

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

11 JAN 31 PM 4:43

BY RONALD R. CARPENTER

NO. 84660-0

CLERK *bjh*

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

YUSSUF ABDULLE,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

DANIEL T. SATTERBERG
King County Prosecuting Attorney

MICHAEL J. PELLICCIOTTI
Deputy Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>SUMMARY OF ARGUMENT</u>	1
B. <u>ISSUES</u>	1
C. <u>STATEMENT OF THE CASE</u>	2
D. <u>ARGUMENT</u>	3
1. <u>MIRANDA</u> DOES NOT REQUIRE TESTIMONY AT A PRETRIAL HEARING FROM MULTIPLE OFFICERS WHO WERE PRESENT AT A CUSTODIAL INTERROGATION	3
2. THE MISSING WITNESS DOCTRINE DOES NOT SUPERSEDE A TRIAL JUDGE'S ASSESSMENT OF VOLUNTARINESS	14
3. THE COURT OF APPEALS ERRED BY REVERSING THE TRIAL COURT ON A CLAIM RAISED FOR THE FIRST TIME ON APPEAL.....	18
E. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Berghuis v. Thompkins, 130 S. Ct. 2250,
176 L. Ed. 2d 1098 (2010)..... 12

Colorado v. Connelly, 479 U.S. 157,
107 S. Ct. 515, 93 L. Ed. 2d 473 (1986)..... 12

Crane v. Kentucky, 476 U.S. 683,
106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)..... 11

Dickerson v. U.S., 530 U.S. 428,
120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000)..... 12, 13

Haynes v. State of Washington, 373 U.S. 503
83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963)..... 5

Lego v. Twomey, 404 U.S. 477,
92 S. Ct. 619, 30 L. Ed. 2d 618 (1972)..... 10, 11, 12, 17

Miranda v. Arizona, 384 U.S. 436,
86 S. Ct. 1602, 16 L. Ed 694 (1966).....*passim*

Mitchell v. United States, 526 U.S. 314,
119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999)..... 12, 13

Oregon v. Bradshaw, 462 U.S. 1039,
103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983)..... 13

Washington State:

Abdulle, No. 63742-8-1 4

City of Seattle v. Stalsbrotten, 138 Wn.2d 227,
978 P.2d 1059 (1999)..... 4

Green v. City of Seattle, 146 Wash. 27,
261 P. 643 (1927)..... 8

<u>In re Francis</u> , ___ Wn.2d ___, 242 P.3d 866 (2010).....	8
<u>In re Hansen's Estate</u> , 66 Wn.2d 166, 401 P.2d 866 (1965).....	7
<u>In re Rights to Waters of Stranger Creek</u> , 77 Wn.2d 649, 466 P.2d 508 (1970).....	13
<u>Spain v. Employment Sec. Dept.</u> , 164 Wn.2d 252, 185 P.3d 1188 (2008).....	8
<u>State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	15, 17
<u>State v. Braun</u> , 82 Wn.2d 157, 509 P.2d 742 (1973).....	11
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	17
<u>State v. Cheatham</u> , 150 Wn.2d 626, 81 P.3d 830 (2003).....	15
<u>State v. Collins</u> , 74 Wn.2d 729, 446 P.2d 325 (1968).....	16
<u>State v. Davis</u> , 73 Wn.2d 271, 438 P.2d 185 (1968).....	6-20
<u>State v. Davis</u> , 12 Wn. App. 288, 529 P.2d 1157 (1974).....	9
<u>State v. Dodd</u> , 8 Wn. App. 269, 505 P.2d 830 (1973).....	9
<u>State v. Erho</u> , 77 Wn.2d 553, 463 P.2d 779 (1970).....	9, 14
<u>State v. Gormley</u> , 53 Wash. 543, 104 P. 620 (1909).....	8

