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2017

No. 65822-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

ANDRE HAMLET, JR.,

Appellant.

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

The Honorable Regina S. Cahan

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Based upon information provided by a cooperating informant, a narcotics investigation involving Andre Hamlet was begun, which resulted in a charge of possession of methamphetamine with the intent to distribute. The State did not call the cooperating informant to testify at trial and Mr. Hamlet subsequently and unsuccessfully sought a missing witness instruction. Mr. Hamlet submits the trial court's denial of the missing witness instruction impermissibly infringed upon his right to present a defense, and as a result, he is entitled to reversal of his conviction and remand for a new trial.

B. ASSIGNMENT OF ERROR

Mr. Hamlet's Sixth Amendment and Fourteenth Amendment rights to present a defense were denied when the trial court refused to instruct the jury regarding a missing witness.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

As part of a defendant's constitutionally protected right to present a defense he is entitled to instructions embodying his theory of the case if the evidence supports that theory. The investigation of Mr. Hamlet arose out of a tip from a cooperating informant who was not called by the State to testify at trial. Mr. Hamlet unsuccessfully sought a missing witness instruction

because of the State's failure to call the cooperating informant. Is Mr. Hamlet entitled to reversal of his convictions where his right to present a defense was impermissibly infringed?

D. STATEMENT OF THE CASE

A cooperating informant provided Seattle Police Detective Peter Lazarou with Andre Hamlet's telephone number. RP 26, 31-32.¹ Lazarou sought \$40 of methamphetamine, which the person who answered the phone agreed to provide. RP 32-33. It was agreed that the transaction would occur at a retail location on 85th Street NW and Greenwood Avenue. RP 33. Approximately 15 minutes later, Lazarou received a telephone call changing the location of the transaction to 87th Street NW and Greenwood Avenue. RP 35. The caller stated that he was in a silver Volkswagen. RP 37.

When Lazarou and other officer arrived, they noted a silver Volkswagen in the parking lot. RP 40. Lazarou called the number and the person standing outside the Volkswagen picked up the telephone. RP 41-42. The officers moved in and arrested the person outside the Volkswagen, who was later identified as Andre

¹ "RP" refers to the single volume of transcript which contains all of the proceedings other than the sentencing hearing.

Hamlet. 43-45, 70. A small amount of methamphetamine was found on Mr. Hamlet. RP 77-79.

Mr. Hamlet was charged with possession of methamphetamine with the intent to deliver. CP 5. At trial, the State did not call the cooperating informant as a witness. As a result, Mr. Hamlet proposed the missing witness instruction, WPIC 5.20, be given to the jury. RP 109. The trial court refused. RP 112. Mr. Hamlet was subsequently convicted as charged. CP 11; RP 141.

E. ARGUMENT

THE TRIAL COURT IMPERMISSIBLY INFRINGED MR. HAMLET'S RIGHT TO PRESENT A DEFENSE WHEN IT REFUSED TO GIVE THE PROPOSED MISSING WITNESS INSTRUCTION

1. A defendant is entitled to have the jury instructed on his theory of the case. The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a defendant's right to a trial by jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993) (the Sixth Amendment protects the defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' ").

Similarly, the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

As part of the constitutionally protected right to present a defense, each side in a case is entitled to instructions embodying its theory of the case if the evidence supports that theory. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993). The proponent of a jury instruction is entitled to have the instruction given where it describes his theory of the case and is supported by sufficient evidence. *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1062 (1997). When considering whether a proposed jury instruction is supported by sufficient evidence, the trial court must take the evidence and all reasonable inferences in the light most favorable to the requesting party. *State v. Hanson*, 59 Wn.App. 651, 656-57, 800 P.2d 1124 (1990).

This Court reviews a trial court's refusal to give a requested jury instruction *de novo* where the refusal is based on a ruling of law. *State v. White*, 137 Wn.App. 227, 230, 152 P.3d 364 (2007), *citing State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

Where the court's refusal to give a requested instruction was based on factual reasons, it is reviewed for an abuse of discretion. *White*, 137 Wn.App. at 230, *citing Walker*, 136 Wn.2d at 771-72. A proposed instruction is appropriate if it properly states the law, is not misleading, and allows a party to argue a theory of the case that is supported by the evidence. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

Here, Mr. Hamlet proposed WPIC 5.20, the standard missing witness instruction, because of the State's failure to call a necessary witness, the cooperating informant. Mr. Hamlet's right to present a defense was infringed when the trial court refused to give the proposed instruction.

2. A defendant is entitled to a missing witness instruction where the evidence presented warrants it. Under the missing witness doctrine, a jury may draw an inference against a party who fails to produce a witness when that party has control of the witness and the witness is naturally in that party's interest to produce. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991), *quoting State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185 (1968). The missing witness inference applies in criminal cases where the State fails to call a logical witness. *See, e.g., Blair*, 117 Wn.2d at 487-88.

