

FILED

SEP 08 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 287378

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

MIGUEL DIAZ CISNEROS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF RESPONDENT

JAMES P. HAGARTY
Prosecuting Attorney

Kevin G. Eilmes
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I. ASSIGNMENTS OF ERROR

A. ISSUE PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in concluding that Miguel Diaz Cisneros was guilty of the offense of second degree assault?
2. Whether the State committed any *Brady* violations with respect to the whereabouts of a potential witness?
3. Whether defense counsel rendered ineffective assistance of counsel?

B. ANSWER TO ASSIGNMENTS OF ERROR.

1. The State concedes that there is insufficient evidence to support the conviction on Count 3 for second degree assault.
2. The record does not demonstrate the existence of all of the elements of a *Brady* violation.
3. Counsel was not ineffective, and even if counsel's representation was deficient, it did not prejudice Mr. Cisneros' defense.

II. STATEMENT OF THE CASE

The Statement of the Case contained in the Appellant's opening brief is generally accurate, though the State offers the following supplement to that narrative.

Several references were made to Marvella's new boyfriend during testimony at trial. Marvella testified that the boyfriend was in the house

during the events in question, and was hiding in a bedroom closet. **(RP 283)** Karina, Marvella's daughter, agreed that the boyfriend was in a closet. **(RP 394)** Other references to the boyfriend are found in the record. **(RP 250, 259-60, 326, 345. 395)** Nowhere during the testimony of Marvella and Karina is the boyfriend identified by name.

In his Statement of the Case, Cisneros recites that Marvella identified her boyfriend as Fernando Chavez, and cites to page 240 of the Clerk's Papers. **(Appellant's Opening Brief, p. 6)** That reference is within the declaration of defense counsel in support of his post-trial motions, including a motion for a new trial. Counsel asserted in that declaration that Ms. Alcantar identified Fernando Chavez as her new boyfriend. **(CP 240)** Counsel further stated that the deputy prosecutor had indicated to him that investigators could not find Chavez. **(CP 240-41)**

This version of events was hotly disputed during argument on the defense motions. Defense counsel represented to the court that Chavez was identified during testimony at trial. **(10-30-09 RP 4)** The deputy prosecutor pointed out that there was no such testimony at trial, having had the benefit of reading the verbatim transcript. **(10-30-09 RP 12-13)** When challenged with this information, defense counsel responded: "I

know it's there. All right. If it isn't there, it's in the recording." (10-30-09 RP 12)

The prosecutor further disputed defense counsel's assertion that he had represented that Chavez could not be found. (10-30-09 RP 6-7)

The issue was revisited at the time of sentencing on December 18, 2009. Defense counsel reiterated that the State had violated its discovery obligations, and deprived Cisneros of a fair trial, by representing that Fernando Chavez could not be found, asserting that his testimony would impeach that of Marvella Alcantar. (Bell RP 85) At this hearing, there was again no reference to where in the record Ms. Alcantar identified Mr. Chavez as her boyfriend.

Fernando Chavez testified under oath, again at the sentencing hearing, that he was merely acquainted with Ms. Alcantar, and was never her boyfriend. (Bell RP 88-89) He also signed a statement indicating that he had, in turn, read a statement of Ms. Alcantar indicating that he was her boyfriend. (CP 268-71) The Alcantar statement itself is not part of the record.

The record reflects no finding on the part of the court that the State violated its discovery obligations to the defendant, or failed to disclose exculpatory information.

Cisneros also filed a pre-trial motion for leave to take the deposition of Rito Reyes. (CP 50-54) Within that motion, counsel referred to Reyes as a “key witness”. (CP 51) He was also described as “ostensibly a fugitive from justice”. (CP 52) In fact, the court observed that Reyes had an outstanding warrant for his arrest. (Bell RP 50-51)

The court did grant a continuance to allow counsel to take the deposition of Reyes in Mexico, but mused that the deposition may not have been admissible at trial. The State objected to the continuance. (Bell RP 66-68)

III. ARGUMENT

1. The State concedes that insufficient evidence supports the court’s conclusion that Cisneros committed the crime of second degree assault against Luis Alcantar.

