Original

No. 36085-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Troy S. McClure

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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Lewis County Superior Court

Cause No. 06-1-00601-6

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO GIVE A "MISSING WITNESS" INSTRUCTION.

McClure argues that the trial court should have granted his request for a missing witness instruction. Brief of Appellant, 3. McClure's argument is misplaced.

A missing witness instruction allows the jury to infer that an uncalled witness would have given unfavorable testimony to the party to whom the witness peculiarly available. WPIC 5.20. In order to invoke the missing witness rule, a defendant must show that, as a matter of reasonable probability, the prosecution would not have failed to produce the witness unless his or her testimony would have been unfavorable to the State. State v. McGhee, 57 Wn. App. 457, 463, 788 P.2d 603, rev. denied, 115 Wn.2d 1013 (2990). "The inference is based, not on the bare fact that a particular person is not produced as a witness, but on his non-production when it would be natural for him to produce the witness if the facts known by him had been favorable." State v. Davis, 73

Wn.2d 271, 280, 438 P.2d 185(2968) (quoting Wigmore, Evidence sec. 286 (3d ed. 1940). The inference does not arise when the witness is unimportant or the testimony would be cumulative. State v. Blair, 117 Wn.2d 479, 488-490, 816 P.2d 718 (1991). Furthermore, this doctrine applies only when the witness is "'[p]eculiarly available' to the party against whom the instruction is offered. Davis, 73 Wn..2d at 276-77.

For a witness to be "peculiarly available":

> There must have been such a community of interest between the party and the witness, or the party must have so superior an opportunit7 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.*

Davis, 73 Wn.2d at 277.

A trial court's refusal to submit a proposed jury instruction is reviewed for an abuse of discretion. State v, Picard, 90 Wn.App. 890, 902, 954 P.2d 336, rev. den. 136 /wn.2d 1021 1998). There is no right to an instruction unsupported by the evidence. State v. Staley, 123 Wn.2d 794, 803 872 P.2d 502 (1994).

WPIC 5.20 states:

> If a party does not produce the testimony of a witness who is [within the control of] [or] [peculiarly available to] that party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why i6t has not called the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.

WPIC 5.20.

In the present case, after hearing argument from both sides, the trial court decided not to give the missing witness instruction. In his oral ruling, the trial judge gave the following reasons for the decision not to allow the missing witness instruction:

> First of all, just because the officer is a law enforcement officer, as far as I'm concerned, doesn't necessarily mean that the witness is peculiarly available to the state. The witness is probably available to the state, but also available to the defense. But that's not the most significant aspect, as far as I'm concerned. The testimony has to relate to an issue of fundamental importance as contrasted to trivial or unimportant issues. again, what you're asking me to do is to give a missing witness instruction based on speculation and conjecture that there may be something about the condition of the pickup when the pickup was found and apparently searched by some unknown officer, possibly Sergeant Breen. Based on that kind of a showing, I can't find that any testimony that the sergeant would have given, if in fact he's the one that searched the pickup, is something that would relate to an issue fundamental importance. * * * * And again, I can't say that the circumstances establish, as a matter of reasonable probability, that the /state would not

> knowingly fail to call a witness who searched the truck unless the witness's testimony would be damaging. As far as I'm concerned, it's just as likely that she didn't call the officer who searched the truck because there was nothing whatever that was found in the truck which is relevant or material to the charge here, which is felony eluding. So, I'm declining to give a missing witness instruction for those reasons.

RP trial, 96-98.

