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Court of Appeals
Division III
State of Washington

No. 33828-2-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY HUESTIES

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Judge Cameron Mitchell

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Jeffrey Huesties was convicted of theft of rental equipment pursuant to RCW 9A.56.096 after he failed to return a dehumidifier to Pasco Rentals that he had rented on behalf of an acquaintance, Tony Rodriguez.

Mr. Huesties' conviction should now be reversed, because the jury was instructed on an alternate means of theft that was not supported by the evidence. Moreover, the jury was not provided a unanimity instruction and did not return a special verdict finding Mr. Huesties guilty of the means of committing theft that did apply in this case.

Alternatively, Mr. Huesties' conviction should be reversed and the matter remanded for a new trial, because the jury was improperly instructed that it could presume Mr. Huesties' criminal intent, even though there was no evidence Mr. Huesties' received the proper notice that would have triggered the presumptive criminal intent inference and instruction. Mr. Huesties was denied his constitutional rights to have the State prove its case beyond a reasonable doubt and effective assistance of counsel when the improper presumptive intent instruction was given without objection.

Finally, Mr. Huesties is entitled to a new trial, because the jury was erroneously provided a missing witness instruction and the prosecutor

made an improper missing witness argument as to Mr. Rodriguez. The missing witness instruction and inference were not permissible as to Mr. Rodriguez, because this individual was not peculiarly available to the defendant, his whereabouts were unknown to both parties, there was not sufficient personal relationship between the individual and the defendant so that he was naturally in the defendant's control, and Mr. Rodriguez was unavailable to the defendant as a witness because Mr. Rodriguez's testimony would have been self-incriminating. The improper missing witness instruction and argument in this case unconstitutionally shifted the burden of proof to the defendant. Additionally, defense counsel's failure to object to the improper instruction and argument deprived Mr. Huesties of his constitutional right to effective assistance of counsel.

Mr. Huesties respectfully requests this Court reverse his conviction and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. The court erred by instructing the jury on an alternate means of theft that was not supported by the evidence.
2. Mr. Huesties was denied his constitutional right to a unanimous jury verdict.
3. The court erred by instructing the jury on the statutory presumption regarding Mr. Huesties' criminal intent found in RCW 9A.56.096(2), (3).
4. The court erred by providing the jury a missing witness instruction as to Mr. Rodriguez.

5. The prosecutor erred by arguing a missing witness inference regarding Mr. Rodriguez.
6. The defendant was deprived of his constitutional right to have the State prove its case beyond a reasonable doubt without any shifting of the burden to the defendant based on the errors above.
7. The defendant was deprived of his constitutional right to effective assistance of counsel based on the errors above.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Mr. Huesties was denied his constitutional right to a unanimous jury verdict when a unanimity instruction was never given, the jury did not elect between the alternative means of theft that were argued, and there was not sufficient evidence Mr. Huesties wrongfully obtained the rental equipment as opposed to exerting unauthorized control over lawfully rented property.

Issue 2: Whether Mr. Huesties was denied his constitutional rights to have the State prove its case beyond a reasonable doubt and to effective assistance of counsel when his attorney failed to object to an erroneous jury instruction encouraging the jury to presume the defendant's intent to deprive Pasco Rentals of its property.

Issue 3: Whether Mr. Huesties was denied his constitutional rights to effective assistance of counsel and a fair trial when, without objection, the trial court gave a missing witness instruction as to Mr. Rodriguez, a person who was not "peculiarly available" to the defendant and whose absence was satisfactorily explained; or, alternatively, whether the prosecutor unconstitutionally shifted the burden of proof by arguing the missing witness inference as to Mr. Rodriguez, an individual whose whereabouts were unknown and whose testimony would have been self-incriminatory.

D. STATEMENT OF THE CASE

In October 2014, Jeffrey Huesties picked up a dehumidifier from Pasco Rentals and executed a rental contract. RP¹ 21-22, 29-30; Exhibit 1. Video showed Mr. Huesties was accompanied to the rental store by another man who helped load the equipment. RP 82-83.

Pasco Rentals called Mr. Huesties on November 19, 2014, after the equipment was not returned. RP 33. The next day, Mr. Huesties left a message with Pasco Rentals that he would return the dehumidifier the same day. *Id.* When the equipment was not returned, Pasco Rentals attempted to send a certified letter to provide Mr. Huesties notice that the rental equipment had not been returned, but the letter was returned without being claimed after three unsuccessful delivery attempts by the post office. RP 22, 31-32. Mr. Huesties never received the certified letter. RP 47. Without objection, the jury was instructed it could presume Mr. Huesties intended to deprive Pasco Rentals of the rental equipment if he failed to return the equipment or make acceptable arrangements with the owner for returning the property within 72 hours of “receipt of proper notice.” RP 11, 64, 93; CP 48.

On December 13, 2014, a Pasco Rentals manager contacted law enforcement when the dehumidifier (which cost \$930 to replace) was not returned. RP 21, 25, 28. Mr. Huesties was charged with theft of rental

¹ “RP” refers to the trial transcript. Other transcript(s) are identified by date.

equipment; to wit, the State charged that Mr. Huesties did “wrongfully obtain or exert authorized control of [rental] property...” CP 3; RP 36.

Mr. Huesties testified he rented the dehumidifier as a favor for an acquaintance named Tony Rodriguez after Mr. Rodriguez helped him repair his vehicle. RP 44. Mr. Huesties said Mr. Rodriguez asked him to rent the equipment for him, because Mr. Rodriguez’s apartment had flooded and Mr. Rodriguez could not provide identification to rent the dehumidifier himself. RP 42, 52. Mr. Huesties testified his friends John and Lisa were with him when he received the call for help from Mr. Rodriguez, and John drove Mr. Huesties to Pasco Rentals to help pick up and then drop off the dehumidifier at Mr. Rodriguez’s apartment. Mr. Huesties testified when he arrived at Pasco Rentals, the dehumidifier was ready and waiting for him to pick up, and Mr. Rodriguez promised to return the dehumidifier. RP 43.

