

NO. 34570-6-II  
Cowlitz Co. Cause NO. 05-1-00938-9

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

---

STATE OF WASHINGTON,

Respondent,

v.

MANUEL ORTIZ-SANTIAGO,

Appellant.

---

COURT OF APPEALS  
DIVISION II  
FILED  
BY: [Signature]  
FEB 7 2007  
PM 12:54  
CLERK

---

**BRIEF OF RESPONDENT AND RESPONSE  
TO STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW**

---

SUSAN I. BAUR  
Prosecuting Attorney  
G. TIM GOJIO/WSBA #11370  
Deputy Prosecuting Attorney  
Attorney for Respondent

Office and P. O. Address:  
Hall of Justice  
312 S. W. First Avenue  
Kelso, WA 98626  
Telephone: 360/577-3080

PM 2-5-07

## TABLE OF CONTENTS

	Page
<b>I. IDENTITY OF RESPONDENT.....</b>	<b>1</b>
<b>II. SHORT RESPONSE TO ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>A. Effective Assistance of Counsel.....</b>	<b>1</b>
<b>B. Oath of Interpreter.....</b>	<b>1</b>
<b>III. COUNTERSTATEMENT OF THE CASE.....</b>	<b>1</b>
<b>A. Factual Background.....</b>	<b>1</b>
<b>B. Procedural Background .....</b>	<b>9</b>
<b>IV. ARGUMENT.....</b>	<b>9</b>
<b>A. Appellant was not denied effective assistance of counsel. ....</b>	<b>9</b>
<b>1. Standard of Review.....</b>	<b>9</b>
<b>2. No showing That Cross-examination of Witness Loughmiller             Constituted Ineffective Assistance of Counsel.....</b>	<b>10</b>
<b>3. Voluntary Intoxication .....</b>	<b>14</b>
<b>(a) Whether to Seek Voluntary Intoxication Jury                 Instruction Was a Trial Strategy or Tactic .....</b>	<b>15</b>
<b>(b) Appellant Fails to Show the Absence of Legitimate                 Strategic or Tactical Rationales for Not Asking for the                 Instruction .....</b>	<b>18</b>
<b>4. Interpreter Qualification.....</b>	<b>21</b>
<b>A. Standard of Review.....</b>	<b>21</b>

**B. Analysis ..... 23**

**(1) Respondent’s Motion to Supplement the Record or  
    Alternatively to Designate the Oath of Interpreter as Clerk’s  
    Papers..... 23**

**(2)No Prejudice Shown From Failing to Administer Oath ..... 23**

**V. RESPONSE TO STATEMENT OF ADDITIONAL GROUNDS 27**

**VI. CONCLUSION ..... 29**

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Bercier v. Kiga</i> , 127 Wn.App. 809 (Div. 2, 2004).....	11
<i>State v. Adams</i> , 91 Wn.2d 86, 586 P.2d 1168 (1978) .....	15
<i>State v. Aquino-Cervantes</i> , 88 Wn.App. 699, 945 P.2d 767 (Div. 2, 1997) .....	21
<i>State v. Bowerman</i> , 115 Wash.2d 794, 802 P.2d 116 (1990) .....	10
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	28
<i>State v. Carr</i> , 13 Wn. App. 704, 537 P.2d 844 (1975) .....	14
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2001) .....	10, 11
<i>State v. Cord</i> , 103 Wn.2d 361, 693 P.2d 81 (1985).....	28
<i>State v. Coria</i> , 120 Wn.2d 156, 839 P.2d 890 (1992).....	20
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980) .....	28
<i>State v. Dennison</i> , 115 Wn.2d 609 (1990).....	11
<i>State v. Fairfax</i> , 42 Wn.2d 777, 258 P.2d 1212 (1953).....	13
<i>State v. Finley</i> , 97 Wn.App. 129, 982 P.2d 681 (1999).....	18
<i>State v. Hackett</i> , 64 Wn.App. 780, 827 P.2d 1013 (1992).....	17
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	10
<i>State v. Kruger</i> , 116 Wn.App. 685 (Div. 3, 2003).....	14, 18, 20
<i>State v. McNeal</i> , 145 Wn.2d 352, 37 P.3d 280 (2002) .....	15, 17

<i>State v. Oswalt</i> , 62 Wn.2d 118, 381 P.2d 617 (1963).....	13
<i>State v. Pham</i> , 75 Wn.App. 626, 879 P.2d 321 (1994), <i>review denied</i> , 126 Wn.2d 1002, 891 P.2d 37 (1995).....	21, 22
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	27
<i>State v. Schaaf</i> , 109 Wash.2d 1, 743 P.2d 240 (1987).....	20
<i>State v. Serrano</i> , 95 Wn.App. 700, 977 P.2d 47 (Div. 3, 1999) .....	21, 22, 23, 24, 26
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004) .....	28
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	9, 10, 11
<i>United States ex. Rel. Negron v. New York</i> , 434 F.2d 386 (2 <sup>nd</sup> Cir., 1970) .....	22, 23

