

NO. 42599-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JUAN JOSE RECINOS,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
2012 AUG 15 AM 11:48  
STATE OF WASHINGTON  
BY DEPUTY

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

The Honorable Ronald E. Culpepper

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BRIEF OF APPELLANT

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VALERIE MARUSHIGE  
Attorney for Appellant

23619 55<sup>th</sup> Place South  
Kent, Washington 98032  
(253) 520-2637

*P.M. 8-14-2012*

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting a 911 recording.
2. The trial court erred in admitting statements made by appellant to law enforcement.
3. The trial court erred in entering finding of fact VIII and conclusion of law II in its 3.5 Findings of Fact and Conclusions of Law.
4. The trial court erred in admitting highly prejudicial photographs of appellant.
5. Defense counsel was ineffective for failing to object to the State's use of a recorded jail call that was not admitted as evidence.
6. Cumulative error denied appellant a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in admitting a 911 recording where the statements made to the operator did not meet the requirements of the excited utterance exception to the hearsay rule? (Assignment of Error 1).
2. Did the trial court err in admitting statements made by Recinos to law enforcement where there was no testimony at the 3.5 hearing that he was advised of *all* of his rights under Miranda? (Assignment of Error 2, 3).

3 Did the trial court err in admitting highly prejudicial photographs of Recinos in custody and restrained in handcuffs which eroded the presumption of innocence? (Assignment of Error 4).

4. Was defense counsel ineffective in failing to object to the State's use of a recorded phone call made by Recinos while in jail where the State did not move to admit the recording as evidence and therefore it was not properly admitted? (Assignment of Error 5).

5. Is reversal required where the cumulative effect of the errors denied appellant of his constitutional and fundamental right to a fair trial before an impartial jury? (Assignment of Error 6).

C. STATEMENT OF THE CASE<sup>1</sup>

1. Procedure

On February 25, 2010, the State charged appellant, Juan Jose Recinos, with two counts of attempted murder in the first degree and three counts of assault in the first degree with four firearm enhancements; three counts of vehicular assault; and one count of failure to remain at an injury accident. CP 1-6. The State amended the information on February 28, 2011, charging Recinos with two counts of attempted murder in the

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<sup>1</sup> There are 14 volumes of verbatim report of proceedings: 1RP - 08/19/10; 2RP - 07/02/10, 09/03/10, 10/01/10, 01/18/11, 02/07/11; 3RP - 02/28/11, 03/01/11 (voir dire); 4RP - 02/22/11, 02/24/11, 02/28/11; 5RP - 03/01/11; 6RP - 03/02/11; 7RP - 03/03/11; 8RP - 03/07/11; 9RP - 03/08/11; 10RP - 03/09/11; 11RP - 03/09/11 (verdict); 12RP - 03/25/11; 13RP - 04/08/11, 05/20/11, 07/08/11, 08/19/11; 14RP - 09/02/11.

second degree with firearm enhancements; two counts of assault in the first degree with firearm enhancements; one count of vehicular assault; and one count of failure to remain at an injury accident. CP 30-34.

The case went to trial before the Honorable Ronald E. Culpepper. 4RP 4. The court held a 3.5 hearing on February 22, 2011 and trial testimony began on March 1, 2011. 4RP 7-42; 5RP 110. On March 9, 2011, a jury found Recinos guilty as charged. CP 164-77. Recinos had no prior criminal history. CP 249-50. At sentencing on August 19, 2011, the court vacated the two counts of assault in the first degree and sentenced Recinos to 125 months for each of the two counts of murder in the second degree, 12 months for the vehicular assault, and 17 months for failure to remain at an injury accident. The court ordered that the sentences shall be served concurrently with an additional 120 months for firearm enhancements for a total of 245 months in confinement and 36 months of community custody. CP 196-209.

The State filed motion to correct the judgment and sentence on August 23, 2011 (Supp CP \_\_\_\_, Motion to Correct Judgment and Sentence, 08/23/11). On September 6, 2011, the court imposed 108 months for murder in the second degree as charged in count one and a below the standard range sentence of 17 months for murder in the second degree as charged in count two, to be served consecutively. The court imposed

concurrent sentences of 9 months for the vehicular assault and 13 months for failure to remain at an injury accident and an additional 120 months for firearm enhancements, for a total of 245 months in confinement and 36 months of community custody. CP 247-60.

