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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,

vs.

ISMAIL HASSAN,
Appellant.

OPENING BRIEF

On Appeal from King County Superior Court No. 08-1-09739-7 KNT
The Hon. Laura Gene Middaugh, Judge

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by permitting the State to amend the information on Count II from second- to first-degree assault *after* the State rested, *after* the trial was completed, and *after* a verdict returned.

2. The trial court erred by giving the State's requested "missing witness" instruction (Instruction No. 8) where the defense theory was to attack the State's proof, namely the identification of Mr. Hassan by the State's witnesses; where Mr. Hassan did not testify and where no defense witness implied that other uncalled witnesses could corroborate the defense case; and where the "missing" witnesses had apparent Fifth Amendment privileges.

3. The trial court improperly excluded significant portions of the two defense experts's testimony and thereby substantially interfered with Mr. Hassan's constitutional right to present a defense.

4. Do the firearm "enhancements" violate double jeopardy where each charged crime requires use of a firearm as an element of the offense?

5-7. The "firearm" enhancements were not included in the general "to convict" instructions (Nos. 15 and 16). There were no separate "to convict" instruction for the firearm enhancements and there were no instruction(s) defining any of the elements of the firearm enhancement

(Instruction No. 18). Thus, the firearm enhancement verdicts were obtained in violation of Due Process.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Where an Information unambiguously charges assault in the second degree do the State and Federal Constitutions permit the State to amend the Information to a more serious crime, here assault in the first degree, *after* verdict?

2. Was it proper for the Court to give the State's "missing witness" instruction where the "missing" witnesses had apparent Fifth Amendment privileges and where the instruction allowed jurors to penalize Mr. Hassan for his silence—both in and out of court.

3. Did the trial court's exclusion of relevant and exculpatory portions of the testimony of two defense experts interfere with his constitutional right to present a defense?

4. Does it violate double jeopardy to charge a firearm "enhancement" where use of a firearm is already an element of the offense?

5. Where the "firearm" element is not included in a "to convict" instruction and where the only instruction defining the State's proof requirement fails to or incorrectly defines all of the elements of the enhancement, is the error structural, requiring automatic reversal?

III. STATEMENT OF THE CASE

Introduction

Someone fired a shotgun at two cars carrying a total of six people. Ismail Hassan was identified by several witnesses as that person. His defense attempted raise reasonable doubts about his identification as the shooter.

Procedural History

On September 4, 2008, the State charged Mr. Hassan by Information with two counts of first-degree assault. CP 1-5. The case proceeded to trial in King County Superior Court.

Pretrial hearings began on April 9, 2009.

On April 15, 2009, the parties delivered their opening statements. Testimony began that same day. On April 28, 2009, the State sought to amend the Information. The defense did not object. The Second Amended Information charged Mr. Hassan with “Assault in the First Degree” in Count I and “Assault in the Second Degree” in Count II. Count II cited to the second-degree assault statute, RCW 9A.36.021, and alleged that Mr. Hassan “intentionally assault[ed] two people with a deadly weapon.” CP 49-50.

The jury was instructed on April 29, 2009 and returned “guilty” verdicts that day. CP 55-78. The jury also answered “yes,” on the “firearm” special verdict forms. CP 51-54.

After a new trial motion was denied, Mr. Hassan was sentenced on May 22, 2009 (although the *Judgment and Sentence* was not filed until May 26, 2009). CP 99-106. Prior to sentencing, the State sought and was granted permission to amend the Information to now charge Assault in the First Degree with a Firearm in Count II. CP 97-98. At the time of sentencing, Mr. Hassan had no criminal history. He was sentenced to 93 months on each count along with two 60 month enhancements. All of the time was ordered to run consecutively for a total of 306 months. CP 99-106. After sentencing, Mr. Hassan filed a timely notice of appeal.

Facts—The Party

On August 30, 2008, Yudith Fuentes was celebrating her birthday. RP (4/22/09) 61-87. The party eventually led to Mr. Hassan's apartment. *Id.*¹ At some point, the party got loud and Mr. Hassan asked those people to quiet down. RP (4/22/09) 71. This request, led to a fight involving Mr. Hassan and Yudith's boyfriend, Fidel Juarez. *Id.* at 71-72. Other people were involved in the fight including two men already present at Mr. Hassan's apartment when the party-goers arrived, who Hassan had described as his "cousins." *Id.* at 73-75. At least one of those men threatened Juarez and his brothers with a knife. *Id.*

All but one of the party-goers then fled the party. *Id.* at 76. That person, Eduardo Lopez Nicio, claims he tried to leave, but was assaulted by

¹ Several witnesses testified to these largely uncontested facts.

“Ismail’s friends.” RP (4/20/09) 31-32. He testified that both “friends” assaulted him. *Id.*

Shots Fired

The party-goers drove off in two vehicles. As they attempted to drive away, both cars were hit by gunfire. The victims identified Mr. Hassan as the shooter. *See e.g., id.* at 78, 85.

The police were called and arrived only minutes later. Based on the victims’ statements, Mr. Hassan, who denied he was the shooter, was arrested. RP (4/20/09) 84-90; 100-09.

Defense Case

Three witnesses were called in the defense case. Mr. Hassan did not testify.

The defense called two experts: Kay Sweeney, a forensic scientist and Dr. Geoffrey Loftus, a psychologist who has extensively studied the interaction between memory and identification. Dr. Loftus, a professor of psychology at the University of Washington, testified about how memory works and the factors that can result in the misidentification of a suspect in a crime. RP 4/24/09) 30-92. There were several times prior to and during trial where the Court limited the scope of Dr. Loftus’s testimony.

