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COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH HAWKINS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge John McCarthy

No. 10-1-00577-5

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defense trial counsel was ineffective where his representation did not fall below an objective standard of reasonableness and the defendant suffered no prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

On February 8, 2010, the State charged Kenneth Hawkins, a.k.a. “Ken Loc” with three counts: Count I, Conspiracy to Commit Murder in the First Degree, and/or Robbery in the First Degree, and/or Assault in the First Degree, and/or Drive-By Shooting, and/or Burglary in the First Degree, and/or Theft in the First Degree, and/or Possession of Stolen Property in the First, and/or Identity Theft in the First Degree, and/or Theft of A Motor Vehicle, and/or Unlawful Delivery of a Controlled Substance, and/or Unlawful Possession of a Controlled Substance With Intent to Deliver, and/or Unlawful Possession of a Firearm in the First Degree; Count II, Robbery in the First Degree; Count III, Theft of a Motor Vehicle. CP 1-3. Count I was alleged to have occurred during the period between December 1, 2008, and January 15, 2010. CP 2. Counts II and III were alleged to have occurred August 26, 2009. CP 2-3. The information also identified 31 co-defendants. CP 1.

An Amended/Corrected Information was filed March 24, 2010, that added four additional co-defendants, and expanded the charging period on Count I by three months to September 1, 2008, to January 15, 2010. CP 26-29.

On March 30, 2010, the case was assigned to the Honorable Judge Thomas Felnagle. CP 165. On May 26, 2010, the court granted in part a defense Knapstad motion and limited the conspiracy claim in Count I to the offenses charged in Counts II and III. CP 30; 35-38; 90-92.

Because this case was originally charged as part of a broader conspiracy, total discovery in the case was over 5,000 pages. RP 07-19-10, p. 9, ln. 21-22; p. 11, ln. 12-13. However, the great majority of that evidence was not directly relevant to the charges in this case once Judge Felnagle entered his ruling limiting the scope of the conspiracy charge. *See* RP 07-19-10, p. 18, ln. 11-16. In preparing this case for trial, the prosecutor realized that in the 5,000 pages of discovery he could not find copies of at least one report directly related to the police incident number that was the basis of this case. RP 07-21-10, p. 189, ln. 10-14. So the prosecutor went to the LESA [Law Enforcement Support Agency] Records to review the incident report and copied anything he did not recognize. RP 07-21-10, p. 189, ln. 15-18. That same day he sent a copy

to defense counsel. RP 07-21-10, p. 189, ln. 18-19. Defense counsel received those items on Friday July 16, 2010. RP 07-21-10, p. 187, ln. 7-12.

On July 19, 2010, the case was reassigned to the Honorable Judge John McCarthy for trial. CP 166. The defense filed motions *in limine* that same day. CP 93-102.

On July 19, 2009, the defendant also filed a *pro se* motion and memorandum of law for a continuance along with a support affidavit for a continuance. In that motion, arguing for a continuance under “CrR 3.3(f)(2) to avoid an issue of RPC 8.4.” CP 167-170. In the supporting affidavit the defendant claimed that:

(1): Counsel has not interview [sic] any of the witnesses;

(2): Counsel has not let me read my police reports of the crime;

(3) Counsel has not provided my [sic] with any of the discovery so I can be prepared for trial;

(4): Photo lineup-ups or photographic line-ups conducted of defendant;

(5) Any recorded or written statements of the victims;

(6) Witness list was never seen til July 16th, 2010, three days prior to trial; and

(7) Witness list of my defense have not been contacted to prove character of this defendant;

finally:

(8): Non of the arresting officers were interviewed about their statements made to see who was questioned due to there could be a showing of a possible witness that is creditable and beneficial for the defendant along with a lack of police investigation making it favorable for the State for a conviction.

CP 167-68. The court denied the motion. RP 07-19-10, p. 20, ln. 2-25.

The court empaneled a jury the following day on July 20, 2010. CP 171-74; CP 175.

