

NO. 42565-3-II

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

STATE OF WASHINGTON, Respondent

v.

KENNETH RAYMOND NORDSTROM, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01492-6

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

| | | |
|------|--|----|
| A. | RESPONSE TO ASSIGNMENTS OF ERROR..... | 1 |
| I. | THE TRIAL COURT DID NOT ERR IN NOT REDACTING THE CD OF THE 911 CALL SUA SPONTE, IN THE ABSENCE OF A REQUEST BY THE DEFENDANT TO DO SO..... | 1 |
| II. | THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT, AND IF ANY ERROR OCCURRED IT WAS HARMLESS..... | 1 |
| III. | THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING THE DEFENDANT’S MOTION TO PRESENT SURREBUTTAL..... | 1 |
| IV. | THE TRIAL COURT DID NOT IMPOSE A SENTENCE THAT WAS CLEARLY EXCESSIVE..... | 1 |
| V. | THE TRIAL COURT DID NOT ERR IN INCLUDING THE DEFENDANT’S PRIOR OREGON CONVICTION FOR ASSAULT IN THE SECOND DEGREE IN HIS OFFENDER SCORE..... | 1 |
| B. | STATEMENT OF THE CASE | 1 |
| C. | ARGUMENT..... | 10 |
| I. | THE TRIAL COURT DID NOT ERR IN NOT REDACTING THE CD OF THE 911 CALL SUA SPONTE, IN THE ABSENCE OF A REQUEST BY THE DEFENDANT TO DO SO..... | 10 |
| II. | THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT, AND IF ANY ERROR OCCURRED IT WAS HARMLESS..... | 13 |
| a. | Standard of Review | 14 |
| b. | Missing Witness Doctrine was satisfied | 14 |
| III. | THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING THE DEFENDANT’S MOTION TO PRESENT SURREBUTTAL..... | 21 |
| IV. | THE TRIAL COURT DID NOT IMPOSE A SENTENCE THAT WAS CLEARLY EXCESSIVE..... | 24 |

| | | |
|----|---|----|
| V. | THE TRIAL COURT DID NOT ERR IN INCLUDING THE DEFENDANT'S PRIOR OREGON CONVICTION FOR ASSAULT IN THE SECOND DEGREE IN HIS OFFENDER SCORE..... | 25 |
| D. | CONCLUSION | 28 |

TABLE OF AUTHORITIES

Cases

| | |
|--|----------------|
| <i>State v. Blair</i> , 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) | 14, 15, 16 |
| <i>State v. Bourgeois</i> , 133 Wash. 2d 389, 399, 945 P.2d 1120 (1997) | 21 |
| <i>State v. Branch</i> , 129 Wn.2d 635, 649-50, 919 P.2d 1228 (1996) | 24 |
| <i>State v. Cheatam</i> , 150 Wn.2d 626, 652, 81 P.3d 830 (2003) .. | 14, 15, 16, 18 |
| <i>State v. Corbett</i> , 158 Wn.App. 576, 597, 242 P.3d 52 (2010) | 28 |
| <i>State v. Crenshaw</i> , 98 Wash. 2d 789, 806, 659 P.2d 488 (1983) | 21 |
| <i>State v. Davis</i> , 73 Wn.2d 271, 277, 438 P.2d 185 (1968) | 16 |
| <i>State v. DuPont</i> , 14 Wn. App. 22, 24, 538 P.2d 823 (1975) | 22 |
| <i>State v. Emery</i> , 174 Wn.2d 741, 760, 279 P.3d 653 (2012) | 14, 20 |
| <i>State v. Ford</i> , 137 Wn.2d 472, 479, 973 P.2d 452 (1999) | 26, 27 |
| <i>State v. Gregory</i> , 158 Wn.2d 759, 845-46, 147 P.3d 1201 (2006) | 15, 16 |
| <i>State v. Halstien</i> , 122 Wash. 2d 109, 127, 857 P.2d 270 (1993) | 22 |
| <i>State v. Harris</i> , 12 Wn.App. 381, 529 P.2d 1138 (1974) | 22, 23 |
| <i>State v. Jamison</i> , 25 Wn.App. 68, 74, 604 P.2d 1017 (1979) | 22, 23 |
| <i>State v. Kirwin</i> , 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) | 11 |
| <i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) | 11, 12 |
| <i>State v. O’Cain</i> , 279 P.3d 926, 933 (2012) | 12 |
| <i>State v. Reed</i> , 168 Wn.App. 553, 572, 278 P.3d 203 (2012) | 15 |
| <i>State v. Ritchie</i> , 126 Wn.2d 388, 392-93, 894 P.2d 1308 (1995) | 24 |
| <i>State v. Robinson</i> , 171 Wn.2d 292, 304, 253 P.3d 292 (2011) | 11 |
| <i>State v. Sao</i> , 156 Wn.App. 67, 80, 230 P.3d 277 (2010) | 24 |
| <i>State v. Scott</i> , 110 Wn.2d 682, 685, 757 P.2d 492 (1988) | 11, 12 |
| <i>State v. Stambach</i> , 76 Wn.2d 298, 456 P.2d 362 (1969) | 23 |
| <i>State v. Stenson</i> , 132 Wash. 2d 668, 709, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998) | 22 |
| <i>State v. Tili</i> , 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) | 26 |