When Mr. Huesties learned the dehumidifier had not been returned, he said he attempted to contact Mr. Rodriguez, but Mr. Rodriguez had moved out of his apartment and disconnected his phone. RP 45-46. Mr. Huesties testified he never intended for the dehumidifier to not be returned to Pasco Rentals. RP 48. He also attempted to work with the collection agency to arrange payments to reimburse Pasco Rentals for the equipment. RP 55.

Mr. Huesties was the only person who testified for the defense, which prompted the State to request and the court to give a missing witness instruction,

informing the jury it could infer any testimonies from missing witnesses would have been unfavorable to the pertinent party in the case. RP 94. The State then pointed out to the jury that the defendant never called John, Lisa or Mr. Rodriguez to testify. RP 113. The State further argued that Mr. Huesties' story was "bunk," that if the story was true than John and Lisa would have testified, that there was a good chance Mr. Rodriguez did not even exist or live in the apartment where Mr. Huesties said he dropped off the equipment², and that Mr. Huesties probably just "hocked" the dehumidifier himself. RP 98-102.

Before trial, defense counsel had notified the court he knew Mr. Rodriguez's former address at the apartment in Pasco where Mr. Huesties said he dropped off the dehumidifier. RP 12-13, 15. But counsel explained Mr. Rodriguez was no longer at this address; counsel did not call this person to testify because Mr. Huesties was unable to provide a current address or phone number for Mr. Rodriguez. *Id.* "John" and "Lisa" were apparently not called to testify because they were out of town and unavailable. RP 62-63; 9/15/15 RP 4.

The jury was instructed on the two charged alternate means of theft – wrongfully obtain or exert unauthorized control over property. CP 3, 44-45, 47. The jury was not provided a unanimity instruction as to the two means of theft. CP 36-53. The State argued both means to the jury, stating "there is no question that Mr. Huesties obtained this property and that he wrongfully retained this

² The apartment building where Mr. Rodriguez was supposed to live was sold at a foreclosure auction at the beginning of 2015, and the new landlord did not know the previous tenants. RP 82-85.

property by failing to return it to Pasco Rental.” RP 97. Defense counsel argued this was not a case of wrongfully obtaining property because the defendant properly rented the equipment. RP 109-10.

Following the evidence, instructions and argument, the jury convicted Mr. Huesties of theft of rental equipment. CP 77. This appeal timely followed. CP109.

E. ARGUMENT

Issue 1: Whether Mr. Huesties was denied his constitutional right to a unanimous jury verdict when a unanimity instruction was never given, the jury did not elect between the alternative means of theft that were argued, and there was not sufficient evidence Mr. Huesties wrongfully obtained the rental equipment as opposed to exerting unauthorized control over lawfully rented property.

The State argued and the jury was instructed on two alternative means of committing theft: wrongfully obtain or exert unauthorized control over rental property. CP 44, 45, 47; RP 97. But the jury was not provided a unanimity instruction for these alternate means (*see* CP 36-53), the jury did not elect between the alternate means when convicting Mr. Huesties in its general verdict (CP 77), and there was not substantial evidence that Mr. Huesties wrongfully obtained the rental property (as opposed to wrongfully *retaining* property – or exerting unauthorized control over property – that was initially lawfully obtained). Mr. Huesties’ conviction should be reversed and the matter remanded for a new trial.

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). “[T]he right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury and thus may be raised for the first time on appeal.” *State v. Handyside*, 42 Wn. App. 412, 415, 711 P.2d 379 (1985); *State v. Martin*, 69 Wn. App. 686, 689, 849 P.2d 1289 (1993) (Even if instructing the jury on an alternate means that is unsupported by the evidence was “plainly the result of oversight, the giving of this erroneous instruction is not trivial... and may be raised for the first time on appeal.”); RAP 2.5(a).

“The right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged.” *State v. Emery*, 161 Wn. App. 172, 198, 253 P.3d 413 (2011) (citing *Ortega-Martinez*, 124 Wn.2d at 707). “The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury.” *Ortega-Martinez*, 124 Wn.2d at 707.

“In reviewing an alternative means case, the court must determine whether a rational trier of fact *could* have found each means of committing the crime proved beyond a reasonable doubt.” *State v. Kitchen*, 110

Wn.2d 403, 410-11, 756 P.2d 105 (1988). “This requirement of sufficient evidence embodies constitutional considerations of due process.” *Martin*, 69 Wn. App. at 688 (citing *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980)).

If one of more of the alternative means is not supported by substantial evidence, the conviction will be reversed unless the court can determine the verdict was based on only one of the alternative means and that substantial evidence supported that alternative means. *State v. Rivas*, 97 Wn. App. 349, 351, 984 P.2d 432 (1999), *review denied*, 140 Wn.2d 1013 (2000), *disapproved of on other grounds by State v. Smith*, 159 Wn. 2d 778, 154 P.3d 873 (2007)). “If the instructions given and the jury’s verdict plainly show the jury must have been unanimous as to the alternative means which was supported by sufficient evidence, this court may conclude the erroneous instruction did not affect the outcome, and the error was harmless.” *Martin*, 69 Wn. App. at 689.

