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No. 70462-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT G. ISABEL,

Appellant.

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

The Honorable Mariane Spearman

BRIEF OF APPELLANT

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1. The trial court erred in failing to grant a mistrial for a witness's non-responsive inflammatory testimony.

2. Mr. Isabel's Sixth Amendment and Fourteenth Amendment rights to present a defense were denied when the trial court refused to instruct the jury regarding a missing witness.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court must grant a mistrial where a trial irregularity so prejudiced the jury that it denied the defendant a fair trial. Witness misconduct may be the basis for a mistrial. Here, in a non-responsive answer, the victim *sua sponte* testified about threats to himself and his family and intimated they came from Mr. Isabel. Did the trial court abuse its discretion in failing to declare a mistrial because of the witness's misconduct, mandating reversal of Mr. Isabel's conviction?

2. As part of a defendant's constitutionally protected right to present a defense the defendant is entitled to instructions embodying his theory of the case if the evidence supports that theory. Here, the State failed to call as a witness the police officer who took the initial report from the victim and his cousin. The information from the police officer's initial investigation was critical to Mr. Isabel's cross-

examination of the victim. Mr. Isabel unsuccessfully sought a missing witness instruction because of the State's failure to call the police officer. Is Mr. Isabel entitled to reversal of his convictions where his right to present a defense was impermissibly infringed?

C. STATEMENT OF THE CASE

Robert Isabel was charged with drive-by shooting and unlawful possession of a firearm in the first degree. CP 1-2. Prior to trial, Mr. Isabel moved to compel the testimony of Seattle Police Officer Michael Connors. 1/8/2013RP 64. Officer Connors was the first police officer to respond to Willie Watson's, the victim's cousin, 911 call. 1/8/2013RP 64-65. Officer Connors conducted the initial interview with the alleged victim, Marion Tucker. 1/8/2013RP 65. Officer Connors' interview contained information that Mr. Isabel sought to impeach Mr. Tucker. 1/8/2013RP 65. Officer Connors had left the Seattle Police Department and the State allegedly had no contact information for him. 1/8/2013RP 67. The State noted that it had issued a subpoena for Officer Connors, but had no further contact with him. 1/8/2013RP 68. The trial court ordered the State to disclose the officer's last known address:

> I don't think the State or the police have an obligation to hunt down potential Defense witnesses. It includes

> information such as radio transmissions. They have an obligation to turn that over. They don't have an obligation to hunt for your witnesses.
>
> But they should have the last known address of their employee. I don't know why they can't turn that over.

1/8/2013RP 69.

Mr. Isabel subsequently proposed instructing the jury that Officer Connors was a "missing witness" as he was peculiarly available to the State:

> We believe this witness, Officer Michael Connors, the State has control over this witness. He worked with the Seattle Police Department . . .
>
> Officer Connors has records with the Seattle Police Department. Whether he has been moved or transferred, they can get a hold of them. Officer Connors has cases with the Seattle Police Department, had cases with the Seattle Police Department that were ready for trial. And the prosecutor and the Seattle Police Department would have access to him to bring them [sic] here for trials.
>
> He is the first officer on the scene. And in his report there is some exculpatory evidence in that report from Officer Connors . . . He did write a report on this incident which is the basis for this whole investigation.

1/15/2013RP 72-73. The court refused to instruct on "missing witness":

> I suggested to you that maybe you should have – if you want me to sign an order to give to the East Precinct. They must have his last known address. They must have had to send out tax information.

> Frankly, this is in control of the Seattle Police Department, not the Prosecutor's Office. These are two separate entities.
> . . .
>
> The evidence that Mr. Connors would testify to would be for impeaching Mr. Tucker on the stand. It wouldn't even be substantive evidence.
> . . .
> The other element is that there be no satisfactory explanation of why the State didn't call the person. Obviously, the State didn't call him because they don't know where he is. He is no longer working there. Maybe the same reason the Defense can't find him.

1/15/2013RP 79.[1]

During the trial, Mr. Tucker provided a non-responsive answer to a question on cross-examination:

> Q: You continued south after you stopped correct?
>
> A: Uh-huh.
>
> Q: You went to Mr. Watson's house?
>
> A: Yes, sir.
>
> Q: How far is Mr. Watson's house?
>
> A: Well, I can't tell you that, actually tell you where he lives at. *Mr. Isabel's family has been threatening my*

[1] Connors' report disclosed that there were two individuals inside the car from which Mr. Isabel was alleged to have shot. 1/15/2013RP 28-30. In addition, the location of the shooting was significantly different in Connors' report from the location Mr. Tucker alleged the shooting to have occurred. *Id.* at 28-29.