### Statutes

RCW 2.43.030(1)(b).....	21
RCW 2.43.050 .....	21, 24
RCW 69.50.435 .....	20

### Other Authorities

3 <i>Wigmore on Evidence</i> (3d ed.) § 1002, p. 656.....	13
ER 607 .....	13
Fourteenth Amendment to the United States Constitution .....	20
RAP 2.5(a)(3).....	22, 23, 24, 26
<i>Tegland, 2007 Courtroom Handbook on Washington Evidence</i> , ER Rule 613, at 321.....	14

Washington State Constitution, Article 1, Section 12 .....	20
WPIC 18.10, <i>cited with approval in Coates</i> , 107 Wn.2d at 892, 735 P.2d 64.....	17

**I. IDENTITY OF RESPONDENT**

The respondent is the State of Washington.

**II. SHORT RESPONSE TO ASSIGNMENTS OF ERROR**

**A. Effective Assistance of Counsel:** The Appellant was not denied effective assistance of counsel.

**B. Oath of Interpreter:** Marta Rutherford, the interpreter in the case, has an oath of interpreter on file with the Cowlitz County Superior Court clerk. Regardless, the Appellant has failed to show any prejudice as a result of the failure of the court to administer an oath of interpreter.

**III. COUNTERSTATEMENT OF THE CASE**

**A. Factual Background**

On July 31, 2005, Gary Elms was watching television late that evening when a man came up to his back porch and begged him to “turn him loose because his hands were tied behind him.” RP at 339-40. Elms cut one wire loose, and the man sat down. Elms observed that the man was “scared to death” and was “shaking like an old horse dying.” RP at 340. Elms sent his wife to call for police. RP at 340.

On July 31, 2005, Cowlitz County Deputy Sheriff Andrew Nunes was dispatched to 2015 - 46<sup>th</sup> Avenue in Longview, Cowlitz County, State of Washington. Deputy Nunes arrived right after midnight and spoke with the reporting party Mr. Elms and with Mr. Creed. Creed was fidgety and

appeared amped up and scared. RP at 154. Creed's shirt was completely soaked with sweat, and he appeared terrified to Longview Officer Steve Dennis. RP at 352. Creed told Deputy Nunes that Mr. Santiago assaulted him at 2017 – 46<sup>th</sup> Avenue, the next-door residence. RP at 155. Creed told officer Dennis that Manuel had tied him up, kept him in a closet, and repeated several times that Manuel said he was going to kill him. RP at 353. Creed said this happened two hours prior, and that Manuel was in a white Honda Accord. RP at 354. Creed told Deputy Nunes that he was struck with a gun or pistol whipped, RP at 430, and described the gun as a Ruger 9 mm, black, silver and gray, model PB9. RP at 426-27.

As Deputy Nunes was talking to Creed in the driveway of 2017 – 46<sup>th</sup> Avenue, Deputy Nunes observed a vehicle coming down 46<sup>th</sup>, and saw the vehicle stop, back up quickly into another driveway, then head towards Ocean Beach Highway on 46<sup>th</sup>. RP at 155, 355. Officer Dennis observed that the vehicle was a white Honda Accord. RP at 356. Both Deputy Nunes and Officer Dennis got into their patrol vehicles and followed the vehicle. RP at 156. Deputy Nunes was about a couple hundred yards behind the vehicle. RP at 156. The vehicle ran a stop sign, almost hit an ambulance, spun out, and continued traveling. RP at 357. Officer Dennis lost sight of the vehicle when it turned, and then saw the

vehicle parked by a field with the driver's door open and the lights on. RP at 358. Officer Dennis saw a female later identified as Michelle Fletcher get out of the passenger side of the car. RP at 358. Fletcher did not have anything in her hands, and did not throw a gun or anything. RP at 359. Officer Dennis yelled for her to stop, and she did. RP at 359. Officer Dennis advised that the driver of the vehicle had fled from the vehicle into an adjacent field. RP at 157.

Cowlitz County Deputy Brent Harris and Nitro, the county tracking dog, arrived on the scene at 12:38 AM. RP at 194-95. Deputy Harris put Nitro into the driver's side of the vehicle, closed the door so Nitro could get the scent, and told Nitro to seek. RP at 196, 215. Nitro found a subject laying in the grass, Nitro bit the individual, and once Deputy Harris could see the hands of the subject, Deputy Harris called Nitro off. RP at 197. The subject located was the defendant, Mr. Ortiz-Santiago, and Deputy Nunes and Officer Dennis identified the defendant in the courtroom at trial. RP at 159, 363.

Mr. Ortiz-Santiago was found "maybe 150 yards" from the Honda where Nitro started the search. RP at 203, 205. Nitro continued to search the area for articles, and located a "black player's baseball cap", a "player 69 hat" which Deputy Harris took from Nitro. RP at 205-06, 212. The baseball cap was found about 50 feet from where the suspect was located.

RP at 222. Deputy Harris continued to have Nitro search for articles, and Nitro "indicated" on the front portion of an old flat bottomed boat by digging "kind of clawing at the area." RP at 207-08. Officer Harris located a nickel plated Ruger semi-automatic handgun in the area underneath that boat. RP at 208, 222. That gun was found close to where Nitro had originally tracked. RP at 216. No fingerprints of any value were found on the gun. RP at 227.