<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	17
<u>State v. Haack</u> , 88 Wn. App. 423, 958 P.2d 1001 (1997).....	9
<u>State v. Haynes</u> , 58 Wn.2d 716, 364 P.2d 935 (1961).....	4, 5
<u>State v. Huxoll</u> , 38 Wn. App. 360, 685 P.2d 628 (1994).....	9
<u>State v. Kirkpatrick</u> , 160 Wn.2d 873, 161 P.3d 990 (2007).....	19
<u>State v. Lanning</u> , 5 Wn. App. 426, 487 P.2d 785 (1971).....	9
<u>State v. Mark</u> , 34 Wn. App. 349, 661 P.2d 157 (1983).....	9
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	17
<u>State v. Moore</u> , 79 Wn.2d 51, 483 P.2d 630 (1971).....	4
<u>State v. Reed</u> , 56 Wn.2d 668, 354 P.2d 935 (1960).....	7
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	15, 17
<u>State v. Ruud</u> , 6 Wn. App. 57, 481 P.2d 1351 (1971).....	9
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	18
<u>State v. Stein</u> , 144 Wn.2d 236, 27 P.3d 184 (2001).....	19

<u>State v. Zwicker</u> , 105 Wn.2d 228, 713 P.2d 1101 (1986).....	4
<u>Townsend v. Rosenbaum</u> , 187 Wash. 372, 60 P.2d 251 (1936).....	11
<u>Wright v. Safeway Stores, Inc.</u> , 7 Wn.2d 341, 109 P.2d 542 (1941).....	15

Constitutional Provisions

Washington State:

Const. art. I, § 9.....	4
Const. art. IV, § 2	8

Statutes

Washington State:

RCW 9.33.020.....	4
-------------------	---

Rules and Regulations

Washington State:

CrR 3.5.....	1, 2, 14, 19, 20
RAP 2.5.....	2, 18, 19

Other Authorities

Rule of Pleading, Practice, and Procedure 101.20W, RCW Vol. 0, 1961	5
WPIC 5.20.....	15

A. SUMMARY OF ARGUMENT

The Court of Appeals relied on a decision of this Court to hold that Miranda v. Arizona and the missing witness doctrine require testimony from multiple officers at a CrR 3.5 hearing, even if the trial judge is satisfied based on the testimony of a single officer that the requirements of Miranda were met. The Court of Appeals' rationale has been superseded by Supreme Court precedent, and it also involves a misapplication of the missing witness doctrine to pretrial judicial fact-finding. Trial courts have discretion to decide fact questions; imposing a "missing witness rule" is unwarranted.

B. ISSUES

1. Does Miranda v. Arizona require testimony at a pretrial hearing from multiple officers who witnessed the reading or waiver of Miranda rights to establish compliance with Miranda?

2. Can the missing witness doctrine, which allows juries to infer that a missing witness's testimony would be unfavorable, trump a trial judge's discretion to determine facts and assess witness credibility at a CrR 3.5 hearing?

3. Under RAP 2.5(a), should the Court of Appeals have declined to consider this claim when it was not preserved below?

C. STATEMENT OF THE CASE

Police arrested Defendant Yussuf Abdulle for stealing checks in Bellevue and attempting to cash them at two Seattle banks. Bellevue Police Detective Steven Hoover questioned Abdulle during and after transport to the police station. While Det. Hoover rode in the back seat with Abdulle, a second officer drove them. Abdulle confessed to sealing the checks from his former employer because he was angry that he had been fired.

The trial court held a CrR 3.5 pretrial hearing to determine the admissibility of Abdulle's statements to Det. Hoover. Although Det. Hoover testified that Abdulle confessed after an appropriate waiver of Miranda rights, Abdulle testified that he never waived his rights and never confessed. A full recitation of facts from that hearing is contained in the State's briefing to the Court of Appeals.

After considering the starkly divergent testimony from Det. Hoover and Abdulle, the trial court found Det. Hoover's testimony "more credible and reliable than Abdulle's." CP 71-72. The trial court made factual findings consistent with Det. Hoover's testimony and ruled that Abdulle had knowingly, intelligently, and voluntarily waived his Miranda rights. CP 71-73. The court admitted Abdulle's

confession to Det. Hoover and a jury convicted Abdulle as charged.

CP 58-60. Abdulle appealed.

The Court of Appeals held that the trial court erred in admitting the confession because the State did not present the testimony of the second officer present when Abdulle waived his right to counsel. The court ruled that this issue can be raised for the first time on appeal since it is the State's burden to ensure that the record reflects compliance with Miranda. This Court granted the State's Petition for Review.

D. ARGUMENT

1. MIRANDA DOES NOT REQUIRE TESTIMONY AT A PRETRIAL HEARING FROM MULTIPLE OFFICERS WHO WERE PRESENT AT A CUSTODIAL INTERROGATION.

