

Court of Appeals No. 34761-0-II

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

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**KAMARA KAM CHOUAP,**

**Defendant/Appellant.**

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**APPELLANT 'S OPENING BRIEF**

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**PIERCE COUNTY SUPERIOR COURT,**

**CAUSE NO. 04-1-04273-1**

**THE HONORABLE FREDERICK W. FLEMING,  
Presiding at the Trial Court.**

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**I. ASSIGNMENT OF ERROR**

Mr. Chouap received ineffective assistance of counsel.

**II. ISSUES PRESENTED**

Is it an objectively reasonable legitimate trial strategy for counsel for Mr. Chouap to move successfully to prohibit one witness from offering evidence that Mr. Chouap was in a gang but for counsel to fail to object when a different witness offers the same evidence? (Assignment of Error No. 1)

**III. STATEMENT OF THE CASE**

***A. Procedural Background***

On September 7, 2004, Mr. Chouap was charged with assault in the second degree, possession of a stolen firearm, and unlawful possession of a firearm in the second degree. CP 1-3.

On January 18, 2005, the charges were amended to domestic violence assault in the second degree committed either by recklessly inflicting substantial bodily harm or with a deadly weapon, possession of a stolen firearm, and unlawful possession of a firearm in the first degree. CP 5-6.

On February 28, 2005, Mr. Chouap pled guilty to the amended charges of assault in the second degree with no alternative means charged and unlawful possession of a firearm in the first degree. CP 72-73, 75-82.

On June 24, 2005, Mr. Chouap filed a motion to withdraw his guilty

plea. CP 90-99. The trial court granted the motion. RP 355, 7-22-05<sup>1</sup>.

On November 17, 2005, the State charged Mr. Chouap with domestic violence assault in the second degree committed either by recklessly inflicting substantial bodily harm or by use of a deadly weapon, possession of a stolen firearm, unlawful possession of a firearm in the first degree, and two counts of intimidating a witness. CP 101-104.

Mr. Chouap stipulated pre-trial that, prior to the events at issue, he had been convicted of a serious offense which barred him from lawfully possessing a firearm. RP 8-9, 349.

Pre-trial, the court ruled that evidence relating to Mr. Chouap's membership in a gang was overly prejudicial and inadmissible. RP 63-77.

The second trial commenced on December 19, 2005 (RP 87) and ended with the jury finding Mr. Chouap guilty of assault in the fourth degree, unlawful possession of a firearm in the first degree, and both counts of witness intimidation. RP 495-497. The jury did not find that Mr. Chouap was armed with a firearm when he assaulted Ms. Daunis and did not find that the assault was committed against a family or household member. RP 496-497.

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<sup>1</sup> The transcript of the two trial is not paginated continuously between the two trials. Reference to the second trial will be made by giving the page number, reference to the first trial will be made by giving the page number and the date of the hearing.

Mr. Chouap received a high end standard range sentence of 89 months with all counts running concurrent. CP 203-215.

A Notice of Appeal was filed on April 28, 2006. CP 221.

***B. Factual Background***

Angel Delvalle is an inspector with the United States Marshal Service. RP 291. In November of 1999, Mr. Delvalle's government vehicle was stolen from in front of his house. RP 293. Inside the vehicle was a shotgun. RP 293-294. When Mr. Delvalle recovered his vehicle, the shotgun was missing. RP 294-295.

Plaintiff's exhibit 4A is the shotgun that was stolen from Mr. Delvalle's vehicle. RP 298. The stock of the rifle was modified between the time it was stolen from Mr. Delvalle and when he identified it in court, but Mr. Delvalle was not sure if the barrel had been modified. RP 298.

Mr. Chouap is Ms. Daunis' ex-boyfriend. RP 243. Mr. Chouap was living with Ms. Daunis off and on. RP 256.

