NO. 45774-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

VINCENT L. FOWLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-00466-4

BRIEF OF RESPONDENT

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	Jodi R. Backlund Po Box 6490 Olympia, Wa 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED December 3, 2014, Port Orchard, WA **Original e-filed at the Court of Appeals. Copy to counsel listed at left.**

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2. Whether two instructions were not improper judicial comments on the evidence where the missing witness instruction accurately stated the law and did not a convey the judge's impression of the evidence, and where the courts have repeatedly held that the non-corroboration instruction is not a comment on the evidence?

3. Whether the Washington Supreme Court has already rejected the claim that the recoupment statute violates defendants' right to counsel?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Vincent L. Fowler was charged by information filed in Kitsap County Superior Court with one count of first-degree rape of a child and two counts of first-degree child molestation, involving two sisters, ACG and AG. A jury found Fowler guilty as charged. CP 60-61.

B. FACTS

AG[1] was born February 5, 2001. 1RP 96. She was 12 at the time of trial. 1RP 97. Fowler was her mother's friend. 1RP 97. AG was nine or ten when she first met Fowler. 1RP 98. Fowler would visit when they were at the home of AG's friend in Port Orchard. 1RP 98. At one point they lived there. 1RP 98.

AG was alone once with Fowler. It was the only time she ever spent the night at Fowler's apartment. 1RP 108. She was playing with his dog and then they were going to play video games. 1RP 98. Fowler's roommate Monica Boyle was there. 1RP 99. Boyle left and Fowler fixed them some canned food for dinner. 1RP 99. After dinner AG played with the dog a bit and then went to sleep on the couch in the living room. 1RP 100. She went to sleep before Fowler. 1RP 110. She was wearing a shirt and jeans with shorts and underwear under the jeans. 1RP 100.

She woke up when she felt Fowler unzipping her pants and rubbing her vagina. 1RP 101. He was rubbing her on top of her clothes. 1RP 101. She turned over and got up and went to the bathroom. 1RP 102. When she turned over Fowler quickly went back to the floor and pretended to be sleeping. 1RP 102.

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[1] In accordance with this Court's General Order 2011-1, the victims will be referred to by their initials. The State will follow the initial used in the appellant's brief. Thus, ACG is the victim born in 2003 and identified in Counts I and II and AG is the victim born in 2001 and referenced in Count III of the first amended information. *See* CP 17-19.

After going to the bathroom, AG came back and sat on the couch, awake, for the rest of the night. 1RP 102. AG was nine or ten at the time. 1RP 103.

AG told her friend the next day. 1RP 103. She also told her brother. 1RP 103. She told her mother, but she did not believe her.

Fowler later apologized to her and said he was drunk and "didn't know," and would not "do it again, if he did." 1RP 106. She told her mother about it a few weeks after it happened. 1RP 111. Her conversation with Fowler was after that. 1RP 111.

ACG was 10 years old at the time of trial. 1RP 117. ACG was nine or ten when she met Fowler. 1RP 120. She once spent the night in a house with Fowler. 1RP 120. It was at Gina's, near the Albertson's in East Bremerton 1RP 120. Gina, ACG, AG, their mother, and her brothers were also there. 1RP 120.

She had fallen asleep on the couch. 1RP 121. Fowler was sleeping on the other couch. 1RP 121. She woke up when he touched her. 1RP 121. He had pulled her pants and underwear down to her knees. 1RP 122. He touched her vagina with her hands. 1RP 122. Her mother, who was sleeping in the bedroom, got up to use the bathroom and he stopped. 1RP 123. When her mother came out, ACG went and told her mother she wanted to sleep with her. 1RP 123.

ACG usually slept in the bedroom when she spent the night at Gina's. 1RP 129. The first incident occurred the only time she slept on the couch. 1RP 129. She had fallen asleep there after skating. 1RP 130.

A second incident occurred in the same house, two days after the first. 1RP 125, 132. ACG's mother, sister, and brothers were in the house. ACG was sleeping on the bed in the bedroom. 1RP 125. Her sister and older brother were also in the bedroom. 1RP 125. She was wearing a Hello Kitty skirt and underwear. 1RP 125. Fowler came in and touched her vagina. 1RP 125. He touched her under the skirt but on top of her underpants. 1RP 126. Her brother rolled over and Fowler stopped and left the room.. 1RP 126.

ACG talked to her sister about the incident. 1RP 127. She also talked to a woman at the prosecutor's office. 1RP 127. She did not tell anyone else because she was scared they would not believe her. 1RP 128.

The authorities were investigating an unrelated case when the victims disclosed Fowler's involvement. 1RP 89. The case was referred to Bremerton Police Detective Kenny Davis to investigate. 1RP 89. He reviewed the recorded statements of the victims made to the child interviewer. 1RP 89. He spoke with Natalie, the apartment manager, and with the victims' mother. 1RP 90. Fowler was arrested and Davis interviewed him. 1RP 90-91. After waiving his rights, Fowler denied the

allegations. Fowler did admit that he knew them and was around them at the time of the alleged acts. 1RP 92. Fowler knew their mother and had spent time with the girls. 1RP 92.

