

FILED
COURT OF APPEALS
DIVISION II

06 DEC 11 AM 9:43

STATE OF WASHINGTON

BY *[Signature]*
DEPUTY

NO 34570-6-II.
Cowlitz County No 05-1-00938-9.

STATE OF WASHINGTON,

Respondent,

vs.

MANUEL ORTIZ-SANTIAGO

Appellant.

BRIEF OF APPELLANT

ANNE CRUSER/WSBA #27944
Attorney for Appellant

P. O. Box 1670
Kalama, WA 98625
360 - 673-4941

pm 12-7-06

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

I. MR. ORTIZ-SANTIAGO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL. 1

II. MR. ORTIZ-SANTIAGO IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT FAILED TO ADMINISTER AN OATH TO THE INTERPRETER..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

I. MR. ORTIZ-SANTIAGO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO CONDUCT PROPER IMPEACHMENT OF MR. LOUGHMILLER AND FAILED TO REQUEST AN INSTRUCTION ON VOLUNTARY INTOXICATION..... 1

II. MR. ORTIZ-SANTIAGO’S CONVICTION SHOULD BE REVERSED, AND HIS CASE REMANDED FOR A NEW TRIAL, BECAUSE THE COURT FAILED TO ADMINISTER THE REQUIRED OATH TO THE INTERPRETER. 1

C. STATEMENT OF THE CASE..... 1

1. PROCEDURAL HISTORY 1

2. FACTUAL HISTORY 2

D. ARGUMENT 11

I. MR. ORTIZ-SANTIAGO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO CONDUCT PROPER IMPEACHMENT OF MR. LOUGHMILLER AND FAILED TO REQUEST AN INSTRUCTION ON VOLUNTARY INTOXICATION..... 11

1. FAILURE TO IMPEACH 12

2. FAILURE TO REQUEST INSTRUCTION ON VOLUNTARY INTOXICATION. 13

II. MR. ORTIZ-SANTIAGO’S CONVICTION SHOULD BE REVERSED, AND HIS CASE REMANDED FOR A NEW TRIAL, BECAUSE THE COURT FAILED TO ADMINISTER THE REQUIRED OATH TO THE INTERPRETER. 16

E. CONCLUSION..... 22

TABLE OF AUTHORITIES

Cases

<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	22, 23
<i>Neder v. United States</i> , 527 U.S. 1, 7-9 (1999)	23
<i>State v. Brett</i> , 126 Wn.2d 136, 829 P.2d 29 (1995)	12
<i>State v. Coates</i> , 107 Wn.2d 882, 735 P.2d 64 (1987).....	15
<i>State v. Finley</i> , 97 Wn.App. 129, 982 P.2d 681 (1999).....	15
<i>State v. Gallegos</i> , 65 Wn.App. 230, 828 P.2d 37 (1992).....	15
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994).....	13
<i>State v. Gonzalez-Morales</i> , 138 Wn.2d 374, 979 P.2d 826 (1999).....	20, 21, 22
<i>State v. Kruger</i> , 116 Wn.App. 685, 67 P.3d 1147 (2003).....	15
<i>State v. Piche</i> , 71 Wn.2d 583, 430 P.2d 522 (1967)	13
<i>State v. Varga</i> , 151 Wn.2d 179 (2004)	12, 13
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984)	12
<i>United States Ex. Rel. Negron v. New York</i> , 434 F.2d 386 (1970)	19, 24
<i>United States v. Gonzales-Lopez</i> , No. 05-352 (decided by the Supreme Court June 26 th , 2006).....	23, 24
<i>Washington v. Recuenco</i> , No. 05-83 (decided by the Supreme Court June 26 th , 2006).....	23

Statutes

RCW 9A.40.020 (1) (d)	2
RCW 2.43.010	18
RCW 2.43.030	24
RCW 2.43.080	18, 19
RCW 69.50.4013	2
RCW 9.41.040 (1) (a)	2

A. ASSIGNMENTS OF ERROR

I. MR. ORTIZ-SANTIAGO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

II. MR. ORTIZ-SANTIAGO IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT FAILED TO ADMINISTER AN OATH TO THE INTERPRETER.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. MR. ORTIZ-SANTIAGO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO CONDUCT PROPER IMPEACHMENT OF MR. LOUGHMILLER AND FAILED TO REQUEST AN INSTRUCTION ON VOLUNTARY INTOXICATION.

II. MR. ORTIZ-SANTIAGO'S CONVICTION SHOULD BE REVERSED, AND HIS CASE REMANDED FOR A NEW TRIAL, BECAUSE THE COURT FAILED TO ADMINISTER THE REQUIRED OATH TO THE INTERPRETER.

C. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

The Clark County Prosecuting Attorney charged Manuel Ortiz-Santiago by Third Amended Information with Count I: Kidnapping in the First Degree while armed with a firearm, contrary to RCW 9A.40.020 (1) (d); Count II: Violation of the Uniform Controlled Substances Act (Possession of Methamphetamine Hydrochloride), contrary to RCW 69.50.4013 (1) & (2); and Count III: Unlawful Possession of a Firearm in the First Degree, contrary to RCW 9.41.040 (1) (a). CP 18-19.

Mr. Ortiz-Santiago proceeded to a jury trial on November 1st, 2006. Verbatim Report of Proceedings, Volume II. Mr. Ortiz-Santiago stipulated that he had previously been convicted of a serious offense as defined in chapter 9.41 RCW and his right to possess a firearm had not been restored. CP 11. The jury returned verdicts of guilty on each count, as well as a special verdict finding that Mr. Ortiz-Santiago was armed with a firearm during the commission of the kidnapping. CP 47-50. Mr. Ortiz-Santiago was given a point in his offender score for having been on community custody at the time of the current offenses. CP 53. This determination was made by the court. Id. Mr. Ortiz-Santiago was sentenced to 209 months' imprisonment, the bottom of the standard range. CP 56. This appeal followed. CP 62.

2. FACTUAL HISTORY

On July 31st, 2005 Michael Allen Creed was staying occasionally at 2017 46th Avenue in Longview, Washington. III RP 238. This was the house Mr. Ortiz-Santiago shared with his fiancé, Maria Tubbs. Id. at 235. Mr. Creed is a drug dealer and daily drug user. Id. at 233-234, 289. Creed claimed to be a drug dealer employed by Mr. Ortiz-Santiago. Id. at 233-234. Mr. Creed claimed that he sold drugs for Mr. Ortiz-Santiago. Id. at 233-235. As of July 31st, according to Mr. Creed, he was in debt for drug money to Mr. Ortiz-Santiago for approximately \$1500-\$2000. Id. at 239.

On July 31st Mr. Creed claimed spent the day driving around selling methamphetamine and smoking methamphetamine. Id. at 241, 242, 312. He claimed he got a call from Mr. Ortiz-Santiago asking to meet him at the house on 46th Avenue. Id. at 241. When Mr. Creed arrived at the house he went to the room he was staying in and started smoking methamphetamine. Id. at 242. He had a gun with him in the room, which was a Ruger P89 9 mm. Id. at 244. He also had “tweaker belongings,” such as wires and power cords. Id. at 245. Mr. Creed claimed that when Mr. Ortiz-Santiago arrived home he was with Chris Loughmiller and a woman named Leilani. Id. at 246. Mr. Ortiz-Santiago allegedly came into the room where Mr. Creed was staying while Mr. Loughmiller stayed in the living room. Id.

According to Mr. Creed, Mr. Ortiz-Santiago became irate and accused Mr. Creed of selling his gun. Id. Mr. Creed replied that he hadn’t sold his gun and retrieved it, handing it over to Mr. Ortiz-Santiago. Id. at 247. He claimed Mr. Ortiz-Santiago then cocked the gun and put a round in the chamber and pointed it at him. Id. Mr. Ortiz-Santiago allegedly accused Mr. Creed of disloyalty and betrayal and of owing him money. Id. Mr. Creed claimed that Mr. Ortiz-Santiago then pulled another gun out of his waistband and pointed that one at him too, talking about which gun he liked better and which gun he was going to shoot Mr. Creed with. Id.

at 248. Then, according to Mr. Creed, Mr. Ortiz-Santiago stood up and hit him in the back of the head with the Ruger P89. Id. He then allegedly punched Mr. Creed in the head and told him to lie down on his stomach and put his hands behind his back. Id. at 249. At some point during this time Mr. Loughmiller came into the room. Id.

Mr. Creed said that Mr. Ortiz-Santiago left the room at some point and that Mr. Loughmiller began tying his arms and legs behind his back with cords. Id. at 251. At some point Mr. Ortiz-Santiago allegedly re-entered the room and assisted Mr. Loughmiller with tying Mr. Creed up. Id. According to Mr. Creed, Mr. Ortiz-Santiago still had the gun in his hand. Id. at 252. At some point during the time Mr. Loughmiller had Mr. Creed alone in the room Mr. Creed pleaded with Mr. Loughmiller not to kill him, telling him he wanted to see his son one last time. Id. at 254-255. Mr. Loughmiller allegedly said “Don’t you have a picture of him in your wallet?” Id. at 255. At some point Mr. Ortiz-Santiago allegedly came back into the room and again told Mr. Creed he was going to kill him, but then he turned off the light and left the room with Mr. Loughmiller. Id. at 259. Mr. Ortiz-Santiago and Mr. Loughmiller then left the house. Id. at 260.