On September 3, 2004, Ms. Daunis went to her apartment and found Mr. Chouap locked in her bedroom. RP 244. Ms. Daunis knocked on the door but Mr. Chouap didn't open the door. RP 244. Ms. Daunis got a feeling that there was someone in the room with Mr. Chouap, so she decided to sit down and smoke a cigarette by herself. RP 244.

Ms. Daunis sat on the couch for about 30 minutes then started to look through dressers that Mr. Chouap and his friends had put in the hallway to see if she could find a tool to unlock the bedroom door. RP 245. Ms. Daunis found a pair of tweezers and attempted to unlock the bedroom door when the door suddenly flew open. RP 245. Mr. Chouap had opened the door and was holding a shotgun that she and Mr. Chouap owned. RP 245.

Ms. Daunis tried to look around Mr. Chouap to see who was in the room and Mr. Chouap said something like, "I told you to go sit down." RP 246. Ms. Daunis then felt something hit her on the side of her head. RP 246. Mr. Chouap then said, "Bitch, go sit down on the couch and stay there," and shut the door. RP 246. Ms. Daunis then went and sat on the couch. RP 246.

After Ms. Daunis sat down on the couch, she noticed she was bleeding. RP 247. Mr. Chouap did not know that Ms. Daunis was injured. RP 247. Later that day Ms. Daunis's brother, Daniel, drove her to the hospital. RP 248. Ms. Daunis has a scar from the injury to her ear. RP 248.

Ms. Daunis had the shotgun because a woman had called her house while everyone was sleeping and threatened to kill her family. RP 249. Ms. Daunis asked Mr. Chouap to find something to protect Ms. Daunis and her family, so Mr. Chouap spoke to his friends and obtained the shotgun. RP 249. Ms. Daunis does not know who Mr. Chouap purchased the shotgun

from. RP 257. Ms. Daunis had hidden the shotgun in the loveseat in her bedroom. RP 259.

At 4:30 P.M. on September 3, 2004, Deputy Salmon was dispatched to the Coventry Court Apartments in Tacoma. RP 131. The 911 dispatch center asked Deputy Salmon to respond to that location in response to a domestic incident. RP 131. At least four Pierce County Deputies and several Tacoma police officers also responded to the apartments. RP 131-132. The officers had been told that there was a domestic incident occurring, possibly involving a shotgun. RP 132.

When enough police officers had arrived, the officers went to the apartment in question, knocked on the door, and announced themselves as police officers. RP 133. A six or seven year old girl young girl who was upset, crying, and distressed opened the door. RP 133. An officer pulled the little girl out of the way and the officers walked into the apartment. RP 133-134.

Deputy Salmon was the third officer to enter the apartment. PR 135. As Deputy Salmon entered the apartment and made his way towards a hallway which led to some bedrooms, Deputy Salmon observed Mr. Chouap coming towards him. RP 135. Deputy Salmon also saw Peggy Daunis sitting on a couch. RP 136. Deputy Salmon noticed that Ms. Daunis had a large

amount of blood on the side of her face and also on her shirt. RP 1136-137. In one of the bedrooms, the police found Mr. Chouap and another female. RP 184. As the police were about to open the bedroom door, Mr. Chouap opened the door from the inside. RP 185. Mr. Chouap was surprised to see the police and did not get on the ground right away so the deputies grabbed Mr. Chouap and “helped” him to the ground. RP 198. Deputy Salmon took Mr. Chouap into custody and placed him in handcuffs. RP 137. Deputy Salmon then escorted Mr. Chouap out of the apartment and to Deputy Salmon’s patrol car. RP 137, 141.

Before Mr. Chouap was led away, Deputy Melhoff asked him where the shotgun was. RP 199. Mr. Chouap told Deputy Melhoff that he didn’t know anything about a shotgun. RP 199. Deputy Melhoff and the Tacoma officer stayed in the bedroom where they found Mr. Chouap to secure it. RP 185-186. In the bedroom the police found a shotgun underneath a couch. RP 187. Deputy Melhoff did not notice and blood, skin, or hair on the shotgun. RP 200. One fingerprint was found on the shotgun, but there was not enough detail to make a comparison. RP 310-311.