Deputy Nunes arrested the defendant, placed him in the back of the patrol car, and upon looking in the Honda saw a black magazine for a 9 mm handgun in the door side map pocket. RP at 438. The bullets in the magazine were jacketed hollow point 9 mm with the writing "9 mm Lugar R-P" written on them. RP at 439.

Officer Rick Williams of the Cowlitz County jail searched the defendant when the defendant was brought into the jail that evening. RP at 186. Two bullets were found in the defendant's right front pocket, one bullet in his left pocket, as well as some loose crystal substance with the consistency of rock salt. RP at 188-89. The three bullets recovered by Officer Williams were "9 mm jacketed hollow points" and were labeled "9 mm Lugar R-P." RP at 441.

Chris Loughmiller testified that he and Manuel Santiago were down by the river drinking beer when Manuel said that Michael Creed had

messed up, and Manuel asked Loughmiller if he “was down”, that is “if things were to happen if I was going to have his back.” RP at 373-74. Loughmiller testified that he called Michael Creed at the request of Manuel, and asked Creed to meet at the house. RP at 376.

Loughmiller testified that Creed was kneeling on the floor, and then Creed was holding his head by the wall, as if Creed had fallen backwards, but Loughmiller did not see any blows struck. RP at 378-79. Loughmiller saw that the defendant had a second gun, a 9 mm Ruger. RP at 379. The defendant asked Loughmiller to tie up Creed, and Loughmiller did so using stereo wire and sweatpants. Loughmiller identified the defendant in the courtroom. RP at 380-81. Loughmiller and the defendant left, got a motel room, and the defendant leaves at one point and returns with Michelle Fletcher. RP at 392. The defendant tells Loughmiller that “Mr. Creed had gotten away, and I said How did that happen? And he said, Well, he said, I don’t know, but I don’t like any games, and if something happens to my girl, something is going to happen to you, and I was like, Well – and then he turned around and left.” RP at 393. The defendant was putting a gun to Loughmiller’s head, and Loughmiller was swatting it away maybe two or three times. RP at 393-94.

Loughmiller testified that he was given a plea offer to testify, and that his charges were reduced from kidnapping first with a firearm enhancement to kidnapping second, and that Loughmiller pleaded guilty, with a sentencing range of 6-12 months. That plea was based upon Loughmiller testifying truthfully in court. RP at 397.

Michael Allen Creed testified that he was selling methamphetamine for Manuel Ortiz Santiago. RP at 232. Creed testified that he was getting 4 ounces a week, which cost about \$700 an ounce, or \$2,800 total. RP at 235. Creed kept cars and miscellaneous items at the house on 46<sup>th</sup> avenue. RP at 235-36. Creed was in debt for about \$1,500 to \$2,000 to the defendant for drugs. RP at 239. On July 31, 2005, the defendant was driving around selling drugs, and he gets a phone call to meet Manuel at the house. RP at 241. Creed testified that the defendant was first calm and then became very irate for some reason, accusing Creed of selling his gun, then asking Creed if he had any other guns on him. RP at 247. Creed testified that the defendant was mad, pointed a gun at him and said that Creed had “messed up. I betrayed him. I owe him thousands of dollars” and that Creed “wasn’t loyal to him.” RP at 247.

Creed testified that the defendant pulled out “his other gun” and started talking about “which gun he liked better, which gun he was going to shoot me with”. RP at 248. Creed testified that the defendant hit him in

the back of the head with the Ruger P89, continued to yell at him, punched him in the side of his head, and told Creed to lay down on his stomach and put his hands behind his back. RP at 248-49. Creed testified that Chris Loughmiller tied his hands behind his back “really tight” and that Loughmiller also tied his feet. RP at 251. Creed attempted to call 911 with a cell phone using his tongue on the buttons, but Loughmiller saw what was happening and grabbed the cell phone, tore the battery off the phone and threw it on the floor. RP at 255-56. After a visit by Corey, Manuel returned to the room and told Creed that he’s going to kill him, but that first Creed was going to sign over all his titles and belongings. RP at 259.

The lights in the room were turned off, and Creed laid on the floor for about 5-10 minutes before kicking the cords off his feet. RP at 260. Creed, with his hands still bound behind his back, managed to leave the house and went next door first to a trailer where Gary Elm, Jr., lived, then to the house. RP at 262. At the house Creed found a big serrated knife, but was unable to free his hands. RP at 263. Creed saw a car driving down the street, ran off the lighted porch and hid, then saw the car, a red Dodge or Eagle Talon, and recognized it as Maria’s red car when it backed out of the driveway. RP at 263-64. Gary Elm Sr. cut Creed’s hands free, and while Creed was on the back porch, pleaded with Elm to turn off the

back porch light. RP at 265. Police officers came, and Creed told them what was going on, including that he owed Manuel, that he was selling methamphetamine for Manuel, and told police what Manuel and Chris had done to him. RP at 267. Creed and the officers were on the front porch waiting for another officer to show up, and Creed saw a car coming down 46<sup>th</sup> and turn around. RP at 268.

