

Original

NO. 35585-0-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

HERMAN SATTERWHITE, APPELLANT

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY [Signature] RECEIVED

Appeal from the Superior Court of Pierce County  
The Honorable Lisa Worswick and The Honorable Thomas J. Felnagle

No. 05-1-02305-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the prosecutor commit prosecutorial misconduct when he noted in rebuttal that defendant failed to call witnesses who could substantiate defendant's claims and whom defendant claimed he tried to contact?

B. STATEMENT OF THE CASE.

1. Procedure

On May 12, 2005, the Pierce County Prosecutor's Office filed an information charging HERMAN ROOSEVELT SATTERWHITE, hereinafter "defendant," with one count of unlawful possession of a controlled substance. CP 1-2. The State later amended the information to charge defendant with one count of unlawful possession of a controlled substance: forty grams or less of marijuana, one count of unlawful possession of a controlled substance: cocaine, and two counts of bail jumping. CP 24-26. The court held a CrR 3.5 hearing on October 4, 2006. RP(2)<sup>1</sup> 10-36, 442-445.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in seven volumes. The volume containing the proceedings of July 6, 2006, is paginated one through thirteen; the remaining volumes are paginated consecutively to each other. Citations to the volume containing the proceedings of July 6, 2006, will be preceded by "RP(1)." Citations to the remaining six volumes will be preceded by "RP(2)."

On May 12, 2005, defendant was arraigned and release on his own recognizance. RP(2) 160-161. On June 22, 2005, defendant signed a scheduling order that required him to appear in court on July 6, 2005. RP(2) 173; CP 144. On July 6, 2005, defendant failed to appear at that hearing. RP(2) 173, 223; CP 145-146. On August 2, 2005, defendant signed a scheduling order that required him to appear in court on August 31, 2005. RP(2) 303; CP 148. Defendant failed to appear at the August 31, 2005, hearing. RP(2) 212; CP 150-151.

The matter proceeded to a jury trial on October 4, 2006. RP(2) 39. The jury found defendant guilty as charged on all four counts. RP(2) 398-400; CP 114-118. The court sentenced defendant to 50 months confinement for each count of bail jumping, 24 months confinement for unlawful possession of a controlled substance: cocaine, and 90 days confinement for unlawful possession of a controlled substance: marijuana. RP(2) 409-439; CP 101-118. The court ordered defendant to serve his sentences concurrently and gave defendant credit for 256 days served. RP(2) 409-439; CP 101-118. The court also sentenced defendant to 9-12 months community custody and ordered him to pay monetary penalties. RP(2) 409-439; CP 101-118.

From this entry of judgment and sentence, defendant has filed a timely notice of appeal. CP 119-132.

## 2. Facts

In the early hours of May 11, 2005, Tacoma Police Officer Darren Kelly responded to a call at an AM/PM gas station in Tacoma, Washington. RP(2) 86-91. When he arrived, he learned from the station clerk that defendant had been loitering at the gas station and that the clerk wanted defendant to leave the premises. RP(2) 91-93. The clerk identified defendant for Officer Kelly, and Officer Kelly approached defendant and told him to leave the premises and not return. RP(2) 92-93. Defendant said that Officer Kelly could not tell him to stay away from the gas station. RP(2) 93, 96. Officer Kelly asked defendant for identification, and defendant was eventually able to produce his Washington State identification card. RP(2) 97.

Officer Kelly filled out a blue incident card and gave the card to the clerk. RP(2) 99. He then waited nearby to monitor defendant. RP(2) 99-100. Officer Kelly watched defendant walk across the street for a few moments and then cross back. RP(2) 99-100. When defendant returned to the side of the street on which the AM/PM was located, he walked onto the premises of the AM/PM. RP(2) 100. As defendant was walking toward the gas pump island, Officer Kelly approached him and placed him under arrest for criminal trespass. RP(2) 101. Officer Kelly searched defendant incident to that arrest and found a piece of crack cocaine and a baggy of marijuana in defendant's pocket. RP(2) 130-104.

