

FILED

JAN 10 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28737-8-III

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

vs.

MIGUEL DIAZ CISNEROS
Appellant

BRIEF OF APPELLANT

Andrea Burkhart, WSBA #38519
Attorney for Appellant
Burkhart and Burkhart, PLLC
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630

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I. INTRODUCTION

In December 2007, Miguel Diaz Cisneros was arrested at the home of his ex-girlfriend, Marvella Alcantar, and charged with multiple offenses. Cisneros spent a year and a half in custody before he was tried at a bench trial in July 2009. Both parties testified and disputed the facts. Ultimately, the trial court determined that Alcantar's testimony was more credible than Cisneros's, and convicted him of first degree burglary, first degree assault, second degree assault, and second degree unlawful possession of a firearm. The burglary and assault charges carried firearm enhancements. He was ultimately sentenced to over 26 years in prison.

Several errors, during both the pre-trial and trial phases, significantly prejudiced Cisneros and deprived him of a fair trial. First, the evidence presented at trial was legally insufficient to support a finding that Cisneros committed second degree assault. Second, the prosecution failed to disclose information tending to negate Cisneros's guilt in violation of *Brady v. Maryland*, which requires that Cisneros be granted a new trial. Finally, Cisneros's attorney rendered ineffective assistance of counsel by failing to make an appropriate investigation of all witnesses with potentially

exculpatory testimony. Because of these errors, the judgment and sentence should be vacated, the convictions reversed, and the case remanded for a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Conclusion of Law No. IV: "On December 10, 2007, the defendant committed the crime of Assault in the Second Degree when he intentionally assaulted Luis Alcantar with a firearm [...] he [...] pointed it and created an apprehension that he was going to shoot at Luis Alcantar." CP 262.
2. The trial court erred in finding Cisneros guilty of Assault in the Second Degree.
3. The prosecution violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), when it failed to provide accurate information to the defense regarding Fernando Chavez, a potential eyewitness, in response to Cisneros's discovery requests.
4. Defense counsel rendered ineffective assistance of counsel by failing to make a reasonable investigation into the identity and whereabouts of Fernando Chavez.
5. Defense counsel rendered ineffective assistance of counsel by failing to interview and/or take the deposition of Rito Reyes, a witness with potentially corroborating testimony.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in finding that all elements of Assault in the Second Degree had been proved beyond a reasonable doubt when:

- (a) Uncontested evidence at trial indicated that Luis Alcantar, the alleged victim of second degree assault, was asleep throughout the entire incident;
- (b) There was no evidence that Luis was physically harmed or even touched in any way by the defendant;
- (c) The trial court did not find that Cisneros took any actions constituting an unsuccessful attempt to physically harm or touch Luis; and
- (d) At most, Cisneros only pointed a firearm at Luis and then lowered it without incident.

2. Whether the prosecution violated due process and the disclosure requirements of *Brady v. Maryland* when:

- (a) The victim, Marvella Alcantar, and her children claimed that Alcantar's new boyfriend was hiding in a bedroom closet during the entire incident;
- (b) The alleged boyfriend was identified as Fernando Chavez;
- (c) The prosecution represented to defense counsel that investigators were unable to locate Chavez and his whereabouts were unknown; and
- (d) Chavez testified at sentencing that he had never dated Alcantar, that he was not present at her house on December 10, 2007, and his residence of over 15 years in Outlook, Washington is listed on his driver's license records.

3. Whether defense counsel rendered ineffective assistance of counsel when:

- (a) Rito Reyes, a material witness, could have provided potentially corroborative testimony;
- (b) Reyes's location and contact information were known to defense counsel;
- (c) Defense counsel sought multiple continuances over six months for the specific purpose of interviewing and taking Reyes's testimony;
- (d) Defense counsel did not obtain Reyes's testimony and failed to even speak with him;
- (e) Alcantar claimed her boyfriend was hiding in a closet in her home during the incident; and
- (f) Defense counsel did not make any independent investigation prior to trial into the whereabouts and knowledge of Alcantar's boyfriend.

