

No. 47559-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

KENNETH SEAN McMILLIAN, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni. A. Sheldon, Judge

No. 13-1-00492-5

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. McMillian contends that the trial court erred by compelling him to provide privileged information about his surprise alibi testimony and that the court erred by allowing the State an opportunity to investigate McMillian's surprise testimony. But the record shows that beyond the omnibus disclosure of an undescribed alibi defense, McMillian was not compelled to give any disclosure regarding his alibi defense. And what McMillian describes as a continuance was actually a mere overnight recess, and the trial court did not diminish McMillian's right to a *fair* trial when it allowed the State to address McMillian's surprise alibi testimony with rebuttal evidence gathered during the recess.
2. Without any pre-testimony disclosure of any detail of his alibi defense, McMillian voluntarily chose to testify at trial and provided testimony that he was staying for one week at the home of his friend Frankie Marino when the underlying burglary occurred in this case. However, McMillian did not call Marino as a witness to corroborate his alibi defense, and the only reason he gave for failing call him was that he believed that there was a warrant for Marino's arrest. Because McMillian's explanation for not calling Marino was not a satisfactory explanation as contemplated by the missing witness rule, the trial court did not err by giving a missing witness instruction on the facts in this case.
3. McMillian describes numerous examples in narrative fashion of what he sees as prosecutorial misconduct. The State asks this court to find that none of the allegations of misconduct alleged by McMillian has merit and particularly that any of what is alleged is sufficient for this Court to find reversible error.
4. McMillian contends that the evidence is insufficient to sustain any of the jury's guilty verdicts for burglary in the second degree, possession of stolen property in the second degree, and bribing a witness. McMillian claims that the

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evidence is insufficient based on his contention that there was no nexus linking him to his black Dodge Durango that contained some of the things that were stolen in the burglary. The State counters that sufficient evidence exists to sustain each of the jury's verdicts in this case.

5. McMillian contends that this Court should overrule *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992), and hold that error occurred in this case because when police looked into the windows of his unattended Durango and saw some of the items that were stolen in the underlying burglary in this case, the police then impounded the Durango while they obtained a search warrant to enter the Durango and seize the stolen items and search for further evidence of the burglary. McMillian contends that police should obtain a warrant before impoundment. State counters that McMillian has not shown that the existing Huff rules is both incorrect and harmful, and therefore this Court should not overrule Huff.

B. FACTS AND STATEMENT OF THE CASE

On October 3, 2013, at approximately 10:30 in the morning, CPL Reed of the Mason County Sheriff's Office responded to the scene of a reported burglary. RP 56, 156. When he investigated, he found boot prints that he attributed the burglar. RP 58. CPL Reed placed his own boots next to the boot prints, and by doing this he surmised that the burglar's boot size was probably an 11, since the prints were slightly larger than his own boots, which were size 10 ½. RP 58, 143.

CPL Reed recognized the boot prints as Vibram sole boots. RP 93.

The boot prints had no water damage; so, he extrapolated that the prints

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were fresh, since they were made after it had recently stopped raining. RP 93.

While further investigating, CPL Reed found a paper receipt nearby that had an address on it. RP 59. He went to the address that was printed on the receipt, 3171 Agate Road, but he somehow ended up instead at 3171 Agate Road, which was the address of Miguel Silva. RP 59-60, 90, 143. Silva's house was about 2 ½ miles from the burglary scene. RP 299.

When CPL Reed arrived at Silva's house, there was a black Durango parked in the driveway. RP 60. Two civilians testified that they had seen a black Durango near the burglary scene. RP 72, 79. CPL Reed approached the house to knock on the door, and as he passed the Durango, he saw what he recognized as stolen items from the burglary in the Durango. RP 60-61. He knocked on the door to the house, but no one answered. RP 61. He then sealed the Durango with evidence tape and had it towed to the Sheriff Department's impound yard, where he locked it in the garage. RP 61. He then applied for a search warrant, received it, and served it the next day. RP 62. The burglary victim confirmed that some of the items seized from the Durango were his things that were stolen in the burglary. RP 68, 73-75, 126, 145, 148-49.