Mr. Creed was able to free his legs and flee the house. Id. at 260-261. He ran to a neighbor’s trailer and knocked, but got no response. Id.

at 262. During this time he saw a car come down 46th and turn into the driveway at 2017, which apparently was driven by Maria Tubbs, Mr. Ortiz-Santiago's girlfriend. *Id.* at 263-264. Mr. Creed estimated that Maria was there for about four minutes. *Id.* at 264. After having no success knocking on the trailer door, Mr. Creed then knocked on the door of the porch belonging to Gary Elm, Sr. *Id.* Mr. Elm cut the wires off his hands and his wife called the police. *Id.* at 265.

While the police were speaking to Mr. Creed at Mr. Elm's house, a car came down 46th Avenue. II RP, 155. As it got close to Mr. Ortiz-Santiago's house it turned around and went back down 46th Avenue. *Id.* at 156. After a short pursuit, the car stopped and the occupants fled the car. II RP at 157, III RP, 358. A female fled from the passenger side. III RP, 358. After a canine search, Mr. Ortiz-Santiago was found lying in tall grass. III RP, 205. He was arrested and taken to the Cowlitz County jail and searched. During the search, some loose methamphetamine and three bullets were found in Mr. Ortiz-Santiago's pockets. II RP, 187.

Chris Loughmiller testified on behalf of the State in exchange for a reduction of his charges. III RP, 397. Mr. Loughmiller was originally charged with kidnapping in the first degree with a firearm enhancement, but pled guilty to kidnapping in the second degree without a firearm enhancement in exchange for his testimony. *Id.* His sentencing range on

kidnapping in the second degree was six to twelve months, whereas his original range on the kidnapping first degree with the firearm enhancement was 111 to 128 months. IV RP, 408.

Loughmiller's testimony was substantially as follows: He had been hanging out at a house in Kelso on July 31st, 2005. Id. at 369. In the early afternoon Mr. Ortiz-Santiago picked him up in Kelso and they drove up to "Corey's" house in Centralia. Id. at 369-370. They were at Corey's house for three or four hours and doing methamphetamine while there. Id. at 371. After leaving Corey's, he and Mr. Ortiz-Santiago drove back to town and stopped at the Cowlitz River to talk. Id. at 372.

As they drank beer, Mr. Creed's name came up. Id. When asked by the prosecutor what Mr. Ortiz-Santiago said about Mr. Creed, Loughmiller said that Ortiz-Santiago said that Mr. Creed had "messed up." Id. Loughmiller claimed he didn't know what Mr. Ortiz-Santiago meant by that. Id. at 373. When asked if they discussed the dealing of methamphetamine or debts owed for dealing methamphetamine, Loughmiller said "No." Id. When asked by the prosecutor if they discussed any plan of things they were going to do later that day, Loughmiller said "No." Id. at 373-374. When asked if there was any mention about Mr. Ortiz-Santiago doing anything to Mr. Creed, Loughmiller said "No." Id. at 374. When asked if Mr. Ortiz-Santiago

mentioned anything about Mr. Loughmiller being “down with anything,” Loughmiller said “Yes.” Id. When pressed as to what that meant, Loughmiller said it was simply a question of whether Loughmiller would have Mr. Ortiz-Santiago’s back. Id. When asked what the context of this was, Loughmiller said “I figured it was just in general.” Id.

Later, Mr. Ortiz-Santiago picked up Loughmiller, and they then picked up a woman by the name of Leilani. Id. at 375. Loughmiller placed a phone call to Mr. Creed telling him to meet them at the house on 46th. Id. at 375-376. When they arrived at the house, Loughmiller and Mr. Ortiz-Santiago went into Mr. Creed’s room. Id. at 376. Loughmiller claimed that Creed and Ortiz-Santiago began talking but refused to say what they were talking about, claiming he had “tuned out for a little bit.” Id. Loughmiller said that Ortiz-Santiago asked Creed for his gun, and Creed gave it to him. Id. at 377. Mr. Ortiz-Santiago just held the gun and looked at it. Id. Mr. Ortiz-Santiago was telling Mr. Creed that he “messed up.” Id. Loughmiller said that Mr. Ortiz-Santiago was just holding the gun and Mr. Creed was kneeling on the floor. Id. at 378. Loughmiller claimed that he then looked down for a second and when he looked up Mr. Creed was holding his head against the wall like he had fallen backwards. Id. Loughmiller was not sure what caused Mr. Creed to fall back and he did not see Mr. Ortiz-Santiago hit Mr. Creed. Id.

