

NO. 41468-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

BILLIE JO FELLAS,

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO
BY [Signature]

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

The Honorable George L. Wood, Judge

BRIEF OF APPELLANT

JARED STEED
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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion for a new trial without holding an evidentiary hearing. CP 18.

2. Appellant received ineffective assistance of counsel.

3. The trial court erred in entering Motion for New Trial Findings of Fact 3-4, 6-11.¹ CP 18.

4. The trial court erred in entering Motion for New Trial Conclusions of Law 1-12. CP 18.

Issues Pertaining to Assignments of Error

Appellant moved for a new trial under CrR 7.5, arguing prosecutorial misconduct, trial irregularities, ineffective assistance of counsel, and a lack of substantial justice deprived her of a fair trial. Appellant's motion was supported by three sworn affidavits asserting a State witness was "coached" and the prosecutor presented improper rebuttal testimony at trial. The State responded with four sworn affidavits that contradicted Appellant's alleged errors and factual assertions. The trial court determined an evidentiary hearing was unnecessary and denied the motion for new trial. Defense counsel did not object to the court's conclusion that an evidentiary hearing was unnecessary.

¹ The Motion for New Trial Findings of Facts and Conclusions of Law are attached to this brief as an appendix.

1. Where Appellant provided prima facie evidence in support of her motion for new trial, did the trial court err in denying the motion without first holding an evidentiary hearing to assess the credibility of the competing affiants and resolve the disputed issues of fact?

2. Was defense counsel ineffective by failing to object to the trial court's determination that an evidentiary hearing was unnecessary?

B. STATEMENT OF THE CASE

1. Procedural History

On April 17, 2009, the Clallam County prosecutor charged Billie Jo Fellas with one count of delivery of a controlled substance and one count of resisting arrest. CP 61. The State later amended the information, adding an allegation that the controlled substance delivery occurred in a public park contrary to RCW 69.50.435. CP 58; 1RP 4.²

Trial commenced on August 9, 2010. 1RP 26. A jury found Fellas guilty as charged and found the drug delivery occurred in a public park. CP 6, 31-33.

The court imposed standard range sentences of 12 months and one day for delivery of a controlled substance, and 90 days for unlawful imprisonment, with 12 months of community custody. The court added a

² This brief refers to the verbatim report of proceedings as follows: 1RP – August 9, 2010; 2RP – August 10, 2010; 3RP – August 25, 2010; 4RP – October 14, 2010; 5RP – October 21, 2010; 6RP – November 9, 2010.

consecutive 24-month sentencing enhancement to the 12-month sentence for delivery in a public park. CP 6; 6RP 9-10. Fellas timely appeals. CP 4.

2. Trial Testimony

On August 7, 2008, Police Officers with the Olympic Peninsula Narcotics Enforcement Team arranged an undercover controlled buy of methamphetamine using informant Rhonda Zuzich. 1RP 27, 35-36, 50. Zuzich participated so she could “work off” her own pending shoplifting and methamphetamine charges. 1RP 55-56.

Zuzich agreed to contact Michelle Knotek to arrange a meeting to purchase methamphetamine. 1RP 50-52, 87-88; 2RP 15-16. After a search of Zuzich and her car revealed no drugs or money, Detective Michael Grall gave Zuzich \$100 in pre-recorded buy money. 1RP 40-42, 88, 128; 2RP 16, 24. Police then followed Zuzich to Knotek’s apartment in Sequim. 1RP 88. At the apartment, Zuzich asked Knotek whether she could get methamphetamine. Knotek used Zuzich’s phone to call a potential source. Knotek got the phone number from her friend “Kelly.” 1RP 51-53, 61-63, 71. Knotek said the person she called was Fellas. 1RP 62-64.