IV. STATEMENT OF THE CASE

Miguel Diaz Cisneros met Marvella Alcantar in 2005. RP 40.¹ Although he was married, he and his wife, Oralia Cisneros, had drifted apart. RP 19, 193. Cisneros and Alcantar began dating and he moved into her home in Sunnyside, Washington. RP 40, 44. During their two-year relationship, Alcantar gave birth to a little

¹ There are several different volumes all with different pagination for the verbatim report of proceedings. Accordingly, I will use the following citations: (1) "**Bell RP**" for the volume containing transcripts of multiple pretrial hearings, which was transcribed by Bell Transcription and Typing Services; (2) "**7/02/2009 RP**" for the transcript of the 7/02/2009 pretrial motions hearing; (3) "**RP**" for the volumes containing the July 2009 bench trial transcript; and (4) "**10/30/2009 RP**" for the transcript of the 10/30/2009 hearing.

girl, Kiera. RP 41-42. In the spring of 2007, Cisneros discovered that Kiera was not his child and the couple ended their relationship. RP 42, 45, 46. Cisneros and his wife began mending their relationship, but he continued to provide Alcantar with financial support. RP 46, 48.

On December 9, 2007, Cisneros called Alcantar to let her know that he would be stopping by her home to give her \$100.00 she had requested in order to buy necessities for her children. RP 73, 74, 77-78. At the time, Cisneros was with his friend and co-worker, Rito Reyes, and was driving his employer, Jose Cervantes's black Escalade truck. RP 79. Cisneros had borrowed the car several hours earlier, and Cervantes had left his twelve gauge shotgun, which he used for rabbit hunting in his orchards, in between the truck seats. RP 62-63, 68.

Cisneros arrived at the house, and because he was not permitted to possess a gun, he brought the shotgun with him to leave with Alcantar for safekeeping. RP 82, 85. Alcantar opened the door for Cisneros. RP 83, 257. Cisneros gave Alcantar the money and the shotgun; she hid the gun in the house. RP 83, 86. Cisneros was at the house less than five minutes before police arrived. RP 87.

Alcantar and her two teenage children, Jose and Karina, testified that Cisneros had called Alcantar that day to inquire into whether she had a new boyfriend. CP 259-60. Alcantar testified that Cisneros threatened to kill her and her new boyfriend and informed her that he was going to her house; Alcantar told her children to call the police. CP 260. The Alcantars testified that they saw Cisneros loading a shotgun in the driveway. CP 260; RP 360. When he approached the house, Alcantar unlocked and opened the door, and Cisneros forced his way into the home. CP 260; RP 360. Cisneros maintained that he did no such thing. RP 255. In addition, the court also placed greater weight in Alcantar's testimony that, during the encounter, Cisneros had pointed the shotgun at Alcantar and at her five-year-old son, Luis, who was sleeping in her bedroom. RP 260. Cisneros testified that he never pointed the gun at anyone. RP 89.

The Alcantars claimed that Alcantar's new boyfriend was hiding in a bedroom closet during the incident. RP 283, 394. Alcantar identified her boyfriend as Fernando Chavez. CP. 240. Despite being a potential eyewitness, Chavez was never contacted prior to trial, because the prosecution represented to defense

counsel that he could not be located and his whereabouts were unknown. CP 240.

Following his arrest on December 10, 2007, Cisneros was held in custody until his trial in July 2009. CP 1; Bell RP 2.

Between December 2007 and July 2009, over a year and a half, Cisneros's trial date was continued no less than 12 times. CP 9, 11, 12, 17, 18, 26, 27, 28, 29, 36, 39, 57.

In December 2008, Cisneros indicated that he felt his appointed counsel was "too busy," expressed his frustration that he had languished in jail for a year without a trial, and requested leave to substitute retained counsel. Bell RP 43. At that time, substitute counsel represented to the court that, if permitted to enter the case, he would find and interview Reyes. Bell RP 51. Reyes, despite initially being arrested as a co-defendant, had been released on bail and had returned to Mexico. Bell RP 51. Retained counsel was substituted on January 16, 2009. CP 38.