The defendant testified at trial on his own behalf. RP 495-526. He denied seeing Mr. Loughmiller that evening, denied threatening Mr. Creed with a gun “because I never saw him that evening”, denied asking Mr. Loughmiller to tie up Mr. Creed, and denied threatening Mr. Loughmiller with a gun. RP at 505. The defendant admitted that he saw the officers on the street on 46<sup>th</sup>, got nervous because he had some methamphetamine in his pocket, left and tried to out run the police. RP at 504. The defendant didn’t remember how the bullets got into his pocket. RP at 504. On cross examination the defendant denied dealing drugs, testified that he fell down in the field and did not take the methamphetamine out of his pocket, though he didn’t want to get arrested. RP at 522-23. The defendant denied throwing a 9 mm Ruger P89 “because he never had a pistol”. RP at 524.

## **B. Procedural Background**

By a Third Amended Information, the state charged Manuel Ortiz-Santiago with kidnapping in the first degree, violation of the uniform controlled substances act, and unlawful possession of a firearm in the first degree. CP at 18-20.

The jury found Manuel Ortiz-Santiago guilty of kidnapping in the first degree, guilty of violation of the uniformed controlled substances act, and guilty of unlawful possession of a firearm in the first degree. RP at 571, CP at 47, 49, 50. The jury also returned a special verdict finding that the defendant was armed with a firearm at the time he committed the kidnapping. RP at 572, CP at 48.

The court sentenced the defendant to 209 months confinement, based on an offender score of 9, with kidnapping in the first degree being a seriousness level "X" crime, with a standard range of 149-198 months. CP at 53. The firearm enhancement was 60 months, making the standard range 209 to 248 months. CP at 53.

## **IV. ARGUMENT**

### **A. Appellant was not denied effective assistance of counsel.**

#### **1. Standard of Review**

Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation. *State v.*

*Bowerman*, 115 Wash.2d 794, 808, 802 P.2d 116 (1990). *Strickland* requires:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The appellant bears the burden of showing that, but for the ineffective assistance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). See also *State v. Cienfuegos*, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001)

**2. No showing That Cross-examination of Witness Loughmiller Constituted Ineffective Assistance of Counsel.**

The Appellant claims that trial defense counsel was ineffective as counsel "failed to conduct proper impeachment of Mr. Loughmiller". Br. of App. at 11. The Appellant claims that "impeachment was never completed" and that defense counsel "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.” Br. of App. at 12-13.

The Appellant, however, fails to cite any authority to support the claim that the conduct of trial defense on impeachment of witness Loughmiller here fell below an objective standard of reasonableness, nor does Appellant cite any cases to support the claim that trial defense counsel’s conduct prejudiced the Appellant. An appellate court need not consider arguments that are not developed in the briefs and for which a party has not cited authority. *Bercier v. Kiga*, 127 Wn.App. 809, 824 (Div. 2, 2004), citing *State v. Dennison*, 115 Wn.2d 609, 629 (1990). Apart from Appellant’s citations to the standard of review concerning effective assistance of counsel, Br. of App. at 11-12, there is no citation to any authority to support that trial defense counsel was ineffective while conducting cross examination of witness Loughmiller.

Should the court nonetheless examine the claim, there is nothing in the record to show that trial defense counsel’s performance resulted in any prejudice to the defendant, nor does the record show that trial defense counsel’s performance was so serious that defense counsel was not functioning as ‘counsel’ guaranteed by the Sixth Amendment. *Cienfuegos*, 144 Wn.2d at 226-27, citing *Strickland*, 466 U.S. at 687.

The Appellant claims that trial defense counsel never completed the impeachment of witness Loughmiller, that was due to trial defense counsel failing to anticipate the need for an impeachment witness, or that trial defense counsel did not interview Loughmiller in the presence of a witness, and that “Neither excuse is acceptable.” Br. of App. at 12-13. The Appellant fails to show the prejudice, if any, from trial defense counsel’s supposed failure to impeach witness Loughmiller as to possible inconsistent statements as to whether or not Loughmiller met with the defendant after the incident.

This is merely a collateral matter that does not go to the heart of Loughmiller’s testimony – that the defendant told Loughmiller that Creed had “messed up”, RP at 372, the defendant asked Loughmiller to call Creed to meet at the house, RP at 375-76, that they met Creed at the house, and the defendant told Creed that Creed had messed up “one too many times and he wasn’t putting up with it.” RP at 377. Loughmiller testified that there were two guns present at the incident, and that the defendant directed Loughmiller to tie up Creed, and Loughmiller did so. RP at 379-81. Loughmiller further testified that the defendant made statements about Creed getting away, and the defendant put a gun to Loughmiller’s head, which Loughmiller had to swat away two or three times. RP at 393-94. Loughmiller impeached himself by admitting to

making inconsistent statements to Deputy Nunes in order to get himself out of trouble. RP at 396.

