NO. 36321-6

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

MONTAIE C. MCHENRY, Appellant

v.

STATE OF WASHINGTON, Respondent

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin
Pierce County Superior Court Cause No. 06-1-02250-7

CORRECTED BRIEF OF APPELLANT

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1. Did the state prove beyond a reasonable doubt that the defendant committed the crime of assault in the second degree as charged in count 3?

2. Did the state prove beyond a reasonable doubt that the defendant committed the crime of unlawful possession of a firearm in the first degree?

C. STATEMENT OF THE CASE

1. Procedure.

The State of Washington charged MONTAIE COLDEN MCHENRY, hereinafter the defendant, with the crimes of first degree assault, intimidating a witness, and unlawful possession of a firearm in the first degree. CP 1-2.

On February 13, 2007, the matter was assigned for trial to the Honorable Thomas Larkin. The State filed a second amended information at that time. The second amended information reduced the charge of assault in the first degree to assault in the second degree. CP 20-23.

The defendant thus faced trial on assault in the second degree, count I, intimidating a witness, count II, assault in the second degree, count III, assault in the second degree, count IV, and unlawful possession of a firearm, count V. RP 5-6.

During closing argument, the prosecutor commented on the defendant's failure to testify when she argued, "The defendant wants you to believe . . ." RP 279. Defense counsel timely objected, "The defendant never testified and I think it is improper for the State to be telling the jury what the defendant wanted." RP 280. The court overruled the objection. RP 280.

The prosecutor then immediately commented again on the defendant's failure to testify: "Counsel is absolutely right, you didn't hear from the defendant . . ." RP 280.

The prosecutor also argued that in order to believe the defense's story, you have to believe Mrs. McHenry (apparently Teiashia Jackson). RP 288.

The prosecutor also argued, "When the defense puts on a defense, the defendant doesn't have to prove anything, not one piece of evidence . . . but once he puts on evidence, his evidence is subject to the same level of scrutiny that you would give my evidence, the State's evidence. You have to examine the defense's evidence in the same manner that you examine the state's evidence and you have to say to yourselves. . ." RP 290. Defense counsel objected to this argument as "burden shifting" and the court excused the jury. RP 290-91.

The court sustained the defendant's objection, finding that the prosecutor was attempting to shift the burden by starting to mention witnesses that the defense should have called. RP 293-94. The court noted that the state was attempting to argue the missing witness instruction, although the state had not asked for any missing witness instruction. RP 291-92.

The jury subsequently convicted the defendant of the lesser included crime of assault in the fourth degree on count I, assault in the second degree

on counts 3 and 4, and unlawful possession of a firearm in the first degree on count 5. The jury found that the defendant was armed with a firearm at the time of the commission of count 3 and also armed with a deadly weapon, a knife, on count 4. RP 326-27; CP 60, 61.

On April 6, 2007, the court convened a sentencing hearing. RP 4/6/07 4. At that time, the parties presented argument regarding whether the assault in the second degree convictions merged for sentencing purposes. RP 4/6/07 4-5.

The court held that the felony assaults constituted "same criminal conduct" for purposes of offender scoring. RP 4/6/07 15.

The court continued the matter to allow the state to obtain additional information about the defendant's date of release in the Oregon conviction in order to determine whether or not that conviction had washed. RP 4/6/07 18-19.

On May 7, 2007, the court again convened a sentencing hearing. RP 5/7/07 4. At that time, the court imposed sentences at the low end of the standard ranges. With the addition of the mandatory 48 months of flat time for the sentencing enhancements, the sentence imposed was 105 months. RP 17; CP 79-83.

The defendant thereafter timely filed this appeal. CP 101-116.

2. Facts.

TYSHAWANA BROWN

In May 2006, fifteen year old Tyshawana Brown lived with her father, who was the defendant in the case. RP 123-124. The defendant's wives and other children also lived at the home. RP 124, 125.

