

NO. 64359-2-1

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

REC'D
AUG 04 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

RENE NAITOKO,

Appellant.

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

The Honorable Helen Halpert, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The Superior Court erred in entering findings of fact 6, 7, and 8 (Findings of Fact and Conclusions of Law and Order on Determination on the Merits Pursuant to RAP 16.11). 2CP 62-63.¹ A copy of the court's findings is attached as appendix A.

2. The Superior Court erred in entering Conclusions of Law 3, 4, and 5. 2CP 64-65.

3. The Superior Court failed to consider prejudice stemming from counsel's failure to object to evidence of the petitioner's pre-arrest silence admitted in his assault trial.

4. The Superior Court erroneously concluded there is no basis to grant the petitioner a new trial. 2CP 65-66.

5. The Superior Court erred by dismissing petitioner/appellant Naitoko's personal restraint petition. 2CP 68-69.

Issues Related to Assignments of Error

1. Where a personal restraint petitioner asserted self-defense in an assault prosecution, and where a witness subsequently testifies in a reference hearing that the defendant was attacked

¹ "CP" refers to the clerks papers designated in Naitoko's direct appeal (No. 57467-1-1) from the judgment in King County Superior Court No. 04-1-13301-3 SEA. "2CP" refers to the clerks papers designated from the reference hearing ordered pursuant to this personal restraint petition.

shortly before the alleged assault, did the Superior Court err by finding the testimony “would support the State’s version of events”?

2. Did the Superior Court err by finding it was “undisputed” a shooting incident occurred after midnight, where the state’s witnesses estimated the incident may have occurred before midnight?

3. Did the Superior Court err by discrediting the testimony of a defense witness in a reference hearing because the witness’s estimate of the time of day was inaccurate, where the state’s witnesses also gave inaccurate estimates?

4. Did the Superior Court err by finding defense witnesses were not in proximity to a shooting incident outside a bar, where the record establishes the witnesses and the shooting were located on the south side of the building?

5. Did the Superior Court err in finding a defense witness “did not describe looking away” from a fight outside a bar, where the witness testified she was returning to her car across the street from the bar during the fight?

6. Did the Superior Court err by applying rigorous standards for assessing the testimony of defense witnesses, while not applying those standards to the testimony of the state’s witnesses?

7. Where a witness in a reference hearing testified he saw an assault defendant attacked outside a bar, did the Superior Court err by finding the witness's testimony "made no sense"?

8. Did the Superior Court err by finding that a witness at a reference hearing testified he was afraid to talk to police "because they held him responsible for making peace between the Tongans and the Samoans," where the witness did not so testify?

9. In an assault prosecution where three friends provided mutually corroborating testimony for the State, and where the defendant claiming self-defense was the sole defense witness, is a new trial required because defense counsel failed to present the testimony of three witnesses who would corroborate the self-defense claim?

10. Did the Superior Court err by failing to consider cumulative prejudice stemming from the failure of petitioner's attorney to object at trial to evidence of the petitioner's pre-arrest silence?

B. STATEMENT OF THE CASE

1. Procedural Facts

A jury found 21 year-old Ranae Naitoko guilty of two counts of first degree assault, each with a firearm enhancement, and one count of first degree unlawful firearm possession. CP 16-20. The King

County Superior Court sentenced Naitoko to confinement for thirty-one years and three months. CP 82.

Naitoko appealed his convictions. He claimed violation of his constitutional right to self-representation, instructional error, and violation of his Fifth Amendment right to remain silent by testimony describing his pre-arrest silence. This Court rejected Naitoko's self-representation and instructional claims. The Court agreed evidence of his pre-arrest silence violated his Fifth Amendment right, but concluded the error was harmless. The Court affirmed the Superior Court judgment. State v. Naitoko, 139 Wn. App. 1016 (June 18, 2007 unpublished opinion).

Naitoko filed a personal restraint petition. He argued, among other issues, his attorney was ineffective for failing to investigate potential defense witnesses and for failing to object to the evidence of his pre-arrest silence. Order of Partial Dismissal & Transfer ("Order") at 1. This Court determined Naitoko's witnesses claim was not frivolous, but could not be resolved on the record before the court. Order at 1-2. The case was transferred to the superior court for a determination on the merits. Order at 2. The appeals court directed the superior court to determine whether Naitoko's trial counsel failed to investigate potential defense witnesses, whether counsel made a

reasonable decision not to present the testimony of such witnesses, and whether Naitoko made a sufficient showing of prejudice from any error. Order at 6.

This Court also transferred Naitoko's pre-arrest silence claim and directed the superior court to assess its cumulative effect in the event the court determined Naitoko was prejudiced regarding the witnesses issue. Order at 7.

The superior court held a reference hearing at which Naitoko's trial attorney and four defense witnesses testified. The court found Naitoko's attorney should have contacted the witnesses, but concluded Naitoko suffered no prejudice from counsel's deficient performance. 2CP 64-65. Accordingly, the court did not address Naitoko's pre-arrest silence claim. 2CP 65. The court ruled there was no basis to grant relief and dismissed Naitoko's personal restraint petition. 2CP 65-66. This appeal timely follows. 2CP 70-78.

2. Pretrial Proceedings Addressing Potential Defense Witnesses

Thirteen days before his trial,² Naitoko moved to discharge his attorney. In open court, he stated his relationship with defense

² Trial commenced July 12, 2005. RP 94 (jury selection).

counsel Michael Danko was “not working out.” RP 1.³ Naitoko told the court he and his attorney argued whenever counsel came to see him, and he stated, “I can't get my point across.” RP 1. Naitoko complained, “I can't go on . . . with him representin' me. It's not working.” RP 1-2. Counsel addressed the court and stated he spent considerable time providing explanations and answering his client's questions. The trial court denied Naitoko's motion. RP 1-3.

Naitoko renewed his request to discharge his attorney on the first day of trial. He told the court his attorney had urged him to accept a plea offer from the state that was “just outrageous.” RP 6. Naitoko asserted his attorney would only discuss continuances and plea offers, not the facts of the case. RP 7. He stated his attorney was not prepared for trial, and asked, “where are my witnesses?” RP 7. Naitoko explained, “I got witnesses...that I want to bring in...[W]e could never discuss anything about my witnesses...” RP 7-8. Naitoko provided the names of seven individuals he wished to call as witnesses. RP 8-9. Naitoko could not state the specifics of their testimony: he asserted the witnesses would “tell about what

³ “RP” refers to the report of proceedings for Naitoko's trial in July 2005. “2RP” and “3RP” refer to the reports for the reference hearing on September 10, 2009 and September 24, 2009 respectively.

happened,” and “They gonna say I didn’t do what the Prosecutors are accusing me of doing.” RP 10.