In *State v. Rivas*, the jury was instructed on an alternate means for committing assault³ that was not supported by substantial evidence. 97 Wn. App. at 352. But the Court did not reverse, because it could “determine from the record that the jury verdict was based on only one of the alterative means and substantial evidence supports that means...” *Id.*

³ This case was later disapproved by *State v. Smith*, 159 Wn.2d 778, to the extent that the various definitions of assault were interpreted as alternate means of committing assault.

at 350. Importantly, the charging document made it clear the defendant was only charged with one means of committing assault, and the prosecution and defense focused on only one alternative means during the trial. *Id.* at 353-55. The Court held, “there was no danger that the jury’s verdict rested on an unsupported alternative means...” *Id.* at 355.

Here, Mr. Huesties was convicted of theft of rental equipment pursuant to RCW 9A.56.096. Theft could be proven by alternate means. “‘Theft’ means [in pertinent part]: (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services...” RCW 9A.56.020(1)(a); CP 44, 45, 47. “Wrongfully obtain” and “exert unauthorized control over” are alternate means of committing theft under RCW 9A.56.020(1)(a). *State v. Lee*, 128 Wn.2d 151, 904 P.2d 1143 (1995); *State v. Linehan*, 147 Wn.2d 638, 56 P.3d 542 (2002), *cert. denied*, 123 S.Ct. 1633 (2003).

“Under an alternative means analysis..., the jury must be unanimous as to whether [a defendant] committed theft by wrongfully obtaining, exerting unauthorized control, or obtaining the [property] by color and aid of deception.” *Linehan*, 147 Wn.2d at 648. “Unanimity is not required if there is substantial evidence supporting each of these alternative means.” *Id.* at 649.

For purposes here, the law is well settled that theft may be committed by either of the alternative means of wrongfully obtaining or exerting unauthorized control over property. *Lee*, 128 Wn.2d 151; *Linehan*, 147 Wn.2d at 648-49. In this case, the jury was never provided a unanimity instruction and it did not return a special verdict as to any particular means of theft. CP 36-53, 77. *Accord State v. Bland*, 71 Wn. App. 345, 358, 860 P.2d 1046 (1993), *disapproved on other grounds by State v. Smith*, 159 Wn.2d 778 (see FN3 above) (noting that the jury’s general verdict did not allow the Court to determine which means the jury relied upon to return its verdict).

Unlike in *Rivas, supra*, Mr. Huesties was charged with both alternative means of theft. CP 3. And, the State argued both alternative means to the jury. The State argued “there is no question that Mr. Huesties obtained this property and that he wrongfully retained this property by failing to return it to Pasco Rental.” RP 97. The State then again invited the jury to convict under either alternative means. RP 112. The jury returned only a general verdict rather than electing between the alternative means, and the State focused on either means at trial. Thus, there is certainly a danger that the jury’s verdict in this case could have rested on either of the alternative means of committing theft. *C.f., Rivas*, 97 Wn. App. at 355. Accordingly, the matter must be reversed for lack of

a unanimous jury verdict unless substantial evidence supports both means presented to the jury.

Substantial evidence does not establish Mr. Huesties committed theft by the alternate means of wrongfully obtaining the rental property in question. “Wrongfully obtains means to take wrongfully the property or services of another.” *Linehan*, 147 Wn.2d at 652; 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 79.02 (3d Ed); CP 45. Mr. Huesties could not “take” the rental equipment once he had it in his possession pursuant to the rental agreement; he, therefore, cannot be convicted under the “wrongfully obtain” alternative. Where the accusation is wrongfully *retaining* property that was lawfully *obtained*, there can be no theft by taking because the person obtained the property legally and not “wrongfully.” At most, the only means that would apply to the wrongful *retention* of rental equipment is theft by exerting unauthorized control over the rental equipment.

The key issue here is there is no evidence Mr. Huesties wrongfully obtained the rental equipment. To the contrary, the evidence showed Mr. Huesties peaceably walked into Pasco Rentals, signed and executed a contract to rent equipment, Pasco Rentals had the equipment ready and waiting for Mr. Huesties to pick up, Mr. Huesties gave Pasco Rentals his true name and address, and Mr. Huesties peaceably left the rental store

with the dehumidifier. RP 21-22, 29-30, 43, 48, 82-83; Exhibit 1. There is no evidence Mr. Huesties entered the premises without permission, took the dehumidifier without Pasco Rentals' agreement, committed any fraudulent act, or made any misrepresentations in order to obtain the dehumidifier.

Given the evidence, the only means by which Mr. Huesties could have committed theft was by "exerting unauthorized control over" the rental property he had initially legally obtained. Mr. Huesties had the right to possess and use the dehumidifier under the agreement. Someone who legally obtains property as a lessee but illegally withholds or appropriates the property has exerted unauthorized control over the property. Mr. Huesties lawfully obtained the rental equipment, even if that retention later became unlawful by exerting unauthorized control over the property.

In sum, Mr. Huesties was denied his constitutional right to a unanimous jury verdict when the State argued and the jury was instructed on an alternate means of committing theft that was not supported by the evidence. The jury was never given a unanimity instruction and did not elect between the means upon which it convicted. Because it is impossible to tell which alternate means the jury relied upon to convict, substantial evidence must support both means that were offered to the

jury. Here, there was not any evidence, let alone substantial evidence, that Mr. Huesties wrongfully obtained the dehumidifier when he executed the rental contract. Therefore, Mr. Huesties' conviction should be reversed and the matter remanded for a new trial on the only remaining alternate means of committing theft that was charged in this case (exerting unauthorized control over the rental property). *State v. Ramos*, 163 Wn.2d 654, 660, 184 P.3d 1256 (2008) (setting forth this remedy).

Issue 2: Whether Mr. Huesties was denied his constitutional rights to have the State prove its case beyond a reasonable doubt and to effective assistance of counsel when his attorney failed to object to an erroneous jury instruction encouraging the jury to presume the defendant's intent to deprive Pasco Rentals of its property.