As to the missing witness instruction, the trial court just did not feel it was warranted under these facts. The deputy prosecutor did not believe that the deputy who searched the defendant's vehicle (Deputy Breen –the "missing" witness) had anything to add to the Attempting to Elude charge and in fact that deputy may have brought in evidence that the defense would not have wanted the jury to hear. The deputy prosecutor thus gave "a satisfactory explanation . . . for the absence of the missing witness." Blair, 117 Wn.2d at 489. In other words, as the trial judge said in his ruling on this issue, "I can't say that the circumstances establish, as a matter of reasonable probability, that the state would not knowingly fail to call a witness who searched the truck unless the witness's testimony would be damaging. As far as I'm concerned, it's just as likely that she didn't call the officer who searched the truck because there was

nothing whatever that was found in the truck which is relevant or material to the charge here, which is felony eluding." RP Trial 97-98 (emphasis added).

The trial judge did not abuse his discretion in not allowing the missing witness instruction to be submitted to the jury and this issue should be disregarded by this Court.

B. THE JURY INSTRUCTION WAS INCORRECT BUT IN THIS CASE THE ERRORS WERE HARMLESS.

McClure claims that the jury instructions were improper because the instructions were erroneously based on the former Attempting to Elude statute because prior to 2003, a conviction for Attempting to Elude required proof that the accused drove "in a manner indicating a wanton or willful disregard for the lives or property if others." Former RCW 46.61.024. However, in 2003, the statute was amended and the current statute now requires proof that the suspect was driving "in a reckless manner." RCW 46.61.024 (2003). But this argument by McClure should be disregarded because this particular issue was decided in State v.Ridgley, 141 Wn. App. 771, 174 P.3d 105 (2007). In Ridgley the appellate court considered this very issue but found the error harmless. Id. As the Ridgley court stated:

> Roggenkamp [153 Wn.2d 614, 106 P.3d 196 (2005] makes it clear that 'willful or wanton' is a 'higher mental state' than 'reckless.' 153 Wn.2d at 626. Thus, 'reckless' conduct is established by proof of 'willful or wanton' conduct and, therefore, we hold that the erroneous 'willful or wanton' jury instruction was harmless beyond a reasonable doubt.

Ridgley, 174 P.3d at 111 (emphasis added). Accordingly, the portion of McClure's brief assigning error to the "willful or wanton" versus "in a reckless manner" portion of the jury instructions fails because it is harmless error pursuant to this Court's decision in Ridgley, supra.

But McClure further argues that the jury instructions were also in error because the instructions allowed conviction "without proof that the pursuing vehicle was 'equipped with lights and sirens.'" Brief of Appellant, 9. Just as in the previously discussed "in a reckless manner" language was added to the statute in 2003, so was the "equipped with lights and sirens language" added to the statute in 2003. RCW 46.61.024 (2001); compare RCW 46.61.024 after 2003 (adding the "in a reckless manner" language and also adding "and the vehicle shall be equipped with lights and sirens." RCW 46.61.024. But McClure's argument fails here too.

The to-convict instruction in this case stated:

> To convict the defendant of Attempting to Elude a Pursuing Police Vehicle . . . each of the following elements of the crime must be proved bey7ond a reasonable doubt:
> (1) That on or about the 29th day of June, 2006, the defendant drove a motor vehicle;
> (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;
> (3) That the signaling police officer's vehicle was appropriately marked,showing it to be an official police vehicle;
> (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
> (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others;
> (6) That the acts occurred in the State of Washington...

Instruction No. 5, Supp CP (last portion of instruction omitted).

A challenged jury instruction is reviewed *de* novo and is evaluated in the context of the instructions as a whole. State v. Pirtle 127 Wash.2d 628, 656-657, 904 P.2d 245 (1995); *State v. Brett,* 126 Wash.2d 136, 171, 892 P.2d 29 (1995); State v. Benn, 120 Wash.2d 631, 654-55, 845 P.2d 289, *cert. denied,* 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993). "[A] jury instruction that relieves the prosecution of its burden to prove an element of a crime is subject to harmless error analysis unless the error is structural and affects the framework under which the trial proceeds." State v. L.B. 132 Wn.App. 948, 954, 135 P.3d 508