The Court of Appeals held that under Miranda, when a defendant denies waiving the right to counsel and the State, without explanation, fails to call other officers who were present to corroborate the interrogating officer's testimony, the defendant's statements are inadmissible. Abdulle, No. 63742-8-1 (slip op., at 1). This holding is without constitutional basis and incorrectly interprets Miranda.¹ A review of Washington and United States

¹ The Washington constitutional guarantee against self-incrimination is the same as the federal right. Wash. Const. art. I, § 9; State v. Moore, 79 Wn.2d 51, 57,

Supreme Court cases shows how this error inadvertently crept into Washington law.

Prior to Miranda, in 1960, Washington courts did not require police to provide suspects with express or uniform constitutional warnings, and left the jury to decide whether a defendant's confession was voluntary. State v. Haynes, 58 Wn.2d 716, 719-20, 364 P.2d 935 (1961). The trial court simply instructed the jury to disregard any confession where a police officer or prosecutor denied the suspect his right to communicate with counsel, or induced an involuntary confession based on the totality of circumstances. Id. at 722 (citing the former RCW 9.33.020(5)).

In 1961, this Court promulgated a new court rule that directed the trial court to resolve questions of voluntariness before admitting a confession as evidence; the rule did not, however, require police to provide a specific advisement of rights before taking a suspect's statement. Haynes, 58 Wn.2d at 720 (citing Rule of Pleading, Practice, and Procedure 101.20W, RCW Vol. 0, 1961).

Shortly thereafter, the United States Supreme Court reversed this Court's decision in Haynes, despite the jury's finding

483 P.2d 630 (1971); State v. Zwicker, 105 Wn.2d 228, 242, 713 P.2d 1101 (1986); City of Seattle v. Stalsbroten, 138 Wn.2d 227, 232 n.1, 978 P.2d 1059 (1999).

that Haynes confessed voluntarily, because Haynes was never "advised by authorities of his right to remain silent, warned that his answers might be used against him, or told of his rights respecting consultation with an attorney." Haynes v. Washington, 373 U.S. 503, 511, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963). The Supreme Court held that although factual findings and evidentiary conflicts are left to a jury or trial judge, a confession may still be involuntary as a matter of law, if these due process safeguards had not been satisfied by police. Haynes, 373 U.S. at 515-16.

In 1966, the Supreme Court issued Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), which established a uniform procedural requirement to ensure that suspects are advised prior to interrogation of their privilege against self-incrimination and their right to counsel. Although Miranda held the State must bear a "heavy burden" to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination or counsel, the Court did not define the weight of that "heavy burden." Id. at 474-75. Thus, lower courts were left to wonder whether the "heavy burden" required proof by a preponderance of the evidence, beyond a reasonable doubt, or by some other measure.

Two years after Miranda, without any guidance from the Supreme Court, this Court concluded in State v. Davis that the "heavy burden" required the trial court to find that a suspect's confession was admissible "beyond a reasonable doubt." 73 Wn.2d 271, 285-86, 438 P.2d 185 (1968). In Davis, the Court considered whether the defendant² waived his constitutional rights when he made statements to a jail captain following his attempted escape. Id. at 275-77. At a pretrial hearing, the jail captain testified that after advising the defendant of his rights the defendant waived those rights by giving a statement. Id. at 274-75. Conversely, the defendant testified that after being advised on his rights, he expressed his unwillingness to speak to the captain and gave no statement. Id. Although another officer had been present during the interrogation, that officer did not testify at the pretrial hearing, but the trial court found the captain's testimony more credible and admitted the statements to the jury. Id. at 275. The defendant objected. Id.

The Davis Court bluntly stated that "[b]ut for the holding in Miranda, we would have no hesitancy in sustaining the trial court's

² The petitioning defendant in Davis was named James L. Belknap. Davis, 73 Wn.2d at 274.

findings [that the statement was made and that it was made knowingly, intelligently, and voluntary]." Id. at 281-83. The Court recognized that whether the defendant actually made a statement is merely a factual question, which raises no constitutional issues and is not affected by Miranda. Id. at 281. Prior to Davis, when a trial court found an officer to be more credible than the defendant, the reviewing court would not disturb that finding, or a finding of voluntariness, unless it lacked substantial support in the evidence.³ Id. at 283 (citing State v. Reed, 56 Wn.2d 668, 354 P.2d 935 (1960)). After Miranda, however, the Davis Court concluded that the "heavy burden" required the prosecution to show beyond a reasonable doubt that the defendant waived his rights knowingly, intelligently, and voluntarily. Id. at 285-86.