AG indicated that the incident occurred in Port Orchard at Fowler's apartment there. 1RP 92. Fowler acknowledged that he had lived at that apartment and associated with the friend that AG had mentioned. 1RP 93. AG stated that when at Fowler's apartment, she would sleep on the couch and Fowler slept on the floor on the night of the incident. 1RP 93. Fowler admitted that when AG stayed at his apartment, she would sleep on the couch and he would sleep on the floor. 1RP 93.

With regard to ACG's claim, Fowler admitted that he was around her when the family lived with Gina. 1RP 93. Fowler stated that he was 46 years old. 1RP 94.

The prosecutor's office child interviewer interviewed both girls. 2RP 159. The interviewer related the contents of ACG's interview, which was generally consistent with her trial testimony. 2RP 161-64.

Fowler testified that the dog woke AG up. 2RP 196. He denied ever having contact with the girls. 2RP 196, 207.

In rebuttal, Detective Davis confirmed that Fowler never mentioned the dog during their 35-minute recorded interview. 2RP 219.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY GAVE A MISSING WITNESS INSTRUCTION REGARDING FOWLER'S FORMER ROOMMATE MONICA BOYLE, WHO DID NOT TESTIFY, WHERE FOWLER TESTIFIED AT TRIAL AND DENIED MOLESTING AG, BUT CLAIMED THAT THE DOG JUMPED ON HER THAT NIGHT, AND FURTHER TESTIFIED THAT BOYLE WAS PRESENT DURING THE ALLEGEDLY ENSUING RUCKUS.

Fowler next claims that the trial court erred in giving a missing witness instruction. This claim is without merit. AG testified that she was awakened by Fowler pulling down her pants and touching her vagina the one time she spent the night at Monica Boyle's apartment. Fowler acknowledged the sleeping arrangements on the date in question, but testified, without corroboration, that Boyle's dog jumped on AG, and that he complained to Boyle about it at the time. Boyle's testimony could have shed light on whose story was more accurate. Moreover, Boyle was clearly peculiarly available to Fowler. Finally, any error would be harmless.

1. The trial court properly gave a missing witness instruction where Fowler implied that it was the dog, and not Fowler's molestation, that awakened AG.

The Supreme Court has held that the missing witness doctrine applies equally to the State and the defense. *State v. Blair*, 117 Wn.2d 479, 488, 816 P.2d 718 (1991). The doctrine applies when circumstances

indicate, as a matter of reasonable probability, that the party against whom the missing witness rule was sought to be applied in the case would not knowingly fail to call the witness in question unless the witness's testimony would be damaging. *Id.* "In other words, 'the inference is based, not on the bare fact that a particular witness 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 [her] had been favorable.'" *Blair*, 117 Wn.2d at 488 (*quoting State v. Davis*, 73 Wn.2d 271, 280, 438 P.2d 185 (1968)) (alteration added). This Court reviews a trial court's decision whether to give a particular instruction for abuse of discretion. *State v. Winings,* 126 Wn. App. 75, 86, 107 P.3d 141 (2005). A trial court abuses its discretion only where its decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The Court has thus found four factors that must be satisfied. First, the doctrine applies only if the potential testimony is material and not cumulative. *Blair*, 117 Wn.2d at 489. Second, the doctrine applies if the missing witness is particularly under the control of the defendant rather than being equally available to both parties. *Blair*, 117 Wn.2d at 488. Third, the doctrine applies if the witness's absence is not satisfactorily explained. *Blair*, 117 Wn.2d at 489. Finally, the doctrine may not be

applied if it would infringe on a criminal defendant's right to silence or shift the burden of proof. *Blair*, 117 Wn.2d at 491, 816 P.2d 718. *See also State v. Montgomery*, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008). Fowler argues that the first, second, and fourth requirements were not met.

a. Testimony from Boyle would have been material and not cumulative.

Unlike in *State v. Montgomery*, 163 Wn.2d 577, 599, 183 P.3d 267 (2008), Fowler's testimony that the dog jumped on AG was not corroborated by any other witness. Also unlike *Montgomery*, *id.*, since Fowler claimed he complained to Boyle about the dog at the time, she would presumably have had relevant knowledge.

AG testified that she woke up when she felt Fowler unzipping her pants and rubbing her vagina. 1RP 101. He was rubbing her on top of her clothes. 1RP 101. She turned over and got up and went to the bathroom. 1RP 102. When she turned over Fowler quickly went back to the floor and pretended to be sleeping. 1RP 102. After going to the bathroom, she came back and sat on the couch, awake, for the rest of the night. 1RP 102. She did not remember the dog ever jumping on her while she was sleeping. 1RP 111.

