

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 39347-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Steven Dembrowicz,**

Appellant.

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Lewis County Superior Court Cause No. 09-1-00206-6

The Honorable Judge Nelson Hunt

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. Mr. Dembrowicz's convictions infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of each offense.
2. The trial court erred by refusing Mr. Dembrowicz's proposed missing witness instruction.
3. The trial court erred by adding a point to Mr. Dembrowicz's offender score based on his community custody status.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Due process requires the state to prove every element of a criminal offense beyond a reasonable doubt. Mr. Dembrowicz was convicted despite the state's failure to prove an element of each offense. Must Mr. Dembrowicz's convictions be reversed and the case dismissed for insufficient evidence?
2. An accused person is entitled to a missing witness instruction when the state fails to call a person within the control of or peculiarly available to the prosecution. Here the court denied Mr. Dembrowicz's request for a missing witness instruction, despite the state's failure to call witnesses within the control of or peculiarly available to the prosecution. Must Mr. Dembrowicz be granted a new trial?
3. An offender may not be sentenced above her or his standard sentence range absent notice of aggravating factors and proof to a jury beyond a reasonable doubt. In this case, the state did not notify Mr. Dembrowicz it would be seeking to enhance his sentence, and the court refused to require the state to a jury beyond a reasonable doubt that Mr. Dembrowicz was on community custody at the time of the offense. Did the imposition of an enhanced sentence violate Mr. Dembrowicz's Sixth and Fourteenth Amendment rights to notice, a jury trial, and proof beyond a reasonable doubt?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

An officer saw Steven Dembrowicz on foot, and recognized him. RP (5/28/09) 14-15. The officer ran his name, and dispatch indicated a warrant was out for Mr. Dembrowicz's arrest. RP (5/28/09) 16. Additional officers came to the scene, and Mr. Dembrowicz cooperated with the arrest. RP (5/28/09) 17-18. A search revealed 3 small baggies in his pants pocket, one of which contained a small rock or crystal. RP (5/28/09) 18.

The state charged Mr. Dembrowicz with Possession of a Controlled Substance (methamphetamine) and Unlawful Use of Drug Paraphernalia. CP 24.

At trial, when Officer Clary, who had done the search, was shown a photograph of baggies, he was unable to say that they were the same ones he took from Mr. Dembrowicz. RP (5/28/09) 19. He said a different officer had taken the photos. RP (5/28/09) 23. The state did not call the officer who took the photos. RP (5/28/09) 13-62. Even so, the court admitted the photo. RP (5/28/09) 19.

According to Officer Clary, another officer took the baggies into evidence. RP (5/28/09) 26. Officer Butcher, who had Officer Panco with him, took the items and did a field test. RP (5/28/09) 40. Then he put it

into the evidence system, and later requested they be sent to the lab. RP (5/28/09) 41-43.

The state called forensic scientist Sharon Herbelin. She testified that she opened an envelop with two baggies inside. RP (5/28/09) 49-54. when asked if they were the same ones shown in the photo, she couldn't say. RP (5/28/09) 55-56, 61. Her test results, that it contained methamphetamine, were admitted over defense objection. RP (5/28/09) 55-60.

The state didn't call Officer Panco, and the defense proposed a missing witness instruction, based on WPIC 5.20:

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.  
Defendant's Proposed Instructions, Supp. CP.

The court denied the request. RP (5/28/09) 63-65.

The jury returned two guilty verdicts. RP (5/28/09) 89-90.

At sentencing, the court inquired of the state whether Mr. Dembrowicz's status on community custody needed to be plead and proved in order for the enhancement to apply. RP (5/28/09) 87-88. The state responded that it did not. RP (5/28/09) 88. The defense indicated on

a proposed stipulation regarding criminal history “Defense objects to score.” Stipulation on Prior Record, Supp. CP. Further, the defense acknowledged the court’s ruling on the community custody status, objected, and stipulated that Mr. Dembrowicz was on that status at the time of the incident. RP (5/28/09) 90-91, 94. Based on that, the court added a point to the score and sentenced Mr. Dembrowicz. RP (5/28/09) 94. This timely appeal followed. CP 3.

### ARGUMENT

**I. MR. DEMBROWICZ’S CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES BEYOND A REASONABLE DOUBT.**

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003).

The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.<sup>1</sup> *DeVries*, at 849. The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra*.

The state was required to prove that Mr. Dembrowicz possessed methamphetamine. The substance seized from Mr. Dembrowicz was given to Officer Butcher, who subjected it to a field test before packaging it. RP (5/28/09) 40. Butcher did not testify that he reserved a portion of the substance to send to the lab. RP (5/28/09) 38–49. Without reserving some of it, the field test reagents must have contaminated the substance. Under these circumstances, the lab test results are suspect, and cannot prove beyond a reasonable doubt that the substance was methamphetamine.

