

NO. 36321-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MONTIAE COLDEN MCHENRY, APPELLANT

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DIVISION II
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STATE OF WASHINGTON
DEPUTY

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin

No. 06-1-02250-7

BRIEF OF RESPONDENT

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

1. Did the jury have sufficient evidence to convict defendant of second degree assault and first degree unlawful possession of a firearm?
2. Did the State act properly when it responded to defense counsel's statement that defendant did not testify and when it made a missing witness argument outside the presence of the jury?

B. STATEMENT OF THE CASE.

1. Procedure

On May 19, 2006, the Pierce County Prosecutor's Office filed an information charging MONTIAE COLDEN MCHENRY, hereinafter, "defendant," with one count of first degree assault, one count of intimidating a witness, and one count of first degree unlawful possession of a firearm. CP 1-2. The State amended this information twice, eventually charging defendant with three counts of second degree assault, one count of intimidating a witness, and one count of first degree possession of a firearm. CP 20-23. The matter proceeded to a jury trial on

February 20, 2007. RP(2/20/07) 1.¹ After the State rested, the court dismissed the charge of intimidating a witness. RP(5/7/07) 4.

During closing argument, the prosecutor argued for the State as follows:

[THE STATE:] [T.B.]² testified that the defendant fired this rifle in house before, that he was the one who caused the bullet holes, that the gun was fired in April of 2004; but the Defense, this is what they want you to believe: The defendant wants you to believe that he had no idea, none whatsoever, that he knew there was a rifle in the house. Why? Because he knows –

[DEFENSE COUNSEL:] I am going to object. The defendant never testified, and I think it is improper for the State to be telling the jury what the defendant wanted.

THE COURT: Well, this is argument, and she has some leeway. You'll get your chance to respond to it. She has a chance to argue what she thinks you're going to argue. You may continue.

[THE STATE:] Counsel is absolutely right, you didn't hear from the defendant, but you heard from his wife. You heard his wife, Mrs. McHenry, testify that he has no idea that there was a rifle in the house. And again, why? Because the Defense knows that the State has to prove that he knew that there was a rifle, that he knowingly possessed it, knowingly owned it, and that is why his wife came in here to tell you that he had no idea.

¹ The Verbatim Report of Proceedings is contained in 11 volumes, only some of which are paginated consecutively. Citations to the pages of the record will be preceded by "RP([date of proceeding])." I.e., "RP(2/13/07) 1" refers to the first page of the proceedings of February 13, 2007.

² Defendant's daughter was a juvenile at the time defendant committed his crimes. The State will refer to her by her initials out of respect for her privacy.

RP(2/26/07) 279-280. Later in her closing, the prosecutor argued as follows:

[THE STATE:] Ladies and gentlemen, before you decide whether you can believe her or not, think of this: It is my burden. I have the burden to prove beyond a reasonable doubt that he's guilty, and you know that. But you know what else? When the Defense puts on a defense, the defense doesn't have to prove anything, not one piece of evidence. It is my burden, and I bear that burden gladly; but once he puts on evidence, his evidence is subject to the same level of scrutiny that you would give my evidence. You have to examine the Defense's evidence in the same manner that you examine the State's evidence, and you have to say to yourselves –

[DEFENSE COUNSEL:] I'll object to this Your Honor. This is shifting the burden.

[THE STATE:] Absolutely not.

[DEFENSE COUNSEL:] I object, Your Honor.

THE COURT: Hold it, Ms. Ko. Members of the jury, I am going to excuse you into the jury room

(Jury Absent.)

RP(2/26/07) 290-291. Defense counsel was afraid that the prosecutor was going to point out that one of defendant's wives³ had not testified at trial.

RP(2/26/07) 291-294. The prosecutor argued that she should be able to point out that fact under *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830

³ Defendant considered two women who lived with him on May 18, 2007, to be his wives: Turasha Prater and Teaisha Jackson. RP(2/22/07) 195, 206. Ms. Prater has since changed her last name to McHenry, but the State will refer to her as Ms. Prater to avoid confusion. RP(2/22/07) 206.

(2003), even without requesting a missing witness instruction.

RP(2/26/07) 291-294. The court sustained the objection, the jury was brought back into the courtroom, and the court instructed the jury as follows:

(Jury Present.)

THE COURT: You may be seated.

Members of the Jury, I have sustained the Defense's objection to the State's reference to a missing witness, and you're to disregard any information or any arguments about that.