By contrast, Fowler painted a completely different picture of the events:

Q. All right. So do you remember anything waking

you up during the middle of the night?

A. The puppy.

Q. Okay. And what happened with the puppy?

A. It came in – I was on the floor. It came and licked me on the face. So I pushed the dog off me. And then I noticed it jumped up on the couch, and it jumped up on [AG]. So I took the puppy off [AG], and I called Monica because I thought she was in the back room. But she came out the kitchen. I said, You let the dog out. And she said she didn't realize she left the door open. And so she just came from the kitchen and put the dog back up.

Q. Do you remember did [AG] wake up?

A. Yeah. She woke up because the dog was licking her.

2RP 195-96. He further claimed that he stood up and talked to Boyle for about five minutes. 2RP 196.

The dog jumping on AG was not, as Fowler would characterize it, "an insignificant detail" of his version of the events. Brief of Appellant at 8. To the contrary according to Fowler, the dog jumping on her was the *only* thing that happened to AG that night. This directly contradicts AG's assertion that the *only* thing she recalled happening was Fowler unzipping her pants and fondling her vagina.

Nor would testimony from Boyle have been cumulative. To the contrary, it could have either supported Fowler's version of the events, or refuted it.

b. Fowler shared a "community of interest" with Boyle, who was his former roommate.

Fowler reads the second factor of the rule too narrowly. Boyle did not have to be under Fowler's "control" for the doctrine to apply. To the contrary, as the Supreme Court explained:

> For a witness to be "available" to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.

Blair, 117 Wn.2d at 490. The rationale for 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. *Id.*

Here, if Fowler's claim were true, he could have expected that Boyle would corroborate it. Were it not, he likewise would have been in a position to know that she could not have. Boyle could not testify to a negative, *i.e.*, that Fowler did not molest AG. AG, however, testified that she awoke only once that night, and did not go back to sleep. If the cause of the awakening was the puppy jumping on her, Boyle presumably could have corroborated it, since Fowler testified that he made a "deal" out of it and talked to her about letting the dog loose for five minutes. The State,

on the other hand, had no knowledge of Fowler's claim until the end of trial, and certainly had no motivation to call Boyle as a witness.

c. Fowler's failure to call Boyle was not adequately explained.

If a witness's absence can be satisfactorily explained, no inference is permitted. *Blair*, 117 Wn.2d at 489. Fowler concedes that this third factor was met. Brief of Appellant at 8. Moreover, the State does not bear the burden of showing any reason for the absence of the witness. *Id.* It is the party against whom the rule would operate who is entitled to explain the witness's absence and avoid operation of the inference. *Id.*

In *Blair*, the defendant argued that the State could have investigated and tried to locate the witnesses itself, but it did not demonstrate any attempt to do so, nor did the State offer any proof it had tried to identify or subpoena the witnesses. *Blair*, 117 Wn.2d at 491. The Court rejected that argument:

> The requirement, however, is, as one court has put it, that the party seeking benefit of the inference must show the "absent witness was peculiarly within the other party's power to produce". United States v. Williams, 739 F.2d 297, 299 (7th Cir.1984).

Blair, 117 Wn.2d at 491. Thus, where the missing witnesses appeared on a list in the defendant's possession at the time of his arrest, the instruction was proper. Here the missing witness was Fowler's former roommate. Until Fowler's testimony there was no reason for the State to believe she

was a relevant witness. Further, although Fowler called the apartment manager to show that Boyle had moved out two years earlier, the manager also testified that Boyle gave a local forwarding address, and, indeed, the manager had seen Boyle in Wal-Mart a mere two months before trial.

d. The missing witness argument did not shift the burden of proof.

Fowler finally claims that the instruction shifted the burden of proof. He fails to explain this contention beyond his bare assertion. Brief of Appellant at 9. Moreover, it is contrary to the holding in *Blair*:

> We do not agree, however, that any comment referring to a defendant's failure to produce witnesses is an impermissible shifting of the burden of proof. To the extent *State v. Traweek*, 43 Wn. App. 99, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986), indicates that the State may never comment on the defendant's failure to call witnesses or produce evidence, it is overly broad. It is disapproved to the extent it is inconsistent with our analysis herein. Here, nothing in the prosecutor's comments said that the defendant had to present any proof on the question of his innocence. The prosecutor was entitled to argue the reasonable inference from the evidence presented. Defendant testified. In so doing, he waived his right to remain silent. He specifically testified about the notations on the slips of paper. He testified he knew, at the time he was arrested, how to locate the people listed on the slips. Only their first names were listed, and according to his testimony he had a business or personal relationship with the people listed. Under these circumstances, the prosecutor's comments about defendant's failure to call the witnesses were not error.
>
> Moreover, we note the trial court properly instructed the jury that counsel's remarks are not evidence, instruction 1, Clerk's Papers, at 15; and that the State has the burden of proof and the defendant is presumed

innocent, instruction 2, Clerk's Papers, at 17.

