

COURT OF APPEALS
STATE OF WASHINGTON

11 APR 19 4 15 PM '17

NO. 41176-8-II

STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH HAWKINS,

Appellant.

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

The Honorable John McCarthy, Judge

AMENDED BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>The Incident and Investigation</u>	2
2. <u>The Charges and Pretrial Matters</u>	5
3. <u>Late Discovery Disclosure and Trial Unpreparedness</u>	9
4. <u>The Trial, Verdict and Sentence</u>	17
C. <u>ARGUMENT</u>	19
APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL	19
1. <u>Counsel’s Performance Was Objectively Unreasonable</u>	19
2. <u>Defense Counsel’s Deficient Performance Prejudiced The Defense</u>	25
D. <u>CONCLUSION</u>	28

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Dependency of V.R.R.</u> 134 Wn. App. 573, 141 P.3d 85 (2006)	23
<u>In re Fleming</u> 142 Wn.2d 853, 16 P.3d 610 (2001)	20, 28
<u>In re Personal Restraint of Pirtle</u> 136 Wn.2d 467, 965 P.2d 593 (1998)	25
<u>State v. Brooks</u> 149 Wn. App. 373, 203 P.3d 397 (2009)	26
<u>State v. Jury</u> 19 Wn. App. 256, 576 P.2d 1302 (1978)	20
<u>State v. Knapstad</u> 107 Wn.2d 346, 729 P.2d 48 (1986)	7
<u>State v. Krenik</u> 156 Wn. App. 314, 231 P.3d 252 (2010)	24
<u>State v. Maurice</u> 79 Wn. App. 544, 903 P.2d 514 (1995)	20
<u>State v. Petrina</u> 73 Wn. App. 779, 871 P.2d 637 (1994)	22
<u>State v. Stenson</u> 132 Wn.2d 668, 940 P.2d 1239 (1997)	20
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987)	19
<u>State v. Visitacion</u> 55 Wn. App. 166,, 776 P.2d 986 (1989)	21

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Crawford v. Washington
541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)..... 27

Hawkman v. Parratt
661 F.2d 1161 (8th Cir.1981) 19

Sanders v. Ratelle
21 F.3d 1446 (9th Cir.1994) 20

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 19-21, 25

RULES, STATUTES AND OTHER AUTHORITIES

U.S. Const. Amend. VI 19, 27

A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to effective assistance of counsel.

Issue Pertaining to Assignment of Error

Appellant's defense centered on the issue of identity. Three days before trial, the State provided defense counsel with new discovery, including photomontages and a police report documenting the fact that a police informant was the first to mention appellant's name in connection with the charged robbery. Defense counsel glanced at this material but did not review it carefully. He did not move for a continuance based on the late disclosure and the need for additional time to reflect on the new discovery.

On the first day of trial, it quickly became apparent defense counsel was unprepared. The record shows he was unaware his client and two of the State's witnesses had been the subject of photo montages. Counsel also was unaware that an informant had connected appellant with the offense. Consequently, while cross-examining the lead detective, defense counsel inadvertently opened the door to testimony about the informant's identification of appellant at the scene of the crime and his suggestion that appellant was connected with the robbery.

Defense counsel made an impassioned motion to dismiss for failure to disclose information about the informant prior to trial. After the State pointed out that it had provided that information in the new discovery, defense counsel still did not request a continuance to reflect and correct the course of the defense. Was appellant denied effective assistance of counsel?

B. STATEMENT OF THE CASE

1. The Incident and Investigation

On August 21, 2009, Micah Wells drove himself to the 54th Street Bar in Tacoma. 7RP 241-42¹. Wells owned a Crown Victoria that had been enhanced with expensive chrome rims and an extensive stereo / video system. 7RP 242, 423. Wells had been drinking earlier that day and then spent an hour in the bar. 7RP 241-42. He was very intoxicated when he left the bar. 7RP 263.