Defense counsel addressed the court and stated he had discussed self-defense with Naitoko. RP 17. Counsel stated, “I provided my advice regarding that, given my understanding of the anticipated testimony.” RP 17. The court then inquired about the individuals named by Naitoko as potential defense witnesses:

THE COURT: Have you received information about these people that the Defendant just listed?

MR. DANKO: I’m aware of—I have some information about all of these people.

THE COURT: Is there anything that would be exculpatory or that could help make the self-defense argument?

MR. DANKO: I have no information at this particular point that would lead me to want to subpoena any of these witnesses.

RP 17.

The court denied Naitoko’s renewed request to discharge his attorney. RP 48-49.

3. Reference Hearing: Counsel’s Investigation of Potential Defense Witnesses

The reference hearing occurred September 10 and September 24, 2009. 2RP 3; 3RP 3. The hearing illuminated why defense

counsel was not inclined to subpoena the witnesses named by Naitoko. Counsel had not spoken with them.

Danko testified at the hearing and confirmed Naitoko had given him the names of witnesses to contact regarding his self-defense claim. 2RP 22. Counsel explained he relied on Naitoko's girlfriend, Stephanie Moore, to contact the witnesses. 2RP 23, 35. However, Moore never reported she had contacted anyone. 2RP 35. Danko never attempted to reach the witnesses himself, and he never assigned an investigator to interview the individuals named by Naitoko. 2RP 23-26, 44, 88. Counsel acknowledged he had no information from any of the witnesses when Naitoko's trial commenced. 2RP 55.

The superior court found Naitoko provided his attorney with names of potential witnesses to support his self-defense claim, counsel did not engage an investigator to locate the witnesses, and counsel never spoke to any of the potential witnesses. 2CP 61-62. (FOF 2, 3, 5). The court concluded counsel's performance was deficient because the witnesses should have been contacted, and more formal methods for doing so should have been implemented. 2CP 64 (COL 1). The court stated the decision not to call any of the

witnesses could not be considered tactical because Danko had spoken to none of them. 2CP 64 (COL 2).

4. Trial

The charges against Naitoko arose from an incident at the First Avenue Pub, a bar on the northwest corner of 16th Avenue Southwest and Southwest 112th Street in the Burien/White Center area of King County. RP 144, 185-88; Ex. 7. On February 20, 2004, Naitoko was involved in a fight inside the bar with Michael Schirmer. RP 144, 148, 160-61. The fight was broken up, and those involved left the bar. RP 117-18, 149-50. Naitoko later fired shots with a handgun outside the bar, injuring Schirmer and Maua Vaivao. RP 153-59, 262, 264-67, 358.

The parties disputed what occurred inside the bar and the circumstances leading to the shooting outside the bar. Three state's witnesses testified they saw Naitoko fire shots at Schirmer. Naitoko was the sole defense witness. He testified he fired the gun in self-defense.

a. Michael Schirmer Testimony

Michael Schirmer testified he was a regular customer at the pub, and a number of his friends also went there. RP 160. Schirmer got to the bar at 6:30 that night. RP 146. Later in the evening he

saw Naitoko in the bar, "trying to be a tough guy". RP 144, 148. Schirmer decided to confront Naitoko: he approached the defendant and said, "What's up?" RP 148. Naitoko responded, "What's up?" and the confrontation escalated into a pushing and shoving fight. RP 148, 160-66. Several people in the bar, including friends of Schirmer and friends of Naitoko, jumped in to break up the fight. RP 148-49, 164. Naitoko then exited the bar out the back door. RP 150. Schirmer left the bar through the front door. RP 150. Schirmer testified the fight involved "a little bit" of pushing. RP 161. He said he did not hit anyone, and he did not see anyone else hitting other people. RP 166.

Outside the bar, Schirmer saw a group of friends standing around his car outside the bar. RP 168-69. These included state's witnesses Ciona Luuga and Maua Vaivao. RP 170-71, 262. Schirmer said he remained outside for five to ten minutes, "five feet or less" from the front door. RP 171-72. He then saw Naitoko appear from the south around the corner of the bar. RP 151. He said Naitoko was holding a gun and said, "What's up now, nigger?" RP 152. Naitoko fired two shots, and Schirmer ran for the door to the bar. RP 153. Schirmer was struck on his lower right leg as he entered the bar. RP 153.

Schirmer acknowledged he "had a lot to drink" that night. RP 175-76. During cross-examination, he confirmed Naitoko was "in the parking lot" when Schirmer first saw him outside the bar. RP 173.

b. Ciona Luuga Testimony

Ciona Luuga was Schirmer's long-time friend and roommate. RP 278, 287-88. He occasionally worked as a bouncer at the bar. RP 289. Luuga testified he was in the bar at the time of the fight between Naitoko and Schirmer. RP 280. He went to Schirmer's aid and "threw a couple punches". RP 280. He also saw Schirmer "hitting other people." RP 290. About five to seven others, drawn from both camps, intervened to stop the fight. RP 280. Luuga testified the two groups separated, and he left the bar through the front door. RP 281. He remained outside between two cars, one of which belonged to Schirmer. RP 282. Maua Vaivao was with him. RP 282. Luuga testified Naitoko came around the corner with a gun, said something to Schirmer, and started shooting at Schirmer. RP 284-85. Luuga stated he was 15-20 feet away from Schirmer. RP 285. He testified that, once the shooting began, Schirmer was "running around," and ran "all the way to the front of the door." RP 286. After the shots, Naitoko "went around the corner and off he

goes.” RP 287. Luuga testified Schirmer “had a couple of beers” that night. RP 278.

c. Maua Vaivao Testimony

Maua Vaivao is Schirmer’s friend and considers him “something like a nephew.” RP 259. He did not see the fight inside the bar because he was outside smoking a cigarette. RP 260-61. He said he was “parked between” some cars. RP 263. He testified he heard a shot, turned, and saw Naitoko shooting a gun in Schirmer’s direction. RP 263-64, 270. Vaivao stated Schirmer was 25-30 feet away, between him and Naitoko. RP 263, 272. Schirmer was “trying to find somewhere to run or something.” RP 272. Two ricochet fragments struck Vaivao. RP 264, 274.

d. Puletua PoPo Letuli Testimony

State’s witness Puletua PoPo Letuli (referred to by witnesses as “PoPo”) worked in the bar. RP 326. He testified he came inside from the parking lot and saw a commotion. RP 326. He saw Naitoko and Schirmer on top of the pool table fighting each other. RP 326. Letuli testified Naitoko and Schirmer were the only ones involved in the fight. RP 326. He stated he helped break up the fight by grabbing hold of Naitoko. RP 326-27.

e. Shawn Hunt Testimony

Shawn Hunt testified for the state. Intending to visit the pub, Hunt parked his car across the street from the pub in the parking lot of the “Thai Thai” restaurant. RP 246-48, 253. Hunt was just opening his car door when he “saw a bunch of commotion” and heard gunshots. RP 248, 254-55. He testified he then saw a person jump inside a vehicle that departed the scene. RP 254. He did not see a gun. RP 248.

Hunt explained he was “across the street that runs parallel to the building.” RP 253. Asked how far the building was from the street, Hunt answered, “the length of a parking space.” RP 253. Hunt stated there is no parking lot in “front” of the bar, “just a little sidewalk, and then 16th Avenue or Ambaum, I call it.” RP 254.⁴ When asked if he could see the “front of the Pub,” Hunt answered,

Not directly on, but, yes, I was—I’d say I was a little bit farther by the—I could see the car parked there--

...

--I could see a bunch of commotion, and I heard shots.

RP 254 (emphasis added).

⁴ The bar was located near the spot where 16th Avenue veers and becomes Ambaum Blvd. RP 186. Witnesses at trial referred to the street in front of the bar both as 16th Avenue and as Ambaum. RP 186, 254.

f. Ranae Naitoko Testimony

Naitoko, the sole defense witness, testified he acted in self-defense.

He testified Schirmer and a large man, "Mr. Big Guy", approached him inside the bar. RP 346. After Schirmer issued an insult, "Mr. Big Guy" punched Naitoko in the face while Schirmer grabbed Naitoko's hair. RP 346-47. Naitoko stated his face was slammed into the pool table and he was punched. RP 349. PoPo picked him up and hit him in the ribs. RP 349-50. He escaped out the back door and was kicked from behind as he did so. RP 350. Naitoko stated his wind was knocked out. RP 351. He rested on the steps for a few minutes. RP 351. Then, two men who had been part of Schirmer's group came out of the bar. RP 352. Naitoko ran, but he encountered Schirmer, Mr. Big Man, and three others. RP 353. He heard them say "there he go". RP 355.

Naitoko testified the group rushed at him and grabbed his hair again. RP 357. He stated he put his head down and started swinging. RP 358. He felt a "big belly" as he was being hit from all directions. RP 358. Naitoko grasped at the shirt and waist of the person with the belly and felt a gun. RP 358. He testified, "I just grabbed the gun and it just-- I shot it, I just shot it." RP 358. He

stated, "I wasn't aiming at nothing". RP 359. He fired the gun two or three times. RP 359. After shooting the gun he dropped it and ran away. RP 359-60. He heard gunshots as he was running. RP 368.

g. Forensic Evidence

Police investigators discovered damage to Schirmer's car and an adjacent red vehicle caused by bullets. Schirmer's white car is shown in six photographs mounted on cardboard as Exhibit 5. RP 146-47; Ex. 5. The photos primarily depict the white car. However, the third and fifth photographs also include small sections of a red car parked side-by-side next to Schirmer's car. Ex. 5.

King County Sheriff's Detective William Butterfield investigated the scene and testified about the damage to both cars. He said Schirmer's car was parked in the "parking lot." RP 132. Butterfield testified the vehicle was struck on the front windshield by bullets fired from a gun. RP 134-35; Ex. 5.

Exhibit 6 consists of six photographs of the red car "parked next to the white vehicle." RP 135-36; Ex. 6. Butterfield testified he recovered a bullet fragment from the red vehicle's radiator, "just to the inside of the driver's side headlight." RP 136-37; Ex. 6. Based on the front-end damage to both vehicles, Butterfield concluded the shots must have come from the south. RP 137.

h. Location of the “Back Door” and the Parking Lot

Witnesses at Naitoko’s trial consistently referred to a “front door” and “back door” at the First Avenue Pub. However, in terms of relative aspect, the “back door” was in fact a *side* door. The front door faced 16th Avenue to the east. RP 186; Ex. 7 (photographs “A” and “C”). The “back door” faced *south* toward SW 112th Street. RP 185-88; Ex 7 (photographs “D” and “F”). Just outside the southward facing “back door” was a parking area along the south side of the building next to SW 112th Street. RP 186-87; Ex. 7 (photographs “D” and “F”). The parking area was striped to provide side-by-side parking spaces oriented perpendicular (north-south) to the side of the building. Ex. 7 (photographs “D” and “F”). As previously stated, there was no parking lot in “front” of the bar next to 16th Avenue. RP 254.⁵

i. The Number of People Present at the Bar

State’s witness Michael Mayer owned the First Avenue Pub. RP 113. He knew Schirmer as a regular customer. RP 124. On the night of the shooting the bar was busy with karaoke and a pool tournament. RP 114. Mayer testified the bar was fairly crowded. RP

⁵ At trial, the state used a diagram, Ex. 1, purporting to illustrate the relative locations of the bar, of the damaged vehicles, and of Michael Schirmer when a bullet struck him. RP 109-10. The exhibit was admitted for illustrative purposes only and is not part of the record. RP 109-10.

123. He estimated there were fifty people present at the time of the disturbance. RP 123-24.

King County Deputy Sheriff James Schrimpscher was on patrol near the bar when a call came over the radio reporting shots fired. RP 104. Schrimpscher responded to the scene and stationed himself where he could see the bar entrance. RP 105. He testified he saw “a large group of people out in front of the bar.” RP 105. When other deputies arrived, “we went ahead and kind of dispersed the crowd so we could see what was going on.” RP 105.

j. Testimony Regarding the Time of Day.

Trial testimony varied significantly regarding the time of day when the shots were fired. Two doctors who treated Schirmer and Maivao testified their patients arrived at the Harborview emergency room at 2:00 a.m. RP 208-09, 228. Other state’s witnesses who were present at the bar placed the event earlier in the evening. Mayer, the bar owner, testified the incident occurred “somewhere after 11 o’clock.” RP 123. Shawn Hunt estimated the time was “somewhere around...I don’t know, 11 or 12, something like that. I’m not exactly sure, so—it was quite awhile ago.” RP 247. Vaivao testified the incident occurred “probably like little past 12 or one or something.” RP 268.

k. Testimony Regarding Naitoko's Pre-Arrest Silence

King County Sherriff's Detective John Holland testified he spoke to Naitoko by phone after the shooting. RP 196. Holland told Naitoko he needed to meet to "get his side of the story." RP 197. Naitoko agreed to meet Holland. RP 197. Holland testified Naitoko never showed up for the appointment. RP 197.

During cross-examination, the prosecutor prodded Naitoko to explain why he skipped the interview: "[W]hy didn't you just call Detective Holland and say, hey, you know, we have a relationship, let me tell you what happened... why did you not talk with him?" RP 362-63.

5. Defense Witness Testimony at the Superior Court Reference Hearing

At the reference hearing four witnesses testified about the 2004 shooting at the First Avenue Pub.

a. Malu Tuifua

Malu Tuifua testified he went to the tavern with Naitoko. 2RP 92. He described Naitoko as a very close friend, "like family." 2RP 100. While inside the bar, Tuifua heard noise coming from the pool table area. 2RP 94. He testified he looked and saw "a bunch of Samoan guys...holding a guy down by the hair, the other guys were

punching.”⁶ 2RP 94. Tuifua moved closer and saw Schirmer holding Naitoko’s hair. 2RP 96. When asked how many people were involved, Tuifua testified:

It was just a bunch of people, that’s all I could say. You know, I was nervous as well, and I was a little bit intoxicated, but I do remember seeing a bunch of guys surrounding him and being on top of him.

Q. Why were you nervous?

A. Because I was scared that I might get jumped as well because I was with him.

2RP 95-96.

Tuifua stated Naitoko was eventually able to get up and run out of the bar through the back door. 2RP 96-97. Tuifua ran out the front door to his car. 2RP 97. Just as he was about to start the engine, he heard a gunshot. 2RP 97. He looked through his window and saw “a bunch of Samoan guys out there.” 2RP 97. The Samoans were ducking. 2RP 97. Tuifua circled the bar looking for Naitoko, but did not find him. 2RP 97-98. Not seeing Naitoko, Tuifua went home. 2RP 98. Tuifua testified he did not see a scuffle outside the bar, “just people ducking after the fact.” 2RP 103.

⁶ Tuifua testified he and Naitoko are Tongan. He explained Tongans and Samoans “never really got along.” 2RP 96.

The superior court found Tuifua's testimony did not support

Naitoko's defense:

Mr. Tuifua testified that he saw the fight in the bar but did not see the shooting. In fact, his testimony, if anything, would support the State's version of events.

2CP 62 (FOF 6).

b. Sioeli Latu

Sioeli Latu testified he was a friend of Naitoko's and had known Naitoko for ten years. 3RP 5. When Latu went to the bar on the night of the incident, Naitoko was already there. 3RP 6. Latu was playing pool. 3RP 7. After a pool game he went to the bathroom; when he came out, he saw "a whole bunch of people on somebody." 3RP 7. Latu discovered the people were jumping on Naitoko. 3RP 7-8. They were beating Naitoko with their fists and were kicking him. 3RP 8. Schirmer was one of the people hitting Naitoko. 3RP 9. Latu testified he tried to pull the people off Naitoko. 3RP 8. When the fight broke up, Naitoko ran out the back door. 3RP 10, 18. Latu also headed for the back door. 3RP 10. He struggled to get there because he had to push his way through numerous people who had been involved in the altercation. 3RP 19. As he left the bar, Latu saw fighting going on outside, but he did not see who was involved. 3RP 10. Latu testified

he heard a gunshot outside the bar and ran for safety. 3RP 10, 19-20.

Latu testified he had four to five mixed drinks that evening and was “tipsy.” 3RP 14, 23. He admitted that, contrary to his testimony, he told the attorney representing Naitoko in the reference hearing that he saw Naitoko assaulted outside the bar. 3RP 24.

The superior court noted in its findings that Latu testified he was “somewhat intoxicated” at the bar. 2CP 64 (FOF 9). The court also found his testimony was evasive regarding his earlier inconsistent statement made to defense counsel. 2CP 64 (FOF 9). The court made no finding addressing Latu’s credibility generally.

c. Nesiteko Fainga

Nesiteko Fainga testified she is related to Naitoko through her mother and is like a big sister to Naitoko. 2RP 148. She went to the bar with her cousin on the night of the incident. 2RP 144. When asked what time she arrived at the bar, she testified, “I am not sure, it’s a long time ago, but I would say between eight and ten we were there.” 2RP 144. Fainga described her location when she arrived at the bar:

We parked—the easy way to explain it is the back door of the bar. Across the street, I think it’s a Thai restaurant. That’s where we parked.

2RP 144.

As Fainga crossed the street to go to the bar, she saw a fight break out. 2RP 144. She saw several people “jumping somebody” near the back door. 2RP 145, 152. At first, she did not see who was being attacked, but she recognized Naitoko’s clothing from having seen him earlier in the day. 2RP 144-45, 151. Then she heard someone say “Ranae’s getting jumped.” 2RP 145. She saw people on top of Naitoko, punching and kicking him. 2RP 145. Fainga and her cousin decided not to go inside the bar. 2RP 145. Instead, they began walking back toward their car. 2RP 147, 153. As they were crossing the street returning to their car, Fainga heard a gunshot. 2RP 153. She and her cousin reached the car and left the scene. 2RP 147. Fainga did not see who fired the gun. 2RP 147. She estimated there were 15-20 people outside the bar during the scuffle, and she also saw people inside the doorway trying to go outside. 2RP 157. She explained she did not attempt to help Naitoko because “It was too many guys” and it was dangerous. 2RP 152-53. She also explained her brother had recently been shot, and she was afraid “a gun could be involved.” 2RP 146, 153.

The superior court found Fainga “appeared to be testifying honestly to the best of her current recollection.” 2CP 63 (FOF 8).

However, the court noted, “Although it is otherwise undisputed that the incident occurred after midnight, Ms. Fainga testified that she and [her cousin] arrived between 8:00-10:00 in the evening.” 2CP 63 (FOF 8). The court also found,

It is difficult to determine what exactly Ms. Fainga did see: she described a fight at the back door of the bar and did not describe either looking away or the fight moving. However, the trial testimony, including the forensic evidence, establishes that the shooting occurred in the front of the bar.

2CP 63 (FOF 8).

d. Patrick Moimoi

Patrick Moimoi testified he was at the bar the night of the incident. 2RP 111. Moimoi stated he saw some “scuffles” in the bar. 2RP 112. He saw bouncers “grabbing people” and he decided “I need to get out.” 2RP 121. Moimoi went to his car and started to drive away. 2RP 112. He was waiting at a red light when he observed a group of people attacking someone outside the bar. 2RP 113-14, 127. Moimoi explained it was dark and he just glanced at the scene. 2RP 115. He described seeing a lot of heads, arms, and fists “like a rugby game.” 2RP 115. He estimated there were fifty to sixty people attacking the person outside the bar. 2RP 114. Moimoi also stated the crowd had beer bottles. 2RP 114. While he was waiting at

the red light, Moimoi heard gunshots. 2RP 129-30. The crowd “scattered” and Moimoi saw Naitoko holding a pistol. 2RP 130. When asked what Naitoko was doing, Moimoi answered, “Trying to survive.” 2RP 130. Moimoi testified he then left the area to “find someplace safe to go.” 2RP 115.

Moimoi testified under cross-examination that older people in his community had “yelled” at him to “stop the violence between Tongans and Somoans.” 2RP 138-39.

Moimoi’s testimony varied from a declaration he executed seventeen months earlier, on May 19, 2008.⁷ Moimoi’s declaration states:

On February 20, 2004 I Patrick Moimoi was present that night at the First Avenue Pub. As I was pulling out in my car coming from where I parked across the street, I pulled out to a red light. When I looked at the corner of the bar, I seen Mike Schirmer and a few other guys standing around somebody and beating that somebody up; all of a sudden I heard shots and the group of guys scattered and ran. When I looked back to the corner I seen my cousin Ranae stumbling around with a gun in his hand.

Reference Hearing Ex. 2.

The superior court found Moimoi’s testimony would substantiate Naitoko’s self-defense claim “if believed.” 2CP 62 (FOF

⁷ Moimoi testified at the reference hearing on September 10, 2009. 2RP 1, 109.

7). However, the court found Moimoi “was not a credible witness.” Id. The court found his testimony “made no sense,” noting Moimoi testified there were 50-60 people beating up the defendant with beer bottles, while “none of the officers who testified at trial testified to finding beer bottles at the scene, and the defendant did not testify about being attacked with beer bottles.” Id. The court also noted, “No one else observed a group this large involved in a fight. In fact, in his declaration, Mr. Moimoi asserted that he observed ‘a few’ people beating up defendant.” Id. The court also found Moimoi “testified that he was afraid to talk to the police because they held him responsible for making peace between the Tongans and the Samoans.” 2CP 63 (FOF 7).

6. The Superior Court’s Decision Denying Relief

The superior court included in its fact findings that “Mr. Tuifua, Mr. Moimoi, Ms. Fainga and Mr. Latu are long-time friends of the defendant, and in some cases, the defendant’s family.” 2CP 64 (FOF 10).

The court concluded Naitoko suffered no prejudice from his trial attorney’s deficient performance. 2CP 65 (COL 4). The court reasoned Moimoi is not a credible witness, and the other three witnesses who testified at the reference hearing “did not see the

actual shooting.” Id. The court concluded the testimony of Latu and Fainga “was somewhat inconsistent with defendant’s trial testimony.”

Id. Regarding Naitoko’s trial, the court stated,

[T]he evidence introduced by the State was strong; it included testimony from a number of witnesses and exhibits establishing where the shootings occurred. The jury, after hearing defendant’s version of events, found the State’s evidence sufficient to convict the defendant.

2CP 64-65 (COL 3).

The court concluded the evidence received at the reference hearing did not undermine confidence in the outcome of Naitoko’s trial. 2CP 65 (COL 4). The court found no basis for a new trial. 2CP 66.

C. ARGUMENT

A new trial is necessary because Naitoko’s trial attorney was ineffective. There is a reasonable probability the outcome of the trial would have been different but for counsel’s failure to present the testimony of Tuifua, Latu, and Fainga. Counsel’s failure to object to evidence of Naitoko’s pre-arrest silence compounded the unfair prejudice. This Court should reverse the dismissal of Naitoko’s petition and order a new trial.

1. LEGAL STANDARDS APPLICABLE TO DEFENSE COUNSEL'S DEFICIENT PERFORMANCE

The federal and Washington constitutions guarantee the right to effective assistance of counsel. U.S. Const. amend 6; Const. art. 1 § 22. An accused is denied this right and is entitled to reversal of his conviction when his attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability the outcome would be different but for the attorney's conduct. State v. Doogan, 82 Wn. App. 185, 188-89, 917 P.2D 155 (1996) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The defense "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. A reasonable probability is one sufficient to undermine the confidence in the outcome of the case. 466 U.S. at 694.

Defense counsel has an obligation to "provide factual support for [the] defense where such corroboration is available.'" In re Davis, 152 Wn.2d 647, 739, 101 P.3d 1 (2004) (quoting Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir.1995)). Not pursuing such corroborating evidence with an adequate pretrial investigation may establish constitutionally deficient performance. Davis at 739.

A trial court's factual findings are erroneous where not supported by substantial evidence in the record. Davis, at 679. Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Id. The trial court's conclusions of law are reviewed de novo. State v. Smith, 154 Wn. App. 695, 699, 226 P.3d 195 (2010). Claims of ineffective assistance of counsel present mixed questions of law and fact and are reviewed de novo. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

"Credibility determinations are for the trier of fact and cannot be reviewed on appeal." In re Personal Restraint of Gentry, 137 Wn.2d 378, 410-11, 972 P.2d 1250 (1999). In a criminal jury trial, the trier of fact for determining the merits of a criminal charge is the jury. See e.g., State v. Williams, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 2390081, at *7 (June 15, 2010) ("We defer to the jury on issues of conflicting testimony and the credibility of the witnesses.") For factual inquiries unrelated to the merits, the trier of fact is the trial court judge. See e.g., Davis at 682-83 (trial court's credibility determinations in reference hearing inquiry into shackling of defendant at trial are not reviewable); Gentry at 410-11 (credibility determinations in reference hearing inquiry into juror misconduct); State v. Sadler, 147 Wn. App.

97, 115-16, 193 P.3d 1108 (2008) (evaluating attorney's credibility in a Batson⁸ hearing).

Under the cumulative error doctrine, a reviewing court may reverse a defendant's conviction when the combined effect of errors during trial denied the defendant his right to a fair trial, even if each error standing alone would be harmless. State v. Venegas, 155 Wn. App. 507, 520 228 P.3d 813 (2010).

2. THE SUPERIOR COURT REJECTED THE TESTIMONY OF THE DEFENSE WITNESSES ON THE BASIS OF ERRONEOUS FINDINGS OF FACT.

The Superior Court relied on several erroneous fact findings to deny Naitoko a new trial.

a. Tuifua

The court found that Tuifua's testimony "would support the State's version of events." 2CP 62 (FOF 6). The finding is more accurately characterized as a legal conclusion. Regardless, the record does not support it. Tuifua stated he saw several people on top of Naitoko inside the bar, holding Naitoko by his hair and punching him. His testimony corroborated Naitoko's account of what occurred inside the bar, and it contradicted the State's witnesses who described a mere shoving match that was quickly subdued. Tuifua

⁸ Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

supported Naitoko's version of the incident, not the State's version.

The court's contrary finding -is not supported.

b. Fainga / Latu

The Superior Court discounted Fainga's testimony because she stated she arrived at the pub between 8:00 and 10:00 p.m., whereas the court found "it is otherwise undisputed that the incident occurred after midnight." 2CP 63 (FOF 8).⁹ The finding is erroneous.

Michael Mayer, the bar owner, testified the incident occurred "somewhere after 11 o'clock." RP 123. Shawn Hunt testified it was "somewhere around...I don't know, 11 or 12, something like that. I'm not exactly sure, so—it was quite awhile ago." RP 247.

The court discounted the testimony of Fainga and Latu based on its finding that "the trial testimony, including the forensic evidence, establishes that the shooting occurred in the front of the bar." 2CP 63 (FOF 8). This finding implies that Fainga and Latu could not have observed events connected to the shooting because they observed conduct in the vicinity of the "back door." 2CP 63 (FOF 8); 2CP 64-65 (COL 3). To the extent the court's finding is construed to mean Latu

⁹ Fainga qualified her estimate with the comment, "I am not sure, it's a long time ago...." 2RP 144.

and Fainga were not in proximity to the shooting, it is erroneous. As detailed above, the “back door” was in fact a side door facing south. The south side of the building is where the incident occurred. Undisputed forensic evidence established the bullets that struck the two vehicles came from the south. Those cars were parked side-by-side. There was side-by-side parking along the south side of the building. Detective Butterfield testified Schirmer’s car was in the “parking lot.” There was no parking area on the east, “front” side of the bar. Schirmer confirmed that when he first saw Naitoko outside the bar, Naitoko was in the parking area. Maivao, who was standing with Luuga next to Schirmer’s car, testified Schirmer was between Maivao and Naitoko when the shots were fired.

In addition, State’s witness Shawn Hunt testified he parked his car in the lot of the Thai restaurant across the street from the pub. He stated the distance between the bar and the street was “the length of a parking space.” RP 253. This testimony establishes Hunt was across the street from the south side of the building, facing the side-by-side parking area adjacent to the pub. From there, he could not see the “front” of the pub “directly,” but he saw the commotion outside. RP 248, 253-55. Hunt’s testimony validates Fainga’s

account because she too had parked at the Thai restaurant.¹⁰

Fainga's view of the scene was similar to Hunt's. Fainga arrived a few minutes earlier than Hunt and witnessed events occurring outside the bar just before the shooting. Both Fainga and Hunt witnessed a commotion. The Superior Court's implicit finding that Latu and Fainga were not in a position to witness events connected to the shooting is erroneous.

The court also discounted Fainga's testimony because it found she "described a fight at the 'back door' of the bar and did not describe either looking away or the fight moving." 2CP 63 (FOF 8). The finding is erroneous because Fainga described looking away: she testified she was walking back to her car parked across the street at the Thai restaurant when she heard a gunshot. 2RP 147, 153.

c. Moimoi

The court found Moimoi's description of the scene outside the bar "made no sense." 2CP 62 (FOF 7). The finding implies Moimoi's testimony was incomprehensible, incoherent, or illogical. The finding is erroneous because, though the court found Moimoi not credible, his

¹⁰ Fainga explained that the Thai restaurant was across the street from the "back door." 2RP 144.

testimony was clear. He testified a large crowd attacked Naitoko outside the bar. Whether or not the court believed Moimoi, his testimony made sense.

The court's dim view of Moimoi's testimony derived in part from the erroneous finding that Moimoi "testified that he was afraid to talk to the police because they held him responsible for making peace between the Tongans and the Samoans." 2CP 63 (FOF 7). The finding is erroneous because Moimoi did not make such statements. The court appears to have misinterpreted Moimoi's testimony that he had been yelled at by elders in his community to stop violence occurring between Tongans and Samoans. 2RP 138-39.

The court explicitly found Moimoi not credible, and it rejected his testimony outright. The finding has no effect in determining whether a new trial is required because the jury, not the trial judge, is the trier of fact for the merits of a criminal charge. In this context it is the jury's prerogative to resolve credibility questions. Moimoi's testimony would not preclude the jury from concluding he witnessed an assault against Naitoko outside the bar. The record supports Moimoi's assertion he saw fifty or more people outside the bar. Mayer estimated there were fifty people in the bar when Schirmer confronted Naitoko inside. When Officer Schrimpsher responded to

the scene, he saw “a large group of people out in front of the bar.” RP 105. The jury could conclude Moimoi witnessed a large crowd and an assault on Naitoko, but that he was mistaken regarding the number of people who participated in the assault.

3. THIS COURT SHOULD ORDER A NEW TRIAL FOR NAITOKO.

Tuifua, Latu, and Fainga corroborate Naitoko’s self-defense claim. They corroborate his testimony he was attacked inside the bar, and they corroborate his claim he was attacked outside the bar. At trial, *lack* of corroboration crippled Naitoko’s defense.

This case involves conflicting accounts from two groups. The state presented its case through the mutually reinforcing testimony of members of one group. For the defense, Naitoko was the sole witness. Given this imbalance, it was natural and predictable the jury would accept the version presented by multiple, corroborating witnesses. This disequilibrium would not have existed if Tuifua, Latu, and Fainga had testified. There is a reasonable probability the outcome of the trial would have been different had the jury received the testimony of the missing defense witnesses.

The superior court concluded otherwise because it misconstrued the trial record. As discussed in detail above, the

court's finding that events occurring near the "back door" were not in the vicinity of the shooting is erroneous. The south side of the pub exterior—where the "back door" was located—is where the shooting occurred. The court's conception of "front" and "back" as geographically separate is incorrect and not supported by the record.

The court also discounted the impact of Naitoko's witnesses by emphasizing facts that could affect their credibility. The court unfairly skewed its analysis to favor the state: while applying rigorous standards to defense testimony, the court did not subject the state's witnesses to similar scrutiny.

The court questioned Fainga's credibility because she testified she arrived at the pub between 8:00 and 10:00 p.m., whereas the court found "it is otherwise undisputed that the incident occurred after midnight." 2CP 63 (FOF 8). As noted above, this finding is erroneous. More to the point, the time of day testimony of the state's witnesses varied widely. Mayer and Hunt said the incident might have occurred before midnight. Vaivao estimated it was "probably like little past 12 or one or something." RP 268. The doctors who treated Schirmer and Vaivao testified their patients arrived at the Harborview emergency room at 2:00 a.m. RP 208-09, 228. Fainga testified *more than four years after the trial*. Given the widely varying estimates of

the state's witnesses, it is unreasonable to discount Fainga's testimony by faulting her sense of time.

Regarding Latu, the superior court noted he was "somewhat intoxicated." The fact is unremarkable. The incident arose late in the evening at a bar hosting a pool tournament and karaoke. Schirmer was the central figure in the state's case against Naitoko. Regular customer Schirmer had been at the bar *since 6:30*, several hours before he decided to initiate a confrontation with Naitoko. Schirmer admitted he had "a lot to drink." RP 146, 175-76. Despite the obvious intoxication of the state's most important witness, the court concluded the state's case was strong. In this context, it is untenable to discount the testimony of a defense witness merely because that witness – like the state's – had been drinking.

