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A. ASSIGNMENTS OF ERROR

1. The trial court's failure to give a missing evidence instruction denied appellant her constitutional right to present a complete defense

2. The court's exclusion of evidence relevant to a key prosecution witness's motive to lie violated appellant's constitutional right of confrontation.

Issues pertaining to assignments of error

1. Appellant was charged with assault and unlawful possession of a firearm based on allegations that she and her husband broke into a house and shot the victim. When police arrived at the scene, they found numerous blood stains throughout the house which appeared unrelated to the man's injuries and other physical evidence which was unexplained by the man's story. The police failed to collect this blood and physical evidence and failed to contain the scene to preserve the evidence. Under the circumstances, was appellant entitled to a missing evidence instruction?

2. The defense theory at trial was that the victim was lying about the incident which resulted in the shooting in order to cover up his culpability. The defense moved to admit evidence of the victim's prior conviction to establish his motive for lying to the police. Given the

importance of this evidence to the defense, did the court violate appellant's constitutional right to confront the witnesses against her by denying the motion?

B. STATEMENT OF THE CASE

1. Procedural Facts

Shortly after 12:30 p.m. on July 6, 2004, police responded to a report of gunshots at a house in Tacoma to find a man lying on the living room floor with a gunshot wound in his side. There were numerous blood stains on the bedroom walls, door and window, and on the living room carpet and couch, which appeared unrelated to the man's injuries. 16RP¹ 748-51. No one else was present in the house, and the man's statements did not explain the blood. 16RP 751. Yet, no detectives were called, the crime scene was not contained, no crime log was established, and, inexplicably, no blood evidence was collected. 12RP 150-51; 13RP 219; 16RP 841-42. Appellants Lisa Kanamu and Larry Blackwell were prosecuted for the shooting based on the victim's statements, despite their inconsistency with the unexplained physical evidence at the scene.

¹ The Verbatim Report of Proceedings is contained in 23 volumes, designated as follows: 1RP—3/7/05; 2RP—3/14/05; 3RP—4/29/05; 4RP—6/1/05; 5RP—6/13/05; 6RP—4/4/06; 7RP—4/27/06; 8RP—4/28/06; 9RP—10/9/06; 10RP—10/10/06; 11RP—10/11/06; 12RP—10/12/06 (a.m.); 13RP—10/12/06 (p.m.); 14RP—10/16/06; 15RP—10/17/06; 16RP—10/08/06; 17RP—10/19/06; 18RP—10/23/06; 19RP—10/24/06; 20RP—10/25/06; 21RP—10/26/06; 22RP—12/8/06; 23RP—12/22/06.

The Pierce County Prosecuting Attorney charged Kanamu with first degree assault, second degree assault, and unlawful possession of a firearm. CP 54-55; RCW 9A.36.011(1)(c); RCW 9A.36.021(1)(c); RCW 9.41.040(1)(a). The first three trials on these charges ended in mistrial. The first mistrial was declared following improper comments by the prosecutor in opening statement. 2RP 24. The verdicts reached after the second trial were vacated due to juror misconduct. 5RP 46-47. And the third trial ended in a hung jury. 8RP 12. Kanamu was convicted on all three counts following the fourth trial, before the Honorable Stephanie A. Arend. The court imposed standard range sentences, with consecutive firearm enhancements on the assault convictions, for a total of 373 months confinement. CP 159-60. Kanamu filed this timely appeal. CP 174.

2. Substantive Facts

Diana Bucenski met Tom Monagin in 2001, and she lived with him most of the next three years. 14RP 295, 297. She did not work, and Monagin supported her. 16RP 894. He also supported her \$100 a day methamphetamine habit. 14RP 295. Monagin was madly in love with Bucenski and would have done just about anything for her. 17RP 952. Bucenski, however, was not as enamored. Although she was romantically involved with Monagin, she slept with other men as well. 14RP 308, 441, 461.