Counsel for the State has reviewed the verbatim report of proceedings, as well as relevant case law, and is of the opinion that insufficient evidence supports Cisneros’ conviction for the offense of second degree assault on Count 3.

The Court of Appeals has held that a third party’s fear and apprehension of harm for a victim is insufficient to support a finding of assault against the victim. State v. Nicholson, 119 Wn. App. 855, 862, 84 P.3d 877 (2003), *overruled on other grounds*, State v. Smith, 159 Wn.2d

778, 154 P.3d 873 (2007). Specifically, assault of a child by “fear and apprehension” is not supported by the fact that the child’s mother was concerned for the safety of the child. Id.

Here, the record shows that Luis Alcantar was asleep at the time Cisneros pointed a shotgun at him, and could not himself have been in fear or apprehension of harm. Instead, it was Marvella Alcantar who apprehended the possibility of harm to her son. It is significant that the court found that Cisneros aimed a shotgun at an individual in the bed whom he believed to be Ms. Alcantar’s new boyfriend, and then concluded that in so doing, Cisneros “created an apprehension that he was going to shoot at Luis Alcantar.” (CP 262) In light of the decision in Nicholson, the conviction for second degree assault should be vacated, and Cisneros resentenced on the remaining counts.

2. Cisneros has not demonstrated on this record that all the elements of a *Brady* violation are present.

Cisneros maintains on appeal that Marvella Alcantar and her children claimed that Marvella’s new boyfriend, Fernando Chavez, was hiding in a bedroom closet during the events in question, and that the deputy prosecutor represented to defense counsel that Mr. Chavez could not be located. As a Fernando Chavez was located, and testified for Cisneros in support of his motion for a new trial, Cisneros claims that the

State violated his due process rights, and the rule that exculpatory information must be provided to the defense pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 368 (1970), as well as CrR 4.7(a)(3).

It is true that a prosecutor's failure to comply with discovery requirements, which causes prejudice to the defendant, deprives a defendant of a fair trial. Brady, 373 U.S. at 87; In re Rice, 118 Wn.2d 877, 887, 828 P.2d 1086 (1992). Pursuant to court rule, remedies for such a breach include dismissal or a new trial. CrR 4.7(h)(7)(i); CrR 7.5(a)(5).

In order to establish a *Brady* violation, a defendant must demonstrate the existence of each of three necessary elements: "(1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." State v. Mullen, 171 Wn.2d 881, 895, ___ P.3d ___, (2011), quoting Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). As the Washington Supreme Court has observed, the *Brady* analysis not only involves its discrete elements, but also the "animating purpose" to preserve the fairness of criminal trials. Id., quoting Morris v. Yist, 447 F.3d 735, 742 (9th Cir. 2006). With respect to the first element of the analysis, a prosecutor is required only to disclose

evidence “favorable to the accused, that, if suppressed, would deprive the defendant of a fair trial.” *Id.*, quoting *Morris*, 447 F.3d at 742, and *United v. Bagley*, 473 U.S. 667, 675, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

The second *Brady* element requires proof that the State actually suppressed evidence favorable to the defense in the possession or control of either the prosecutor or law enforcement. *Mullen*, 171 Wn.2d at 895, (citations omitted)

Further, where “a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government.” *Mullen*, 171 Wn.2d at 896, quoting *United State v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991).

Third, evidence is prejudicial “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Mullen*, 171 Wn.2d at 897, quoting *Bagley*, 473 U.S. at 682.

Here, however, it is apparent that Cisneros’ argument is based solely upon the representations, and possible misunderstanding, on the part of trial defense counsel as to what was in the record. As set forth in the counter statement of facts, Ms. Alcantar did not identify Fernando Chavez as the boyfriend hiding in the bedroom closet. Even at sentencing

some weeks after the issue was first raised, Cisneros' counsel still did not identify where in the trial record that Chavez was referenced.

Even taking counsel's statements at face value, or the possibility that Ms. Alcantar may have identified a Francisco Chavez in pre-trial statements, there is absolutely no factual basis in the record for the court to have found that the State suppressed Mr. Chavez' identity or whereabouts. Counsel had equal access to any such individual.

