

NO. 36276-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

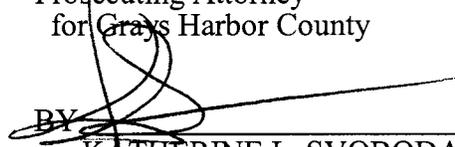
SHANE H. NULF,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID E. FOSCUE, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFE
Prosecuting Attorney
for Grays Harbor County

BY 
KATHERINE L. SVOBODA
Deputy Prosecuting Attorney
WSBA #34097

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

TABLE

Table of Contents

COUNTERSTATEMENT OF THE CASE 1

 Procedural History 1

 Factual Background 1

RESPONSE TO ASSIGNMENTS OF ERROR 1

 This case is significantly different on its facts, so as to be
 distinguished from *Hickman*. 1

 The statements of the victim were not a violation of the
 defendant’s Sixth Amendment rights. 5

 The defendant was not entitled to a missing witness instruction in
 this case. 6

CONCLUSION 10

TABLE OF AUTHORITIES

Table of Cases

Delaware v. Van Arsdall, 475 U.S. 673, 684, 106
S.Ct. 1431, 89 L.ed.2d 674 (1986) 5

State v. Barrington, 52 Wn.App. 478, 484, 761
P.2d 632 (1987) *review denied*, 11 Wn.2d 1033 (1988) 1

State v. Blair, 117 Wash.2d 479, 489, 816
P.2d 718 (1991) 7-9

State v. Carmillo, 115 Wn.2d 60, 71, 794
P.2d 850 (1990) 2

State v. Carter, 74 Wash.App. 320, 332, 875, 875
P.2d 1 P.2d 1 (1994), *aff’d*, *State v. Carter*, 127
Wash.2d 836, 904 P.2d 290 (1995) 8

<i>State v. Davis</i> , 73 Wash.2d 271, 280, 438 P.2d 185 (1968)	7, 9
<i>State v. Hickman</i> , 135 Wash.2d 97, 100, 954 P.2d 900 (1998)	2, 4
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993)	1
<i>State v. Kroll</i> , 87 Wn.2d 829, 842, 558 P.2d 173 (1976)	2
<i>State v. McCollum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)	1
<i>State v. McGhee</i> , 57 Wash.App. 457, 462, 788 P.2d 603, <i>review denied</i> , 115 Wash.2d 1013, 797 P.2d 513 (1990)	7
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	2
<i>State v. Smith</i> , 148 Wash.2d 122, 139, 59 P.3d 74 (2002)	5

OTHER

Washington Practice, Evidence, sec. 85 at 248 (1989)	8
WPIC 5.20	6

COUNTERSTATEMENT OF THE CASE

Procedural History

The defendant was charged by Information on February 12, 2007 with one count of Assault in Violation of a No Contact Order–Domestic Violence. (CP 1-3). The case proceeded to jury trial and the defendant was found guilty as charged on April 17, 2007. (CP 38). The defendant was given a standard range sentence on May 9, 2007. (CP 44-52).

Factual Background

The State basically agrees with the facts as laid out in the Brief of Appellant.

RESPONSE TO ASSIGNMENTS OF ERROR

This case is significantly different on its facts, so as to be distinguished from *Hickman*.

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. McCollum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn.App. 478, 484, 761 P.2d 632 (1987) *review denied*, 11 Wn.2d 1033 (1988).

Circumstantial evidence is as reliable and probative as direct evidence.

State v. Kroll, 87 Wn.2d 829, 842, 558 P.2d 173 (1976).

All reasonable inferences from the evidence must be drawn in favor of the State and interpreted more strongly against the defendant.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In considering this evidence, “credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Carmillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, the defendant relies on *State v. Hickman*, to advocate for dismissal due to insufficient evidence of venue. However, there is enough evidence in the record for the jury to have concluded that the defendant committed his crime in Grays Harbor County. In *Hickman*, the defendant purchased an expensive car in Washington state, and, some time later, he moved to Hawaii and left the car with a friend. This location was not adduced at trial. Eventually, Hickman and some acquaintances decided that the acquaintances would “steal” the car and sell it for parts. Hickman’s friend who was storing the car called police to report it stolen. Hickman filed a claim by telephone with his insurance company in Kent, King County, Washington, and the insurance company paid the balance of the loan on the car. *State v. Hickman*, 135 Wash.2d 97, 100, 954 P.2d 900 (1998).

The car was subsequently found stripped in Snohomish County and Hickman was charged with committing insurance fraud “in Snohomish

County, Washington.” While the trial was held in Snohomish County, the only two references made to that county were made by the Snohomish County Sheriff, who testified that there was a call reporting the car stolen “off Logan road” without further description of the location of Logan Road, and by a deputy who testified he located the car’s hulk on a rural road in Snohomish County. *State v. Hickman*, 135 Wash. 2d at 100-101.

