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COURT OF APPEALS  
DIVISION II

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NO. 36276-7-II

STATE OF WASHINGTON  
THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

SHANE NULF,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

---

BRIEF OF APPELLANT

---

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A. SUMMARY OF ARGUMENT.

The jury instructions proposed by the prosecution and used by the court required the prosecution to prove that the acts constituting the charged offense occurred in Grays Harbor County, Washington. Because there was no testimony that the offense happened in Grays Harbor County, there was insufficient evidence to prove all essential elements of the crime as charged.

Furthermore, the prosecution violated Mr. Nulf's right to confront witnesses against him by using a statement that the non-testifying complainant made to a police officer in the course of investigating a completed crime. The court also deprived Mr. Nulf of the right to present his defense by rejecting the proposed missing witness instruction.

B. ASSIGNMENTS OF ERROR.

1. There was insufficient evidence to prove all essential elements of the offense charged.

2. The prosecution violated Mr. Nulf's Sixth Amendment right to confront witnesses against him.

3. The court improperly refused to provide a missing witness instruction.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The prosecution must prove all essential elements of a crime listed in a “to convict” instruction, including venue, when the prosecution proposes and the court delivers a jury instruction listing venue as an element of the offense. Did the prosecution fail to prove all essential elements of the offense when it offered no evidence that the offense occurred in Grays Harbor County and the “to convict” instruction required the prosecution to prove this element?

2. The Sixth Amendment right of confrontation strictly bars the prosecution from presenting testimonial statements from a witness to investigating police officers when the declarant is not available from cross-examination. Here, a police officer repeated the complainant’s out-of-court statement made while the police were investigating the completed offense and the complainant did not testify at trial or submit to cross-examination. Does the erroneous admission of this testimonial statement that provided a critical identification of Mr. Nulf as the perpetrator of the crime require reversal?

3. A criminal defendant is entitled to a missing witness instruction where the State fails to produce an available witness

who would naturally be in the interest of the prosecution to produce. Here, the complaining witness was peculiarly available to the prosecution since Mr. Nulf was forbidden to contact her due to a court order and, although she was the named complainant, the prosecution told the court that she would not likely testify favorably to the prosecution. Did the court err in refusing to provide the proposed missing witness instruction when the prosecution failed to produce the complaining witness or to adequately explain her absence?

D. STATEMENT OF THE CASE.

On February 9, 2007, Barrie Christman witnessed what appeared to be a woman being assaulted inside a car. 1RP 19-20.<sup>1</sup> Mr. Christman called the police and stayed with the assault victim, Rebecca Moose, after the perpetrator left the scene. 1RP 21. Mr. Christman later identified Shane Nulf as the perpetrator of the assault. 1RP 22-23.

Mr. Nulf was charged with one count of Assault in Violation of a No Contact Order. CP 1-2. Ms. Moose did not testify at trial.

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<sup>1</sup> The verbatim report of proceedings consists of two volumes of transcripts, and will be referred to herein as follows:  
1RP refers to March 22, and April 17, 2007, proceedings;  
2RP refers to May 9, 2007 proceedings.

Mr. Nulf and a friend, Gabriel Beglinger, testified that they were together during the time of the incident and they did not see Ms. Moose on the day in question. 1RP 68-72, 83-86. After a jury trial before Judge David Foscue, Mr. Nulf was convicted of the charged offense. CP 38. He received a sentence of 54 months in prison, the high end of the standard sentencing range. 2RP 6. This appeal timely follows. CP 53-54.

Further pertinent facts are discussed in the relevant argument sections below.

E. ARGUMENT.

1. THERE WAS INSUFFICIENT EVIDENCE OF AN ESSENTIAL ELEMENT OF THE CHARGED CRIME

a. Due process requires the prosecution to prove each element of the offense beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Where an additional element is added to the “to convict” instruction without any objection from the prosecution, the State assumes the burden of proving the additional element beyond a reasonable doubt and this element becomes the “law of the case.” State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998). If the State fails to meet its burden with respect to the added element, the conviction must be dismissed. Id. at 103.