Ms. Ko, you may continue.

RP(2/26/07) 294. At no point in her closing did the prosecutor tell the jury that one of defendant's wives had not testified. In his closing, defense counsel told the jury, "I have no reason to believe that [the State] is not operating ethically." RP(2/26/07) 295.

The jury found defendant guilty of one count of fourth degree assault, two counts of second degree assault, and one count of first degree unlawful possession of a firearm. RP(2/27/07) 325-331; CP 58-62, 84-98. The jury found by special verdict that defendant was armed with a rifle while committing one count of second degree assault and that defendant was armed with a knife while committing the other count of second degree assault. RP(2/27/07) 325-331; CP 64-65, 84-98.

On May 7, 2007, the court sentenced defendant to serve 365 days in jail for the count of fourth degree assault. CP 79-83. The court gave defendant 309 days credit for that sentence and ordered that it be served

concurrently to his sentences on the other counts. CP 79-83. The court ordered defendant to serve 57 months' confinement for each count of second degree assault, to be served concurrently to each other. CP 84-98. The court sentenced defendant to 53 months confinement for first degree unlawful possession of a firearm to be served consecutively to his other sentences. CP 84-98. The court sentenced defendant to 48 months confinement for his sentencing enhancements to be served consecutively to his sentence on his other counts. CP 84-98. In total, defendant was sentenced to serve 105 months' confinement and ordered to pay monetary penalties. CP 79-98. From entry of this judgment and sentence, defendant has filed a timely notice of appeal. CP 101-116.

2. Facts

On May 18, 2007, defendant's 15-year-old daughter T.B. was in defendant's kitchen when defendant entered the kitchen, ordered her to "tell the truth," and began punching T.B. in the back. RP(2/21/07) 124, 129-130. T.B. did not know what defendant meant at first. RP(2/21/07) 130. She hunched over and fell to the floor, keeping her back to defendant and curling up as he continued to beat her. RP(2/21/07) 130-131. When T.B. curled up, defendant began kicking her. RP(2/21/07) 131. Defendant left the kitchen to retrieve a hammer from his toolbox, and T.B. sat up on the kitchen floor. RP(2/21/07) 131. Defendant returned and began hitting T.B.'s knee, elbows, and back while saying, "You won't be able to walk

no more if you don't tell me the truth, and I'll break your knees and you know that." RP(2/21/07) 132. T.B. felt pain and then numbness, and she began bleeding. RP(2/21/07) 132.

After defendant finished beating T.B. with the hammer, he stood her up, dragged her by her shirt into the living room, and sat her on a couch. RP(2/21/07) 133-134. Defendant insisted that T.B. was lying about something and demanded that she tell him the truth. RP(2/21/07) 134. Defendant then dragged her back into the kitchen, saying, "I'm tired of you flaunting yourself in the doggone yard." RP(2/21/07) 134. He picked up a butcher knife, grabbed T.B.'s ponytail, and began cutting off T.B.'s hair while she was on the floor in a "crawling position." RP(2/21/07) 134. The blade of the knife was very close to T.B.'s scalp during this cutting process, leaving bald patches. RP(2/21/07) 135. During the cutting, defendant told T.B. that she was trying to be too pretty. RP(2/21/07) 136. T.B. did not struggle hard against defendant's grip because she was afraid of being cut by the knife. RP(2/21/07) 136. In the midst of cutting T.B.'s hair, defendant pulled her by her hair into the living room and finished cutting it there. RP(2/21/07) 136. It took defendant five minutes to completely cut off T.B.'s ponytail. RP(2/21/07) 136. When he had cut off T.B.'s ponytail, he pushed her outside onto the porch, saying, "Now you can go and try to be pretty." RP(2/21/07) 136-137.

Defendant ordered T.B. back inside, and she complied.

RP(2/21/07) 138. While T.B. was on the couch in the living room, defendant paced in front of her and insisted that she tell him the truth.

RP(2/21/07) 138. He then picked up a chair from the dining room table and broke it over T.B.'s head. RP(2/21/07) 138. At that moment, one of defendant's wives, Taeisha Jackson, walked into the living room.

RP(2/21/07) 140. Defendant said to T.B., "I know what is going on. You lie too much, and you need to tell me the truth. You are making it harder on yourself." RP(2/21/07) 141.