“A party's failure to produce a particular witness who would ordinarily . . . testify raises the inference in certain circumstances that the witness's testimony would have been unfavorable[]” to the party. *State v. McGhee*, 57 Wn.App. 457, 462-63, 788 P.2d 603, review denied, 115 Wn.2d 1013, 797 P.2d 513 (1990). Under the missing witness doctrine, where a party fails to produce otherwise proper evidence within his or her control, the jury may draw an inference that the evidence will have been unfavorable to that party. *State v. Russell*, 125 Wn.2d 24, 90, 882 P.2d 747 (1994). 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, quoting *Davis*, 73 Wn.2d at 277.

To obtain a missing witness instruction in a criminal case, the defendant is not required to prove that the State deliberately suppressed unfavorable evidence.² *Id.* at 463. Rather, the

² The missing witness instruction proposed by Mr. Hamlet states:

If a person who could have been a witness at trial is not called to testify, you may be able to infer that the person's testimony

defendant must establish circumstances indicating that the State would not knowingly fail to call the witness unless the witness's testimony would be damaging to the State. *Davis*, 73 Wn.2d at 280. "In other words, 'the inference is based, not on the bare fact that a particular person is not produced as a witness, but on his non-production when it would be natural for him to produce the witness if the facts known by him had been favorable.'" *Davis*, 73 Wn.2d at 280 (citations omitted).

In addition, a missing witness instruction is appropriate when the uncalled witness is "peculiarly available" to the State. *Davis*, 73 Wn.2d at 276. For a witness to be "peculiarly available" to the State, there must have been a community of interest between the State and the witness, or the State must have such a superior opportunity for knowledge of a witness that there was a reasonable

would have been unfavorable to a party in the case. You may draw this inference only if you find that:

- (1) The witness is within the control of, or peculiarly available to, that party;
- (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
- (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
- (4) There is no satisfactory explanation of why the party did not call the person as a witness; and
- (5) The inference is reasonable in light of all the circumstances.

WPIC 5.20.

probability that the witness would have been called to testify for the State except that the testimony would have been damaging. *Id.* at 277. Accordingly, a party seeking the benefit of the inference must show the missing witness was “peculiarly within the other party's power to produce.” *Id.*

Failure to give a warranted missing witness instruction is reversible error. *Id.* at 280-81.

3. The failure of the State to call the cooperating informant at trial warranted a missing witness instruction. As noted *supra*, Mr. Hamlet needed only to show that the State would not knowingly fail to call the cooperating informant as a witness, unless as a matter of reasonable probability, the cooperating informant's testimony would have been damaging to its case. *Davis*, 73 Wn.2d at 280. In refusing the instruction, the trial court was persuaded by the officer's claim that the cooperating informant was reliable. RP 113. But, this testimony by the officer must be balanced by the fact the investigation against Mr. Hamlet was instituted because of information from the cooperating informant. Thus, the reliability and veracity of the cooperating informant was critical to the jury's determination of Mr. Hamlet's guilt, and he did not have any opportunity to test either the credibility or reliability of the

cooperating informant. Despite the officer's untested claim of the cooperating informant's reliability, the fact the State failed to call the cooperating informant alone speaks volumes. Given the importance of the cooperating informant to the investigation of Mr. Hamlet, it seems impossible the State would not have called the cooperating informant absent the fact the State had concerns about the cooperating informant's testimony.

The court trial refused to give the missing witness instruction but told Mr. Hamlet he was free to argue the failure of the State to call the cooperating informant in his closing argument. RP 112. But this "remedy" was not sufficient to allow Mr. Hamlet to argue his theory of the case. Counsel's ability to argue the issue before the jury was meaningless given the courts subsequent instruction to the jury:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. *You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.*

CP 16 (emphasis added). Thus, the jury was instructed to disregard the exact argument the court proposed to Mr. Hamlet as a remedy for the court's failure to give the proposed instruction.

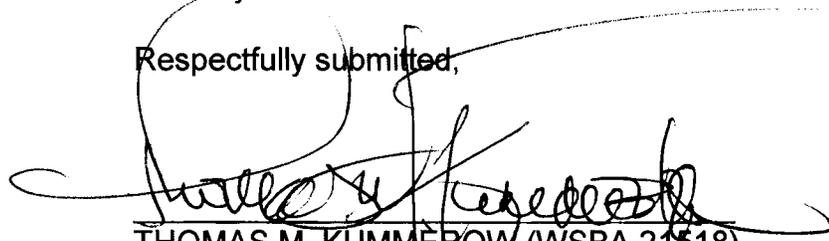
The court's failure to give the proposed missing witness instruction was reversible error. *Davis*, 73 Wn.2d at 280-81. As a consequence, Mr. Hamlet was denied his constitutionally protected right to present a defense because he was denied the ability to argue his theory of the case with support in the instructions. Mr. Hamlet submits this Court must reverse his conviction and remand for a new trial.

F. CONCLUSION

For the reasons stated, Mr. Hamlet requests this Court reverse his conviction and remand for a new trial.

DATED this 22nd day of December 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

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DIVISION ONE**

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Respondent,)	
)	NO. 65822-1-I
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ANDRE HAMLET, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF DECEMBER, 2010.

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