Blair, 117 Wn.2d at 491-92.

Here, Fowler likewise testified and introduced the contention that Boyle was present and aware of the alleged incident with the dog. The State was thus entitled to comment on the lack of corroborating evidence. Moreover, the State did nothing to avoid its burden of proof.

The State's argument began with a lengthy discussion of why the two girls were credible. 2RP 259-69. In the course of that discussion, the State noted its burden to prove the elements beyond a reasonable doubt. 2RP 265.

The State then devoted less than two full pages to discussing Fowler's credibility, and in that context, his failure to call Boyle to corroborate his story. 2RP 269-71.

The prosecutor then turned to "the nuts and bolts of the elements the *State* has to prove." 2RP 271 (emphasis added). She particularly noted that the State's burden was beyond a reasonable doubt. 2RP 271. She then addressed the instructions and the evidence supporting each element. 2RP 271-74. At no point did the State suggest that Fowler had any duty to prove anything. The State summed up as follows:

> And again, you need to go back and think about and weigh the credibility of the witnesses. AG was able to provide you details of the event. These are details that a child would not

make up or not be able to make up on the fly.

> Ladies and gentlemen, this is not a he-said, she-said. This is a she-said, she-said, he-said. And after you've considered all of the evidence, I think that you will be convinced beyond a reasonable doubt that the State has proven the elements of those three charges. I'd ask that you come back with a verdict of guilty. Thank you.

2RP 274.

In his closing, Fowler reminded the jury of the State's burden in his opening paragraph. 2RP 276. He repeatedly referenced the State's burden throughout his argument. 2RP 285, 287, 288.

His argument quickly focused on the credibility of the girls. 2RP 279-82. With regard to the dog incident, he argued that he was not suggesting that the AG mistook the dog for him:

> The Defense is not – we are not arguing that the dog committed the offense or that inadvertently caused her zipper to come down, that she believed that it was the Defendant but, in fact, it was the dog who landed on her. That is not what the Defense is arguing. We're not saying that there was some misunderstanding, that she happened to believe it was the dog who woke her up and it was the Defendant. We're not saying that this was some kind of misunderstanding with the dog.

2RP 282. Fowler went on to argue that he dog was essentially irrelevant and that the factors for the instructional inference were not met:

> I would suggest this is a trivial or non-significant fact; that it's really not in dispute as to whether Monica Boyle had a dog; okay? And we're not suggesting that the dog – this was some misunderstanding and the dog did it. The State is saying that you know what? In essence, they're arguing that Mr. Fowler came up with this as his

> defense. Well, I'll say the dog did it. Because he never told Detective Davis. Detective Davis never asked him about whether a dog jumped on – he never said no. He was asked about whether he did this, and he said no. And that there was a dog at the apartment, it's a very innocuous fact. And the State is trying to make you think that the fact that Ms. Boyle is not here to testify whether she has a dog or whether she remembers the dog waking up Mr. Fowler that night is somehow significant.

2RP 283. Fowler than turned to the allegations regarding ACG, and questioned her credibility. 2RP 284-86.

In rebuttal, the State again at no point suggested that Fowler bore the burden of proving anything. It did, however, argue that the jury could properly draw the inference allowed under the missing witness doctrine:

> The Defense argues that the issue about the dog – the dog was brought up not because there was a misunderstanding. But, in fact, if you listen to the words from the Defendant's mouth, he's saying that's how [AG] woke up, not that she woke up because he was touching her. She woke up because of the dog. That is not a trivial matter. That is something of fundamental importance. And if they could have had Monica Boyle come in and testify that, in fact, yes, the Defendant picked up the dog, handed it to her, he was frustrated because the dog had woken up the two people in the living room, they could have done that. And they didn't. And you can make the reasonable inference that Ms. Boyle would not have had testimony that would be helpful to the Defendant.

2RP 289-90.

Finally, as in *Blair*, the jury was instructed by the court that the State bore the burden of proof beyond a reasonable doubt. CP 40. Further, nothing in the instruction required the inference to be drawn, or

specifically identified the witness(es) to which the instruction applied:

> If a person who could have been a witness at trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:
>
> (1) The witness is within the control of, or peculiarly available to, that party;
>
> (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
>
> (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
>
> (4) There is no satisfactory explanation of why the party did not call the person as a witness; and
>
> (5) The inference is reasonable in light of all the circumstances.
>
> The parties in this case are the State of Washington and Vincent L. Fowler.

CP 46. The jury was permitted to draw the inference only if the five enumerated elements were satisfied. The trial court did not abuse its discretion.

2. Under the facts of this case, where there was no evidence that the girls were untruthful or that they had any motive to fabricate their stories, any error would be harmless.