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When the burglary occurred, Miguel Silva had a roommate named Misty Byrd who lived with him in the house where CPL Reed first found the Durango with the stolen goods. CP 200. Mr. Silva came home on October 3 and saw the police as they were leaving with the Durango. CP 201-02, 204. Silva did not know who was associated with the Durango, but he had seen McMillian at his house when McMillian was visiting Misty Byrd, but he was unclear about whether that was before or after October 3rd. RP 202-03, 216-19.

None of the State's witnesses saw anything to indicate that the Durango had been stolen or that anyone had forced entry into it. RP 127-30, 154, 162. But on October 8, five days after it was seized by CPL Reed, McMillian reported the Durango stolen. RP 133. Thirteen days later, on October 21, McMillian went to the impound lot and recovered his Durango. RP 162-63. Sometime after recovering the vehicle from impound, McMillian obtained the services of a mechanic who said that someone had tampered with the ignition to McMillian's Durango. RP 281-83. There was no testimony about when this might have occurred.

While the case was pending trial, Miguel Silva showed up at the courthouse in response to a subpoena. RP 204. McMillian saw him and inquired about why he was there. RP 204. McMillian offered Silva

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\$500.00 if Silva would leave the court and not testify. RP 204. Silva ignored him and then reported the incident to the Sheriff's Office. RP 204-05.

The State charged McMillian with one count each of burglary in the second degree, possession of stolen property in the second degree, and bribing a witness. CP 157-58. After receiving the evidence during trial on the merits, the jury returned guilty verdicts for all three charges. CP 103-05.

C. ARGUMENT

1. McMillian contends that the trial court erred by compelling him to provide privileged information about his surprise alibi testimony and that the court erred by allowing the State an opportunity to investigate McMillian's surprise testimony. But the record shows that beyond the omnibus disclosure of an undescribed alibi defense, McMillian was not compelled to give any disclosure regarding his alibi defense. And what McMillian describes as a continuance was actually a mere overnight recess, and the trial court did not diminish McMillian's right to a *fair* trial when it allowed the State to address McMillian's surprise alibi testimony with rebuttal evidence gathered during the recess.

The trial court erred by ordering McMillian to provide the State information known only to McMillian (privileged information) and then giving the State a continuance during trial to investigate this privileged information, and further by allowing the State to discredit McMillian's testimony on this issue through hearsay for which no proper foundation was laid, and by denying McMillian an opportunity to rebut the discrediting information

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Here, McMillian contends that the trial court erred when, “[d]uring trial on the State’s motion, the trial court ordered the defendant to disclose all of the facts underlying his alibi defense.” Br. of Appellant at 6, citing RP 406-09. But McMillian’s citation to the record does not support his contention, and contrary to his contention, the trial court made no such order. Instead, McMillian’s citation refers to the trial court’s discussion of McMillian’s CrR 8.3 motion to dismiss the State’s case, which was based on McMillian’s contention that the State did something wrong when it asked the trial court for an opportunity to investigate McMillian’s surprise alibi. RP 388-389, 406-409.

The prosecutor asked the trial court judge to order the defendant to provide information about his alibi defense, after the defendant first raised it during trial, but the trial court issued no such order. RP 387. Instead, the trial court pointed out that “the issue is that they’re not calling this person as a witness... And so if they’re not calling a person as a witness, then I think we need to look at the missing witness instruction rather than anything further...” RP 390.

Immediately following the discussion cited above, the trial court then recessed at 3:34 p.m. RP 391. The court then reconvened at 10:46 a.m. the following morning after the trial court judge completed an

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assignment as a visiting judge in a neighboring county. RP 391. This break in the trial is the *continuance* that is at issue here. Sometime during that recess, McMillian's trial counsel filed his CrR 8.3 motion to dismiss, because he saw some misconduct in the fact that the prosecutor had an opportunity during the overnight recess to look into the facts underlying McMillian's alibi defense. RP 392; CP 138-46.

