

COURT OF APPEALS
DIVISION II

11 AUG -8 AM 10:24

STATE OF WASHINGTON
BY 
DEPUTY

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

NO. 41468-6-II

STATE OF WASHINGTON,

Respondent,

vs.

BILLIE JO FELLAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00153-6

BRIEF OF RESPONDENT

BRIAN PATRICK WENDT, WSBA # 40537
Deputy Prosecuting Attorney

Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, WA 98362-3015
(360) 417-2297 or 417-2296

Attorney for Respondent

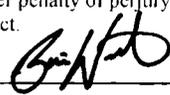
SERVICE	<p>Mr. Jared Steed Nielsen, Broman & Koch 1908 E. Madison Street Seattle, WA 98122</p>	<p>This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: August 5, 2011, at Port Angeles, WA <u></u></p>
----------------	--	--

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	ii
I. COUNTERSTATEMENT OF THE ISSUES	1
II. STATEMENT OF THE CASE	1
III. ARGUMENT.....	10
A. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL WITHOUT A FACT-FINDING HEARING.....	10
B. FELLAS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.....	14
IV. CONCLUSION	16

TABLE OF AUTHORITIES

<u>U.S. Supreme Court Cases:</u>	<u>Page(s)</u>
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	14-16
 <u>Washington Cases:</u>	
<u>Page(s)</u>	
<i>Dean v. Group Health Cooperative of Puget Sound</i> , 62 Wn. App. 829, 816 P.2d 757 (1991)	11-12
<i>In re Pers. Restraint of Flemming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001)	15
<i>In re Pers. Restraint of Pirtle</i> , 136 Wn.2d 467, 965 P.2d 593 (1998)	15
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997)	11
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	13
<i>State v. Forest</i> , 125 Wn. App. 702, 105 P.3d 1045 (2005)	11, 13
<i>State v. Foster</i> , 140 Wn. App. 266, 166 P.3d 726 (2007)	15-16
<i>State v. Jackson</i> , 75 Wn. App. 537, 879 P.2d 307 (1994).....	11, 13
<i>State v. Latham</i> , 100 Wn.2d 59, 667 P.2d 56 (1983)	14
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	14-15
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	11
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	11
<i>State v. Walker</i> , 19 Wn. App. 881, 578 P.2d 83 (1978).....	14
<i>State v. Wilson</i> , 71 Wn.2d 895, 431 P.2d 221 (1967)	11

State v. Billie Jo Fellas: COA No. 41468-6-II
Brief of Respondent

<u>Other Cases:</u>	<u>Page(s)</u>
<i>State v. Rodriguez</i> , 244 Neb. 707, 509 N.W.2d 1 (1993).....	14

I. COUNTERSTATEMENT OF THE ISSUES:

1. Did the trial court err by denying the defendant's motion for a new trial without a formal fact-finding hearing with live testimony when (1) such a hearing is not required under CrR 7.5; (2) the trial judge carefully reviewed the record, verbatim transcript of proceedings, and his own observations and memories from trial when it denied the motion for new trial; and (3) the defense never objected to the absence of a formal fact-finding hearing with live testimony?
2. Did the defendant receive ineffective assistance of counsel when her attorney did not demand a fact-finding hearing where family members could testify in support of her motion for a new trial?

II. STATEMENT OF THE CASE:

Underlying Facts:

On August 7, 2008, the Olympic Peninsula Narcotic Enforcement Team (OPNET)¹ worked with confidential informant, Rhonda Zuzich, to purchase methamphetamine. RP (8/9/2010) at 35, 41, 50. Prior to its investigation, OPNET searched Zuzich's person and vehicle. RP (8/9/2010) at 40-41, 51, 87; RP (8/10/2010) at 16, 24. The search produced no money, drugs, or other contraband. RP (8/9/2010) at 41; RP (8/10/2010) at 16, 24.

¹ OPNET is a regional drug task force that is a "conglomerate of officers from multiple agencies on the Olympic Peninsula[.]" Its "sole purpose is to work narcotics related crime." RP (8/9/2010) at 27.

Following the search, Zuzich drove her vehicle to Michelle Knotek's apartment. RP (8/9/2010) at 51. OPNET officers followed closely behind. RP (8/9/2010) at 89; RP (8/10/2010) at 25. Shortly after Zuzich arrived at the apartment complex, Knotek's vehicle entered the parking lot. RP (8/9/2010) at 89; RP (8/10/2010) at 25.

Zuzich asked Knotek if she had any methamphetamine for sale. RP (8/9/2010) at 61-62. Knotek said she did not, but that she could purchase methamphetamine from someone named "B.J." (Billie Jo Fellas). RP (8/9/2010) at 51, 62, 64. Knotek and Zuzich drove their vehicles to a local bank, where Zuzich pretended to withdraw money.² RP (8/9/2010) at 52, 63-64, 90-91; RP (8/10/2010) at 26. Zuzich gave \$100 to Knotek. RP (8/9/2010) at 52. The two then drove their vehicles to a Rite Aid in Port Angeles, Washington. RP (8/9/2010) at 52, 57, 64, 92; RP (8/10/2010) at 17-19, 26.

At the Rite Aide, Knotek used Zuzich's cell phone to call Fellas. RP (8/9/2010) at 52-53, 63-64. Fellas told Knotek to meet her at Lincoln Park because there had already been too much "traffic" at her apartment. RP (8/9/2010) at 64. Knotek left to meet Fellas, while Zuzich waited at a local Starbucks. RP (8/9/2010) at 52-53, 58, 65; RP (8/10/2010) at 19.

² Zuzich already possessed \$100 in pre-recorded bills that she received from OPNET officers. RP (8/9/2010) at 88, 128; RP (8/10/2010) at 24.

OPNET officers followed Knotek's vehicle,³ while others monitored Zuzich at the coffee shop. RP (8/9/2010) at 93, 103; RP (8/10/2010) at 19, 26.

At Lincoln Park, Knotek parked alongside Fellas' vehicle. RP (8/9/2010) at 66, 93, 95, 97-98; RP (8/10/2010) at 27-28, 53-54. Knotek entered Fellas' vehicle, she purchased a baggie of methamphetamine. RP (8/9/2010) at 66. After speaking with Fellas for 20 minutes, Knotek got back in her vehicle and proceeded directly to Zuzich. RP (8/9/2010) at 66: RP (8/10/2010) at 28.

Back at Starbucks, Knotek gave Zuzich methamphetamine and \$20 change. RP (8/9/2010) at 53, 66-67; RP (8/10/2010) at 19-20. Zuzich placed the drugs in her vehicle's ashtray and returned to an OPNET location in Sequim, Washington. RP (8/9/2010) at 54, 102; RP (8/10/2010) at 20-21.

OPNET officers searched Zuzich and her vehicle a second time. RP (8/9/2010) at 42-43, 54, 103; RP (8/10/2010) at 12-13, 21, 28. The officers found the drugs Zuzich put in the ashtray. RP (8/9/2010) at 103; RP (8/10/2010) at 13, 21, 28. The drugs tested positive for

³ OPNET officers briefly lost sight of Knotek's vehicle en route to Lincoln Park. RP (8/9/2010) at 93-94, 126-27, 137-38; RP (8/10/2010) at 17-18, 26, 29.

methamphetamine. RP (8/9/2010) at 106; RP (8/10/2010) at 36. No other drugs were discovered on Zuzich or inside her vehicle.

On April 14, 2009, OPNET arrested Knotek for delivery of methamphetamine.⁴ RP (8/9/2010) at 67, 71, 73, 75, 79, 115, 119, 128. Knotek agreed to cooperate with law enforcement. RP (8/9/2010) at 68, 76, 116, 136; CP 199-22. Knotek told officers she purchased the drugs she delivered to Zuzich from Fellas. RP (8/9/2010) at 129-30. In exchange for her cooperation, Knotek was permitted to enter a drug court / diversion program. RP (8/9/2010) at 76-82; CP 199-22.

On April 16, 2009, OPNET officers knocked on Fellas' apartment door. RP (8/9/2010) at 119; RP (8/10/2010) at 39. After the officers identified themselves, Fellas invited them into her home. RP (8/9/2010) at 121; RP (8/10/2010) at 39. The officers declined the invitation. RP (8/9/2010) at 121; RP (8/10/2010) at 39. Fellas exited her apartment to speak with law enforcement on the outside balcony. RP (8/9/2010) at 121; RP (8/10/2010) at 39-40.

When the officers informed Fellas she was under arrest, she immediately tried to reenter her apartment. RP (8/9/2010) at 121; RP (8/10/2010) at 40, 43. The officers physically prevented Fellas from

⁴ Knotek's arrest was delayed because OPNET officers had a number of higher priority cases to investigate and difficulty coordinating officers' training/vacation schedules. RP (8/9/2010) at 84-85

accessing her apartment.⁵ RP (8/9/2010) at 121-22; RP (8/10/2010) at 40, 43. Fellas repeatedly tried to pull away from the officers. RP (8/9/2010) at 122-23; RP (8/10/2010) at 40-44. As a result, the officers had to forcibly escort her to their patrol vehicles. RP (8/10/2010) at 122-23; RP (8/10/2010) at 40-44.

Procedural History:

The State charged Fellas with two criminal counts: (1) delivery of a controlled substance – methamphetamine, and (2) resisting arrest. CP 58, 61.

During the jury voir dire, Juror 29 informed the court he knew the lead investigating officer, Detective Michael Grall. CP 83. The juror explained he had been friends with the officer for approximately 20 years. CP 83. However, the juror said his friendship would not prevent him from fairly considering the evidence against the defendant. CP 83-84. The defense did not seek to excuse the juror for cause. CP 125. Additionally, it exhausted its seven peremptory challenges before Juror 29 was empanelled in the jury. CP 20, 123.

At trial, the State's witnesses testified according to the events presented above. RP (8/9/2010) at 26-149; RP (8/10/2010) at 12-46. After

⁵ The officers prevented her from re-entering her apartment due to officer safety concerns. RP (8/9/2010) at 124-25.

Knotek testified, she observed the remainder of the first day's trial proceedings. RP (8/10/2010) at 75-76.

On the second day of trial, the defense informed the trial court that certain members of the Fellas family believed Knotek was coached during her testimony regarding the specifics of her agreement with the State /

OPNET:

Well, Your Honor, I bring the second issue somewhat hesitantly. But, after court yesterday my client[']s relatives -- my client's daughter and brother and some other relatives approached me indicating that when Ms. Knotek was testifying that she kept looking at the prosecution table and that they saw Detective Grall coaching her on her testimony. Now I didn't witness it ... I do know that when Ms. Knotek was testifying she was looking over there quite a bit when I was asking her about her testimony -- asking her specifically about the plea deal that she had received but I did not notice any coaching, but my client's relatives are adamant that it happened.

RP (8/10/2010) at 6-7. *See also* RP (8/10/2010) at 8-11; CP 136-38. The defense explained "coaching" meant that the detective was "nodding his head yes or no, coaching her to either answer yes or no." RP (8/2010) at 7. However, the defense conceded the bailiff and court reporter had not seen any nodding or signaling. RP (8/10/2010) at 7. *See also* CP 69-72, 118.

The defense moved for a dismissal pursuant to CrR 8.3(b). RP (8/10/2010) at 7. The trial court denied the motion, reasoning "[i]t seems to me that's an issue that can be taken up post trial if there's a problem.

RP (8/10/2010) at 7-8. The trial court recognized the real issue pertained to the witness' credibility. RP (8/10/2010) at 11. Thus, the court permitted the defense to call the relatives as witnesses to share their observations that the detective may have been communicating answers to Knotek during her testimony. RP (8/10/2010) at 11.