The Appellant fails to show that there is any relevance as to whether Loughmiller did or did not meet with the defendant between the time of the incident and the time of trial. ER 401. Whether or not Loughmiller did or did not meet with the defendant after the incident and before trial is a collateral matter:

It is a well recognized and firmly established rule in this jurisdiction, and elsewhere, that a witness cannot be impeached upon matters collateral to the principal issues being tried. The purpose of the rule is basically two-fold: (1) avoidance of undue confusion of issues, and (2) prevention of unfair advantage over a witness unprepared to answer concerning matters unrelated or remote to the issues at hand.

*State v. Oswalt*, 62 Wn.2d 118, 120, 381 P.2d 617 (1963), citing *State v. Fairfax*, 42 Wn.2d 777, 258 P.2d 1212 (1953), and 3 *Wigmore on Evidence* (3d ed.) § 1002, p. 656 (Other citations omitted).

The credibility of a witness may be attacked by any party. ER 607. However, the Appellant fails to note that prior to cross-examination the state already elicited Loughmiller's prior inconsistent statements to Deputy Nunes:

"Q. And when you talked to Deputy Nunes, did you tell him the truth about your role and Manuel's role involving Mr. Creed?

A. No, I didn't.

Q. No, you didn't? Okay, did you lie to this officer?

A. Yes, I did.

Q. Why did you lie to him?

A. To try to get myself out of trouble - - telling him what I thought he wanted to hear.”

RP at 396-97.

If the witness denies making a statement about a collateral matter, the examiner is bound by the witness’s denial and may not introduce extrinsic evidence that the witness made the statement. This rule is a variation on the familiar, general rule that extrinsic evidence is inadmissible to contradict a witness on a collateral matter. *Tegland, 2007 Courtroom Handbook on Washington Evidence*, ER Rule 613, at 321, citing *State v. Carr*, 13 Wn. App. 704, 537 P.2d 844 (1975). Here, Loughmiller denied making an inconsistent statement about whether or not Loughmiller ran into the defendant after the incident. RP at 418-19. Whether or not Loughmiller met with the defendant between the incident and trial is collateral, and any extrinsic evidence, such as the testimony of witness to the prior inconsistent statement that was not presented by trial defense counsel, would have been inadmissible. *Tegland*, at 613.

### **3. Voluntary Intoxication**

The Appellant claims that trial defense counsel was ineffective for failing to request a jury instruction concerning voluntary intoxication, citing *State v. Kruger*, 116 Wn.App. 685, 691 (Div. 3, 2003). Br. of App. at 13.

**(a) Whether to Seek Voluntary Intoxication  
Jury Instruction Was a Trial Strategy or  
Tactic**

The defendant testified that he never saw the victim the evening in question, and never threatened the victim. RP at 505. A voluntary intoxication defense is inconsistent with a claim of denial, and trial defense counsel's failure to request a voluntary intoxication defense is a matter of trial strategy or tactics, which does not amount to ineffective assistance of counsel. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

The defendant testified at trial on his own behalf. RP 495-526. The defendant's defense was denial – that he never saw the victim that evening, and did not threaten the victim.

Q. Had you – Did you see Mr. Creed that evening on July 31 at all?

A. I didn't see him at all or communicate with him at all.

Q. What about Mr. Loughmiller that evening?

A. Nothing. No.

Q. Did you see Leilani that evening?

A. No.

Q. Did you threaten Mr. Creed with a gun?

A. It is impossible because I never saw him that evening.

Q. Okay, so that evening did you threaten Mr. Creed with a gun?

A. No.

Q. That evening did you ever ask Mr. Loughmiller to tie up Mr. Creed?

A. No.

Q. Did you ever threaten Mr. Loughmiller with a gun?

A. No.

RP at 505.

The defendant testified that he knew the victim, that they just knew each other and hung out with him twice. RP 495-96. The defendant testified that he never gave the victim methamphetamine “I never gave him anything”, and never sold methamphetamine to other people. RP at 497. The defendant testified that he lived with friends, including his fiancé. RP at 498. The defendant denied that he and Corey dealt drugs. RP at 500. The defendant testified that he was at Corey’s house that evening and left around 10 or 10:30. RP at 501. The defendant testified that he dropped off keys for Maria, his fiancée. RP at 501-02. The defendant got a phone call from Maria scolding him that the doors to the house were open. RP at 503. The defendant drives up to the street, and saw some officer there, and he got nervous since he had “a little bit of methamphetamine in my pocket.” RP at 504. He parked the car, and “started running, but not running very good because I was drunk” RP at 504. He testified that he did not have a gun that evening, and that he did not remember how the bullets got into his pocket that evening. RP at 504.

Through cross examination the defendant stuck with the story that he never encountered the victim Mr. Creed the evening in question, and never pointed a gun at anybody. RP at 525.