After leaving, Wells spoke to a few men in the parking lot. 7RP 247. As Wells turned away and began walking to his car, someone came out of nowhere and struck him on the head. 7RP 248. He was hit approximately five times and suffered a laceration on his forehead. 7RP 249. During the incident, Wells' keys and

¹ The transcripts are identified as follows: 1RP (March 30, 2010); 2RP (April 16, 2010); 3RP (May 6, 2010); 4RP (May 21, 2010); 5RP (May 26, 2010); 6RP (June

wallet were taken. 7RP 251. He did not know by whom. 7RP 251. At some point, Wells realized his car was leaving the parking lot. 7RP 254.

After the incident, Wells left the parking lot and called 911. 7RP 70, 73, 253. Officer Steven Butts responded. 7RP 70. Wells told Butts three black men attacked him, took his keys and wallet, and drove away with his car.² 7RP 73. Wells indicated the men were Chicago Crips. 7RP 73. Wells would later testify that he did not recall seeing appellant Kenneth Hawkins that night. 7RP 284.

The case was assigned to Detective Timothy Griffith. 7RP 86. Wells called Griffith and said he had been inquiring in the community whether anyone knew what happened to his car. 7RP 87. He reported a few names that had come up in his conversations. 7RP 87. Wells would later testify he did not hear Hawkins' name mentioned. 2RP 278.

Based on Wells' information, Griffith put together two photo montages. 7RP 89. These included pictures of Curtis Hudson and Brandon Sparks, both Hilltop Crip (HTC) members. 7RP 89, 93.

1, 2010); 7RP (multiple-volume trial and sentencing transcript beginning July 19, 2010).

² Wells' car was later recovered, but it had been stripped. 7RP 139, 243-44.

On September 2, 2009, Griffith showed the montages to Wells. 2RP 88. Wells identified Hudson but not Sparks. 7RP 96.

Griffith also obtained a copy of the surveillance video from the 54th Street Bar. 7RP 97-98. Griffith and Detective John Ringer, a purported HTC expert, showed the surveillance video to a confidential informant (CI). 7RP 116-23. The CI identified four people he recognized in the video who might be involved in the incident -- Sparks, Hudson, Manny Hernandez (a HTC), and "Ken Loc." 7RP 113, 116, 121-122. Griffith asked Ringer who used the street name "Ken Loc." 7RP 114, 122. Ringer said Hawkins did. 7RP 122. This was the first time Hawkins' name had been mentioned in conjunction with the incident. 7RP 113, 121.

Griffith met with Wells again and showed him photo montages containing the pictures of Hernandez and Hawkins. 7RP 109-10. Wells identified Hernandez, but he was unable to identify Hawkins. 7RP 110.

Meanwhile, Curtis Hudson was arrested for unrelated charges. 7RP 371, 402. After police showed Hudson the video of the 54th Street Bar incident, Hudson realized the police had evidence connecting him with that incident, so he began offering

information which eventually led to a highly beneficial plea agreement. 7RP 400, 439, 464-66.

In the words of Detective Ringer, Hudson “wanted to do anything he could to help himself.” 7RP 489. Hudson claimed, even though he was present and knew about the plan to assault and rob Wells, he did not participate in the robbery. 7RP 383, 417. He claimed Hawkins and Sparks assaulted Wells so Sparks could obtain Wells’ car keys and take the car. 7RP 383-84, 417-19, 422. Hudson also said Hernandez was at the bar and knew about the incident, but was not directly involved. 7RP 378.

2. The Charges and Pretrial Matters

On February 8, 2010, the Pierce County Prosecutor charged appellant Kenneth Hawkins, and thirty other persons, with conspiracy to commit thirteen different felonies based on an alleged affiliation with the HTC gang. CP 1-25.³ The prosecutor also charged appellant as an accomplice to first degree robbery and taking of a motor vehicle (arising out of the 54th Street Bar incident). CP 1-3. On March 4, 2010, the State filed an amended information, charging appellant as a principle. CP 26-29.