On May 17, 2006, Tyshawana was at home with her brothers and sisters when a man called Buddha called at the house. RP 126-27. Buddha said that he was there to get a CD from the defendant. RP 127. Tyshawana unsuccessfully attempted to contact the defendant by cell phone. RP 127. Buddha then departed the residence. RP 128.

Approximately fifteen minutes later, Buddha returned to the residence with Tyshawana's cousin. They left almost immediately after learning that the defendant had not yet returned. RP 128.

The next morning, the defendant confronted Tyshawana. RP 129. The defendant wanted to know what she had done with Buddha. RP 129. The defendant ordered her to "tell the truth" and then started punching her in the back with a closed fist. RP 130-31. The defendant kicked Tyshawana for a while and then went to the front porch to retrieve a hammer from a box. RP 131. The defendant then returned to the kitchen where Tyshawana had remained. RP 131-32.

The defendant started hitting Tyshawana with the hammer on her knee, elbows, and back. The defendant stated, "You won't be able to walk no more if you don't tell the truth and I'll break your knees and you know that." RP 132.

When the defendant stopped hitting Tyshawana, she stood up. RP 133. The defendant took her into the living room where he talked to her about telling the truth. RP 134.

Apparently unhappy with his daughter's statements, the defendant dragged her back into the kitchen where he grabbed a knife. RP 134. The defendant then started to cut her hair with the knife. RP 134. As the defendant cut her hair, he stated that she was "trying to be too pretty." RP 135.

After cutting her hair, the defendant forced Tyshawana out onto the porch. He told her, "Now you can go and try to be pretty." RP 136.

After Tyshawana stood on the porch for a while, the defendant ordered her back into the house. RP 138. The defendant continued to admonish his daughter to "tell the truth" and when she did not comply to his satisfaction, he picked up a chair and hit her over the head. RP 138. The chair shattered. RP 138.

When one of the defendant's wives entered the residence, the defendant went upstairs to get a gun. RP 142. Tyshawana started screaming. RP 144. The defendant told Tyshawana that he was going to kill her. RP 142. The defendant then fired a warning shot. RP 143. Tyshawana testified that, while in the dining room, the defendant fired the warning shot toward the back of the house. RP 143. The backyard and the cars were behind the house. RP 143.

Shortly after the gunshot, a neighbor called the police. RP 145. When the police arrived, the defendant took the gun into the basement. RP 146. Tyshawana heard the defendant tell one of his wives to get away from the house because a firecracker had gone off. RP 148.

Tyshawana asked the police to get an ambulance for her. RP 148. She was taken to Mary Bridge Children's Hospital where she was examined and her injuries were photographed. RP 149.

Approximately four months to this event, the defendant saw Tyshawana, age fifteen, engaged in sexual intercourse with a young man who was twenty-two years old. RP 158, 166. The defendant became very angry at that time. RP 158. The defendant called the police. RP 166.

TEAISHIA JACKSON

Teaishia Jackson, the defendant's wife, was present in the home on May 18, 2006, when the defendant confronted Tyashawana about a young man who had been observed leaving the residence. RP 193-94. Tyshawana was not forthcoming with any information. RP 194.

Tyshawana attempted to get a hammer to hit her father. They wrestled for the hammer. RP 196. The defendant won control of the hammer and then slammed it on the kitchen counter. RP 197. The defendant never struck Tyshawana with the hammer. RP 220.

Tyshawana continued to argue and fight with the defendant. The defendant grabbed a pair of scissors to cut her hair. When the scissors would not work, he used a knife to cut her hair. RP 198. In the family's religion, the man is allowed to do such things as cut the female's hair "if the man believes you're using your beauty in an advantage to be promiscuous." RP 230.

At some point during the argument, the defendant grabbed a chair and slammed it on the floor. RP 205. At one point, the defendant chased Tyshawana into the basement when she ran from him. RP 234. At that time, Tyshawana slipped on the stairs. RP 234.