Loughmiller proceeded to tie up Mr. Creed, while Mr. Ortiz-Santiago was holding a second gun after having thrown Mr. Creed's gun into the corner. *Id.* at 379-380. Mr. Ortiz-Santiago was holding this gun to the floor. Loughmiller did not see Mr. Ortiz-Santiago make any threatening motions with the gun because he was too busy tying up Mr. Creed. *Id.* at 380. When Loughmiller caught Mr. Creed trying to make a 911 call on his cell phone, Loughmiller told him "that was stupid." *Id.* at 382. During a period of time when Mr. Ortiz-Santiago was out of the room, Mr. Creed was asking Loughmiller to let him go. *Id.* at 383. Mr. Creed told Loughmiller he wanted to see his son one last time and kept pleading "Just let me see my boy, just let me see my boy..." but Loughmiller told him "No, I can't do that." *Id.* Mr. Loughmiller also smoked methamphetamine during this time. *Id.* at 386. Also, Corey arrived at the house. *Id.* at 387. Mr. Loughmiller went to the store to purchase food and beer, and after returning he got high again. *Id.* After talking to Corey, Ortiz-Santiago, and Leilani for a period of time everyone left the house. *Id.* Loughmiller, Ortiz-Santiago, and Leilani drove to a motel. *Id.* at 388. When they left, Mr. Creed was still tied up. *Id.*

After being arrested for kidnapping Mr. Creed, Loughmiller lied to Deputy Nunes about his involvement in order to avoid getting in trouble. *Id.* at 396. The prosecutor asked Mr. Loughmiller, without objection,

whether he was telling the truth in his testimony, and he said "Yes." Id. at 397. The prosecutor then asked whether his plea agreement was based upon him testifying truthfully, and he replied that it was. Id. The prosecutor then asked "Is that your understanding of your obligation, to tell the truth in this courtroom?" Loughmiller replied "Yes, it is." Id. The prosecutor then asked "And have you done that?" Loughmiller replied "Yes sir, I have." Id. at 398.

During cross examination, the following exchange occurred between defense counsel and Mr. Loughmiller:

Ms. Couto: Now do you remember when you testified yesterday, and do you remember saying that in between the time that you were arrested a month after this incident, that you actually had contact with Mr. Ortiz-Santiago; do you remember testifying to that?

Loughmiller: Yes.

Ms. Couto: And do you remember in our conversation upstairs that you stated you did not run into Manuel after the incident? Do you remember saying that?

Loughmiller: No, I don't.

...

Ms. Couto: So now you remember seeing [sic], I didn't run into Manuel after the incident?

Loughmiller: No, I don't.

Ms. Couto: You remember telling me that? Okay, so you've changed your story again, right?

Loughmiller: No, because I don't remember saying that.

Id. at 418-419.

Deputy Nunes testified that when Mr. Ortiz-Santiago was arrested he was having trouble walking and that he stated he was very intoxicated. Id. at 456-457. Deputy Nunes gave Mr. Ortiz-Santiago a portable breath test which revealed an alcohol level of .113. Id. at 457.

Mr. Ortiz-Santiago testified that he was at Corey's house on July 31st, 2005, and was there until around 10:00 or 10:30. Id. at 501. He was not with Mr. Loughmiller. Id. At some point while he was at Corey's house, he got a call from his girlfriend Maria. Id. Maria scolded him during the phone call because she had come from work to find the house unsecured with doors open. Id. at 503. After leaving Corey's, but prior to going home, he received a call from his friend Michelle Fletcher and picked her up. Id. When he turned on to 46th Avenue, he became scared because he saw police officers and he knew he had methamphetamine in his pocket. Id. at 504. He was also drunk. Id. He testified that after he fled the car he began running, but had a difficult time doing so because of his intoxication. Id.

Mr. Ortiz-Santiago was assisted by a Spanish interpreter during the trial. At no time prior to the commencement of the trial or during the trial was the interpreter sworn in. Verbatim Report of Proceedings. Defense counsel did not object to the giving of any of the court's instructions, or to the court failing to give any requested instructions. Verbatim Report of Proceedings. No instruction was given on voluntary intoxication or the inferior degree offense of kidnapping in the second degree. CP 21-46. The jury returned verdicts of guilty on all three counts, as well as a finding that Mr. Ortiz-Santiago was armed with a firearm during the commission of the kidnapping. CP 47-50.

D. ARGUMENT

I. MR. ORTIZ-SANTIAGO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO CONDUCT PROPER IMPEACHMENT OF MR. LOUGHMILLER AND FAILED TO REQUEST AN INSTRUCTION ON VOLUNTARY INTOXICATION.

