No. 45774-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Vincent Fowler,

Appellant.

Kitsap County Superior Court Cause No. 13-1-00466-4

The Honorable Judge Anna Laurie

Appellant's Reply Brief

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ARGUMENT

I. THE COURT'S MISSING WITNESS INSTRUCTION VIOLATED DUE PROCESS BY PERMITTING AN UNRELIABLE INFERENCE OF MR. FOWLER'S GUILT.

A. The missing witness doctrine does not apply to Mr. Fowler's case.

Mr. Fowler relies on the argument set forth in his Opening Brief.

B. The missing witness doctrine violates due process when applied against an accused person in a criminal case because it permits jurors to infer damaging facts that are not rationally related to the facts that the state proves at trial.

Due process prohibits a court from instructing a jury on a factual inference if there is "no rational connection between the facts proved and the ultimate fact presumed." *Leary v. United States*, 395 U.S. 6, 33, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) (*quoting Tot v. United States*, 319 U.S. 463, 467, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943)). A court may not instruct jurors on a factual inference if more than one reasonable conclusion could be drawn from the facts proved. *State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989).

The "missing witness" doctrine permits a jury to draw negative inferences from a party's failure to call a witness. *State v. Dixon*, 150 Wn. App. 46, 56, 207 P.3d 459 (2009). As outlined at length in Mr. Fowler's Opening Brief, the doctrine is a legal anachronism permitting courts to

penalize a party for failure to call a witness. *See Herbert v. Wal-Mart Stores, Inc.,* 911 F.2d 1044, 1046 (5th Cir. 1990). The doctrine permits inferences based on antiquated legal considerations rather than logic. *Id.*; *Herbert,* 911 F.2d at 1046.[1] Accordingly, the inference violates due process when applied against accused persons: it undermines the presumption of innocence and has no rational connection to the facts actually proved. *Leary*, 395 U.S. at 33.

Indeed, the state effectively concedes this point. Respondent erroneously argues that the "missing witness" inference applies only if there "is no other plausible reason why the witness was not called." Brief of Respondent, pp. 23-24. Respondent claims that the inference comports with due process because of this. Brief of Respondent, p. 24. But the "missing witness" doctrine requires only a failure to satisfactorily explain the witness's absence.[2] *State v. Montgomery*, 163 Wn.2d 577, 598-599,

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[1] Respondent argues that this legal history is not properly before this court. Brief of Respondent, p. 18. But the state misapprehends the import of the analysis. The "missing witness" doctrine's basis in the anachronistic "voucher rule" and lack of recourse for concealment of evidence is critical to the due process analysis. It shows that the inference is based not on logic and reason but rather on other considerations.

[2] Respondent also argues that the witness must be in the particular control of the accused, rather than equally available to both parties. Brief of Respondent, p. 23. Earlier in its brief, however, the state argues that the missing witness need only be within the accused's "community of interest." Brief of Respondent, p. 10.

Furthermore, Respondent's "particular control" argument undermines the state's position on the propriety of the instruction in this case. The state had access to Monica Boyle's name and contact information early in the investigation. RP (trial) 178-84, 238, 256. If the doctrine requires the witness to be particularly in the control of the accused, then the court

(Continued)

183 P.3d 267 (2008). Numerous strategic reasons could lead an accused person to forgo calling a witness, regardless of the favorability of the available testimony. These include the witness's susceptibility to impeachment, clear bias, and problematic demeanor. Furthermore, the accused person might open the door to otherwise inadmissible evidence by calling a witness with favorable information. *In re Elmore*, 162 Wn.2d 236, 266, 172 P.3d 335 (2007); *United States v. Lathrop*, 634 F.3d 931, 939 (7th Cir. 2011); *Pina v. Maloney*, 565 F.3d 48, 56 (1st Cir. 2009); *State v. James*, 48 Wn. App. 353, 360, 739 P.2d 1161 (1987).

These strategic considerations are generally inadmissible to explain a witness's absence. In some cases admission of the explanation would cause as much damage as calling the witness. In extreme cases, an accused person may not wish to even reveal the explanation to the prosecution.

Without analysis, Respondent summarily dismisses these alternate explanations for failure to call a witness. Brief of Respondent, p. 24. The state misapprehends the import of these considerations to the due process analysis. Respondent's argument—that the inference is only permitted when there is no plausible alternate reason for failure to call a witness—is

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erred by giving the instruction, and Mr. Fowler's convictions must be reversed. *Dixon*, 150 Wn. App. at 55.

not based on sound logic and is unreasonable under the due process clause.

The *Tot* rule—requiring a rational connection between the facts proved and the inference drawn—applies equally to permissive inferences and mandatory presumptions. *Jackson*, 112 Wn.2d at 876. Still, the state relies on the permissive nature of the missing witness rule to argue that it does not violate due process. Brief of Respondent at 20, 24. Respondent misapprehends the standard. *Id.* The rule applies to permissive inferences. *Id.*

Similarly, the "rational connection" requirement of *Tot* is not limited to cases involving elements of a criminal offense. Indeed, the United States Supreme Court has extended the rule to civil actions as well. *See e.g. Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). Still, Respondent argues that the "missing witness" inference accords with due process because it is not directly probative of an element of the crime. Brief of Respondent, p. 19. The state's argument is misplaced.

Due process requires a "rational connection" between the facts proved at trial and the facts a jury is instructed it may presume. *Leary*, 395 U.S. at 33. The inferred fact must "more likely than not" flow from

the fact proved. *Jackson*, 112 Wn.2d at 875. Still, the state argues that a permissive inference comports with due process unless there is "no rational way the trier of fact could make the connection the inference permits." Brief of Respondent, p. 21. Respondent drastically misstates the legal standard. *Id.*

The court violated Mr. Fowler's right to due process by providing a missing witness instruction. The instruction permitted jurors to infer that Boyle's testimony would have been damaging to the defense, based on the unrelated fact that Mr. Fowler did not call her to testify. *Jackson*, 112 Wn.2d at 876. Mr. Fowler's convictions must be reversed. *Id.* at 879.

II. THE COURT'S INSTRUCTIONS INCLUDED JUDICIAL COMMENTS ON THE EVIDENCE BECAUSE THEY LENT SPECIAL WEIGHT AND VALUE TO CERTAIN TESTIMONY.

A. The court's missing witness instruction improperly commented on the evidence.

Mr Fowler relies on the argument set forth in his Opening Brief.

B. The court's "no corroboration necessary" instruction improperly commented on the evidence.

A judge's statement qualifies as an unconstitutional judicial comment on the evidence if the jury can infer the court's attitude. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); *accord State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006); Wash. Const. art. IV, § 16. A

court also comments on the evidence by instructing the jury regarding the weight to give to certain evidence. *In re Det. of R.W.*, 98 Wn. App. 140, 144, 988 P.2d 1034 (1999) (*citing Lane*, 125 Wn.2d at 838).

An instruction conveying the court's opinion regarding the "worth" of a witness's testimony constitutes an impermissible comment on the evidence. *State v. Mellis*, 2 Wn. App. 859, 862, 470 P.2d 558 (1970). This is so whether the opinion is explicit or implied. *Id.*

Here, the court provided the jury with the following instruction:

> In order to convict a person of Child Molestation in the First Degree and/or Rape of a Child in the First Degree it is not necessary that the testimony of the alleged victim be corroborated. CP 45.

This instruction was an impermissible judicial comment on the evidence. CP 45; *R.W.*, 98 Wn. App. at 144.

In 1949, the state Supreme Court upheld the following jury instruction:

> You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

State v. Clayton, 32 Wn.2d 571, 572, 202 P.2d 922 (1949). The court relied heavily on the ameliorative effect of the second sentence in the instruction: "it is plain, we think, that the jury must have understood, from the second sentence of the instruction, that appellant's guilt or innocence was to be determined from *all* the evidence in the case." *Id.* at 577.

The court's instruction in this case did not contain language reminding jurors to resolve the case by considering all of the evidence. The state attempts to excuse this omission by arguing that the missing language—considered vital by the *Clayton* court—was made up for by instructions regarding the burden of proof, etc. Brief of Respondent, pp. 30-31 (*relying on State v. Johnson,* 152 Wn. App. 924, 219 P.3d 958 (2009); *State v. Zimmerman*, 130 Wn. App. 170, 181, 121 P.3d 1216 (2005) *review granted, cause remanded,* 157 Wn.2d 1012, 138 P.3d 113 (2006).

The state's reliance on *Johnson* and *Zimmerman* is misplaced. The *Johnson* explicitly noted that a non-corroboration instruction could constitute an impermissible comment on the evidence absent the qualifying language in the second sentence of the *Clayton* instructions. *Johnson,* 152 Wn. App. at 936. Accordingly, the *Johnson* court admonished trial courts to include the additional language. *Id.*

Zimmerman is inapplicable. The *Zimmerman* court did not consider whether omission of the second sentence rendered a non-corroboration instruction an impermissible comment on the evidence. *Zimmerman*, 130 Wn. App. 170.

None of the instructions to which Respondent refers undoes the prejudicial effect of the non-corroboration instruction. The state points out that the court instructed the jury that they were the sole judges of credibility and that the state had the burden of proving the charges beyond a reasonable doubt. Brief of Respondent, pp. 30-31.

Those standard instructions are not inconsistent with the court's more specific admonishment that the alleged victims' testimony, alone, did not require corroboration. Indeed, the jury is free to believe or disbelieve any witness's testimony whether corroborated or not. But the court's instruction did not apply to just any witness. By singling the girls' testimony out as particularly reliable, the court implied that their statements carried special weight or were of more worth than the other evidence. Such an implication violates art. IV, § 16. *R.W.*, 98 Wn. App. at 144; *Mellis*, 2 Wn. App. at 862

The trial court made a judicial comment on the evidence by instructing the jury that the alleged victims' testimony, alone, did not

require corroboration. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Mr. Fowler's convictions must be reversed. *Id.*

III. THE COURT VIOLATED MR. FOWLER'S SIXTH AMENDMENT RIGHT TO COUNSEL BY IMPOSING ATTORNEY'S FEES IN A MANNER THAT IMPERMISSIBLY CHILLS THE EXERCISE OF THAT RIGHT.

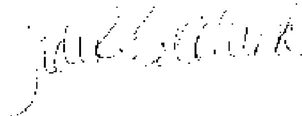
Mr. Fowler relies on the argument set forth in his Opening Brief.

CONCLUSION

For the reasons set forth above and in Mr. Fowler's Opening Brief, Mr. Fowler's convictions must be reversed and the order for him to pay $1135 in attorney's fees must be vacated.

Respectfully submitted on December 30, 2014,

BACKLUND AND MISTRY



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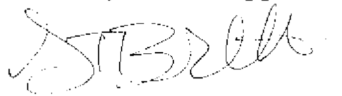

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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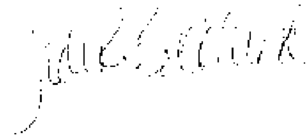
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 30, 2014.



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