Trial defense counsel was not ineffective for not seeking a voluntary intoxication jury instruction since whether or not to seek such a jury instruction is clearly a matter of tactics, particularly in light of the defendant's testimony that he did not even encounter the victim or Mr. Loughmiller that evening. *McNeal*, 145 Wn.2d at 362. Had trial defense counsel sought the voluntary intoxication jury instruction, defense counsel would have had to argue alternatively, that the defendant was not present, as he testified, RP at 505, but that if he was present, then he was too drunk to form the requisite intent to kidnap the victim. If trial defense counsel had presented the second argument to the jury, counsel would have had to ask the jury to not believe the testimony of her client but instead argue that the defendant was present but could not form intent.

A typical voluntary intoxication instruction would read:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted] ... with [intent].

WPIC 18.10, *cited with approval in Coates*, 107 Wn.2d at 892, 735 P.2d 64; *State v. Hackett*, 64 Wn.App. 780, 786, 827 P.2d 1013 (1992).

Intent is an element of assault. So a voluntary intoxication instruction may well have been warranted here. *State v. Finley*, 97 Wn.App. 129, 134-35, 982 P.2d 681 (1999); *cf. Coates*, 107 Wn.2d at 892-93, 735 P.2d 64 (intoxication is not a defense to the forms of third degree assault that involve mental states of only criminal negligence).

*State v. Kruger*, 116 Wn.App. 685, 691-92, 67 P.3d 1147 (Div. 3, 2003)

The defendant here was charged with kidnapping, which required showing that the defendant “abducted Michael Creed with the intent to inflict extreme mental distress on Michael Creed.” RP at 532. While intent is an element of kidnapping in this case, the decision to seek the voluntary intoxication jury instruction is clearly a matter of trial tactics.

**(b) Appellant Fails to Show the Absence of Legitimate Strategic or Tactical Rationales for Not Asking for the Instruction**

The Appellant needs to show an absence of legitimate strategic or tactical rationales for not asking for the instruction. *State v. Kruger*, 116 Wn. App. 685, 691, 67 P.3d 1147 (Div. 3, 2003). However, the Appellant here fails to show that there was an absence of legitimate strategic or tactical rationales for not asking for the instruction. Rather, the Appellant argues that had there been the voluntary intoxication instruction the jury “could consider his [the defendant’s] intoxication in evaluating his mental state.” Br. of App. at 14. Further, the Appellant argues that 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.” Br. of App. at 14.

The Appellant’s argument is at odds with testimony of the defendant at trial that he never encountered Mr. Creed or Mr. Loughmiller that evening. RP at 505. The Appellant’s argument is also at odds with the theory of the case argued by trial defense counsel. Trial defense counsel argued that the motives of Mr. Creed and Mr. Loughmiller needed to be questioned, particularly in light of their changing testimony, and their drug use. RP at 559-60. The gist of trial defense counsel’s argument was that the defendant’s story made more sense than the story provided by Mr. Creed and Mr. Loughmiller; that the defendant visited Corey for most of the day, came back to drop keys off for Maria, ran into his friend Michelle, and then headed back home after hearing that his home was wide open. RP at 564-65. Trial defense counsel argued that the defendant ran (from the police) because he had methamphetamine on him, and had been drinking. RP at 564. This argument is consistent with the defendant’s testimony that he never encountered either Mr. Loughmiller or Mr. Creed on that evening. RP at 505.

Based on the testimony of the defendant that he never encountered the victim that evening, trial defense counsel pursued a theory of the case that questioned the credibility of Mr. Creed and Mr. Loughmiller, and

argued that the defendant's story made more sense than the stories of Mr. Creed and Mr. Loughmiller. The Appellant has failed to show that such a strategy was not legitimate, and as such the court should find that trial defense counsel was not ineffective for not asking for a voluntary intoxication instruction. See *Kruger*, 116 Wn.App. at 691.

The Appellant then launches into an interesting discussion that drug dealers have a distinct sub-culture, that Mr. Creed had assumed the risk, and that the defendant's intoxication "diminished his ability to comprehend that this type of event would cause extreme emotional distress to a person such as Mr. Creed." Br. of App. at 15.

First, the Appellant fails to cite to any authority for this novel approach to the law, that drug dealers are not subject to the same laws and the same protection under those laws as the rest of society. The legislature may enact laws intended to keep drug dealers away from school children by enacting the school zone enhancement in RCW 69.50.435. *State v. Coria*, 120 Wn.2d 156, 839 P.2d 890 (1992). The Appellant completely fails to show there is any rational basis for denying drug dealers the equal protection of the law. See, generally, the equal protection clause of the Washington State Constitution, Article 1, Section 12, and the Fourteenth Amendment to the United States Constitution, *State v. Schaaf*, 109 Wash.2d 1, 17, 743 P.2d 240 (1987).

#### 4. Interpreter Qualification

##### A. Standard of Review

The Appellant claims that conviction should be reversed because the trial court failed to administer the oath of interpreter as required under RCW 2.43.050. Br. of App. at 16. The Appellant fails to indicate whether the defendant raised an objection concerning the qualification or competency of the interpreter at trial. Br. of App. at 1-2, 16-22.