When trial resumed after the recess, while McMillian's trial counsel argued his understanding of whether he was required to disclose alibi information, the court interjected and inquired of McMillian's trial counsel whether the point of his argument was on the topic of his CrR 8.3 motion to dismiss. RP 393. Defense counsel answered, "Well, so far I don't see any prejudice. I don't know if [the prosecutor] has come up with any additional information he intends to use as a result of that continuance." RP 393. Later, counsel attempted to explain his motion, as follows:

The motion to dismiss per 8.3(b) due to the improper request for a continuance. But the prejudice prong, I'm just not sure of. Prejudice is not always obvious right up front. It kind of depends, like I said, if he's come up with anything. Although on the face of it there is prejudice to Mr. McMillian's right to remain silent. ...

RP 394.

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Despite all the discussion about whether the court could compel McMillian to disclose information about his alibi defense, beyond the mere fact of the claim of an alibi, the court in this case never required him to do so and never enforced any court rule or omnibus order requiring him to do so. RP 385-406. Instead, other than defense counsel's voluntary utterance that Frankie's name was actually "Francis," the only disclosure about alibi information occurred when McMillian voluntarily took the stand and testified that he was at Frankie Marino's house when the burglary in this case occurred. RP 349-50, 386.

McMillian contends that error occurred because the court granted a continuance that allowed the State to check on the existence of Frankie Marino and to find out whether, in fact, there was a warrant for his arrest. Br. of Appellant at 7. McMillian contends that further error occurred because the State found out that there were no arrest warrants for a Frankie or Francis Marino in the Tacoma area. *Id.* Despite McMillian's own, uncorroborated hearsay testimony that Frankie Marino had an arrest warrant, McMillian contends that further error occurred because the trial court allowed CPL Reed to testify that he could not find an arrest warrant for Marino. Br. of Appellant at 7-8.

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The Washington Rules of Evidence provide an applicable hearsay exception, as follows:

Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

ER 803(10). Hence, the trial court did not err on this point.

Additionally, contrary to McMillian's assertions, he had ample opportunity to rebut CPL Reed's testimony. For one, McMillian could have disclosed Marino pretrial and asked for a continuance until Marino could be apprehended or otherwise compelled to testify. Or, McMillian could have asked for extra time to locate the warrant and corroborate its existence.

In his brief to this Court, when addressing the overnight recess during which the State searched for Frankie "Francis" Marino and verified that he had no known warrant for his arrest, McMillian makes the following bold pronouncement: "This continuance granted the State allowed the State to investigate the defendant's own testimony, which is privileged, in order to profit from it; this the Constitution does not allow."

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Br. of Appellant at 11. But McMillian provides no citation to support this assertion. Instead, McMillian delves into a discussion of *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886), for its references to the “forcible and compulsory extortion of a man’s own testimony ... to be used as evidence to convict him of crime...” Br. of Appellant at 11, quoting *Boyd* at 630. But there was nothing forcible or compulsory in the instant case; nor was there any extortion. Instead, there was only: 1) McMillian’s voluntary, surprise testimony that he was at Frankie Marino’s house when the burglary occurred; and, 2) a missing witness instruction because McMillian did not satisfactorily explain why he did call Marino as a witness.

In summary, McMillian contends that the trial court’s decision to recess the trial at 3:34 p.m. and to resume again at 10:44 the next day denied him his right to a *fair* trial, because the “continuance” allowed the State an opportunity to prepare for his surprise alibi defense and testimony. Br. of Appellant 6-14. But the trial court never required or compelled McMillian to disclose anything about his alibi defense outside of his trial testimony. Nevertheless, the language of *State v. Nelson*, 14 Wn. App. 658, 662-64, 545 P.2d 36, 38-39 (1975), should be applicable here.