On July 21, 2010, the defense raised and the court considered a motion for a mistrial. The motion was based on the fact that some discovery that the defense did not receive until July 16, 2010, as well as the fact that an informant referred to in that discovery who identified the defendant as a possible person of interest from video of the robbery was not listed in the discovery as a “confidential” informant. RP 07-21-10, p. 188, ln. 22-25. The court denied the motion for a mistrial. RP 07-21-10, p. 194, ln. 8 to p. 196, ln. 9.

The jury returned verdicts of Guilty on all three counts. CP 142, 144-45. However, in special verdict forms for each count the jury no to the gang enhancement special verdicts. CP 146-48.

On August 9, 2010, the defendant filed a *pro se* Motion For Relief of Judgment and Order and supporting memorandum claiming:

On the date of July 19, 2010, the defendant had filed a motion along with a written statement requesting a continuance due to the reasons stated below:

- (1) Attorney and client never had ample time to go over evidence of case;
- (2) Attorney never had time to interview all witnesses;

- (3) A new witness was added to the witness list; and
- (4) Witness for defendant was never allowed to be added to defenses [sic] witness list due to lack of Pre-trial discovery matters due to defense attorneys [sic] full schedule and with “4000 pages” of discovery.

CP 176; 177-82. The court denied the motion. RP 07-21-10, p. 194, ln. to p. 196, ln. 9.

On September 3, 2010, the State sentenced the defendant to a total of 171 months.

The defendant timely filed a notice of appeal on September 3, 2010. CP 162.

2. Facts

On August 26, 2009, Micah Wells was a 32 year old full-time college student studying culinary arts at Clover Park. RP 07-21-10, p. 240, ln. 3-13; p. 241, ln. 18. Micah Wells was at the 54th Street Sports Bar and had been there about an hour drinking. RP 07-21-10, p. 16 to p. 242, ln. 3. He drove there in a brown Crown Victoria with an interior he customized. RP 07-21-10, p. 242, ln. 8-20. Micah estimated that the car was worth \$10,000.

As Micah Wells left the bar, he stopped to talk to a couple groups of patrons. RP 07-21-10, p. 247, ln. 3-22. That took about 20 minutes. RP 07-21-10, p.246, ln. 25 to p. 247, ln. 23 to p. 248, ln. 2.

Brandon Starks met up with his friend, the defendant Kenneth Hawkins, at around 9:00 or 10:00 p.m. RP 07-21-10, p. 294, ln. 5 to p.

295, ln. 7. At about 11:45 p.m. to 12:00 a.m., Starks rode with Hawkins in Hawkins' black Yugo to the 54th Street Sports Bar. RP 07-21-10, p. 294, ln. 6-9; p. 295, ln. 8-17; p. 296, ln. 8-9. They were joining two friends who were there, Manuel Hernandez and Curtis Hudson. RP 07-21-10, p. 296,ln. 11-14. While Hawkins and Starks did not go to the bar with the intention to commit a crime, they were open to the possibility of committing a crime if the opportunity arose. RP 07-21-10, p. 297, ln. 7-18.

When Hawkins and Starks got to the bar, they did not go inside, but rather were hanging outside in the parking lot with people. RP 07-21-10, p.297, ln. 25 to p. 298, ln. 6. Starks was not of legal drinking age, but that did not have anything to do with why he did not go inside. RP 07-21-10, p. 298, ln. 7-12.

Starks also knew Micah Wells because he used to go to school with Manuel [Hernandez] and Starks knew Micah Wells' car. RP 07-21-10, p. 298, ln. 13-25.

Curtis Hudson proposed that they take Wells' money. RP 07-21-10, p. 7-19. Taking the car was not part of Hudson's original proposal, but after Brandon Starks agreed to take Wells' money, he knew he could also take Wells' car. RP 07-21-10, p. 299, ln. 18-22. Brandon Starks then told Hudson and Hawkins about his idea to also take Wells' car. RP 07-21-10, p. 300, ln. 3-13. Hawkins said that he was "down" or that he was "with it," meaning that he wanted to be part of it and was going to do it. RP 07-

21-10, p. 300, ln. 22-25. Hawkins said he was broke and wanted the money. RP 07-21-10, p. 301, ln. 1-5. Manny Hernandez said he didn't want to be part of it and went back into the bar. RP 07-21-10, p. 302, ln. 4-9.