Further, Mr. Cisneros was convicted after a bench trial. The court, sitting as trier of fact, heard Mr. Chavez' testimony at sentencing, and had the benefit of the arguments of counsel before entering its findings and conclusions of law. Cisneros cannot now say that the outcome of the trial would have been different if the trier of fact had heard that testimony at trial.

3. Counsel was not ineffective for failing to depose Rito Reyes or failing to locate Fernando Chavez.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (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 defendant, *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, 334-35, 899 P.2d 1251 (1995), *citing* State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In weighing the two prongs found in Strickland, a reviewing court begins with a strong presumption that defense counsel's representation was effective. In fact, the presumption "will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004).

Because the presumption runs in favor of effective representation, a defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The defendant also bears the burden of showing that, but for counsel's deficient representation, the result of the trial would have been different. Thomas, 109 Wn.2d 225-26.

Here, the record does reflect that Cisneros' trial was postponed on several occasions to allow defense counsel an opportunity to travel to Mexico and take the deposition of Rito Reyes, and leave was granted to take the deposition. However, the State objected to the motion, and the issue whether such a

deposition would be admissible at trial was left for another day.

(Bell RP 67) As Cisneros points out in his opening brief, his counsel's last motion for a continuance to take the deposition was denied, and the matter proceeded to trial; Mr. Reyes was not deposed.

Mr. Cisneros claims that the failure to take Reyes' deposition constituted ineffective assistance of counsel. He is incorrect.

It is clear from the record that for a number of reasons, including scheduling and other commitments, counsel was not able to make the trip to Mexico. Assuming for the sake of argument that the failure to take the deposition was deficient, Cisneros still has not met his burden of proving that, but for counsel's deficient performance, the result of the trial would have been different. Contrary to defense counsel's insistence that Mr. Reyes was a key witness, and only "ostensibly" a fugitive from justice, Mr. Reyes was, as the court indicated, subject to an outstanding bench warrant from Yakima County Superior Court.

Mr. Reyes has certain rights. Under both Art. I. sec. 9 and the Fifth Amendment, a witness has a right not to give incriminating answers in any proceeding. State v. Hobbie, 126 Wn.2d 283, 289-90, 892 P.2d 85

91995), *citing* Kastigar v. United States, 406 U.S. 441, 32 L. Ed. 2d 212, 92 S. Ct. 1653, *reh'g denied*, 408 U.S. 931, 33 L. Ed. 2d 345, 92 S. Ct. 2478 (1972).

In addition to the rights accorded any witness, a criminal defendant has an absolute right to remain silent. State v. Lougin, 50 Wn. App. 376, 381, 749 P.2d 173 (1988), *citing* State v. Parker, 79 Wn.2d 326, 331, 485 P.2d 60 (1971). Defense counsel indicated that he believed Mr. Reyes would appear voluntarily for a deposition, but Mr. Reyes was under no obligation to testify under oath in such a proceeding, and it is not apparent from the record how Mr. Reyes would have had access to independent counsel in Mexico in order to advise him as to any waiver of his Fifth Amendment rights. Even if the State had agreed to the deposition, it would have been precluded from conducting any meaningful cross-examination absent a knowing and voluntary waiver.

Also, as an apparent fugitive, Mr. Reyes was not unable to attend the trial, or otherwise prevented from attending the trial, as contemplated by CrR 4.6(a). The deposition, if taken, would not have been admissible at trial in any event, and the second prong of Strickland is not met.

Cisneros also asserts that counsel was ineffective for failing to exercise due diligence to locate Fernando Chavez in order for him to testify that he was not Ms. Alcantar's boyfriend, and thus impeach her

testimony. Again, as noted above, counsel did locate a Fernando Chavez, and the court had the benefit of his testimony before findings were entered. Counsel exercised due diligence in bringing this individual before the court, but was ultimately unsuccessful in moving for a dismissal or new trial. Again, Cisneros has not demonstrated that he was prejudiced by any deficiency.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions on one count each of first degree burglary, first degree assault, and second degree unlawful possession of a firearm. The second degree assault conviction should be vacated, and Mr. Cisneros resentenced on the remaining counts.

Respectfully submitted this 27th day of September, 2011.


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