Statutes

| | |
|---------------------------|----|
| ORS 163.175(1)(b) | 27 |
| RCW 9.94A.525 | 26 |
| RCW 9.94A.525(3) | 27 |
| RCW 9A.36.021(1)(c) | 27 |
| RCW 9A.36.031 | 27 |

Rules

| | |
|-------------------------------|--------|
| Evidence Rule 103(a)(1) | 12 |
| RAP 2.5 | 12, 13 |
| RAP 2.5(a)(3) | 11 |

A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT DID NOT ERR IN NOT REDACTING THE CD OF THE 911 CALL SUA SPONTE, IN THE ABSENCE OF A REQUEST BY THE DEFENDANT TO DO SO.
- II. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT, AND IF ANY ERROR OCCURRED IT WAS HARMLESS.
- III. THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING THE DEFENDANT'S MOTION TO PRESENT SURREBUTTAL.
- IV. THE TRIAL COURT DID NOT IMPOSE A SENTENCE THAT WAS CLEARLY EXCESSIVE.
- V. THE TRIAL COURT DID NOT ERR IN INCLUDING THE DEFENDANT'S PRIOR OREGON CONVICTION FOR ASSAULT IN THE SECOND DEGREE IN HIS OFFENDER SCORE.

B. STATEMENT OF THE CASE

1. Procedural history

Kenneth Nordstrom was convicted of burglary in the first degree, assault in the second degree against Amy Decknadel, and assault in the fourth degree against Ashley Grant, with a special verdict finding that the defendant knew that Ashley Grant was pregnant at the time he committed the burglary, CP 107-11 i. The defendant was sentenced within the standard range, but given an additional 40 months on the burglary charge

based on the aggravating circumstance found by the jury. CP 167-183.

This timely appeal followed. CP 194.

2. Substantive facts

Kenneth Nordstrom and Mary Decknadel were in a dating relationship and had known each other for ten years. RP 233. The defendant stayed in a number of places, lacking a permanent home but staying primarily with Mary. RP 243-45. Mary has two daughters. RP 232. Her older daughter lived on her own but her seventeen year-old daughter, Amy, lived with her. RP 234. The defendant was abusive to Mary and deliberately caused turmoil between her and her family. RP 234, 236. The defendant did not get along with Amy, and they argued frequently. RP 268. The defendant was very controlling and succeeded in isolating Mary from her family. RP 302-04. One of the main points of contention between the defendant and Amy was the defendant's racism and hatred of Amy's African American and Mexican friends, including her friend Ashley Grant, whom he called a "nigger." RP 240-41, 324, 326. In the summer of 2010, tensions in the apartment escalated and there were a number of incidents between the defendant and Amy. RP 242, 245-48. For a brief period in August Amy moved out of the apartment and in with her grandmother. RP 243. After Amy returned home, Mary told the defendant he was not permitted to be at her home when she wasn't there. RP 243.

Although the defendant briefly had a key to the apartment while Amy was gone, after Amy returned the locks were changed and the defendant no longer had a key. RP 244-45.

In the days prior to the incident the defendant broke all of Amy's CDs and dumped spaghetti on her bed. RP 246-48. The spaghetti incident occurred the night before the assault. RP 333-35. Amy and the defendant got into a verbal argument and Amy left to spend the night at her aunt's house. RP 335. She returned the next day, Sunday, to an empty house and invited Ashley to stay the night with her. RP 335.

On Friday, September 10, 2010 the defendant spent part of the night at Mary's. RP 273. They argued and Mary missed work the next day as a result. RP 246. The defendant drove Mary to work on Sunday morning where she was to work a shift at an adult care facility. RP 248, 250. Mary specifically told the defendant not to go to her apartment because she would not be there. RP 249.

The sliding glass door in Mary's apartment was not secure. RP 254. In fact, on one occasion when Mary locked herself out of her front door the defendant scaled up the building using the balcony of the neighbor below to gain access to Mary's balcony. RP 253-54. After gaining access to Mary's balcony he was able to get into her apartment through the unsecured sliding glass door. RP 253.