On April 14th, the Court precluded Dr. Loftus from describing how lighting can effect an identification (that was offered specifically on the issue of skin tone). RP (4/14/2009) 229. Although the Court did not set the

all of the parameters of Dr. Loftus's testimony at that hearing, the Court set forth the general rule that was enforced during the trial: Dr. Loftus's opinion can be supported only by information that is beyond common knowledge—but cannot support his opinion based on commonly accepted theories. *Id.* at 236. For example, the Court held that Dr. Loftus could not discuss the failure of the witnesses to identify an apparently obvious emblem on a shirt and could not discuss how distance, duration, or divided attention affect memory and the ability to identify a particular person. *Id.* at 239. *See also* RP (4/23/09) 115-19.

The trial court's restrictions did not end there. During his testimony, the trial court refused to allow Dr. Loftus to discuss the relationship between alcohol and memory (RP (4/24/09) 73); inferences that a witness may make based on past experience (*id.* at 75); and he was not permitted to testify regarding the problems inherent in a show up procedure (*Id.* at 75); as well as the relevance of post-event information. *Id.* at 76-77. The defense objected to these restrictions.

Kay Sweeney, a forensic scientist was also called by the defense. Like with Dr. Loftus, the Court imposed several significant restrictions on Mr. Sweeney's testimony. The defense sought to have Mr. Sweeney, who took numerous photographs of the scene in order to determine whether the lighting could distort colors, testify to his opinions on that topic. RP (4/9/09) 52. Likewise, the trial court prohibited Mr. Sweeney from

testifying to his opinion calculating the distance of shots fired based on the pattern of damage. *Id.*; RP (4/28/09) 5. Mr. Sweeney was able to testify about the potential significance of the lack of gunshot residue on Mr. Hassan and the ability to fingerprint certain seized items. RP (4/28/09) 37.

Mike Ochoa was also called by the defense. RP (4/24/09) 93-115. He heard the shots, walked outside less than a minute later and was shortly thereafter joined by Mr. Hassan, who was “calm and collected.” *Id.* at 107. Mr. Ochoa was not at the party and did not have any knowledge about who was there or what happened. *Id.* at 96, 112.

The “Missing Witness” and “To Convict” Instructions

Over defense objection, the State sought and was given a “missing witness” instruction based on Mr. Hassan’s failure to identify or call the two “cousins” at the party. The Instruction (No. 8) is attached as Appendix A. The general “to convict” instructions did not include the firearm “enhancement” element. Instead, a separate instruction told jurors to answer a special verdict form if they found that Mr. Hassan was armed with a firearm at the time of the crimes. Those instructions are attached as Appendix B.

IV. ARGUMENT

A. The Trial Court Improperly Permitted the State to Amend the Information After Verdict in Violation of the State and Federal Constitutions.

Introduction

During trial, Mr. Hassan was charged with one count of first degree and one count of second-degree assault. CP 49-50. Earlier in the proceedings, the charging document alleged two counts of first-degree assault.

However, the charging document in place at trial (the Second Amended Information) alleged in Count II the crime of “assault in the second degree,” cited to the second-degree assault statute, and stated the elements of second-degree assault. Thus, the face of the charging document revealed only the intent to charge second-degree assault in Count II.

After the verdict, the State sought to amend the charging document to charge two counts of first-degree assault. CP 97-98. The State argued that it had intended to charge Mr. Hassan with first-degree assault in the amended Information, characterizing the second-degree assault charge as a clerical error. Over the defense objection, the trial court permitted the post-verdict amendment of the Information. RP (5/22/09) 3.

The trial court erred.

The Constitution Limits Amendment After the State Rests

Washington law is clear that an Information cannot be amended to a more serious charge after the State rests its case. *State v. Pelkey*, 109 Wash.2d 484, 745 P.2d 854 (1987). Applying settled law, the trial court should not have been permitted the State to amend the charging document after verdict.

U.S. Const. Amend. VI provides in part: “In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation; ...” Washington Const. art. 1, § 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him.” Thus, an accused must be informed of the criminal charge he is to meet at trial and cannot be tried for an offense not charged. *Auburn v. Brooke*, 119 Wash.2d 623, 627, 836 P.2d 212 (1992); *State v. Irizarry*, 111 Wash.2d 591, 592, 763 P.2d 432 (1988).

In *State v. Pelkey, supra*, our Supreme Court clearly outlined the constitutional limitations to CrR 2.1. Under *Pelkey*, the State cannot amend a charge after it has rested its case in chief *unless* the amended charge is a lesser included offense or a lesser degree of the same offense. *Pelkey*, 109 Wash.2d at 491; *see also State v. VanGerpen*, 125 Wash.2d 782, 789-91, 888 P.2d 1177 (1995); *State v. Markle*, 118 Wash.2d 424, 436-37, 823 P.2d 1101 (1992). The *Pelkey* court held that because an amendment after the

State rests “necessarily prejudices” a defendant's constitutional right to demand the nature and cause of the accusation against him, a trial court commits *per se* reversible error if it allows the State to amend the information after that point in a criminal case. *Markle*, 118 Wash.2d at 437 (quoting *Pelkey*, 109 Wash.2d at 491) (emphasis omitted). As the Supreme Court noted in *VanGerpen*:

This court drew a bright line in *Pelkey*, which we adhered to in *Markle* and in *Schaffer*. The rule that any amendment from one crime to a different crime after the State has rested its case is *per se* prejudicial error (unless the change is to a lesser included or lesser degree crime) protects the constitutional right of the accused to be informed of the nature of the offense charged. A change in the rule would necessitate a reversal of both *Pelkey* and *Markle* and this we decline to do.