Defendant testified at trial that he did not intend to trespass at the AM/PM on May 11, 2005. RP(2) 254. Defendant claimed he was trying to ask the officers for directions to the bus stop when he spoke to them the second time. RP(2) 254. He admitted that he had marijuana in his pocket, but claimed he did not know that the other substance in his pocket was crack cocaine. RP(2) 284

Defendant testified he appeared in court on July 7, 2005, because he mistakenly thought his hearing was set for that day instead of July 6. RP(2) 299-302. Mary Martin, his attorney at the time, was at the courthouse that day and assisted in quashing the bench warrant. RP(2) 256, 259, 299-302. Defendant also testified he arrived late to the August 31, 2005, hearing. RP(2) 305. He claimed he learned on August 31, 2005, that Ms. Martin had a medical emergency and Robert Depan had been substituted as his attorney. RP(2) 261-262. Defendant testified that he tried to contact Mr. Depan at the Department of Assigned Counsel, but could not reach Mr. Depan. RP(2) 305-309. Defendant said he continually tried to reach Mr. Depan until defendant was arrested. RP(2) 305-309. Defendant also called Helene Chabot, an attorney who works at the Department of Assigned Counsel. RP(2) 325. Ms. Chabot briefly testified about the warrant quashing procedure she follows when her clients appear late to a hearing. RP(2) 325-329.

C. ARGUMENT.

1. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHEN HE NOTED IN REBUTTAL THAT DEFENDANT FAILED TO CALL WITNESSES WHOM HE TRIED TO CONTACT AND WHO COULD SUBSTANTIATE HIS CLAIMS.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962); State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); State v. Furman, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993).

A defendant claiming prosecutorial misconduct in argument bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence

addressed in the argument and the instructions given. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998); State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998). Prejudice on the part of the prosecutor is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” Dhaliwal, 150 Wn.2d at 578, quoting Pirtle, 127 Wn.2d at 672; accord Brown, 132 Wn.2d at 561.

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, 79 Wn. App. at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id. In the present case, defendant admits that he failed to preserve the errors he has alleged with a timely objection. Br. of Appellant at 15. As a result, defendant cannot prevail on his claim of prosecutorial misconduct unless he meets the flagrant and ill-intentioned standard. Binkin, 79 Wn. App. at 293-294.

Courts of appeal will not review issues for which inadequate argument has been briefed or only passing treatment has been made. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995).

Defendant has failed to show either that the prosecutor erred or that any error was so flagrant and ill-intentioned that a curative instruction could not have cured it.

- a. The prosecutor did not commit prosecutorial misconduct when he argued that defendant should have called Ms. Martin and Mr. Depan to corroborate his claims.

After defendant had given his closing argument, the prosecutor gave his rebuttal argument. RP(2) 353-392. As part of that rebuttal argument, the prosecutor said,

What is missing from the defendant's case? They chose to put on a case to you. He failed to call his attorney, Mary Martin, to back up his claims that he appeared here on July 6th or when he appeared on July 7th, whether he appeared in this courtroom at all those days or when it occurred. We know he signed a scheduling order dated July 7th quashing the warrant. We don't know whether it occurred in this building, whether he walked over to DAC that day and said, I have to take care of this.

But, wouldn't you expect to hear from Mary Martin, his own attorney, about the encounters that they had? He didn't call her. He also didn't call his attorney Bob Depan. And you can say, well, according to him, he never met Bob Depan. That's his version. There's no other corroborating evidence on this. He has attorneys – he's had attorneys at Department of Assigned Counsel. There are certainly records about this. Mr. Depan, certainly, no reason to indicate he couldn't have come in and said, you know what, I never met Mr. Satterwhite. I do remember that I got maybe 12 or more messages from him wanting to quash the warrant. No, I never called him back. I asked my staff to do it or I was just negligent, but you know what, it's certainly not his fault. Or, you know, I told him to come in and do this, this is what we had to do, or I couldn't reach

him because of this problem or this problem or this problem, but, yea, he tried, and he left messages.

You heard from Ms. Chabot that Ms. Martin and Mr. Depan work at the Department of Assigned Counsel. Why didn't he bring these individuals in here to corroborate his version of events to you? Why didn't he call them? What is his real defense? He doesn't take responsibilities for his own actions.

RP(2) 388-389. Defendant claims that these statements were erroneous because they shifted the burden of proof to defendant and misled the jury into thinking Mr. Depan could testify. However, these statements were not erroneous because (1) the statements were in direct response to defendant's closing argument, (2) the statements were permissible under the missing witness doctrine, and (3) Mr. Depan could have testified if defendant had called him.