Ashley Grant disliked the defendant. RP 110-14. Ashley is Amy's best friend. RP 109. Ashley believed the defendant disliked her based on the fact that he called her a nigger on numerous occasions. RP 112. About a month before this incident Ashley stopped going over to Amy's house because she was pregnant and feared the defendant. RP 113-14. On the evening of Sunday, September 12, 2010 Amy called Ashley and asked her to come spend the night with her because her mother was going to be working and she would be alone. RP 116-17. Ashley agreed to spend the night. RP 116. Amy and Ashley ate food, watched a movie and retired to the living room couches to sleep. RP 117-18. Ashley awoke hearing noises in the house. RP 118. She looked over her shoulder and saw the defendant standing over Amy, saying "What are you going to do now that you're mom's not here? Don't you have anything to say to me, bitch?" RP 119. The defendant then began beating Amy in the face. RP 119. After four or five blows to Amy the defendant turned to Ashley and began hitting her. RP 119-20. After hitting Ashley about five times the defendant ran after Amy, who had fled to the kitchen in search of a phone. RP 120. Ashley grabbed her cell phone and fled the apartment to call 911. RP 120.

According to Amy she awoke to find the defendant standing over her. RP 338. He said something to her that she couldn't recall and then began hitting her. RP 338. After hitting her a few times he began to assault

Ashley. RP 338. Amy fled to the kitchen in an attempt to grab a phone. RP 338. The defendant followed Amy to the kitchen and continued beating her there. RP 338-39. Ashley fled the apartment with her phone while the defendant continued to assault Amy so that she could call 911. RP 120-21. She hid in a bush so as not to be seen. RP 121-22. At the beginning of the 911 call Ashley was so terrified of being found by the defendant that she initially didn't speak or respond to the questions by the dispatcher. RP 121. When she felt sure she would not be detected she began speaking to the dispatcher. RP 121-22. She was extremely upset and clearly identified the defendant as the intruder who had attacked her and Amy. RP 145.

The defendant broke Amy's nose during the assault and her head hurt "severely." RP 223, 341. she had bruising on her face for a month after the assault. RP 353. The bruising was so extensive that Amy actually withdrew from school. RP 353. Amy identified the defendant as her attacker to the emergency room physician who treated her. RP 223.

Ashley was pregnant at the time of the assault. RP 113, 123. The jury, having heard that Ashley's pregnancy was discussed several times in the defendant's presence, concluded that he knew Ashley was pregnant at the time of the assault. RP 124, 126, 350. CP 111.

Scott Blohm and his mother Elizabeth allowed the defendant to stay at their house when he needed to. RP 174-77. The defendant had told

Elizabeth he would be staying at the Blohm house on the weekend of September 11th and 12th but the defendant did not, in fact, stay there. RP 179, 188. The defendant told Elizabeth that the reason he needed to stay there was because Mary would be working that evening and he was not allowed to be at her apartment while Amy was there. RP 188.

The defendant testified that on Saturday evening he and Mary went to a party and came home around midnight. RP 522-23. The next morning he took Mary to work. RP 523. He testified that after he dropped Mary off he went to Elizabeth Blohm's house, a family friend with whom he frequently stayed. RP 524. Ms. Blohm corroborated this. RP 198. After leaving Ms. Blohm's house he testified that he drove back to north Portland. RP 524. He evidently went to Gregory Thomas's house, a person he claimed to be working for at the time removing a tree. RP 516-17, 525. The defendant's testimony on this point is not clear because he testified in the hypothetical:

Uh, I would go over there and at that time, I was working for Greg Thomas. Mr. Thomas would be at work and I would work up until the point that he got home. So—and, he got home 4:30 to 5:30 depending on how late he worked.

RP 525.

Defense counsel asked "And then, you go—where did you go next?" The defendant said:

Where did I go next? I went and—we were sitting there. I was talking with Mr. Thomas and I was pretty sure I knew where a very old friend of mine was—

[at this point the State objected that the defendant was being non-responsive.]

I—after that, I went to look for a friend and I don't know the exact name of a street but it was one block west off of Lombard. It would have been southwest off Lombard. I believe the name of the street is Bryant Street.

...

This is Sunday afternoon. I had talked with Greg for a while so this was probably 6:30.

RP 525-26.

Asked what he did next, the defendant testified that he “found” Carl Kessler and stayed there (although he didn't say where “there” was) for a “good couple of hours with him and his roommates.” RP 526. At some point, the defendant testified, he and Carl left for Vancouver to pick up a computer. RP 526. When asked where he spent the night, the defendant said, “Where did I spend the night? I spent the night at the job site”, which according to him was in Portland. RP 526-27. He couldn't recall the address. RP 527. He testified he returned to Ms. Blohm's house the following morning. Id.