In the living room, Deputy Melhoff observed a woman sitting on the couch. RP 190. The woman was distraught, crying, and bloody. RP 190. The woman was speaking to the deputies and was discussing her relationship

with Mr. Chouap and the fact that she was upset because Mr. Chouap had another girlfriend then began to cry hysterically. RP 196. The woman said that she didn't call 911. RP 196-197.

As Deputy Salmon escorted Mr. Chouap out of the apartment, he read Mr. Chouap his *Miranda* rights. RP 137-138. Mr. Chouap acknowledged that he understood his *Miranda* rights. RP 138. As Deputy Salmon was speaking to Mr. Chouap, Deputy Melhoff exited the apartment carrying a pistol-gripped shotgun. RP 140-141. Deputy Salmon asked Mr. Chouap if he had hit his girlfriend in the head with a pistol-gripped shotgun and Mr. Chouap denied doing so. RP 138. Mr. Chouap told Deputy Salmon that Ms. Daunis must have inflicted her injuries on herself. RP 138. Deputy Salmon did not see any blood on the shotgun. RP 146. The length of the shotgun barrel was 14 and 1/8 inches. RP 213-214.

On September 3, 2004, a deputy had Ms. Daunis write a statement. RP 273. Ms. Daunis was upset that the police were there. RP 331. She indicated that she did not know who had called the police and that she had not. RP 331. The deputy threatened Ms. Daunis that she would lose her child unless she completed all of the paperwork and went to the hospital. RP 274. In the statement Ms. Daunis wrote that Mr. Chouap had thrown open the bedroom door while holding a shotgun, called Ms. Daunis a bitch, hit Ms.

Daunis in the side of the head with the shotgun, and cut her ear with the tip of the gun. RP 275. Ms. Daunis had been awake for three or four days prior to this incident. RP 280.

Medical aid was called for. RP 140. The paramedics examined Ms. Daunis and determined that she did not need to be transported to the hospital but encouraged Ms. Daunis to go to the hospital to have her injury examined. RP 331. On September 3, 2004, Mr. Prudden was working as a physician's assistant in the emergency room at St. Clare Hospital. RP 169. Mr. Prudden treated Ms. Daunis when she came into the emergency room at St. Clare Hospital. RP 169-171

Mr. Prudden's "Emergency Services Care Record" indicated that Ms. Daunis had a 2 centimeter long superficial laceration on her ear. RP 171-173, 177-178. Ms. Daunis told the triage nurse, the physician assistant, and a social worker that Mr. Chouap had hit her in the head with a shotgun because she was concerned about the threat of losing her daughter. RP 277.

On October 20, 2004, Det. Ringer interviewed Ms. Daunis. RP 231. Following this conversation, Det. Ringer obtained a search warrant for phone calls that were placed from the Pierce County Jail to Ms. Daunis' phones numbers of 537-1215 and 538-5112. RP 232. Det. Ringer sought the search warrant because Ms. Daunis was very anxious and was "backtracking" on

some of the things she had said occurred. RP 232. Ms. Daunis acknowledged that she had spoken with Mr. Chouap. RP 232.

In February of 2005, Ms. Daunis received a telephone call from Mr. Chouap while he was in jail. RP 249. Plaintiff's exhibit 2 is a recording of the phone call. RP 233, 250. Det. Ringer listened to the phone calls and heard Mr. Chouap's and Ms. Daunis' voices on the recordings. RP 233. Mr. Chouap has never threatened Ms. Daunis either directly or over the phone, but other people have. RP 270. Prior to trial, Ms. Daunis received two letters from friends of Mr. Chouap telling her not to appear at trial. RP 278-279.