A month later, counsel moved for a continuance and for leave to depose Rito Reyes in Mexico. CP 50-54. In his motion, counsel stated that Reyes had contacted the Cisneros family, was willing to testify under oath, and could provide material testimony regarding the events leading to Cisneros's arrest. CP 52; Bell RP

62. The court granted the motion “for purposes of taking the deposition.” Bell RP 67.

In April 2009, counsel, having failed to contact Reyes, requested another continuance. Bell RP 71. Counsel reiterated the importance of Reyes’ testimony, and the court reluctantly continued Cisneros’s case once more, but with the following admonition: “I will continue it one more time. If you cannot make arrangements to get down there then it will not be continued again, period. This is it. We’re done.” Bell RP 72, 73. Counsel responded that he understood.

In early June 2009, counsel appeared yet again to request a continuance for purposes of taking Reyes’ deposition, citing his busy schedule and deferred honeymoon as the reason for his failure to do so over the preceding six months. Bell RP 76-78. As promised, the court refused to grant any more continuances and set the matter for trial. Bell RP 78. In the end, counsel failed entirely to take Reyes deposition, or to even interview him. Bell RP 82.

Cisneros was tried by bench trial July 6-10, 2009. The court found him guilty of first degree burglary, first degree assault, and second degree assault—each with a firearm enhancement—as well

as second degree unlawful possession of a firearm. RP 611-616. Following trial, defense counsel managed to locate Fernando Chavez, who testified that he had never been contacted by Sunnyside police despite the fact that the address where he had resided for over 15 years was listed in his driver's license records. CP 238-42. Counsel moved for a finding that the prosecution had committed *Brady* violations, and requested either dismissal or a new trial. CP 239. Nether request was granted by the trial court.

Cisneros was sentenced to a total of 316 months of confinement, over 26 years. CP 284. He timely appeals.

V. ARGUMENT

A. THE TRIAL COURT ERRED IN FINDING CISNEROS GUILTY OF ASSAULT IN THE SECOND DEGREE

The basis of the conviction for second degree assault was the allegation that Cisneros pointed the shotgun at Luis Alcantar, Alcantar's five year old son. However, the uncontested facts established that Luis Alcantar was asleep throughout the incident and could not have been placed in apprehension of harm by any conduct of Cisneros. Moreover, in Washington, the person at whom the conduct is directed must be the person who experiences

the fear or apprehension of harm for an assault to occur. It is legally insufficient for a third-party to experience fear or apprehension that the victim will be harmed. Because the evidence is insufficient to establish that Luis Alcantar was placed in fear of harm by any actions by Cisneros, the State failed to meet its burden to establish an essential element of second degree assault. Consequently, the conviction must be reversed and dismissed.

The due process clause requires that each element of a crime charged be proved beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *see also* RCW 9A.04.100. In Washington, to prove second degree assault, the prosecution must show that the defendant, under circumstances not amounting to assault in the first degree (1) assaulted another person (2) with a deadly weapon. RCW 9A.36.021(1)(c).

The first element, assault, is an essential element of the crime of second degree assault. *State v. Smith*, 159 Wn.2d 778, 788, 154 P.3d 873 (2007). Washington courts use three common law definitions in determining whether an assault has occurred—(1) attempt, with unlawful force, to inflict bodily injury upon another (attempted battery); (2) unlawful touching of another (battery); or (3)

putting another in fear and apprehension of harm. *State v. Elmi*, 166 Wn.2d 209, 215-16, 207 P.3d 439 (2009). These definitions are merely descriptive of the term assault and do not constitute additional alternative means of committing the crime of assault. *Id.* (citing to *Smith*, 159 Wn.2d at 785).

A defendant does not commit assault on the basis of putting another person in fear and apprehension of harm unless the victim is aware of the defendant's actions *prior to* the assault. See *State v. Bland*, 71 Wn. App. 345, 860 P.2d 1046 (1993), *overruled on other grounds in State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007). In *Bland*, the victim, William Carrington, was asleep in a recliner chair positioned in front of his living room window when the defendant shot a gun in the direction of the Carrington's house. *Id.* at 349. The bullet struck the Carrington's front window, shattering glass all over the sleeping man and missing his head by eight inches. *Id.* Carrington awoke and became frightened only after the shot was fired. *Id.* In holding that there was insufficient evidence to support a finding of assault on the basis of fear and apprehension of harm, the court explained that Carrington could not have experienced such fear or apprehension prior to the incident because he was asleep at the time the gun was fired. *Id.* at 355.