> *friends and my family and my kids.* So I can't tell you that.

1/10/2013RP 123 (emphasis added). Mr. Isabel immediately objected to the answer as nonresponsive. *Id.* The court merely answered by stating, "Ask another question." *Id.*

At the end of that day's trial testimony, Mr. Isabel moved for a mistrial based upon Mr. Tucker's nonresponsive answer regarding threats. 1/10/2013RP 136. Mr. Isabel argued this testimony by Mr. Tucker was particularly prejudicial because of the fact he was charged with drive-by shooting. 1/14/2013RP 4-5. The trial court denied the motion for a mistrial, noting:

> [T]he statement is not attributed to Mr. Isabel. It's attributed to Mr. Isabel's family. And presumably Mr. Isabel doesn't have 100 percent control of his family members.
>
> There was no motion in limine to instruct the witness not to mention that, so there's been no motion in limine violated. I do not find it to be inherently prejudicial.

1/14/2013RP 10. The court then went further and without prompting stated: "And at this point, I don't think it would be in the Defendant's best interest to admonish the jury about it and bring it up again." *Id.*

At the conclusion of the jury trial, Mr. Isabel was convicted as charged. CP 54-55.

D. ARGUMENT

1. MR. TUCKER'S UNRESPONSIVE TESTIMONY ABOUT THREATS TO HIMSELF AND HIS FAMILY WARRANTED A MISTRIAL

a. Mistrial is a remedy for a witness's improper testimony. A court should grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can insure that he will be tried fairly. *State v. Mak,* 105 Wn.2d 692, 701, 718 P.2d 407 (1986). Generally, the trial court has wide discretion in dealing with irregularities that arise at trial. *State v. Blum,* 17 Wn.App. 37, 42, 561 P.2d 226 (1977). A court should grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. *State v. Lewis,* 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Those errors that may have affected the outcome of the trial are prejudicial. *State v. Gilcrist,* 91 Wn.2d 603, 612, 590 P.2d 809 (1979).

In deciding whether a remark was so prejudicial as to deny a defendant his right to a fair trial, a court examines (1) the seriousness of the remark, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. *State v. Johnson,* 124 Wn.2d 57, 76, 873 P .2d 514 (1994); *State v. Hopson,*

113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. *State v. Greiff,* 141 Wn.2d 910, 921, 10 P.3d 390 (2000); *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). "An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court." *Greiff,* 141 Wn.2d at 921. This Court will overturn a trial court's denial of a motion for mistrial when there is a substantial likelihood the prejudice affected the jury's verdict. *Greiff,* 141 Wn.2d at 921.

b. Mr. Tucker's unsolicited non-responsive statement regarding threats to him and his family were substantially prejudicial and required a mistrial. Despite the prejudicial nature of Mr. Tucker's testimony, the trial court denied the mistrial motion and inexplicably refused *sua sponte* to admonish the jury to ignore his inflammatory comments. Mr. Isabel submits this must result in the reversal of his convictions.

Witness misconduct generally entails a witness providing intentionally inadmissible and unsolicited testimony or engaging in extraordinary conduct likely to prejudice the trier of fact. *See State v. Taylor,* 60 Wn.2d 32, 33, 371 P.2d 617 (1962) (police officer

intentionally twice injected impermissible testimony that the defendant had a parole officer); *Storey v. Storey,* 21 Wn.App. 370, 372, 585 P.2d 183 (1978) (witness purposely injected impermissible testimony to influence the jury), *review denied,* 91 Wn.2d 1017 (1979); *State v. Harstad,* 17 Wn.App. 631, 638, 564 P.2d 824 (1977) (witness cried and embraced one of the defendants), *review denied,* 89 Wn.2d 1013 (1978).

In *Taylor*, the trial court granted both defendants a new trial because of a non-responsive answer by a police officer that the defendant had a parole officer. *Taylor*, 60 Wn.2d at 33-34. The trial court ruled:

> There is, it seems to me, a great probability that all of this may have revealed to at least some members of the jury that the defendant Taylor had been in previous trouble with the law. They were not told in so many words that Taylor had previously been convicted of another crime, but it was made evident that he was on probation. Laymen might easily conclude from this that he had committed one or more previous offenses.

Id. at 35.