In Hickman, the prosecution agreed to submit a “to convict” jury instruction that listed as an element of the crime that the acts constituting the offense occurred in Snohomish County. Id. at 101. The trial testimony mentioned the name of a certain road, but there was no testimony that this road was in Snohomish County. Id. at 100. The Hickman Court rejected the prosecution’s argument that it did not need to prove the offense occurred in Snohomish County where the plain language of the “to convict” instruction required such proof. Id. at 103-04. The court additionally refused to take judicial notice or assume that a particular road must be in

Snohomish County when there was no testimony supporting this contention. Id. at 104.

b. Instruction 4 included venue as an essential element of charged offense, thus requiring the prosecution to prove venue beyond a reasonable doubt. In the case at bar, the “to convict” instruction read as follows:

To convict the defendant of Assault in Violation of a No Contact Order each of the following elements must be proved beyond a reasonable doubt:

(a) That on or about February 9, 2007, a valid no contact order was in effect against the defendant Shane H. Nulf, in favor of Rebecca Ann Moose;

(b) That the defendant Shane H. Nulf, had knowledge of the order’s terms and conditions;

(c) That on or about February 9, 2007, the defendant assaulted Rebecca A. Moose in violation of that order; and

(d) That the foregoing acts occurred in Grays Harbor County, Washington.

....

(Emphasis added.) CP 35-36 (Instruction 4).<sup>2</sup> In light of this instruction, the State was required to prove beyond a reasonable doubt Mr. Nulf assaulted Ms. Moose in violation of the no contact order in Grays Harbor County. Hickman, 135 Wn.2d at 99. The State did not meet this burden.

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<sup>2</sup> The prosecution proposed this instruction. Supp. CP \_\_, sub. no. 27 (a supplemental designation has been filed for the prosecution’s proposed instructions).

In its best light, the prosecution presented evidence that Barrie Christman was at his residence on February 9, 2007, when he witnessed what appeared to be an assault inside a car. 1RP 18-19. When asked where he resided, Mr. Christman said, “30 Elkinson Road.” 1RP 18. Mr. Christman did not elaborate on the location of his home or of the incident beyond this street address.

Lieutenant David Porter from the Grays Harbor County Sherriff’s Department testified he was “dispatched to an assault call down on Aldolfsen (sic) Road off of State Route 12.” 1RP 35 (parenthetical in transcript). Officer Eric Cowsert from the Grays Harbor Sherriff’s Office said he responded, “To the area of State Route 12 on Alfredson Road.” 1RP 48.

None of the police officers testified that they only worked in Grays Harbor County or that the area of the assault report occurred inside Grays Harbor County. Even if jurors could be expected to be familiar with local roads, the witnesses spoke of “Elkinson Road,” “Aldolfson Road,” and “Alfredson Road,” for what was presumably the same place, further confusing the location of the assault. 1RP 18, 35, 48.

When Mr. Nulf objected to the lack of proof of venue at the close of the case, the prosecutor asserted that Mr. Christman

testified he lived in Oakville, which is in Grays Harbor. 1RP 121. Yet the record of the proceedings does not support this contention. Mr. Christman only offered a street address and other witnesses also confined their testimony to street names, without specifying that these locations were in Grays Harbor. The trial court dismissed Mr. Nulf's objection by stating that proof of venue is not required, but this ruling ignores the fact that the "to convict" instruction unambiguously required the prosecution to prove the acts occurred in Grays Harbor County. 1RP 121; Hickman, 135 Wn.2d at 104-05.

c. The Court must dismiss Mr. Nulf's conviction. As in any case involving insufficient evidence, the absence of proof beyond a reasonable doubt of an added element requires dismissal of the conviction and charge. Hickman, 135 Wn.2d at 99 (citing Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). As in any case reversed for insufficient evidence, the Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. Hickman, 135 Wn.2d at 99 (citing inter alia, North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490

U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)). Because the State failed to prove each of the acts constituting the alleged assault in violation of a no contact order occurred in Grays Harbor County, the Court must reverse Mr. Nulf's conviction and dismiss the charge.