The court proceedings indicate that the interpreter, Marta Rutherford, was introduced to the jury as a “court certified Spanish-language interpreter.” RP at 61. See also *State v. Aquino-Cervantes*, 88 Wn.App. 699, 703, 945 P.2d 767 (Div. 2, 1997) (“The State also called Marta Ochoa-Rutherford, the certified court interpreter for Cowlitz County.”)

The State has reviewed the report of proceedings, and there was no objection by trial defense counsel to the use of Ms. Rutherford at that point or at any point during the trial. As such, the Appellant is raising the issue of the competency or qualification of the interpreter for the first time on appeal.

When a non-English-speaking person is a party to a legal proceeding, a “certified” interpreter must be appointed unless good cause is shown. RCW 2.43.030(1)(b); see *State v. Pham*, 75 Wn.App. 626, 633, 879 P.2d 321 (1994), review denied, 126 Wn.2d 1002, 891 P.2d 37 (1995). Mr. Serrano contends he is

entitled to a new trial because the interpreter at his trial was “qualified” but not “certified.” Because defense counsel did not object at trial, he may not raise the issue for the first time on appeal unless the error was of constitutional magnitude. *See* RAP 2.5(a)(3).

A defendant has a constitutional right to “a competent interpreter, [but] not necessarily a certified interpreter.” *Pham*, 75 Wn.App. at 633, 879 P.2d 321. Nothing in the record suggests the interpreter in this case was incompetent. The record certainly does not support Mr. Serrano’s allegation that the interpreter ordered him to answer as the interpreter directed. Nor is there any support for Mr. Serrano’s allegation that he did not speak Spanish and thus was unable to understand the Spanish-speaking interpreter. The record indicates Mr. Serrano was aware of what was happening and was able to participate throughout the proceedings. Because there is no basis for Mr. Serrano’s contention the interpreter was incompetent, he has no constitutional claim and may not raise the statutory issue for the first time on appeal.

*State v. Serrano*, 95 Wn.App. 700, 704, 977 P.2d 47 (Div. 3, 1999)

The Appellant claims that the right to an interpreter for a non-English speaking person is constitutional in nature, and cites to *United States ex. Rel. Negron v. New York*, 434 F.2d 386 (2<sup>nd</sup> Cir., 1970). Br. of App. at 17. In *Negron* no translator was provided to the defendant, who spoke no English.

The government does not dispute that at the time of his trial, Negron, a 23-year-old indigent with a sixth-grade Puerto Rican education, neither spoke nor understood any English. His court-appointed lawyer, Lloyd H. Baker, spoke no Spanish. Counsel and client thus could not communicate without the aid of a translator.[FN2] Nor was Negron able to participate in any manner in the conduct of his defense, except for the spotty instances when the proceedings were conducted in Spanish, or Negron’s Spanish words were translated into English, or the English of his lawyer,

the trial judge, and the witnesses against him were gratuitously translated for Negron into Spanish.

FN 2. At the hearing before Judge Bartels, Baker testified that he ‘was not able to speak with’ Negron ‘at all’ without an interpreter.

*U. S. ex rel. Negron v. State of N. Y.*, 434 F.2d 386, 388 (C.A.N.Y. 1970)

As such, *Negron* is not on point with the situation here with the Appellant. The Appellant here was not denied an interpreter. In order to raise the issue for the first time on appeal, the Appellant needs to show that the error is of a constitutional magnitude. *Serrano*, 95 Wn. App. at 704, citing RAP 2.5(a)(3).

## **B. Analysis**

### **(1) Respondent’s Motion to Supplement the Record or Alternatively to Designate the Oath of Interpreter as Clerk’s Papers**

The State has filed a motion with the court to allow the State to designate as clerk’s papers, or to supplement the record, with the oath of interpreter Marta Ochoa Rutherford. That oath of interpreter is on file with the Clerk of the Superior Court for Cowlitz County, and was filed as of February, 2005, prior to the trial court date in this case.

### **(2) No Prejudice Shown From Failing to Administer Oath**

There is nothing in the record to indicate that the supposed failure of the court to administer the oath of interpreter in this case resulted in any

prejudice to the Appellant. There is nothing in the Brief of Appellant to indicate that the failure of the trial court to have the interpreter, prior to beginning to interpret, take an oath as required under RCW 2.43.050, resulted in any prejudice to the defendant. Br. of App. at 16-17.

The Appellant claims that he 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.” Br. of App. at 19-20. The Appellant fails to cite to any authority for this proposition.

It is the Appellant’s burden to show that the error, if any, concerning the qualifications of the interpreter here, was of a constitutional magnitude. *Serrano*, 95 Wn.App. at 704, citing RAP 2.5(a)(3). The Appellant has failed to show any prejudice. See Br. of App. at 19-20. The Appellant has failed to include a single citation to the record to support the argument that there was any prejudice due to poor interpreting. See Br. of App. at 16-22. Rather, the Appellant argues that 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” again without citation to authority and without citation to the record. Br. of App. at 21.