³ The Information and Statement of Probable Cause contain 51 charges in total. CP 1-25. Appellant is focusing on the charges that apply to him.

On March 30, 2010, the trial court held a pretrial status hearing. 1RP. Neither the State nor the defense were ready for trial. 1RP 27-28. The prosecutor informed the trial court, given the considerable discovery and complexity of its conspiracy theory, the State might not be prepared until September. 1RP 30. In the meantime, the trial court entered a sixty day continuance. 1RP 58.

During a status conference on April 16, 2010, the defense complained that it was unable to formulate defenses or bring proper pretrial motions because the State had not provided all the discovery and had not been specific as to whom the discovery applied. 2RP 54, 58. The trial court ordered the State to hand over all discovery it currently possessed and, within one week, identify the specific discovery that pertained to each defendant. 2RP 54-58, 62-63.

At the next hearing, the State confirmed that the 4,500 pages of discovery it had already provided was the extent of its existing evidence against the defendants. 3RP 42. The State also argued, under its general conspiracy theory, all the evidence applied to all the defendants. 3RP 15-16, 41-42. It explained its general conspiracy theory as follows: the defendants belonged to a HTC gang; the gang exists solely for the purpose of committing

crimes in order to make money; the defendants understood this to be the case when they agreed to join the gang; thus, all criminal acts for monetary gain undertaken by gang members is part of a conspiracy. 3RP 15-16.

The trial court continued the case so the defendants could file Knapstad⁴ motions. 3RP 53. Regarding discovery production, the trial court informed the State it could not add any evidence of which it currently knew about, should have known about, or could have known about; however, the State could continue to augment discovery with newly generated evidence.⁵ 3RP 55, 57-58.

On May 21, 2010, the defendants moved to dismiss the conspiracy charge in count I. 4RP 10-44; CP 30-38. The trial court denied in part and granted in part. CP 90-92. It did not dismiss the conspiracy charge outright, but it limited the scope of the charge. 4RP 44-46; CP 90-92. Specifically, the trial court ruled the State could not proceed under a generalized theory; however, it could proceed on conspiracy charges as they related to other specific criminal charges. 4RP 44-46. For Hawkins, this meant

⁴ State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

⁵ Around this time, Sparks and Hernandez became "cooperating witnesses" in exchange for substantially beneficial plea deals. 7RP 217-20, 315-17, 466-67.

count I only applied to a conspiracy to commit first degree robbery or taking of a motor vehicle as had been charged in counts II and III. 4RP 85.

On May 26, 2010, the trial court granted Hawkins' motion to sever his case so he could stand alone for trial. 5RP 99-100. The trial court then took up the issue of scheduling. 5RP 100. Defense counsel said he was not ready for trial because he had additional investigation to complete. 5RP 100. When the trial court asked how much time he needed, defense counsel reported, given his trial schedule, the absolute soonest he could start was the end of July. But he also said he really needed until mid September. 5RP 100. The issued was reserved. 5RP 100.

The scheduling matter was taken up again on June 1, 2010. 6RP 59. Defense counsel explained he was in trial most of the month of June and was "pretty booked up this summer for trials." 6RP 59. He suggested September 7, 2010, for a trial date. 6RP 59. Defense counsel told the trial court he had spoken to two prosecutors about the proposed continuance. RP 59. Prosecutor Gregory Greer did not agree; however, Prosecutor James Schacht

The State was still conducting interviews and generating new evidence as a result.

(who ultimately tried the case) said he would try the case on September 7th. RP 60.

Prosecutor Greer addressed the trial court. 6RP 60. He said that he preferred a trial date later that month, explaining he would be trying other murder cases in August and wanted to be finished so he could start a three-month leave in October. 6RP 60. Hearing this, the trial court pressed defense counsel to identify a July trial date. 6RP 61. Defense counsel explained he had three trials set in early July so the third week in July was the first available date. 6RP 61. The trial was set for July 19, 2010. 6RP 61.