The to convict instructions were as follows:

To convict the defendant of the crime of Insurance Fraud, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That the defendant, James Hickman, on or about the 1st day of July, 1992, to the 31st of August, 1992, did knowingly present or cause to be presented a false or fraudulent claim or any proof in support of such claim, for the payment of a loss under a contract of insurance; and (2) That the false or fraudulent claim was made in excess of One Thousand Five Hundred Dollars (\$1,500); and (3) **That the act occurred in Snohomish County, Washington.** *State v. Hickman* at 101.

The Court found that the law of the case doctrine applied and that under these instructions, the State was obligated to prove venue beyond a reasonable doubt, even though it was not an element of the crime. *Id.* at 101-102. The other question addressed by the Court was whether or not the State “offered sufficient evidence that Hickman presented a false insurance claim in Snohomish County.” *Id.* at 105. The Court found that:

When Hickman allegedly called his insurance company to submit the fraudulent claim, he was in Hawaii while his insurance company was in King County. The relevant reference to Snohomish County was the Snohomish County Sheriff’s testimony that he had been called, following the theft of the vehicle, to an address “off Logan Road.” Even assuming Logan Road is somewhere in Snohomish County

and only in Snohomish County, such evidence simply does not demonstrate Hickman knowingly presented or caused to be presented a fraudulent insurance claim in Snohomish County. *Id.* at 105-106.

The Court then reversed and dismissed *Hickman*.

The case here is clearly distinguishable. Unlike *Hickman*, all of the incident at bar occurred in the same location. Also, several officers testified: Detective Matt Organ, Lieutenant David Porter, Deputy Eric Cowsert, and Deputy Tracy Gay. These officers all testified that they were employed by Grays Harbor County and there was no testimony that they worked outside of that jurisdiction. (3/22/07 RP 28, 34, 47, and 55). They also described the location as “area of State Route 12 in Alfredson Road.” (3/22/07 RP at 48). This is in Grays Harbor County. Lieutenant Porter also testified that he “responded from the Montesano area.” (3/22/07 RP at 35). Montesano is the county seat of Grays Harbor and a reasonable person could infer that he was working within the county.

In *Hickman*, there were several places where pertinent events took place, Hawaii, Kent, King County, and Snohomish County. The only event in Snohomish County was the location of the vehicle. All the evidence showed that Hickman’s fraud was perpetrated at another location. In this case, all evidence presented puts the crime in one location, and a reasonable jury can, and did, find that it occurred in Grays Harbor County.

The statements of the victim were not a violation of the defendant's Sixth Amendment rights.

The State concedes that Ms. Moose's statement to Deputy Cowser was likely testimonial. However, violation of the confrontation clause is subject to a constitutional harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.ed.2d 674 (1986). Under this rule, the defendant's convictions can be upheld if this Court finds beyond a reasonable doubt that any reasonable jury would have reached the same result without having heard Ms. Moose's statement to the police. *See State v. Smith*, 148 Wash.2d 122, 139, 59 P.3d 74 (2002). The Court should apply the untainted evidence test to determine whether the remaining untainted evidence admitted at trial was so overwhelming that it would necessarily lead to a finding of guilt, the State asserts it does. *Smith*, 148 Wash.2d at 139.

Here, the untainted evidence against the defendant was overwhelming. First, there was the testimony of the eyewitness, Barrie Christman. Mr. Christman observed the assault, identified the two parties and saw a trail of blood following the victim as she walked. (3/22/07 RP 19-23, 46). There was no evidence that Mr. Christman knew either the defendant or Ms. Moose, or that he was biased in any way. The defendant was also tracked by his license plate number that was provided to the deputies by Mr. Christman. (3/22/07 RP at 35).

When the defendant was arrested, he made the statement “that was one of the dumbest things I have done in my life. I should not have met up with her.” (3/22/07 RP at 57-58). Deputies also described blood they found in the passenger area of the defendant’s car. (3/22/07 RP at 37-39, 42, 58, 61). There were also descriptions of the significant injuries suffered by Ms. Moose. (3/22/07 RP at 46, 50). The jury was also provided the no contact order showing that the defendant was the person prohibited from contacting Ms. Moose due to domestic violence. (Exhibit 1).

The defense presented was one of general denial. The credibility of the defendant was up to the jury to determine, and the one insignificant comment by Lieutenant Porter was not what swayed the jury. The untainted evidence is overwhelming, and beyond a reasonable doubt the jury would have convicted without the statement from Ms. Moose.