The court further held that a victim's fear and apprehension experienced *after* the incident is not sufficient to find an assault. *Id.* at 355-56. In sum, unless a victim experiences fear or apprehension of harm either before or at the time of the threat, no assault has taken place.

As in *Bland*, the person at whom the shotgun was allegedly pointed – Luis Alcantar – was not only covered by a blanket, but also was asleep during the entire incident. RP 260, 373, 382. Alcantar testified that Luis “was all covered. He was sleeping.” RP 260. Karina Alcantar testified that Luis was asleep in the bedroom the whole time. RP 382. In fact, there is absolutely no evidence in the record that Luis ever woke up while Cisneros was at the house. Like the victim in *Bland*, Luis was asleep during the entire incident. There is no way that he could have been put into fear or apprehension of harm by the defendant's actions. *Bland*, 71 Wn. App. 355. Accordingly, no assault by way of putting the victim in apprehension of harm could have occurred.

In addition, the victim, the person at risk of harm from the defendant's actions, must personally experience fear and apprehension of harm; a third party's fear and apprehension of harm for the victim is insufficient to support a finding of assault.

See *State v. Nicholson*, 119 Wn. App. 855, 84 P.3d 877 (2003), *overruled on other grounds in State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007). In *Nicholson*, the defendant was charged with second degree assault of a child for holding a knife to his 20-month-old son's belly while indicating to the boy's mother that he would cut the child. *Nicholson*, 119 Wn. App. at 857. The court reversed the defendant's conviction for assault, specifically holding that assault by "fear and apprehension" cannot be transferred to a third party. *Id.* at 862, 864. The fact that the mother feared for the child's safety does not support a finding that the defendant assaulted the child on the basis of fear and apprehension of harm. *Id.* at 862-63.

The present case is indistinguishable from *Nicholson*. The trial court's only basis for finding that an assault occurred against Luis was that Cisneros "pointed" a gun at Luis (who was covered by blankets at the time), and that this pointing "created an apprehension that he was going to shoot at Luis Alcantar." CP 262. The court did not find , and there was no evidence in the record supporting a finding, that Cisneros unlawfully touched Luis (a battery) or that he unsuccessfully attempted to inflict bodily injury upon Luis with the mere act of pointing the gun, for example, by

taking aim or putting his finger to the trigger (an attempted battery). The court merely found that Cisneros's actions created the "apprehension" or concern that he was going to shoot the sleeping person. CP 262. Accordingly, the only apparent basis for finding assault was under the "fear and apprehension of harm" common law definition of assault.

The court's conclusion that Cisneros "created an apprehension," without specifically finding *who* was apprehensive, overlooks the requirement that the victim actually experience the apprehension. Moreover, the court seems to suggest that the mother's fear, which was evident in her decision to remove the covers and reveal the sleeping child, is sufficient "apprehension" to prove assault. CP 260. As *Nicholson* held, fear and apprehension for the safety of a victim that are experienced only by a third party are insufficient to support a finding of assault, even if that third party is the victim's mother. *Nicholson*, 119 Wn. App. at 862-63. Consequently, the evidence in the record is legally insufficient to support the court's conclusion that Cisneros committed second degree assault against Luis Alcantar.

Because each element of the charge of second degree assault—namely, the element of "assault"— was not proved

beyond a reasonable doubt, Cisneros's conviction and the related firearm enhancement must be reversed and dismissed.