Brandon Starks, Curtis Hudson and Kenneth Hawkins first had contact with Micah Wells a few minutes before they took his stuff. RP 07-21-10, p. 302, ln. 17-12; p. 303, ln. 8-10. Wells was drunk, and talking crazy and one of them asked where he was from. RP 07-21-10, p. 302, ln. 24 to p. 4. Starks thought Wells said he was from Atlanta. RP 07-21-10, p. 303, ln. 15-16.

After talking to the groups in the parking lot for about 20 minutes, Micah Wells continued to his car, he was struck out of no where. RP 07-21-10, p. 248, ln. 3-4. Hawkins punched Micah Wells to the ground where Hawkins and Hudson punched him. RP 07-21-10, p.304, ln. 4-23. Brandon Starks grabbed the key chain that was hanging out of Micah Wells' pocket and ran to his car. RP 07-21-10, p. 304, ln. 7-18. Curtis Hudson took Wells' necklace. RP 07-21-10, p. 304, ln. 8-9

In all, Micah Wells was hit about five times. RP 07-21-10, p. 249, ln. 21-25. Micah Wells was knocked to the ground. RP 07-21-10, p. 250, ln. 10-13. After that he didn't really recall what happened to him. RP 07-21-10, p. 250, ln. 14-15. His wallet and keys were removed from his possession. RP 07-21-10, p. 250, ln. 25 to p. 251, ln. 1. He also saw his car being stolen. RP 07-21-10, p. 255, ln. 17-19.

The proceeds of the robbery were to be split between Kenneth Hawkins, Curtis Hudson and Brandon Starks. RP 07-21-10, p. 306, ln. 7-12

After the robbery, Micah Wells' head wasn't there and he just walked off and as he did so he called police and reported his car stolen. RP 07-21-10, p. 252, ln. 12 to p. 253, ln. 7.

On August 26, 2009, Tacoma Police Officer Steven Butts was working as a patrol officer and responded to an incident at the 54th Street Sports bar at about 12:20 a.m. RP 07-20-10, p. 68-70. Officer Butts met with the caller, Micah Wells, a couple blocks away from the sports bar. RP 07-20-10, p.70, ln. 22 to p. 71, ln. 8.

The officers observed that Micah Wells appeared to have a cut on his forehead, and there was blood from the middle of his forehead down, kind of dripped down to his nose that appeared to be dried. RP 07-20-10, p. 72, ln. 3-6. It appeared to probably be a minor injury, but you never know, so the officers called the fire department to administer treatment. RP 07-20-10, p. 72, ln. 7-11.

Mr. Wells was very excited when the officers first arrived, and almost a little bit hysterical. RP 07-20-10, p.71, ln. 12-15. As they talked further, Mr. Wells was very nervous about cars driving by and was afraid that something else was going to happen to him as he was standing there talking to Officer Butts in view of the traffic going by. RP 07-20-10, p.71, ln. 15-20. Thus, Mr. Wells was displaying fear to Officer Butts even as he

was talking to two uniformed police officer with two marked patrol cars.
RP 07-20-10, p. 71,ln. 21-25.

C. ARGUMENT.

1. TRIAL COUNSEL WAS NOT INEFFECTIVE

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995){ TA \l "*State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995)" \s "State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)" \c 1 }.

Moreover, to raise a claim of ineffective assistance of counsel for the first time on appeal, the defendant is required to establish from the trial record: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. *McFarland*, 127 Wn.2d at 333-34.