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The *Nelson* court quoted the United States Supreme Court for its reasoning, as follows:

The adversary system of trial is hardly an end in itself; It is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by *insuring [b]oth the defendant and the State ample opportunity to investigate* certain facts crucial to the determination of guilt or innocence.

Nelson at 663 (emphasis added), quoting *Williams v. Florida*, 399 U.S. 78, 82, 90 S. Ct. 1893, 1896, 26 L. Ed. 2d 446 (1970). *Williams v. Florida* further reasoned that:

Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.

Williams v. Florida, 399 U.S. 78, 85, 90 S. Ct. 1893, 1898, 26 L. Ed. 2d 446 (1970). The *Nelson* court cited the above language in support of the Court's proposition that:

[W]ithout pretrial disclosure the State might well obtain a delay or continuance if truly surprised by defense testimony and that such relief would not contravene either Fifth or Fourteenth Amendment guaranties; that pretrial disclosure would in large measure avoid the necessity of a disrupted trial without offending a criminal defendant's basic rights.

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Nelson at 664. Hence, although the trial court in the instant case did not compel any kind of disclosure from McMillian, and thus the holdings of *Nelson* and *Williams v. Florida* would otherwise seem inapplicable to the instant case, both cases stand for the proposition that the trial court in the instant case did not err by recessing overnight and allowing the State to prepare a response to McMillian's surprise testimony regarding Frankie Marino. *Id.*

2. Without any pre-testimony disclosure of any detail of his alibi defense, McMillian voluntarily chose to testify at trial and provided testimony that he was staying for one week at the home of his friend Frankie Marino when the underlying burglary occurred in this case. However, McMillian did not call Marino as a witness to corroborate his alibi defense, and the only reason he gave for failing call him was that he believed that there was a warrant for Marino's arrest. Because McMillian's explanation for not calling Marino was not a satisfactory explanation as contemplated by the missing witness rule, the trial court did not err by giving a missing witness instruction on the facts in this case.

The first indication that McMillian was claiming as an alibi defense that he staying at the house of friend named "Frankie" in Tacoma when the burglar occurred in this case was after the State had rested and Amber Miller was testifying for the defense. RP 339. McMillian himself then testified that "Frankie" came to Ms. Miller's house, picked up McMillian, and then took him to Tacoma. RP 349. McMillian later

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testified that Frankie's last name was "Marino." RP 350. McMillian testified that Frankie Marino would not be testifying because he had a warrant for his arrest. RP 350. The prosecutor did not object to McMillian's unfounded claim that Frankie Marino had a warrant, but McMillian did not attempt to explain the context of the warrant, how he knew it to exist, or whether he would know whether it still existed at the time of trial.

At the close of evidence, the trial court provided the jury with a missing witness instruction. RP 114 (Jury Instruction No. 6). McMillian contends that the instruction was improper because he and one of his witnesses, Amber Miller, both had convictions for theft, and when the prosecutor argued to the jury concerning the weight of their testimony he referred each of them individually as a "convicted thief." Br. of Appellant at 14-21; RP 508. But the prosecutor's comment was limited to a single, fleeting utterance in regards to each witness, and McMillian did not object. Perhaps it was unwise of the prosecutor to refer to either witness as a "convicted thief" based on their convictions for theft, but if any error might have resulted from the prosecutor's choice of words, the error could have been easily cured with an instruction from the court had McMillian objected.

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The missing witness doctrine permits the State to “point out the absence of a ‘natural witness’ when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable.” *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). Because the doctrine subjects the defendant's theory of the case to the same scrutiny as the State's theory, the State is allowed to argue and the jury can infer the missing witness' testimony would have been unfavorable to the defendant. *Id.*

The missing witness doctrine applies only if four elements are met: (1) the missing witness's testimony must be material and not cumulative; (2) the missing witness must be “particularly under the control of the defendant rather than being equally available to both parties”; (3) the witness's absence must not be satisfactorily explained; and, (4) application of the doctrine must not shift the burden of proof. *Montgomery* at 598-99. The facts of the instant case show that items (1), (2), and (4) are clearly satisfied, but item (3) requires more inquiry.