(2006),_quoting State v. Eaker, 113 Wn.App. 111, 120, 53 P.3d (2002) (citing State v. Jennings, 111 Wn.App. 54, 62-63, 44 P.3d 1 (2002). An error is harmless if it appears beyond a reasonable doubt that it did not contribute to the verdict. Eaker, 113 Wn.App. at 120. It is the State's burden to prove the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Whether a flawed jury instruction is harmless error depends upon the facts of a particular case. Indeed, "'not every omission or misstatement in a jury instruction relieves the State of its burden.'" So as to require reversal. State v. Williams, 158 WN.2d 904, 917, 148 P.3d 993 (2006), citing State v. Berubeu, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003)(quoting State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)); Neder v. U.S. 527 U.S. 1,l 9, 119 S,.Ct. 1827, 144 L.Ed.2d 35 (1999). An erroneous instruction is harmless if, based on the evidence, it appears beyond a reasonable doubt that the error did not contribute to the verdict. State v. Bland, 128 Wn.App. 511, 516, 116 P.3d 428 (2005); *accord* State v. Carter, 154 Wn.2d 71, 81, 109 P.3d 823 (2005). "'Applied to an element omitted from,or misstated in, a jury instruction, the error ..[is] harmless if that element is supported by uncontroverted evidence.'" Eaker, 113

Wn.App. at 120 (emphasis added) (quoting Jennings, 111 Wn.App. at 64. Because the error here is not structural, it is therefore subject to harmless error analysis. State v. L.B. at 954.[1] Applying these rules to the instruction at issue here, it can be seen that the missing "equipped with lights and sirens" element which was omitted from the jury instruction was indeed supported by "uncontroverted evidence." Eaker, 113 Wn.App. at 120. For example Officer Brockmueller described his patrol car in this passage, "My patrol vehicle is a 1996 Crown Victoria, white in color, has a full light bar across the top, a federal siren equipped, blue lettering on the side that says, "Toledo Police Department." RP Trial 66 (emphasis added). The officer went on to say, "I activated my lights . . and continued to follow [the defendant]. RP Trial 67. The officer continued, "After I got my lights activated and got up to speed I noticed that he wasn't going to pull over and I activated my siren." RP Trial 67. This uncontroverted testimony by Officer Brockmueller shows definitively that his police vehicle was

[1] *See* Arizona v. Fulminante 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (listing examples of structural errors such as absence of counsel for a criminal defendant, a judge who is not impartial, unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, the right to public trial, involuntary statements or confessions of the defendant). State v. L.B., 132 Wn.App. at 954, n.2.; *see also* Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (citing a "very limited class of errors" that qualify as "structural" error.

"equipped with lights and sirens." Because of this testimony, the lack of such language in the jury instruction should be seen as harmless error and this Court should affirm the conviction for Attempting to Elude.

CONCLUSION

The trial judge's decision to refuse to given the defendant's missing witness instruction was correct because the witness was not peculiarly available to the prosecutor and because the prosecutor gave a satisfactory explanation as to why the other officer was not called to testify. Furthermore, the errors in the jury instructions under the facts of this case were harmless. Accordingly, McClure's conviction for Attempting to Elude should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of February, 2008

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

By: _____
Lori Smith, WSBA 27961
Deputy Prosecutor

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. TROY S. MC CLURE Appellant.	))))))))))	NO. 36085-3-II DECLARATION OF MAILING

LORI SMITH, Deputy Prosecutor for Lewis County, Washington, declare under penalty of perjury of the laws of the State of Washington that the following is true and correct: On **February 14, 2008,** I served appellant with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Backlund & Mistry
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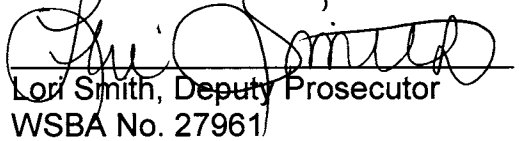
DATED this 14 day of February, 2008, at Chehalis, Washington.



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