In *Johnson,* a spectator's angry outburst during trial was directed towards the judge and jury. *Johnson,* 124 Wn.2d at 76-77. The woman "insulted the State's witnesses and asserted that the defendant was not a gang member." *Id.* at 76. Important to the

decision to affirm the denial of a motion for a mistrial was the fact the trial court instructed the jury to disregard the outburst. *Id.* at 77.

Finally, in *State v. Bourgeois,* a spectator glared at a witness and made a hand-gesture in the nature of pointing a gun at the witness. 133 Wn.2d 389, 408, 945 P.2d 1120 (1997). Because fear and retaliation were central themes in the State's case, the gesture arguably reinforced the impression that the defendant and his friends were the type of people that harm those who testify against them. *Id.* The Supreme Court found the irregularity serious but affirmed the denial of a mistrial because the trial court did not learn of it until after the trial and, consequently, was unable to instruct the jury to disregard it. *Bourgeois,* 133 Wn.2d at 409.

The common thread in each of these cases is that while the irregularity was considered serious, critical to the affirmation of the denial of a mistrial was the trial court's subsequent instruction to the jury. Here, the error was just as serious as those in the cited decisions, but the trial court specifically, and preemptively, refused to instruct the jury, ruling that it would not be in Mr. Isabel's interest to "admonish the jury about it." 1/14/2013RP 10. Mr. Isabel never had the option of asking the court for an admonishment or curative instruction.

Given the importance of curative instructions where witnesses make inflammatory comments, the trial court's inexplicable refusal to either offer to admonish the jury or give a curative instruction damaged Mr. Isabel's right to a fair trial. As a consequence, Mr. Isabel's convictions must be reversed and remanded for a new trial.

2. THE TRIAL COURT IMPERMISSIBLY INFRINGED MR. ISABEL'S RIGHT TO PRESENT A DEFENSE WHEN IT REFUSED TO GIVE A MISSING WITNESS INSTRUCTION

a. A defendant is entitled to have the jury instructed on his theory of the case. The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a defendant's right to a trial by jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993) (the Sixth Amendment protects the defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'"). Similarly, the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

As part of the constitutionally protected right to present a defense, the defendant is entitled to instructions embodying his theory of the case if the evidence supports that theory. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993). The proponent of a jury instruction is entitled to have the instruction given where it describes his theory of the case and is supported by sufficient evidence. *State v. Williams,* 132 Wn.2d 248, 259, 937 P.2d 1062 (1997). When considering whether a proposed jury instruction is supported by sufficient evidence, the trial court must take the evidence and all reasonable inferences in the light most favorable to the requesting party. *State v. Hanson,* 59 Wn.App. 651, 656-57, 800 P.2d 1124 (1990).

This Court reviews a trial court's refusal to give a requested jury instruction *de novo* where the refusal is based on a ruling of law. *State v. White*, 137 Wn.App. 227, 230, 152 P.3d 364 (2007), *citing State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). Where the court's refusal to give a requested instruction was based on factual reasons, it is reviewed for an abuse of discretion. *White*, 137 Wn.App. at 230, *citing Walker*, 136 Wn.2d at 771-72. A proposed instruction is appropriate if it properly states the law, is not misleading, and allows a party to argue

a theory of the case that is supported by the evidence. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

Here, Mr. Isabel requested a missing witness instruction because of the State's failure to call a necessary witness. Mr. Isabel's right to present a defense was infringed when the trial court refused to give the requested instruction.

b. A defendant is entitled to a missing witness instruction where the evidence presented warrants it. Under the missing witness doctrine, a jury may draw an inference against a party who fails to produce a witness when that party has control of the witness and the witness is naturally in that party's interest to produce. *State v. Blair,* 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991), *quoting State v. Davis,* 73 Wn.2d 271, 276, 438 P.2d 185 (1968), *overruled on other grounds by State v. Abdulle,* 174 Wn.2d 411, 275 P.3d 1113 (2012). The missing witness inference applies in criminal cases where the State fails to call a logical witness. *See, e.g., Blair,* 117 Wn.2d at 487-88.

"A party's failure to produce a particular witness who would ordinarily . . . testify raises the inference in certain circumstances that the witness's testimony would have been unfavorable[ ]" to the party.