To support its argument that Mr. Huesties intended to deprive Pasco Rentals of its equipment, the State requested and the jury was given an instruction allowing it to presume Mr. Huesties' intent to deprive where he received "proper notice" that the equipment had not been returned. RP 93. Although there was evidence Pasco Rentals sent such notice by certified mail, the undisputed evidence was that the certified notice letter was returned to Pasco Rentals unopened and unclaimed after three unsuccessful delivery attempts; Mr. Huesties never actually received this certified notice letter. RP 22, 31-32, 47.

Under these circumstances, the law is well settled that the jury instruction in this case regarding presumptive intent was not permitted.

State v. Fleming, 155 Wn. App. 489, 503-07, 228 P.3d 804 (2010).

Giving the erroneous instruction improperly reduced the State's constitutional burden to prove all elements of Mr. Huesties' charged offense beyond a reasonable doubt. *See id.* at 505. Additionally, Mr. Huesties was deprived of his constitutional right to effective assistance of counsel due to counsel's failure to object to the erroneous instruction.

As a threshold matter, a party may challenge a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a) The party must "identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

- (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on

consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Mr. Huesties was convicted of theft of rental equipment pursuant to RCW 9A.56.096. This statute provides: "A person who, with intent to deprive the owner or owner's agent, wrongfully obtains, or exerts unauthorized control over, or by color or aid of deception gains control of personal property that is rented, leased, or loaned by written agreement to the person, is guilty of theft of rental, leased, lease-purchased, or loaned property." RCW 9A.56.096(1). In some circumstances, the jury is permitted to presume the defendant's intent to deprive the owner of the rental property, such as where the jury finds the following:

That the person who rented or leased the property failed to return or make arrangements acceptable to the owner of the property or the owner's agent to return the property to the owner or the owner's agent within seventy-two hours after receipt of proper notice following the due date of the rental, lease, lease-purchase, or loan agreement...

RCW 9A.56.096(2)(a) (emphasis added).

"As used in subsection (2) of this section, 'proper notice' consists of a written demand by the owner or the owner's agent made after the due date of the rental, lease, lease-purchase, or loan period, mailed by certified

or registered mail to the renter, lessee, or borrower at: (a) The address the renter, lessee, or borrower gave when the contract was made; or (b) the renter, lessee, or borrower's last known address if later furnished in writing by the renter, lessee, borrower, or the agent of the renter, lessee, or borrower.” RCW 9A.56.096(3); RP 93-94; CP 49.

Here, the jury was instructed according to the above statutory presumption on intent and proper notice:

You may presume intent to deprive the person who rented or leased property failed to return or make arrangements acceptable to the owner of the property, or the owner's agent, to return the property to the owner, or the owner's agent, within 72 hours after receipt of proper notice following the due date of the rental, leased, leased purchase or loan agreement.

Proper notice means a written demand by the owner or the owner's agent made after the due date of the rental, lease, lease purchased or loan period mailed by certified or registered mail to the renter, lessee or borrower at A, the address the renter, lessee or borrower gave when the contract was made; or B, the renter, lessee, or borrower's last known address if later furnished in renter, lessee, borrower or the agent of the renter, lessee or borrower.

RP 93-94; CP 48-49.

Jury instructions must be supported by substantial evidence and, when read as a whole, properly inform the jury of the applicable law.

Fleming, 155 Wn. App. at 503-04 (citing *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002)). “A trial court commits prejudicial error by submitting an issue to the jury not warranted by the evidence.” *Id.* at 504.

The above instructions on presumptive intent and proper notice were not permitted in this case. They were not supported by substantial evidence and erroneously informed the jury on inapplicable law.

“RCW 9A.56.096(2)(a) allows the jury to presume an intent to deprive only upon a showing that the defendant *received* the proper notice.” *Fleming*, 155 Wn. App. at 503 (emphasis in original). Pursuant to this statute, “‘*proper notice*’ consists of a written demand by the owner or the owner’s agent made after the due date of the rental, lease or lease-purchase period, *mailed by certified or registered mail to the renter or lessee at: (a) The address the renter or lessee gave when the contract was made; or (b) the renter or lessee’s last known address if later furnished in writing by the renter or lessee, or the agent of the renter or lessee.*” *Id.* at 504 (quoting RCW 9A.56.096(3)) (emphasis in original). “RCW 9A.56.096(2)’s plain language requires that a defendant actually receive the statutorily defined proper notice before a jury can be instructed that it may presume his intent to deprive.” *Id.* at 505.

This case is directly on point with *State v. Fleming, infra*. In *State v. Fleming*, the State provided evidence that Quality Rentals sent proper notice to the defendant but, “because the certified letter was returned unclaimed, it failed to prove Fleming received the notice...” 155 Wn.2d at 505. The defendant’s actual receipt of the certified letter was a

“condition precedent to giving an instruction allowing, but not requiring, the jury to presume his unlawful intent.” *Id.* The Court held the jury could not be instructed that it may presume the defendant’s intent to deprive since the State failed to prove he received proper notice. *Id.* (“the absence of evidence of actual receipt of statutorily defined ‘proper notice’ precluded the trial court from instructing the jury that from the fact of receipt, it may infer the requisite criminal intent.”) “[B]ecause the State did not present any direct evidence that Fleming received written ‘proper notice’ by certified or registered mail as former RCW 9A.56.096(3) requires, it was error to instruct the jury that it may presume his intent to deprive from a failure to return the property within 72 hours of an unproven event.” *Id.* at 507.

Finally, the *Fleming* Court noted the error in that case was constitutional in that it reduced the State’s burden to prove its case, and the Court concluded the error “was not harmless beyond a reasonable doubt because the untainted evidence is not so overwhelming that it ‘necessarily leads to a finding of guilt.’” 155 Wn.2d at 505.