#### **IV. SUMMARY OF TESTIMONY**

##### ***•Deputy Ryan Salmon***

At 4:30 P.M. on September 3, 2004, Deputy Salmon was dispatched to the Coventry Court Apartments in Tacoma. RP 131. The 911 dispatch center asked Deputy Salmon to respond to that location in response to a domestic incident. RP 131. At least four Pierce County Deputies and several Tacoma police officers also responded to the apartments. RP 131-132. The officers had been told that there was a domestic incident occurring, possibly involving a shotgun. RP 132. Deputy William Melhoff was also dispatched to a domestic situation at the Coventry Court Apartments on September 3, 2004. RP 181-182.

When enough police officers had arrived, the officers went to the apartment in question, knocked on the door, and announced themselves as police officers. RP 133, 182-183. A six or seven year old girl young girl who was upset, crying, and distressed opened the door. RP 133. An officer pulled the little girl out of the way and the officers walked into the apartment. RP 133-134.

Deputy Salmon was the third officer to enter the apartment. PR 135. As Deputy Salmon entered the apartment and made his way towards a hallway which led to some bedrooms, Deputy Salmon observed Mr. Chouap coming towards him. RP 135. Deputy Salmon also saw Peggy Daunis sitting on a couch. RP 136. Deputy Salmon noticed that Ms. Daunis had a large amount of blood on the side of her face and also on her shirt. RP 1136-137. Deputy Salmon took Mr. Chouap into custody and placed him in handcuffs. RP 137. Deputy Salmon then escorted Mr. Chouap out of the apartment and to Deputy Salmon's patrol car. RP 137, 141.

As Deputy Salmon escorted Mr. Chouap out of the apartment, he read Mr. Chouap his *Miranda* rights. RP 137-138. Mr. Chouap acknowledged that he understood his *Miranda* rights. RP 138. As Deputy Salmon was speaking to Mr. Chouap, Deputy Melhoff exited the apartment carrying a pistol-gripped shotgun. RP 140-141. Deputy Salmon asked Mr. Chouap if

he had hit his girlfriend in the head with a pistol-gripped shotgun and Mr. Chouap denied doing so. RP 138. Mr. Chouap told Deputy Salmon that Ms. Daunis must have inflicted her injuries on herself. RP 138. Deputy Salmon did not see any blood on the shotgun. RP 146.

Medical aid was called for and Ms. Daunis was taken to a hospital. RP 140.

● ***George Prudden***

Mr. Prudden is a physician's assistant. RP 168. On September 3, 2004, Mr. Prudden was working as a physician's assistant in the emergency room at St. Clare Hospital. RP 169. Mr. Prudden treated Ms. Daunis when she came into the emergency room at St. Clare Hospital. RP 169-171

Mr. Prudden's "Emergency Services Care Record" indicated that Ms. Daunis had a 2 centimeter long superficial laceration on her ear. RP 171-173, 177-178.

● ***William Melhoff***

Deputy William Melhoff was also dispatched to a domestic situation at the Coventry Court Apartments on September 3, 2004. RP 181-182. Deputy Melhoff, Deputy Salmon, and another Tacoma Police officer went to the apartment. RP 182-183. When the officers knocked on the door to the apartment, a seven or eight year old girl answered the door and the police

scared her. RP 183. The police took the girl out of the apartment and went inside. RP 183. Deputy Melhoff entered the apartment and observed a lady on a couch or chair to his right. RP 183.

In one of the bedrooms, the police found Mr. Chouap and another female. RP 184. As the police were about to open the bedroom door, Mr. Chouap opened the door from the inside. RP 185. Mr. Chouap was surprised to see the police and did not get on the ground right away so the deputies grabbed Mr. Chouap and "helped" him to the ground. RP 198. Mr. Chouap was then handcuffed and led away by Deputy Salmon. RP 185. Before Mr. Chouap was led away, Deputy Melhoff asked him where the shotgun was. RP 199. Mr. Chouap told Deputy Melhoff that he didn't know anything about a shotgun. RP 199. Deputy Melhoff and the Tacoma officer stayed in the bedroom where they found Mr. Chouap to secure it. RP 185-186. In the bedroom the police found a shotgun underneath a couch. RP 187. Deputy Melhoff did not notice any blood, skin, or hair on the shotgun. RP 200.