In order to establish a claim for ineffective assistance of counsel, an appellant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by his counsel's errors, such that "but for counsel's errors the outcome of the proceedings would have been different." *State v. Varga*, 151 Wn.2d 179, 198 (2004), citing *State v. Brett*, 126 Wn.2d 136, 199, 829 P.2d 29 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). A

reviewing court will presume the defendant received effective assistance of counsel unless that presumption is overcome by a clear showing of incompetence. *Varga*, 151 Wn.2d at 199; *State v. Piche*, 71 Wn.2d 583, 590-1, 430 P.2d 522 (1967). Ineffective assistance will not be found where counsel's actions go to the theory of the case or trial tactics. *Varga*, 151 Wn.2d at 199; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

1. FAILURE TO IMPEACH

Defense counsel attempted to impeach Mr. Loughmiller on the issue of whether he had spoken to Mr. Ortiz-Santiago prior to his arrest for this crime. At trial, Mr. Loughmiller, in a transparent attempt to make himself look more credible, stated that he had spoken to Mr. Ortiz-Santiago prior to being arrested and lying to Deputy Nunes about having kidnapped Mr. Creed. Defense counsel apparently had interviewed Mr. Loughmiller prior to trial, at which time he evidently told her that he *did not* have any contact with Mr. Ortiz-Santiago prior to his arrest. However, this impeachment was never completed because defense counsel failed to call a witness who would testify that Mr. Loughmiller told her what she claimed he told her. As such, this impeachment was never completed.

There are only two explanations for defense counsel's failure to call a witness who could impeach Mr. Loughmiller on this point: She had

either failed to anticipate the need for such a witness and issue a subpoena, or she did not interview Mr. Loughmiller in the presence of a witness. Neither excuse is acceptable. Mr. Loughmiller is an admitted liar, who says what he needs to say in order to achieve his desired result. It was extremely prejudicial to Mr. Ortiz-Santiago that the jury never heard from a witness who would confirm that Mr. Loughmiller was lying when he claimed that he had spoken to Mr. Ortiz-Santiago prior to being arrested. Defense counsel's failure to conduct proper impeachment of Mr. Loughmiller cannot be considered tactical, as there was no conceivable benefit to Mr. Ortiz-Santiago in failing to impeach Mr. Loughmiller and this failure was only to his detriment.

2. FAILURE TO REQUEST INSTRUCTION ON VOLUNTARY INTOXICATION.

“Effective assistance of counsel includes a request for pertinent instructions which the evidence supports.” *State v. Kruger*, 116 Wn.App. 685, 688, 67 P.3d 1147 (2003), citing *State v. Finley*, 97 Wn.App. 129, 134, 982 P.2d 681 (1999). This includes an instruction on voluntary intoxication when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite intent or mental state. *Kruger* at 691, citing *State v. Gallegos*, 65 Wn.App. 230,

238, 828 P.2d 37 (1992). Although diminished capacity by voluntary intoxication is not a true defense, intoxication may bear upon a defendant's ability to have formed the requisite intent to commit the crime charged. *Kruger* at 691; *State v. Coates*, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987).

Here, the State was required to prove two intentional acts on the part of Mr. Ortiz-Santiago: That he intentionally restrained Mr. Creed by either secreting him a place he was not likely to be found or by threatening him with deadly force or actually using deadly force (CP 31), and that he did so with the intent to inflict extreme distress on Mr. Creed. (CP 29). The defendant's level of intoxication could have called the defendant's mental state into question had the jury been properly instructed that they could consider his intoxication in evaluating his mental state.

The jury could have concluded, in the very least, that Mr. Ortiz-Santiago's high level of intoxication could have diminished or negated any attempt on his part to cause extreme mental distress to Mr. Creed. Two things are notable on this point: First, it was Loughmiller, not Mr. Ortiz-Santiago, who cruelly told Mr. Creed that he could not allow him to see his son again and asked him, nonchalantly, whether he had a picture of him in his wallet. There is no evidence in the record Mr. Ortiz-Santiago

was even aware of this conversation between Loughmiller and Creed or even knew Creed had a three year-old son.