On cross examination, the defendant said that the “job site” was a white house in Portland owned by Greg Thomas. RP 550. When asked if

he stayed in a bedroom in this house he said “No. I was at—no. I was in my car.” RP 550. He testified that he had gotten drunk the night before with Carl. RP 551. After being asked twice how long he was with Carl, the defendant claimed that he had been with Carl between 6:30 and 11:00 or 11:30 that night. RP 551. The defendant claimed that Carl’s house was ten blocks away from the “job site.” RP 551. The defendant agreed that Greg Thomas would have seen him at his house when he woke up in the morning. RP 555.

Regarding how he ran into Carl, the defendant said that it occurred to him out of the blue as he was sitting at Greg Thomas’s house to go find his old friend Carl whom he had not seen in twenty years. RP 552-53. He said that he gathered enough information from Greg Thomas to figure out where Carl lived. RP 553. The defendant then gave a very long winded explanation of how he found Carl’s house, but said it was “very easy to find.” RP 553-52.

Although he claimed he was not at Mary’s apartment on the evening of September 12, he hotly denied that he lacked permission to be there. RP 517, 550. Although he testified that he had been at Greg Thomas’s house (sleeping in his car) at the time of the assault, on rebuttal the State presented a jail phone call between the defendant and Mary in which he told Mary that he had been with a woman named Shannon Wink

at the time of the assault. RP 610-14. He never mentioned being at a "job site." RP 614. The State noted that it was, of course, not privy to any of the information the defendant revealed during his testimony. RP 570. The defendant made no statements to the police. RP 570. There was no evidence about how the defendant departed the scene of the assault (whether on car, bicycle or foot.) Report of Proceedings.

After the State played the jail phone call in rebuttal, the defendant sought to testify in surrebuttal. RP 620. The defendant made an offer of proof for his proposed testimony, in which he did not rebut that he made the statements on the jail phone call. RP 623-27. Rather, he wanted to explain the statements. *Id.* The court denied his motion to offer surrebuttal, noting that the defendant did not seek to rebut Mary's testimony or rebut anything offered on the jail phone call. RP 628-29.

3. Pre-trial motion

Prior to trial, defense counsel objected to the admission of the 911 tape on the ground that it contained hearsay statements. RP 62-66. He argued first, that the entire call was not admissible because no part of it contained excited utterances or present sense impression remarks. *Id.* Alternatively, he argued that some of the statements were in response to questioning (although he didn't identify which ones) and were therefore

inadmissible even if other parts of the call were admissible. Id. He argued that the tape should be redacted to remove the alleged hearsay remarks. Id.

The court ruled that there were some statements made on the tape that were not excited utterances because they were in response to questioning, but clarified that the remaining remarks were, in fact, present sense impression statements. RP 64-66. The court also noted that there was no confrontation clause issue because both Amy Decknadel and Ashley Grant, who can be heard on the 911 call, were going to be testifying at trial. Id. Defense counsel did not object to any part of the 911 tape on the ground that it contained prejudicial allegations about his client. Id.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN NOT REDACTING THE CD OF THE 911 CALL SUA SPONTE, IN THE ABSENCE OF A REQUEST BY THE DEFENDANT TO DO SO.

The defendant complains in this appeal that he was denied a fair trial because the trial court did not redact the CD of the 911 call, even though he did not object to the portion of the 911 call he now complains of. As noted above, the defendant's objection to the 911 call was limited to his complaint that it contained hearsay that did not meet any hearsay exception. His generalized request for redaction, thrown in as an

afterthought (see RP at 66), was for redaction of statements that he felt did not meet any hearsay exception. Nordstrom did not object to the portion of the 911 call he now complains of, and did not give the trial court an opportunity to address this issue at the relevant time--trial. This claim is raised for the first time on appeal.

Because this claim was not raised below, the defendant has not preserved it for appeal. “The general rule in Washington is that a party’s failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a ‘manifest error affecting a constitutional right.’” *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) and *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Robinson* at 305, *McFarland* at 333; *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). “[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources.” *Robinson* at 305.

As explained in *McFarland*, supra RAP 2.5(a)(3) is “not intended to afford criminal defendants a means for obtaining new trials whenever

they can identify some constitutional issue not raised before the trial court.” *McFarland* at 333. In order to obtain review under RAP 2.5, the error must be “manifest,”—i.e. it must be “truly of constitutional magnitude.”” *Id.*; *State v. Scott* at 688. To be deemed manifest constitutional error, a defendant must identify the error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights. *McFarland* at 333.