The court noted there were substantial and compelling reasons for an exceptional sentence below the standard range:

[H]e has no prior criminal history. Apparently came to this country from Guatemala at age 16, worked hard, got somewhere, was able to get married, four kids, a house, et cetera. And other than this, and an unfortunate fascination with guns, doesn't have any real problems.

14RP 17.

Recinos filed a timely notice of appeal. CP 261-86.

2. 3.5 Hearing

At about 12:10 a.m. on February 24, 2010, Deputy Thompson was dispatched to the home of Mark and Teresa Moreau to investigate a report of a shooting involving a motor vehicle collision. 4RP 9-11. While he waited for additional units to arrive, Mark Moreau drove up in a car with Juan Recinos. 4RP 11-12. Thompson testified that he detained Recinos who was advised of his rights but Thompson could not remember who advised him. 4RP 12. Recinos invoked his right to remain silent and Thompson placed him in his patrol car in handcuffs. While transporting Recinos to the scene of the collision, he asked Thompson if his wife was

alright and said “he had found out that she was having an affair with a black man.” 4RP 14-16.

Detective Gundermann spoke with Recinos at the scene of the collision while he was in custody in the back of the patrol car. 4RP 27-28. Gundermann testified that she could not recall “which trooper told me, but he was advised of his rights and he did not want to talk to the deputies.” 4RP 29. She proceeded to ask Recinos if he wanted to give a statement and he responded that he wanted to speak to an attorney first. 4RP 29. Then Recinos asked her what he was being arrested for and she told him there had been a collision and a shooting. Recinos “indicated he didn’t know anything about a collision or a gun.” 4RP 30.

Over defense counsel’s objection, the court found that Recinos’s statements were admissible because they were spontaneous and “not the product of any kind of interrogation.” 4RP 40-42.

### 3. Trial Testimony

Juan and Tiffany Recinos were married in 1999 and have four young children.<sup>2</sup> 9RP 730. After working six years as a mortgage broker, Juan started his own company in 2007. 9RP 731. Despite a downturn in the economy, he managed to stay in business and worked side jobs on weekends to support his family. 9RP 730-31.

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<sup>2</sup> Mr. and Mrs. Recinos are referred to by their first name for clarity.

At 12:30 a.m on February 24, 2010, Detective Gundermann received a call about an accident at Meridian and 168<sup>th</sup> in east Pierce County. 5RP 120-22. When Gundermann arrived at the scene, she saw a silver Honda Civic that had sustained “massive contact damage” to the front and side of the car. 5RP 124. She learned that a passenger, Tiffany Recinos, and driver of the car, Arthur DeVone, were transported to the hospital. 5RP 125. The driver of a white Scion that had extensive damage to the front of the car was taken to the hospital. 5RP 128. Gundermann spoke with the driver of a slightly damaged silver Chevy Impala who remained at the scene. 5RP 127. While inspecting the Honda Civic, she noticed what appeared to be bullet holes and red paint chips on the rear bumper. 5RP 129-32.

Meanwhile, Deputy Thompson had transported Juan Recinos to the accident scene from the home of Mark and Teresa Moreau, Tiffany’s parents. 5RP 136-37, 9RP 669, 673, 679-83. Thompson responded to the Moreau residence to investigate a 911 call Teresa Moreau made reporting that “her son-in-law had been involved in a shooting.” 9RP 669. Gundermann went to talk to Juan who was in the back seat of the patrol car. 5RP 137-38. She checked his right hand where “there was a fresh laceration.” 5RP 138-39. Thereafter, Gundermann went to the Moreau home about two miles away. 5RP 133, 141-42. She located a Honda

Odyssey minivan that was red or maroon in color which was consistent with the paint chips on the Honda Civic. 5RP 133. Gundermann obtained a search warrant and collected tennis shoes and pants which appeared to have blood on them and a semiautomatic Glock that appeared to have blood on the handle. 5RP 144-47.