Defendant had previously been convicted of a serious offense and was not permitted to possess a firearm. RP(2/22/07); CP 26. Nonetheless, defendant went upstairs and returned with a rifle. RP(2/21/07) 141-142. T.B. began screaming at the sight of the gun. RP(2/21/07) 144. She had seen the gun before because defendant once brought it out and threatened his wife with it. RP(2/21/07) 142. Defendant pointed the gun at T.B. RP(2/21/07) 142. Defendant put the gun on the table and told T.B., "I'll kill you," and then, "I'll just shoot you in your foot." RP(2/21/07) 143. He told Ms. Jackson, "You guys need to try to get this out of her and just explain to her or something before I end up hurting this girl." RP(2/21/07) 143. Defendant then picked up the gun, fired a round toward the back of the house, and said, "Okay, that is a warning shot." RP(2/21/07) 143. Defendant took the gun into the basement, and T.B. looked out the window and saw that there were police officers outside the house.

RP(2/21/07) 145. Defendant returned from the basement and went out the back door. RP(2/21/07) 147. T.B. and Ms. Jackson then left through the front door. RP(2/21/07) 148-149.

Earlier that day, Detective Terry Krause and Officer John Durocher of the Tacoma Police Department received a report that a verbal domestic dispute was occurring on the 2100 block of South M Street in Tacoma, Washington. RP(2/20/07) 38. Detective Krause arrived first, but he could not immediately determine where the dispute was occurring. RP(2/20/07) 39, 49-50. After Officer Durocher arrived, the two officers decided to split up and search for the disturbance; Detective Krause walked down South M Street, and Officer Durocher walked down the alley. RP(2/20/07) 41, 49-50.

As Detective Krause walked toward 2112 South M Street, he heard a man in that house say angrily, "they're not coming in." RP(2/20/07) 50. He then heard the sound of a rifle cycling and then a rifle firing from inside the house. RP(2/20/07) 50-51. Detective Krause radioed for backup and then yelled for anyone in the house to come out. RP(2/20/07) 39-40, 52-53. T.B. and two females in their twenties eventually emerged and Detective Krause convinced them to come to the sidewalk. RP(2/20/07) 53-56. Detective Krause noticed that T.B.'s face was injured, her hair had been "hacked up," her elbow was swollen, and she was limping. RP(2/20/07) 55-56' RP(2/21/07) 105. T.B. asked the police to call for an ambulance because she was bruised and bleeding, her head and

elbow were swollen, and she had a hard time walking. RP(2/21/07) 139, 148. She was taken to a local hospital to be treated. RP(2/21/07) 105-106. At the hospital, the police took pictures of her T.B.'s injuries. RP(2/21/07) 149; Exs. 58-86.

When defendant ran out the back door, Officer Durocher drew his weapon and ordered him to stop. RP(2/20/07) 42-43. Defendant stopped and eventually went down on his knees as Officer Durocher ordered. RP(2/20/07) 42-43. Backup arrived, and Officer Durocher handcuffed defendant, left defendant in the custody of other officers, and aided in securing the scene. RP(2/20/07) 44. Inside the home, the officers found a broken chair, a hammer, a butcher knife with hair on it, a lamp with a hole through it, a hole in the living room wall, a hole in the dining room window, loaded rifle magazines, a bag with ammunition in it, and a .223 caliber rifle with a spent cartridge in the chamber. RP(2/20/07) 60-62, 64-68, 72-82; Exs. 16, 20, 22-26, 29-32, 38-40, 45-49, 51-55, 57, 60-62. The hole in the living room wall was a bullet hole, and the hole in the dining room window was the same size as the hole that a .223 caliber bullet would make. RP(2/20/07) 82-83. The rifle was a functioning firearm. RP(2/21/07) 101.

At trial, defendant called Ms. Jackson to testify that two men came to defendant's house on May 18, 2007. RP(2/22/07) 193-194. Ms. Jackson testified that T.B. and defendant got into a fight because T.B. would not answer defendant's and Ms. Jackson's questions about the two

men. RP(2/22/07) 194-195. Ms. Jackson claimed that T.B. grabbed the hammer first and that defendant had to wrestle the hammer out of T.B.'s hands. RP(2/22/07) 196-197. She claimed that she did not see defendant strike T.B. with the hammer. RP(2/22/07) 198. Ms. Jackson said that when defendant cut T.B.'s hair, T.B. was crying and they were arguing. RP(2/22/07) 199. She testified that the hole in the living room wall and the holes in the lamp were caused by a young man who shot a single bullet into the house in April 2005. RP(2/22/07) 201-202. Ms. Jackson claimed that she did not hear any gunshots on May 18, 2007; any explosions were fireworks that the family was setting off. RP(2/22/07) 203. She claimed that defendant broke the chair on the floor, not on T.B.'s head. RP(2/22/07) 203. Ms. Jackson claimed that defendant cut T.B.'s hair because, in her religion, a daughter must cut her hair if her father decides that she is being promiscuous. RP(2/22/07) 230.