In the living room, Deputy Melhoff observed a woman sitting on the couch. RP 190. The woman was distraught, crying, and bloody. RP 190. The woman was speaking to the deputies and was discussing her relationship with Mr. Chouap and the fact that she was upset because Mr. Chouap had another girlfriend then began to cry hysterically. RP 196. The woman said

that she didn't call 911. RP 196-197.

**●Terry Franklin**

Terry Franklin is a Forensic Scientist with the Washington State Patrol crime lab. RP 204. Mr. Franklin's specialty is firearms. RP 204-205. He testified that the length of the shotgun barrel was 14 and 1/8 inches. RP 213-214.

**●Robert De Grasse**

Robert DeGrasse works at the Pierce County Jail and is in charge of the inmate telephone system. RP 222. All telephone calls made by inmates at the pierce county jail are recorded. RP 222. When a call is placed by an inmate, the recording system records the time the inmate picks up the receiver, the time the person receiving the call picks up their receiver, the length of time of the conversation, the phone number called by the inmate, the phone number from which the call is placed, and the content of the phone conversation. RP 222-223. The system also notifies the inmate that the phone call is being monitored and recorded and records this warning. RP 224.

Mr. DeGrasse's duties include making copies of inmate phone calls when requested to by law enforcement or the prosecutor. RP 224.

Plaintiff's exhibit 2 is a CD which has recorded on it a call made on

February 23, 2005, to 253-538-5112. RP 224-225. Mr. DeGrasse made the CD and gave it to Detective Ringer. RP 226.

**●John Ringer**

Mr. Ringer is a Detective with the City of Tacoma. RP 229. Det. Ringer has interviewed both Ms. Daunis and Mr. Chouap. RP 230-231.

On October 20, 2004, Det. Ringer interviewed Ms. Daunis. RP 231. Following this conversation, Det. Ringer obtained a search warrant for phone calls that were placed from the Pierce County Jail to Ms. Daunis' phone numbers of 537-1215 and 538-5112. RP 232. Det. Ringer sought the search warrant because Ms. Daunis was very anxious and was "backtracking" on some of the things she had said occurred. RP 232. Ms. Daunis acknowledged that she had spoken with Mr. Chouap. RP 232.

Plaintiff's exhibit 2 is a CD with two of the phone calls between Mr. Chouap and Ms. Daunis recorded on it. RP 233. Det. Ringer listened to the phone calls and heard Mr. Chouap's and Ms. Daunis' voices on the recordings. RP 233.

During the interviews with Det. Ringer, Ms. Daunis indicated that, in her mind, she thought Mr. Chouap was a potential boyfriend. RP 238.

**●Peggysue Ann Daunis**

Mr. Chouap is Ms. Daunis' ex-boyfriend. RP 243.

In 1992, Ms. Daunis' ex-husband assaulted her and injured her head. RP 250. As a result of this head injury, Ms. Daunis suffers memory problems. RP 251. Ms. Daunis loses track of what she is saying and forgets things that have happened. RP 251. Ms. Daunis also takes medications for anxiety. RP 251.

In September 2003, Ms. Daunis was dating Mr. Chouap, although they had never held hands, kissed, or been physically intimate. RP 243, 255-256. At this time, Ms. Daunis was also constantly smoking methamphetamine three or four times a week. RP 252-253. Mr. Chouap was living with Ms. Daunis off and on. RP 256. Sometimes, Ms. Daunis cuts herself. RP 265. She has lost count of the number of times she has cut herself. RP 265.

Ms. Daunis has had eleven surgeries on her left knee and three surgeries on her right ankle and she loses her balance a lot. RP 263.