The superior court also highlighted the fact that the missing defense witnesses "are long-time friends of the defendant, and in some cases, the defendant's family." 2CP 64 (FOF 10). The court's observation could be applied, verbatim, to the three state's witnesses who testified they saw Naitoko fire the weapon. Schirmer and Luuga were long time friends and roommates. Vaivao was Schirmer's friend and considered him a nephew.

The superior court noted the testimony of Fainga and Latu was “somewhat inconsistent” with Naitoko’s trial testimony. 2CP 65 (COL 4). Here too, the court’s criticism applies equally to the state’s evidence. Schirmer testified the fight inside the bar involved mere pushing, and he claimed he did not hit anyone. But Luuga saw Schirmer hitting other people. Letuli testified Schirmer and Naitoko were fighting each other on top of the pool table. Schirmer testified he was “five feet or less” from the front door when Naitoko appeared with a gun. Luuga stated Schirmer was “running around,” and ran “all the way” to the front door when the shooting began. RP 286. The state’s witnesses provided widely varying estimates of the time of day of the incident. While Schirmer acknowledged he’d had a lot to drink, Luuga testified Schirmer merely “had a couple of beers” that night. RP 278.

The evidence corroborating Naitoko’s self-defense claim would have strengthened Naitoko’s defense and could have led to a different outcome at trial. A rational jury could have reasonable doubt about the state’s claims. The superior court erred by discounting this evidence on the basis of erroneous findings of fact, and on the basis of reliability considerations unevenly applied. This court should reverse the superior court and order a new trial.

4. COUNSEL'S FAILURE TO OBJECT TO EVIDENCE OF NAITOKO'S PRE-ARREST SILENCE COMPOUNDED THE PREJUDICE.

The superior court did not consider the pre-arrest silence issue because it concluded Naitoko was not prejudiced by his attorney's failure to investigate defense witnesses. For the reasons argued above, counsel's failure to call witnesses provides ample grounds for a new trial.

The violation of Naitoko's Fifth Amendment right to remain silent adds another layer of prejudice. The state invited the jury to infer consciousness of guilt because Naitoko did not meet with a detective. The failure to object to this evidence magnified the deficiency of counsel's performance. Naitoko's counsel provided ineffective assistance. A new trial is required.

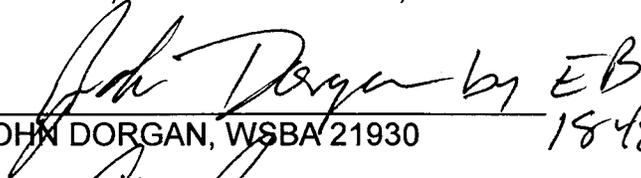
D. CONCLUSION

This Court should reverse the trial court's ruling and remand for a new trial.

DATED this 4th day of August, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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APPENDIX A

No. 64539-2-1

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The Superior Court for the State of Washington
County of King

In re the Matter of the Personal Restraint of:

RANAE NAITOKO,
Petitioner.

Court of Appeals No. 62585-6-1
Superior Ct. No. 04-1-13301-3 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND ORDER
ON DETERMINATION ON THE MERITS
PURSUANT TO RAP 16.11

STATE OF WASHINGTON,
Plaintiff,

Vs.

RANAE NAITOKO,
Defendant.

Procedural History

Defendant Ranae Naitoko was convicted, following a jury trial, of two counts of assault in the first degree, with weapons enhancements, and one count of unlawful possession of a firearm. The judge presiding over the trial was the Honorable Sharon

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1 Armstrong. Defendant's direct appeal was unsuccessful, and his conviction was
3 affirmed in an unpublished opinion. (Division I, No. 57467-1-I, June 18, 2007).

5 The defendant subsequently filed a personal restraint petition, raising a number
7 of challenges to his conviction. The petition was transferred to Superior Court to
9 address the ineffective assistance of counsel claims for a decision on the merits, by an
11 order dated April 1, 2009. Judge Armstrong was unavailable to conduct the hearing, and
13 the matter was assigned to the undersigned judge.

15 Because of the need for the defense attorney to conduct substantial
17 investigation, the matter was not ready for hearing until September 10. All testimony
19 could not be concluded in one day, and the hearing resumed on September 24 for the
21 remaining witnesses and for argument. The following witnesses testified:

- 23 • Michael Danko (defendant's attorney at trial)
- 25 • Malu Tauifua
- 27 • Patrick (Liki) Moimoi
- 29 • Nesiteko Fainga
- 31 • Siieli (Joey) Latu
- 33 • Ranae Naitoko

35 The court also reviewed the exhibits admitted during the hearing, the verbatim
37 report of proceedings from the trial and trial exhibit nos. 7 and 8, which are poster
39 boards containing photographs of the First Avenue Pub in Seattle.¹

41 The trial testimony was summarized by the Court of Appeals in its opinion on
43 direct review. These findings are addressed only to those issues contained in the Order
45 on Transfer.

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49 ¹ The trial exhibits were not available until after closing argument. The attorneys were invited by court staff to view the exhibits. No request for additional argument based on the exhibits was received.

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Findings of Fact

1. Michael Danko, defendant's trial counsel, is an experienced criminal defense attorney. His practice is between 70-80% criminal law. Mr. Danko routinely destroys his office files four years after trial. He had destroyed the file in this case prior to testifying and, although the record is not explicit, it appears clear that the decision to destroy the file was made prior to Mr. Danko's having been notified of the transfer hearing.
2. The defendant, at all times, asserted to Mr. Danko that he was acting in self-defense. He provided names of several potential witnesses to Mr. Danko. The defendant provided almost no details about what information these potential witnesses might have. The court is satisfied that, although defendant testified at the hearing that he also provided phone numbers, this is not accurate.
3. Mr. Danko did not obtain the services of an investigator to locate the witnesses. Instead, he relied on defendant's girlfriend, Stephanie Moore, to locate these individuals. Mr. Danko believed it would be less alienating and more productive to have the initial contact made by someone known to the witnesses. Ms. Moore was not able to provide phone numbers to Mr. Danko. Mr. Danko's last contact with Ms. Moore was in May 2005. Trial was held in July. Neither the defense nor the State was able to locate Ms. Moore to testify at the hearing.
4. At one point, Mr. Danko went to defendant's father's home to attempt to locate witnesses but was unsuccessful.