Id. at 791. There is likewise no reason to overrule those cases in this case.

The Information Unambiguously Charged Second-Degree Assault

The State will likely argue in response, as it did in the trial court, that the second-degree assault count, a charge that correctly stated the elements of second-, but not first-degree assault, was a clerical error.

VanGerpen also considered and rejected this argument:

The State argues that the omission of the element of “premeditation” was only a “scrivener's” error and relies on the cases which hold that technical defects can be remedied midtrial. Convictions based on charging documents which contain only technical defects (such as an error in the statutory citation number or the date of the crime or the specification of a different manner of committing the crime charged) usually need not be reversed. However, omission of an essential statutory element cannot be considered a mere technical error. Sometimes errors made in charging documents are oversights in omitting an element of the crime, but for sound policy reasons

founded in our state and federal constitutions, this court has nonetheless consistently adhered to the essential elements rule.

Id. at 790. Indeed, if the State could claim that the Information did not accurately reflect its intent because of a scrivener's error, the *Pelkey* rule would effectively be eviscerated. The State claims that it made an error in charging. However, the State has only itself to blame. *See generally State v. Dearbone*, 125 Wash.2d 173, 883 P.2d 303 (1994) (requiring a "good cause" showing for State's self-inflicted procedural error).

Thus, it was clear error to permit the trial court to the amendment. The only real issue is remedy.

The State Should Not be Permitted to Charge First-Degree Assault

VanGerpen remanded for a new trial where the State was permitted to file a new information. However, on the issue of remedy, *VanGerpen* can be distinguished from the case at bar.

In *VanGerpen*, the defendant contended that because the elements of his charging document added up only to murder in the second degree (the element of premeditation was missing), he should be sentenced only for that crime. However, the defendant in *VanGerpen* "was not really charged with attempted murder in the second degree because the charging document was ambiguous on its face." *Id.* at 792. "It stated the charge was 'attempted murder in the first degree' and cited to the correct statutory citations for that offense, but then it accidentally omitted an element of that

crime and thereby inadvertently listed the statutory elements of only attempted murder in the second degree.” *Id.*

In *VanGerpen* the charging document was internally inconsistent and contradictory on its face. Here, the charging document is internally *consistent*—charging only assault in the second-degree. Thus, this Court should not permit any post-verdict amendment of the charging document.

If this Court grants Mr. Hassan a new trial based on any of the arguments below, the State should be limited to an assault in the second-degree charge on Count II. If this Court denies Hassan’s requests for a new trial, then it should remand for entry of a second-degree assault conviction.

B. The Trial Court Erred by Giving a Missing Witness Instruction That Could Be Used Against Mr. Hassan.

Introduction

In *State v. Blair*, 117 Wash.2d 479, 816 P.2d 718 (1991), the Washington Supreme Court authorized a narrow set of circumstances where a “missing witness” instruction could be used against a defendant. However, the court emphasized that limitations on the doctrine are particularly important when a criminal defendant’s failure to call particular witnesses is the subject of prosecutorial comment. Those limitations are *even more* important when the defense failure to call a witness is the subject of a court’s jury instruction.

This case falls far outside of narrow set of circumstances approved

in *Blair*. Just as importantly, the use of the instruction in this case penalized Mr. Hassan’s right to silence, obscured the presumption of innocence and switched the burden of production, and constituted a comment on the evidence. Because the State cannot show that the instruction was harmless beyond a reasonable doubt, reversal is required.

Facts Relevant to this Claim of Error

Mr. Hassan’s defense was “general denial”—that doubts existed about whether Hassan was the shooter. During his case, Hassan called three witnesses (two experts and a neighbor). The upshot of all of this testimony was to cast doubt on the State’s case, namely his identification as the shooter. No defense witness made any mention of the two “cousins.” Hassan did not testify.

Nevertheless, the State sought and the trial court gave a “missing witness” instruction, based on the failure of Mr. Hassan to identify and call the “cousins” present at Hassan’s apartment. Thus, the jury was permitted to infer (as substantive evidence) from Mr. Hassan’s failure to call these two men that they would have testified Mr. Hassan was the shooter.

History of the Missing Witness Instruction

In both civil and criminal cases, if a party fails to call a particular witness to testify when it would seem natural to do so, an inference may arise that the witness's testimony would have been unfavorable. The rule is

often referred to in a short-hand way as the "missing witness" rule.²

The missing witness rule has also been sharply criticized for its "potential inaccuracy and unfairness." R. Stier, *Revisiting the Missing Witness Inference--Quieting the Loud Voice from the Empty Chair*, 44 Md. L.Rev. 137, 151 (1985). Critics have noted that the decision not to call the witness may be based upon many facts besides the party's fear that weaknesses in his case will be exposed if testimony is heard.

Thus, many courts have noted the danger that the missing witness instruction, "which in effect creates evidence from non-evidence, may add a fictitious weight to one side of the case ... by giving the missing witness undeserved significance." *Dent*, 404 A.2d at 171; see also *Davis*, 633 A.2d