Here, McMillian testified that Frankie Marino would not be testifying “[be]cause he has a warrant for his arrest.” RP 350. But item three states that “the witness's absence must not be *satisfactorily*

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explained[.]” Thus, the qualifying term “satisfactorily” must have some meaning that is important to the qualifying condition. Here, McMillian’s explanation was not satisfactory. He did not explain his basis of knowledge; nor did he explain how a warrant for Frankie Marino’s arrest would somehow prevent McMillian from nevertheless issuing a subpoena and, if necessary, obtaining a material witness warrant. Still more, McMillian testified that he knew where to find Frankie Marino and knew exactly where he lived. RP 381-82. So, there was no explanation for why he withheld the fact of Marino’s existence until during the trial, and there was no explanation for why McMillian didn’t even try to compel Marino’s appearance at trial.

The State contends that this case presents an example of when the missing witness instruction is most appropriate. *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008); *State v. Green*, 2 Wn. App. 57, 69-70, 466 P.2d 193 (1970).

3. McMillian describes numerous examples in narrative fashion of what he sees as prosecutorial misconduct. The State asks this court to find that none of the allegations of misconduct alleged by McMillian has merit and particularly that any of what is alleged is sufficient for this Court to find reversible error.

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Here, McMillian presents a number of allegations of prosecutorial misconduct, the first of which is his contention that the prosecutor committed misconduct by misstating the evidence during closing argument. Br. of Appellant at 21. McMillian avers that the prosecutor muddled the facts when speaking of the shoe size of footprints found at the crime scene. *Id.* Review of the verbatim report shows that about three months prior to the burglary, CPL Reed saw McMillian wearing boots that “were similar in size” to CPL Reed’s own boots. RP 121. Deputy Reed had earlier testified that his own boots were a size 10 ½. RP 21. Thus, when the prosecutor argued that CPL Reed had seen McMillian wearing size 10 boots, the prosecutor misspoke. RP 482.

But McMillian cleared up this mistake during his own closing argument, where he clarified the facts pertaining to the boot size. RP 485-86. Still more, the trial court judge instructed the jury, in part, as follows:

The lawyers’ remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 108 (Jury Instruction No. 1, para. 7). “[T]he jury is presumed to follow the instruction that counsel’s arguments are not evidence.” *State v.*

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Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (citations omitted). The State contends that McMillian's ability to point out the prosecutor's misstatement during McMillian's own closing argument, together with the presumption that the jury follows the court's instructions, leads to a finding that McMillian has failed to show any prejudice and that, therefore, this error was harmless. *Id.*

McMillian next presents a number of examples of the prosecutor's arguments during closing argument and avers that these arguments constitute misconduct. Br. of Appellant at 22-23. But again, "the jury is presumed to follow the instruction that counsel's arguments are not evidence." *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (citations omitted). Here, the prosecutor merely argued against contested inferences from the evidence and the credibility of the witnesses; thus, here, no misconduct occurred. "In closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses." *State v. Thorgeron*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011) (citations omitted).

McMillian next contends that the prosecutor cross-examined two of McMillian's witnesses about their relationship with defense counsel

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and that by doing so, the prosecutor “strongly impl[ied] that they were lying because of that relationship.” Br. of Appellant at 23. Additionally, McMillian contends that the prosecutor “implied that [defense counsel] was suborning perjury by putting on witnesses to lie.” *Id.* However, a review of McMillian’s supporting citations to the record does not support his contentions. *Id.* at 23, citing RP 287, 308. RP 287 reveals only that in regards to witness Baker the prosecutor asked whether he was on a first name basis with defense counsel and whether he worked regularly for him. RP 308 reveals only that in and in regards to witness Gilbertson, the prosecutor asked questions that elicited that Gilbertson does investigations for defense attorneys and that he has worked for McMillian’s counsel many times.