The defendant was not entitled to a missing witness instruction in this case.

The State also asks the Court to affirm the trial court's refusal to give WPIC 5.20, the “missing witness” instruction. The request was based on Ms. Moose's failure to appear at trial.

WPIC 5.20 reads as follows:

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 it 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.

A party's failure to produce a particular witness who would ordinarily testify raises the inference in certain circumstances that the witness's testimony would have been unfavorable. *State v. McGhee*, 57 Wash.App. 457, 462, 788 P.2d 603, *review denied*, 115 Wash.2d 1013, 797 P.2d 513 (1990). To invoke the “missing witness” rule and obtain an instruction in a criminal case, the defendant is not required to prove that the prosecution deliberately suppressed unfavorable evidence. *McGhee*, 57 Wash.App. at 463, 788 P.2d 603. Instead, the defendant must establish circumstances indicating that the State would not knowingly fail to call the witness unless the witness’s testimony would be damaging. *State v. Davis*, 73 Wash.2d 271, 280, 438 P.2d 185 (1968). No such inference arises if a satisfactory explanation can be given for the absence of the missing witness. *State v. Blair*, 117 Wash.2d 479, 489, 816 P.2d 718 (1991). Also, “[w]hen both the defendant and the State have connection with the witness, the trial court is entitled to consider the defendant’s failure to compel the witness’s testimony in determining whether the ‘missing witness’ instruction should be given. *McGhee* at 464.

Furthermore, the “missing witness” instruction is appropriate only when the uncalled witness is “peculiarly available” to one of the parties, a requirement the Supreme Court has addressed:

For a witness to be “available to one party to an action, there must have been such a community of interest between

the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, 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 Wash.2d at 277, 438 P.2d 185.

The missing witness instruction is inappropriate if the uncalled witness is equally available to the parties and thus available to the party who would benefit from the inference. *Blair*, 117 Wash.2d at 490; 5, 816 P.2d 718 Washington Practice, Evidence, sec. 85 at 248 (1989). In the present case, the trial court rejected the proposed missing witness instruction because Ms. Moose was not peculiarly available to the State and because the State made reasonable efforts to secure her presence in court and thought that she would testify. There is no error in the trial court's decision. As stated above, if a witness's absence can be explained, the inference that the witness's testimony would be damaging to the party for whom that witness would have testified is not permitted. See *State v. Carter*, 74 Wash.App. 320, 332, 875, 875 P.2d 1 P.2d 1 (1994), *aff'd*, *State v. Carter*, 127 Wash.2d 836, 904 P.2d 290 (1995). (where a defendant tried unsuccessfully to produce a witness by means of a subpoena and a material witness warrant, the State's remarks at trial regarding the witness's absence were improper). Here, the State had attempted to serve Ms. Moose with a subpoena, and described Ms. Mooses's outstanding warrants to the court. (3/22/07 RP at 105). The State's explanation of Ms. Moose's absence was adequate to prevent the inference that her testimony would be unfavorable

to the State. Also, the defendant made no attempt to secure Ms. Moose's appearance or testimony. (3/22/07 RP at 104).

Also, Ms. Moose was not a witness who was peculiarly within the State's power to produce. See *Blair*, 117 Wash.2d at 491, 816 P.2d 718 (citing *United States v. Williams*, 739 F.2d 297, 299 (7th Cir.1984). Her status as a domestic violence victim did not establish the type of professional or personal relationship typically viewed as necessary to make a witness "peculiarly available" to one party. See *Davis*, 73 Wash.2d at 278, 438 P.2d 185 (uncalled witness was a law enforcement officer who worked so closely with the county prosecutor's office as to indicate a community of interest between the prosecutor and the uncalled witness); see also *Blair*, 117 Wash.2d at 490, 816 P.2d 718 (defendant had business or personal relationship with people who owed him money such that prosecutor's reference to them as missing witnesses was permissible). Given that the defendant and Ms. Moose had a long term relationship, it cannot be assumed that the State and Ms. Moose possessed a greater community of interest than did the defendant and Ms. Moose.

CONCLUSION

For the reasons stated above, the State asks this Court to affirm the ruling of the trial court.

DATED this 14 day of January, 2008.

Respectfully Submitted,


By: _____

KATHERINE L. SVOBODA
Deputy Prosecuting Attorney
WSBA #34097

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DECLARATION OF MAILING

SHANE H. NULF,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 11th day of January, 2008, I mailed a copy of the Brief of Respondent to Nancy P. Collins; Washington Appellate Project; 1511 Third Avenue, Suite 701, Seattle, WA 98101, and to Shane H. Nulf; DOC#756334; MICC; P.O. Box 881000; Steilacoom, WA 98388 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman