IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28737-8-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
MIGUEL CISNEROS DIAZ,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — This appeal follows convictions for first degree burglary, first degree assault, second degree assault, and second degree unlawful possession of a firearm. The trial judge sitting as the trier of fact found that the defendant illegally entered his former girl friend's home, threatened her with a shotgun, and that he was a convicted felon who could not legally possess a firearm. There is substantial evidence to support the court's findings and they in turn support the convictions with the exception of the second degree assault. We also conclude that the defendant has not made a sufficient showing to support a conclusion that his lawyer was ineffective. We therefore affirm the convictions for first degree burglary, first degree assault, and second degree unlawful

possession of a firearm, but vacate the conviction for second degree assault and remand for resentencing.

FACTS

Miguel Cisneros Diaz forced his way into the home of Marvella Alcantar with a shotgun in hand. Mr. Cisneros Diaz and Ms. Alcantar had had an intimate relationship and had previously lived together. Mr. Cisneros Diaz was mad because Ms. Alcantar had recently started dating another man. He believed that man was in the house at the time. Whether or not he was is disputed.

Once inside, Mr. Cisneros Diaz pointed the shotgun at Ms. Alcantar and threatened to kill her and her new boyfriend. He then pushed Ms. Alcantar with the shotgun into a nearby bedroom and aimed the gun at a person sleeping in the bed. Ms. Alcantar removed the covers from the person in the bed, revealing her five-year-old son Luis Alcantar. Mr. Cisneros Diaz lowered the gun and turned to leave. He then noticed the police arriving and threw the gun on the sofa in an attempt to hide it. The police met Mr. Cisneros Diaz at the door and arrested him. The police also arrested Mr. Cisneros Diaz's friend, Rito Reyes, who was waiting outside.

The State charged Mr. Cisneros Diaz with first degree burglary for unlawfully entering the home of Ms. Alcantar with the intent to commit assault against both Ms.

Alcantar and her boyfriend all while armed with a shotgun; first degree assault of Ms. Alcantar for pointing the barrel of the shotgun at her and threatening to kill her and her boyfriend; second degree assault for pointing the shotgun at Luis and threatening to shoot him; and second degree unlawful possession of a firearm for possessing the shotgun after previously being convicted of a felony.

Mr. Cisneros Diaz's trial was continued some 12 times for various reasons, including substitution of counsel at defense counsel's request. Mr. Cisneros Diaz again requested leave to substitute retained counsel after he found an attorney who said he would find and interview Mr. Reyes. The State also charged Mr. Reyes but he was released on bail and fled to Mexico. The court allowed the substitution of counsel. New counsel moved to continue the case three more times before the matter was finally set for trial. Counsel did not interview Mr. Reyes.

Mr. Cisneros Diaz testified that he stopped by the home to give Ms. Alcantar $100 to buy necessities for her children. He said that he brought the shotgun into the house to leave with Ms. Alcantar for safekeeping. He maintained that the police arrived less than five minutes after he gave Ms. Alcantar the money and the shotgun. Mr. Cisneros Diaz testified that he never pointed the shotgun at anyone. The court did not believe Mr. Cisneros Diaz and found him guilty as charged.

Following the trial, defense counsel managed to locate Fernando Chavez, the alleged boyfriend who was hiding in the closet at Ms. Alcantar's house during the incident. Mr. Chavez provided a declaration in which he said that he had never been contacted by the police and had lived in the same location for over 15 years. Defense counsel moved for a new trial and argued that the prosecution had violated the obligations imposed by *Brady v. Maryland*[1] when the State claimed it could not locate Mr. Chavez. The court denied the motion, entered judgment and sentenced Mr. Cisneros Diaz.

DISCUSSION

Sufficiency of the Evidence Second Degree Assault

Mr. Cisneros Diaz contends that Luis Alcantar could not have experienced the requisite apprehension of harm required for second degree assault because he was asleep during the incident. The State agrees. And that conviction will be vacated.

Brady Violation—Witness Fernando Chavez

The State must disclose all known material exculpatory evidence. *See Brady*, 373 U.S. at 87. This includes impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Material evidence is evidence that raises a reasonable probability that the result of the proceeding would have been different had

[1] *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

the evidence been disclosed. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* We review the claimed error de novo. *United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993).