Tiffany Recinos testified that she and Juan were having marital problems in February 2010. 6RP 256-57. Sometime in mid-February, she became romantically involved with Arthur DeVone, a patient at St. Joseph's Dialysis Center where she worked as a nurse. 6RP 257-61. Juan happened to answer her cell phone once when DeVone called and he accused her of having an affair. Juan said he would kill them both if he discovered that they were having an affair and that he would kill her if she tried to divorce him. 6RP 262-64.

Tiffany was working on February 23, 2010, and she left early around 7 p.m. because Juan kept calling her. Juan wanted to know why she did not come home two nights ago and threatened to come to her workplace and make a scene if she did not provide an explanation. 6RP 267-68. Tiffany called DeVone because she was scared and drove in her Honda Civic to see him at his parents' house. They went out to eat at Taco Bell and stopped at Safeway before driving toward her house in Puyallup. 6RP 268-72. While DeVone was driving down 94<sup>th</sup> Street, they

passed Juan in his Honda Odyssey minivan and she waved at him. 6RP 275-77. Suddenly, Tiffany heard what sounded like “rocks being thrown at the car.” 6RP 278. DeVone said they were bullets and told her to get down. Then the minivan collided with the passenger side of the car and DeVone stepped on the gas to get away. She heard more of “those same rock sounds, the bullet sounds” and the minivan rear-ended the car twice. 6RP 279-80. Tiffany blacked out but remembered DeVone running a red light through an intersection and another car hitting them. 6RP 281-82.

Tiffany was taken to Tacoma General where she regained consciousness after three days in a coma. She underwent several surgeries for the multiple injuries she suffered from the collision. After a month in the hospital, she convalesced at her parents’ home for about two and a half months. 6RP 282-85.

Arthur DeVone testified that they passed Juan in a red Honda minivan and when he pulled up alongside them, Tiffany said, “That’s my husband.” 6RP 372-73. When DeVone drove ahead, “he comes and rams his van on the right side of the passenger door.” 6RP 373. DeVone started driving faster but the minivan got behind him and bumped the rear of the car several times. Then he heard gun shots which made him speed up to escape. 6RP 374-75. He accelerated to a speed of 90 miles an hour trying to make it through an intersection but he ran a red light and was hit

by another car. 6RP 380. DeVone got out of the car and fell immediately because his leg was broken. 6RP 380-81. He saw Juan get out of his van and go over to the passenger side of the Honda Civic momentarily before walking up to him. 6RP 383-86. Juan pulled out a black Glock and said, "I should kill you both," then hit him on the head. 6RP 386.

DeVone saw Juan running back to his minivan as a white suburban approached the scene. An ambulance transported him to Tacoma General where he was hospitalized for a week. DeVone received stitches for his head wound and underwent surgery on his leg. 6RP 390, 392-94.

Juan testified that he became concerned when Tiffany was missing for about 20 hours between the early evening of February 21, 2010 and the afternoon of February 22, 2010. 9RP 737. When Tiffany came home, "she appeared to be drugged" and went to sleep until the following day when she had to go to work. Juan questioned her about what happened and she said she went to a bar and a stranger slipped some drugs in her drink. She got away and slept overnight in her car before coming home. 9RP 739-40. Tiffany left for work around 1:00 p.m. on February 23<sup>rd</sup> and was supposed to be home by 9 p.m. 9RP 741. When Tiffany did not return, Juan called her workplace and spoke with an employee who said she already left to go home. 9RP 741-42. Juan called Tiffany's cell phone but she did not answer so he took the children in his minivan and drove

around to look for her. Unable to find her, he got home around 11:15 p.m. and checked their credit card account online. When he discovered two pending charges from Taco Bell and Safeway gas station, Juan became alarmed because those were places Tiffany did not usually go to. 9RP 742-44. He grabbed his firearm and drove to the Safeway where he saw Tiffany's Honda Civic pulling out of the parking lot onto Meridian.