On September 3, 2004, Ms. Daunis went to her apartment and found Mr. Chouap locked in her bedroom. RP 244. Ms. Daunis knocked on the door but Mr. Chouap didn't open the door. RP 244. Ms. Daunis got a feeling that there was someone in the room with Mr. Chouap, so she decided to sit down and smoke a cigarette by herself. RP 244.

Ms. Daunis sat on the couch for about 30 minutes then started to look

through dressers that Mr. Chouap and his friends had put in the hallway to see if she could find a tool to unlock the bedroom door. RP 245. Ms. Daunis found a pair of tweezers and attempted to unlock the bedroom door when the door suddenly flew open. RP 245. Mr. Chouap had opened the door and was holding a shotgun that she and Mr. Chouap owned. RP 245.

Ms. Daunis tried to look around Mr. Couap to see who was in the room and Mr. Chouap said something like, "I told you to go sit down." RP 246. Ms. Daunis then felt something hit her on the side of her head. RP 246. Mr. Chouap then said, "Bitch, go sit down on the couch and stay there," then shut the door. RP 246. Ms. Daunis then went and sat on the couch. RP 246.

After Ms. Daunis sat down on the couch, she noticed she was bleeding. RP 247. Mr. Chouap did not know that Ms. Daunis was injured. RP 247. Later that day Ms. Daunis's brother, Daniel, drove her to the hospital. RP 248. Ms. Daunis has a scar from the injury to her ear. RP 248.

Mr. Chouap and Ms. Daunis had the shotgun because a woman had called her house while everyone was sleeping and threatened to kill her family. RP 249. Ms. Daunis asked Mr. Chouap to find something to protect Ms. Daunis and her family, so Mr. Chouap spoke to his friends and obtained the shotgun. RP 249. Ms. Daunis does not know who Mr. Chouap purchased the shotgun from. RP 257. Ms. Daunis had hidden the shotgun in the

loveseat in her bedroom. RP 259.

On September 3, a deputy had Ms. Daunis write a statement. RP 273. The deputy threatened Ms. Daunis that she would lose her child unless she completed all of the paperwork and went to the hospital. RP 274. In the statement Ms. Daunis wrote that Mr. Chouap had thrown open the bedroom door while holding a shotgun, called Ms. Daunis a bitch, hit Ms. Daunis in the side of the head with the shotgun and cut her ear with the tip of the gun. RP 275. Ms. Daunis had been awake for three or four days prior to this incident. RP 280.

Ms. Daunis told the triage nurse, the physician assistant, and a social worker that Mr. Chouap had hit her in the head with a shotgun because she was concerned about the threat of losing her daughter. RP 277.

In February of 2005, Ms. Daunis received a telephone call from Mr. Chouap while he was in jail. RP 249. Plaintiff's exhibit 2 is a recording of the phone call. RP 250. Mr. Chouap has never threatened Ms. Daunis either directly or over the phone, but other people have. RP 270. Prior to trial, Ms. Daunis received two letters from friends of Mr. Chouap telling her not to appear at trial. RP 278-279.

**●Angel Delvalle**

Angel Delvalle is an inspector with the United States Marshal

Service. RP 291. In November of 1999, Mr. Delvalle's government vehicle was stolen from in front of his house. RP 293. Inside the vehicle was a shotgun. RP 293-294. When Mr. Delvalle recovered his vehicle, the shotgun was missing. RP 294-295.

Plaintiff's exhibit 4A is the shotgun that was stolen from Mr. Delvalle's vehicle. RP 298. The stock of the rifle was modified between the time it was stolen from Mr. Delvalle and when he identified it in court, but Mr. Delvalle was not sure if the barrel had been modified. RP 298.

**●Allen Johnson**

Mr. Johnson is a forensic technician for the Pierce County Sheriff's Department. RP 302. Mr. Johnson testified that one fingerprint was found on the shotgun, but there was not enough detail to make a comparison. RP 310-311.