Although not necessarily endorsing a presumption of police misconduct, the Davis Court held as a matter of law, that Miranda demanded a "more credible and sophisticated technique of proof" by the State to counter a presumption against waiver. Id. at 285, 287. As a result, this Court held that when there is a "swearing contest" between a defendant and a police officer, the State cannot

³ The reviewing court would typically sustain the trial court's factual findings, including a finding of voluntariness, unless the finding lacked substantial evidentiary support or the evidence preponderates against the findings. In re Hansen's Estate, 66 Wn.2d 166, 170, 401 P.2d 866 (1965).

satisfy its "heavy burden" beyond a reasonable doubt without calling or explaining the absence of an available corroborating officer. Id. at 285-88.

Davis was decided by a majority of this Court.⁴ However, in his concurrence as the fifth member of the majority, Chief Justice Finley lamented that Washington law was being preempted by Miranda. Id. at 297. The Chief Justice wrote:

This action is required, not because statements which [the defendant] allegedly made were unreliable or untrue, not because there is even a slight suggestion he was improperly treated, but because the state has not met what in my opinion is an *inordinately* heavy burden of showing that what are termed the 'Miranda warnings' were given and that [the defendant] waived his rights pursuant to these warnings.

Id. (C.J. Finley concurrence) (emphasis added). Chief Justice Finley concluded, "the majority opinion in the instant case aptly states the law, and I must fully, albeit unhappily, concur."

A year after Davis, in State v. Erho, 77 Wn.2d 553, 556, 463 P.2d 779 (1970), this Court again weighed the post-Miranda "heavy burden" facing the State. Four justices, applying the analysis in

⁴ The majority in Davis consisted of all five members of Department Two. Davis, 73 Wn.2d at 271. A decision on an issue before the court is not settled law and has no precedential value unless decided by a majority of the Court. Wash. Const. art. IV, § 2; State v. Gormley, 53 Wash. 543, 553-56, 104 P. 620 (1909); Green v. City of Seattle, 146 Wash. 27, 30-31, 261 P. 643 (1927); Spain v. Employment Sec. Dept., 164 Wn.2d 252, 260 n.8, 185 P.3d 1188 (2008); In re Francis, ___ Wn.2d ___, 242 P.3d 866, 873 n.7 (2010).

Davis, attempted to create a rule that where "there appears to be adequate opportunity to obtain and present the corroborating testimony of other officers present at the scene of apprehension and custody . . . the state fails to meet the heavy Miranda burden of proof when, without explanation, it omits to supply such corroboration. Id. at 782-83. However, a majority of the Court did not adopt this rule. Thus, Erho is not binding precedent. See supra, n.5 In his dissent, Chief Justice Finley argued that "the views of the majority⁵ are an unnecessary extension and application of Miranda." Id. at 562.

Despite Erho's lack of precedential value, the Court of Appeals erroneously relied on Erho to reverse the trial court in this case and in other published cases.⁶

Except for Davis, which has never been challenged, counsel has found no other valid case of a state high court, federal appellate court, or the Supreme Court holding that Miranda requires

⁵ For Court cases heard prior to 1970, a majority of a Department could resolve a case, but only a majority of the full Court after en banc review or a unanimous Department could create law and Court precedent. See supra n. 5.

⁶ See State v. Ruud, 6 Wn. App. 57, 61-61, 481 P.2d 1351 (1971); State v. Lanning, 5 Wn. App. 426, 432, 487 P.2d 785 (1971); State v. Davis, 12 Wn. App. 288, 291-92, 529 P.2d 1157 (1974); State v. Dodd, 8 Wn. App. 269, 274, 505 P.2d 830 (1973); State v. Mark, 34 Wn. App. 349, 351-52, 661 P.2d 157 (1983); State v. Huxoll, 38 Wn. App. 360, 363-64, 685 P.2d 628 (1994); State v. Haack, 88 Wn. App. 423, 433-34, 958 P.2d 1001 (1997).

a corroborating officer to testify before admitting a defendant's statement, regardless of whether a "swearing contest" occurred. The novelty Davis's holding is rooted in its misinterpretation of Miranda's "heavy burden."