Second, Mr. Creed is a drug dealer who is familiar with the workings of this sub-culture. One could surmise that such an event is neither unexpected nor uncommon in this subculture. An argument akin to “assumption of the risk” could be made on this point. In the very least, Mr. Creed’s own involvement in this lifestyle and his knowledge of the risks one assumes in dealing drugs for a living (as evidenced by his admitted possession and frequent display of handguns to others with whom he comes into contact in his business) could lead to an inference that this type of event would not cause him “extreme emotional distress.” Alternatively, these facts could at least lead to an inference that Mr. Ortiz-Santiago’s high level of intoxication diminished his ability to comprehend that this type of event would cause extreme emotional distress to a person such as Mr. Creed. Mr. Creed was not an innocent stranger abducted off the street by Mr. Ortiz-Santiago and held at gunpoint. Such a victim would, of course, be expected to suffer extreme emotional distress. Mr. Creed’s conduct, while it does not excuse any criminal act committed against him, at least contributes to an inference that he, unlike an innocent stranger, would not suffer extreme emotional distress. As such, an instruction of voluntary intoxication could have caused a different

outcome in the jury's verdict, be it a finding of guilt to kidnapping second degree or an acquittal.

II. MR. ORTIZ-SANTIAGO'S CONVICTION SHOULD BE REVERSED, AND HIS CASE REMANDED FOR A NEW TRIAL, BECAUSE THE COURT FAILED TO ADMINISTER THE REQUIRED OATH TO THE INTERPRETER.

The trial court failed to comply with RCW 2.43.050 by failing to administer the oath to the interpreter assisting Mr. Ortiz-Santiago, and this error cannot be considered harmless. RCW 2.43.010 states: "It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them." Pursuant to that statutory mandate, RCW 2.43.050 requires: "Before beginning to interpret, every interpreter appointed under this chapter shall take an oath affirming that the interpreter will make a true interpretation to the person being examined of all the proceedings in a language which the person understands, and that the interpreter will repeat the statements of the person being examined to the court or agency conducting the proceedings, in the English language, to the best of the interpreter's skill

and judgment.” Further, RCW 2.43.080 provides that all interpreters serving in a legal proceeding shall abide by the code of ethics established by Supreme Court rule.

It has been held that the right to an interpreter for a non-English speaking person is constitutional in nature. In *United States Ex. Rel. Negron v. New York*, 434 F.2d 386 (1970), the Second Circuit held that the right to an interpreter for a non-English speaking defendant is as fundamental as the right to confront adverse witnesses, as guaranteed by the Sixth Amendment, and the right to consult with one’s attorney. The Court analogized the right to an interpreter with the right to be present at one’s own trial. *Negron* at 389. In *Negron*, the defendant had been provided an interpreter sporadically throughout the proceedings, and rather than make a true interpretation, the interpreter simply summarized the testimony of the witnesses. Moreover, the Court held that the defendant’s “passive acquiescence” to this arrangement could not be deemed a waiver on his part of his fundamental right to an interpreter. *Negron* at 390.

Here, no oath was given as strictly required by RCW 2.43.050. The requirement to take an oath should not be regarded as a disposable formality; it is no less important than the oath taken by a witness as a condition of giving testimony in a legal proceeding.

Surprisingly, Appellant found no published case which deals directly with this issue of the trial court's failure to administer an oath to the interpreter. *State v. Gonzalez-Morales*, 138 Wn.2d 374, 979 P.2d 826 (1999) addressed the question of whether the trial court erred in "borrowing" the defendant's interpreter for brief periods of time so that she could translate for several non-English speaking witnesses. The Court was asked to decide whether this arrangement violated the defendant's constitutional right to counsel. In that case, the record reflected that a certified interpreter had been appointed to assist the defendant. *Gonzales-Morales* at 377. When the State called a witness who spoke Spanish, the trial court, apparently lacking a second interpreter, called the Office for the Administrator of the Courts to ask whether he could utilize the same interpreter for the witness but the Court received no response. The trial court decided that the interpreter could translate for the witness so long as the interpreter remained seated at counsel table with the defendant. The interpreter agreed that this resolution was appropriate, and merely stipulated that should the defendant have a question, the testimony would need to be interrupted so that the interpreter could assist the defendant in conferring with his attorney. The trial court agreed. *Gonzales-Morales* at 377. Although counsel for the defendant registered an objection at the conclusion of the evidence, the trial court noted that at no time during the

testimony did the defendant indicate he wished to speak with his attorney. *Gonzales-Morales* at 378. The Supreme Court affirmed defendant's conviction.

The Court began its analysis by observing that in this state, the right to an interpreter is based on the Sixth Amendment right to confront witnesses and the right to a fair trial by being present at one's own trial. *Gonzales-Morales* at 379. The Court held that the purpose of RCW 2.43 is "to uphold the constitutional rights of non-English speaking persons. *Gonzales-Morales* at 382. The defendant, however, had not suffered a violation of his constitutional rights because he was provided with the opportunity to confer with his counsel, through the interpreter, at any and all times. At no time was he denied his right to an interpreter, nor was his exercise of this right interfered with. *Gonzales-Morales* at 387-88. The Court concluded by noting that its holding was compelled by the facts of the case, leaving open the possibility that under different circumstances, a violation of the right to counsel might be found. *Id.* at 388.