The policy behind requiring a proper objection to be made at trial was recently addressed by Division One of this Court, albeit in the context of alleged confrontation clause errors. The Court emphasized Evidence Rule 103(a)(1) which states:

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context.

The Court observed: “This rule protects the integrity of judicial proceedings by denying a defendant the opportunity to sit on his rights. bet on the verdict, and then, if the verdict is adverse, gain a retrial by asserting his rights for the first time on appeal.” *State v. O’Cain*, 279 P.3d 926, 933 (2012).

The defendant had several opportunities to object to this portion of the 911 call. He and his counsel listened to the call outside the presence of the jury prior to opening statements. The purpose of that exercise was to have the defendant state any and all objections he had to the recording so that the trial court could rule on them in advance. The only objection he chose to raise was a hearsay objection. He did not raise a prior bad acts objection. This was his decision, made with the benefit of counsel. The recording was played several more times throughout the trial. Again, he could have objected but chose not to. This strongly suggests he was lying in wait to raise this error on appeal, particularly given the overwhelming evidence of his guilt. He should not be heard to complain now about something he specifically chose not to object to below.

Nordstrom does not even discuss RAP 2.5 in his brief nor appear to recognize that he bears the burden of demonstrating to this Court why his complaint should be entertained for the first time on appeal. Because he has failed to meet a burden that is squarely placed upon him, this Court should decline to address this assignment of error.

II. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT, AND IF ANY ERROR OCCURRED IT WAS HARMLESS.

The defendant complains that the prosecutor committed misconduct during closing argument by referencing his failure to call the witnesses he mentioned in his testimony, witnesses which would have corroborated his testimony. He claims that the missing witness doctrine was not satisfied here and that the error was not harmless.

a. *Standard of Review*

The defendant objected to each of the remarks he complains of in this appeal. To prevail on a claim of prosecutorial misconduct, the Supreme Court has recently reiterated:

Once a defendant establishes that a prosecutor's statements are improper, we determine whether the defendant was prejudiced under one of two standards of review. If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict.

State v. Emery, 174 Wn.2d 741, 760, 279 P.3d 653 (2012).

b. *Missing Witness Doctrine was satisfied*

Under the missing witness doctrine, where a party fails to call a witness the party would logically be expected to call as part of his case and the witness is within the peculiar control of the party, the jury may draw an inference that the testimony would be adverse to that party. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991); *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The testimony must concern a

matter of importance as opposed to a trivial matter, it must not be merely cumulative, the witness's absence must not be otherwise explained, the witness must not be incompetent or his testimony otherwise privileged, and the testimony must not infringe upon a defendant's constitutional rights. *Blair* at 489-91; *Cheatam* at 653. Additionally, the inference is not available where the witness's testimony would necessarily be incriminating. *State v. Gregory*, 158 Wn.2d 759, 845-46, 147 P.3d 1201 (2006).

Generally, the inference is not available where the witness is equally available to the parties. *Blair* at 490; *State v. Reed*, 168 Wn.App. 553, 572, 278 P.3d 203 (2012). A witness is not equally available to the other party merely because the witness is subject to the subpoena power, however. *Reed* at 572, citing *Blair* at 490. Further, being peculiarly available to a party does not mean that if the other party *could* call the witness, the doctrine is inapplicable." *Cheatam* at 653 (emphasis added).

Rather,

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 at 490; quoting *State v. Davis*, 73 Wn.2d 271, 277, 438 P.2d 185 (1968).

When the doctrine is satisfied there is no misconduct where the prosecutor argues the inference to the jury. *Cheatam* at 653. If error occurs, it is subject to harmless error analysis. *Gregory* at 846. Finally, the inference is not unavailable “simply because credibility is a central issue.” *Blair* 492.

In this case, each of the remarks complained of by Nordstrom were proper. The first remark, reprinted in full, was:

What he testified to is that he went out somewhere in Portland. Ran into some random friend and that it was his friend. This was one of his friends. They go back—they go so far back, this person that he was with. But, you didn’t hear from him today. You didn’t hear from Shannon Wink either, the person that he told Mary Ann on the phone that he was with. You know, his friends.

RP 690. The defendant objected at this point, arguing that the State’s argument shifted the burden of proof. The court orally re-instructed the jury that the defendant bears no burden of proof and apparently overruled the objection. RP 690.

The second remark was:

This work site he was at. It was at somebody’s house. Somebody—somebody—Gary would have woken up and found this man at his house. But, you didn’t hear from Gary. Nor did you hear from Carl.