In late June 2004, Bucenski met and began a relationship with David Vicenzi. 14RP 311; 17RP 996. Monagin had just rented a house in Tacoma for himself and Bucenski, and Bucenski brought Vicenzi to the house the weekend they moved in. 14RP 322, 327. The next weekend, Vicenzi was shot in Bucenski's bedroom, where they had been having sex. 14RP 359, 367.

Both a neighbor, who had heard the gunshots, and Vicenzi called 911. 11RP 79-80; 16RP 736. When police arrived, Vicenzi was the only person in the house. 16RP 736. He was naked, lying facedown on the living room floor with a gunshot wound in side. 15RP 671-72. Vicenzi told police he was in the bedroom with Bucenski when Blackwell² and Kanamu entered. 15RP 674. Vicenzi said he tried to close the door on Blackwell, but the door was kicked in. When he saw that Blackwell had a gun, he broke the window and tried to leave that way. Blackwell then shot him in the back. 16RP 720. When asked why Blackwell would shoot him, Vicenzi said Blackwell had stolen his car and he had confronted Blackwell about it earlier that day. 15RP 693; 16RP 720. Vicenzi did not know where Bucenski had gone. 15RP 675.

² Vicenzi told the police that a man he knew as "D" and a woman he knew as "Lisa" entered the room. He later identified them as Blackwell and Kanamu. 15RP 674; 16RP 836.

Police searched the house to make sure no one else was there. A partially-opened folding knife was located outside the front door, about 10 feet from where Vicenzi was lying. 12RP 131, 138. In the bedroom, police found that the window was broken and there was blood on the window sill, on the walls, and on the door jamb. 13RP 211, 250. There were two bullet holes in one wall. 13RP 221. The top panel of the bedroom door was broken from the inside outward. 13RP 211; 16RP 741. Police located the missing piece of the door, which had blood on it, in the living room. There was also blood on the living room couch and carpet. 13RP 211.

The officers noted that Vicenzi was not bleeding significantly, and the only source of blood was the bullet hole in his side. 16RP 748. In walking through the scene, they noted that much of the bloodstains were at shoulder height. 16RP 749. The officers concluded that the physical evidence was not consistent with Vicenzi's story and that someone besides Vicenzi was bleeding in the house. 16RP 749-51, 774, 777. They reported their conclusions to their supervisor. 16RP 761, 777.

Vicenzi was taken to the hospital, where it was discovered one bullet had entered his left side and another had grazed his back. 15RP 617. Vicenzi's spine was injured and he had lost the use of his legs, although he regained some mobility after rehabilitation. 15RP 618, 620;

17RP 962. The trauma surgeon who examined Vicenzi in the emergency room found no injuries to his extremities or any injury which could have accounted for the blood on the walls at the scene. 15RP 637, 646, 649.

Although a “forensics specialist” responded to the scene, he failed to collect any blood evidence. 13RP 196, 219. He dusted the bedroom door for latent fingerprints, finding none, and he collected the folding knife and three 9mm cartridge casings. 13RP 208. But he did not collect the board broken from the bedroom door, which was found in the living room, even though it had blood on it. 13RP 256. Nor did he collect any of the broken glass. 13RP 220. Instead, he took photographs of the blood stains, the broken door, and the glass. 13RP 205-05.

Normal procedure when police respond to a major assault would be to contain the scene with crime scene tape, have an officer start a crime scene log, and notify detectives. 12RP 150. None of that was done in this case. 16RP 840-42.

A detective was finally assigned to the case on July 7. 16RP 790. He believed procedure should have been followed and detectives called to the scene the night of the shooting. 16RP 818. Because the scene was no longer in police control when he was assigned to the case, the detective did not even go into the house and made no attempt to collect the missing evidence. 16RP 818, 870, 879.

The detective spoke to Vicenzi at the hospital the day after the shooting. 16RP 792. Vicenzi's story was similar to what he had told the responding officers. 16RP 861. After trying to locate Bucenski for a week, the detective finally met with her at a restaurant. 16RP 820. She, too, said Blackwell had shot Vicenzi. 16RP 822.