² The years since *Blair* have witnessed a growing wariness among courts about the wisdom of the missing witness rule, and a number of courts have rejected it outright. See *State v. Tahair*, 172 Vt. 101, 772 A.2d 1079, 1083-84 (Vt. 2001) (and cases cited therein); *State v. Malave*, 250 Conn. 722, 737 A.2d 442, 447 (1999) (concluding that "the rule should be abandoned in criminal cases"); *State v. Brewer*, 505 A.2d 774, 777 (Me.1985) (holding that "in a criminal case the failure of a party to call a witness does not permit the opposing party to argue, or the factfinder to draw, any inference as to whether the witness's testimony would be favorable or unfavorable to either party"); *State v. Caron*, 300 Minn. 123, 218 N.W.2d 197, 200 (1974) (forbidding comment upon defendant's failure to call witnesses); *Henderson v. State*, 367 So.2d 1366, 1368 (Miss.1979) (holding that "an instruction on either party's failure to call a witness in criminal cases should not be given"); *State v. Jefferson*, 116 R.I. 124, 353 A.2d 190, 199 (1976) (any comment upon defendant's failure to produce witnesses "was improper"), *abrogated on other grounds by State v. Caruolo*, 524 A.2d 575, 581 (R.I.1987); *State v. Hammond*, 270 S.C. 347, 242 S.E.2d 411, 416 (1978) (observing that "such a charge has no proper place in the judge's statement of the law"); *Russell v. Commonwealth*, 216 Va. 833, 223 S.E.2d 877, 879 (1976) (concluding that "[w]e do not believe a missing-witness presumption instruction has any place in a criminal case"); see also *Dent v. United States*, 404 A.2d 165, 170 (D.C.1979) (allowing instruction, but noting that "[c]ourts have recognized several dangers inherent in allowing the jury to draw an inference adverse to a party from the absence of evidence"); *Taylor v. State*, 676 N.E.2d 1044, 1046 (Ind.1997) (observing that "[t]he tendered instruction, commonly referred to as a missing witness instruction, is not generally favored in Indiana"); *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682, 685 (Iowa 1976) (noting that "[t]he inference should be invoked prudently" and with caution); *Davis v. State*, 333 Md. 27, 633 A.2d 867, 879 (1993) (trial court "should be especially cautious" in giving missing witness instruction); *Commonwealth v. Schatvet*, 23 Mass.App.Ct. 130, 499 N.E.2d 1208, 1211 (1986) (holding that, "[b]ecause the inference, when it is made, can have a seriously adverse effect on the noncalling party ... it should be invited only in clear cases, and with caution").

at 879 (trial court's missing witness instruction, in contrast to prosecutor's reference to missing witness in closing argument, "creat[es] the danger that the jury may give the inference undue weight"); *Francis*, 669 S.W.2d at 89 (same); *Henderson*, 367 So.2d at 1368 (rejecting missing witness instruction on ground that it "place[s] too much emphasis on such permissible inference and tend[s] to cause juries to decide cases on the lack of testimony rather than direct testimony").

Courts and commentators have further noted that the instruction raises constitutional concerns by implying that the defendant has some obligation to produce evidence, thus diminishing the State's burden of proving the defendant's guilt beyond a reasonable doubt. See *Brewer*, 505 A.2d at 777 ("The inference may have the effect of requiring the defendant to produce evidence to rebut the inference."); *Caron*, 218 N.W.2d at 200 (such comment "might suggest to the jury that defendant has some duty to produce witnesses or that he bears some burden of proof"); *Jefferson*, 353 A.2d at 199 (same); *Russell*, 223 S.E.2d at 879 (instruction could "weaken, if not neutralize, the presumption of innocence").

Current Limitations on the Giving of a Missing Witness Instruction

In a criminal case, the burden of proof is on the State to prove every element of the crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 22. The accused has no obligation

to testify or present any evidence, and it is error for State to suggest otherwise. *State v. Montgomery*, 163 Wash.2d 577, 597, 183 P.2d 267 (2008); *State v. Blair*, 117 Wash.2d 479, 491, 816 P.2d 718 (1991); U.S. Const. amends. 5, 14; Wash. Const. art. 1 §§ 9, 22.

It is for these reasons that the instruction is proper only in certain limited circumstances. But “limitations on the missing witness doctrine are particularly important when, as here, the doctrine is applied against a criminal defendant.” *Montgomery*, 163 Wash.2d at 598. Three important requirements must be met before a party may utilize the missing witness doctrine: (1) the witness must be peculiarly available to the party against whom the inference is to be drawn, (2) the testimony must be important and not cumulative, and (3) there must not be an explanation for the witness’s absence, such as a testimonial privilege or incompetence. *Montgomery*, 163 Wash.2d at 598-99; *Blair*, 117 Wash.2d at 489-91. The presence of any one of these considerations is sufficient to preclude use of the missing witness instruction or argument by the State. *Blair*, 117 Wash.2d at 488-90.

In this case, none of the requirements set forth in *Blair* were satisfied. Just as importantly, the giving of the instruction violated several constitutional concerns that did not arise in *Blair*.

The Missing Witnesses Had Apparent Self-Incrimination Concerns

A missing witness instruction is improper if the witness's testimony

would be inadmissible due to the assertion of a privilege. However, the defendant need only show that missing witness's testimony would be *potentially* self-incriminating, raising the possibility that the witness *might* assert the privilege against cross examination. *State v. Gregory*, 158 Wash. 2d 759, 147 P.3d 1201 (2006). *Gregory* holds that the instruction is not proper when, if the missing witnesses' testimony were helpful to the defendant, it would have incriminated the witness(es). *Id.* at 846.

Here, it was clear that the “missing” witnesses had potential Fifth Amendment concerns—for both charged and uncharged crimes. Not only could either or both witnesses be implicated in the shooting (as either a principal or an accomplice), they were implicated in the earlier fight and at least one of them alleged pulled a knife during the earlier fight. In contrast to the minimal showing required under the law, the trial court in this case reasoned that in order to avoid the instruction Mr. Hassan was required to call the witnesses and have them claim a self-incrimination privilege. That is simply not the law.