Here, too, the trial court erred by giving the presumptive intent jury instruction where there was no proof Mr. Huesties actually received Pasco Rentals’ certified letter. The undisputed evidence was that Pasco Rentals sent a certified letter to Mr. Huesties’ address in an effort to

provide proper notice, just like the rental company did in *Fleming, supra*. But, like in *Fleming*, the letter was returned to Pasco Rentals unclaimed after three unsuccessful delivery attempts. RP 22, 31-32. Mr. Huesties confirmed he never received the certified letter. RP 47.

Because the State failed to provide evidence that Mr. Huesties received the certified letter, the jury could not be instructed that it could presume Mr. Huesties' criminal intent based on his receipt of proper notice. *Fleming*, 155 Wn. App. at 503-05. This instructional error is of constitutional dimension, because it reduced the State's burden of proof regarding the necessary mens rea element in this case. *Id.* at 505. The error also implicates Mr. Huesties' constitutional rights to effective assistance of counsel since defense counsel failed to object to a clearly impermissible presumptive inference instruction.

The constitutional error in this case was manifest; the error affected the defendant's rights at trial. *O'Hara*, 67 Wn.2d at 98. Moreover, there is a reasonable probability the result would have been different had counsel properly objected. *McFarland*, 127 Wn.2d at 334-35. And, this constitutional error cannot be considered harmless beyond a reasonable doubt "because the untainted evidence is not so overwhelming that it 'necessarily leads to a finding of guilt.'" 155 Wn.2d at 505

Indeed, the main contested issue in this case was whether Mr. Huesties intended to deprive Pasco Rentals of the dehumidifier after he loaned it to Mr. Rodriguez. The defense's position was Mr. Huesties rented the equipment on behalf of Mr. Rodriguez, whom the defendant expected to return the equipment; Mr. Huesties insisted he never intended to deprive Pasco Rentals of its equipment. RP 42-45, 48. Mr. Huesties attempted to work with a collection agency to reimburse Pasco Rentals for the equipment. RP 55. He attempted without success to locate Mr. Rodriguez in order to retrieve and return the dehumidifier to Pasco Rentals. RP 45-46. Mr. Huesties' intent was a key disputed issue in this trial.

Had the jury not been erroneously encouraged to presume Mr. Huesties' criminal intent, there is at least a reasonable probability the results of the trial would have been different. There was no direct evidence proving Mr. Huesties' criminal intent. There was no evidence Mr. Huesties attempted to fraudulently obtain the dehumidifier; indeed, he provided his true name and address to the rental company. RP 48. There was never any proof Mr. Huesties sold the dehumidifier or traded it to Mr. Rodriguez in exchange for work done on his vehicle. Instead, the State relied on the presumptive inference above, along with another impermissible inference in this case (see Issue 3 below), to try to prove

Mr. Huesties' criminal intent. Standing alone, the erroneous instruction on presumptive intent should result in a new trial. When combined with the erroneous missing witness instruction and inference addressed below (see Issue 3), the only fair remedy in this case is to reverse and remand for a new trial.

Issue 3: Whether Mr. Huesties was denied his constitutional rights to effective assistance of counsel and a fair trial when, without objection, the trial court gave a missing witness instruction as to Mr. Rodriguez, a person who was not “peculiarly available” to the defendant and whose absence was satisfactorily explained; or, alternatively, whether the prosecutor unconstitutionally shifted the burden of proof by arguing the missing witness inference as to Mr. Rodriguez, an individual whose whereabouts were unknown and whose testimony would have been self-incriminatory.

The trial court granted the State's request for a missing witness instruction, although it did not specify which missing witness(es) the instruction applied to. RP 94. The State then argued the missing witness inference as to John, Lisa⁴ and Mr. Rodriguez. RP 113. The trial court erred by giving the missing witness instruction as to Mr. Rodriguez, who was not available for Mr. Huesties to call as a witness. Alternatively, the prosecutor violated the defendant's constitutional rights by arguing the missing witness inference as to Mr. Rodriguez. Mr. Rodriguez was not “peculiarly available” to the defendant to call as a witness, and his absence from trial was satisfactorily explained, since both parties were equally

⁴ The State sometimes mistakenly referred to “Lisa” as “Sue.”

unable to locate this individual and Mr. Rodriguez's testimony, if favorable to Mr. Huesties, would have been self-incriminatory. Defense counsel was ineffective for failing to object to the missing witness instruction and the prosecutor's missing witness inference argument as to Mr. Rodriguez. RP 64, 77-78.

This Court reviews defense counsel's failure to make a proper objection pursuant to an objective standard of reasonableness, and reverses for ineffective assistance where there is a reasonable probability the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 334-35. This Court reviews a trial court's decision to give a missing witness instruction for abuse of discretion. *State v. Montgomery*, 163 Wn.2d 577, 601, 183 P.3d 267 (2008). "Discretion is abused if the trial court's decision is manifestly unreasonable or is based on untenable reasons or grounds." *Id.* (internal citations omitted). "[W]hether legal error in jury instructions could have misled the jury is a question of law, which [this Court] review[s] de novo." *Id.* at 597. Where a prosecutor improperly invokes the missing witness inference, reversal is required where there is a substantial likelihood that the misconduct affected the jury's verdict. *See State v. Carter*, 74 Wn. App. 320, 332, 875 P.2d 1 (1994), *aff'd*, 127 Wn.2d 836 (1995) (requiring showing of prejudice to reverse).