However, where an appellant claims ineffective assistance of counsel for trial counsel's failure to object to the admission of evidence, the burden on the appellant is even higher. To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: not objecting fell below prevailing professional norms; 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. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004){ TA \l "*In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004)" \s "In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004)" \c 1 }. To prevail on this issue, the appellant must also rebut the presumption that the trial counsel's failure to object "can be characterized as legitimate trial strategy or tactics." *In re Pers. Restraint of Davis*, 152 Wn.2d at 714 (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002){ TA \l "*State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)" \s "State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)" \c 1 } (emphasis added in original)). Deliberate tactical choices may only constitute ineffective assistance if they fall outside the wide range of professionally competent assistance, so that "exceptional deference must be given when evaluating counsel's strategic decisions." *In re Pers. Restraint of Davis*, 152 Wn.2d

at 714 (quoting *McNeal*, 145 Wn.2d at 362).

Courts engage in a strong presumption that counsel's representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. The burden is on an appellant alleging ineffective assistance

of counsel to show deficient representation based on the record established in the proceedings below. *McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) } Wn.2d at 334.

Here, the defense claims that trial counsel for the defendant was ineffective for several reasons. Those reasons are not carefully separated and treated individually. Rather, they are lumped together as part of a general claim of ineffective assistance. The defense claim of prejudice is then also dealt with generally, rather than being tied to specific claimed errors. In responding to the defense claim, the State has attempted to break the defense claim down by each alleged occurrence or type of ineffective assistance, and then connect that with the claimed prejudice.

The defense claims that trial counsel was ineffective for a number of different reasons. First, trial counsel did very little to investigate the case before trial. Br. App. 20. Second, counsel failed to apprise himself of important facts. Br. App. 20. Third, counsel did not make sure he had enough time to adequately reflect and prepare for trial. Br. App. 20. Fourth, counsel failed to pursue witness interviews except for talking to the victim the week before trial. Br. App. 20-21. Fifth, counsel failed to provide the defendant with discovery materials so he could contribute to his own defense. Br. App. 21. Sixth, and most importantly, counsel did not read and reflect on new discovery or inform the trial court that he

needed additional time to do so. Br. App. 21.

a. The Defense Fails To Establish That Trial Counsel Did Little To Investigate Or Prepare The Case For Trial.

The defense claims that trial counsel did very little to investigate the case before trial. Br. App. 20. The defense provides no citation to the record in support of this claim. Nor is this claim supported by the record, which does not contain detailed information as to what defense counsel did or did not do in preparation for trial. Rather, this claim appears to be a general inference from the other specific claims the defense makes. Those claims are addressed in the following sections.

However, the record does not show that counsel did little to investigate or prepare the case for trial. Moreover, the defendant shows no prejudice in support of such a claim.

b. Defense Counsel Did Not Fail To Apprise Himself Of Important Facts

The defense claims that trial counsel failed to apprise himself of important facts. Br. App. 20. The defense provides no citation to the record in support of this claim. However, some of the defense arguments appear to fall under this description.

The defense specifically claims that trial counsel's failure to carefully review the State's evidence prior to trial resulted in his being

utterly unaware of the involvement of a confidential informant. Br. App. 22 (citing 7 RP 113-14, 134-35, 192, trial counsel was actually aware of the involvement of the informant. RP 07-21-10, p. 2-10. What trial counsel was not aware of was the fact that the informant was “confidential.” RP 07-21-10, p. 188, ln. 10-13; ln. 23-24.

The status of the informant as “confidential” is a distinction without a difference where no testimony by the confidential informant was admitted at trial and the only role of the confidential informant was to review the video of the robbery and identify to police possible suspects they should further investigate. RP 07-21-10, p. 194, ln. 21 to p. 195, ln. 22. Accordingly, counsel’s performance was not deficient in regard to this issue, nor did the defendant suffer any prejudice.

Without citing to the record, the defense also claims that trial counsel failed to grasp the fact that his client’s picture had been shown to the victim, Micah Wells, in a montage and Wells was unable to identify his client. Br. App. 21. However, as the defense acknowledges in their brief, defense counsel was advised of this fact prior to the start of trial. RP 07-19-10, p. 16, ln. 10-19. Further, trial counsel later claimed that he actually was aware of this fact. RP 07-21-10, p. 193, ln. 8-16. Therefore, again, counsel’s performance at trial was not deficient, and this alleged deficiency could not have resulted in an prejudice to the defendant.