Juan followed the car, drove up next to it, and honked his horn. He saw Tiffany through a partially rolled down window and she said, "Help." 9RP 747. Then a hand reached around the side of her head and the window rolled up and the car took off. 9RP 747. Juan explained that he grew up in Guatemala where kidnappings are very common so he was startled when the car sped off and he could not see who was driving. 9RP 747-48. He chased the car and the driver suddenly slammed on the brakes causing him to rear-end the Honda Civic, "[a]t this point fear entered into my head. I thought maybe she was car-jacked, kidnapped. I had no clue." 9RP 749. Juan took out his pistol and shot at the tires to disable the car. 9RP 749. He kept following the car at a high rate of speed until it went through a red light and got T-boned by another car. 9RP 754-55.

Juan got out of his minivan and ran to help his wife. As he approached the Honda Civic, DeVone stepped out of the car. Juan yelled

at him and “h]e turned around and starts swinging at me, and I fought back.” 9RP 756. In self-defense, Juan hit DeVone on the head with his gun and wrestled him to the ground. 9RP 755-56. Juan went to check on Tiffany and when he looked at her, he then realized that she was having an affair with DeVone. He became confused and panicked. Remembering that his children were at home alone, he left the scene. 9RP 756-58. Juan called his in-laws to have them pick up his children, and he went to their house where he was eventually arrested by the police. 9RP 759-60.

Theresa Moreau testified that she and her husband went to the Recinos house on February 22, 2010, to make sure Tiffany was alright because Juan told them that she had been out all night. Juan was upset and said he would kill her if she was with another man, “I didn’t think he meant it. I didn’t think he meant he wanted to kill her.” 8RP 580, 594-95. The next day, she and her husband went to bed around 10 p.m. after taking sleeping pills. Around midnight, she was awakened out of a “dead sleep” by a phone call from Juan, telling her that he was coming over. 8RP 581-84. Moreau got up and let Juan in the house. His pants and shoes were bloody and he said, “I found them together. I shot.” 8RP 585. Then he said “something about T-boned” which made her think he had T-boned their car. 8RP 585. Juan told her that the children were home alone so she

grabbed her cell phone and drove to the Recinos house. On her way to house, she called 911 to report what happened. 8RP 586-87.

An inmate testified that Juan told him that he was charged with attempted murder for trying to kill his wife because she was cheating on him. 8RP 512-13. He acknowledged that inmates can receive favorable treatment and financial compensation for providing information but denied that he received any benefits for his testimony. 8RP 523-24, 32.

D. ARGUMENT

CUMULATIVE ERROR DENIED RECINOS HIS  
CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Every person accused of a crime is entitled to a fair trial by an impartial jury. U.S. Const. amendments VI, XIV, section 1; Wash. Const. art. I, sections 3, 21, 22. Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

1. The trial court erred in admitting a 911 recording of a call made by Theresa Moreau because her statements to the operator did not meet the requirements of the excited utterance exception to the hearsay rule.

Hearsay is inadmissible but a recognized exception to the hearsay rule is an excited utterance. ER 802, 803(a)(2). An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2). A proponent of excited utterance evidence must satisfy three “closely connected requirements” that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007).

The excited utterance exception is based on the reasoning that “under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore, Evidence section 1747, at 195 (1976)). The utterance of a person in such a state is believed to be “a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock,” rather than an expression based on reflection or self-interest. Id.

ER 803(a)(2) should be interpreted in a sufficiently restrictive manner as not to lose sight of the basic elements which distinguish excited utterances from other hearsay

statements. This is necessary in order to preserve the real purpose of the exception and prevent its application where the factors guaranteeing trustworthiness are not present.

State v. Dixon, 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

Here, Theresa Moreau testified that she was awakened around midnight by a call from Juan who said he was on his way to her house. 8RP 581-84. She got out of bed and let Juan in. His pants and shoes were bloody and he said, "I found them together. I shot." 8RP 585. Then he said "something about T-boned" which made her think he had T-boned their car. 8RP 585. Juan told her that the children were home alone so she grabbed her cell phone and drove to the Recinos house. She called 911 on her way to the house. 8RP 586-87.