Even Assuming the Witnesses Did Not Have Fifth Amendment Concerns, the Defense Theory Did Not Imply that the Witnesses Had Highly Relevant Testimony

The law permits subjecting testimony proffered by a defendant to the same scrutiny that can be applied to the State's case. *State v. Contreras*, 57 Wash.App. 471, 476, 788 P.2d 1114 (1990). In other words, sometimes the failure to call a witness can be considering impeaching. For that reason, the

State may point out the absence of a “natural witness” when it appears from the trial record 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. *Blair*, 117 Wash.2d at 485-86.

In this case, the defense never implied that the “missing” witnesses had any relevant testimony. A mere unexplained failure to call a witness does not give rise to the inference. The inference that witnesses available to a party would have testified adversely to such party arises only where, under all circumstances of the case, such unexplained failure to call witnesses creates a suspicion that there has been a willful attempt to withhold competent testimony. That inference was simply not warranted in this case. Indeed, if giving a missing witness instruction was appropriate in this case, it would also be appropriate in every case where any potential witness was identified who had a relationship to the defendant.

Further, the identification of the witnesses as “cousins,” was insufficient to establish that the witness was within the control of Mr. Hassan. In slang, “cousin” is often used to describe an acquaintance or friend.

The facts in *Blair* stand in stark contrast to the facts in this case. In *Blair*, the defendant testified and his testimony established “unequivocally” that the absent persons could have corroborated his story. In addition, Blair

testified he could have located the witnesses and the State would have had much difficulty in doing so because they were listed (in a ledger created by defendant) by first name only. *Id.* at 487. Likewise, in *State v. Contreras*, 57 Wash.App. 471, 788 P.2d 1114 (1990), the defendant's alibi was that he spent the entire night with his girlfriend and they ran into some acquaintances on a couple of occasions during the night. *Id.* at 472-73. The acquaintances testified, but the girlfriend did not. *Id.* The court found it permissible to argue that the girlfriend's testimony would have been unfavorable because the defendant did not call her even though she was a key witness with a special relationship to the defendant. *Id.* at 475-76.

It is important to keep in mind that the defendant, under our Constitution, “need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: ‘Prove it!’” *See Williams v. Florida* 399 U.S. 78, 112 (1970) (Black, J. dissenting).

In this case, Mr. Hassan was deprived of that right. Applying the test set forth in *Blair*, the instruction was improper.

The Instruction Violated Several Constitutional Guarantees

Not only was the decision to give the instruction in this case contrary

to the test set forth in *Blair*, it violated several constitutional protections.

A missing witness instruction is improper if it would infringe on a criminal defendant's right to silence or shift the burden of proof. *Id.* at 491. It is inherently contradictory, on the one hand, to instruct the jury that the defendant does not have to testify and does not have to prove his innocence, and on the other hand, to instruct the jury that if it determines that a witness would have been naturally produced by the defendant it may conclude that the witness' testimony would have been harmful to the defendant. That the State may never impose a burden or duty upon the defendant to produce evidence is another way of saying the defendant has a *right* not to defend and may instead rely on weaknesses in the State's case.

In other words, if a defendant does not have a duty to produce witnesses to prove his innocence, then the failure to call a witness should not be held against him.

However, that is exactly what happened in this case. Mr. Hassan's jury was told that because Mr. Hassan did not identify the "cousins" sufficiently so that the State could locate them and/or failed to provide a satisfactory explanation for why the witnesses were not called, the jury could conclude that the witnesses would have identified Mr. Hassan as the shooter. Thus, a negative inference was permitted from Mr. Hassan's failure to provide this information—from his silence.

The instruction permitted jurors to conclude that missing witnesses

would have provided damning substantive evidence against Mr. Hassan. In previous case, like *Blair*, the missing witness rule was limited to impeachment of the defense case. Here, because of the Court’s instruction, juror were permitted to use an empty witness chair as perhaps the most damning substantive evidence of guilt. This violated Mr. Hassan’s Sixth Amendment rights to confrontation and compulsory process.

The instruction also violated Due Process in this case because the State was only required to establish that the “inference is reasonable,” rather than requiring jurors to be convinced of the inference beyond a reasonable doubt. In addition, the instruction constituted a comment on the evidence in violation of Art IV, sec. 16 of the State Constitution because it told juror’s that—in the eyes of the Court—the evidence supported, although it did not require, an inference that the missing witnesses’ testimony would have been unfavorable to Mr. Hassan. Courts do not give instructions unsupported by the evidence.

Mr. Hassan asserts that this State should abandon the missing witness instruction. However, short of doing so, it is clear that the instruction in this case was highly improper for numerous reasons.

The State Cannot Demonstrate Harmlessness Beyond a Reasonable Doubt

“An erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did

not contribute to the verdict obtained.’ Whether a flawed jury instruction is harmless error depends on the facts of a particular case.” *State v. Carter*, 154 Wash.2d 71, 81, 109 P.3d 823 (2005) (alteration in original) (quoting *State v. Brown*, 147 Wash.2d 330, 332, 58 P.3d 889 (2002)).

This Court should reverse and remand for a new trial.

C. The Trial Court Precluded Mr. Hassan from Presenting the Complete Opinions of His Experts and Thereby Denied Him the Right to Present a Defense

Introduction

The trial court permitted two defense experts to testify, but only after significantly limiting the scope of each witnesses’ testimony.

Dr. Loftus was allowed to testify about how memory can result in an unintentional and unknowing case of misidentification, but was largely limited to describing the non-intuitive factors. Thus, he was precluded from discussing those factors which would likely have been most accepted by Hassan’s jury. As a result, the unfair limitations imposed by the Court likely injured the credibility of Dr. Loftus’s opinion in the eyes of Hassan’s jury.³

In addition, the trial court precluded Kay Sweeney from testifying to his opinions about lighting and distance fired. RP (4/9/09) 52.