Mr. Cisneros Diaz argues that he requested in his omnibus application that the prosecution "disclose evidence in plaintiff's possession, favorable to the defendant on the issue of guilt" and "identify each witness or document that supports lack of culpability." Clerk's Papers (CP) at 45. He claims by way of defense counsel's declaration, that the prosecutor specifically indicated that investigators could not find "Fernando Chavez." CP at 240. And Mr. Cisneros Diaz contends that was not entirely true because Mr. Chavez later testified after the trial that he had lived in the Sunnyside/Outlook area for over 15 years; his Washington driver's license lists the address that he had lived at for over 15 years; and he has known Ms. Alcantar and her family for approximately 20 years, but he had never dated her and was not present at her house on the night in question. Mr. Cisneros Diaz argues the prosecutor's misleading characterization of its investigative efforts effectively led to the suppression of material and relevant evidence.

There are a couple of problems with Mr. Cisneros Diaz's assignment of error. First, he has failed to show that the prosecution even knew the identity of Ms. Alcantar's

alleged boyfriend; there is no mention of the name in this record other than counsel's declaration in posttrial proceedings. And the best that can be said is that the State should have been able to find Mr. Chavez. But the State did not have the obligation to search out evidence to help Mr. Cisneros Diaz. *See State v. Thomas*, 150 Wn.2d 821, 851, 83 P.3d 970 (2004) ("No *Brady* violation occurs if the defendant could have obtained the information himself through reasonable diligence."). Its duty was to disclose exculpatory evidence already in its possession. *Brady*, 373 U.S. at 87. Defense counsel's declaration appears to be the only mention of a Fernando Chavez. Also this suggests that defense counsel had the opportunity to locate any boyfriend. Finally, the court had the benefit of Fernando Chavez's testimony in posttrial proceedings and before the court entered its findings and conclusions. The court denied the motion, as it was privileged to do, apparently after concluding that the information was not material.

There was no *Brady* violation here.

Deposition—Rito Reyes in Mexico

Mr. Cisneros Diaz next contends that his lawyer was ineffective because he did not locate and depose Rito Reyes in Mexico and Fernando Chavez in Sunnyside, Washington.

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*,

165 Wn.2d 870, 883, 204 P.3d 916 (2009). There is a strong presumption that counsel was effective. *State v. Woods*, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). This suggests that counsel did things for a reason. To overcome that presumption the defendant must show that counsel's performance was deficient in some respect, and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The trial was postponed several times to allow defense counsel an opportunity to travel to Mexico and take the deposition of Rito Reyes, who allegedly would have corroborated Mr. Cisneros Diaz's version of events. Defense counsel did not make it to Mexico for various reasons. The question then is whether the decision to proceed without the testimony prejudiced Mr. Cisneros Diaz. We conclude it would not.

First, Mr. Reyes was subject to an outstanding arrest warrant; this would have presented a conflict between the State's right to cross-examine him and his constitutional right to remain silent. This prompted the court to express reservations about the admissibility of any deposition. It is difficult then to conclude that Mr. Cisneros Diaz was prejudiced. Moreover, counsel may well have had perfectly legitimate tactical reasons for not taking the time or incurring the expense to depose a witness in Mexico

who would have, at best, only corroborated what his cohort Mr. Cisneros Diaz said.

Finally, Mr. Cisneros Diaz argues that his lawyer should have located and subpoenaed Mr. Chavez. We have already addressed Mr. Cisneros Diaz's concerns about potential witness Fernando Chavez. Ultimately the court had the benefit of Mr. Chavez's statements and obviously was not impressed.

We conclude that counsel's representation was not ineffective.

STATEMENT OF ADDITIONAL GROUNDS (SAG)

First Degree Burglary—Sufficiency of the Evidence

Mr. Cisneros Diaz contends he could not have committed first degree burglary because he lawfully entered Ms. Alcantar's house, never threatened anyone, and simply asked for the shotgun to be placed in safekeeping. But according to Ms. Alcantar and her daughter, Mr. Cisneros Diaz forced his way through the front door with the shotgun and only threw the gun on the sofa after he realized the police had arrived. The judge accepted Ms. Alcantar's version of events. And he was privileged to do that. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) ("Credibility determinations are for the trier of fact."). The State met its burden of production. *State v. Henjum*, 136 Wn. App. 807, 810, 150 P.3d 1170 (2007). And it was for the trial court to pass on how persuasive that evidence was, not us. *Id.*

First Degree Assault—Sufficiency of the Evidence

Mr. Cisneros Diaz next contends he could not have committed first degree assault because he never hit Ms. Alcantar or her children, and gave her the shotgun for safekeeping. He contends that no real attacker would relinquish his weapon to his intended victim. He offers no other evidence to refute Ms. Alcantar's or her daughter's testimony.