Kanamu and Blackwell were charged with first degree assault against Vicenzi, second degree assault against Bucenski, and unlawful possession of firearm. CP 54-55.

At trial, Bucenski and Vicenzi gave different versions of the shooting. According to Bucenski, she heard a voice coming from the laundry room and recognized it as Kanamu's, and she saw a man she knew as Jason walk from the laundry room to the living room. 14RP 360, 364. Blackwell then walked into the bedroom, with Kanamu behind him. Blackwell started yelling at Vicenzi, saying something about jewelry and a gun. 14RP 364-65. Bucenski asked Blackwell what he was doing there, and Blackwell told her to shut up. Kanamu then handed Blackwell a gun and said, "Shoot him, Honey," and Blackwell fired three or four shots. 14RP 366-67.

Bucenski then added that the door was broken when Vicenzi tried to slam it shut on Blackwell before the shooting, the window was broken after the door, and seconds later the gun went off. 14RP 369. She also

said Blackwell was holding the gun during the confrontation at the door.
14RP 370.

Vicenzi's account was significantly different. He testified that Kanamu opened the bedroom door, and Blackwell came around the corner and started dousing him and Bucenski with beer. Blackwell then threw the beer bottle into the room. 17RP 966. Vicenzi went to the door, pushed Blackwell back into the hall, and slammed the door shut. When he did so, he pushed a panel of the door out toward the hall. 17RP 967.

Next, Vicenzi broke the window so that he and Bucenski could escape. He then picked up the beer bottle, opened the door, and threw the bottle toward some scuffling noises he heard in the living room. 17RP 967. Vicenzi shut the door and hit the wall a couple of times. He then went back to the window to break it some more. 17RP 968. At that point, Blackwell came in the room yelling obscenities, and Kanamu pulled a gun from her waistband and handed it to Blackwell. Blackwell first pointed the gun at Bucenski, and when Kanamu told Blackwell to shoot, Blackwell shot Vicenzi. 17RP 968.

Vicenzi had never told police about his second trip to the door after breaking the window, about throwing the beer bottle, about hitting the wall, or about breaking the window a second time. 17RP 1024-25, 1087. He explained that once he learned that the blood on the wall and

doorframe was an issue, he put it together that he had cut his hand on the window. 17RP 974, 1103-06. In September 2005, he put these additional details in a written statement to the prosecutor in an attempt to explain the blood evidence. 17RP 1086-89.

Vicenzi and Bucenski also gave different versions of why Blackwell and Kanamu would want to shoot Vicenzi. According to Bucenski, Kanamu was angry with Vicenzi for stealing her gun. Blackwell and Kanamu had left the gun with Bucenski, and, instead of returning it, she told them Vicenzi had stolen it. 14RP 334, 336-37. Bucenski admitted, however, that Blackwell was not upset about the gun, Kanamu had retaliated for the gun by stealing Vicenzi's car, and she had no reason to believe Kanamu would hurt Vicenzi. 15RP 531-33.

Vicenzi denied stealing Kanamu's gun or even knowing that Bucenski had accused him of doing so. 17RP 993. He believed the shooting was motivated by the fact that he and Bucenski had attempted to retrieve the car Bucenski loaned Kanamu and Blackwell. 17RP 994. Vicenzi said he had had no negative interactions with Kanamu, however, and he knew of no reason why she would want him shot. 17RP 1023.

Kanamu testified that she had nothing to do with the shooting. 18RP 1258. She knew both Vicenzi and Bucenski and had been their drug supplier for some time. 18RP 1241-43. She had left a gun at Bucenski's

house the weekend before the shooting, and Bucenski told her that Vicenzi had stolen it. 18RP 1250-51. Kanamu decided to take his car and hold it until she got her gun back. 18RP 1252, 1254. After she took the car, she spoke to Vicenzi, who was pretty upset. Since he no longer had her gun, Kanamu sold the car. She was no longer mad at Vicenzi, but she ended her association with him at that time. 18RP 1254-55.