³ Not only did the trial court exclude large portions of Dr. Loftus’ testimony, the trial court made what was either intended or could have been interpreted by jurors as a sarcastic comment about Dr. Loftus’s testimony to jurors, stating: “This is exciting isn’t it, guys?” RP 66. Earlier the Court had indicated that jurors might find the testimony “boring.” RP (4/14/09) 238.

As a result of these restrictions on both defense experts, Mr. Hassan was denied the right to present a full defense. Hassan was prejudiced because the unreasonable limitations placed on his defense made it much less persuasive.

The Constitutional Right to Present a Defense

The United States Constitution guarantees criminal defendants “a meaningful opportunity” to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation marks omitted). A central component of a defendant's right to present a defense is the right to offer the testimony of witnesses. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988).

The adversary process is a fundamental attribute of our adjudicatory process. Criminal defendants are entitled to an opportunity to present evidence central to their defense, to call witnesses to testify on their behalf, and to rebut the prosecution’s case. *Ferensic v. Birkett*, 501 F.3d 469, 475 (6th Cir.2007). The denial of the right to present exculpatory evidence calls into question the ultimate integrity of the fact-finding process. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

The right to effectively present a defense is constitutionally required. *Washington v. Texas*, 388 U.S. 14 (1967) (Texas statute categorically excluding certain witnesses violated compulsory process guarantee); *Chambers v. Mississippi*, supra (exclusion of exculpatory evidence violated the accused right to present witnesses in his own defense); *Crane v. Kentucky*,

476 U.S. 683 (1986) (exclusion of evidence regarding the psychological environment surrounding defendant's confession denied defendant meaningful opportunity to present a complete defense); *Rock v. Arkansas*, 483 U.S. 44 (1987) (Exclusion of hypnotically enhanced testimony constitutes constitutional violation). This right stems from several constitutional protections.

For example, a criminal defendant has a Sixth Amendment right to compulsory process. *Washington*, supra; *Chambers*, supra. The right to call witnesses in order to present a meaningful defense at a criminal trial is a fundamental constitutional right. Compare *Washington v. Schriver*, 255 F.3d 45 (2d Cir. 2001) (exclusion of defense evidence did not rise to level of constitutional violation because evidence would not have created otherwise non-existent reasonable doubt); *Gov't of Virgin Islands v. Mills*, 956 F.2d 443, 445-6 (3d Cir. 1992) ("The testimony to be offered by Maynard, and excluded by the court, was new, non-cumulative and favorable.").

In addition to the right to compulsory process, a defendant has a Fifth Amendment due process right (*Chambers v. Mississippi*, 410 U.S. 284 (1973)), and a Sixth Amendment confrontation clause right to present evidence. *Davis v. Alaska*, 415 U.S. 308, 318 (1974). In *Davis*, the Court held that an accused has a right to expose the jury to facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The right[] ... to call witnesses in one's own behalf ha[s] long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. at 294 (1973); *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (holding that "an essential component of procedural fairness is an opportunity to be heard"); *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts.... [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.").

Supreme Court decisions regarding the exclusion of exculpatory evidence set several criteria for a reviewing court's determination of whether excluding the evidence violates the federal constitution.

The first factor is whether the evidence is relevant. *See Montana v. Egelhoff*, 518 U.S. 37 (1996) (due process right does not include the right to introduce legally irrelevant evidence). All of the excluded evidence in this case was clearly relevant.

Next, reviewing courts must evaluate the probative value of the evidence on the issue that it is offered to prove. The more highly relevant the evidence is, the more powerful case for admitting it. A related consideration is the importance of the issue the evidence is offered to

prove. The more crucial that evidence, the more compelling the need to introduce it. *See Johnson v. Puckett*, 176 F.3d 809, 821 (5th Cir. 1999) (“The failure to admit evidence amounts to a due process violation only when the omitted evidence is a crucial, critical, highly significant factor in the context of the entire trial.”).

A criminal defendant’s decision how to defend himself should be respected unless it will result in a disruption of the orderly process of justice. *People v. Ortiz*, 800 P.2d 547, 552 (Cal. 1990).

The judiciary's stance on allowing expert testimony on the fallibility of eyewitness identification has shifted dramatically over the past several decades. During the 1970s and early 1980s, when criminal defendants first attempted to introduce eyewitness expert testimony in court, judges were uniformly skeptical about admitting such evidence. *See, e.g., United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *United States v. Purham*, 725 F.2d 450, 454 (8th Cir. 1984) (finding that matter was within the common knowledge of jurors); *United States v. Thevis*, 665 F.2d 616,641 (5th Cir. 1982) (finding that matter was adequately addressed by cross-examination); *United States v. Sims*, 617 F.2d 1371, 1375 (9th Cir. 1980) (finding lack of general acceptance within scientific community); *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979) (finding that testimony would be prejudicial).

In the mid-1980s, the trend among courts shifted toward allowing such expert testimony in cases where the evidence could illuminate for jurors the psychological factors influencing the memory process. *See, e.g., United States v. Moore*, 786 F.2d 1308, 1313 (5th Cir. 1986) (finding that where key evidence is eyewitness testimony, expert testimony regarding accuracy of identification is helpful); *United States v. Downing*, 753 F.2d 1224, 1232 (3d Cir. 1985) (holding that "expert testimony on eyewitness perception and memory [should] be admitted at least in some circumstances"); *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir. 1984) ("The day may have arrived, therefore, when [the expert's] testimony can be said to conform to a generally accepted explanatory theory.").