The defendant again objected “about burden of proof.” RP 749. The judge reiterated his burden of proof instruction. RP 749. The State immediately followed this up by saying:

The State absolutely has the burden of proof in this case. But, when you present a defense and the person that you have—if the witnesses that you are using that you decide to raise in your defense are in your control then it—

Defense counsel interrupted the prosecutor in mid-sentence and said “Same objection. Lack of control. I don’t know we have established control over these people.” RP 749. The court again gave a cautionary instruction to the jury that they are to follow the evidence and decide the credibility of the witnesses, and they are to follow the instructions and apply the instructions to the evidence. RP 749.

These remarks were proper. From the moment the defendant began his testimony he over-explained even minor details. His testimony was over the top, to put it charitably. He offered a convoluted, modified alibi defense in which he pointed to two individuals with whom he had been on September 12th and would have been expected to corroborate his story if, in fact, it had been true. He testified that he was with Greg Thomas, and then he was with Carl Kessler until about 11:30 p.m., then he was back at Greg Thomas’s house. Oddly, he didn’t stay with Carl Kessler who he claimed lived only ten blocks away from his “job site” and with whom he

had been drinking all night. Even more oddly he didn't sleep inside Greg Thomas's house, a man with whom he had been socializing only hours earlier. Last, he told Mary in a recorded phone call that he had been with a woman named Shannon Wink and never mentioned Greg Thomas or Carl Kessler. It was entirely proper for the prosecutor to argue the missing witness inference in light of the defendant's failure to call these logical witnesses.

The defendant's assignment of error centers entirely on only one prong of the missing witness doctrine—that the three witnesses at issue were equally available to the State. However, the defendant mischaracterizes the rule regarding availability of a witness. As noted above, a witness is not equally available to the State simply because the State is aware of a witness's name or possesses subpoena power.

“Availability ‘is to be determined based upon the facts and circumstances of that witness’s ‘relationship to the parties, not merely physical presence or accessibility.’” *Cheatam* at 654, quoting Thomas E. Zehnle, 13 CRIM. JUST. 5, 6 (1998) (quoting *United States v. Torres*, 845 F.2d 1165, 1169 (2d Cir. 1998)). Here, the names of Greg Thomas and Carl Kessler were known only to the defendant until he took the witness stand and revealed their existence and role in the case. The defendant apparently argues that the mere existence of these individuals makes them equally available to

the parties as a matter of law. The defendant's argument fails. Greg Thomas and Carl Kessler were precisely the type of witnesses who have "such a community of interest" with the defendant, and who the defendant had "so superior an opportunity for knowledge" of the witnesses that it would have made it "reasonably probable that the witness would have been called to testify for [the defendant] except for the fact that [the] testimony would have been damaging. *Blair* at 490. Even if the State had known the names Greg Thomas and Carl Kessler prior to the defendant's testimony, that fact would still not render these witnesses "equally available" to the State.

The defendant's claim as to the equal availability of Shannon Wink fails for the same reason. The defendant baldly asserts that "the state knew exactly who 'Shannon' was and could have called this witness had the state chosen to do so." A review of the record does not support this assertion, which is made without citation to the record. There is no evidence the State "knew exactly who Shannon was" prior to trial. The discussion regarding the jail phone call did not involve when the call was made or when the State became aware of it. The record is simply silent on this point. Even so, the mere knowledge of Shannon Wink's existence does not render her equally available to the State as a matter of law as the defendant asserts in his brief.

The State properly commented on the defendant's failure to call witnesses that he referenced in his testimony and whom would logically be able to corroborate his testimony on the most relevant question before the jury—where he was the night of September 12th, 2010. Moreover, even if error occurred Mr. Nordstrom fails to show he suffered prejudice, as he must in order to obtain relief. See *Emery*, supra, at 760-61.

Here, the evidence against Nordstrom was overwhelming and it is unlikely it affected the jury's verdict. There was no question that Ashley and Amy were assaulted by an intruder who was in the apartment unlawfully; there was no question that Ashley was the victim of an assault in the fourth degree and that Amy was the victim of an assault in the second degree. The only point of contention was whether Nordstrom had been the assaultive intruder. On that point, the evidence overwhelmingly demonstrated that it was the defendant who committed these crimes. Ashley and Amy both identified Nordstrom as the person who assaulted them. This was not an eyewitness identification of a stranger; Nordstrom was well known to both girls. The identification occurred immediately after the commission of the crime. In fact, it was arguably contemporaneous as Ashley initiated the call to 911 before Nordstrom had even left the apartment. Nordstrom bore extreme animosity toward both of the victims and tensions had been escalating in the days prior to the crime.