Ms. Jackson admitted on cross examination that Ms. Prater was present during the altercation between T.B. and defendant. RP(2/22/07) 208. Ms. Jackson knew where Ms. Prater worked and Ms. Prater knew Ms. Jackson was going to testify in this case. RP(2/22/07) 210-213, 227-228. She admitted that she agreed to come to court and testify without having to be subpoenaed; the defense only had to call her and tell her when to come to court. RP(2/22/07) 210-213.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD FIND DEFENDANT GUILTY OF SECOND DEGREE ASSAULT AND FIRST DEGREE UNLAWFUL POSSESSION OF A FIREARM.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing 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, challenging 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*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

- a. There was sufficient evidence to convict defendant of second degree assault.

Defendant claims that the jury did not have sufficient evidence to convict defendant of count III: second degree assault with a firearm. Br.

of appellant at 10-11. “A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree...[a]ssaults another with a deadly weapon.” RCW 9A.36.021 (1)(c). The term “assault” is not statutorily defined, so Washington courts apply the common law definition to the crime. *State v. Aumick*, 126 Wn.2d 422, 426 n.12, 894 P.2d 1325 (1995). An assault is an attempt, with unlawful force, to inflict bodily injury upon another, whether or not the victim is actually harmed. *Aumick*, 126 Wn.2d 422; CP27-57 (Instruction 8). An assault is also an act “done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.” *State v. Austin*, 59 Wn. App. 186, 796 P.2d 746 (1990); CP27-57 (Instruction 8).

There was evidence that defendant used a rifle to attempt with unlawful force to inflict bodily injury on T.B. with the rifle. The jury heard that defendant retrieved a rifle during an argument with T.B. RP(2/21/07) 141-142. He brought the rifle downstairs, pointed it at T.B., and threatened to shoot and kill T.B. with it. RP(2/21/07) 142-143. T.B. knew that defendant had previously threatened his wife with that same gun. RP(2/21/07) 142. He then fired a shot while T.B. was in the house. RP(2/21/07) 143. Detective Krause heard the rifle cycle and fire when he was outside defendant’s home. RP(2/20/07) 50-51. When the officers

entered defendant's home, they found holes in a lamp, a window, and a wall that could have been made by the bullet defendant fired. RP(2/20/07) 60-62, 64-68, 72-82; Exs. 16, 20, 22-26, 29-32, 38-40, 45-49, 51-55, 57, 60-62. They also found a spent bullet casing in the chamber of the rifle they recovered from defendant's home. RP(2/20/07) 60-62, 64-68, 72-82.

Alternatively, there was evidence that defendant intended to use a rifle to place T.B. in reasonable apprehension and imminent fear of bodily injury and succeeded in creating such apprehension. Simply by retrieving the rifle during a heated argument and threatening to shoot and kill T.B, defendant intentionally created reasonable apprehension in T.B. that she would be harmed. RP(2/21/07) 142-143. T.B.'s fear was especially reasonable because she knew defendant had threatened his wife with the rifle in the past. RP(2/21/07) 142.

b. There was sufficient evidence to convict defendant of first degree unlawful possession of a firearm.

Defendant claims that the jury did not have sufficient evidence to convict defendant of Count V: first degree unlawful possession of a firearm. Br. of Appellant at 10-11. "A person...is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity

in this state or elsewhere of any serious offense as defined in this chapter.”
RCW 9A.040(1)(a).