Despite the emergence of numerous psychological studies demonstrating the inherent fallibility of human memory, jurors continue to place great reliance on eyewitness identification testimony in criminal cases. Recognizing the dichotomy between eyewitness identification errors and jurors' reliance on expert testimony, the Washington Supreme Court authorized (but did not require) the admission of such evidence in *State v. Cheatam*, 150 Wash.2d 626, 81 P.3d 830 (2003).

Although the Supreme Court upheld the exclusion of Dr. Loftus's testimony in *Cheatam*, it noted, "(d)epending on the facts of a given case, this testimony may be very helpful to a jury's assessment of credibility." *Id.* at 649. *See also Ferensic*, 501 F.3d at 477 (expert testimony regarding

eyewitness identifications “inform[s] the jury of *why* the eyewitnesses' identifications were inherently unreliable” and, thus, provide a “scientific, professional perspective that no one else [can] offer[] to the jury.”) *id.* at 482 (the significance of an expert's testimony “cannot be overstated” because, without it, a jury has “no basis beyond defense counsel's word to suspect the inherent unreliability of an eyewitness identification.”).

ER 702, while permitting opinion testimony from experts with specialized knowledge, does not require an expert's testimony to be based entirely on specialized or technical knowledge. Even a cursory examination of the caselaw proves this point. *See e.g., State v. Avendano-Lopez*, 79 Wash. App. 706, 904 P.2d 324 (1995) (drug dealers often have drugs and money on them); *State v. Francisco*, 148 Wash. App. 168, 199 P.3d 478 (2009) (drug dealers usually sell drugs instead of giving them away for free).

However, that is exactly what happened here. By excluding significant portions of Dr. Loftus's testimony that made intuitive sense, Dr. Loftus was permitted only to describe the counter-intuitive aspects of memory.

D. Double Jeopardy was Violated By Including a Firearm Element Enhancement in Crimes that Both Required Proof of a Firearm as Part of the Core Crime.

Both crimes charged included the use of a firearm as part of the core crime. Both crimes were “enhanced” by the same element—the use of a firearm. This violates double jeopardy.

In 1995, Initiative 159 entitled “Hard Time for Armed Crime” was submitted to the Legislature, which enacted it without amendment. Laws of 1995, ch. 129; *State v. Broadaway*, 133 Wash.2d 118, 124, 942 P.2d 363 (1997); WASHINGTON SENTENCING GUIDELINES COMM’N, ADULT FELONY SENTENCING app. F at F-1 (1996). The purpose of the initiative was to increase sentences for armed crime. *Broadaway*, 133 Wash.2d at 128.

RCW 9.94A.310 (3)(f) (1998) provides that the “firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.”

Subsequent caselaw has explained that the purpose of the statute is to “punish armed offenders more harshly to discourage the use of firearms, except when the possession or use of a firearm is a necessary element of the underlying crime itself.” *State v. Pedro*, 148 Wash. App. 932, 946, 201 P.3d 398 (2009) (*quoting State v. Berrier*, 110 Wash. App. 639, 650, 41 P.3d 1198 (2002)) (internal quotations omitted and emphasis added).

However, the Sentencing Guidelines Manual has always provided:

Initiative 159, enacted in 1995, made the deadly weapon enhancement applicable to nearly all felonies, doubled that enhancement for subsequent offenses, and created a separate, more severe enhancement where the weapon was a firearm. *State v. Workman*, 90 Wash.2d 433 (1978), prohibits “double counting” an

element of an offense for the purpose of proving the existence of the crime and using it to enhance the sentence, without specific Legislative intent to so allow. Consistent with *Workman*, neither the firearm enhancement nor the 'other deadly weapon' enhancement applies to specified crimes *where the use of a firearm is an element of the offense* (listed in RCW 9.94A.310(3)(f) and (4)(f)). These sentence enhancements apply to crimes committed on and after July 23, 1995.

II-62 (1996) (emphasis added). *See also* Sentencing Guidelines Manual (2008).

That is exactly what happened in this case. Mr. Hassan's use of a firearm constituted two duplicate elements in each of his crimes. As a result, he received a ten year increase in his sentence.

This result was not intended.

The basic rules of statutory construction apply with equal force to legislation by the people through the initiative process. *Senate Republican Campaign Comm. v. Public Disclosure Comm'n*, 133 Wash.2d 229, 241 n. 7, 943 P.2d 1358 (1997); *Thorne*, 129 Wash.2d 736, 762-63, 921 P.2d 514 (1996). The rule of lenity is a rule of statutory construction which applies to penal statutes. The rule applies to the SRA and operates to resolve statutory ambiguities, absent legislative intent to the contrary, in favor of a criminal defendant. *In re Sietz*, 124 Wash.2d 645, 652, 880 P.2d 34 (1994); *State v. Roberts*, 117 Wash.2d 576, 586, 817 P.2d 855 (1991); *see also State v. Lively*, 130 Wash.2d 1, 14, 921 P.2d 1035 (1996); *State v. Gore*, 101 Wash.2d 481, 486, 681 P.2d 227 (1984).

Washington courts have repeatedly looked to the explanations of the Sentencing Guidelines Commission when interpreting the SRA. *See e.g., State v. Ha'mim*, 132 Wash.2d 834, 844, 940 P.2d 633 (1997); *In re Long*, 117 Wash.2d 292, 301, 815 P.2d 257 (1991). For example, the Washington Supreme Court held in *Post Sentencing Rev. of Charles*, 135 Wash.2d 239, 250-51, 955 P.2d 798 (1998), that the statute was ambiguous about whether firearm enhancements must run consecutively to each other when the underlying crimes and sentences run concurrently. The Court specifically relied on the comments of the Sentencing Guidelines Commission to support the conclusion that the statute was ambiguous. And, because there was no clear legislative intent on the point, the Court applied the rule of lenity and held that firearm enhancements run concurrently when the base sentences run concurrently. *Id.* at 254. *Charles* provides compelling support for Hassan's argument herein.