3. Late Discovery Disclosure and Trial Unpreparedness

On Friday July 16, 2009 -- three days before trial -- the prosecutor for the first time accessed the Law Enforcement Support Agency (LESA) system to obtain records pertaining to Hawkins' case that were missing from the 5,000 pages of discovery the State had already produced. 7RP 189. These new records included a police report documenting the involvement of the CI and the photo montages. 7RP 189, 191. The prosecutor made copies and sent them to defense counsel that same day. 7RP 189. Defense

counsel glanced over the new documents, but did not read them closely. 7RP 187.

As the first order of business on July 19, 2010, defense counsel handed the trial court Hawkins' motion for a continuance. 7RP 3. In his supporting affidavit, Hawkins explained he was bringing the motion because defense counsel had not yet interviewed the witnesses or officers, had not shared the police reports with him, and had not provided him a copy of the discovery (including photo line-ups and victim statements). Supp. CP ___ (Defendant's Support Affidavit for Motion for Continuance, July 19, 2010). Hawkins said that he had not seen the State's witness list until July 16, 2010 – just three days before trial. Id. He also said defense witnesses had not been contacted.⁶ Id.

The trial court invited defense counsel to comment. 7RP 9. Defense counsel said that more time would be "beneficial." 7RP 9. He confirmed that he had not yet shown Hawkins the police report and had not provided Hawkins with the pertinent discovery. 7RP 10. Defense counsel explained that his preparation for trial was hampered by the fact his girlfriend was at Harborview the previous week with a very serious eye infection that had blinded her in one

eye and was threatening to cause total blindness. 7RP 10. Defense counsel also explained that there were over 5,000 pages of discovery, requiring a great amount of time merely to decipher what related to Hawkins. 7RP 10. Defense counsel said he had summarized the contents for Hawkins, but it would take a week or two to identify, pull, and copy the pertinent documents for Hawkins' review. 7RP 10-11.

The trial court inquired whether defense counsel had spoken to witnesses. 7RP 12. Defense counsel said he had talked to Wells the previous week, but he had not interviewed Hudson, Starks, or Hernandez. 7RP 12. He said he reviewed their documented interviews. 7RP 12-13. The trial court asked whether there were photo line-ups. 7RP 13. Defense counsel said it was his understanding there was one montage from which Wells identified Hudson. 7RP 14. When asked whether he had an opportunity to look at that, defense counsel responded, "At some point I probably did. This weekend in going through and trying to find it, I couldn't find it...." 7RP 14. Defense counsel explained it was his understanding that no other montages were presented to Wells. 7RP 14.

⁶ At the end of trial, Hawkins also alleged that defense counsel failed to

The prosecutor informed the trial court that defense counsel's representation of the record was "not accurate." 7RP 14. He explained that the images of all three of the co-defendants were presented in montages. 7RP 14. Defense counsel then asked the prosecutor whether his client was included in a montage. 7RP 14. The prosecutor said he was. 7RP 15.

Defense counsel explained, although he read through the discovery, he did not recall the fact that there were photo montages pertaining to his client, Sparks, or Hernandez. 7RP 15-16. At this point, the prosecutor informed the trial court it had accessed the LESA Records three days prior to trial and sent copies of the montages and records to defense counsel, but defense counsel evidently did not read them. 7RP 17-18.

After this exchange, Hawkins was permitted to address the trial court. 7RP 17. He asked for a continuance of "at least two weeks" so he could review the discovery so he could prepare himself to go to trial. 7RP 17.

The State admitted it would not be prejudiced if the case were continued. 7RP 18. It noted, however, there had been plenty of time for the defendant to have read the information pertinent to

subpoena a defense witness. 7RP 484.

this case. 7RP 18. The State indicated less than 100 pages of the original 5,000 pages were actually relevant to Hawkins' case. 7RP 18. He suggested the defendant could read it at some point without the need for a continuance. 7RP 18.