Blackwell presented evidence from a forensic scientist who concluded, after evaluating the photographs of the blood evidence and reviewing the various statements given by Vicenzi and Bucenski, that the statements did not account for the physical evidence. 18RP 1134. His reconstruction of the incident was severely limited, however, by the police failure to collect critical blood evidence, the broken door section, and the broken glass. 18RP 1135-38. Although the expert concluded that someone other than Vicenzi had been bleeding in the house, it was impossible to determine who that was due to the lack of investigation by the police. 18RP 1201, 1204, 1209.

C. ARGUMENT

1. THE COURT VIOLATED KANAMU'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN IT REFUSED TO GIVE A MISSING EVIDENCE INSTRUCTION.

Although police responded and took control of the scene within minutes of the shooting, police failed to follow the procedures necessary for preserving material evidence. The scene was not contained, no crime scene log was started, and no detectives were called. No one with investigative experience guided the forensic specialist's efforts, and as a result, no blood evidence was collected, and the broken door section and broken glass clearly involved in the struggle were left at the scene.

Kanamu's trial attorney moved to dismiss the charges due to the state's failure to preserve material evidence. In the alternative, counsel sought an instruction informing the jury it could infer from the state's failure to preserve material evidence that the evidence would have been unfavorable to the state. CP 12-15. At the start of the final trial, counsel reminded the court that his previous request for a missing evidence instruction was denied. Recognizing the prior ruling remained in effect, counsel noted his exception for the record. 9RP 9-10.

It is a well established rule that where a party fails to produce otherwise proper evidence within his or her control, the jury may draw an

inference that the evidence would be unfavorable to that party. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). In such cases, it is proper for the court to so instruct the jury. State v. Lopez, 29 Wn. App. 836, 631 P.2d 420 (1981).

The Supreme Court described the scope of the missing evidence doctrine in Blair. The doctrine does not apply if the missing evidence is cumulative or unimportant or if its absence can be satisfactorily explained. Nor does it apply if the evidence is equally available to both parties. Blair, 117 Wn.2d at 489. It is not necessary for the party seeking to apply the doctrine to prove deliberate suppression of the missing evidence, however. Blair, 117 Wn.2d at 488.

First, the evidence missing in this case was neither cumulative nor unimportant. The initial responding officers testified that the blood evidence could not be explained by Vicenzi's injuries, and the emergency room doctor agreed. There was no explanation for how the door section ended up in the living room with blood on it or how blood came to be on the living room couch. 15RP 646, 64916RP 748-51, 777. Without collection and analysis of this evidence, there was no way to determine who else was bleeding in the house that night and what really happened. 18RP 1209.

Moreover, the absence of this crucial evidence was a result of police failure to follow proper crime scene procedures. In a major assault such as occurred in this case, the proper procedure is to call in detectives. The detectives can then ensure that the crime scene is properly contained, all potentially relevant evidence is collected, and the evidence collection is properly documented. 16RP 840-42. In this case, however, none of that was done, despite the responding officers' concerns that Vicenzi's story and injuries did not account for the physical evidence.

Instead, the forensic specialist was left to determine on his own what evidence to preserve. He collected none of the blood visible at the scene, even though doing so would be as simple as swabbing the stain and placing the swab in a bag. 13RP 219, 231. It would also have been simple to collect and preserve the broken door section and broken glass. 13RP 220, 256. The forensic specialist admitted it was his responsibility to collect evidence and he should have done a better job processing the scene, but excused his failure saying he did not have a detective there to guide him. 13RP 268.

Because the loss of the evidence resulted from the police failure to follow their own procedures for processing a crime scene, the absence of the evidence cannot be satisfactorily explained.

Next, the evidence was not equally available to both parties prior to its destruction. To the contrary, the police controlled the crime scene on the night of the shooting and failed to contain it for further investigation. 16RP 870. In disregarding the proper procedures for preserving evidence, police rendered the potentially exculpatory evidence unavailable to the defense.

