 251 (2009). The victim called 911, identified White as her assailant, and gave a written and oral statement to police. Id. at 178. At trial, the victim testified that she had been assaulted on July 4, 2007, but had no recollection of how it occurred because she was intoxicated at the time. Id. She also testified that White was not present on July 4. Id. When presented with her prior statements, she testified that she could not remember if the statements were true. Id.

On appeal, White claimed that the victim disavowed her prior statements when she testified that White was not present on July 4. Id. at 184. Therefore, White argued, the victim's statement failed under the Alvarado test. Id. This Court held that the victim's statement satisfied all of the non-exclusive factors of the Alvarado test. Id. at 186. Addressing White's claim that the victim had

disavowed the prior statements, this Court held that, even though she testified contrary to her prior statements, "After reading the statement on the stand, [the victim] did not disavow the accuracy of the statement." Id. at 185. Considering all of the factors outlined in Alvarado, this Court held that the totality of the circumstances supported admission of the statements. Id. at 186.

Here, Camacho's testimony that she did not remember whether Cervantes called Daza-Flores a snitch certainly does not amount to disputing her prior statement. While her testimony that she did not see the stick arguably contradicts her prior statement describing the stick to Detective Johnson,⁴ she never testified that the description of the stick was inaccurate. Under White, contradictory testimony is not equal to a witness disavowing a prior statement. Although Camacho initially questioned the accuracy of her prior statement that Cervantes charged Daza-Flores, she explained that she believed it was incorrect because *she did not remember it*. Importantly, Camacho never claimed that she lied to Johnson in any portion of the statement. See State v. Floreck, 111 Wn. App. 135, 139-40, 43 P.3d 1264 (2002) (holding that the

⁴ Prior to testifying that she did not see the stick, Camacho actually testified Cervantes had "some kind of a stick" in his hand, but that she really did not pay much attention to it. 1RP 65

totality of the circumstances test was not satisfied when the witness specifically said that her prior statement was a lie). Finally, even if Camacho disavowed the accuracy of that one sentence in her statement, that does not mean that the entire statement was unreliable. Indeed, during trial, Camacho never disputed the accuracy of her prior statement that Cervantes assaulted Daza-Flores at least twice before Daza-Flores defended himself.

In addition, Camacho's statement met the other prongs of the Alvarado test. At the time of her interview, Camacho averred the accuracy of the statement when she confirmed that everything that she had told Johnson was true to the best of her knowledge. The recording process here was reliable: her statement was recorded by Johnson as she was giving it and was transcribed verbatim. Finally, the details of Camacho's statements were consistent with Daza-Flores's statement, as well as his physical injuries, giving it additional indicia of reliability. The totality of the circumstances indicated that Camacho's statement accurately reflected her knowledge of the assault.

e. Any Error Admitting Camacho's Statement Was Harmless.

Because the alleged error involves the violation of an evidentiary rule, rather than a constitutional mandate, the error is not prejudicial "unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Any error is harmless if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Id.

In its oral findings, the trial court acknowledged that Carolina Camacho was clearly an unwilling witness, and indicated that the court did not rely on her testimony. The trial court's written findings do not even mention Camacho's testimony. Meanwhile, the trial court found Oscar Daza-Flores's testimony credible and found that Cervantes's testimony that he acted in self-defense was not credible. Given that the trial court placed little if any weight on Camacho's testimony, and that the trial court found that Cervantes's testimony was not credible, the trial court would have found Cervantes guilty regardless of Camacho's written statement.

Moreover, contrary to Cervantes's claim, Camacho's trial testimony did not support his self-defense theory. Camacho did not testify that Daza-Flores assaulted Cervantes first or approached him in any way that could be interpreted as threatening. Rather, Camacho testified that she saw Cervantes and Daza-Flores in a physical struggle, but did not remember who started it. Her trial testimony was not consistent with Cervantes's self-defense theory.

2. CERVANTES RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Finally, Cervantes claims that trial counsel was ineffective because he agreed with the prosecutor that Camacho had not disavowed her prior statement. Cervantes's claim fails because trial counsel properly stipulated that Camacho had not disavowed her statement. But even if Camacho did disavow her statement, Cervantes cannot show that he was prejudiced by any deficient performance.

To prevail on an ineffective assistance of counsel claim, Cervantes must show (1) that his attorney's conduct fell below an objective standard of reasonableness, and (2) that this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668,

687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If a defendant fails to demonstrate either prong, the inquiry ends. Id. at 78.

Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. Because an ineffective-assistance claim can function as a way to escape rules of waiver and raise issues not presented at trial, the Strickland standard must be scrupulously applied. Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011).

Cervantes argues that trial counsel's performance was deficient because he acknowledged that Camacho had not disavowed the accuracy of her statement. As discussed above, trial counsel's acknowledgement was proper because Camacho did

not disavow the accuracy of her statement. She simply testified that she could not remember all of the details of the incident, or she gave somewhat contradictory testimony. Under White, contradictory testimony does not amount to disavowing a prior statement. 152 Wn. App. at 186. Because Camacho never testified that her prior statement was inaccurate or a lie, trial counsel properly conceded this point.

But even if trial counsel was deficient, Cervantes cannot show that he was prejudiced. To prevail, Cervantes must show a reasonable probability that "but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. In the case of an insufficient evidentiary objection, Cervantes must show that the proposed objection would likely have been sustained and that the result of the trial would have been different if the evidence had not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Cervantes argues that a proper objection "likely would have been sustained, as the court itself found--on more than one occasion--that Camacho had disavowed accuracy." App. Br. at 27. Cervantes misstates the trial court's findings. The trial court never found that Camacho had disavowed her statement; rather, the court

engaged in a discussion of the issue. 2RP 30-31, 34. As the court explained, it was "basically working through this thinking aloud," in part because it had not anticipated addressing the issue that day. 2RP 34-35. The court's "working through" the issue did not amount to a finding. Indeed, at the end of its colloquy, the court found that Camacho "didn't disavow the accuracy to the statements, she was saying she couldn't remember them." 2RP 35-36. Prior to reading Camacho's statement into the record the next day, the court reiterated that despite its initial inclination to find that Camacho had disavowed her statement, it was more accurate to find "that the witness basically stated that she could not remember the statements attributed to her." 3RP 3. Accordingly, counsel's stipulation was appropriate, not deficient.

But even if counsel had argued that Camacho had disavowed her prior statement, and even if such an objection had resulted in the trial court refusing to admit Camacho's statement, Cervantes still cannot show prejudice. Given that the trial court did not rely on Camacho's testimony or prior statements, suppression of the prior statement would not have changed the court's verdict. Consequently, Cervantes cannot show that but for any deficient

performance, the trial court would have found him not guilty. His claim fails both prongs of Strickland, and it should be rejected.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Cervantes's conviction.

DATED this 7 day of February, 2012.

Respectfully submitted,

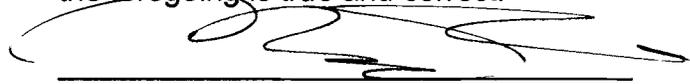
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Nelson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JONATHAN CERVANTES, Cause No. 67113-8-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

02-07-12

Date