In 1971, the Supreme Court clarified in Lego v. Twomey, that Miranda's "heavy burden" requires proof of a lack of coercion only by a *preponderance of the evidence*, not beyond a reasonable doubt. 404 U.S. 477, 484, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972). The Supreme Court held that admissibility of evidence rests with the trial judge, so, contrary to Davis, if the facts establish that it is more likely than not that a defendant's confession was made knowingly and voluntarily and that the defendant's constitutional rights were protected, then the probative value of the defendant's confession should be presented to the jury. Id. at 489.

The Supreme Court recognized that the requirement of proof beyond a reasonable doubt applies to the elements of the offense and that a jury determines what weight to give a defendant's confession in light of claims of coercion. Id. at 485-86. If the trial judge determines by a preponderance of evidence that a confession is voluntary, then the jury may still find, as with any part of the prosecutor's case, that the confession is "insufficiently

corroborated or otherwise . . . unworthy of belief." Crane v. Kentucky, 476 U.S. 683, 688-89, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting Lego, 404 U.S. at 485-86).

After Lego, it became clear that the preponderance of the evidence standard that Washington trial courts applied *before* Davis was a correct statement of the law.⁷ See Townsend v. Rosenbaum, 187 Wash. 372, 391, 60 P.2d 251 (1936); In re Hansen's Estate, 66 Wn.2d at 170 (holding that a trial court's findings represent evidence admitted by a preponderance). This Court quickly restated the correct standard. See State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973) (citing Lego, 404 U.S. 477) (holding that the State must prove voluntariness by a preponderance of the evidence, not beyond a reasonable doubt). The Court of Appeals, however, has continued to apply the Davis rule. This case presents the Court with its first opportunity since Lego to correct the erroneous holding in Davis, which the Court of Appeals relied on to suppress Abdulle's statement.

The Supreme Court has cautioned against expanding current "exclusionary rules by erecting additional barriers to placing

⁷ Since the issue of voluntariness is a conclusion of law, the appellate courts rely on the trial court's factual findings and review the law de novo. See State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

truthful and probative evidence before state juries. . ." Colorado v. Connelly, 479 U.S. 157, 166, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) (quoting Lego, 404 U.S. at 488-89). The "main purpose of Miranda is to ensure that an accused is advised of and understands the right to remain silent and right to counsel . . . our subsequent cases have reduced the impact of the Miranda rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." Berghuis v. Thompkins, ___ U.S. ___, 130 S. Ct. 2250, 2261, 176 L. Ed. 2d 1098 (2010)).

In its initial review of Miranda, the Davis Court questioned whether it was sufficient to rely on one officer's testimony to prove compliance with the new "Miranda rights." Davis, 73 Wn.2d 284. Yet, more than forty years later, "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture." Dickerson v. U.S., 530 U.S. 428, 430, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) (citing Mitchell v. United States, 526 U.S. 314, 331-32, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999)). It is a rare case where a defendant can make a colorable argument that a self-incriminating statement was

involuntary when Miranda warnings were given. Dickerson, 530 U.S. at 430.

Here, there is no dispute that Miranda warnings were read to Abdulle. CP 71. Moreover, the trial court made factual findings consistent with the fact that Abdulle reinitiated conversation and voluntarily spoke to Det. Hoover. CP 72-73. Abdulle's reinitiating of the conversation amounted to a voluntary waiver of his right to remain silent, as a matter of law. See Oregon v. Bradshaw, 462 U.S. 1039, 1044, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983)(holding that a defendant may implicitly waive his right to silence by voluntarily reinitiating a conversation). If not for the erroneous holding in Davis, Abdulle's statement to Det. Hoover would be admissible under Miranda.

Respectfully, this Court should reverse its holding in Davis because it is clearly incorrect and harmful. In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The Davis Court incorrectly anticipated a higher standard of proof than applies to Miranda. Further, the Davis Court's holding is harmful because it leads to the unwarranted suppression of relevant evidence based on an incorrect standard of law. And, because the State does not know until it has rested in a CrR 3.5 hearing whether

the defendant plans to testify, the State must preemptively call extra witnesses not otherwise needed, or summon additional officers after the defendant has testified. Either way, the public bears the expense of bringing to court multiple officers for a pretrial hearing when such testimony is not essential. The Constitution does not require such a cumulative testimony rule.