B. THE PROSECUTION COMMITTED *BRADY* VIOLATIONS BY MISLEADING DEFENSE COUNSEL IN RESPONSE TO A SPECIFIC DISCOVERY REQUEST

In *Brady v. Maryland*, the United States Supreme Court announced that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution.*” 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963) (emphasis added). Accordingly, Washington State Superior Court Criminal Rule 4.7(a)(3) requires the prosecuting attorney to disclose “any material or information within the prosecuting attorney’s knowledge which tends to negate the defendant’s guilt as to the offense charged.” In addition, the Washington Rules of Professional Conduct mandate that prosecutors “make timely disclosure to the defense of all evidence or information known to the prosecution that tends to negate the guilt of the accused or mitigates the offense.” RPC 3.8(d).

The purpose of the *Brady* rule is to prevent miscarriage of justice and to ensure that the defendant receives a fair trial. *In re Rice*, 118 Wn.2d 876, 887, 828 P.2d 1086 (1992). A prosecutor's failure to comply with discovery requirements, which causes prejudice to the defendant, deprives the defendant of a fair trial. *See State v. Dunivin*, 65 Wn. App. 728, 732, 829 P.2d 799 (1992). Appropriate remedies include dismissal of the case or granting of a new trial. CrR 4.7(h)(7)(i); CrR 7.5(a)(5).

In determining whether due process has been violated and a *Brady* violation has occurred, the court considers whether the undisclosed evidence was material to guilt or punishment. *In re Rice*, 118 Wn.2d at 887. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome." *In re Rice*, 118 Wn.2d at 887 (quoting *Bagley*, 473 U.S. at 682).

Material evidence may include evidence that is wholly impeaching. *See State v. Benn*, 120 Wn.2d 631, 649-50, 845 P.2d 289, *cert. denied* 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331

(1993); *State v. MacDonald*, 122 Wn. App. 804, 809, 95 P.3d 1248 (2004). In *State v. MacDonald*, the defendant was charged with first degree and second degree rape for two separate incidents involving two separate victims. *Id.* at 807. With respect to the second degree rape charge, there was no physical evidence that the defendant had raped the victim; the only evidence was the victim's testimony. *Id.* at 810. The State failed to disclose evidence impeaching the victim's credibility. *Id.* The court found that such impeachment evidence would have been material and relevant, and its omission undermined confidence in the outcome of the proceeding. *Id.* On this basis, due process had been violated. *Id.*

In the present case, the prosecution misrepresented investigative efforts to locate Alcantar's alleged boyfriend, Fernando Chavez, who was a potential eyewitness to the charged incident. CP 240. In making its representations to defense counsel, the prosecution effectively suppressed potentially material and relevant impeachment evidence.

First, in Cisneros's omnibus application, filed February 26, 2009, he requested that the prosecution "disclose evidence in plaintiff's possession, favorable to defendant on the issue of guilt," and to identify any "witness or document that supports lack of

culpability.” CP 45. This request obligated the prosecution pursuant to *Brady* to disclose all favorable evidence material to the issue of guilt.

Second, according to defense counsel, the prosecutor advised counsel that investigators could not find Fernando Chavez and his whereabouts were unknown. CP 45. To the contrary, Chavez testified before the sentencing court on December 18, 2009, that (1) he had lived in the Sunnyside/Outlook area of Washington for over 15 years; (2) his Washington State driver’s license lists the address that he has lived at for over 15 years; and (3) although he has known Alcantar and her family for approximately 20 years, he had never dated her and was not present at her house on December 10, 2007. Bell RP 88-90. Clearly, the state’s investigators made little, if any, attempt to actually locate and contact Chavez. Regardless of whether the prosecutor’s misleading characterization of the investigative efforts of the state were made in good faith or bad faith, they were relied upon by the defense, who had no reason to question the accuracy of the representation. CP 240. Assured that locating Chavez would be an unproductive use of time, particularly given the fact that state investigators with their experience and resources had

come up empty-handed, defense counsel did not have an opportunity prior to trial to investigate Chavez's knowledge. Any impeachment evidence that Chavez could have provided was effectively suppressed.