- i. The prosecutor did not err when he noted that defendant failed to call Ms. Martin and Mr. Depan because the prosecutor was directly responding to claims that defendant made in closing argument and during defendant's case-in-chief.**

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. Dhaliwal, 150 Wn.2d at 577; State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). A prosecutor's remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in

reply to his or her acts and statements. State v. Gentry, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995); State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994); State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967); State v. LaPorte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961). The prosecutor, as an advocate, is “entitled to make a fair response to the arguments of defense counsel.” State v. Russell, 125 Wn.2d at 87.

The prosecutor did not shift the burden of proof when he noted in rebuttal that defendant failed to call Ms. Martin. Both in his testimony and during his closing argument, defendant claimed that he came to court on July 7, 2005, and spoke to Ms. Martin. RP(2) 256, 356-357. In his rebuttal argument, the prosecutor listed what was “missing from the defendant’s case,” noting that defendant failed to call Ms. Martin “to back up his claims that he appeared here on July 6th or when he appeared on July 7th, whether he appeared in this courtroom at all those days or when it occurred.” RP(2) 388. The prosecutor merely responded to defendant’s affirmative claims, noting that they lacked evidentiary support because defendant chose not to call Ms. Martin. The interaction between defendant and Ms. Martin was raised by defendant first; the prosecutor only mentioned defendant’s failure to call Ms. Martin in response to defendant’s argument.

Similarly, the prosecutor did not shift the burden of proof when he pointed out in rebuttal that defendant failed to call Mr. Depan. During defendant’s testimony, defendant claimed that he had tried to contact Mr.

Depan at the Department of Assigned Counsel, but he had to speak to Ms. Chabot because Mr. Depan was not in his office. RP(2) 262. Defendant also claimed that he tried to contact Mr. Depan “several times,” but Mr. Depan never returned his phone calls. RP(2) 263-264. In closing argument, defense counsel argued that defendant learned Mr. Depan had been appointed as his attorney on August 31, 2005, and that Mr. Depan “never communicate[d] once with [defendant]... despite the many occasions that [defendant] attempted to contact Mr. Depan.” RP(2) 356-357. Defense counsel argued that defendant “never actually saw Mr. Depan during all the time that Mr. Depan was representing him.” RP(2) 357, 359. The prosecutor’s rebuttal argument focused on the lack of evidentiary support for these claims, highlighting the fact that defendant failed to call Mr. Depan and corroborate his claim that the two had never spoken to each other. RP(2) 389. Defendant raised this issue in his own closing argument; the prosecutor mentioned it only in rebuttal to defendant’s arguments.

The prosecutor’s responses in this case are similar to the prosecutor’s statements in State v. Gregory, 158 Wn.2d 759, 859-860, 147 P.3d 1201 (2006). The Gregory court held that the prosecutor had not improperly shifted the burden of proof because (1) prosecutors do not shift the burden when they argue that a defendant’s version of events is not corroborated by the evidence, and (2) a jury is presumed to follow the court’s instructions regarding the proper burden of proof. Id. at 861-862.

Gregory was convicted of aggravated first degree murder and the State sought the death penalty. Id. at 812. At the close of the penalty phase,<sup>2</sup> the prosecutor noted that, while Gregory hired a mitigation specialist, Gregory failed to call many witnesses who could have offered evidence to mitigate Gregory's conduct. Id. at 859. On rebuttal, the prosecutor again noted that Gregory:

hired a mitigation expert to try to dig up anything they could that was positive to say about Allen Gregory, anything they could.

....

And you can bet that they put on the very best and all the evidence they could scrape together that they thought could possibly mitigate his responsibility.

Id. at 860 (editorial markings omitted). In the present case, the prosecutor's rebuttal argument noted that defendant's arguments lacked evidentiary support. Moreover, the jury in this case was presumed to apply the proper burden of proof because the court instructed the jury on that burden. CP 61-87. This Court should affirm defendant's conviction just as the Washington Supreme Court affirmed Gregory's conviction.