Teaishia Jackson noticed a gun clip and magazines on the dining room table. RP 199. She questioned Tyshawana regarding those items. RP 200.

While the argument had been going on, the family's other children were out in the yard. The family had planned a barbeque for that day and the children were popping fireworks. RP 203.

The argument between Tyshawana and the defendant lasted quite a while. It ended when the family noticed that there were police officers in the yard next to their home. RP 202-03.

Mrs. Jackson told the police about the fireworks. RP 219

OTHER EVIDENCE

Police officers obtained a search warrant for the defendant's residence. RP 57. During the subsequent execution of that warrant, police located a rifle, magazines, and ammunition, as well as the hammer, a butcher knife, clumps of hair. RP 64, 65, 66, 67.

Tacoma Police Department latent print examiner Toni Martin and forensic specialist Renee Campbell examined certain items taken from the defendant's residence for fingerprints. RP 110-12. No latent fingerprints were found on the semi-automatic rifle, the rifle magazines, and the ammunition. RP 113.

Brenda Lawrence, a firearms examiner with the Washington State Patrol, examined the rifle and determined that it was operable. RP 94, 100.

D. ARGUMENT.

1. THE DEFENDANT'S CONVICTIONS FOR COUNTS 3 AND 5 MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE ADDUCED AT TRIAL TO PROVE GUILT BEYOND A REASONABLE DOUBT.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

In this case, the state charged the defendant in count 3 with the crime of assault in the second degree with a rifle. CP 20-23. The state was required to prove: (1) That on May 18, 2006, the defendant assaulted Tyshawana Brown, (2) with a deadly weapon. RCW 9A.36.021(1)(c)[1].

[1] See Appendix A

In this case, the state offered only the uncorroborated testimony of Tyshawana Brown. Tyshawana Brown testified that the defendant had fired a shot into the back of the residence. RP 142. The defendant was standing in the dining room when he fired the shot. RP 142. The shot went toward the back of the house. RP 142. The back yard and the cars were behind the house. RP 143.

Significantly, there was absolutely no ballistic evidence to corroborate Tyshawana's testimony. There were no bullet holes in the residence except for one that had been fired by one of Tyshawana's boyfriend some months prior to this incident. RP 2/22/07 201. Further, although the children were in the background at this time, the state did not produce them as witnesses or otherwise allege that the bullet had struck any person or object.

The lack of physical evidence corroborating Tyshawana's testimony equates to a lack of sufficiency of the evidence, where there absolutely should have been corroborative ballistics evidence if the event had occurred as she described. This conviction must be reversed and dismissed.

In addition, the state charged the defendant in count 5 with the crime of unlawful possession of a firearm. The state was required to prove that the defendant, having been previously convicted of a serious offense, knowingly

and unlawfully had a firearm in his possession. RCW 9.41.010(12)[2], 9.41.040(1)(a)[3].

In this case, the state failed to adduce sufficient evidence to establish the elements of the crime. Again, the only witness who claimed to have seen the defendant with a gun was Tyshawana. However, her testimony was fatally flawed because her account of the defendant's actions with the firearm was belied by the total absence of corroborative physical evidence. That, coupled with the lack of fingerprint evidence, creates a reasonable doubt as to the state's evidence and requires this court to reverse this conviction.

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[2] See Appendix B
[3] See Appendix C

2. THE DEPUTY PROSECUTOR COMMITTED REVERSIBLE ERROR WHEN SHE ARGUED IN CLOSING THAT THE DEFENDANT HAD A DUTY TO PRODUCE WITNESSES AND ALSO COMMENTED ON THE DEFENDANT'S FAILURE TO TESTIFY.