**●Ed Smith**

Mr. Smith is a property officer who works in the Pierce County Sheriff's Department property room. RP 313. Plaintiff's exhibits 4A and 4B were received by the property room through the South Hill precinct on September 5, 2004. RP 315. The shotgun and the shells left the property room on February 2, 2005 and were returned on February 3, 2005. RP 316. The shotgun and shells left the property room again on February 8, 2005 and

were transported to the Washington State Patrol Crime Lab in Tacoma by property officer Jim Hill. RP 316-317. The items were returned again on February 15, 2005. RP 317.

●*Franz Helmcke*

Deputy Helmcke is a patrol deputy with the Pierce County Sheriff's Department. RP 324. On September 3, 2004, Dep. Helmcke was dispatched to the Coventry Court Apartments in response to a call of someone getting hit with a shotgun. RP 324-325. When Dep. Helmcke arrived, officers from both Pierce County and Tacoma were present. RP 325. Medical aid was also dispatched to the apartment but were staged in another area until the area was secure. RP 328. The officers approached the apartment with their weapons drawn and knocked on the door. RP 326. Ms. Daunis' daughter answered the door. RP 326.

Deputies Salmon and Melhoff were present and upon entering the apartment went down a short hallway towards some bedrooms. RP 326. Dep. Helmcke saw Ms. Daunis sitting on the couch or a chair in the living room. RP 327. Dep. Helmcke noticed Ms. Daunis had some type of wound on the left side of her head. RP 327-328.

Dep. Helmcke saw Mr. Chouap being handcuffed and taken out of the apartment. RP 329-330. Dep. Helmcke spoke with Ms. Daunis. RP 330.

Ms. Daunis was upset that the police were there. RP 331. She indicated that she did not know who had called the police and that she had not. RP 331.

The paramedics examined Ms. Daunis and determined that she did not need to be transported to the hospital but encouraged Ms. Daunis to go to the hospital to have her injury examined. RP 331.

Ms. Daunis wrote a statement. RP 332. Plaintiff's exhibit 9 is a copy of Ms. Daunis' statement. RP 332.

●*Kamara Chouap*

Mr. Chouap was a friend of Ms. Daunis and they would get high together. RP 359. Mr. Chouap met Ms. Daunis in June of 2004. RP 359.

During the time Mr. Chouap was hanging out with Ms. Daunis, he was living with his mother. RP 363. During this time, Mr. Chouap was not Ms. Daunis' boyfriend. RP 365. Mr. Chouap never held Ms. Daunis' hand, never went on a date with Ms. Daunis, was never intimate with Ms. Daunis, and had no belongings at Ms. Daunis' apartment. RP 365.

Mr. Chouap spent about half the month at Ms. Daunis' apartment. RP 366. Mr. Chouap sometimes fell asleep there, but he was not on the lease and did not pay utilities. RP 367. Mr. Chouap did bring food for Ms. Daunis' daughter because there was no food in the apartment and Ms. Daunis' daughter was always hungry. RP 367.

The night before Mr. Chouap was arrested, Mr. Chouap was at Ms. Daunis' apartment helping her move. RP 369. In the middle of the night an acquaintance of Ms. Chouap arrived at the apartment, so Mr. Chouap and his acquaintance went back into a bedroom, smoked marijuana, and fell asleep. RP 369-370.

Mr. Chouap awoke to Ms. Daunis banging on the bedroom door asking, "Why is the door locked?" RP 370. Mr. Chouap told her he was sleeping, but Ms. Daunis kept trying to get into the room. RP 370. Mr. Chouap opened the door and Ms. Daunis saw Mr. Chouap's acquaintance and started "going wild," swinging her arms and trying to get at Mr. Chouap's acquaintance. RP 370-371. Mr. Chouap tried to hold Ms. Daunis back and ended up slapping her with an open hand. RP 371. Mr. Chouap did not have a shotgun or anything else in his hands when he slapped Ms. Daunis. RP 372.