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<sup>2</sup> As the court noted in Gregory, "the same standards of review that apply to the guilt phase apply to the penalty phase in a capital case," so the burden shifting that Gregory alleged is identical to the burden shifting that defendant alleges in the present case. Gregory 158 Wn.2d at 858 (citing State v. Davis, 141 Wn.2d 798, 870-872, 10 P.3d 977 (2000)).

The prosecutor's rebuttal argument directly responded to statements and arguments that defendant raised in his case-in-chief and closing. The prosecutor does not shift the burden of proof when it points out the evidentiary deficiencies of defendant's arguments. See Russell, 125 Wn.2d at 85-86. Thus, the prosecutor did not err by pointing out those deficiencies.

**ii. The prosecutor did not err when he noted that defendant failed to call Ms. Martin and Mr. Depan because the missing witness doctrine allowed the prosecutor to note this fact.**

Even when a prosecutor does not respond directly to a defendant's claims, a prosecutor may comment on a defense failure to call a witness under the missing witness doctrine. Under this doctrine, a party's failure to produce a particular witness who would "ordinarily and naturally testify raises the inference . . . that the witness's testimony would have been unfavorable." State v. David, 118 Wn. App. 61, 66, 74 P.3d 686 (2003) (quoting State v. McGhee, 57 Wn. App. 457, 462-63, 788 P.2d 603 (1990)); State v. Cheatam, 150 Wn.2d 626, 652-653, 81 P.3d 830 (2003) State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991); State v. Davis, 73 Wn.2d 271, 277, 438 P.2d 185 (1968). Where a party fails to produce otherwise proper evidence within his or her control, the jury may draw an inference unfavorable to that party. Russell, 125 Wn.2d at 90.

The “testimony must concern a matter of importance as opposed to a trivial matter, it must not be merely cumulative, the witness’s absence must not be otherwise explained, the witness must not be incompetent or his or her testimony privileged, and the testimony must not infringe a defendant’s constitutional rights.” Cheatam, 150 Wn.2d at 652-653; Blair, 117 Wn.2d at 489-91.

The missing witness doctrine does not apply if the witness is equally available to both parties. Blair, 117 Wn.2d at 490. A witness is not equally available merely because he or she is physically present or subject to the subpoena power. Davis, 73 Wn.2d at 276. A witness’s availability may depend upon his or her relationship to one or the other of the parties, and the nature of the testimony that he or she might be expected to give. Davis, 73 Wn.2d at 277. This instruction is appropriate only when an uncalled witness is “peculiarly available” to one of the parties. Cheatam, 150 Wn.2d at 652. Accordingly, a party seeking the benefit of the inference must show the missing witness was ““peculiarly within the other party’s power to produce.”” State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) (quoting United States v. Williams, 739 F.2d 297, 299 (7th Cir. 1984)). Being “peculiarly available” to a party means:

[T]here must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably

probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.

Blair, 117 Wn.2d at 490 (quoting State v. Davis, 73 Wn.2d 271, 277, 438 P.2d 185 (1968)). Availability “is to be determined based upon the facts and circumstances of that witness’s ‘relationship to the parties, not merely physical presence or accessibility.’” Cheatam, 150 Wn. 2d at 654, quoting Thomas E. Zehnle, 13 CRIM. JUST. 5, 6 (1998).

As the court explained in Blair, the “rationale behind this requirement 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.” Blair, 117 Wn.2d at 490.

In the instant case, the missing witness doctrine permitted the prosecutor to discuss defendant’s failure to call Ms. Martin. As defendant’s former attorney, Ms. Martin would ordinarily and naturally be called to testify as to whether he appeared at a required hearing at which Ms. Martin was present. See David, 118 Wn. App. at 66. Whether defendant was present on July 6, 2005, was a matter of importance at trial because it was one of the elements of Count II. CP 24-26; see Cheatam, 150 Wn.2d at 652-653. If Ms. Martin had been able to testify that defendant appeared for his hearing on July 6, 2005, the evidence would

not merely be cumulative. Although defendant testified that he appeared on July 6, 2005, the jury could easily have doubted the story because of defendant's interest in explaining why he failed to appear. Ms. Martin's testimony may have been able to corroborate defendant's otherwise implausible testimony. See Cheatam, 150 Wn.2d at 652-653. Ms. Martin's testimony would have been peculiarly available to defendant. Defendant was Ms. Martin's former client, so there would have "been such a community of interest between" her and defendant that it is "reasonably probable that [Ms. Martin] would have been called to testify for [defendant] except for the fact that [Ms. Martin's] testimony would have been damaging." Blair, 117 Wn.2d at 490.