An examination of the record will show that Marta Ochoa Rutherford was introduced as a court-certified Spanish language interpreter. RP at 61. There were numerous times the interpreter sought clarification from parties in order to fulfill her interpreting duties, which indicates the interpreters continued presence, and her active involvement in translating for the Appellant<sup>1</sup>. The Appellant testified that his English skills were such that “there are some words that I don’t know how to say, especially with things like - - things here in court. Q. Okay, so you understand simple terms, but the more complicated words you have problems with? A. Correct.” RP at 495. The defendant did not express any confusion concerning the proceedings or the questions being asked of him at any time during direct or cross examination. RP at 495-526. At one point the defendant corrected the interpreter. RP at 516.

In all fairness, and again the Appellant has not noted this in the brief, trial defense counsel at one point mentioned a “little bit” of a communication problem during the trial:

“[DEFENSE COUNSEL]: Your Honor, I need a second with my client because we’re having a little bit of communication problems with the interpreter, so if I could just have a second?

THE COURT: All right.

(Brief pause in Proceedings)

[DEFENSE COUNSEL]: Your Honor, I will need to take a break a little bit later. We’re just not communicating on this issue.

---

<sup>1</sup> See, for example, RP at 222, 232, 254, 278, 297, 393, 414, 442, 462, 463, 465, 477, 503, 506, 512, 516, 522, 524, and 525.

THE COURT: All right. Are you ready to proceed?  
[DEFENSE COUNSEL]: Yes.

RP at 288. However, it is not clear if the communication problem deals with the interpreter, or with the communication between the defendant and the trial defense counsel. Additionally, there is no showing by the Appellant that the ‘little bit of a communication problem’ rises to an error of constitutional magnitude. *Serrano*, 95 Wn.App. at 704, RAP 2.5(a)(3).

It is notable that the defendant did not express any confusion during cross examination, sticking with his story that he did not deal drugs, RP at 518, stuck with his story that he didn’t know how the bullets wound up in his pocket and that he didn’t have a pistol, RP at 524, and never pointed a gun at the victim because he never carries a gun. RP at 525. There is no indication in the defendant’s testimony that the defendant didn’t understand the questions that were asked of him, and the defendant’s responses to questions were in context and appropriate with his claim of denial – that he did not encounter the victim or witness Loughmiller that evening. There is nothing in the record to indicate that the supposed failure of the court to administer the oath of interpreter in this case prior to trial prejudiced the Appellant in any manner.

**V. RESPONSE TO STATEMENT OF ADDITIONAL GROUNDS**

The defendant filed a statement of additional grounds claiming that he was totally in the dark about the trial, that evidence should have been suppressed, and that witnesses admitted to lying to police officers before taking sweet offers from the state in return for their testimony, and that “none of this was ever remotely brought through to the defendant and/or the jury at the time as to strategic or tactical advantages or disadvantages.” SAG at 4. The defendant also claims that his rights were violated since all the elements of the charged crimes were not proved. SAG at 4. He claims that there was no nexus between the firearm and the defendant, and that the record will show that there was no weapon in his possession. SAG at 6.

The Appellant’s statement of additional grounds essentially raises a sufficiency of the evidence argument. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence

are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). See, generally, *State v. Thomas*, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004).

The record will show that Chris Loughmiller testified in open court that he lied to the officer “to try to get myself out of trouble”. RP at 396-97. Trial defense counsel cross-examined Loughmiller to indicate that his original range was 111 to 128 months, and because of the plea agreement he was facing 6 to 12 months, and that his motivation in testifying was to help prevent him getting a lot of prison time. RP at 408-09.

Concerning the Appellant’s claim that he did not have a gun in his possession, there was testimony by Creed that the defendant pointed a gun at Creed, cocked the gun, and struck Creed with that gun. RP at 247-48. Loughmiller also testified that Creed handed a gun to the defendant, and was holding the gun while telling Creed that he had messed up. RP at 377. Loughmiller testified that one of the guns handled by the defendant was a 9 mm Ruger. RP at 379. It is up to the jury to determine the

credibility of the testimony of Loughmiller and Creed. There was sufficient evidence to support all convictions.

## **VI. CONCLUSION**

There is nothing in the record to indicate that trial defense counsel was ineffective in this case. The Appellant has failed to show any prejudice from a supposed failure to impeach witness Loughmiller concerning a claimed meeting between the defendant and the witness that happened after the charged kidnapping incident. Whether or not such a meeting took place, and impeachment of witness Loughmiller concerning that meeting was a collateral matter, and will not support a claim of ineffective assistance of counsel.

There is nothing in the record to support any prejudice to the Appellant from the failure of trial defense counsel to request a voluntary intoxication jury instruction since the defendant at trial claimed not to have been present at the time of the kidnapping, and claimed that he did not meet or encounter either the victim or witness Loughmiller the evening of the claimed kidnapping.

There is nothing in the record to support that the Appellant was prejudiced by the failure of the court to administer the oath of interpreter in this case.

The conviction should be affirmed.

Respectfully submitted this 5 day of February, 2007.

SUSAN I. BAUR  
Prosecuting Attorney

By   
G. TIM GOLLO/WSBA #11970  
Deputy Prosecuting Attorney  
Representing Respondent