Finally, Kanamu need not show the state deliberately suppressed the evidence. See Blair, 117 Wn.2d at 488. A missing evidence instruction does not depend on a due process violation, where it is necessary to show bad faith on the part of the state. See State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). If the state had denied Kanamu due process by destroying evidence in bad faith, the appropriate remedy would be dismissal. Id.

Where the defense merely seeks to have the jury instructed as to the missing evidence doctrine, however, a showing that the police consciously disregarded procedures for preserving evidence should be sufficient. See State v. Maniccia, 355 N.W.2d 256, 259 (Iowa 1984) (finding that loss of evidence impaired defendant's right to a fair trial but that dismissal was not appropriate, court ordered that jury be informed about the missing evidence and instructed it could draw an inference adverse to the state from its destruction); Tinsley v. Jackson, 771 S.W.2d

331, 332 (KY 1989) (remanding for hearing to determine whether “missing evidence” instruction was appropriate). But See State v. Boyd, 29 Wn. App. 584, 629 P.2d 930, (denial of due process caused by state’s destruction of evidence not cured by instruction informing the jury of the circumstances of destruction; charges dismissed), review denied, 96 Wn.2d 1012 (1981).

An accused is assured the right to fairly defend against the state’s accusations. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The right to present a complete defense is protected by the Sixth and Fourteenth Amendments to the United States Constitution. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). These constitutional protections include the right to offer the testimony of witnesses, to present one’s own version of the facts, and to argue one’s theory of the case. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The state constitution protects these rights as well. Wash. Const. art. I, § 22; State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

The requirements for a missing evidence instruction were satisfied in this case, and the court’s failure to give the instruction impaired Kanamu’s ability to present her theory of the case to the jury. Since denial of a meaningful opportunity to present a complete defense is violation of a

constitutional right, the court's error is presumed prejudicial, and reversal is required unless the prosecution proves the error is harmless beyond a reasonable doubt. Maupin, 128 Wn.2d at 928-29.

Defense counsel argued in closing it was possible someone with access to the house could have interrupted Bucenski and Vicenzi having sex; they started arguing; there was a confrontation at the door; Vicenzi became violent, slamming the person against the window; the other person was cut during the altercation; and Vicenzi was shot to stop his violent rage. Everyone involved believed they could be in serious trouble, so they reported nothing to the police, except for Vicenzi, who had a grudge against Blackwell for stealing his car. 19RP 1428-29. Counsel pointed out that Vicenzi had changed his story to try to account for the blood on the walls, but his story still did not explain the physical evidence. 19RP 1408-11. It was clear that Vicenzi was not the one bleeding in the house. 19RP 1399. But, due to the inept police investigation, the jury did not know who the bleeder was or what really happened. 19RP 1418, 1438.

A missing evidence instruction could have significantly aided in this defense. State v. Campbell, 103 Wn.2d 1, 19, 691 P.2d 929 (1984) (where police notes of interview with witness who described suspect were destroyed, defense was significantly aided by missing evidence

instruction). The court's failure to give the instruction was not harmless beyond a reasonable doubt, and reversal is required.

2. THE TRIAL COURT VIOLATED KANAMU'S CONSTITUTIONAL RIGHT TO CROSS EXAMINE THE STATE'S KEY WITNESS ABOUT HIS MOTIVE TO LIE.

Defense counsel moved in limine³ to admit Vicenzi's 20-year-old manslaughter conviction, for which he served a ten year sentence. Counsel argued this conviction was relevant to Vicenzi's motive to lie. 6RP 25, 27. Counsel explained that there was physical evidence at the scene of a fight and struggle, as well as evidence that the blood on the walls did not come from Vicenzi. The defense theory was that Vicenzi had been beating somebody up, and he was shot to stop the attack. Knowing that with a prior conviction he would be treated harshly if the police knew of his culpability, he lied about what happened, naming Kanamu and Blackwell as the shooters. 6RP 28.