None of the exceptions to the missing witness doctrine prevented the prosecutor from applying it to Ms. Martin's absence. See Cheatam, 150 Wn.2d at 652-653; Blair, 117 Wn.2d at 489-91. Defendant did not explain why Ms. Martin would be unavailable to testify. The record does not indicate that she was incompetent to testify when defendant was at trial. Attorney-client privilege would not have excluded Ms. Martin from testifying about where defendant was on July 6, 2005, because such testimony would not require her to divulge any communication between her and her client. See RCW 5.60.060(2)(a); State v. Athan, \_\_\_ Wn.2d \_\_\_, 158 P.3d 27 (2007) (the attorney-client privilege is confined to communications between the attorney and the client). Finally, none of defendant's constitutional rights would have been implicated if Ms. Martin

had testified on his behalf. In fact, defendant could have compelled Mr. Depan to testify because he has a Sixth Amendment right to “have compulsory process for obtaining witnesses in his favor.” U.S. Const. amend. VI.

The missing witness doctrine also permitted the prosecutor to discuss defendant’s failure to call Mr. Depan. See David, 118 Wn. App. at 66. Defendant would ordinarily and naturally be expected to call Mr. Depan if Mr. Depan could substantiate defendant’s claim that he and Mr. Depan had never met. See Id. Whether the two had met was a matter of importance at trial. Defendant claimed that he arrived for the August 31, 2005, hearing late, but no one knew he was there because he went to find Mr. Depan at the Department of Assigned Counsel. RP(2) 356-359. Thus, calling Mr. Depan could have confirmed whether defendant’s story was accurate. This testimony would not be merely cumulative. Mr. Depan could have testified as to whether he ever received a message from defendant on August 31, 2007, which is a fact about which defendant could not testify. See Cheatam, 150 Wn.2d at 652-653. Mr. Depan’s testimony would have been peculiarly available to defendant. Defendant was Mr. Depan’s former client, so there would have “been such a community of interest between” him and defendant that it is “reasonably probable that [Mr. Depan] would have been called to testify for [defendant] except for the fact that [Mr. Depan’s] testimony would have been damaging.” Blair, 117 Wn.2d at 490.

None of the exceptions to the missing witness doctrine prevented the prosecutor from applying it to Mr. Depan absence. See Cheatam, 150 Wn.2d at 652-653; Blair, 117 Wn.2d at 489-91. Defendant did not explain why Mr. Depan would otherwise be unavailable to testify. There was no evidence that Mr. Depan was incompetent to testify at the time defendant's case went to trial. Mr. Depan's testimony would not have been privileged because, while Mr. Depan would be testifying whether or not he had communicated with defendant, Mr. Depan would not be testifying as to the substance of that communication. See RCW 5.60.060(2)(a); Athan, \_\_ Wn.2d \_\_. Finally, none of defendant's constitutional rights would have been implicated if Mr. Depan had testified on his behalf. There is no evidence that the testimony would have incriminated defendant or violated defendant's right to counsel.<sup>3</sup> In fact, defendant could have compelled Mr. Depan to testify because he has a Sixth Amendment right to "have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

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<sup>3</sup> Defendant does assert that commenting on Mr. Depan's absence may have violated defendant's right to counsel. Br. of Appellant at 10. The State addresses this argument in the next subsection.

- iii. **The prosecutor's argument did not mislead the jury because defendant could have called Mr. Depan to testify without violating attorney-client privilege, the Rules of Professional Conduct, or defendant's constitutional right to counsel.**

Defendant claims that the prosecutor misled the jury when he suggested that defendant could have called Mr. Depan to testify. Br. of Appellant at 10-14. He claims that Mr. Depan was prohibited from testifying by RCW 5.60.060(2)(a), Evidence Rule ("ER") 501, Rule of Professional Conduct ("RPC") 1.6, and defendant's constitutional right to counsel.