Last, Nordstrom's testimony was not credible. It vacillated between being evasive and overly-detailed. While he testified that he had been sleeping in a car at Greg Thomas's house at the time of the assault, he told Mary in a phone call from the jail that he was with Shannon Wink. The evidence of Nordstrom's guilt was overwhelming.

The deputy prosecutor did not commit misconduct. If this Court finds otherwise, any error was harmless beyond a reasonable doubt.

III. THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING THE DEFENDANT'S MOTION TO PRESENT SURREBUTTAL.

The defendant claims that the trial court denied him his constitutional right to present a defense by denying his motion to present surrebuttal. Although the defendant couches this as a constitutional claim, it is not. The decision whether to admit evidence lies within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of that discretion. *State v. Bourgeois*, 133 Wash. 2d 389, 399, 945 P.2d 1120 (1997); *State v. Crenshaw*, 98 Wash. 2d 789, 806, 659 P.2d 488 (1983). An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome. *State v. Stenson*, 132 Wash. 2d 668, 709, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d

323 (1998); *State v. Halstien*, 122 Wash. 2d 109, 127, 857 P.2d 270 (1993).

Regarding the decision whether to allow surrebuttal, Division Two of this Court observed:

Testimony which is merely cumulative or confirmatory, or which is merely a contradiction by a party who has already so testified does not justify surrebuttal as of right. Moreover, a defendant on surrebuttal may not introduce evidence, as of right, on an essential point on which he failed to give evidence in his case in chief.

State v. DuPont, 14 Wn. App. 22, 24, 538 P.2d 823 (1975).

State v. Jamison, 25 Wn.App. 68, 74, 604 P.2d 1017 (1979). *State v.*

Harris, 12 Wn.App. 381, 529 P.2d 1138 (1974), also decided by this

Court, is analogous to this case. In *Harris*, the defendant was charged with second degree murder of a woman she got into an argument with. Several months prior to the murder, the defendant had argued with the victim's sister. The defendant testified, in her case-in-chief, that the argument with the victim occurred because the victim was angry about the argument several months earlier between her sister and the defendant. On rebuttal, the State offered two witnesses whose account of the earlier fight between the defendant and the victim's sister differed from the account offered by the defendant in her case-in-chief. The defendant sought to testify in

surrebuttal about the fight with the victim's sister. The trial court denied the defendant's offer of surrebuttal. This Court affirmed the trial court:

Counsel made no specific offer of proof but it is apparent both from the record and from the brief that the defendant was seeking the right to present the *details* of the January event to the same extent that the prosecution witnesses had presented them in rebuttal. She had that right to present details, insofar as those details had a reasonable relationship to her state of mind in March, in her case-in-chief. She did not have the same right on surrebuttal.

Simply stated, the function of surrebuttal is to rebut the rebuttal. For example, as a matter of right, the defendant in a criminal matter may impeach the credibility of the State's rebuttal witnesses or rehabilitate his own witnesses whose credibility has been attacked by the prosecution's rebuttal evidence. It is not the function of surrebuttal to provide the defendant an opportunity to present evidence cumulative or confirmatory of that which has been, or ought to have been, presented in his case-in-chief. Cumulative or confirmatory evidence is admissible on surrebuttal solely at the discretion of the trial court.

Harris at 385-86, citing *State v. Stambach*, 76 Wn.2d 298, 456 P.2d 362 (1969).

Here, the trial court did not abuse its discretion in denying the defendant's proffered surrebuttal. Like the defendant in *Jamison*, supra, the defendant here sought to give testimony that was merely a contradiction by a party who had already testified (him). His opportunity to explain why he told Mary Decknadel a different story about where he

was the night of September 12th than the one he told the jury was in his case-in-chief, not surrebuttal. Nordstrom's claim fails.

IV. THE TRIAL COURT DID NOT IMPOSE A SENTENCE THAT WAS CLEARLY EXCESSIVE.

Here, the defendant challenges his exceptional sentence only on the ground that it is clearly excessive. An exceptional sentence is reviewed for abuse of discretion, and the appellate court will reverse only if it finds the length of the sentence clearly excessive. *State v. Ritchie*, 126 Wn.2d 388, 392-93, 894 P.2d 1308 (1995). "A sentence is clearly excessive if it is based on untenable grounds or untenable reasons or if it is an action no reasonable judge would have taken." *State v. Sao*, 156 Wn.App. 67, 80, 230 P.3d 277 (2010); *State v. Branch*, 129 Wn.2d 635, 649-50, 919 P.2d 1228 (1996). "[A] trial court is under no obligation to 'articulate reasons for the length of an exceptional sentence.'" *Sao* at 80, citing *Ritchie*, supra, at 392.