The State moved to admit a recording of the 911 call as an excited utterance. 8RP 648-49. During the 911 conversation, Moreau said her son-in-law, Juan Recinos, said he shot the guy her daughter was with and he T-boned them. He told her his shoes and pants were bloody. Ex. 137. Over defense counsel's objection, the court admitted the recording as an excited utterance because she was "under the effect of a startling event, concerned about the collision and the kids being left alone." 8RP 649-50.

Contrary to the court's ruling, Moreau's statements fail to meet the requirements of an excited utterance because the record establishes that no startling event occurred nor was she under the stress of excitement caused

by a startling event. The trial court found that Moreau's call qualifies as an excited utterance because she testified that Juan previously told her that if he caught Tiffany with another man, he would kill them. 8RP 650. The court's reasoning is fatally undermined by the fact that Moreau never expressed any fear for her daughter during the 911 call. Moreau never testified that she was startled or shocked when Juan showed up at her house. She never said she was afraid of what may have happened to Tiffany. Upon hearing that her daughter was involved in a shooting and collision, Moreau's immediate reaction was to get in her car and drive to the Recinos house to check on the children. She repeatedly told the 911 operator that she was concerned about the children.

Moreau was composed enough to make the call while driving. Her voice reflected "no stress of excitement." She sounded relatively calm, unlike someone reacting spontaneously to a startling event. Evidence that the declarant has calmed down before making the statement tends to negate a finding of spontaneity. State v. Doe, 105 Wn.2d 889, 893-94, 719 P.2d 554 (1986). There were long pauses and she was mostly responding to questions. An excited utterance may be made in response to questioning, but this tends to counter the element of spontaneity. State v. Williamson, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000).

The record substantiates that the trial court erred in admitting Moreau's statements as an excited utterance and that the error was prejudicial because as the court recognized, the recording bolstered the State's case. 8RP 650-51.

2. The trial court erred in admitting Juan's custodial statements because the State failed to prove that he was fully advised of all of his rights under Miranda.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." In Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United States Supreme Court held that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." Prior to any questioning, the individual must be warned that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him. Miranda, 384 U.S. at 479.

Miranda expressly prohibits drawing an inference of knowledge of the right against self-incrimination from the circumstances of the defendant. "*No amount of circumstantial evidence that the person may*

*have been aware of his right will suffice to stand in its stead. Only through [Miranda warnings] is there ascertainable assurance that the accused was aware of this right.”* State v. Sargeant, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988)(emphasis added by the court).

Courts “indulge every reasonable presumption against waiver of fundamental constitutional rights” and “do not presume acquiescence in the loss of fundamental rights.” A waiver is ordinarily an intentional relinquishment or abandonment of a known right of privilege. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). For a statement to be admissible under Miranda, “the State must establish by a preponderance of the evidence that the defendant, after being fully advised of his rights, knowingly and intelligently waived them.” State v. Haack, 88 Wn. App. 423, 435-36, 958 P.2d 1001 (1997)(citing State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973)).

A review of the adequacy of Miranda warnings is conducted *de novo*. State v. Hopkins, 134 Wn. App. 780, 785, 142 P.3d 1104 (2006)(citing United States v. San Juan-Cruz, 314 F.3d 384, 387 (9<sup>th</sup> Cir. 2002)).

At the 3.5 hearing, Deputy Thompson was asked if Recinos was advised of his rights:

Q. To your knowledge, was Mr. Recinos, at the time he was detained, advised of his constitutional rights?

A. He was.

Q. Did you advise him of his constitutional rights?

A. I don't recall if I did or not.

Q. To your knowledge, could another deputy have advised him of his rights?

A. Yes.

4RP 12.

Thompson testified that Recinos was handcuffed and transported to the scene of the collision and turned over to the Washington State Patrol. During the drive, Recinos asked if his wife was alright and said "he found out that she was having an affair with a black man."<sup>3</sup> 4RP15-17.