“Generally, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence.” *Montgomery*, 163 Wn.2d at 652; *State v. Contreras*, 57 Wn. App. 471, 788 P.2d 1114 (1990) (the absence of duty to call witnesses is a “judicially developed corollary of the State’s burden to prove each element of the crime charged beyond a reasonable doubt.”) However, “[u]nder the ‘missing witness’ or ‘empty chair’ doctrine..., where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and,...he fails to do so,- the jury may draw an inference that it would be unfavorable to him.” *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (internal citations omitted). A missing witness inference may be permitted in “criminal cases where the defense fails to call logical witnesses.” *Id.* at 486.

WPIC 5.20 sets forth when a jury may make a missing witness inference:

If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:

- (1) The witness is within the control of, or peculiarly available to, that party;
- (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;

(3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;

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

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

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 5.20 (3d Ed). *Accord Montgomery*, 163 Wn.2d at 598-99.

It is error to give a missing witness jury instruction unless there is evidence supporting each of the above factors. *Montgomery*, 163 Wn.2d 577. The comments to WPIC 5.20 instruct that this “instruction should be used sparingly.”

Whether or not a missing witness instruction is actually given, a prosecutor is precluded from arguing a missing witness inference where the above criteria are not met, including where the witness is not peculiarly available to the defendant. It is generally only “permissible for the prosecutor to comment on the defendant’s failure to call a witness provided that it is clear the defendant was able to produce the witness and the defendant’s testimony unequivocally implies that the absent witness could corroborate his theory of the case.” *Blair*, 117 Wn.2d at 487. When this rule is applied to the defense, care should be taken to ensure the rule’s application does not shift the burden of proof to the defendant or constitute

an impermissible comment on facts not in evidence. *Blair*, 117 Wn.2d 479; *Montgomery*, 163 Wn.2d at 599 (“the doctrine may not be applied if it would infringe on a criminal defendant’s right to silence or shift the burden of proof.”)

Pertinent here, the missing witness inference “only arises where the witness is peculiarly available to the party, i.e., peculiarly within the party’s power to produce.” *State v. Cheatham*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). “For a witness to be peculiarly available to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, that it was reasonably probable that the witness would have been called to testify for such party except for the fact that the testimony would have been damaging.” *State v. David*, 118 Wn.2d 61, 66-67, 74 P.3d 686 (2003), *opinion withdrawn in part, modified in part on other grounds*, 130 Wn. App. 232 (2005); *Blair*, 117 Wn.2d at 490 (internal citations omitted).

“The rationale for [allowing a missing witness inference where the defendant fails to call a certain witness to testify] is that a party will likely call as a witness one who is bound to him by ties of affection or interest unless the testimony will be adverse, and that a party with a close connection to a potential witness will be more likely to determine in

advance what the testimony would be.” *David*, 118 Wn.2d at 66-67. If a witness is equally available to the State, including where neither party has control over the individual, both a missing witness instruction and missing witness argument are precluded. *Montgomery*, 163 Wn.2d at 598-99; *Blair*, 117 Wn.2d at 488-90.

“If a witness’s absence can be satisfactorily explained, no [missing witness] inference is permitted.” *Blair*, 117 Wn.2d at 489 (citing *State v. Lopez*, 29 Wn. App. 836, 631 P.2d 420 (1981) (missing witnesses were transients who left town and could not be located)). The witness must not be incompetent or his or her testimony privileged, and the testimony must not infringe a defendant’s constitutional rights, else the witness’s absence is satisfactorily explained. *Montgomery*, 163 Wn.2d at 599; *Cheatam*, 150 Wn.2d at 653.

In *State v. Blair*, a defendant testified that the names listed on confiscated sheets of paper were not a drug ledger or “crib notes”, as the prosecution suggested, but were simply names of persons with personal loans and amounts owed to the defendant from card games. 117 Wn.2d at 482-83. The Court noted the persons on the list either had a business or personal relationship with the defendant, and many of the names were first names only, thus known to the defendant alone. *Id.* at 490, 492. “[T]he defendant was the only one who could reasonably determine who the

people on the slips were, given the first names listed.” *Id.* at 491. “Thus, the prosecutor showed the peculiar availability of the witnesses to the defense within the context of the missing witness doctrine.” *Id.*

On the other hand, in *State v. David, supra*, the Court held a witness was not “peculiarly available” to one party, because the whereabouts of the witness were kept confidential from all parties for the witness’s protection. 118 Wn. App. at 67. Similarly, a missing witness instruction and argument was improper in *State v. Montgomery* as to the defendant’s landlord and 14-year-old grandson, who may have been able to corroborate the defendant’s story about why certain items were purchased by the defendant. 163 Wn.2d at 596-97. The Court held the grandson’s absence from trial was adequately explained, as his testimony was not critical and he was in school at the time. *Id.* at 599. The missing witness inference was also inappropriate as to the defendant’s landlord, because this witness was not “specifically under [the defendant’s] control.” *Id.*

An individual is not peculiarly available to the defendant and his absence can be satisfactorily explained where the witness is unavailable because his testimony, if favorable to the defendant who would call him as a witness, would be self-incriminatory. *State v. Gregory*, 158 Wn.2d 759, 845-46, 147 P.3d 1201 (2006), *overruled on other grounds by State v.*

W.R., Jr., 181 Wn.2d 757 (2014) quoting *Blair*, 117 Wn.2d at 489-90 (“[T]he missing witness doctrine is limited; ‘the inference is not available if the witness’s testimony would necessarily be self-incriminatory if favorable to the party who could have called the witness.’”)