Under RCW 5.60.060(2)(a), "[a]n attorney or counselor shall not, **without the consent of his or her client**, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." (emphasis added). ER 501 simply references RCW 5.60.060(2)(a); it does not create any privileges itself. ER 501. RPC 1.6 prohibits a lawyer from "reveal[ing] information relating to the representation of a client **unless the client gives informed consent**, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." (emphasis added). "The United States Constitution and the Washington Constitution both guarantee a criminal defendant the right to counsel." State v. Bao Sheng Zhao, 157 Wn.2d 188, 204, 137 P.3d 835

(2006). Nothing prohibits defense counsel from testifying in a proceeding in which the attorney's client is a defendant. See State v. Sullivan, 60 Wn.2d 214, 220, 373 P.2d 474 (1962)(discussing a balancing test that would determine whether the State may call defense counsel as a witness). In fact, "a lawyer[']s] testimony is admissible, if otherwise competent." Id. at 219 (quoting Ryan v. Ryan, 48 Wn.2d 593, 599, 295 P.2d 1111 (1956)).

The prosecutor accurately informed the jury in this case that defendant could have called Mr. Depan to testify. Mr. Depan could have testified without implicating RCW 5.60.060(2)(a) by testifying that he spoke to defendant without actually relating the substance of that communication. Under RCW 5.60.060(2)(a), ER 501, and RPC 1.6, Mr. Depan could have testified to any aspect of his representation if defendant had given Mr. Depan informed consent to do so. Defendant's constitutional right to counsel would not have prevented Mr. Depan from testifying to any aspect of the communication. His right to counsel would only be implicated if Mr. Depan were called to testify for the State; here defendant could call Mr. Depan to testify on defendant's behalf. See Sullivan, 60 Wn.2d at 220.

Defendant erroneously argues State v. Sullivan, 60 Wn.2d 214, holds that a defendant's right to counsel is violated if the defendant chooses to call a former defense attorney as a witness. In Sullivan, the prosecutor called Ms. Sullivan's trial counsel to testify about information the attorney had learned from Ms. Sullivan. Id. at 216-217. The Sullivan

court held that the trial court violated the attorney-client privilege when it forced the defense attorney to testify to the substance of an attorney-client communication. Id. at 218. The court noted in dicta that

[i]f defense counsel is required to testify under compulsion, it might well be that defendant's right to complete and unhampered representation is invaded. Balanced against this, however, is the possibility that defense counsel's testimony is necessary to the state's case in the interest of justice and for the protection of the public.

Id. at 220.

Sullivan would not have prevented defendant in this case from calling his former attorney as a witness to testify as to defendant's whereabouts. The balancing test that Sullivan contemplates only applies when the State calls the acting defense attorney as a witness and thus compels the attorney to testify against the witness he is currently defending. Sullivan, 60 Wn.2d at 220-222. In the present case, Mr. Depan was not defendant's attorney at the time of trial, and the prosecutor argued that the defense, not the State, could have called Mr. Depan to substantiate defendant's claims. RP(2) 388-389. Moreover, in Sullivan, the defense attorney was testifying about the substance of attorney-client communications. Sullivan, 60 Wn.2d at 218. Here, the prosecutor argued that Mr. Depan could have testified about defendant's whereabouts, not as to the substance of any attorney-client communication. Finally, the Sullivan balancing test is merely dicta. Sullivan's substantive holding determined when the attorney-client privilege obtains; the issue of defense

counsel's testimony was simply an issue which "may be presented to the trial court" on remand in that case. Sullivan, 60 Wn.2d at 218. Therefore, defendant's argument that the Sullivan balancing test controls here is without merit because it is dicta and applies to the *State's* ability to call *present* defense counsel to testify about the substance of attorney-client *communications*, not the *defendant's* ability to call *former* defense counsel to testify to defendant's *whereabouts*.

Defendant also suggests that the prosecutor's comment about Mr. Depan's failure to testify somehow infringed upon defendant's right to counsel. Br. of Appellant at 10. Defendant does not assign error to this issue, however, and defendant's argument focuses on whether or not the prosecutor misled the jury when he suggested that Mr. Depan could testify. Br. of Appellant at 1, 10-14. Defendant was represented by counsel throughout his trial, and nothing in the record suggests that his counsel was inadequate. RP(1) 1-RP(2) 439. Because defendant has only made passing mention of his right to counsel and does not argue how the prosecutor's comment chilled that right, this court should not consider defendant's claim that his right to counsel was infringed.