Finally, as indicated by his testimony at Cisneros's sentencing, Chavez could have provided material and relevant evidence impeaching Alcantar's credibility. Bell RP 88-90. And Alcantar's credibility was critical in resolving the discrepancies between her version of events and the version presented by Cisneros. Similar to the circumstances of *State v. MacDonald*, there was no physical evidence that established an assault had occurred. *MacDonald*, 122 Wn. App. at 810. The evidence against Cisneros consisted almost entirely of eyewitness testimony by Alcantar and her two teenage children. Not only did all three of these witnesses live in the same house during the year and half period between when Cisneros was arrested and trial commenced, but also Karina and Jose Alcantar admitted on the trial record that they had discussed the case and their testimony at trial with each other and their mother during the trial. RP 442, 453. Thus, they certainly admitted that there was opportunity to fabricate their testimony, raising the question of whether, in fact, they did so.

All three witnesses claimed that Alcantar's new boyfriend, Chavez, had been hiding in the house on the night of the incident. Objective testimony from Chavez—a man unrelated to the entire case and the defendant—rebutting this assertion would have drawn into question Alcantar's credibility, as well as given rise to the inference that the witnesses had coordinated their versions of the event to incorporate at least one lie.

The prosecution suppressed potentially material and relevant impeachment evidence from Chavez, which, if presented, would likely have created a reasonable doubt as to Cisneros's guilt and changed the outcome of the proceeding. This was a violation of the prosecution's constitutional duty under *Brady* and warrants either dismissal of the case or new trial.

C. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL THAT PREJUDICED CISNEROS'S DEFENSE

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Grier*, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009).

“To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense.” *State v. Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Prejudice is established where the defendant shows that the outcome of the proceedings would likely have been different but for counsel's deficient representation. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Where the record shows an absence of conceivable *legitimate* trial tactics or theories explaining counsel's performance, such performance falls “below an objective standard of reasonableness” and is deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). In short, unreasonable trial tactics justify reversal. *Grier*, 150 Wn. App. at 633.

1. Counsel's performance was deficient because he failed to conduct a reasonable investigation of witnesses who may have provided exculpatory testimony

The general presumption that counsel's decision not to call a witness is a matter of trial strategy or tactics may be overcome by

showing that the witness was not presented because counsel failed to conduct an appropriate investigation. *State v. Weber*, 137 Wn. App. 852, 858, 155 P.3d 947 (2007); *see also State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987). Failure to conduct a reasonable investigation is especially egregious when exculpatory evidence would have been uncovered. *Weber*, 137 Wn. App. at 858 (citing to *In re Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004)).

In *State v. Visitacion*, defense counsel's investigation consisted solely of discussing the case with the defendant and reviewing the prosecution's investigation materials. 55 Wn. App. 166, 174, 776 P.2d 986 (1989). Counsel made no effort to contact or interview at least two witnesses, whose testimony may have corroborated the defendant's testimony, relying instead on their police statements in preparing the case. *Id.* at 172, 174. The court held that counsel's failure to conduct an independent investigation fell below the standard of performance a reasonably competent attorney would exercise under similar circumstances. *Id.* at 174.

Failure to conduct a reasonable investigation due to counsel's neglect or schedule conflicts may also fall below an objective standard of reasonableness. *See Weber*, 137 Wn. App. at 858. Counsel in *Weber* not only was aware of certain witnesses,

but also considered their potential testimony to his client's defense to be material. *Id.* Notwithstanding, counsel failed to call these witnesses at trial, let alone interview them. *Id.* Counsel "simply did not get the job done." *Id.* (citing to the record). The court held that if prejudice to the defendant was found, counsel's neglect constituted deficient performance. *Id.*

In Cisneros's case, defense counsel failed to make reasonable investigation of two witnesses with potentially exculpatory testimony. For the first witness, counsel did not depose, interview, or even speak to Rito Reyes, a witness for whom counsel continued Cisneros's trial for over six months so that he could have time to adequately investigate the witness's knowledge. In fact, in July 2009, on the eve of trial, counsel revealed the following:

I have tried repeatedly to get enough time to get down there and try and preserve his testimony. No resources [...] I had to choose between a 22-year deferred vacation with a wife who said I'm filing for dissolution of marriage if I don't go on this deferred honeymoon and going to Mexico [...] I have never talked to the fellow, and he doesn't speak English. It's a frustration of mine. I don't know what to do about that.