Defense counsel countered that there were approximately 400 pages of discovery documenting the interviews with Hudson, Starks, and Hernandez, any of which could be relevant to the case. 7RP 19. He also challenged the State's comment that there had been ample time for him to give his client the relevant documents. 7RP 19. Defense counsel explained he was a solo practitioner who had been in trial for three of the last six weeks and, thus, could not easily get those documents to his client. 7RP 19.

The trial court denied Hawkins' motion. 7RP 20. It pointed out, although the case was complex at first, it had been simplified. 7RP 20. The trial court commented "there is never enough time from anybody's perspective to get ready for trial." 7RP 20. It suggested that defense counsel pull records as the case progressed and give those to Hawkins to review. 7RP 20.

Later that morning, however, defense counsel's lack of preparedness became glaringly apparent. 7RP 113-15, 134-37. While cross-examining detective Griffith, defense counsel learned

for the first time that a CI was involved in the case and was the first person to suggest Hawkins' involvement in the incident.⁷ 7RP 113. This door having been opened by defense counsel, Griffith testified that the CI was the first person to connect Hawkins with the incident via the street name "Ken Loc" and had placed him at the scene through the video. 7RP 113-15, 123, 129-30, 134-37.

After Griffith was off the stand and the jury was out of the courtroom, defense counsel made an impassioned motion to dismiss. 7RP 134-35. He was furious that he had not been told about the confidential informant. 7RP 134-35. Defense counsel said the defense had the right know about this information and the right to interview the CI in order to fully prepare a defense. 7RP 135.

The State responded that the defense could not claim surprise because the state had provided Griffith's written report documenting the CI's role in the new discovery. 7RP 136. The State also informed the trial court it was invoking the confidential informant privilege with respect to the CI's identity. 7RP 136. The trial court reserved the issue so that the parties could review the content of the discovery. 7RP 137.

⁷ The State had avoided introducing this evidence during direct examination.

The next day, defense counsel renewed his motion to dismiss due to government mismanagement. 7RP 186. Defense counsel pointed out that three days before, the prosecutor had given him pages 5048-5114 of discovery, which included a report that vaguely mentioned the informant. 7RP 186. Counsel explained that although he received the information on Friday, he was not able to review it until Saturday or Sunday and then just glanced over it. 7RP 187. Defense counsel noted, however, that the police report at issue had been generated in September or October of 2009, and thus, he should have received it sooner. 7RP 186. He explained that this information was crucial to the defense, and he would have investigated the issue further, had he read Griffith's report earlier. 7RP 188, 193.

The prosecutor argued the State was in compliance with the discovery rules because the information was in the LESA system -- not in his possession -- until a few days before trial and he had turned it over to the defense as soon as it was in his possession. 7RP 190-91. The prosecutor also told the trial court that the defense's previous lack of diligence in investigating this case was a factor that should be considered. 7RP 190. The prosecutor informed the trial court that defense counsel had never requested

to interview Detective Griffith, Wells, or any informant. 7RP 190. Finally, he argued defense counsel had plenty of time over the weekend to review the new discovery and incorporate it into the defense theory. 7RP 191.

Defense counsel again argued the report addressing the CI was crucial to the defense and the fact that the police buried it constituted government mismanagement. 7RP 193. He explained it was irrelevant who he had interviewed previously. 7RP 194. He could not have questioned anyone about the CI when he did not know that the CI existed. 7RP 194. Defense counsel insisted the case should be dismissed for government mismanagement. 7RP 193-94.

The trial court denied the defense's motion to dismiss because there was no evidence of "deliberate concealment of material or substantial evidence." 7RP 194. The trial court noted defense counsel, not the State, had introduced the CI's involvement. 7RP 195. Additionally, defense counsel failed to provide any legal authority that the defense would have been entitled to know the name of the CI. 7RP 194-96. The trial court also suggested defense counsel had been able to attack the

reliability of the CI's identification through his cross-examination of Griffith. 7RP 195.