2. THE ADMISSION OF THE ABSENT  
COMPLAINANT'S STATEMENTS TO THE  
POLICE WHEN INVESTIGATING THE  
COMPLETED OFFENSE VIOLATED MR.  
NULF'S RIGHT TO CONFRONT THE  
WITNESSES AGAINST HIM UNDER THE  
SIXTH AMENDMENT

a. The confrontation clause prohibits admission of uncross-examined statements by absent declarants when those statements are "testimonial" in nature. The Sixth Amendment right of confrontation prohibits the prosecution from eliciting out-of-court statements by non-testifying witnesses when there has not been an opportunity for adequate cross-examination. Davis v. Washington, \_\_ U.S. \_\_, 126 S.Ct. 2266, 2278, 165 L.Ed.2d 224, 237 (2006); Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004); State v. Mason, 160 Wn.2d 910, 920, 162 P.3d 396 (2007); U.S. Const. amend. 6 (guaranteeing a defendant the right, "to be confronted with witnesses against him."); Wash.

Const. art. 1, section 22 (guaranteeing the accused the right “to meet the witnesses against him face to face.”).

In Davis, the Supreme Court ruled that statements recounting completed criminal acts to investigating officers are “inherently testimonial.” 126 S.Ct. at 2278. Moreover, “[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard.” Crawford, 541 U.S. at 52. In Mason, the Washington Supreme Court recognized that statements to police involving the report of a crime are testimonial unless there is an “ongoing emergency.” 160 Wn.2d at 920. When the offense is over, there is not an “ongoing emergency” for the purposes of the confrontation clause, even if the complainant still seeks protection from the police. Id.

b. The complainant’s out of court statement to police that Mr. Nulf was the perpetrator was testimonial and therefore inadmissible absent the opportunity to cross-examine the declarant. In the case at bar, the complainant did not testify at trial and was never subject to cross-examination.

Without the complainant’s testimony, it was particularly essential for the prosecution to prove that Mr. Nulf was correctly identified as the perpetrator. The sole eyewitness did not know the

parties to the incident, and the perpetrator remained inside a car during the incident, thereby limiting the opportunity for observation. 1RP 19-21.

In an effort to prove Mr. Nulf's responsibility for the offense, the prosecution elicited testimony from Lieutenant Porter explaining why he arrested Mr. Nulf. RP 35-36. Lieutenant Porter said he arrested Mr. Nulf based on the license plate number given by a witness and after he asked another officer who was at the scene of the offense "to verify with the victim whether or not the person she was naming as a suspect was, in fact, the same person as the registered owner of the vehicle that dispatch had ran, and I was advised that's correct." RP 36.

Lieutenant Porter conveyed that the victim told the police that the registered owner of the car was the perpetrator, and that person was Mr. Nulf. RP 36. This testimony was critical to the prosecution's case, as it provided the only verification from the victim that she named Mr. Nulf as the perpetrator. This verification was obtained by the police after the assault was over and the perpetrator had fled the scene, and accordingly, was testimonial in nature. Davis, 126 S.Ct. at 2278.

c. The erroneous admission of the testimonial statement requires reversal. The improperly admitted statements in violation of Mr. Nulf's right of confrontation are harmless only if the State proves beyond a reasonable doubt they did not affect the outcome of the case. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt").

Here, the prosecution used testimony from Lieutenant Porter that the assault victim had told the police that the owner of the car was the person who assaulted her. 1RP 36. This testimony was critical to the case, because the jury otherwise had not heard any testimony from her. Moreover, unlike Mr. Christman, Ms. Moose knew Mr. Nulf, and her identification of Mr. Nulf to the police provided crucial support for the State's case. It removed the doubt that jurors may well have had regarding the accuracy of Mr. Christman's identification of a stranger inside a car as the perpetrator.