McMillian next contends that the prosecutor committed misconduct because during cross examination he questioned one of McMillian’s witnesses, Amber Miller, about an interview that he and CPL Reed had with her prior to her testimony. Br. of Appellant at 24. McMillian specifically alleges error related to the following two specific questions by the prosecutor: 1) “Do you remember telling the detective and myself on Friday that you were aware of who his roommate was?” And, 2) “And do you remember telling the detective – sorry – Corporal

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Reed and myself, formerly detective, that you don't remember exactly when the defendant left?" Br. of Appellant at 24, citing RP 336, 338.

"[A] prosecutor's impeachment of witnesses by referring to extrinsic evidence never introduced may rise to a violation of the right to confrontation." *State v. Lopez*, 95 Wn. App. 842, 855, 980 P.2d 224 (1999). "Deciding if the questions are inappropriate requires examining whether the focus of the questioning is to impart evidence within the prosecutor's personal knowledge without the prosecutor formally testifying as a witness." *Id.* "A defendant claiming prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial." *State v. Miles*, 139 Wn. App. 879, 885, 162 P.3d 1169 (2007). Such "[e]rror is harmless unless the improper cross-examination was sufficient to affect the outcome of the trial." *Lopez* at 855-56.

Here, CPL Reed was called to testify twice more after the prosecutor posed the questions quoted above: once by the defense, at RP 412, and once by the State, at RP 415. Neither party asked CPL Reed about the interview with Ms. Miller, but McMillian clearly had the opportunity to confront this witness had he chose to do so. *Id.*

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In hindsight, it is clearly bad practice for the prosecutor to risk implying that he has personal knowledge of the answer when asking a question on cross-examination, but the questions at issue here were of little importance to the total case and the totality of evidence offered at trial. Here, in answer to the first question (“Do you remember telling the detective and myself on Friday that you were aware of who his roommate was?”), Ms. Miller answered, “At the time, Misty Byrd, yes.” RP 336. Thus, the prosecutor’s personal knowledge was unimportant, and there was no need to offer extrinsic evidence to prove the statement. And the same can be said of other question (“And do you remember telling the detective – sorry – Corporal Reed and myself, formerly detective, that you don’t remember exactly when the defendant left?”), because as soon as the prosecutor asked the question, Ms. Miller clarified, by stating, “I don’t remember exactly when he left, no.” RP 338.

Thus, any error that was inherent in the form of the prosecutor’s statement was harmless because it did not affect the jury’s verdict. *State v. Lopez*, 95 Wn. App. 842, 855-56, 980 P.2d 224 (1999).

4. McMillian contends that the evidence is insufficient to sustain any of the jury’s guilty verdicts for burglary in the second degree, possession of stolen property in the second degree, and bribing a witness. McMillian claims that the

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evidence is insufficient based on his contention that there was no nexus linking him to his black Dodge Durango that contained some of the things that were stolen in the burglary. The State counters that sufficient evidence exists to sustain each of the jury's verdicts in this case.

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

McMillian contends that the evidence was insufficient to sustain his convictions in this case because, he contends, “no evidence provided a nexus between the defendant and the stolen property.” Br. of Appellant at

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27. But the facts show that property stolen from the burglary was recovered from McMillian's Durango. RP 60-61, 68, 73-75, 125-26, 145. The Durango was locked and alarmed. RP 130, 162. There was no sign of forced entry into the Durango, and (other than McMillian's later claim) there was no evidence that it was stolen. RP 127-28. It was parked in place that McMillian was connected to, his friend Misty's house. RP 200-03, 216-19. Two civilian witnesses saw a vehicle matching the description of the Durango near the scene of the burglary. RP 72, 79. McMillian claimed the vehicle from the impound lot. RP 162. Footprints at the burglary scene matched the boot tread that CPL Reed had seen on McMillian's boots prior to the burglary. RP 92-93, 119-21, 156-57. And when the case was pending trial, McMillian attempted to bribe a witness. RP 204-05.