State v. McGhee, 57 Wn.App. 457, 462-63, 788 P.2d 603, *review denied,* 115 Wn.2d 1013 (1990). When the missing witness rule applies, the trial court should instruct the jury that they may draw an unfavorable inference against the party failing to call the witness. *State v. Russell,* 125 Wn.2d 24, 90, 882 P.2d 747 (1994); *Davis,* 73 Wn.2d at 281. The rationale behind this requirement is "that a party will likely call as a witness one who is bound to him by ties of affection or interest unless the testimony will be adverse, and that a party with a close connection to a potential witness will be more likely to determine in advance what the testimony would be." *Blair,* 117 Wn.2d at 490, *quoting Davis,* 73 Wn.2d at 277. The negative inference from a failure to call a witness arises whenever the witness is "particularly available" to a party and the witness's testimony would be important and necessary to that party's case. *Davis,* 73 Wn.2d at 276-78.

To obtain a missing witness instruction in a criminal case, the defendant is not required to prove that the State deliberately suppressed unfavorable evidence. *McGhee*, 57 Wn.App. at 463. Rather, the defendant must establish circumstances indicating that the State would not knowingly fail to call the witness unless the witness's testimony would be damaging to the State. *Davis,* 73 Wn.2d at 280. "In other

words, 'the inference is based, not on the bare fact that a particular person is not produced as a witness, but on his non-production when it would be natural for him to produce the witness if the facts known by him had been favorable.'" *Davis,* 73 Wn.2d at 280 (citations omitted).

In addition, a missing witness instruction is appropriate when the uncalled witness is "peculiarly available" to the State. *Davis,* 73 Wn.2d at 276. For a witness to be "peculiarly available" to the State, there must have been a community of interest between the State and the witness, or the State must have such a superior opportunity for knowledge of a witness that there was a reasonable probability that the witness would have been called to testify for the State except that the testimony would have been damaging. *Id.* at 277. Accordingly, a party seeking the benefit of the inference must show the missing witness was "peculiarly within the other party's power to produce." *Id.*

Failure to give a warranted missing witness instruction is reversible error. *Id.* at 280-81.

c. Seattle Police Officer Connors was "peculiarly available" to the State. The trial court was persuaded by the fact Officer Connors could have been called as a witness by either party, thus he was not "peculiarly available" to the State because the police department and the prosecutor's offices are "separate entities." 1/15/13RP 78. But, as stated in *Davis,* the mere fact the officer was available to both parties to subpoena or call as a witness is not determinative. 73 Wn.App. at 276. Rather, the critical question is the relationship between Officer Connors and the respective parties.

The decision in *Davis, supra*, directly contradicts the trial court's conclusion here that the police officer was equally available to both parties and that the police department and the prosecutor are "separate entities:"

> We are of the opinion that, under the facts of the case at bar, the uncalled witness was not equally available to either party as argued by the state, but rather was 'peculiarly available' to the prosecution as these words are defined above. The uncalled witness was a member of the same law enforcement agency as the testifying officer. He was the only other witness to the interrogation. The law enforcement agency of which he was a member was responsible for investigating and gathering all the evidence relative to the charges made against Belknap. The uncalled witness worked so closely and continually with the county prosecutor's office with respect to this and other criminal cases as to

> indicate a community of interest between the prosecutor and the uncalled witness.

Davis, 73 Wn.2d at 277-78.

Officer Connors had been a Seattle Police Officer. It would have been "natural" for the State to call Officer Connors as a witness like it calls other police officers in countless criminal cases. Further, under *Davis* there is a "community of interest" between the police and prosecutor's office. *Id.* Although Connors no longer worked for the Seattle Police Department, the Department would still have a way of contacting Connors as cases on which he worked would still be pending and the prosecutor's office would have had to subpoena him for trial in those pending cases.

In addition, contrary to the trial court's conclusion, Connors' testimony would have been critical to Mr. Isabel's defense. Mr. Isabel's defense rested on proving Mr. Tucker's lack of credibility. Here, that would have been shown to the jury by impeaching Mr. Tucker with the difference between in his statements given initially to Officer Connors, who was the first responding police officer, and those given later to Detective Hughey. As a consequence, Mr. Isabel was denied his constitutionally protected right to present a defense because he was denied the ability to argue his theory of the case, that Mr.

Tucker should not have been considered credible by the jury. Mr. Isabel submits this Court must reverse his convictions and remand for a new trial for the failure to instruct the jury on the missing witness.

E. CONCLUSION

For the reasons stated, Mr. Isabel asks this Court to reverse his convictions and remand for a new trial.

DATED this 10th day of January 2014.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70462-1-I
v.	)	
	)	
ROBERT ISABEL,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF JANUARY, 2014.

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