A person commits first degree assault "if he or she, with intent to inflict great bodily harm . . . [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a).

> "An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is within its range; the pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot."

Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 505, 125 P.2d 681 (1942) (internal quotation marks omitted) (quoting 1 Thomas M. Cooley & John Lewis, A Treatise on the Law of Torts 278-80 (3d ed. 1906)).

Mr. Cisneros Diaz forced his way into Ms. Alcantar's home and threatened to kill her and her boyfriend. He pointed the shotgun at her. Again, the court believed her. So

again, substantial evidence supports the elements of the crime charged.

Second Degree Unlawful Possession of a Firearm—Sufficiency of the Evidence

Mr. Cisneros Diaz next contends that he could not have committed second degree unlawful possession of a firearm because his felony conviction for forgery occurred some 30 years prior. He contends that his record should have been cleared during that time.

RCW 9.41.040 prohibits any individual convicted of a felony from possessing a firearm. However, the individual may petition for restoration of his firearm rights under certain circumstances. *See* RCW 9.41.040(4). Only the court that prohibited possession of a firearm or the superior court in the county in which the individual resides may restore the right to possess a firearm. RCW 9.41.040(4)(b)(i), (ii).

On this record, Mr. Cisneros Diaz's right to possess a firearm was never restored after he was convicted of forgery because he never petitioned for restoration. And clearly, he was in possession of a shotgun.

Offender Score Calculation

Mr. Cisneros Diaz contends the sentencing court miscalculated his offender score and imposed a sentence upward from the standard range. He contends that the court should have treated his present convictions as the "same criminal conduct" for purposes of calculating his offender score under RCW 9.94A.589(1)(a).

We review a trial court's determination of whether multiple crimes constitute the "same criminal conduct" for abuse of discretion or misapplication of the law. *State v. Freeman*, 118 Wn. App. 365, 377, 76 P.3d 732 (2003), *aff'd*, 153 Wn.2d 765, 108 P.3d 753 (2005). Two or more crimes may be considered the same criminal conduct if they (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a).

Mr. Cisneros Diaz's burglary, assault, and unlawful possession of a firearm were not the same criminal conduct. The burglary involved Mr. Cisneros Diaz unlawfully entering the house with the intent to assault both Ms. Alcantar and her boyfriend, while armed with a shotgun. The assault involved Mr. Cisneros Diaz's pointing the barrel of the shotgun at Ms. Alcantar with the intent to inflict great bodily harm. The unlawful possession involved Mr. Cisneros Diaz's possessing the shotgun without the right to do so.

The court then properly counted each conviction as five points in the offender score. The counts involved different intents, different victims, and occurred at different times. His argument fails.

Weapon Enhancements—Violation of Right to Equal Protection

Mr. Cisneros Diaz contends the sentencing court improperly imposed a weapons

enhancement on his second degree unlawful possession of a firearm conviction. He is mistaken.

A firearms enhancement is available on all but a small handful of crimes that must necessarily be committed with a firearm. Unlawful possession of a firearm is one of the excepted offenses. RCW 9.94A.533(3)(f). If the trier of fact concludes that a crime was committed with a firearm, the term for that enhancement "must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement." RCW 9.94A.533(3). Whether the sentences for the offenses are served concurrently or consecutively, the enhancement must be served consecutively. RCW 9.94A.533(3)(e).

Here, the sentencing court imposed a 60-month enhancement on the burglary conviction, a 60-month enhancement on the first degree assault conviction, and a 36-month enhancement on the second degree assault conviction. There was no enhancement for the unlawful possession of a firearm conviction.

We then affirm the convictions for first degree burglary, first degree assault, and second degree unlawful possession of a firearm, but vacate the conviction for second degree assault and remand for resentencing.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to

RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Brown, J.

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Siddoway, J.