To prevail on his claim of prosecutorial misconduct, the defendant bears the burden of proving, first, that the prosecutor's comments were improper and, second, that the comments were prejudicial. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). A prosecutor's improper comments are prejudicial "only where 'there is a *substantial likelihood* the misconduct affected the jury's verdict.'" *Id*

Comments that shift the burden of proof to the defendant are improper. State v. French, 101 Wn. App. 380, 385, 4 P.3d 857 (2000), *review denied*, State v. Barraza, 142 Wn.2d 1022 (2001).

A criminal **defendant** has a constitutional right not to **testify** trial. State v. Contreras, 57 Wn. App. 471, 473, 788 P.2d 1114 (1990). Application of the missing witness doctrine is improper if the prosecutor's comments infringe on the defendant's constitutional right to remain silent. State v. Blair, 117 Wn.2d 479, 485-91, 816 P.2d 718 (1991). Such a comment only implicates a defendant's right to remain silent if the comment is of a type that

the jury would be naturally inclined to view as a comment on the defendant's failure to testify. French, 101 Wn. App. at 389.

In this case, the prosecutor not only commented on the defendant's failure to call his other wife, but also emphasized for the jury the defendant's failure to testify. RP 2/26/97 280.

Further, the prosecutor candidly admitted that she had set up her missing argument during cross-examination of the defendant's witnesses and that she purposefully had not asked for the missing witness instruction, WPIC 5.20[4]. RP 2/16/97 291-292.

The trial court sustained the defendant's objections to this improper argument. RP /26/97 294.

The defendant easily establishes that he was prejudiced by the argument. The state's case depended entirely on the credibility of Tyshawana. The state, in essence, argued that the defendant's failure to produce the testimony of his other wife and his own failure to testify corroborated Tyshawana's testimony.

The prosecutor's argument was improper, prejudicial, and violative of the defendant's constitutional rights under the 6th amendment[5]

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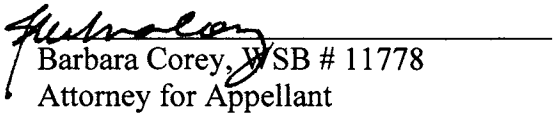
[4] See Appendix "D"
[5] See Appendix "E"

E. CONCLUSION.

For the foregoing reasons, the defendant respectfully asks this court to dismiss his convictions on counts 3 and 5. In addition, the defendant asks this court to reverse his convictions for prosecutorial misconduct and remand the remainder of the case for new trial.

DATED this 3rd day of March, 2008.



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CERTIFICATE OF SERVICE:
The undersigned certifies that on this day she delivered by U.S. Mail or ABC-LMI delivery to the Appellate Unit, Room 946 County-City Building, Tacoma, Washington 98402 and via U.S. Mail, postage pre-paid to appellant, a true and correct copy of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

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Appendix "A"

RCW 9A.36.021
Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

APPENDIX "B"

RCW 9.41.010
Terms defined.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

12) "Serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies, as now existing or hereafter amended:

(a) Any crime of violence;

(b) Any felony violation of the uniform controlled substances act, chapter 69.50 RCW, that is classified as a class B felony or that has a maximum term of imprisonment of at least ten years;

(c) Child molestation in the second degree;

(d) Incest when committed against a child under age fourteen;

(e) Indecent liberties;

(f) Leading organized crime;

(g) Promoting prostitution in the first degree;

(h) Rape in the third degree;

(i) Drive-by shooting;

(j) Sexual exploitation;

(k) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;

(l) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(m) Any other class B felony offense with a finding of sexual motivation, as "sexual motivation" is defined under RCW 9.94A.030;

(n) Any other felony with a deadly weapon verdict under RCW 9.94A.602; or

(o) Any felony offense in effect at any time prior to June 6, 1996, that is comparable to a serious offense, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious offense.

APPENDIX "C"

RCW 9.41.040

Unlawful possession of firearms — Ownership, possession by certain persons — Penalties.

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter

APPENDIX "D"

WPIC 5.20

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

APPENDIX "E"

SIXTH AMENDMENT - "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.