Fowler further asserts the alleged error was harmful because the case was about Fowler's credibility of versus that of the victims. He claims that the missing witness instruction informed the jury that he was not credible, while the corroboration instruction stated that the victims

were.[2]

An erroneous instruction is harmless if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Montgomery*, 163 Wn.2d at 600. Whether a flawed jury instruction is harmless error depends on the facts of a particular case. *Id.*

As discussed above, the instruction was a very minor part of the case. Moreover, as also noted, other than his own denial of the allegations, Fowler's sole defense consisted of attacking the credibility of the victims.

However, nothing in the evidence suggested that the two little girls had any motive to fabricate the charges. There was no evidence of any animosity between them and Fowler. There was no evidence of any friction between Fowler and their friends or family. To the contrary, the evidence suggests that until the assaults, the girls viewed Fowler as a kind of surrogate parent, who watched over them, took them to the store and on outings.

Further contrary to Fowler's contention, and will be discussed more fully, *infra*, neither of these instructions commented on any witness's credibility. As noted, the missing witness instruction only advised the jurors on an inference they *might* draw, *if* they were satisfied

[2] As will be discussed, *infra*, the latter instruction was not an impermissible comment on the evidence, but an accurate statement of the law.

as to the prerequisites. The corroboration instruction did not endorse the girls' credibility; it only, correctly, advised the jury that corroboration was not required to convict. Both parties addressed the lack of corroboration and the inferences to be drawn (or not) therefrom.

Finally, even in the absence of an instruction, the State may properly invoke the missing witness doctrine in closing argument. *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003). It is difficult to see how this instruction, even if inappropriate, could have had any effect on the verdict whatsoever. This claim should be rejected.

3. The missing witness doctrine satisfies due process because it may only be invoked where the inference drawn is rational.

Fowler next argues that the missing witness inference violates due process. He claims that this is so because the inference does not logically flow from the defendant's failure to call a witness. However, Fowler's argument ignores the prerequisites to allowing the instruction and the wording of the instruction itself.[3]

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[3] Fowler also argues that the missing witness doctrine is an anachronism serving policy needs that no longer exist, and should be abolished, presumably as a matter of evidentiary law. That issue, however, was not raised below and as such is not properly before the Court. RAP 2.5(b)(3); *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000) (Questions of the admissibility of evidence are not of constitutional magnitude and do not fall within RAP 2.5's exceptions, and thus may not be raised for the first time on appeal). Moreover, given that the Supreme Court has held that the doctrine properly applies in criminal cases, this Court also lacks the authority to overrule that precedent. *See In re Le*, 122 Wn. App. 816, 820, 95 P.3d 1254, 1256 (2004) (*citing State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984)), *aff'd sub nom. In re Domingo*, 155 Wn.2d 356 (2005). Even the case upon which Fowler so heavily relies did not jettison the missing witness doctrine, noting that it was well established "as the law of the circuit." *Herbert v. Wal-*

The State would first note that the jurisprudence on permissive inferences seems to apply only to proof of an element of the offense. It would therefore question the viability of a due process analysis of an inference that does apply to an element of the offense. For example, in overruling its prior precedent that allowed the missing witness instruction, the Vermont Supreme Court was careful to note that its holding should not be read "to suggest that the inference is so lacking in reason as to violate due process." *State v. Tahair*, 172 Vt. 101, 772 A.2d 1079, 1085 n.3 (2001); *see also State v. Malave*, 250 Conn. 722, 737 A.2d 442, 451 (1999) ("We repeatedly have rejected such arguments ... and we see no persuasive reason to reconsider our holding that [t]he giving of a [missing witness] charge is purely an evidentiary issue and is not a matter of constitutional dimensions.") (internal citations and quotation marks omitted).

Generally, due process requires that the State prove each element of a crime beyond a reasonable doubt. *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994). The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof. *Hanna*, 123 Wn.2d at 710.

Generally, these devices fall into two categories: mandatory

Mart Stores, Inc., 911 F.2d 1044, 1049 (5th Cir. 1990).

presumptions (the jury is required to find a presumed fact from a proven fact) and permissive inferences (the jury is permitted to find a presumed fact from a proven fact but is not required to do so). *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). Mandatory presumptions violate a defendant's right to due process if they relieve the State of its obligation to prove all of the elements of the crime charged. *Deal*, 128 Wn.2d at 699 (*citing Sandstrom v. Montana*, 442 U.S. 510, 523–24, 99 S. Ct. 2450, 61 L. Ed.2 d 39 (1979)). In contrast, permissive inferences do not relieve the State of its burden because the State is still required to persuade the jury that the proposed inference follows from the proven facts. *Hanna*, 123 Wn.2d at 710.

This Court evaluates the propriety of a permissive inference instruction on a case-by-case basis in light of the particular evidence the State presented. *Hanna*, 123 Wn.2d at 712. The United States Supreme Court has established "more likely than not" as the standard of proof for permissive inferences. *Ulster County Court v. Allen*, 442 U.S. 165, 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979). In describing the more likely than not standard, the Washington Supreme Court has stated, "When an inference is only part of the prosecution's proof supporting an element of the crime, due process requires the presumed fact to flow 'more likely than not' from proof of the basic fact." *Hanna*, 123 Wn.2d at 710. The

State has located no case that applies this analytical framework to any inference that does not prove an element of the offense.