“[T]he Legislature is presumed to know the existing state of the case law in those areas in which it is legislating and a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it.” *Price v. Kitsap Transit*, 125 Wash.2d 456, 463, 886 P.2d 556 (1994). Here, the existing state of the case law, referred to by the Guidelines Commission, required clear legislative intent to permit “double counting.”

Thus, both “enhancements” violate double jeopardy. This Court

should remand for dismissal.

E. The Firearm Enhancement Instructions Were Insufficient

Introduction

One of the elements of the charged crimes, the firearm element, was not included in Mr. Hassan’s “to convict” instruction (Instruction Nos. 15, 16). There was no separate “to convict” for that portion of the charged crimes. Instead, the relevant instruction (No. 18) simply told jurors they must find Mr. Hassan was armed with a firearm and defined firearm as a weapon from which a projectile may be fired.

This Error May be Raised for the First Time on Appeal

A party is required to object to an erroneous instruction in order to afford the trial court the opportunity to correct the error. CrR 6.15(c); *State v. Scott*, 110 Wash.2d 682, 685-86, 757 P.2d 492 (1988). Failing to object to an instruction may bar review. *Scott*, 110 Wash.2d at 686. But a party may raise a manifest error of constitutional magnitude for the first time on appeal. RAP 2.5(a)(3).

The Failure to Include the Firearm Element in the “To Convict”

This Court reviews the adequacy of a challenged “to convict” jury instruction *de novo*. *State v. Mills*, 154 Wash.2d 1, 7, 109 P.3d 415 (2005)

The Supreme Court has previously held that a reviewing court may not rely on other instructions to supply an element missing from the “to convict” instruction. *Mills*, 154 Wash.2d at 7. Instead, the “to convict”

instruction must contain all elements essential to the conviction. *Mills*, 154 Wash.2d at 7. This is because the jury has a right to regard the to-convict instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction. *Mills*, 154 Wash.2d at 8. Elements may appear in other instructions, however, and while a reviewing court may not import those elements to cure the omission of an element from a “to convict” instruction, automatic reversal is required only where the trial court failed to instruct the jury on all elements of the charged crime. *State v. DeRyke*, 149 Wash.2d 906, 911-12, 73 P.3d 1000 (2003). Where, instead, the essential elements appear in a definitional instruction, the alleged failure of the “to convict” instruction to include an element is subject to harmless error analysis. *DeRyke*, 149 Wash.2d at 912 (citing *State v. Brown*, 147 Wash.2d 330, 339, 58 P.3d 889 (2002)).

In this case, not only was the firearm enhancement not included in the to-convict instruction, there was no separate to-convict instruction and several of the elements of the firearm enhancement were not defined at any place in the instructions.

For example, the instruction failed to define the term “armed.” Armed has a specific meaning under the law. A person is ‘armed’ if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.” *State v. Valdobinos*, 122 Wash.2d 270,

282, 858 P.2d 199 (1993). In addition, the law requires a a nexus that connects him, the weapon, and the crime. *State v. Schelin*, 147 Wash.2d 562, 567-68, 55 P.3d 632 (2002).

This nexus requirement is “critical” because “[t]he right of the individual citizen to bear arms in defense of himself, or the State, shall not be impaired....” Wash. Const. art. I, § 24. The State may not punish a citizen merely for exercising this right. *State v. Rupe*, 101 Wash.2d 664, 704, 683 P.2d 571 (1984).⁴ The State may punish him for using a weapon in a commission of a crime, though, because a weapon can turn a nonviolent crime into a violent one, increasing the likelihood of death or injury. *State v. Gurske*, 155 Wash.2d 134, 138-39, 118 P.3d 333 (2005).

In addition, the firearm element requires more than proof that the weapon was designed to fire a projectile (as the instruction required), but instead requires proof of operability. *See State v. Pam*, 98 Wash.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wash.2d 124, 761 P.2d 588 (1988).

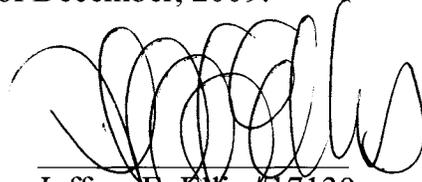
Because the instructions did not require anything close to legally sufficient evidence in order for the jury to convict and because there were multiple elements which were not included in the instructions, reversal is required. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

⁴ Hassan notes that the trial court permitted the State to introduce evidence that Hassan possessed other weapons. In addition to having little to no probative value, this evidence ran afoul of the constitutional right to bear arms.

V. CONCLUSION

Based on the above, this Court should reverse and remand either for a new trial or new sentencing hearing.

DATED this 18th of December, 2009.



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APPENDIX A ~
MISSING WITNESS INSTRUCTION

No. 8

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.

The parties in this case are the State of Washington and Ismail Hassan.

APPENDIX B ~
FIREARM AND "TO CONVICT"
INSTRUCTIONS

To convict the defendant of the crime of assault in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 31, 2008, the defendant assaulted Mari Carmen Vasquez, Yudith Fuentes Carrazco, Luis Juarez Castillo, and Fidel Juarez Castillo;

(2) That the assault was committed with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death;

(3) That the defendant acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

No. 16

To convict the defendant of the crime of assault in the first degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 31, 2008, the defendant assaulted Martha Mercado and Oscar Juarez Castillo;

(2) That the assault was committed with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death;

(3) That the defendant acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count II.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count II.

No. 18

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Counts I and II.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.