There was sufficient evidence that defendant committed the crime of first degree unlawful possession of a firearm. Defendant stipulated that “he was convicted of a serious offense that prohibited him from possessing or owning a firearm on May 18, 2007.” CP 26. The jury heard that defendant retrieved a rifle from the upstairs of his home on May 18, 2007, that defendant fired the gun that day, and that defendant hid the rifle from the police. RP(2/20/07) 60-62, 64-68, 72-82; RP(2/21/07) 142-143, 145-147. The jury heard that Detective Krause heard the gun cycle and fire on that day. RP(2/20/07) 50-51. The police found the gun where T.B. said it was hidden. RP(2/20/07) 60-62, 64-68, 72-82; Exs. 16, 20, 22-26, 29-32, 38-40, 45-49, 51-55, 57, 60-62. When the gun was recovered, it was stashed behind a dresser in the basement, which was where T.B. had said he had taken the gun when the police arrived. Exs. 45-49. There were loaded magazines for the rifle in the house. RP(2/20/07) 60-62, 64-68, 72-82; Exs. 16, 20, 22-26, 29-32, 38-40, 45-49, 51-55, 57, 60-62. The rifle had an empty cartridge in the chamber, suggesting it had been fired at least once. Exs. 48-49. The police found three bullet holes in the home that could have been made by bullets of the same caliber that the rifle fired. RP(2/20/07) 82-83.

The jury had sufficient evidence to convict defendant of second degree assault and first degree unlawful possession of a firearm.

Defendant's argument is entirely concerned with whether the State's evidence below was corroborated, not with whether the State offered sufficient evidence. Br. of Appellant at 10-11. Because this Court views all evidence in the light most favorable to the State, such an argument based on the weight of the State's evidence is inappropriate on appeal. *See Salinas*, 119 Wn.2d at 201.

2. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

“To establish prosecutorial misconduct during closing argument, the defendant bears the burden of demonstrating that the prosecutor's remarks were improper and that they prejudiced the defense.” *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006).

- a. The State did not make an impermissible comment on defendant's right to remain silent.

A prosecutor may not make an improper comment on a defendant's exercise of his right to remain silent in closing argument. *Gregory* 158 Wn.2d at 838. An improper comment on the right to remain silent only occurs “when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” *Gregory*, 158 Wn.2d at 838 (quoting *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). While a prosecutor

cannot point to the lack of defense evidence as proof of guilt, “the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *United States v. Hiatt*, 581 F.2d 1199, 1204 (5th Cir. 1978)).

Here, the State did not make a comment on the defendant’s right to remain silent. The only portion of the State’s closing in which defendant claims such a comment occurred is the following portion:

[DEFENSE COUNSEL:] I am going to object. The defendant never testified, and I think it is improper for the State to be telling the jury what the defendant wanted.

THE COURT: Well, this is argument, and she has some leeway. You’ll get your chance to respond to it. She has a chance to argue what she thinks you’re going to argue. You may continue.

[THE STATE:] Counsel is absolutely right, you didn’t hear from the defendant, but you heard from his wife. You heard his wife, Mrs. McHenry, testify that he has no idea that there was a rifle in the house. And again, why? Because the Defense knows that the State has to prove that he knew that there was a rifle, that he knowingly possessed it, knowingly owned it, and that is why his wife came in here to tell you that he had no idea.

RP(2/26/07) 279-280; Br. of Appellant at 14. The prosecutor’s comment at this portion of the argument was clearly a response to defendant’s objection, which occurred in the presence of the jury. The prosecutor wanted the jury to focus on the credibility of Ms. Jackson’s testimony because she was the only defense witness that supported defendant’s claim

that he did not have a weapon. The prosecutor was suggesting that Ms. Jackson was offering that testimony because it helped her husband, not because it was the truth. Defense counsel introduced the defendant's silence into the prosecutor's closing by objecting and raising that fact. The prosecutor then simply indicated that she was not relying on defendant's silence to make her point, she didn't need the jury to focus on the fact that defendant didn't testify because the jury "heard from his wife." RP(2/26/07) 279-280. The prosecutor was entitled to respond to the suggestion that the prosecutor's argument was unfounded because defendant had not testified. *See Russell*, 125 Wn.2d at 87-88.

The prosecutor was simply clarifying to the jury that, despite what defendant's objection might suggest, she was not relying on any testimony from defendant to make her point. The prosecutor did not comment on defendant's silence and made no suggestion that defendant's decision not to testify indicated he was guilty. The prosecutor did not commit misconduct.

- b. The State did not shift the burden to defendant because the State laid the foundation to use the missing witness doctrine and dense counsel effectively prevented the State from noting defendant's failure to call Ms. Prater.

Under proper circumstances the 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).