Detective Gundemann testified that Recinos was in the back of a patrol car "in an enclosed cage with the door shut." RP 28. She opened the door to speak with him:

Q. Were you aware of whether or not he had been advised of his constitutional rights?

A. Yes.

Q. How were you aware of whether or not he had been advised of his constitutional rights?

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<sup>3</sup> The court's finding of fact VIII erroneously states that "[t]he defendant then stated to Deputy Thompson that he had just found out that his wife was having an affair with a black guy." CP 178-81.

A. I don't recall which trooper told me, but he was advised of his rights and he did not want to talk to the deputies.

Q. You asked Mr. Recinos if he wanted to give a statement?

A. Yes, I did.

Q. And his response was he wanted to speak to an attorney first?

A. Yes.

Q. Did that terminate the conversation?

A. No. Mr. Recinos asked me what he was being arrested for and what was going on.

Q. Did you respond to his questions?

A. Yes, I told him there had been a collision and also a shooting.

Q. And did Mr. Recinos say anything to you regarding your answer to his question?

A. He indicated he didn't know anything about a collision or a gun.

4RP 29-30.

Over defense counsel's objection, the court admitted Recinos's statements to Thompson and Gundermann. 4RP 40-42. The court recognized that there was a problem because Thompson "doesn't remember who exactly warned Recinos of his Miranda warnings" and it "would have been better" if Gundermann had read Recinos his rights.

4RP 41. Nevertheless, the court concluded that his statements were spontaneous and not “the product of any kind of interrogation.”<sup>4</sup> RP 41-42.

To the contrary, the record establishes that even though Gundermann claimed that she was told that Recinos had been advised of his rights and did not want to talk, she initiated a dialogue with him in violation of Miranda. Recinos was handcuffed and held in the caged back seat of the patrol car. She questioned him by asking him if he wanted to give a statement, which provoked him to speak. “By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Miranda, 384 U.S. at 444.

Importantly, in its 3.5 Findings of Fact and Conclusions, the court made no finding that Recinos was advised of his Miranda rights. CP 178-81. Although Thompson and Gundermann claimed that Recinos was advised of his rights, neither of them recited the rights purportedly given. Consequently, the State failed to show that Recinos was advised that anything he says can be used against him in a court of law.

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<sup>4</sup> The court erroneously concluded in Conclusions of Law II, that “[t]he statements of the defendant were made sua sponte and were not the result of police interrogation.” CP 178-81.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system – that he is not in the presence of persons acting solely in his interest.

Miranda, 384 U.S. at 469. (emphasis added).

The record substantiates that there was no proof that Recinos was fully advised of *all* of his rights under Miranda. As the United States Supreme Court reasoned, “The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.” Miranda, 384 U.S. at 468. The record substantiates further that by her own admission, Gundermann violated Miranda by initiating a dialogue with Recinos and proceeding to question him despite being aware that he said he did not want to talk. It is evident that her questioning provoked Recinos’s statements.

Consequently, under Miranda, the trial court erred in admitting Recinos’s statements to Thompson and Gundermann and the error was

prejudicial because the contradictory statements were detrimental to his defense which hinged on his credibility.

3. The trial court erred in admitting highly prejudicial photographs of Recinos in custody thereby eroding the presumption of innocence and violating of his due process right to a fair trial.

The presumption of innocence, although not articulated in the Constitution, “is a basic component of a fair trial under our system of criminal justice.” State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)(quoting Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)). In order to preserve a defendant’s presumption of innocence before a jury, the defendant is “entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man.” State v. Jaime, 169 Wn.2d 857, 861-62, 233 P.3d 554 (2010). It is inherently prejudicial to shackle a defendant during trial, Finch, 137 Wn.2d at 844-45, or force a defendant to wear prison garb during trial, Williams, 425 U.S. at 502-05.