2. THE MISSING WITNESS DOCTRINE DOES NOT SUPERSEDE A TRIAL JUDGE'S ASSESSMENT OF VOLUNTARINESS.

The Court of Appeals held that the holdings in Davis and Erho are akin to the "missing witness rule." Abdulle, No. 63742-8-1 (slip op., at 5) (citing State v. Haack, 88 Wn. App. 423, 433-34, 958 P.2d 1001 (1997)). This rationalization of Davis and Erho is an unwarranted extension of the non-constitutional missing witness rule, it misapplies the rule, and it diminishes the trial court's discretion to manage trials and evaluate witness credibility.

Under the missing witness doctrine, when a party fails to produce otherwise proper evidence which is within his or her control, the jury may draw an inference unfavorable to that party. State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994); State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (citing Davis, 73 Wn.2d at 276). The doctrine applies equally to both parties. Blair,

117 Wn.2d at 488. If requested and applicable⁸, a trial court errs when it does not give a "missing witness" jury instruction.⁹ Id.; Davis, 73 Wn.2d at 274-75.

The Davis Court applied the missing witness doctrine in the context of a jury instruction. Davis, 73 Wn.2d at 280-81. The Court held that given the facts of the defendant's confession, the trial court was required to give a jury instruction if the State did not call a missing officer at trial or explain his absence. Id. at 275-76, 280-81 (citing Wright v. Safeway Stores, Inc., 7 Wn.2d 341, 346, 109 P.2d 542, 544 (1941)). The Court noted that the "missing witness" instruction allowed the jury to consider but not presume, in light of all surrounding evidence, whether the missing testimony would have been unfavorable to the prosecution. Id. at 280.

Nearly all the discussion in Davis applies to this jury instruction. The Davis Court, however, at one part of the opinion

⁸ The rule applies only if the witness is peculiarly available to the opposing party, the testimony relates to an issue of fundamental importance (in contrast to a trivial or unimportant issue), and the circumstances establish that the party would not knowingly fail to call the witness in question unless the witness's testimony would be damaging. Blair, 117 Wn.2d at 488; Davis, 73 Wn.2d at 275-81.

⁹ WPIC 5.20 provides: 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.

conflates its discussions of whether the trial judge properly admitted the defendant's confession under Miranda, with whether the jury was properly instructed under the missing witness doctrine.¹⁰ Id. at 280-81. The Davis Court erred by concluding that the "heavy burden" of Miranda affects all aspects of the trial, including jury instructions and the State's burden of proving the truth of the officer's testimony. Id.; see State v. Collins, 74 Wn.2d 729, 735, 446 P.2d 325 (1968)(holding that Davis applies the missing witness rule to officer testimony). The idea that Miranda applies to testimony or witness credibility is erroneous. Davis clarified that the requirements of Miranda have no effect on the fact-finding process. See supra § D.1; Davis, 73 Wn.2d at 281.

10

Considering the heavy burden Miranda places on the prosecution to prove the validity of an alleged waiver, the close working affiliation between the prosecutor and the law enforcement agency of which the undersheriff is a member, the sharp conflict between the testimony of [the defendant] and the only officer actually testifying, and the fact that the undersheriff was the only other person present during the interrogation and therefore the only other source of relevant evidence—we conclude that, *in view of the state's burden under Miranda, [the defendant] established those circumstances necessary to give rise to the inference of the missing witness rule and that the trial court erred in failing to so instruct the jury.*

Davis, 73 Wn.2d at 280-81 (emphasis added).

After Lego, this Court has never again conflated the missing witness doctrine with any aspect of the Miranda legal analysis, or any other pretrial hearing analysis. This Court has consistently treated Miranda as a question of law for the trial judge, and applied the missing witness doctrine solely to issues of jury argument and instruction.¹¹

The missing witness doctrine is designed to inform jurors that they can draw unfavorable inferences from missing testimony. Juries often consider this instruction and yet can still be satisfied that the evidence presented passes constitutional muster. Trial judges, too, can draw adverse inferences from missing testimony, and yet resolve conflicting testimony, weigh witness credibility, and be satisfied (or not) under the appropriate burdens of proof. This is consistent with the wide deference this Court gives to trial judges in making factual assessments. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The Court of Appeals misapplied the missing witness rule by extending, without constitutional basis, the

¹¹ State v. Montgomery, 163 Wn.2d 577, 597-99, 183 P.3d 267 (2008); State v. Gregory, 158 Wn.2d 769, 845-46, 147 P.3d 1201 (2006); State v. Cheatham, 150 Wn.2d 626, 652-53, 81 P.3d 830 (2003); State v. Russell, 125 Wn.2d 24, 90-92, 882 P.2d 747 (1994); Blair, 117 Wn.2d at 485-88 (citing Davis, 73 Wn.2d at 276-80).

reach of Miranda into the fact-finding process. This Court should reject that extension.