After calling Fellas, Knotek drove to a gas station while Zuzich pretended to go to the bank for money. Instead, Zuzich called police and

asked permission to “front” the buy money to Knotek. After police agreed, Zuzich met Knotek in the parking lot of a Port Angeles Rite Aid and gave Knotek the \$100 in buy money. 1RP 51-52, 63-64, 90-93. Knotek called Fellas again and agreed to meet her at Lincoln Park in Port Angeles. 1RP 64-65. Zuzich told Grall that Knotek was going to Lincoln Park. 1RP 93.

Grall followed Knotek in an unmarked police car as she left the Rite Aid but lost sight of her car for “several minutes.” Knotek was already at Lincoln Park when Grall arrived there. 1RP 93, 127, 138. Knotek said she went directly from the Rite Aid to Lincoln Park, but Grall admitted he did not know what Knotek did during the time he lost sight of her. Grall acknowledged it was important to keep the parties in sight during controlled buys because “it goes to the integrity of the case.” 1RP 65, 126-27.

At the park, Grall saw Knotek’s car parked next to a maroon Toyota Corolla registered to Fellas. 1RP 94-95, 98, 101. Knotek testified she got into Fellas’ car and talked with her for 20 minutes before choosing a baggie of what she thought was methamphetamine. 1RP 65-66, 69, 73, 82. Grall never saw Knotek or Fellas exchange any money or drugs. 1RP 127-28. Grall testified that he made eye contact with Fellas as she left the park and recognized her from her driver’s license picture. 1RP 98-99.

After leaving the park, Knotek drove to the Starbucks in Port Angeles and gave Zuzich \$20 and the baggie. 1RP 53-54, 66-67. Zuzich did not see Knotek buy the baggie. 1RP 58. Zuzich put the baggie in her car ashtray and met police in Sequim. Police searched Zuzich and her car and found the baggie and \$20. No other drugs or money was found. 1RP 42, 53-54, 2RP 13, 21, 28-29. The baggie tested positive for methamphetamine. 1RP 106; 2RP 34-37. The baggie was not tested for fingerprints. 1RP 131.

Knotek was arrested more than a year later and agreed to testify against Fellas, whom police had not yet arrested for the alleged drug delivery at the park. Knotek entered a Drug Court Program in exchange for her cooperation. 1RP 67, 73, 76-84, 115-16, 120, 128-30, 137; CP 73.

On April 16, 2009, Grall and Border Patrol Agent Keith Fischer went to Fellas' apartment intending to arrest her. 1RP 119; 2RP 39. Fellas invited the officers inside, but they refused, showed their badges and told Fellas to step outside. When she did, Grall told her she was under arrest. 1RP 119-25; 2RP 39-40, 68.

According to Grall, Fellas started to go back inside her apartment for her shoes after being told she was under arrest. Grall grabbed Fellas' arm, which Fellas then pulled away. Grall and Fischer forcibly pushed Fellas against a wall and bent her arm to handcuff and prevent her from

going inside the apartment. Grall and Fischer said Fellas would not voluntarily walk down the apartment stairs so they forcibly pushed and pulled her. 1RP 121-25; 2RP 39-43, 71-73. Grall said he told Fellas he would get her shoes. 2RP 59, 73. Fischer denied Fellas was ever told her shoes would be retrieved. 2RP 45.

Officers found no drugs or paraphernalia on Fellas or in her apartment. 1RP 134. Nor did they find any of the \$100 in pre-recorded buy money in Fellas' possession.

Fellas' testimony differed from Knotek's account of the alleged delivery. Fellas denied selling Knotek any drugs. 2RP 56. Fellas agreed to meet Knotek in Lincoln Park only to discuss money Knotek's sister owed her. 2RP 52-53, 55, 61. Fellas agreed on Lincoln Park as the meeting location because she wanted to see if her daughter wanted a ride home from the playfields in the park. 2RP 53, 61-62, 65-66.