The State contends that under the standard of review for claims against the sufficiency of the evidence on appeal, the evidence here was sufficient to sustain the jury's verdicts. McMillian was free to present evidence and argument that he was in Tacoma when the burglary occurred and that his Durango was stolen, but the jury was not required to give weight to the evidence or accept the arguments. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

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5. McMillian contends that this Court should overrule *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992), and hold that error occurred in this case because when police looked into the windows of his unattended Durango and saw some of the items that were stolen in the underlying burglary in this case, the police then impounded the Durango while they obtained a search warrant to enter the Durango and seize the stolen items and search for further evidence of the burglary. McMillian contends that police should obtain a warrant before impoundment. State counters that McMillian has not shown that the existing Huff rules is both incorrect and harmful, and therefore this Court should not overrule Huff.

When investigating the burglary in this case, CPL Reed found a receipt on the ground near the scene of the crime. RP 59. To further his investigation, he went to the address printed on the receipt, and as a consequence he found McMillian's black Durango in a driveway about two and a half miles from the crime scene. RP 59-60, 299. Reed walked past the Durango on his way to the house, and as he passed the Durango he shined his flashlight and saw what he recognized to be some of the victim's stolen property in the Durango. RP 60-61.

CPL knocked on the door to the house, but no one answered. RP 61. Believing that the Durango contained some of the stolen property from the burglary, CPL Reed then sealed the Durango with evidence tape and had it towed to the Sheriff Department's impound yard and locked it

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in the garage. RP 61. This happened on October 3. RP 56. He then applied for a search warrant. RP 62. He received the warrant and on October 4 searched the Durango. RP 62.

Five days after seizure of the Durango, McMillian reported it stolen. RP 133. At trial, McMillian's girlfriend testified that McMillian left the Durango in her driveway and went to Tacoma to stay with a friend for about a week. RP 334. She said that a few days after McMillian left for Tacoma, she woke up and the Durango was gone. RP 335, 441-42. She testified that a week or so later, McMillian returned. RP 442. McMillian testified that he was surprised to find the Durango missing when he returned from Tacoma. RP 349.

From these facts McMillian argues that error occurred because, he contends, "[t]he law does not allow a government agent to seize personal property from a person absent a warrant or other court order." Br. of Appellant at 42. CPL Reed did not search the Durango until after he had obtained a search warrant. RP 62. However, McMillian argues that because the police seized the Durango and impounded it before applying for a search warrant, "[o]bviously, the police's action of seizing [his] automobile deprived him of his property, and there was no notice or opportunity to be heard prior to the deprivation." Br. of Appellant at 46.

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The facts, however, show that McMillian was not deprived of use of the Durango, because he didn't even know it was seized until he returned home and reported it stolen several days after it was seized and searched. RP 335, 349, 441-42.

Controlling precedent is against McMillian's position on this issue, as follows:

[W]hen an officer has probable cause to believe that a car contains contraband or evidence of crime, he or she may seize and hold the car for the time reasonably needed to obtain a search warrant and conduct the subsequent search. It makes no constitutional difference whether this is done by placing a guard on the car at the scene or by towing it to the police station.

State v. Huff, 64 Wn. App. 641, 653, 826 P.2d 698 (1992) (citing, e.g.,

State v. Terranova, 105 Wn.2d 632, 716 P.2d 295 (1986); *Chambers v.*

Maroney, 399 U.S. 42, 51-52, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970)).

McMillian acknowledges that Huff is controlling in this case, but he asks for "a change in existing case law." Br. of Appellant at 2 (Assignment of Error No. 5).