Moreover, this fact was largely irrelevant at trial since the testimony at trial of the victim, Micah Wells, testified that he was so intoxicated at the time that he could not remember who took his car and specifically stated on direct examination that he could not identify his attackers. RP 07-21-10, p. 269, ln. 3-22 to p. 270, ln. 17. The identification of the defendant as the person who assaulted Micah Wells came not from the victim himself, but rather from Hawkins' co-defendants, Brandon Starks and Curtis Hudson, who testified against Hawkins. RP 07-21-10, p. 304, ln. 7-8; RP 07-21-10, p. 383, ln. 19-25.

As trial counsel himself noted, "I was aware of that [Micah Wells' inability to identify the defendant in a montage], and it was of no concern because it didn't link my client to this." RP 07-21-10, p. 193, ln. 15-16.

c. Trial Counsel Did Not Fail To Ensure That He Had Adequate Time To Prepare For Trial

The defense claims that trial counsel did not make sure he had enough time to adequately reflect and prepare for trial. Br. App. 20. The defense provides no citation to the record in support of this claim.

The defendant prepared a *pro se* motion for a continuance. RP 07-19-10, p. 3, ln. 12-19, p. 9, ln. 15-17. In the course of presenting that motion to the court, defense counsel did ask for a one to two week

continuance for personal reasons relating to medical issues pertaining to his girlfriend. RP 07-19-10, p. 10, ln. 1-3. Defense counsel then also went on to also ask the court for a one or two week continuance to further prepare for trial. RP 07-19-10, p. 11, ln. 5-9.

After reviewing the case, the court preliminarily denied the motion for a continuance and decided to proceed with jury selection. RP 07-19-10, p. 20, ln. 24 to p. 21, ln. 10. In making its ruling, the court noted that out of the 5,000 pages of total discovery from the initially broader Hilltop Crips Conspiracy case, the prosecutor had what appeared to be less than 100 that were relevant to this case. RP 07-19-10, RP 07-19-10, p. 9, ln. 21-22; p. 11, ln. 12-13.; p. 18, ln. 14-15. Prior to making its ruling, the court made specific inquires of defense counsel and clarified that defense counsel had interviewed the one victim of the crime. RP 07-19-10, p. 11, ln. 20 to p. 12, ln. 8. The court also discussed the co-defendants who were testifying against the defendant and elicited that although defense counsel did not interview them directly, they were interviewed numerous times by other attorneys on the case and that he had reviewed those interviews. RP 07-19-10, p. 12, ln. 11 to p. 13, ln. 10.

The court then summarized the case by noting it was a fairly straightforward case with alleged codefendants who made an agreement with the state, one alleged victim, and then the police officers, and no

eyewitnesses other than that. RP 07-19-10, p. 13, ln. 14-20. In denying the continuance, the court stated that it anticipated that while the case was pending, defense counsel would go through and identify the other reports he thought relevant and that the defendant should review. RP 07-19-10, p. 20, ln. 20-25.

Contrary to the defense claim, trial counsel did ask for a continuance, and that request was denied. Nor was that denial unreasonable, where the victim had been interviewed, counsel had reviewed interviews with the primary testimonial co-defendant, and the 100 pages of relevant discover was an amount that could reasonably be reviewed in an evening, even if the trial counsel were to have had no prior familiarity with it.

The defense also claims that trial counsel admitted that had he known prior to trial about the police report referencing the CI's involvement, he would have needed to investigate it further. Br. App. 22 (citing 7 RP 188, 193). However, that testimony was minimally irrelevant because it only served as the basis for the police directing their investigation toward the defendant in the first place. *See* RP 07-20-10, p. 115, ln. 5-16; RP 07-21-10, p. 194, ln. 21 to p. 195, ln. 5. It was not evidence that established the guilt of the defendant. RP 07-21-10, p. 195, ln. 15-20.