For example, in *State v. Gregory*, the prosecutor criticized the defense’s failure to call a murder victim’s ex-boyfriend to testify, whom the defense suggested had actually killed the victim. *State v. Gregory*, 158 Wn.2d at 845-46. The Court held, “[t]he missing witness doctrine would not apply here where, if [the ex-boyfriend’s] testimony were favorable to [the defendant], it would have incriminated [the ex-boyfriend.]” *Id.*

Similarly, in *State v. Carter*, a prosecutor remarked about the defendant not calling a particular witness (Smothers) to testify after the defendant claimed that it was not she, but a different woman, who had accompanied Smothers to attract drug buy customers. *State v. Carter*, 74 Wn. App. at 324. Because Smother’s testimony would have been self-incriminatory if it was favorable to the defendant, this witness’s absence from trial was satisfactorily explained and, thus, the prosecutor’s invocation of the missing witness inference was improper. *Id.* at 331-32.

Mr. Huesties testified his friends, “John” and “Lisa,” knew that Tony Rodriguez had asked him to rent the dehumidifier on his behalf, and that Mr. Huesties and John dropped off the dehumidifier at Mr.

Rodriguez's apartment. Because the defendant did not subpoena John or Lisa to testify, the court granted the State's request to give the jury a missing witness instruction. Mr. Huesties does not challenge the missing witness instruction or argument as to these two witnesses. *See State v. Blair*, 117 Wn.2d at 490-92.

However, the trial court did abuse its discretion to the extent that the missing witness instruction was given as to Mr. Rodriguez, to which defense counsel was ineffective in failing to object. RP 94. And, the prosecutor made improper argument that infringed upon the defendant's constitutional rights when he argued the missing witness inference as to Mr. Rodriguez. RP 113.

First, the trial court did not specify which "missing witnesses" the missing witness instruction applied to. RP 94. The instruction was legally deficient to the extent that it permitted the jury to apply the inference to Mr. Rodriguez rather than only to John and Lisa. The missing witness instruction was not supported as to Mr. Rodriguez. Additionally, the prosecutor invoked the missing witness inference, not only as to John and Lisa, but also as to Mr. Rodriguez, to which defense counsel neglected to object. RP 113. This error prejudiced the outcome of this trial.

Mr. Rodriguez should not have been considered a "missing witness" for which the jury was encouraged to presume that his testimony

would be unfavorable to Mr. Huesties. RP 94. Mr. Rodriguez was not “peculiarly available” to the defendant. There was no community of interest between Mr. Huesties and Mr. Rodriguez. They were not bound by the ties of affection or interest. Indeed, they barely knew each other as acquaintances after Mr. Rodriguez helped fix Mr. Huesties’ vehicle. RP 44; *David*, 118 Wn.2d at 66-67. Even if Mr. Huesties and Mr. Rodriguez were acquaintances at one time, there was no community of interest or ongoing special relationship where Mr. Huesties could count on Mr. Rodriguez to appear and testify for him. *See Cheatam*, 150 Wn.2d at 653.

Mr. Huesties did not know how to reach Mr. Rodriguez or have any sort of ongoing relationship so this person was naturally available to Mr. Huesties to call as a witness. RP 11 (Defense counsel: “His name was Tony Rodriguez. That's the only thing that I know and it's the only thing that Mr. Huesties knows.”) The State acknowledged that Mr. Rodriguez was a person Mr. Huesties “hardly kn[ew].” RP 98-99. Mr. Huesties should not be penalized in his criminal trial where no bonds of affection existed between him and the recalcitrant missing witness. Mr. Rodriguez’s whereabouts were unknown to both parties, including defense counsel and the State’s law enforcement officer who tried to locate Mr. Rodriguez’s updated whereabouts to no avail. RP 10-15, 84-85. Mr. Rodriguez was equally unavailable to both parties, which means that the

missing witness inference could not be applied against the defendant. *Montgomery*, 163, Wn.2d at 598-99; *Blair*, 117 Wn.2d at 490–91; *Lopez*, 29 Wn. App. 836 (transients whose whereabouts were unknown were not “missing witnesses” for purposes of the missing witness inference).

Additionally, the missing witness instruction and inference clearly could not be applied against the defendant as to Mr. Rodriguez, because this individual’s absence from the trial could be satisfactorily explained. Mr. Huesties testified that he left the dehumidifier with Mr. Rodriguez, who had promised to return the equipment. RP 43, 46. Both Mr. Rodriguez and the equipment then disappeared. *Id.* Assuming, as we must, that Mr. Rodriguez’s testimony would have been favorable to the defense – that Mr. Huesties gave Mr. Rodriguez the dehumidifier, which Mr. Rodriguez promised to return and never did – this testimony would have implicated Mr. Rodriguez in the rental equipment theft.

In other words, Mr. Rodriguez’s testimony, if favorable to Mr. Huesties, would have been self-incriminatory as to Mr. Rodriguez. The law is well settled that such an individual cannot be considered a missing witness as to the defendant. *Gregory*, 158 Wn.2d at 845-46 (missing witness inference could not be held against the defendant for failure to call an individual that the defendant accused of being the perpetrator of the crime); *Carter*, 74 Wn. App. at 324, 331-32 (missing witness inference

improper as to an individual the defendant accused of participating in the defendant's charged crime).

Encouraging the jury to apply a missing witness inference against the defendant as to Mr. Rodriguez was clear error. The jury was encouraged to infer that any testimony Mr. Rodriguez would have supplied would have been unfavorable to Mr. Huesties. This inference was improper due to Mr. Rodriguez's unavailability to Mr. Huesties as a witness. The missing witness argument invokes constitutional problems as well, because it improperly shifted the burden to the defendant to present evidence and disprove the State's case. Mr. Huesties was denied his constitutional rights to have the State prove its case against him beyond a reasonable doubt (without shifting the burden to the defendant to disprove the same), and Mr. Huesties was denied his constitutional right to effective assistance of counsel when his attorney failed to object to the missing witness instruction and inference being argued as to Mr. Rodriguez. *Contreras*, 57 Wn. App. 471; *Montgomery*, 163 Wn.2d at 599.