7/2/2009 RP 2-3. From his first entry into the case, counsel was aware of the difficulties facing him with respect to taking Reyes's testimony, including Reyes's location in Mexico, Cisneros's tight financial circumstances, counsel's busy schedule, and a potential language barrier. Bell RP 51, 55-56, 64-69. These issues did not unexpectedly arise in the succeeding months; rather counsel made a conscious decision, knowing all of the potential difficulties, to subordinate Cisneros' interest in a speedy resolution of the case to obtaining important corroborative testimony. Inexplicably, counsel failed to take any meaningful steps to actually contact Reyes despite his many representations to the court that he was working on it and the six-month trial delay that his multiple requests occasioned. It is clear that with respect to Reyes counsel "simply did not get the job done," and as a result, Cisneros had to, in counsel's words, "go naked without his material witness." *Weber*, 137 Wn. App. at 858; Bell RP 82.

For the second witness, counsel was on notice from the outset of the case that Alcantar and her children claimed to investigators that Alcantar's new boyfriend had been hiding in a bedroom closet during the incident on December 10, 2007. Counsel was apparently informed by the prosecution at some point

prior to trial that the alleged boyfriend, Chavez, could not be located. CP 240. Relying entirely on the prosecution, counsel made no further attempt to identify and locate this potentially material witness. As indicated by Chavez's testimony at sentencing, he would have provided significant impeachment testimony that would have aided Cisneros's defense.

Counsel's omission is particularly egregious given the fact that in counsel's motion to the court, filed October 30, 2009, he underscores "the ease in which Fernando Chavez was located." CP 240. In a case of "he said, she said" such as this one, where the determination of Cisneros's guilt ultimately came down to a test of credibility, counsel's failure to investigate significant impeachment evidence constitutes a failure to exercise due diligence. Counsel's performance fell below an objective standard of reasonableness, and for this reason, was deficient.

2. Counsel's deficient performance prejudiced the defense

In making its oral ruling, the trial court indicated that the case came down to "a question of credibility between Cisneros and Alcantar and her family." RP 612. There were witnesses supporting Alcantar's version of events, while Cisneros had only

himself—Rito Reyes had disappeared; Fernando Chavez had never even been sought out. In announcing Cisneros's guilt, the trial court made clear that it gave greater weight to the Alcantars' testimony, and that it did not find Cisneros credible. RP 611-615.

Had counsel done his due diligence and obtained the corroborative and impeachment testimony of Reyes and Chavez, Alcantar and her children could have been shown to be lying about Chavez's presence at the house that night and Cisneros's motivation for being at the residence at all. As it was, Cisneros had no one to corroborate his version of events at the house and he was unable to effectively cross-examine Alcantar. For these reasons, Cisneros's defense was significantly prejudiced by counsel's failure to properly investigate the case.

VI. CONCLUSION

Cisneros respectfully requests that the court find that prejudicial errors were committed below such that his convictions ought to be reversed and his case remanded for further proceedings. First, the evidence presented at trial was legally insufficient to support a finding that Cisneros committed second degree assault. Because the State failed to prove this charge beyond a reasonable doubt, Cisneros's conviction should be

reversed and the charge dismissed. Second, the prosecution failed to disclose information required by *Brady v. Maryland*. Lastly, Cisneros's attorney rendered ineffective assistance of counsel by failing to make an appropriate investigation of all witnesses with potentially exculpatory testimony. These errors significantly prejudiced Cisneros's defense, depriving him of a fair and speedy trial and a full opportunity to challenge the State's evidence against him. Cisneros's judgment and sentence should be vacated, the convictions reversed, and the case remanded for a new trial.

Respectfully submitted this 7th day of January, 2011.



Andrea Burkhardt, WSBA #38519
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that on January 7, 2011, I mailed a true and correct copy of the foregoing Brief of Appellant by depositing the same in the United States mail, postage prepaid, addressed as follows:

Yakima County Prosecutor
ATTN: James Hagarty
128 N. 2nd Street, Room 211
Yakima, WA 98901-2639

Miguel Cisneros Diaz
DOC # 332656
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362


Andrea Burkhart, WSBA #38519