There would be expert testimony that Vicenzi's version of what happened did not make sense, given the physical evidence, and thus it was possible he was not telling the truth. The prior conviction would explain his motive for lying. 6RP 29. Counsel argued that the defense had a right

³ The motion was made in April 2006, prior to the third trial in this case. At the start of the fourth trial, the parties and court agreed that all previously issued pre-trial rulings remained in effect. 9RP 6.

to put its version of events before the jury. 6RP 33. The court denied the motion, however, stating it would follow ER 609.

Generally, a conviction that is more than ten years old is not admissible to attack a witness's credibility unless the court finds the conviction substantially more probative than prejudicial. ER 609(b). Nonetheless, a criminal defendant's constitutional right to confront witnesses may take precedence over rules such as ER 609. State v. McDaniel, 83 Wn. App. 179, 188 n.5, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011 (1997).

The Sixth Amendment and Const. art. 1, § 22, guarantee a criminal defendant the right to confront and cross-examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105, 1110 (1974); State v. Russell, 125 Wn.2d 24, 73, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 131 L. Ed. 2d 1005, 115 S. Ct. 2004 (1995). Moreover, confrontation is a fundamental "bedrock" protection in a criminal case. Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359, 158 L. Ed. 2d 177 (2004). See Davis v. Alaska, 415 U.S. at 315 ("Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested."). Because cross examination is so integral to the adversarial process, "a criminal defendant is given extra latitude in cross examination to show motive or credibility,

especially when the particular prosecution witness is essential to the State's case." State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

In McDaniel, the Court of Appeals held that these constitutional rights were violated when the trial court prevented the defendant from cross examining a prosecution witness about previous lies under oath, and about being on probation for a prior conviction, which provided motive for those lies. McDaniel, 83 Wn. App. at 186. Likewise, Kanamu's constitutional rights were violated when she was unable to challenge Vicenzi's credibility and motives.

The court summarily denied the defense motion, citing to ER 609, without addressing the relevance of Vicenzi's prior conviction to his motive to lie in this case. The physical evidence, such as it was, supported the theory that Vicenzi was shot while attacking someone. The defense theory was that he lied about the incident, including falsely accusing Kanamu and Blackwell, in order to cover up his crime. Evidence of the prior conviction was relevant to the defense theory because it established Vicenzi's motive for covering up his participation. The court should have granted Kanamu wide latitude in cross examining Vicenzi to expose this motive.

A violation of the Confrontation Clause is subject to harmless error analysis and requires reversal unless the error was harmless beyond a

reasonable doubt. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), aff'd by Davis v. Washington, 126 S. Ct. 2266 (2006). The error in this case was not harmless.

The state's case was not overwhelming by any means. Its two eyewitnesses gave inconsistent accounts of the shooting, as well as the events leading up to it, and the physical evidence went unexplained. It is reasonably likely that the jury's verdict would have been different had the jury been given evidence of Vicenzi's motive to lie. The violation of Kanamu's right to cross examine this crucial prosecution witness to expose his motive requires reversal.

D. CONCLUSION

The trial court's failure to give a missing evidence instruction and exclusion of evidence relevant to Vicenzi's motive to lie denied Kanamu a fair trial. Her convictions must be reversed and the case remanded for a new trial.

DATED this 20th day of July, 2007.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

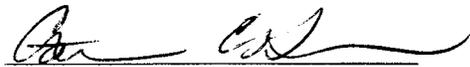
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State v. Lisa Jane Kanamu, Cause No. 35702-0-II, directed to:

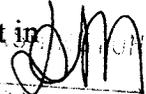
Kathleen Proctor
Pierce County Prosecutor's Office
Room 946
930 Tacoma Avenue South
Tacoma, WA 98402-2102

Lisa Jane Kanamu, DOC# 725124
Washington Corrections Center for Women
9601 Bujacich Road NW
Gig Harbor, WA 98332-8300

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
July 20, 2007

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