3. THE COURT OF APPEALS ERRED BY REVERSING THE TRIAL COURT ON A CLAIM RAISED FOR THE FIRST TIME ON APPEAL.

A party may not raise a claim of error on appeal that was not raised at trial unless it involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. RAP 2.5(a). The rule reflects "a policy of encouraging the efficient use of judicial resources." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

Under RAP 2.5(a)(3), an issue may be raised for the first time on appeal if it is "a manifest error affecting a constitutional right." "Constitutional errors are treated specially because they often result in serious injustice to the accused." Scott, 110 Wn.2d at 686. But, "the exception actually is a narrow one, affording review only of certain constitutional questions." Id. at 682. The constitutional error exception is not meant to award a criminal defendant a new trial whenever he can identify a constitutional issue not litigated below. State v. Kirkpatrick, 160 Wn.2d 873, 879, 161 P.3d 990 (2007).

Under RAP 2.5(a)(3), this Court engages in a two-step process by asking: (1) does the alleged error suggest a constitutional issue, and if so, (2) is the error "manifest?" Kirkpatrick, 160 Wn.2d at 879-80. An alleged error is "manifest" only if the defendant can show it had "practical and identifiable consequences in the trial of the case." State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001). A purely formalistic error is insufficient. Kirkpatrick, 160 Wn.2d at 880.

By relying on the missing witness doctrine, Abdulle is in effect challenging the admissibility of his statement through an evidentiary rule, rather than raising a constitutional issue. As discussed above, Miranda has no effect on any factual determination by the trial court. See supra § D.1, D.2; Davis, 73 Wn.2d at 281. Since there is no constitutional challenge, Abdulle's claim is impermissible, per 2.5(a). Kirkpatrick, 160 Wn.2d at 880.

To the extent that this Court finds a constitutional challenge, it is not manifest. Abdulle never raised any aspect of this claim below. Abdulle never challenged, or even mentioned, the absence of another officer at the CrR 3.5 hearing. The trial court never had an opportunity to make factual findings about whether there even was another officer present at the police station, and to what extent

that officer overheard Abdulle's waiver in the car. Moreover, had Abdulle raised the issue, the State would have had an opportunity to explain the absence of the officer, or called the officer if necessary. Instead, this Court is left to only infer the facts based on Abdulle's failure to bring this claim below. Any error, if constitutional, is not manifest and was thus waived at trial.

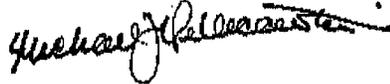
E. CONCLUSION

For the foregoing reasons, the State respectfully asks that this Court reverse the Court of Appeals and affirm Abdulle's convictions.

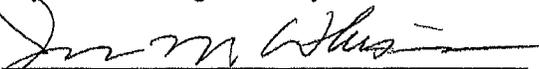
DATED this 31st day of January, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

MICHAEL J. PELLICCIOTTI, WSBA #35554
Deputy Prosecuting Attorney

By: 

JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner
Office WSBA #91002

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

11 JAN 31 PM 4:43

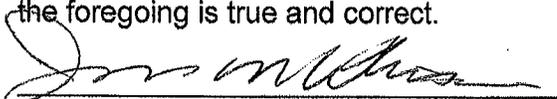
BY RONALD R. CARPENTER

Certificate of Service by Mail

CLERK

Today I sent by electronic mail directed to Jared Steed and Eric Broman, the attorneys for the respondent, at Nielsen, Broman & Koch, PLLC, 1908 E. Madison Street, Seattle, Washington 98122, containing a copy of the Supplemental Brief of Petitioner, in STATE V. YUSSUF ABDULLE, Cause No. 84660-0 in Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name James Whisman
Done in Seattle, Washington

1/31/11
Date 1/31/11

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL