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Court of Appeals  
Division II  
State of Washington  
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NO. 51460-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JASON WHITE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

WHITE'S CONVICTIONS SHOULD BE REVERSED BECAUSE HIS ATTORNEY FAILED TO PRESENT AN ESSENTIAL WITNESS, IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In this appeal, White argues his attorney was ineffective in failing to investigate and present a necessary witness who could have corroborated aspects of his alibi defense. The State argues in response the record is insufficient and White was not thereby prejudiced. Each of these arguments should be rejected. The existing record in this case shows that (1) defense counsel's failure to call White's employer as a witness was the result of mistake, not diligent investigation, and (2) White was prejudiced by this failure because the employer's testimony would have provided essential corroboration of White's alibi.

1. The record establishes the failure to call White's employer as a witness was the result of accident or mistake.

First, the State points out that White's trial counsel stated only that he was unaware of the letter from White's employer, not that he was unaware of the employer's existence. Brief of Respondent at 13. This argument should be rejected because admitted the failure to call White's employer as a witness was the result of accident or mistake, not diligent investigation. CP 41. The record shows that diligent investigation would have uncovered this letter, which was provided to previous counsel. CP 46-49. Defense counsel

also made clear that, if he had been aware of the letter, he would have called White's employer to testify at trial. CP 40; RP 215.

This case is utterly unlike those cited by the State in which the record did not contain sufficient facts to make a determination on a claim of ineffective assistance of counsel. For example, in State v. We, 138 Wn. App. 716, 728, 158 P.3d 1238 (2007), cited by the Brief of Respondent at page 13, the claim of ineffective assistance was raised in the defendant's pro se statement of additional grounds for review. We, 138 Wn. App. at 728. The defendant claimed her attorney

failed to place the appropriate amount of emphasis on certain testimony; failed to object to testimony; failed to ask the appropriate questions of witnesses; failed to counter the State's evidence; failed to contact, interview, and subpoena witnesses; failed to conduct a thorough investigation; and failed to provide her with discovery.

Id. The court concluded that on the record submitted, most of We's claims related to valid strategic decisions by defense counsel. Id. at 729. By contrast, here, the record establishes that counsel's failure to present testimony by White's employer was a mistake or accident, not a tactical decision. CP 41.

State v. Hutchinson, 147 Wn.2d 197, 53 P.3d 17 (2002), also cited by the State, involved a case in which the appellant had filed a personal restraint petition that was then before the court. The court decided Hutchinson's claim

of ineffective assistance on the merits. Hutchinson is not a case in which the record was deemed inadequate to decide the issue.

The record shows that the failure to call this critical witness was the result of accident or mistake on the part of counsel, not the reasonably diligent investigation to which all accused persons are entitled under the 6<sup>th</sup> Amendment. White made the requisite showing that his attorney's performance was deficient under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

2. Testimony by White's employer would have provided critical corroboration of White's alibi.

White also made the requisite showing that his attorney's deficient performance prejudiced his right to a fair trial. Id. A corroborating witness does not have to corroborate every aspect of White's theory of the case in order to be a critical witness, whose absence prejudiced his ability to defend himself at trial. Moreover, the State misleadingly claims the letter did not corroborate White's hours of work. Brief of Respondent at 18. While the employer did not claim to have personal knowledge of when White performed the work, the employer's letter notes that White was scheduled for a "full day." CP 46. The fact that he was scheduled for a full day adds credibility to his testimony that he worked a full day. RP 105, 113. Additional corroboration comes from the fact that, according to his

employer, the work scheduled to be done was, in fact, completed and paid for in full. CP 46. And while it is true that the employer did not specifically state the location of the work, his letter corroborates the client's name, Cathy Thompson, again lending credibility to White's testimony. CP 46.

The State claims all of this did not matter because Michael Clark testified that he did not receive the blue Passat until March. Brief of Respondent at 16-17. But Clark testified that he had earlier, at a time when his recollection was better, signed a statement to police that he was told to pick up his daughter's things, including the blue Passat, in December or January. RP 88-91. After considering his written statement, he concluded it was "that must have been more right than March. I thought it was March." RP 91. It is true that the jury could have opted to credit his testimony that he "thought it was March," over his earlier written statement to police, even though he agreed that statement was written at a time when his memory was better and was "more right." RP 91. But this argument serves only to highlight the prejudice caused to White by the lack of corroboration for his alibi. The jury was faced with conflicting testimony and had to decide who to believe. In the case of Clark, they had to decide which of his statements to believe.

The jury would have been far more likely to credit White's account over Clark's inconsistent testimony if there had been any corroboration

presented. As noted in the opening brief, the State expressly exploited this deficiency in closing argument. RP 182-83, 198. There is a reasonable probability that, if counsel had subpoenaed White's employer, the outcome of the trial would have been different. Counsel's failure was deficient performance that violated White's constitutional right to effective assistance of counsel for his defense. His conviction should be reversed.

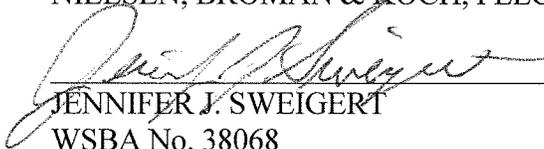
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, White requests this Court reverse his convictions.

DATED this 15<sup>th</sup> day of April, 2019.

Respectfully submitted,

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