The prosecution's use of a statement the complainant made to the police after the incident was testimonial and violated Mr. Nulf's Sixth Amendment rights. Because of the notable absence of the complainant at trial, and based on the possibility that Mr. Christman did not accurately see the perpetrator of the assault during the incident, the erroneous admission of the testimony that Ms. Moose herself verified that Mr. Nulf was the perpetrator cannot be proven harmless beyond a reasonable doubt. Thus, reversal is required.

3. THE TRIAL COURT IMPROPERLY REFUSED  
THE MISSING WITNESS INSTRUCTION  
REQUESTED BY THE DEFENSE

a. A criminal defendant is entitled to a missing witness instruction where the State fails to produce an available witness that would naturally be expected to testify in the interest of the State. Pursuant to the "missing witness" rule, where a party fails to call a witness when it would be natural for that party to produce the witness, the jury may infer that the witness's testimony would have been unfavorable to that party. State v. Russell, 125 Wn.2d 24, 90, 882 P.2d 747 (1994); State v. Blair, 117 Wn.2d 479, 489, 816 P.2d 718 (1991). The rule does not require proof that the party deliberately suppressed the evidence, but rather, only a

showing of a reasonable probability that the party would not otherwise fail to call the witness. Blair, 117 Wn.2d at 488-89. The testimony must concern a matter of importance and not be strictly cumulative. State v. Cheatam, 150 Wn.2d 626, 652-53, 81 P.3d 830 (2003).

The inference arises when the witness is peculiarly available to the party and the witness's absence cannot be satisfactorily explained. State v. Davis, 73 Wn.2d 271, 280, 438 P.2d 185 (1968); see Blair, 117 Wn.2d at 489. 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 (citing Davis, 73 Wn.2d at 277).

The missing witness doctrine does not apply if the witness is equally available to both parties. Blair, 117 Wn.2d at 590. But a witness is not equally available merely because he or she is physically present or subject to the subpoena power. Davis, 73 Wn.2d at 276. A witness's availability may depend, among other things, upon his or her relationship to one of the parties, and the

nature of the testimony that he or she would be expected to give based on the charges. Id. at 277.

When the missing witness rule is applicable, a criminal defendant is entitled to an instruction informing the jury that it is permitted to draw an unfavorable inference against the party who failed to call the witness. Davis, 73 Wn.2d at 281. The party against whom the missing witness rule would operate is allowed to explain the witness's absence in order to avoid the negative inference. Blair, 117 Wn.2d at 489. If the absence is satisfactorily explained, no inference is permitted. Id. But the burden is on the party against whom the missing witness rule operates to explain the witness's absence, and the party invoking the rule need not provide an explanation for the absence. Id. A defendant is not barred from obtaining a missing witness instruction merely because it was possible the defendant could have also subpoenaed the witness. State v. McGhee, 57 Wn. App. 457, 462, 788 P.2d 603, review denied, 115 Wn.2d 1013, 797 P.2d 513 (1990).

b. The trial court improperly refused to provide a missing witness instruction. Mr. Nulf proposed the standard missing witness instruction from the Washington Pattern Jury Instructions: Criminal 5.20, providing as follows:

If a party does not produce the testimony of a witness who is within the control of that party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.

CP 18; 1RP 103. The court refused to give the requested instruction. 1RP 103, 105.

When discussing the missing witness instruction, the prosecution conceded that Ms. Moose would more likely testify favorably to the defense, not the prosecution. 1RP 103-04. The prosecution argued that because she would likely testify more favorably to the defense, Ms. Moose should be seen as someone in the defense control and not in the State's control. Id.

