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NO. 23834-2-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL BECAUSE MR. DAVIS WAS DENIED A FAIR TRIAL

Mr. Davis challenged two separate lines of argument pursued by the prosecutor at trial. The first was the implication that Mr. Davis was under some obligation, contrary to the well recognized protections of the due process clause, that the defendant should have produced witnesses to confirm his alibi. AOB at 10-11 citing RP 463-66, 477-78. State v. French, 101 Wn.App. 380, 385, 4 P.3d 857 (2000), *review denied sub nom.,* State v. Barraza, 142 Wn.2d 1022 (2001); State v. Cleveland, 58 Wn.App. 634, 648, 794 P.2d 546, *review denied*, 115 Wn.2d 1029 (1990), *cert. denied,* 499 U.S. 948 (2001). The second was asking Mr. Davis to opine about whether or not other witnesses were lying. AOB at 12-15 citing RP 478-79, 483-84. State v. Padilla, 69 Wn.App. 295, 302, 846 P.2d 564 (1993).

a. Burden shifting violates the right to due process of law. With regard to the prosecutor's efforts to shift the burden of proof, the State looks to the "missing witness" doctrine, which provides that:

> ...where evidence which would properly be part of a case is within the control of the party whose interest it

> would naturally be to produce it, and, ... he fails to do so, --the jury may draw an inference that it would be unfavorable to him.

State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968); State v. Blair, 117 Wn.2d 479, 488-91, 816 P.2d 718 (1991). This inference and argument are only permitted, however, where the specific limitations to the doctrine do not apply. The first limitation is that the doctrine applies "only where, under all the circumstances of the case, such an unexplained failure to call the witnesses creates a suspicion that there has been a willful attempt to withhold competent testimony." Blair, 117 Wn.2d at 488. Such a conclusion is not warranted by the evidence here because there is no basis for the belief that Mr. Davis would have been seeking to withhold competent testimony. Officers had known since the date of the incident where Mr. Davis was that evening and were always free to contact restaurant staff regarding the timing of his arrival and departure.

The second limitation is that the missing witness inference is not permitted when the witness is unimportant or the testimony would be cumulative. Davis, 73 Wn.2d at 278. In this case, the testimony would presumably have been cumulative of that already provided by Mr. Davis.

Furthermore, where the witnesses' absence can be satisfactorily explained no inference is permitted. For example, where the missing witnesses were transients who left town and could not be located. State v. Lopez, 29 Wn.App. 836, 631 P.2d 420 (1981). To the extent the prosecution seeks to draw the inference from potential patrons, rather than restaurant staff, those potential witnesses represented a similarly transient group of casual acquaintances for whom the inference would not be proper.

Finally, most courts hold that the doctrine does not apply if the uncalled witness is equally available to the parties.

> 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 reasonable probably that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.

State v. Davis, 73 Wn.2d at 277. As noted already, the police were aware from the outset that Mr. Davis was at the restaurant so the staff was equally available to either party, retaining no particular community of interest with Mr. Davis. Nothing made these potential witnesses any less available to the prosecution than to Mr. Davis.

b. Questions regarding who must be "lying" were improper. The prosecutor argues Mr. Davis invited two of the

improper questions by describing the differences in what he believe occurred and what the witnesses described. The record illustrates that the improper questioning was elicited by the trial deputy herself.

Mr. Davis' assertions that Dean Smith and T.B. did not see what they believed they saw does not automatically open the door for the prosecutor to compel him to characterize their testimony as "lies." RP 483. Dean Smith may well have seen someone or something that was similar to Mr. Davis and his vehicle. It is neither appropriate nor informative, therefore, for the accused to speculate about the reasons for such confusion or conflict. That Mr. Davis was able to deflect the same question with regard to Officer Taylor's testimony does little to mitigate the imporer inference the jury was invited to make. State v. Suarez-Brazo, 72 Wn.App. 359, 366-68, 864 P.2d 426 (1994).

c. The improper lines of inquiry require a new trial. Although defense counsel did not object, Mr. Davis is entitled to relief because the questions were so "flagrant and ill-intentioned" as to irrevocably prejudice the jury. State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). The prejudice of such improper lines of inquiry is critical here because "the case essentially turn on the credibility of the two witnesses. In such a swearing contest, the

likelihood of the jury's verdict being affected by improper questioning is substantial." State v. Padilla, 69 Wn.App. at 302. In light of the constitutional rights which were compromised by the improper inquiries, it is implausible to believe a curative instruction could have eliminated the taint and it is impossible for the prosecutor to establish the error was not harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 238-39, 922 P.2d 1285 (1996). Reversal of the conficditons arising out of the May 7th allegations is required.