After the State's case, the defense moved to dismiss the case for government misconduct. RP (8/10/2010) at 47-48. The defense explained that it only sought to preserve the issue for appellate review, and it explicitly affirmed an evidentiary hearing was unnecessary. RP (8/10/2010) at 48-49. The trial court agreed a separate hearing was unnecessary. RP (8/10/2010) at 49. Again, the court stated the defense was free to call witnesses to testify before the jury what they observed between Knotek and the detective.⁶ RP (8/10/2010) at 49-51, CP 21.

Fellas testified in her defense. RP (8/10/2010) at 51. According to Fellas, she only met Knotek in the park to discuss the money that Knotek's sister owed her. RP (8/10/2010) at 52-53, 61. Fellas denied she resisted the officers during her arrest. RP (8/10/2010) at 57-60. She claimed she only tried to get her shoes before she accompanied the officers to the police station. RP (8/10/2010) at 57-58.

⁶ The defense never called the defendant's family members to testify regarding the alleged witness coaching. *See* RP (8/10/2010) at 51-117.

The State called two witnesses to testify on rebuttal: Detective Grall and Knotek. RP (8/10/2010) at 70-82. The defense opposed Knotek's proffered rebuttal testimony. RP (8/10/2010) at 75. The defense claimed Knotek had observed the trial proceedings after her testimony. RP (8/10/2010) at 75. The State explained it intended to call Knotek for a limited purpose: to rebut claims she met the defendant to discuss her sister's debt obligations. RP (8/10/2010) at 75-76. The trial court allowed Knotek to take the stand, noting she had not been present during the defendant's testimony. RP (8/10/2010) at 76, CP 21-22.

In closing arguments, the defense attacked Knotek's credibility. RP (8/10/2010) at 99-104. However, the jury still found Fellas guilty of both criminal charges: (1) delivery of a controlled substance, and (2) resisting arrest. CP 32-33. The jury also returned a special verdict, finding Fellas sold methamphetamine to Knotek in a public park. CP 31.

On August 25, 2010, Fellas obtained new counsel. RP (8/25/2010) at 2. The defense filed a motion for a new trial pursuant to CrR 7.5. RP (8/25/2010) at 2; CP 24-30. The motion failed to incorporate any supporting affidavits. RP (8/25/2010) at 3; CP 24-30. Nonetheless, the trial court afforded counsel additional time to file the requisite supporting documents. RP (8/25/2010) at 3-4.

On October 14, 2010, the trial court held a hearing pursuant to the motion for new trial. RP (10/14/2010) at 2. The court informed the parties it had reviewed the parties' filings and determined an evidentiary hearing was unnecessary. RP (10/14/2010) at 2. *See also* CP 68. However, the court permitted the parties to argue their positions. RP (10/14/2010) at 2. The defense was not prepared to proceed to argument and asked the trial court to reset the hearing. RP (10/14/2010) at 2-3. The defense never opposed the trial court's decision not to hold a fact-finding hearing. *See* RP (10/14/2010) at 2-5.

On October 21, 2010, the parties reconvened to argue the motion for new trial. RP (10/21/2010) at 2. The defense admitted it pieced its motion/argument together based upon a cursory review of the discovery, hearsay, "bits and pieces" of trial transcripts, and counsel's own assumptions. RP (10/21/2010) at 3-15. *See also* RP (11/9/2010) at 5-6. After the Court heard the parties' numerous arguments, it denied the motion. RP (10/21/2010) at 23-28; CP 18-23. The trial court explained it carefully reviewed the record, and that its ruling also encompassed its own memory of the proceedings and observation of the witnesses. RP (10/21/2010) at 11-12, 23-28; CP 20. *See also* RP (10/14/2010) at 2. The defense never raised an objection to the absence of a hearing with live testimony. *See* RP (10/21/2010) at 1-29.

At sentencing, the court sentenced Fellas to 12 months confinement, plus 24 additional months because the delivery occurred at a public park. RP (11/9/2010) at 9; CP 9. Fellas appealed. The superior court stayed her sentence pending appeal.⁷ RP (11/9/2010) at 9-10.

III. ARGUMENT:

A. THE COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL WITHOUT A FACT FINDING HEARING.

Fellas claims the trial court erred because it failed to hold a fact-finding hearing pursuant to her motion for a new trial. *See* Brief of Appellant at 9-13. According to Fellas, the trial court was obligated to conduct a formal fact-finding hearing simply because she filed three affidavits in support of her motion. *See* Brief of Appellant at 12-13. This argument fails because (1) the trial court may resolve a motion for a new trial based solely on the affidavits, (2) the trial court had all the facts necessary to fairly review the contested motion, and (3) the defense never demanded a fact-finding hearing. There was no error.

⁷ However, the superior court subsequently revoked the stay after Fellas violated her conditions of release. Fifteen days after sentencing, Fellas was arrested for possessing a controlled substance with intent to deliver. She pleaded guilty to simple possession. CP Supp (Motion to Revoke Stay of Sentence; Minute Order (12/22/2010); Minute Order (1/20/2011)). *See also State v. Fellas*, 10-1-00493-8.

The decision to grant or deny a new trial is a matter within the discretion of the trial court. *State v. McKenzie*, 157 Wn.2d 44, 51, 134 P.3d 221 (2006). An appellate court should not disturb a trial court's ruling on a motion for new trial unless there is a clear abuse of discretion. *McKenzie*, 157 Wn.2d at 51. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An abuse of discretion also occurs "when no reasonable judge would have reached the same conclusion." *McKenzie*, 157 Wn.2d at 52 (quoting *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997)). With respect to this deferential standard, the Washington Supreme Court has explained " 'the oft repeated observation that the trial judge,' having 'seen and heard' the proceedings 'is in a better position to evaluate and adjudge than can [an appellate court] from a cold, printed record.' " *McKenzie*, 157 Wn.2d at 52 (quoting *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)).

When a moving party makes a prima facie case in support of a motion for a new trial, an evidentiary hearing is preferred but is not required. *State v. Jackson*, 75 Wn. App. 537, 543-44, 879 P.2d 307 (1994). A trial court may resolve a motion for a new trial based solely on the affidavits. *Dean v. Group Health Cooperative of Puget Sound*, 62 Wn. Ap.

829, 838, 816 P.2d 757 (1991). The determination whether a full evidentiary hearing is required once the trial court reviews the accompanying affidavits/declarations is within the discretion of the trial court. *State v. Forest*, 125 Wn. App. 702, 707, 105 P.3d 1045 (2005).

Here, the defense timely filed a motion for new trial. CP 24. However, the defense failed to file any supporting affidavits. CP 24-30. Instead, substitute counsel relied on the self-serving representations of the defendant. CP 24-30. The trial court recognized this deficiency and afforded the defense additional time to supplement its filing. RP (8/25/2010) at 3-4.

Seventeen days later, the defense filed three affidavits to support its motion. CP 136-38. These affidavits were signed by the defendant, the defendant's brother, and the defendant's daughter. RP 136-38. Additionally, these affidavits alleged that (1) defense counsel failed to strike a juror for cause, (2) Detective Grall coached Knotek's testimony when she discussed the specific terms of her drug court contract, and (3) Knotek testified as a rebuttal witness after observing the trial's proceedings. CP 136-38. The State filed responsive briefing⁸ and

⁸ The State's brief included verbatim transcripts of the contested jury voir dire; examinations of the witness, Knotek; argument and ruling regarding the witness Knotek's ability to testify on rebuttal. It also included the court's record regarding the jury selection process. CP 69-135.

affidavits highlighting that the defendant's claims were without legal or factual merit. CP 69-135.

On October 21, 2010, the trial court permitted the defense to argue the three claims it previously briefed and for which it provided supporting affidavits. RP (10/21/2010) at 3-15, 22-23. Additionally, the defense raised a multitude of issues that it failed to brief or provide any supporting authority/facts. *See* RP (10/21/2010) at 3-15, 22-23. The trial court denied the motion. RP (10/21/2010) at 23-28.