Fellas said she had only known Knotek for two months, but previously lived with Knotek's sister. 2RP 56, 60. When Knotek's sister moved out, Fellas rented a storage shed for her effects, but was never given rental money for the shed. 2RPP 52-53. Fellas denied that Knotek got into her car and said no money was exchanged because Knotek did not have any. 2RP 63, 67. Fellas also denied resisting arrest. 2RP 58-59. Fellas said she went back into the apartment for her shoes because of an

existing knee injury. Fellas said she hesitated when walking down the apartment stairs because of her knee and weight. 2RP 58, 69.

3. Motion for New Trial

Following Knotek's testimony, Fellas' trial attorney moved for mistrial under CrR 8.3(b), alleging Grall improperly nodded answers to Knotek during her testimony. Trial counsel acknowledged neither the court clerk nor bailiff witnessed the nodding, but offered the testimony of Donald Fellas, who said he did. 2RP 6-7, 10. The court said it was not "going to have a hearing on it at this point in time..." because "it seems to me that's an issue that can be taken up post trial if there's a problem." 2RP 7-8, 49-50. The trial court said it would allow trial counsel to question Grall in front of the jury about the head nodding. 2RP 11, 49-51. The court denied the motion for mistrial. 2RP 11, 49-51.

Fellas' trial counsel withdrew after trial ended and new counsel was appointed to assist with any post-trial motions and sentencing. Fellas' new counsel moved for a new trial under CrR 7.5. 3RP 2-4; CP 24. In the motion, Fellas' alleged (1) the prosecutor committed misconduct by failing to file chargers until more than a year after the alleged delivery; (2) Knotek gave improper rebuttal testimony; (3) trial counsel was ineffective for failing to challenge a juror for cause; and (4) a lack of substantial justice deprived Fellas of a fair trial. CP 24.

Fellas submitted three sworn affidavits, including her own, in support of the motion. Affidavits from Fellas, Kayla Rhineheart, and Donald Fellas alleged Grall nodded answers to Knotek during Knotek's testimony about the Drug Court Program and agreement she made in exchange for her cooperation. Fellas and Rhineheart's affidavits also asserted Knotek was allowed to give rebuttal testimony at trial despite having remained in the courtroom while other witnesses testified. CP 136.

In response, the State submitted affidavits from Knotek, Grall, court bailiff Gail Triggs, and court clerk Serena K. Gorss. Each affidavit disputed Fellas' factual assertions and insisted Grall did not nod answers to Knotek during he testimony. CP 69, 73.

After receiving all the affidavits, the trial court sent a letter to the attorneys stating, "the Court has reviewed the filings relative to the motion for new trial and finds that evidentiary hearing is not necessary." 4RP 2-3; CP 68. The trial court gave no reason for its decision.

During oral argument on the motion, defense counsel raised several additional claims of ineffective assistance of counsel.³ The trial

³ Those were: (1) trial counsel failed to perfect his motion to dismiss; (2) counsel did not request complete discovery; (3) counsel did not make proper hearsay objections; (4) counsel failed to raise chain of custody challenges; (5) counsel failed to interview and call witnesses; (6) counsel did not fully cross examine Knotek; and (7) counsel failed to move for severance before trial. 5RP 2-6.

court denied Fellas' motion for new trial and entered written findings of fact and conclusions of law in support of the denial. 5RP 28; CP 18.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING FELLAS' NEW TRIAL MOTION WITHOUT HOLDING AN EVIDENTIARY HEARING

Under CrR 7.5, trial courts are authorized to grant a new trial in several enumerated circumstances, including whenever substantial justice has not been done. CrR 7.5(a)(8). The rule provides, in relevant part as follows:

(a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

(1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;

(2) Misconduct of the prosecution or jury;

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;

(4) Accident or surprise;

(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;

(6) Error of law occurring at the trial and objected to at the time by the defendant;

(7) That the verdict or decision is contrary to law and the evidence;

(8) That substantial justice has not been done.

When the motion is based on matters outside the record, the facts shall be shown by affidavit.

CrR 7.5.

A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), rev. denied, 129 Wn.2d 1003 (1996)). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

A court necessarily abuses its discretion "if it based its ruling on an erroneous view of the law." State v. Quismundo, 164 Wn.2d 499, 504,

192 P.3d 342 (2008). Whether and how a court rule is applied is a question of law reviewed de novo. State v. Quintero Morelos, 133 Wn. App. 591, 596, 137 P.3d 114 (2006), rev. denied, 159 Wn.2d 1018 (2007).

1. An Evidentiary Hearing Was Required When Fellas Provided Prima Facie Evidence In Support of the Motion.

Here, the trial court abused its discretion by not holding an evidentiary hearing to resolve the conflicting assertions offered by the parties. Post-trial motions are akin to personal restraint petitions: “each of these proceedings involves similar issues, and each occurs after verdict in a criminal case.” State v. Bandura, 85 Wn. App. 87, 94, 931 P.2d 174 (1997) (citing RCW 10.73.090(2)), rev. denied, 132 Wn.2d 1004 (1997). It is therefore instructive to review what showing must be made in order to obtain an evidentiary hearing on a personal restraint petition. As set forth by the Bandura Court, In re Rice⁴ provided that guidance as follows:

If the petitioner’s allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner’s evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify.

⁴ 118 Wn.2d 876, 886-87, 828 P.2d 1086 (1992), cert. denied, 506 U.S. 958 (1992).

Bandura, 85 Wn. App. at 93-94 (citing In re Rice, 118 Wn.2d at 886).

Once prima facie evidence of facts and errors is presented and “based on more than speculation, conjecture, or inadmissible hearsay,” the trial court is required to hold an evidentiary hearing in a personal restraint petition “in order to define disputed questions of fact.” In re Rice, 118 at 886-87.

In Bandura, this Court held an evidentiary hearing was not required because Bandura’s motion for new trial was not supported with affidavits. Bandura, 85 Wn. App. at 94. Bandura argued his trial attorney was ineffective for requesting lesser-included offense instructions for second and fourth degree assault over his objection. Bandura, 85 Wn. App. at 93. Noting the absence of any affidavits establishing that Bandura told his attorney not to request lesser-included instructions, this Court concluded that “in the face of nothing more than an artfully drafted motion, the trial court was not required to schedule or hold an evidential hearing.” Bandura, 85 Wn. App. at 94.

Unlike Bandura, Fellas’ motion was based on several errors and supported by three sworn affidavits, including her own, which established prima facie evidence of the alleged facts and errors. The affidavits supporting Fellas motion were not based on “speculation, conjecture, or

hearsay,” but described what the affiants personally observed during trial. Even so, controverting affidavits submitted by the State insisted no such errors occurred.

Although the trial court acknowledged the credibility of Knotek vis-à-vis that of Fellas was the “central issue” in the case, it nonetheless concluded an evidentiary hearing to determine the credibility of the affiants was unnecessary. The trial court failed to state any reason why it determined an evidentiary hearing was unnecessary.

Since significant facts were in dispute, the trial court could not properly weigh the credibility of the affiants and resolve the disputed factual issues without an evidentiary hearing. In re Rice, 118 Wn.2d at 886-87 (“If the parties’ materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.”). By denying Fellas’ motion for new trial without first holding an evidentiary hearing, the trial court abused its discretion.

The trial court’s error in failing to conduct an evidentiary hearing was not harmless because Fellas’ factual claims, if believed, entitled her to relief under CrR 7.5(a). While there is conflicting evidence in the record, it is not this Court’s function to substitute its evaluation of factual issues for that of the trial court. In Interest of Perry, 31 Wn. App. 268, 269, 641

P.2d 178 (1982). Appellate courts do not find facts or assess credibility. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Nor do they engage in initial decision-making; they are courts of review. In re Welfare of Woods, 20 Wn. App. 515, 517, 581 P.2d 587 (1978) (citing Wold v. Wold, 7 Wn. App. 872, 876, 503 P.2d 118 (1972)). Reversal of the trial court's decision and remand with an order requiring the trial court to conduct an evidentiary hearing is therefore the appropriate remedy in this case. Remand will enable the trial court to hold an evidentiary hearing to assess the credibility of the affiants and "define disputed questions of fact." In re Rice, 118 Wn.2d at 886-87.