Here, the court admitted a photograph of Recinos looking distraught with his hands behind his back in a patrol car and two photographs of his hands in handcuffs. 5RP 205-07. Ex. 46, 49, 51. When defense counsel objected, the court asked, “Don’t the jurors know

Mr. Recinos was arrested and cuffed?” 5RP 205. Defense counsel responded, “Well, yes, they do, but it’s still unduly prejudicial, which is why he’s not cuffed in front of the jury.” 5RP 205-06. As in any criminal case, the jury heard testimony that Recinos was arrested and handcuffed, but fleeting trial testimony does not carry the highly prejudicial effect of photographs of Recinos in handcuffs, especially when the jury was allowed to view and examine the photographs during its deliberations. The court admitted the evidence to support Gundermann’s testimony that she took photographs of a laceration on Recinos’s hand, but even if they were relevant, any probative value was substantially outweighed by the danger of unfair prejudice. ER 401, 402, 403. The court’s ruling violates the basic rules of evidence.

The trial court erred in admitting the photographs because allowing the jury to see Recinos in custody restrained in handcuffs clearly eroded the presumption of innocence and violated his due process right to appear before the jury with the “dignity” and “self-respect of a free man.” Even though the court gave a limiting instruction, the court erred in admitting the evidence in the first instance. The court’s error was prejudicial because it deprived Recinos of his constitutional right to a fair trial.

4. Defense counsel was ineffective in failing to objecting to the State's use of a recorded jail conversation where the recording was not admitted as evidence.

The right to effective assistance of counsel is “fundamental to, and implicit in, any meaningful modern concept of ordered liberty.” State v. A.N.J., 168 Wn.2d 91, 96, 225 P.3d 956 (2010). “The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

To demonstrate 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 defendant, i.e. there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)(citing Thomas, 109 Wn.2d at 225-26)(applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)).

Here, the State called a corrections officer as a witness. 9RP 687-88. The officer testified that he recorded telephone calls made by Recinos

at the Pierce County Jail and he identified a disk marked as Exhibit 138. 9RP 691-93. However, the State did not move to admit the disk and therefore the disk was not admitted into evidence.<sup>5</sup>

Thereafter, during cross-examination of Recinos, the State proceeded to play the recording of his phone conversation with “Jim,” who Recinos identified as Jim Landon, his former boss. 9RP 766-67. During the conversation, Recinos said he did not shoot at the car. 9RP 767-68. The State used his statements to impeach his prior testimony that he fired four to five shots. 9RP 768. Inexplicably, defense counsel failed to object before the State played the recording. Defense counsel clearly had a basis for objection and his objection would have been sustained because the recording was not properly admitted as evidence. Furthermore, because there was no objection, the record is silent as to whether the recording would have been admissible.

The record establishes that defense counsel’s performance was deficient in failing to object to the use of the recording because it was not admitted as evidence, and Recinos was prejudiced by defense counsel’s deficient performance because the State used the recording to attack his credibility which was critical to his defense.

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<sup>5</sup> The Exhibit Record for Exhibit 138 only indicates that it was received by the Clerk’s Office. Supp. CP \_\_\_\_ (Exhibit Record, 03/09/2011).

5. Cumulative error denied Recinos his constitutional right to a fair trial.

Reversal is required where the cumulative effect of several trial errors materially affected the outcome of the trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). The record establishes that an accumulation of errors materially affected the outcome of the trial where the trial court erred in (1) admitting the recording of Theresa Moreau's call to 911 because it failed to meet the requirements of the excited utterance exception to the hearsay rule; (2) admitting Recinos's statements to Deputy Thompson and Detective Gundermann in violation of Miranda; (3) admitting highly prejudicial photographs of Recinos in custody restrained in handcuffs, which eroded the presumption of innocence and violated his due process right to a fair trial; and (4) defense counsel was ineffective in failing to object to the State's use of a recorded jail conversation which was not admitted as evidence.

E. CONCLUSION

For the reasons stated, this Court should reverse Mr. Recinos's convictions because the insurmountable accumulation of errors deprived him of his constitutional and fundamental right to a fair trial.

DATED this 14<sup>th</sup> day of August, 2012.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Juan Jose Recinos

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Juan Recinos, DOC # 353340, Washington Corrections Center, P.O. Box 900, Shelton, Washington 98032.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14<sup>th</sup> day of August, 2012 in Kent, Washington.

  
VALERIE MARUSHIGE

Attorney at Law  
WSBA No. 25851

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