Nevertheless, assuming, *arguendo*, that the missing witness instruction were subject to this due process analysis, Fowler fails to show error. A permissive inference is constitutionally permissible unless, under the facts presented, there is no rational way the trier of fact could make the connection the inference permits. *State v. Jackson*, 112 Wn.2d 867, 880, 774 P.2d 1211 (1989); *State v. Grayson*, 48 Wn.App. 667, 670, 739 P.2d 1206, *review denied*, 109 Wn.2d 1008 (1987); *see also State v. Deal*, 128 Wn.2d 693, 700, 911 P.2d 996 (1996) (when permissive inferences are only part of State's proof supporting an element, due process is not offended if prosecution shows that inference more likely than not flows from proven fact).

"A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." *State v. Ratliff*, 46 Wn.App. 325, 330, 730 P.2d 716 (1986). "A permissive inference is valid when there is a 'rational connection' between the proven fact and the inferred fact, and the inferred fact flows 'more likely than not' from the proven fact." *Ratliff*, 46 Wn.App. at 330-31 (*quoting Allen*, 442 U.S. at 167; *Leary v. United States*, 395 U.S. 6, 36, 89 S. Ct. 1532, 1548, 23 L. Ed. 2d 57 (1969); *State*

v. Johnson, 100 Wn.2d 607, 616, 674 P.2d 145 (1983), *overruled on other grounds*, *State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985)).

In *Ratliff*, this Court considered "whether the trial court erred in instructing the jury that it could infer malice 'from an act done in willful disregard of the rights of another.'" *Ratliff*, 46 Wn.App. at 329-30. There, police officers left Ratliff in the back of police van for approximately 15 minutes unattended. When the police officers returned, they found that Ratliff had broken the window between the holding area and the cab of the van. They saw that the radio was damaged and an officer's jacket was pulled through the window. Ratliff was convicted of second degree malicious mischief. *Ratliff*, 46 Wn.App. at 326-27.

This court explained that the jury instruction was proper because there was a "rational connection" between the proven facts of that case and an inference of malice:

> Ratliff admitted on cross examination that he continued to pull radio wires loose after he did not succeed in bringing the radio towards him. He stated that he continued to pull at the wires because he "was frustrated." Furthermore, the officers testified that one of their jackets had been pulled through the window into the prisoner holding area, a situation more consistent with malicious intent than with Ratliff's claims that he wanted to use the radio to call help.

Ratliff, 46 Wn.App. at at 331. In conclusion, this Court stated that "the inference of malice flows more likely than not from the conduct of the defendant." *Ratliff*, 46 Wn.App. at at 331.

The missing witness inference clearly meets the due process requirements established in these cases. As noted previously, before the instruction may even be given, the proponent must establish that (1) the potential testimony is material and not cumulative; (2) the missing witness is particularly under the control of the defendant rather than being equally available to both parties; (3) the witness's absence is not satisfactorily explained; and (4) the inference will not infringe on the defendant's right to silence or shift the burden of proof. *Blair*, 117 Wn.2d at 488-89. Further the jury is additionally instructed that it may draw the inference *only* if it finds that:

> (1) The witness is within the control of, or peculiarly available to, that party;
>
> (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
>
> (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
>
> (4) There is no satisfactory explanation of why the party did not call the person as a witness; and
>
> (5) The inference is reasonable in light of all the circumstances.

CP 46; *see* WPIC 5.20.

It follows that because the instruction may not be given if it would shift the burden of proof, that it does not violate due process. Likewise, because it may only be sought by the State or used by the jury if there is

no other plausible reason why the witness was not called, Fowler's concern about tactical reasons for not calling the witness also lack merit. Notably, Fowler did not offer any reason, either to the court or the jury, for why Boyle was not called.

Because the inference was permissive, and because the inference was rational, no due process violation occurred.[4] Moreover, even if there were a violation, it would be harmless for the reasons previously discussed.

B. NEITHER OF THE INSTRUCTIONS, WHICH HAVE BEEN REPEATEDLY HELD PROPER IN WASHINGTON CONSTITUTED A JUDICIAL COMMENT ON THE EVIDENCE.

Fowler next claims that Instructions 8 and 9 were judicial comments on the evidence. This claim is without merit because in neither instruction did the judge convey her personal attitude toward the evidence or Fowler's guilt or innocence. Moreover, the non-corroboration instruction has been explicitly approved by Washington courts for over 50 years. Finally, even if these instructions could be deemed comments on

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[4] One of the out-of-state cases on which Fowler relies is thus inapposite; the instruction in that case was clearly a presumption, not an inference:

> The Court instructs the jury that the unexplained failure of a party to produce a material witness raises a presumption that the testimony of such witness would have been adverse to the party thus failing to produce him. The presumption may be rebutted by the party explaining the absence of the witness and showing that he has been unsuccessful in procuring his presence despite diligent efforts made in good faith to produce the witness.