2. Defense Counsel was Ineffective for Failing To Object to the Court's Decision not to hold an Evidentiary Hearing.

An accused receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation is prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). An accused is prejudiced where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. “A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Fellas’ case satisfies both prongs of Strickland. Attorneys have a duty to research the law and are presumed to know applicable law favorable to their client. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). While an attorney’s decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

There was no legitimate reason for counsel to fail to inform the court that applicable case law called for the court to conduct an evidentiary hearing to resolve the disputed issues of fact before ruling on the motion for new trial. Moreover, there is a reasonable likelihood counsel’s deficient performance affected the outcome. Had counsel objected, an evidentiary hearing likely would have been held based on case law previously cited and because the trial court had already scheduled a hearing to allow counsel to orally argue their respective motions.

Counsel's failure to inform the court that the affidavits submitted in support of Fellas' motion warranted a hearing was therefore ineffective.

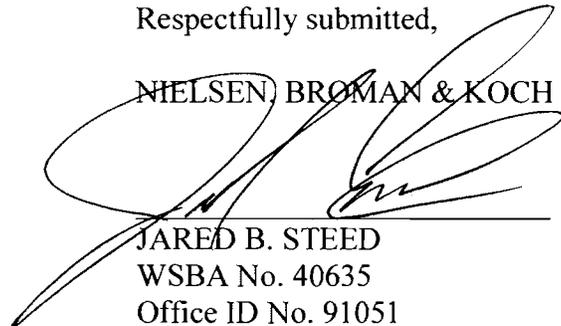
D. CONCLUSION

For the reasons discussed above, this Court should reverse the decision of the trial court and enter an order requiring the trial court to conduct an evidentiary hearing at which the State will be required to show cause why Fellas should not receive a new trial.

DATED this 6th day of June, 2011.

Respectfully submitted,

NIELSEN BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line. The signature is highly cursive and loops around the line.

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APPENDIX

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BARBARA CHRISTENSEN

IN THE SUPERIOR COURT FOR CLALLAM COUNTY, WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

BILLIE JO FELLAS,

Defendant.

NO. 09-1-00153-6

FINDINGS OF FACT AND CONCLUSIONS OF
LAW ON DEFENDANT'S MOTION FOR A
NEW TRIAL

THIS MATTER came before the court on October 21, 2010, for a motion for a new trial, the plaintiff appearing by and through Clallam County Deputy Prosecuting Attorney, Jesse Espinoza, the Defendant appearing in person and by and through her attorney, Jonathan Morrison.

The defendant was charged with Delivery of a Controlled Substance, Methamphetamine, and Resisting Arrest for an incident which occurred on Aug. 7, 2008. The defendant was brought to trial by jury on Aug. 9, 2010, and was found guilty of both counts by a jury on Aug. 11, 2010. On Aug. 23, 2010, the defendant filed a motion for a new trial.

The defendant argued that the defendant's trial attorney was ineffective on the grounds that he did not motion to have juror no. 29 excused for cause during *voir dire* after juror no. 29 indicated that he was long time friends with the State's witness, Detective Mike Grall. The

FINDINGS OF FACT AND CONCLUSIONS
OF LAW ON DEFENDANT'S MOTION
TO DISMISS

Page 1 of 6

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SCANNED - 6

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1 defendant also argued that defense counsel failed to exercise a peremptory challenge to excuse
2 juror no. 29. In addition, Defense counsel asserted that the State's witness, Michelle Knotek was
3 allowed to testify on rebuttal despite the fact that she remained in the courtroom after she
4 testified during the State's case-in-chief. Finally, defense counsel argues for a new trial on the
5 grounds of prosecutorial misconduct. The defendant asserted that Detective Mike Grall was
6 coaching Michelle Knotek during her testimony by nodding his head yes and no.
7