The trial court did not abuse its discretion when it denied the motion for new trial without a formal fact-finding hearing with live testimony. First, the court rule does not mandate an evidentiary hearing. CrR 7.5; *Jackson*, 75 Wn. App. at 543-44; *Forest*, 125 Wn. App. at 707. Second, the trial court's ruling was fully informed because it was based on the judge's memory of the proceedings, observations of the witnesses, and his careful review of the record. RP (10/21/2010) at 28. *See also* RP (10/21/2010) at 23-27; CP 18-23. Third, the defense never demanded an evidentiary hearing, nor objected to its absence. RP (8/10/2010) at 48-49; RP (10/14/2010) at 2-5; RP (10/21/2010) at 1-29. *See State v. Ford*, 137 Wn.2d 472, 487-88, 973 P.2d 452 (1999) ("The general policy of Washington's appellate courts is to require a party to make an objection to an error in the trial court."). Finally, the facts alleged in the defense

affidavits did not support its claims for a new trial.⁹ Under these circumstances, the trial court was within its discretion to rule on the motion for new trial without an evidentiary hearing and live testimony.

B. FELLAS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Fellas claims she received ineffective assistance of counsel because her attorney did not demand a fact-finding hearing where it could present live testimony. *See* Brief of Appellant at 14-16. However, Fellas cannot satisfy the two requisite prongs of an ineffective assistance claim. The argument fails.

To prevail on a claim of ineffective assistance, a defendant must show that her counsel's performance (1) fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced her trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The reasonableness inquiry presumes effective representation and

⁹ *See State v. Latham*, 100 Wn.2d 59, 64, 667 P.2d 56 (1983) (it is not required that jurors be totally ignorant of the facts and issues involved, it is sufficient if the juror can lay aside his/her impression or opinion and render a verdict based on the evidence presented at trial); *State v. Walker*, 19 Wn. App. 881, 883, 578 P.2d 83 (1978) (trial court's determination to allow testimony of a rebuttal witness who, in violation of the exclusionary rule, remained in the courtroom will not be reversed absent a manifest abuse of discretion, *i.e.* prejudice to the defendant's case); *State v. Rodriguez*, 244 Neb. 707, 711, 509 N.W.2d 1 (1993) (allegation of witness coaching is not, per se, grounds for a mistrial).

requires the defendant to show the absence of legitimate, strategic or tactical reasons for the challenged conduct. *McFarland*, 127 Wn.2d at 336. To show prejudice, the defendant must show, but for the deficient performance, there is a reasonable probability that the outcome at trial would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If one of the two prongs of the test is absent, the inquiry ends. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Ineffective assistance of counsel is “a mixed question of law and fact.” *Strickland*, 466 U.S. at 698. Because claims of ineffective assistance of counsel present mixed questions of law and fact, appellate courts review them de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Here, substitute counsel’s representation was not deficient. As argued above, a fact-finding hearing with live testimony was unnecessary. *See argument above*. Because such a hearing was unnecessary, Fellas’ attorney was not deficient when he failed to demand a hearing where live testimony could be introduced.

Assuming a formal fact-finding hearing was required, Fellas failed to demonstrate any resulting prejudice. Fellas assumes she was prejudiced because had her attorney demanded an evidentiary hearing with live

testimony, such a hearing would have necessarily followed. *See* Brief of Appellant at 15. However, she fails to show/argue that the trial court would probably have ordered a new trial. Because Fellas fails to demonstrate any prejudice, her ineffective assistance claim fails. *See Strickland*, 466 U.S. at 697; *Foster*, 140 Wn. App. at 273.

IV. CONCLUSION:

Based on the arguments above, the State respectfully requests that this Court affirm (1) the trial court's denial of the motion for new trial, and (2) Fellas' conviction and sentence.

DATED this 5th day of August, 2011.

DEBORAH S. KELLY, Prosecuting Attorney



Brian Patrick Wendt, WSBA # 40537
Deputy Prosecuting Attorney