Nordstrom cites no comparable authority for his claim that the 40 month sentence imposed here was clearly excessive. He merely points to subjective points on which he disagrees with the trial judge. He believes that Ashley's pregnancy was essentially no big deal: that the fetus wasn't actually harmed so the trial court should have ignored the jury's finding and declined to impose any additional time. He suggests that because

Ashley wasn't the "initial" target of this outrageous home invasion and brutal assault, he should suffer no additional consequence from the jury's finding. Last, he suggests that the trial court should not have imposed any additional time based on the jury's finding because he had already "been punished" for the burglary. He cites no authority for this specious argument, which entirely ignores the exceptional sentencing scheme crafted by the legislature and codified in the SRA.

The sentence was not clearly excessive and Nordstrom offers no credible argument that it was.

V. THE TRIAL COURT DID NOT ERR IN INCLUDING THE DEFENDANT'S PRIOR OREGON CONVICTION FOR ASSAULT IN THE SECOND DEGREE IN HIS OFFENDER SCORE.

The defendant assigns error to the trial court including his prior conviction for assault in the second degree in his offender score, arguing that assault in the second degree in Oregon is not comparable to assault in the second degree in Washington because Oregon's statute does not require the prosecution to prove intent. The State agreed that assault in the second degree in Oregon is not comparable to assault in the second degree in Washington. So did the trial court, which is why the trial court identified assault in the third degree as the Washington felony that was

comparable to the defendant's Oregon assault second degree conviction.

The State argued:

And, because they didn't lay out the actual elements, so we don't know which prong of assault in the second degree the Defendant pled to in the State of Oregon, we would have to give it the – go to the lowest common denominator there. And that would put us as a crime comparable to an assault in the third degree...[W]e have to use the reckless prong that is allowed in our assault in the third degree statute. But still a felony point in Washington.

RP 804. The trial court agreed, stating “The assault two, which in fact is an assault three, as Counsel has stated. So, I think you end with one point on that.” RP 807. Nordstrom's counsel immediately moved on to another crime in the offender score and did not disagree with the trial court's ruling with regard to the assault in the second degree out of Oregon. RP 807.

Under the Sentencing Reform Act (SRA), the sentencing court calculates the defendant's offender score based on his criminal history in order to determine the standard sentencing range. RCW 9.94A.525; *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). This Court reviews a challenge to the sentencing court's offender score calculation de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). Where a prior out-of-state conviction is used to increase an offender score, the State must

prove the conviction would be a felony under Washington law. RCW 9.94A.525(3); *Ford*, 137 Wn.2d at 480.

In Oregon, “a person commits the crime of assault in the second degree if the person ... [i]ntentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon.” See ORS 163.175(1)(b). In Washington, however, the requisite mental state for committing an assault in the second degree is intentionally, not merely knowingly. See RCW 9A.36.021(1)(c). Under RCW 9A.36.031, however, a person commits the crime of assault in the third degree when, under circumstances not amounting to assault in the first or second degree, he or she, with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm, or, with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

In his brief, Nordstrom’s entire argument is based on the undisputed premise that assault in the second degree in Oregon, unless the evidence demonstrates that the mental state the defendant was convicted of having was intent rather than knowledge, is not comparable to assault second degree in Washington. He completely misreads the record in making his argument. He does not argue that assault in the second degree

in Oregon, under the knowledge prong, is not comparable to assault in the third degree in Washington under the lower mental state of criminal negligence. To the extent that this entire assignment of error is based on Nordstrom's misreading of the record, he has not adequately briefed this issue. This Court should not consider assertions which are not supported by argument and citation to authority. *State v. Corbett*, 158 Wn.App. 576, 597, 242 P.3d 52 (2010) ("We do not review assigned errors where arguments for them are not adequately developed in the brief.")

D. CONCLUSION

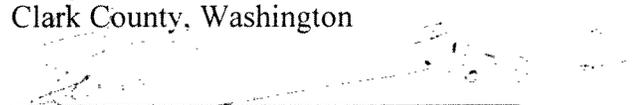
The defendant's conviction and sentence should be affirmed in all respects.

DATED this 13 day of September, 2012.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR
September 10, 2012 - 3:01 PM

Transmittal Letter

Document Uploaded: 425653-Respondent's Brief.PDF

Case Name: State v. Kenneth Nordstrom

Court of Appeals Case Number: 42565-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Comments:

No Comments were entered.

Sender Name: Jennifer M Casey - Email: jennifer.casey@clark.wa.gov

A copy of this document has been emailed to the following addresses:
jahayslaw@comcast.net