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<sup>1</sup> Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589, 592, 123 P.3d 891 (2005). The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence "substantial enough to allow the [reviewing] court to conclude that the allegations are 'highly probable.'" *In re A.V.D.*, 62 Wn.App. 562, 568, 815 P.2d 277 (1991), *citation omitted*.

Mr. Dembrowicz's convictions must be reversed and the case dismissed with prejudice. *Smalis, supra*.

**II. THE TRIAL COURT SHOULD HAVE GIVEN MR. DEMBROWICZ'S MISSING WITNESS INSTRUCTION AND PERMITTED DEFENSE COUNSEL TO ARGUE THE MISSING WITNESS DOCTRINE TO THE JURY.**

A jury may draw inferences unfavorable to a party who fails to produce otherwise proper evidence within that party's control. *State v. Russell*, 125 Wn.2d 24, 90, 882 P.2d 747 (1994). If requested by the accused person and warranted by the facts, a court must instruct the jury on the missing witness doctrine. *State v. Davis*, 73 Wn.2d 271, 438 P.2d 185 (1968). There are three exceptions to this rule.

First, the instruction should not be given if the witness possesses evidence that is unimportant or merely cumulative. *State v. Blair*, 117 Wn.2d 479, 489, 816 P.2d 718 (1991). Second, the instruction should not be given if there is a satisfactory explanation for the witness' absence. *Blair*, at 489. Third, the instruction should not be given if the witness is incompetent or the testimony is privileged. *Blair*, at 489.

The witness must be "within the control of or peculiarly available" to the party against whom the instruction is offered. WPIC 5.20; *Blair, supra*. However, this question of availability does not mean that the witness is present in court or subject to the subpoena power. Instead,

[f]or 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... The rationale for 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.

*State v. Blair*, at 490.

In this case, the trial court should have granted Mr. Dembrowicz’s request for a missing witness instruction. The prosecution was required to establish that the items seized from Mr. Dembrowicz contained methamphetamine. The lab test results were valid and relevant only if the items tested were the same items seized from Mr. Dembrowicz, and only if they had not been tampered with from the moment of the seizure until the time they were tested.

The evidence established that the items tested at the lab were handled by nontestifying personnel at the police department, and then by nontestifying personnel at the crime lab. RP (5/28/09) 41, 48, 57, 61. The state should have called the police and lab personnel to prove that the tested items had not been tampered with.

These missing witnesses were within the control of or peculiarly available to the prosecution. The state did not produce other evidence

proving that these people did not tamper with the items, did not explain their absence, and did not suggest that their testimony would have been privileged. Accordingly, a missing witness instruction was appropriate.

Under these circumstances, the trial court should have given Mr. Dembrowicz's missing witness instruction. The court's refusal to give the requested instruction violated Mr. Dembrowicz' right to a fair trial. His convictions must be reversed and the case remanded for a new trial.

*Davis, supra.*

**III. THE EXCEPTIONAL SENTENCE VIOLATED BLAKELY V. WASHINGTON BECAUSE THE STATE FAILED TO ALLEGE AND PROVE THAT MR. DEMBROWICZ WAS ON COMMUNITY CUSTODY AT THE TIME OF THIS OFFENSE (INCLUDED FOR PRESERVATION OF ERROR).**

Any fact that increases the penalty for a crime must be proved to a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The *Blakely* rule includes an exception for "the fact of a prior conviction." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The Washington Supreme Court has concluded that an increase based on an offender's community custody status falls within the prior conviction exception to the *Blakely* rule. *State v. Jones*, 159 Wn.2d 231, 149 P.3d 636 (2006).

*Jones* was incorrectly decided and should be reconsidered. As the *Jones* dissent pointed out,

[W]hether a defendant is on community placement at any given point in time is not the same as the fact of a prior conviction.... [N]umerous factors require the trial court to look beyond the prior conviction to determine the actual facts. Unlike a prior conviction, a jury has never previously determined that these defendants were on community placement at any particular point in time. Therefore, the Sixth Amendment requires a jury, not the judge, to find whether [an offender was] on community placement when [the offense was] committed.

*Jones*, at 250-251 (Sanders, J., dissenting).

For the reasons outlined by Justice Sanders in his dissent, *Jones* must be overruled. Mr. Dembrowicz's sentence must be vacated and the case remanded for resentencing.

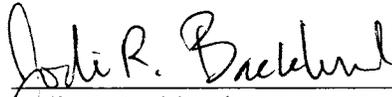
### **CONCLUSION**

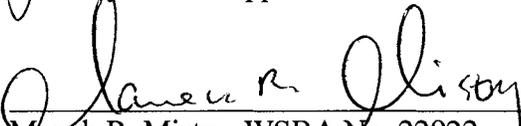
For the foregoing reasons, Mr. Dembrowicz's convictions must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

If the convictions are not reversed, the sentence must be vacated and the case remanded to the superior court for resentencing.

Respectfully submitted on August 20, 2009.

**BACKLUND AND MISTRY**

  
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