Here, the record is devoid of any proof that RCW 2.43's requirement that the interpreter be sworn was complied with. Because of the wholesale non-compliance by the Court of the clear requirements of RCW 2.43, Mr. Ortiz-Santiago was denied due process because it is impossible to determine, upon review, that Mr. Ortiz-Santiago was

afforded his constitutional right to a competent interpreter who promised to make a true and accurate interpretation of the proceedings.

Further, this error is not the type of error that is subject to harmless error analysis. In *Arizona v. Fulminante*, 499 U.S. 279 (1991) the United States Supreme Court divided constitutional errors into two classes: Trial error and structural error. Trial errors are errors which “‘occurred during the presentation of the case to the jury’ and their effect may ‘be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.’” *United States v. Gonzales-Lopez*, No. 05-352 (decided by the Supreme Court June 26th, 2006); citing *Arizona v. Fulminante* at 307-08. These errors include most constitutional errors. *Gonzales-Lopez* at section III. Structural errors, in contrast, are defects which “‘affect the framework within which the trial proceeds’ and are not ‘simply an error in the trial process itself.’” *Gonzales-Lopez*, at Section III, citing *Arizona v. Fulminante* at 309-10; *Neder v. United States*, 527 U.S. 1, 7-9 (1999). “In such cases, the error ‘necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.’” *Washington v. Recuenco*, No. 05-83 (decided by the Supreme Court June 26th, 2006), citing *Neder v. United States* at 9. Examples of structural error include the denial of the right to counsel, or of the right to counsel of

choice, the denial of the right of self-representation, the denial of the right to a public trial, and the denial of the right to a trial by jury by the giving of an unconstitutional reasonable doubt instruction. *Gonzales-Lopez* at Section III.

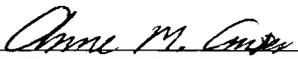
The error in this case affected the framework within which the trial was conducted and was not an error within the trial itself. It is not subject to harmless error analysis because it cannot be measured in relation to the strength of the evidence or the unlikelihood that the error affected the jury's verdict. The requirement that an interpreter be administered the oath under RCW 2.43.050 is the only mechanism by which we can be confident the defendant was afforded his constitutional right to an interpreter. Without the oath, there was effectively no requirement that the interpreter make a true interpretation of the proceedings, as opposed to merely summarizing the proceedings as occurred in *Negron v. New York* (supra). The lack of an interpreter who was administered the oath is the sort of defect in the trial which casts doubt on the fairness of the entire proceeding. Likewise, if the interpreter for Mr. Ortiz-Santiago did not make a true interpretation of the proceedings in a language Mr. Ortiz-Santiago understands, then Mr. Ortiz-Santiago was, as a matter of law, denied his constitutional right to an interpreter. Mr. Ortiz-Santiago is

entitled to a new trial that comports with the principles of fundamental fairness.

E. CONCLUSION

Mr. Ortiz-Santiago's conviction should be reversed and his case remanded for a new trial.

RESPECTFULLY SUBMITTED this 7th day of December, 2006.



ANNE M. CRUSER, WSBA #27944
Attorney for Mr. Ortiz-Santiago

APPENDIX

1. RCW 9.41.040 Unlawful possession of firearms – Ownership, possession by certain persons – Penalties.

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(2)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040);

(ii) After having previously been involuntarily committed for mental health treatment under RCW 71.05.320, 71.34.090[fn*], chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in RCW 9.41.047;

(iii) If the person is under eighteen years of age, except as provided in RCW 9.41.042; and/or

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010.

(b) Unlawful possession of a firearm in the second degree is a class C felony punishable according to chapter **9A.20** RCW.

(3) Notwithstanding RCW **9.41.047** or any other provisions of law, as used in this chapter, a person has been "convicted", whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-factfinding motions, and appeals. Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state. A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. Where no record of the court's disposition of the charges can be found, there shall be a rebuttable presumption that the person was not convicted of the charge.

(4) Notwithstanding subsection (1) or (2) of this section, a person convicted or found guilty by reason of insanity of an offense prohibiting the possession of a firearm under this section other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW **69.50.401** and **69.50.410**, who received a probationary sentence under RCW **9.95.200**, and who received a dismissal of the charge under RCW **9.95.240**, shall not be precluded from possession of a firearm as a result of the conviction or finding of not guilty by reason of insanity. Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:

(a) Under RCW **9.41.047**; and/or

(b)(i) If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW **9.94A.525**; or

(ii) If the conviction or finding of not guilty by reason of insanity was for a nonfelony offense, after three or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW **9.94A.525** and the individual has completed all conditions of the sentence.

(5) In addition to any other penalty provided for by law, if a person under the age of eighteen years is found by a court to have possessed a firearm in a vehicle in violation of subsection (1) or (2) of this section or to have committed an offense while armed with a firearm during which offense a motor vehicle served an integral function, the court shall notify the department of licensing within twenty-four hours and the person's privilege to drive shall be revoked under RCW **46.20.265**.

(6) Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

(7) Each firearm unlawfully possessed under this section shall be a separate offense.

2. RCW 9A.40.020 Kidnapping in the first degree.

(1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent:

- (a) To hold him for ransom or reward, or as a shield or hostage; or
 - (b) To facilitate commission of any felony or flight thereafter; or
 - (c) To inflict bodily injury on him; or
 - (d) To inflict extreme mental distress on him or a third person; or
 - (e) To interfere with the performance of any governmental function.
- (2) Kidnapping in the first degree is a class A felony.

3. RCW 69.50.4013 Possession of controlled substance - Penalty.

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

4. RCW 2.43.010 Legislative intent.

It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

It is the intent of the legislature in the passage of this chapter to provide for the use and procedure for the appointment of such interpreters.

Nothing in chapter 358, Laws of 1989 abridges the parties' rights or obligations under other statutes or court rules or other law.

5. RCW 2.43.030 Appointment of interpreter.

(1) Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings.

(a) Except as otherwise provided for in (b) of this subsection, the interpreter appointed shall be a qualified interpreter.

(b) Beginning on July 1, 1990, when a non-English-speaking person is
a

party to a legal proceeding, or is subpoenaed or summoned by an appointing authority or is otherwise compelled by an appointing authority to appear at a legal proceeding, the appointing authority shall use the services of only those language interpreters who have been certified by the administrative office of the courts, unless good cause is found and noted on the record by the appointing authority. For purposes of chapter 358, Laws of 1989, "good cause" includes but is not limited to a determination that:

(i) Given the totality of the circumstances, including the nature of the proceeding and the potential penalty or consequences involved, the services of a certified interpreter are not reasonably available to the appointing authority; or

(ii) The current list of certified interpreters maintained by the administrative office of the courts does not include an interpreter certified in the language spoken by the non-English-speaking person.

(c) Except as otherwise provided in this section, when a non-English-speaking person is involved in a legal proceeding, the appointing authority shall appoint a qualified interpreter.

(2) If good cause is found for using an interpreter who is not certified or if a qualified interpreter is appointed, the appointing authority shall make a preliminary determination, on the basis of testimony or stated needs of the non-English-speaking person, that the proposed interpreter is able to interpret accurately all communications to and from such person in that particular proceeding. The appointing authority shall satisfy itself on the record that the proposed interpreter:

(a) Is capable of communicating effectively with the court or agency and the person for whom the interpreter would interpret; and

(b) Has read, understands, and will abide by the code of ethics for language interpreters established by court rules.

6. RCW 2.43.080 Code of ethics.

All language interpreters serving in a legal proceeding, whether or not certified or qualified, shall abide by a code of ethics established by supreme court rule.

FILED
COURT OF APPEALS
DIVISION II

06 DEC 11 AM 9:44

STATE OF WASHINGTON

BY [Signature]
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
) Court of Appeals No. 34570-6-II
) Cowlitz County No. 05-1-00938-9
 Respondent,)
) AFFIDAVIT OF MAILING
 vs.)
)
)
 MANUEL ORTIZ SANTIAGO,)
)
)
 Appellant.)
)

ANNE M. CRUSER, being sworn on oath, states that on the 7th day of December 2006 affiant sent placed a properly stamped envelope in the mails of the United States addressed to:

Susan I. Baur
Cowlitz County Prosecuting Attorney
312 S.W. 1st Avenue
Kelso, WA 98626

AND

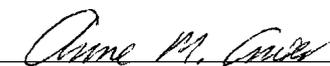
David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300

AND

1
2
3 Manuel Ortiz-Santiago
4 DOC# 726151
5 Clallam Bay Corrections Center
6 1830 Eagle Crest Way
7 Clallam Bay, WA 98362

- 8 (1) BRIEF OF APPELLANT (2 COPIES TO MR. PONZOHA)
9 (2) R.A.P. 10.10 (TO MR. ORTIZ-SANTIAGO)
10 (3) AFFIDAVIT OF MAILING

11 Dated this 7th day of December 2006

12
13 
14 ANNE M. CRUSER, WSBA #27944
15 Attorney for Appellant

16
17 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of
18 Washington that the foregoing is true and correct.

19 Date and Place: December 7th, 2006, Kalama, Washington

20 Signature: Anne M. Cruser