8
9
10 Argument on the defendant's motion was heard on Oct. 21, 2010. At the hearing,
11 defense counsel raised a number of other arguments. Among these, defense counsel argued that
12 trial counsel never perfected his motion to dismiss, that the defendant was charged ~~X~~nine months
13 after the alleged incident, that trial counsel failed to request complete discovery, that trial counsel
14 did not make proper hearsay objections during trial, did not challenge the chain of custody, did
15 not interview witnesses before trial, did not call defense witnesses, did not fully cross examine
16 Michelle Knotek about her drug court contract, and did not move for severance of the two
17 charges prior to trial.
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21 Furthermore, defense counsel raised additional arguments regarding prosecutorial
22 misconduct. Defense counsel asserted that the prosecutor mismanaged witnesses by not making
23 sure that Michelle Knotek left the courtroom after her testimony during the State's case-in-chief
24 and then called her on rebuttal testimony, and that the prosecutor did not properly control the
25 witnesses which resulted in witness coaching by Det. Grall.
26

27 //

28 //

1 The Court having reviewed the briefings and having heard the arguments by the parties,
2 and deeming itself fully apprised in the premises, the court makes the following findings and
3 conclusions:
4

5
6 **I. FINDINGS OF FACTS**

- 7 1. Juror no. 29 indicated that he was a long time friend of Detective Grall and also told the
8 court that this would not affect his ability to be fair.
9
10 2. Both the defendant's trial attorney and the prosecutor exhausted all of their available
11 peremptory challenges and juror no. 29 was the last juror to be empanelled.
12 *and credibility were*
13 3. Detective Grall's testimony ~~was~~ not ~~a~~ determining issue in the case .
14
15 4. The central issue in the case was about the credibility of Ms. Knotek and the credibility
16 of the defendant.
17 *and plea agreement*
18 5. Defense counsel alleged that Ms. Knotek was coached during her testimony regarding her
19 drug court contract by Detective Grall nodding his head yes and no.
20
21 6. The Court did not witness any witness coaching as described by the defendant ~~although~~
22 ~~the Court was in a position to see the alleged coaching because Detective Grall and Ms.~~
both
~~Knotek was ~~not~~ in front of the Court.~~
23
24 7. There was no evidence to show that Ms. Knotek fabricated any details regarding her drug
25 court agreement *a plea agreement, nor was her explanation or description of the*
agreements subject to coaching by a
simple nod of the head.
26 8. The defendant's trial counsel made motions very specifically regarding the alleged
27 witness coaching during trial.
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9. The Court informed defense counsel that he could call witnesses about the coaching and that such credibility issues ~~that might arise could be brought before the jury.~~ *were proper considerations for the jury*

10. Ms. Knotek was not present in the courtroom when the defendant testified.

11. Ms. Knotek's testimony on rebuttal was limited to rebutting the testimony of the defendant.

12. The State filed charges against the defendant on April 17, 2009 alleging, in Count I, that the defendant delivered a controlled substance to another on August 7, 2008 and, in Count II, for resisting arrest on April 16, 2009.

13. The defendant was brought to trial on Aug. 9, 2010, for both Count I, delivery of a controlled substance, and Count II, resisting arrest.

14. Trial counsel had the prior criminal history of the State's witnesses Ms. Zuzich and Ms. Knotek prior to trial.

II. CONCLUSIONS OF LAW

1. The Court would not have granted a for cause motion to exclude juror no. 29 because he indicated that he could be fair and impartial to both the defendant and the State although he was longtime friends with Detective Grall.