Further, the defense has shown no prejudice from the evidence that the defendant was initially identified by the confidential informant. To the contrary, trial counsel used that evidence to insinuate that the identification of the defendant as a suspect may have been deficient and the investigation inadequate. *See* RP 07-20-10, p. 120, ln. 25 to p. 123, ln. 1.

The defense claims that “The CI affirmatively told the police that “Ken Loc” appeared in the video, placing Hawkins at the scene.” Br. App. 26 (citing “7 RP 123.”) However, that claim is not supported by the record cited by defense.

Rather, the record shows, “With respect to the informant, the informant was shown the video and asked to identify people who appeared in the video, correct?” RP 07-20-10, p. 123, ln. 13-15. This occurred on re-direct. No mention of the name “Ken Loc” is made on page 123.

Shortly before, on cross examination, defense counsel elicited that “Ken Loc” was one of the names “thrown out” by the informant, and that another officer, Detective Ringer, suggested that name belonged to the defendant. RP 07-20-10, p. 123, ln. 1-6. Using an electronic search of the transcript, that appears to be the first occurrence of the use of the name “Ken Loc” in that day’s proceedings. A little later, on re-cross, the following exchange occurred:

Q. And through all of this, until you sat down with a confidential informant and/or Mr. Starks, Mr. Hudson or Mr. Hernandez, my client's name never came up, did it?

A. Again, I did not interview any of those defendants regarding the incident, but the name K-Loc or Ken Loc came up when the confidential informant was shown the video.

RP 07-20-10, p. 129, ln. 22 to p. 130, ln. 3. On further re-direct, the State had the following exchange:

Q. By the 17th, you had information that the defendant both had the name K-Loc and may have been involved in the incident; is that correct?

A. That's correct.

Q. And that's the reason you put the montage together containing his image?

A. That's correct.

RP 07-20-10, p. 132, ln. 23 to p. 133, ln. 4.

Nothing in the record supports the defense claim that the informant "affirmatively told the police that "Ken Loc" appeared in the video. *See* also, RP 07-20-10, p. 109, ln. 23-25; p. 113, ln. 24 to p. 114, ln. 2; p. 114, ln. 15-18; p. 115, ln. 6-13; p. 116, ln. 1-6. Rather than showing any prejudice, what the defense has shown is that trial counsel made a tactical decision to raise the informant's identification of "Ken Loc" or "K-Loc" in order to challenge how the defendant came to be a subject of the

investigation in the first place. Trial counsel's tactical decision was not ineffective, nor did it prejudice the defendant.

d. Trial Counsel Was Not Ineffective For Failing To Interview Some Witnesses Where Those Witnesses Had Been Extensively Interviewed By Other Attorneys In The Larger Conspiracy Case

The defense claims that trial counsel was ineffective because he failed to pursue witness interviews except for talking to the victim the week before trial. Br. App. 20-21 (citing 7 RP 12, 190). As indicated in section C. above, trial counsel did not interview the testimonial co-defendants. However, he did review extensive interviews of those defendants by other attorneys in the larger conspiracy case. Nothing in the record indicates that the co-defendants deviated in any significant degree from the information provided in the discovery. As such, counsel's conduct was not ineffective. Nor has the defense shown any prejudice.

e. Trial Counsel Was Not Ineffective Because He Provided His Client With A Summary of Some Police Reports Rather Than The Reports Themselves

The defense claims that trial counsel was ineffective because he failed to provide the defendant with discovery materials so he could contribute to his own defense. Br. App 21 (citing 7 RP 10, 17). In the hearing for the continuance, defense counsel acknowledged that he had

not provided the defendant with all the police reports because of the massive volume of discovery, that he had given his client some of the discovery, but the defendant hadn't read all of it, and that defense counsel had summarized what he did not provide to the defendant.¹ RP 07-19-10, p. 10, ln. 18-25.