The standard for overruling precedent is the same in the Court of Appeals as it is the Supreme Court. *State v. Stalker*, 152 Wn. App. 805, 811-12, 219 P.3d 722 (2009). "Our Supreme Court has held that it will overrule precedent only when such precedent is both incorrect and

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harmful.” *Stalker* at 811 (footnote omitted), citing *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 269, 208 P.3d 1092 (2009). Thus, the Court of Appeals “will abrogate the holding of a prior decision only if the party seeking to have the decision overruled has demonstrated that the precedent is both incorrect and harmful.” *Stalker* at 811, *State v. Kier*, 164 Wn.2d 798, 804-05, 194 P.3d 212 (2008).

Here, McMillian has not shown that the *Huff* rule is incorrect; nor has he shown that it is harmful. A recent case of our Supreme Court distinguishes between a search and a seizure. *State v. Mecham*, 2016 WL 3408871 (No. 90598-3, June 16, 2016). “Both Washington’s constitution and the federal constitution bestow a right to be free from unlawful searches and seizures.” *Mecham* at para. 17, citing Wash Const. art. I, § 7 and U.S. Const. amend. IV. But *Mecham* was concerned with the seizure of a person, rather than property. *Id.* at para. 20. When considering the warrantless seizure of a person, *Mecham* validated such seizures when the seizure is supported by reasonable suspicion. *Id.* at para. 21-22. Here, CPL Reed had probable cause, rather than mere suspicion, to believe that the Durango contained stolen property. RP 60-61.

On these facts, McMillian has not shown that the *Huff* rule, allowing seizure of the Durango while CPL Reed obtained a search warrant, is incorrect. Nor has he shown that the rule is harmful.

D. CONCLUSION

McMillian devotes a great deal of argument to his contention that it was error for the trial court to compel him to disclose information about his alibi defense even though he had no intention to call an alibi witness to corroborate his alibi defense. The trial court underwent great examination of the issue, but in fact the trial court never compelled McMillian to make any disclosures beyond the general omnibus disclosure of an undescribed alibi defense.

McMillian contends that because the trial court recessed overnight during the trial and thus allowed the State time to try to locate McMillian's non-testifying alibi witness or to verify whether the witness in fact had a warrant, he was denied a *fair* trial. But because disclosure of this purported witness was the result of McMillian's own voluntary choice to testify at trial, and because the details of the alibi defense was a complete surprise to the State, no error occurred due to the State having

the benefit of an overnight recess during which it looked McMillian's testimony.

Instead, when McMillian testified that he was at the home of a non-testifying witness when the underlying burglary occurred in this case, the trial court gave a missing witness instruction because McMillian had exclusive control over the witness and had not satisfactorily explained why he did not call the witness to corroborate his alibi testimony. McMillian testified that there was a warrant for the witness's arrest and that that was the reason he was not testifying, but McMillian gave no basis for his knowledge of the warrant or why the mere warrant would prevent his witness's testimony, and the State rebutted the assertion of the arrest warrant. On these facts, this case presents a classic case of when a missing witness instruction is appropriate in the trial court's discretion.

McMillian asserts multiple instances of what he sees as prosecutorial misconduct, but none of the purported instances are substantial, and none suggest any real prejudice to McMillian. As such, McMillian's assertions of reversible error on this point are without merit.

McMillian contends that the evidence is insufficient to sustain the jury's verdicts in regards to any of the jury's three guilty verdicts. But when viewed under the light of the standard of review of claims of

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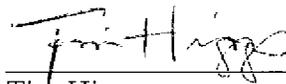
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sufficiency of the evidence on appeal, the evidence is more than ample to support and sustain the jury's verdicts.

Finally, McMillian asks this court to overrule *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992), and to find as a result that the trial court erred by not suppressing evidence based on the State's failure to obtain a warrant for the seizure of McMillian's Durango prior to obtaining a warrant to search it, rather than to impound it on probable cause while applying for a search warrant. However, McMillian has not made the showing, required for overruling established precedent, that the *Huff* rule is both incorrect and harmful. Therefore, the State urges that this Court should not overrule the well-established precedent of *Huff* on the facts of the instant case.

DATED: July 12, 2016.

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