- 1 5. Neither Mr. Danko nor any defense investigator ever spoke to the potential
3 defense witnesses before trial. Mr. Danko does not remember receiving
5 phone calls from potential witnesses, but did speak to Stephanie Moore a
7 number of times.
- 9 6. Malu Taufua left at least one phone message for Mr. Danko, including a call
11 back number. He did not receive a call back. At the hearing, Mr. Taufua
13 testified that he saw the fight in the bar but did not see the shooting. In fact,
15 his testimony, if anything, would support the State's version of the events.
- 17 7. Patrick Moimoi testified that he had left several messages on Mr. Danko's
19 answering machine, including call back numbers. He said that during one call
21 he spoke to a woman to whom he gave his mother's address.² He was not
23 contacted by Mr. Danko. Mr. Moimoi's testimony, if believed, would
25 substantiate defendant's claim of self-defense. He stated that after he left the
27 bar and got in his car, he noticed a struggle at the corner outside the bar and
29 then heard shot. However, Mr. Moimoi was not a credible witness. Putting
31 aside his admission that he had been drinking that evening, his testimony
33 made no sense. He testified that 50-60 people were beating up the
35 defendant and that they had obtained cases of beer bottles to use to attack
37 the defendant. Certainly, none of the officers who testified at trial testified to
39 finding beer bottles at the scene, and the defendant did not testify about being
41 attacked with beer bottles. No one else observed a group this large involved
43 in a fight. In fact, in his declaration, Mr. Moimoi asserted that he observed "a
45 few" people beating up defendant. (Defense Exhibit 2). Mr. Moimoi's
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49 ² Mr. Moimoi's testimony in this regard is somewhat confusing. He testified that the phone was answered by a "female" but referred to the person he spoke to as "him."

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testimony at times wandered into irrelevancies and his affect was quite unusual. For example, he testified that he was afraid to talk to the police because they held him responsible for making peace between the Tongans and the Samoans. As stated above, Mr. Moimoi is simply not a credible witness.

8. Nesiteko Fainga testified that she and her cousin Lily Makaafi drove to the First Avenue Pub and pulled into the parking lot in back near the Thai restaurant. Although it is otherwise undisputed that the incident occurred after midnight, Ms. Fainga testified that she and Ms. Makaafi arrived between 8:00-10:00 in the evening. After they got out of the car, they saw someone being "jumped" and being pulled back into the bar. They didn't know who was being attacked until they heard someone yelling "Ranae's being jumped." Three to five minutes later, the women heard gun shots and left. It is difficult to determine what exactly Ms. Fainga did see: she described a fight at the back door of the bar and did not describe either looking away or the fight moving. However, the trial testimony, including the forensic evidence, establishes that the shooting occurred in the front of the bar. Ms. Fainga appeared to be testifying honestly to the best of her current recollection; however, her memory of the incident as described at the hearing was somewhat different from the version described in her declaration (Defense Exhibit 3).

9. Siieli (Joey) Latu testified that he was at the First Avenue Pub the night of the incident and observed the fight inside the bar. He testified that after the fight was broken up, Ranae left through the back door. As soon as Mr. Latu could make his way through the crowd, he also left through the back door. He saw

1 a fight but could not tell who was involved. He immediately heard shots and
3 ran away from the area. Mr. Latu testified that he was somewhat intoxicated
5 that night. His testimony at the hearing was somewhat evasive, particularly in
7 regards to an earlier, inconsistent statement, he allegedly made to defense
9 counsel.

11 10. Mr. Taifua, Mr. Moimoi, Ms. Fainga and Mr. Latu are long-time friends of the
13 defendant, and in some cases, the defendant's family.

15 **Conclusions of Law**

- 17 1. A defense attorney has a duty to conduct an appropriate investigation. See
19 *State v. Crawford*, 159 Wn. 2d 86 at 98 (2006). Here, defendant always
21 asserted that he acted in self-defense and that he had witnesses to
23 corroborate his version of events. Although the defendant was not
25 forthcoming with Mr. Danko as to what he believed the potential witnesses
27 might say, the witnesses should have been contacted, even in light of Mr.
29 Danko's evaluation of the strength of the State's case. It may have been
31 reasonable to have Ms. Moore initially attempt to contact witnesses; however,
33 when that was unsuccessful, more formal methods should have been
35 attempted.
- 37 2. Because Mr. Danko had not contacted any of these witnesses, the decision
39 not to call them cannot be said to be a trial tactic or a strategic decision.
- 41 3. In evaluating a claim of ineffective assistance of counsel for failure to
43 investigate, the court must look at the strength of the State's case. *In re*
45 *Personal Restraint of Davis*, 152 Wn. 2d 647, 739 (2004). As summarized in
47 the opinion on direct appeal, the evidence introduced by the State was strong;
49 it included testimony from a number of witnesses and exhibits establishing

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1 where the shootings occurred. The jury, after hearing defendant's version of
3 events, found the State's evidence sufficient to convict the defendant.

5 4. There was no prejudice: Mr. Moimoi simply is not a credible witness. The
7 other three witnesses did not see the actual shooting. The testimony given by
9 Mr. Latu and Ms. Fainga, in fact, was somewhat inconsistent with defendant's
11 trial testimony. It cannot be said that there is a "reasonable probability" that
13 the trial result would have been different had these witnesses been called at
15 trial. That is, the evidence adduced at the hearing does not "undermine
17 confidence in the outcome" of the original trial. *Knowles v. Mirzayance*, 556
19 U.S. ___, 129 S. Ct. 1411, 1422, 173 L Ed. 2d 251 (2009).

21 5. The Court of Appeals determined on direct appeal that the comment on
23 defendant's pre-arrest silence was harmless beyond a reasonable doubt. In
25 light of the conclusion that the failure to call the proposed defense witnesses
27 resulted in no prejudice, no further analysis of this issue is required.

29 **ORDER**

31 Pursuant to the Order on Transfer, this court is to make a determination
33 on the merits pursuant to RAP 16.11(b)(c). The court was directed to
35 determine whether trial counsel conducted an adequate investigation,
37 determine whether the failure to call potential defense witnesses was a
39 strategic or tactic decision and determine whether defendant has shown that
41 he was prejudiced by his attorney's failure to call the witnesses. Finally, the
43 Court of Appeals directed this court, if this court found prejudice from the
45 failure to call defense witnesses, to determine whether counsel's failure to
47 object to the comment on pre-arrest silence when considered cumulatively
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with the other errors, requires a new trial. The court, having followed the directive of the Court of Appeals, finds no basis for ordering a new trial.

Dated this ___ day of October, 2009.

Helen L. Halpert, Judge

Deputy Prosecuting Attorney Angela Kaake

Defense Counsel Brian Todd

66

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64359-2-1
)	
RENE NAITOKO,)	
)	
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 4TH DAY OF AUGUST, 2010, 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] RENE NAITOKO
DOC NO. 861958
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF AUGUST, 2010.

x *Patrick Mayovsky*

2010 AUG -4 PM 3:00