With *the pro se* motion filed the day of trial, the defendant was conveying that he didn't think counsel's summary was sufficient and that he wanted to see the actual police reports. RP 07-19-10, p. 10, ln. 25 to p. 11, ln. 2. Defense counsel asked if he could provide unredacted copies of the discovery to his client, noting that the Department of Assigned Counsel did have redacted copies of the discovery available to the defense, but that it was for all 5,000 pages in the multi co-defendant case and that only several hundred of those pages would apply to this defendant's case. RP 07-19-10, p. 11, ln. 7-19.

The court denied the motion for the continuance. Nothing in the record suggests that thereafter trial counsel failed to provide discovery to the defendant, or even if he did so fail, that the defendant was unable to contribute to his defense. Such an impact is unlikely where the defendant already had some of the discovery, and the remaining discovery was

¹ Defense counsel estimated the discovery at some 5,000 pages. RP 07-19-10, p. 9, ln 21-22; p. 11, ln. 12-13.

summarized by defense counsel. This is particularly so where even the court was able to summarize the sources of evidence in the case in denying the motion for a continuance.

f. Trial Counsel Was Not Ineffective Because He Did Not Give Supplemental Discovery A Whole Lot of Look and Just Glanced at it.

The defense claims trial counsel was ineffective because he did not read and reflect on new discovery or inform the trial court that he needed additional time to do so. Br. App. 21 (7 RP 187). The defense claims that on the second day of trial defense counsel finally admitted, “I will be honest with you, I did not give [the new discovery] a whole lot of look. I just kind of glanced at them and then started dealing with other things...” Br. App. 24 (quoting 7 RP 187).

This quote comes from the defense motion for a mistrial. RP 07-21-10, p. 186, ln. 17 to p. 187, ln. 19. July 21, 2010 was a Wednesday. The preceding Friday, the State had provided the defense with 66 pages of additional discovery as a result of determining that the State may not have received all the records on the incident from LESA [Law Enforcement Support Agency] Records. RP 07-21-10, 186, ln. 1-5; p. 189, ln. 10-18. The prosecutor sent copies of that material to defense trial counsel the same day. RP 07-21-10, p. 189, ln. 18-19.

Defense counsel moved for a mistrial for two reasons, because the informant was not listed as a “confidential” informant, and because the discovery was not timely. RP 07-21-10, p. 188, ln 22-25.

As indicated in section b. above, the failure to describe the informant as a “confidential informant” is legally irrelevant.

In denying the motion for a mistrial, the court noted that there was no evidence of deliberate concealment, or even of material or substantial evidence. RP 07-21-10, ln. 9-12. While defense counsel indicated that he “just kind of glanced at the additional discovery”, there is nothing to suggest this was in any way deficient or ineffective. The only issue trial counsel identified as arising from the discovery was that he was unaware that the informant was “confidential.” However, that was because the additional discovery didn’t describe the informant as “confidential”. RP 07-21-10, p. 188, ln. 10-12, 23-24. Nothing in the record suggests that trial counsel was inadequately prepared based on having only just glanced at the additional discovery. Nor has the defense shown any prejudice.

The defense has failed to show that any of the alleged deficiencies by trial counsel in fact rose to the level of ineffective assistance of counsel. More significantly, the defense has failed to show any prejudice

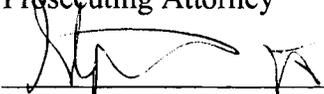
whatsoever. They have certainly not demonstrated a reasonable likelihood that the result of the trial would have been different. Accordingly, the claim of ineffective assistance of counsel should be denied.

D. CONCLUSION.

The Court should reject the claim of ineffective assistance of counsel where trial counsel was in fact not ineffective and especially where the defendant suffered no prejudice. The defense is not entitled to second guess trial counsel's tactical decisions, and have made no showing that there was a reasonable likelihood that the outcome of the trial would have been different. The appeal should be denied.

DATED: July 22, 2011.

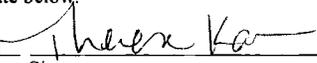
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11 JUL 22 PM 4:39
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.22.11 
Date Signature