Because Mr. Huesties' constitutional rights were violated by the improper burden shifting, he encourages this Court to apply the more stringent standard of constitutional harmless error. "That is, [this Court] must reverse unless [it is] convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt."

Contreras, 57 Wn. App. at 473. Regardless, even if this Court simply analyzes the prejudice prong under an ineffective assistance or prosecutorial misconduct argument, Mr. Huesties can still establish sufficient prejudice in this case from the improper missing witness inference to warrant reversal. *McFarland*, 127 Wn.2d at 334-35 (reversal required where there is a reasonable probability the result of the proceeding would have been different but for counsel's deficient performance); *Carter*, 74 Wn. App. at 332 (reversal required where there is a substantial likelihood that the prosecutor's improper argument affected the jury's verdict).

The jury's application of a missing witness inference against the defendant as to Mr. Rodriguez was incredibly prejudicial in this trial. Mr. Huesties consistently maintained he had rented the dehumidifier on Mr. Rodriguez's behalf to help this individual clear moisture from the air in his apartment after there was a flood. RP 42, 52. The defendant testified he attempted to locate Mr. Rodriguez after he learned the dehumidifier was not returned as promised by Mr. Rodriguez, but Mr. Rodriguez had vacated his apartment. RP 45-46. Mr. Huesties swore he never had any intention of the dehumidifier not being returned to Pasco Rentals. RP 48.

After hearing this testimony from Mr. Huesties, the jury was improperly told to infer that anything Mr. Rodriguez had to say would be

unfavorable to Mr. Huesties. Given that the crux of this case focused on who actually deprived Pasco Rentals of the dehumidifier and Mr. Huesties' intent in this regard, the jury's improper inference based on Mr. Rodriguez's absence from trial was incredibly damaging.

The improper missing witness inference by the jury was made even more prejudicial due to the exaggerated manner in which the prosecutor argued the inference to the jury. The prosecutor argued as follows:

He said he got a call from a guy named Tony, that he needed to rent this thing because Tony couldn't rent this. So he rents it for a guy he hardly knows. How's he know him? He knows him because Tony did him a favor, worked on his car. Well, if you do someone a favor, you owe a favor. What happened here is that Mr. Huesties rented equipment, rented, took it from Pasco Rentals and delivered it in exchange for his car repair. That's what this is all about. It's a straight trade.⁵

RP 98-99.

There is a good chance this place was empty. This is why -- it's another story. Nobody can verify any of the story. This is why Mr. Huesties' story is bunk. He took the property to sell it because he needed the money.⁶

RP 102.

One of the things that's been going over and over again is, well, nobody contradicts Mr. Huesties. And why is that? Because we learned the story yesterday. There is nobody else to call. Who is going to verify his story or not say his story is correct? Where's John? Where's Sue (sic)? Who could help you find Mr. Rodriguez?

⁵ There is no evidence that Mr. Huesties traded the dehumidifier to Mr. Rodriguez; rather, this argument is based on the missing witness inference.

⁶ Again, there is no evidence supporting this argument, as the prosecutor is making the argument based on the missing witness inference as to Mr. Rodriguez.

Because Mr. Rodriguez, John, and Sue (sic) all knew each other. That's how Mr. Huesties met them. Where are they? They're not here. Why? Because Mr. Huesties' story, which isn't true.

RP 113.

The prosecutor's arguments improperly suggested that Mr. Rodriguez's testimony would be unfavorable to Mr. Huesties' position, that Mr. Rodriguez either did not exist or live in the apartment where Mr. Huesties said he dropped off the equipment (which is simply an argument based on the missing witness inference as opposed to actual evidence presented in the case⁷), and that Mr. Huesties' story was untruthful, particularly where he did not call any witnesses to testify and back his story. The jury essentially was encouraged to not only infer Mr. Rodriguez's testimony would be unfavorable to the defendant, but to infer Mr. Huesties was not telling the truth given Mr. Rodriguez's absence from trial. The jury was encouraged to find that, based on the missing witness inference, there was an alternate explanation for what actually happened to the dehumidifier that was different from Mr. Huesties' "story" (again, these alternate explanations offered by the prosecutor appear to be based on the missing witness inference rather than actual evidence presented at trial).

⁷ At most, the evidence indicated Mr. Rodriguez did not live in the apartment as of January 2015 (RP 84-85), but this evidence is consistent with Mr. Huesties' testimony that he found Mr. Rodriguez had vacated the apartment when he returned to the apartment to find the dehumidifier (RP 45-46).

The improper missing witness inferences, particularly when combined with the improper presumption that Mr. Huesties intended to deprive Pasco Rentals of the dehumidifier as set forth in Issue 2 above, demonstrate sufficient prejudice under any standard to reverse this matter and remand for a new trial. *See also State v. McBride*, 192 Wn. App. 859, ___ P.3d ___ (2016) (quoting *State v. Jackson*, 150 Wn. App. 877, 889, 209 P.3d 553 (2009) (“[t]he cumulative error doctrine applies when several trial errors occurred and none alone warrants reversal, but the combined errors effectively denied the defendant a fair trial.”))

F. **CONCLUSION**

Based on the foregoing, Mr. Huesties requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted this 19th day of May, 2016.

/s/ Kristina M. Nichols
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Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 33828-2-III
vs.) Franklin County No. 15-1-50058-8
)
JEFFREY L. HUESTIES) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 19, 2016, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Jeffrey L. Huesties
223405 E. Cochran Road
Kennewick, WA 99337

Having obtained prior permission from Franklin County Prosecutor's Office, I served the Respondent at appeals@co.franklin.wa.us by e-mail with a true and correct copy of the attached document.

Dated this 19th day of May, 2016.

/s/ Kristina M. Nichols
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