2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICITON FOR UNLAWFUL IMPRISONMENT

The offense of unlawful imprisonment requires the defendant "knowingly restrain another person" in such a way that she "is deprived of either liberty of movement or freedom to remain in place..." RCW 9A.40.040; Bender v. City of Seattle, 99 Wn.2d 582, 591, 664 P.2d 492 (1983). Notwithstanding any procedural or extraneous factual differences, the Court of Appeals decision in State v. Kinchen, 92 Wn.App. 442, 963 P.2d 928 (1998), illustrates that restraint requires a substantial interference with another's liberty. See also State v. Robinson, 20 Wn.App. 882, 582, P.2d 580 (1978), affirmed, 92 Wn.2d 357, 597 P.2d 892 (1979). In reviewing the sufficiency of the evidence, it must be examined in its

entirety, and as such, the freedom of movement T.B. demonstrated within belies the assertion there was any substantial interference with her liberty.

3. NEITHER THE TRIAL COURT NOR THE PARTIES HAD THE AUTHORITY TO PERMIT TRIAL ON THE AGGRAVATING FACTORS IN LIGHT OF THE S.R.A'S SPECIFIC PROCEEDURAL PROVISIONS

The prosecutor argues the implied powers provisions of RCW 2.28.150 provided the necessary authority to sanction the procedure use below of charging the jury as to the aggravating factors supporting an exceptional sentence. RCW 2.28.150 provides:

> When jurisdiction is, by the Constitution of this state, or by statue, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, <u>if the course of proceeding is not specifically pointed out by statute</u>, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

(Emphasis added.) Were there a void in which the court and the parties were seeking to devise a procedure, this statute might well have permitted the one devised. See e.g. <u>Hays v. Merchants' Bank</u>, 10 Wash. 573, 574-75, 39 P. 98 (1895) (approving use of a procedure where none was provided by tide lands contest statute). The prosecutor's reliance on the history of habitual offender

proceedings actually illustrates this point because it was only after the statutes were in amended in 1909 and the legislature omitted references to the use of juries that the courts used their implied powers to provide for juries. State v. Smith, 150 Wn.2d 135, 144, 75 P.3d 934 (2003).

The Supreme Court has noted with regard to exceptional sentences under the applicable portions of the Sentencing Reform Act that "It explicitly directs the trial court to make the necessary factual findings and does not include any provision allowing a jury to make those determinations during trial, during a separate sentencing phase, or on remand." State v. Hughes, 154 Wn.2d 118, 149, 110 P.3d 192 (2005). When faced with the same dilemma as the trial court, the Supreme Court noted that "[t]o allow exceptional sentences here, we would need to imply a procedure by which to impanel juries on remand to find the necessary facts, which would be contrary to the explicit language of the statue." Id. In the face of explicit language directing a contrary procedure, RCW 2.28.150 plainly does not provide the authority for the trial court to prescribe a different procedure.

The prosecutor's reliance on the general power provided in CrR 6.16(b) to require special findings or verdicts is similarly inapplicable. The rule provides only that the "court may submit to

the jury forms for such special findings which may be required or authorized by law." CrR 6.16(b). As Hughes notes, however, the law expressly provides for a different procedure, so special findings are neither required or authorized by the law in effect in Washington at the time. 154 Wn.2d at 148-52. The Court went so far as to reject the conclusion of Division One of the Court of Appeals in State v. Harris, 123 Wn.App. 906, 922-26, 99 P.3d 902 (2004), that it could adopt such procedures in the absence of a prohibition in the statute. State v. Hughes, 154 Wn.2d at 152 n.16.

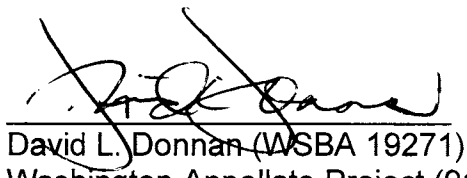
In the end, the coincidence that the procedure used in the trial court is similar to that later adopted by the Legislature does not serve to give the statutory authority required when the incident occurred, the case was charged and the trial was conducted. "[I]t is the function of the legislature and not of the judiciary to alter the sentencing process." State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986); State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975). The trial court act without authority and contrary to the express intent of the legislation in effect at the time by charging the jury with regard to the aggravating factors and the sentences based thereon can not stand.

B. CONCLUSION.

Mr. Davis requests this Court reverse his conviction and sentence, remanding the case for a new trial.

DATED this 7th day of October 2005.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT, v. ANTHONY DAVIS, APPELLANT.	)))))))))	COA NO. 23834-2-III

DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF OCTOBER, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE, WASHINGTON, THIS 7TH DAY OF OCTOBER, 2005.

X_____