4. The Trial, Verdict and Sentence

Hawkins' defense hinged on the question of identity. 7RP 625-26. Hawkins testified he was not at the 54th Street Bar on August 26, 2009, and was, instead, at his cousin's house to where he had been paroled. 7RP 532, 535. Hawkins explained that prior to August 21, 2009, he had been incarcerated for several years. 7RP 528.

Micah Wells was unable to identify Hawkins from the surveillance video, from a photo montage, or in court. 7RP 269, 277-78, 282-84. Detective Ringer testified that although he had known Hawkins for fifteen years, he could not positively identify Hawkins from the video. 7RP 457, 460, 476.

Other than the CI, the State's case rested solely on the testimony of Sparks, Hudson, and Hernandez. All three admitted to being HTC members and being close friends that hung out together. 7RP 151, 296, 300, 371. All three placed Hawkins at the scene. 7RP 162, 165, 304, 377. Sparks and Hudson said Hawkins assaulted Wells. 7RP 304-06, 383,-84. However, the evidence established all three men were testifying as part of substantially

beneficial plea bargains. 7RP 217, 220, 316-17, 358, 400-01. More significantly, all three testified to seeing Hawkins in the community numerous times in July and early August – a time when Hawkins said he was incarcerated.⁸ 7RP 203, 325-26, 405, 435.

This inconsistency was not lost upon the jury. CP 109. During deliberations, the jury asked if there was documentation supporting Hawkins' testimony that he was in jail until August 21. CP 109-11. Unfortunately, defense counsel had not submitted any supporting documentation, despite the fact that Hawkins' criminal record was already before the jury and despite the fact this inconsistency was a critical part of the defense's attack on the credibility of Sparks, Hudson, and Hernandez. 7RP 494-99, 625-26.

The jury found Hawkins guilty of all charges, but it found him not guilty of the gang aggravator. 7RP 659-60. At sentencing, the trial court considered the conspiracy and robbery counts as same criminal conduct, sentencing Hawkins to 171 months. CP 149-161. This appeal timely follows. CP 162.

⁸ The State did not challenge Hawkins' testimony regarding his release date.

C. ARGUMENT

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment guarantees the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “This right exists, and is needed, in order to protect the fundamental right to a fair trial.” Id. at 684.

Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting two-prong test from Strickland, 466 U.S. at 687). As shown below, both prongs are satisfied here.

1. Counsel's Performance Was Objectively Unreasonable.

“Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688. Counsel fails to render constitutionally required effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. Hawkman v. Parratt, 661 F.2d 1161 (8th Cir.1981). Thus, deficient

performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

To provide constitutionally adequate assistance, "counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001) (citing Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir.1994)); see also, Strickland, 466 U.S. at 691. Counsel's performance is inadequate where he or she fails to conduct appropriate investigations (either factual or legal), fails to determine what matters of defense are available, or fails to allow enough time for reflection and preparation for trial. State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995) (citing, State v. Jury, 19 Wn. App. 256, 263-64, 576 P.2d 1302 (1978)).

The record demonstrates defense counsel did very little to investigate the case before trial, failed to apprise himself of important facts, and did not make sure he had enough time to adequately reflect and prepare for trial. Defense counsel failed to pursue witness interviews except for talking to the victim the week

before trial.⁹ 7RP 12, 190. Defense counsel failed to provide Hawkins with discovery materials so he could contribute to his own defense.¹⁰ 7RP 10, 17. Most importantly, defense counsel did not read and reflect on the new discovery or inform the trial court that he needed additional time to do so. 7RP 187.

It was objectively unreasonable for defense counsel not to have carefully reviewed over the weekend the 64 pages of new discovery. One of the most fundamental steps in any defense is to thoroughly review and reflect upon the State's evidence. By not doing this, defense counsel failed to apprise himself of at least two important facts prior to the morning of trial.

First, defense counsel failed to grasp the fact that his client's picture had been shown to Wells in a montage, and Wells was unable to identify his client. Considering that the entire defense rested on the question of identity – this fact was not one reasonably competent counsel would have overlooked. Although defense counsel was ultimately told about the photo montages by

⁹ See, State v. Visitacion, 55 Wn. App. 166, 173-74, 776 P.2d 986 (1989) (holding that the failure to conduct witness interviews was not objectively reasonable performance by counsel).

¹⁰ See, Strickland, 466 U.S. at 691 (explaining that effective representation often involves communication between the defendant and counsel regarding defense strategy and investigation).

the State the morning of trial – that counsel even had to be told underscores the fact that defense counsel was unprepared.

Second, defense counsel's failure to carefully review the State's evidence prior to trial resulted in his being utterly unaware of the CI's involvement. There is no question defense counsel was caught by surprise when Detective Griffith testified that a CI was the first to suggest Hawkins was involved in the incident. 7RP 113-14, 134-35, 192. A reasonably competent attorney (one who had reviewed the discovery provided by the State) would not have been caught off guard and certainly would not have introduced this fact to the jury without further investigation and reflection as to how it factored into the defense. Defense counsel stated that had he known about the police report referencing the CI's involvement prior to trial, he would have needed to investigate it further.¹¹ 7RP 188, 193. Thus, he recognized he had a duty to investigate. Moreover, given the defense strategy in the case, there could be no tactical

¹¹ Although the trial court stated it did not believe the defense would have been entitled to the informant's name, this ruling was based partly on defense counsel's failure to make a timely and well-supported legal argument to the contrary. 7RP 194-96. Had defense counsel taken the time to prepare a well-reasoned motion for disclosure, the trial court likely would have needed to conduct an in camera review before determining whether disclosure of the informant's name could have been helpful to the defense. See, State v. Petrina, 73 Wn. App. 779, 786-88, 871 P.2d 637 (1994).

advantage gained by introducing the fact that the CI placed Hawkins at the scene of the crime, especially where the CI could not be cross examined.

Also unreasonable was defense counsel's failure to timely admit he was unprepared. Competent counsel would have informed the trial court that he could not provide effective assistance without additional time to review the new discovery material and make an informed decision as to how to proceed. See, Dependency of V.R.R., 134 Wn. App. 573, 585-86, 141 P.3d 85 (2006) (quoting counsel explaining to the court he would not be able to render effective assistance if forced to proceed to trial that day). Defense should have candidly admitted his unpreparedness and asked for a continuance as soon as it became apparent he did not even know his client had been the subject of a photo montage. At that point, it was obvious counsel was unaware of crucial information that was contained in the new discovery and needed more time to review the documents to determine what else was he did not know about the case.

It was not until the second day of trial, when defense counsel finally admitted to the trial court, "I will be honest with you, I did not give [the new discovery] a whole lot of look. I just kind of glanced

at them and then started dealing with other things....” 7RP 187. It was too late by then, however. The damage had been done, as the jury had already heard about the CI’s involvement.

Even after finally admitting he had not read the new discovery, defense counsel still did not ask for a continuance to try to correct the course of the defense or request a mistrial based on his own ineffectiveness; instead, defense counsel continued to argue the case should be dismissed due to government mismanagement.¹² Competent counsel would have at the very least asked for a continuance, rather than pushing only for dismissal. See, State v. Krenik, 156 Wn. App. 314, 321, 231 P.3d 252 (2010) (explaining that a continuance is an available remedy when new evidence comes out the first day of trial but it is not found to be prejudicial).

Given all of these factors, it cannot be said counsel’s performance fell within objectively reasonable standards.

¹² Had counsel reviewed the new discovery prior to trial, he might have been in a position to argue Hawkins was actually prejudiced by government mismanagement. 3RP 55, 57-88; see also, State v. Brooks, 149 Wn. App. 373, 390, 203 P.3d 397 (2009). After defense counsel introduced the CI evidence during cross examination due to his own lack of diligence, however, the issue was more appropriately one of ineffective assistance.

2. Defense Counsel's Deficient Performance Prejudiced The Defense.

When counsel's deficient performance prejudices the outcome of the case, reversal is required. Strickland, 466 U.S. at 691. In Strickland, the United States Supreme Court rejected a more onerous burden requiring the defendant to show counsel's deficient performance more likely than not altered the outcome of the case. 466 U.S. at 693-94. In so doing, the Supreme Court recognized, even if counsel's errors cannot be shown by preponderance of the evidence to have determined the outcome, counsel's deficient performance can still render a proceeding unreliable. Id.

The Supreme Court therefore adopted a less demanding standard. It determined that reversal is merited where the defense can show, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have differed. Stickland, 466 U.S. at 694; see also, In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

This record establishes there is a reasonable probability, but for counsel's deficient performance, the outcome would have been different.

Defense counsel's inadvertent introduction of the CI's involvement was particularly damaging to the defense and resulted in a violation Hawkins' right to confrontation. Although the trial court found (for purposes of denying the motion to dismiss) the CI's involvement was not material because the CI was merely "a viewer of a video giving speculation as to who might be involved" (7RP 195-96), the record shows that the CI did not merely speculate that Hawkins was involved. The CI affirmatively told the police that "Ken Loc" appeared in the video, placing Hawkins at the scene. 7RP 123. While this was not "firm evidence" that Hawkins assaulted Wells (7RP 195-96), it was certainly material evidence contradicting the core of Hawkins' defense. It was also material to how the defense would have examined Griffith at trial. See, Brooks, 149 Wn. App. at 390 (explaining that a lead detective's report was material as to how the defense would have examined the witness at trial.).

Due to his unpreparedness, defense counsel unwittingly opened the door to Griffith's testimony that the CI had said Hawkins appeared on the video. 7RP 113-14, 121-23, 130. Hawkins did not have the opportunity to call the CI to test the reliability of his

out-of-court statements.¹³ Hence, defense counsel essentially violated his own client's Sixth Amendment right to confrontation by eliciting an out-of-court statement without the opportunity for cross-examination.¹⁴ See, Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Moreover, this is not a case where the evidence overwhelming supported the State's theory. Wells was unable to identify Hawkins. Ringer could not identify Hawkins from the video. Other than the CI, the only evidence the State had that Hawkins was at the bar that night came from Sparks, Hudson, and Hernandez. However, it was well established that these three men had considerable criminal histories and were testifying in exchange for significant plea deals. Additionally, each of those men testified they saw Hawkins in the community several times in July or early August, 2009. Yet, Hawkins had testified that he had been incarcerated until August 21, 2009. The State did not challenge Hawkins on this point.

¹³ Although the trial court suggested defense counsel was able to attack the reliability of the CI's information via his cross examination of Griffith (7RP 196), this is not the same as cross examining the CI directly.

¹⁴ The prosecutor appears to have recognized defense counsel's questions called for hearsay, but the prosecutor said he did not object so defense counsel could explore. 7RP 136.

Given this record, there is a reasonable probability that defense counsel's inadvertent introduction of the CI's statements into the case tipped the scale in the State's favor and, thus, changed the outcome of the case. As such, Hawkins was prejudiced by defense counsel's deficient performance and reversal is required. See, Fleming, 142 Wn. 2d at 867.

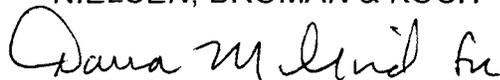
D. CONCLUSION

For the reasons stated above, appellant respectfully asks this Court to reverse his conviction.

Dated this 15th day of April, 2011.

Respectfully submitted

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 41176-8-II
)	
KENNETH HAWKINS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF APRIL 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KATHLEEN PROCTOR
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1 APR 13 6:09 17
STATE OF WASHINGTON
BY: [Signature]
PATRICK MAYOVSKY

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF APRIL 2011.

x Patrick Mayovsky