In response, Mr. Nulf pointed out that Ms Moose was on the State's witness list as an expected witness for the prosecution. 1RP 104. Moreover, Mr. Nulf was legally barred from contacting her because there was a no court order prohibiting him from doing so or from asking others to do so on his behalf. See e.g., Ex. 1 (no contact order); CP 1-2 (Information charging Mr. Nulf with violating a no contact order). Because Mr. Nulf was not in a position to contact her, she certainly should not be seen as particularly

available to him. See e.g., State v. David, 118 Wn.App. 61, 67, 74 P.3d 683 (2003), reversed on other grounds, 160 Wn.2d 1001 (2007) (victim of domestic violence not accessible to defense counsel because of domestic violence allegations).

Here, unlike what would naturally be expected in a criminal case, the prosecution did not believe the complainant in the case at bar would have testified favorably to the State. 1RP 104. Furthermore, the witness was not particularly available to the defense by virtue of the no contact order.

Finally, the prosecution made only minimal efforts to bring Ms. Moose to court. The State had not served her with a subpoena, but had only attempted personal service, without explaining how often it tried or how extensive its efforts. 1RP 105. The prosecution did not attempt any other means of serving a subpoena. See CR 45 (describing mechanisms for serving subpoena); CrR 4.8 (civil rules apply to service of subpoena); see also State v. DeSantiago, 149 Wn.2d 402, 412, 68 P.3d 1065 (2003) (finding service by mail combined with statements from family members that witnesses moved away adequate to show reasonable efforts made to secure witness testimony).

The prosecution had no specific reason to believe the complainant was residing elsewhere, and indeed had recent contact with her. 1RP 105. Only two months elapsed between the initial complaint and the trial, so it was unlikely that the complainant could not have been located due to the passage of time.

The prosecution told the court that the complainant had an unspecified warrant for a misdemeanor or in district court and, “I think she is just sort of laying low.” 1RP 105. The prosecution did not claim that any police officer had ever tried to find her to serve the warrant or that she even knew about the warrant. Based on the absence of evidence the prosecution tried to locate her by more than a single attempt to serve a subpoena, the prosecution did not demonstrate that it made reasonable efforts to find the complainant or that the reason she did not testify was not due to the fact that her testimony would not have been favorable to the prosecution’s case.

c. The trial court’s failure to give Mr. Nulf’s proposed missing witness instruction requires reversal. Jury instructions must properly inform the jury of the applicable law and allow the parties to argue their theories of the case. State v. Mills, 154 Wn.2d 1, 8, 109 P.3d 415 (2005). Specifically, failure to give an

applicable missing witness instruction is reversible error. Davis, 73 Wn.2d at 281; see also David, 118 Wn.App. at 66-67.

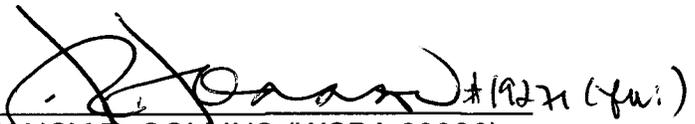
In the case at bar, Mr. Nulf was only able to comment that the prosecution did not produce the complainant at trial in his closing argument. 1RP 116. He asked the jury to consider “the lack of evidence” as to what occurred by virtue of the complainant not explaining the incident. 1RP 116. Yet without the missing witness instruction, he was not able to argue that the jury was specifically authorized by law to infer that Ms. Moose’s testimony would have been unfavorable to the prosecution, thereby preventing Mr. Nulf from fully arguing its theory of the case to the jury. Accordingly, it cannot be said that the error was harmless. The erroneous refusal to give Mr. Nulf’s proposed missing witness instruction requires reversal.

F. CONCLUSION.

For the foregoing reasons, Mr. Nulf respectfully requests this Court vacate his conviction and dismiss the charge due to the insufficiency of the evidence, or, alternatively, order a new trial based on the violations of his right to confront witnesses and present his defense under the Sixth and Fourteenth Amendments.

DATED this 28th day of September 2007.

Respectfully submitted,

  
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