The prosecutor did not mislead the jury when he suggested that Mr. Depan could have testified at trial. Neither RCW 5.60.060(2)(a), ER 501, RPC 1.6, nor defendant's right to counsel would have prevented defendant from knowingly and voluntarily calling his former defense counsel to testify. See Johnson, 119 Wn.2d at 171.

- b. Defendant has failed to prove that the prosecutor's actions were so flagrant and ill-intentioned that a curative instruction would not have cured the error he alleges.

Even if defendant were correct that the prosecutor shifted the burden of proof in this case, a curative instruction would have remedied that alleged error.

Although defendant does acknowledge that he has the burden to prove that the alleged error did “irrevocably prejudice the jury against” him, he has not argued anywhere in his brief what the nature of that prejudice is or why it could not be cured. Br. of Appellant at 15. Because this Court will not review an issue for which inadequate argument has been briefed or passing treatment made, this Court should not consider defendant’s claim that he was irrevocably prejudiced in this case. See Johnson, 119 Wn.2d at 171.

Moreover, there is nothing in the record to suggest that a curative instruction would not have remedied any error here. In fact, the second jury instruction read, “[t]he State...has the burden of proving each element of each crime beyond a reasonable doubt.” CP 61-87. Because juries are presumed to follow the court’s instructions, the jury in this case applied the proper burden of proof. See State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

Finally, any burden shifting would be harmless here because there was overwhelming evidence that defendant was guilty of bail jumping for failing to appear on July 6, 2005, and August 31, 2005.

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1).

The jury had ample evidence that defendant was guilty of bail jumping for failing to appear at the July 6, 2005, hearing. The scheduling order that ordered defendant to appear on July 6, 2005, was admitted into evidence for the jury to review. CP 144. This scheduling order was signed by defendant. CP 144. The jury heard that the court and the prosecutor could not locate defendant at the hearing on July 6, 2005. RP(2) 174, 223. Defendant even admitted that he failed to appear on July 6, 2005, claiming that he mistakenly appeared on July 7. RP(2) 299, 356-357. The order for a bench warrant and the resulting bench warrant were also admitted; both documents reflected the hearing court's determination that defendant failed to appear that day. CP 145-146.

The jury also had ample evidence that defendant was guilty of bail jumping for failing to appear at the August 31, 2005, hearing. The scheduling order that ordered defendant to appear on August 31, 2005, was admitted into evidence for the jury to review. CP 148. This

scheduling order was signed by defendant. CP 148. The jury heard that the court and the prosecutor could not locate defendant at the hearing on August 31, 2005. RP(2) 212-213. Defendant testified that, although he knew he was supposed to appear in court at 8:30 a.m. that day, he did not arrive until approximately 11:15 a.m. RP(2) 303-305. He even said that he knew that he was late to the August 31, 2005, hearing. RP(2) 305. The court's order for a bench warrant and the resulting bench warrant were also admitted; both documents reflected the hearing court's determination that defendant failed to appear that day. CP 150-151.

In the face of such strong evidence, the jury would have to conclude that defendant knew he was required to appear and failed to do so. Even if the prosecutor's conduct was impermissible, defendant was not prejudiced because he would have been convicted in any event due to the overwhelming evidence against him.

Defendant has failed to show that the prosecutor committed misconduct that was so flagrant and ill-intentioned that a curative instruction would not have remedied any possible prejudicial effect of his statements. In fact, defendant has not even specified how he was prejudiced by the error that he alleges. Moreover, the jury would have found defendant guilty beyond a reasonable doubt in the face of the overwhelming evidence against defendant.

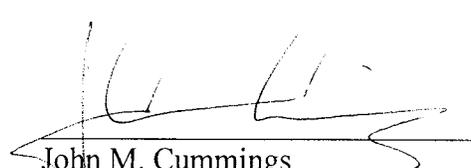
D. CONCLUSION.

For the foregoing reasons, the state requests that this Court affirm defendant's first degree robbery conviction.

DATED: JULY 10, 2007

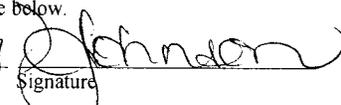
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/10/07   
Date Signature

CLERK OF SUPERIOR COURT OF WASHINGTON  
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BY  DEPUTY