15. Trial counsel's decision not to challenge juror no. 29 for cause was a tactical decision ~~such a decision might require an attack of the credibility of the officer and prosecutor.~~

and credibility were not at issue
2. Detective Grall's testimony ~~was not relevant~~ in the trial and it was highly unlikely that juror no. 29's presence on the panel would have affected the outcome of the trial.

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3. The Court finds that even if the defense allegations that Det. Grall nodding his head as witness coaching were true, it had no impact on Ms. Knotek's testimony ^{which consisted primarily} ~~and she was not~~ *of her description and understanding of the plea agreement* ~~class about her testimony~~ and there was no evidence that her testimony was false or fabricated.
 4. The Court finds no basis for the claim of ineffective assistance because trial counsel's decisions can be characterized as tactical.
 5. The Court finds no basis for the claim of ineffective assistance of counsel because there was no showing of prejudice as there was no indication that ~~that~~ the outcome of the trial would be different.
 6. The Court did not abuse its discretion in permitting Ms. Knotek to testify on rebuttal after the defendant testified because Ms. Knotek was not in the courtroom when the defendant testified and Ms. Knotek's testimony was limited to rebuttal of the defendant's testimony.
 7. Ms. Knotek's testimony on rebuttal did not create prejudice to the defendant's right to a fair trial.
 8. The fact that the defendant was not charged until approximately nine months after the alleged incident did not prevent the defendant from adequately preparing for and presenting a defense and the defendant was not prejudiced by such delay.
 9. The Court finds that the issues presented by defense counsel regarding witness criminal history, hearsay, chain of custody, no defense investigator, had no important impact on the case such that the outcome would be different and the defense had the criminal history of the State's chief witness.

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10. The ~~charge~~^{evidence} of resisting arrest was admissible as guilty knowledge even if the defendant would have pleaded guilty to the crime prior to trial and therefore there was no basis for a severance of the charges of delivery of a controlled substance and resisting arrest.

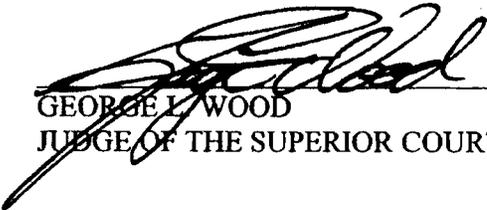
11. The Court finds that there is no basis for ineffective assistance of counsel.

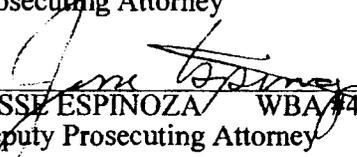
12. The Court finds that the defense has not shown by the various issues that it raised in its motion for a new trial that the outcome of the trial would have been any different.

III. ORDER

Based upon the Findings of Fact and Conclusions of Law, it is hereby ordered that the defendant's motion for a new trial is denied.

Dated this 9th day of November, 2010.


GEORGE L. WOOD
JUDGE OF THE SUPERIOR COURT

Presented by:
DEBORAH S. KELLY
Prosecuting Attorney

JESSE ESPINOZA WBA#40240
Deputy Prosecuting Attorney

Approved for Entry:

JONATHAN R. MORRISON WBA# 31153
Attorney for Defendant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 41468-6-II
)	
BILLIE JO FELLAS,)	
)	
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 7TH DAY OF JUNE, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] BRIAN WENDT
CLALLAM COUNTY PROSECUTOR'S OFFICE
223 E. 4TH STREET, SUITE 11
PORT ANGELES, WA 98823-0037

- [X] BILLIE JO FELLAS
DOC NO. 973535
WASHINGTON CORRECTIONS CENTER FOR WOMEN
9601 BUJACICH ROAD NW
GIG HARBOR, WA 98332

11 JUN -8 AM 11:55
STATE OF WASHINGTON
BY _____
DEPUTY

JUN 08 2011 11:55 AM
CLALLAM COUNTY PROSECUTOR'S OFFICE

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JUNE, 2011.

x Patrick Mayovsky