Under the missing witness instruction, where a party fails to produce otherwise proper evidence within his or her control, the jury may draw an inference unfavorable to that party. WPIC 5.20⁴; *State v. Russell*, 125 Wn.2d 24, 90, 882 P.2d 747 (1994). 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

⁴ The standard missing witness instruction, set forth in WPIC 5.20, is: “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.”

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.'" *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.

No inference is permitted if the witness is unimportant or if the testimony would be cumulative. *Blair*, 117 Wn.2d at 489. As the testimony’s importance depends on the facts of each case, an appellate court will not disturb a trial court’s decision on whether to give the missing witness instruction absent a clear showing of abuse of discretion. *David*, 118 Wn. App. at 67.

Defendant could not have been prejudiced by the misconduct defendant alleges because the prosecutor did not have the opportunity to make an argument based on the missing witness doctrine. The prosecutor was about to argue that Ms. Prater’s absence would allow the jury to draw a negative inference about what her testimony would be; she admitted as much during her argument on defendant’s objection. RP(2/26/07) 291-294. The jury was not in the courtroom when she made this argument, however. RP(2/26/07) 290-294. Defendant objected before the prosecutor could make a missing witness argument, and the Court sustained the objection before the jury was brought back into the courtroom. RP(2/26/07) 290-294. After the jury was returned to the courtroom, the prosecutor avoided the subject of missing witnesses for the rest of the trial. Because the jury did not hear the argument, defendant has

failed to establish prejudice, and his prosecutorial misconduct claim fails. *See Gregory*, 158 Wn.2d at 809.

If the prosecutor had made a missing witness argument to the jury, that argument would not have been improper because established Washington law allows the State to utilize the missing witness doctrine if it lays the foundation that the witness is peculiarly available to the defense. *State v. Cheatam*, 150 Wn.2d 626. The prosecutor carefully laid the foundation required in *Cheatam* when she established that Ms. Prater, as defendant's wife, was uniquely available to defendant. RP(2/22/07) 208, 210-213, 227-228. As the prosecutor noted, the State does not have to request a missing witness instruction to make this argument. *See Cheatam*, 150 Wn.2d at 654; RP(2/26/07) 291-294. The prosecutor's argument would have complied with Washington law, so defendant has failed to show that they would have been improper. *See Gregory*, 158 Wn.2d at 809.

This case is analogous to *State v. Cheatam*, 150 Wn.2d 626. The *Cheatam* court found that a prosecutor does not commit prosecutorial misconduct when she lays foundation that a witness is uniquely available to the defense and makes a missing witness argument even where there is no missing witness instruction given. *Id.* at 652-654. *Cheatam* was charged with rape and claimed he was with his friend Mr. Garrison at the time the rape occurred. *Id.* at 631-632, 652. Mr. Garrison, who worked for *Cheatam's* aunt, was uniquely available to *Cheatam*, but *Cheatam* did

not call him to testify. *Id.* at 653. In closing, the prosecutor questioned “why Rocky Garrison did not appear as a defense witness in support of his alibi.” *Id.* at 652. Defense objected, and the court allowed the argument, but did not give a missing witness instruction. *Id.* at 652. The Washington Supreme Court found that this did not constitute prosecutorial misconduct. *Id.* at 654.

This case is similar. The defense argued that defendant broke the chair on the floor, never fired the rifle, and that the hole in the wall was created in April 2005. RP(2/22/07) 201-203. Ms. Prater, who was present during the argument and could have corroborated these claims, was uniquely available to defendant because defendant knew where she worked and could contact her. RP(2/22/07) 208, 210-213, 227-228. If the prosecutor had been able to make her missing witness argument to the jury, she would have questioned why Ms. Prater had not been called to support the defense’s claims. RP(2/26/07) 291-294. As in *Cheatam*, the prosecutor did not request an instruction but rather laid the foundation to make the missing witness argument. RP(2/26/07) 291-294

Defendant has failed to show that the State acted improperly or that he was prejudiced by any improper statements. *See Gregory*, 158 Wn.2d at 809. The State did not commit prosecutorial misconduct.

D. CONCLUSION.

For the reasons stated above, the State requests that this Court affirm defendant's judgment and sentence.

DATED: APRIL 17, 2008

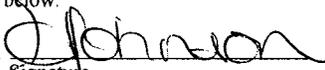
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Certificate of Service:

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.

4/17/08 
Date Signature

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