Russell v. Com., 216 Va. 833, 223 S.E.2d 877, 878 (1976).

the evidence, any error would be harmless for the reasons previously discussed.

1. A judge does not comment on the evidence by accurately instructing the jury on the applicable law.

Article IV, section 16 of the Washington State Constitution prohibits a judge from "conveying to the jury his or her personal attitudes toward the merits of the cases." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). However, jury instructions that "permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law" are proper. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

The constitutional provision's purpose is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the submitted evidence. *State v. Elmore*, 139 Wn.2d 250, 275, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837 (2000). Thus, to constitute a comment on the evidence, it must appear that the trial court's attitude toward the merits of the cause is reasonably inferable from the nature or manner of the court's statements. *Elmore*, 139 Wn.2d at 276, 985 P.2d 289; *see also State v. Ciskie*, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988) (an impermissible comment on the evidence is an indication to the jury of the judge's personal attitudes toward the merits of the cause). By the same token, an instruction that is a neutral and accurate statement of

the law, and neither contains facts nor conveys the trial court's belief or disbelief in any testimony is not a judicial comment on the evidence. *State v. Steen*, 155 Wn. App. 243, 249. 228 P.3d 1285 (2010).

Fowler concedes that his out-of-state cases were not interpreting art. IV, § 16 of the Washington Constitution. He fails to mention, however, that none of them were even interpreting analogous provisions of their own constitutions. Indeed, none of the cited decisions even rested on constitutional grounds, but on those courts view of state procedural jurisprudence. As such, they are not only not persuasive but go to an issue, as previously noted, that Washington Supreme Court precedent prevents this Court from deciding.

2. The missing witness instruction accurately stated the law and did not a convey the judge's impression of the evidence.

The judge gave the following instruction, which was identical to WPIC 5.20:

> If a person who could have been a witness at the trial is not called to testify, *you may be able* to infer that the person's testimony would have been unfavorable to a party in the case. *You may draw this inference only if* you find that:
>
> (1) The witness is within the control of, or peculiarly available to, that party;
>
> (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
>
> (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;

(4) There is no satisfactory explanation of why the party did not call the person as a witness; and

(5) *The inference is reasonable in light of all the circumstances.*

CP 46 (emphasis supplied).

This instruction specifically listed five factors the jury had to find before it could even draw the inference. It explicitly made it clear that the inference was optional: "you *may* be able to infer." At no point does the instruction in any way convey to the jury the judge's feelings on the matter. This instructions simply cannot be construed as a comment on the evidence.

3. The courts have repeatedly held that the non-corroboration instruction is not a comment on the evidence.

In *State v. Malone*, 20 Wn. App. 712, 714, 582 P.2d 883 (1978), the trial court sua sponte included an instruction telling the jury that an alleged rape victim's testimony did not need to be corroborated to find the defendant guilty of rape. This Court there held that this was not a comment on the evidence because it was a correct statement of the law, it was relevant to the issues at trial, and its phrasing did not reveal the trial court's opinion on the witness's credibility. *Malone*, 20 Wn. App. at 714–15. Since *Malone*, Washington courts have consistently held that this instruction is not a comment on the evidence. *State v. Zimmerman*, 130 Wn. App. 170, 180-81, 121 P.3d 1216 (2005), *review granted, remanded*

on other grounds, 157 Wn.2d 1012 (2006); *State v. Johnson,* 152 Wn. App. 924, 936, 219 P.3d 958 (2009).

The latter two cases rely upon *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949), which Fowler claims requires the non-corroboration instruction itself to include additional language instructing the jury to evaluate witness credibility and/or to weigh the evidence under the reasonable doubt standard. Fowler's argument misreads *Clayton* and the subsequent cases that discuss its holding.

Clayton challenged his conviction for carnal knowledge of a 15–year–old girl, arguing that the trial court's non-corroboration instruction was an improper comment on the evidence because it emphasized the victim's testimony and failed to advise the jury to reach a verdict based on all of the evidence presented at trial. *Clayton*, 32 Wn.2d at 572–73. The instruction there provided:

> 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, not withstanding that there be no direct corroboration of her testimony as to the commission of the act.

32 Wn.2d at 572, 202 P.2d 922.

The Supreme Court rejected Clayton's argument and affirmed his

conviction because he failed to show how the instruction produced an improper comment on the evidence or otherwise prejudiced his case. *Clayton*, 32 Wn.2d at 577-78. The Supreme Court explained that although the trial court's non-corroboration instruction "in a sense singled out" the victim's testimony, the trial court never advised the jury that such uncorroborated testimony was sufficient to find guilt. *Clayton*, 32 Wn.2d at 574. The Court further noted that although the non-corroboration instruction did not expressly advise the jury to determine guilt "from all the evidence and surrounding circumstances shown at the trial," 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." *Clayton*, 32 Wn.2d at 577. The Court added, "Moreover, the jury was elsewhere expressly instructed" that is must reach a verdict "beyond a reasonable doubt' only "after examining carefully all the facts and circumstances" in the case. *Clayton*, 32 Wn.2d at 577.

Here, as in *Clayton*, the trial court's non-corroboration instruction was not a comment on the evidence because "the jury was elsewhere expressly instructed" that it must reach a verdict beyond a reasonable doubt after examining all the facts and circumstances produced at trial. The trial court further expressly instructed the jurors:

> As I mentioned during voir dire, the law does not permit me, as a trial judge, to comment in any way on the

> evidence, and I will not intentionally do so. Now, by a comment on the evidence, I mean some expression from me as to my personal opinion of the weight, believability, or impact of testimony or exhibits. If it appears to you that I do comment, please disregard that apparent comment entirely.

1RP 82.

Although the non-corroboration instruction itself did not include the additional language, the trial court's other jury instructions expressly instructed the jury on the burden of proof, the presumption of innocence, and the standard of proof. The other jury instructions at Fowler's trial provided: (1) jurors are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each, CP 37; (2) jurors should consider the testimony of any witness in light of all the evidence and any other factors that bear on believability and weight, CP 37; (3) if it appears that the trial court made a comment on the evidence, "[jurors] must disregard the apparent comment entirely," CP 37; and (4) "[t]he State of Washington is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt," CP 40; (5) a defendant's presumption of innocence continues throughout the entire trial unless the jury determines that "it has been overcome by the evidence beyond a reasonable doubt," CP 40; (6) a reasonable doubt is "such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence." CP 40.

In addition, each of Williams' three to-convict instructions noted that the State must prove each element of the crime beyond a reasonable doubt. CP 48, 52, 54. Finally, instruction 1 provided, "You should consider the instructions as a whole." CP 38.

As the record demonstrates, the trial court's jury instructions in the case at bar satisfy the standard set forth in *Clayton* by "elsewhere expressly instruct[ing]" the jury to reach its verdict beyond a reasonable doubt and in light of all the evidence, and any other factors that bear on believability and weight. *Clayton*, 32 Wn.2d at 577. Notably, *Malone, Zimmerman*, and *Johnson* all upheld instructions that were substantially similar to the instruction below. The trial court did not err in issuing the non-corroboration instruction to the jury.

In *Zimmerman*, 130 Wn. App. at 181, the Court analyzed a non-corroboration instruction virtually identical to the instruction here. Based on *Clayton* and *Malone*, the Court upheld Zimmerman's non-corroboration instruction because it correctly stated the law without expressing an opinion on the evidence. *Zimmerman*, 130 Wn. App. at 182.[5] Thus, Zimmerman, like Malone, fails to support Williams' argument.

[5] Although it was noted that the WPIC Committee recommended against using such an instruction, the Court held that it was "bound by *Clayton* to hold that the giving of such an instruction is not reversible error." *Zimmerman*, 130 Wash.App. at 182-83.

In *Johnson*, the Court again addressed a challenge to a non-corroboration instruction based on the absence of the additional language. Johnson argued that without additional safeguarding language, the trial court's non-corroboration instruction put "the complaining witness's testimony in a favorable light." *Johnson*, 152 Wn. App. at 936. Although the Court reversed Johnson's conviction on different grounds, it noted that Clayton contained "no clear pronouncement" from the Supreme Court about whether additional safeguarding language was mandatory to prevent an impermissible comment on the evidence when issuing a non-corroboration instruction. *Johnson*, 152 Wn. App. at 936.

Based on the above cases, the non-corroboration instruction here did not constitute an improper comment on the evidence or shift the burden of proof. The instruction correctly stated the law, and the other jury instructions specifically advised the jury that it alone decides issues of witness credibility and reaches a verdict after considering all the evidence presented at trial and applying the correct standard of proof.

C. THE WASHINGTON SUPREME COURT HAS ALREADY REJECTED THE CLAIM THAT THE RECOUPMENT STATUTE VIOLATES DEFENDANTS' RIGHT TO COUNSEL.

Fowler next claims that RCW 10.73.160, which provides for recoupment of attorney's fees from convicted defendants, violated the right to counsel under the holding of *Fuller v. Oregon*, 417 U.S. 40, 94 S.

Ct. 2116, 40 L. Ed. 2d 642 (1974). The Washington Supreme Court has already explicitly rejected this contention. *State v. Blank*, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997).

IV. CONCLUSION

For the foregoing reasons, Fowler's conviction and sentence should be affirmed.

DATED December 3, 2014.

Respectfully submitted,
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