Both Mr. Chouap and Ms. Daunis were shocked that Mr. Chouap had slapped Ms. Daunis, so Mr. Chouap told Ms. Daunis to go and sit down on the couch. RP 372. Mr. Chouap went back into the bedroom and fell asleep. RP 372. The next thing Mr. Chouap was aware of was his acquaintance telling him, "The police is here" and knocking on the bedroom door. RP 374. Mr. Chouap opened the door and saw police who asked him if he was

“Clover.” RP 374. Mr. Chouap said that he was “Clover” and the police put Mr. Chouap on the ground, handcuffed him, then took him to a patrol car. RP 374. Mr. Chouap asked what was going on and the police told him that he was being charged with assault in the second degree and felony possession of a firearm in the second degree. RP 374-375.

Mr. Chouap was not aware that there was a shotgun in the bedroom. RP 372. Mr. Chouap denied having bought a shotgun for Ms. Daunis. RP 372. Mr. Chouap told the police that the gun did not belong to him. RP 375.

While he was in jail, Mr. Chouap never called any of his friends, ever wrote letters to any of his friends, and never suggested to anybody that they should do anything to anybody related to this case. RP 379.

## V. ARGUMENT

**It was ineffective assistance of counsel for Mr. Chouap’s trial counsel to have Det. Ringer’s testimony regarding Mr. Chouap’s membership in a gang suppressed then fail to object when Ms. Daunis testified that Mr. Chouap was in a gang.**

In order to show that he received ineffective assistance of counsel, a appellant must show (1) that trial counsel’s conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding

would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2005).

There is a strong presumption that defense counsel's conduct is not deficient. There is a sufficient basis, however, to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2005). Where a defendant has received ineffective assistance of counsel, the proper remedy is remand for a new trial with new counsel. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

Here, counsel for Mr. Chouap succeeded in having testimony from Det. Ringer that Mr. Chouap was in a gang suppressed on the basis that this evidence was more prejudicial to Mr. Chouap than it was probative of any issue. RP 63-77. However, when Ms. Daunis revealed on redirect examination that the police deputies had told her Mr. Chouap was in a gang, counsel for Mr. Chouap failed to object either on grounds that the court had previously ruled that this evidence was inadmissible or even on grounds of hearsay or undue prejudice.. RP 279.

Mr. Chouap was prejudiced by his trial counsel's failure to object to the introduction of this evidence because, as the court had previously ruled, evidence that Mr. Chouap was a gang member was highly prejudicial but

minimally probative of any issue. When evidence is unduly prejudicial, “the minute peg of relevancy is said to be obscured by the dirty linen hung upon it.” *State v. Turner*, 29 Wn.App. 282, 289, 627 P.2d 1324, *review denied*, 95 Wn.2d 1030 (1981). Because of the grave danger of unfair prejudice, evidence of gang affiliation is inadmissible unless the State establishes a sufficient nexus between the defendant’s gang affiliation and the crime charged. *See State v. Campbell*, 78 Wn.App. 813, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004, 907 P.2d 296 (1995).

Here, the State failed to establish a nexus of relevancy and the court properly excluded evidence of Mr. Chouap’s gang affiliation. When Ms. Daunis introduced the evidence and trial counsel for Mr. Chouap failed to object and ask for a curative instruction or a mistrial, the “unfair prejudice” was allowed to exist unchecked.

It was not objectively reasonable, nor can it be considered a valid trial tactic for Mr. Chouap’s trial counsel to seek to exclude evidence offered by one witness but then fail to object to the same highly prejudicial evidence being introduced by another witness.

**VI. CONCLUSION**

This court should vacate Mr. Chouap's convictions and remand for a new trial.

DATED this 30<sup>th</sup> day of November, 2006.

Respectfully Submitted,



Sheri Arnold, WSBA No. 18760  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on December 4, 2006, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and by the U.S. Post Office to appellant, Kamara Kam Chouap, DOC # 811874, Airway Heights Corrections Center, Post Office Box 1899, Airway Heights, WA. 99001, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on December 4, 2006.

  
Norma Kinter

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