

65822-1

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NO. 65822-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDRE HAMLET, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION I
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A. ISSUES PRESENTED

Did the trial court properly deny defendant's motion for a missing witness instruction where the defendant never sought disclosure of the witness' identity or sought to call the witness at trial, the witness was not involved in the drug transaction for which the defendant was convicted, and there was no evidence that the missing witness' testimony would have been unfavorable to the State?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Andre Hamlet was charged via amended information at trial with Violating the Uniform Controlled Substances Act, Possession of Methamphetamine with Intent to Deliver, alleged to have occurred on January 29, 2010. CP 5.¹ At trial, the defense did not note any motions for suppression, and agreed to an order admitting the defendant's pre-arrest statements at trial. RP 10-13; CP 9-10. The defense did not make a motion for the State to disclose the identity of the confidential informant, who is the subject of the contested missing witness Instruction. RP 6, 15-16, 22-24. A jury

¹ RCW 69.50.401(1), (2)(b).

then found Hamlet guilty at trial and the court sentenced the defendant to a standard range sentence. CP 11, 35-43. Hamlet now appeals his conviction. CP 44-53.

2. SUBSTANTIVE FACTS

Officer Lazarou of the Seattle Police Department obtained Hamlet's name and phone number from a cooperating witness who identified Hamlet as a methamphetamine dealer.² RP 32, 48. Lazarou had worked with the cooperating witness prior to this incident for about one year, and the witness was 90 to 95 percent reliable in providing information, and had provided good information to Lazarou several times over the previous year. RP 48, 57. The cooperating witness was not provided any type of compensation in exchange for the information. RP 31, 48.

Lazarou called the phone number he was provided, and asked the person who answered the phone to buy a "40 bag." RP 32, 49. The person who answered the phone identified himself as "Dray" and indicated that he had some "good stuff." RP 32-33.

² The cooperating witness was never named in discovery or at trial, and is the same witness for which the defense at trial requested the missing witness jury instruction at issue here. See RP 1-24.

Officer Lazarou and the person who answered the phone (later identified as Andre Hamlet) then arranged to meet in approximately 18 to 22 minutes at a specific location to complete the transaction. RP 33, 34-35, 58. Officer Lazarou expected to obtain approximately one gram of methamphetamine for that price. RP 50. Approximately 15 minutes later, Lazarou received a phone call from the same person who he had called telling Lazarou to meet him at a different location. RP 35-36, 58. Approximately five minutes later, Lazarou received a third call from the same individual who he spoke to the previous two times, changing the meeting location to a Safeway parking lot, and telling Lazarou that the individual with the drugs would be in a silver Volkswagen. RP 36-37, 58.

Officer Lazarou then drove to the Safeway parking lot, where he saw a silver Volkswagen parked. RP 40. Lazarou saw an individual, later identified as Hamlet, exit the front passenger door. RP 41. Lazarou then placed a phone call to the same number that had been provided by the cooperating witness, and the person who was standing outside of the front passenger door of the silver Volkswagen answered a cell phone right as the call rang. RP 42, 58.

The Seattle Police Department's Anti-Crime Team then moved in and arrested Hamlet from the front passenger seat as well as three other passengers in the silver Volkswagen. RP 39-46, 70-71. As Hamlet stepped out of the car in response to the Anti-Crime Team Officers' commands, he had his hands clenched. RP 71. Officer Maxwell ordered Hamlet to drop what was in his hands, and Hamlet dropped two baggies containing methamphetamine. RP 71-73, 77, 97. The total weight of the baggies was 1.2 grams with packaging, and .6 grams without packaging. RP 50. Officer Maxwell also recovered the cellular phone that Hamlet used to speak to Officer Lazarou from the front passenger seat where Hamlet was sitting in the car. RP 39-46, 73, 78. Lazarou then took custody of the phone and the phone rang when Lazarou called the phone number that had been provided by the cooperating witness. RP 45.

C. ARGUMENT

1. STANDARD OF REVIEW

A trial court's decision regarding jury instructions is reviewed on appeal for an abuse of discretion. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336 (1998) (citing State v. Pesta, 87 Wn. App.

515, 524, 942 P.2d 1013 (1997)). An appellate court will find that a trial court abused its discretion only if “no reasonable judge could have reached the same conclusion.” State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (citing Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). The standard used to determine whether a reasonable judge could have reached the same conclusion is whether the decision in question was manifestly unreasonable or was exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A decision is manifestly unreasonable if it falls outside the range of acceptable choices, given the facts and the applicable legal standard; if the record does not support the factual findings; or if the court misapplies the law. See Marriage of Littlefield, 133 Wn.2d 39, 940 P.2d 136 (1997); State v. Olivera-Avila, 89 Wn. App. 313, 949 P.2d 824 (1997). This is a non-constitutional issue, and an appellant must show that the error was a fundamental defect that resulted in a complete miscarriage of justice. State v. Sherwood, 118 Wn. App. 267, 76 P.3d 269 (2003) (citing In re Personal Restraint of Rice, 118 Wn.2d 876 at 884, 828 P.2d 1086 (1992)). In this case, Judge Cahan’s denial of defendant’s motion for a missing witness instruction was not an

abuse of discretion or a fundamental defect resulting in the complete miscarriage of justice.

2. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISSING WITNESS INSTRUCTION WHERE THE DEFENDANT NEVER SOUGHT DISCLOSURE OF THE WITNESS' IDENTITY OR TO CALL THE WITNESS AT TRIAL. THE WITNESS WAS NOT INVOLVED IN THE DRUG TRANSACTION FOR WHICH THE DEFENDANT WAS CONVICTED, AND THERE WAS NO EVIDENCE THAT THE MISSING WITNESS' TESTIMONY WOULD HAVE BEEN UNFAVORABLE TO THE STATE.

The missing witness instruction informs the jury that it can infer from a witness' absence at trial that the witness' testimony would have been unfavorable to the party who logically would have called him. State v. Davis, 116 Wn. App. 81, 88, 64 P.2d 661 (2003).³ The trial court uses a three-part test to determine whether the instruction is appropriate. First, the witness must be "peculiarly available" to a party; second, the witness' testimony must relate to

³ The jury instruction is entitled "Failure to Produce Witness" and reads: "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. WPIC 5.20.

an issue of fundamental importance; and third, circumstances at trial must establish that, as a matter of reasonable probability, the party would not fail to call the witness unless his testimony would have been damaging or unfavorable. Id. However, no such inference is permitted if the witness' absence can be satisfactorily explained. Id. The first and third prongs of the test are raised by inferences drawn from the relationship or shared community of interest between the witness and the party that would have called him. See State v. Davis, 73 Wn.2d 271, 276-78, 438 P.2d 85 (1968); State v. Clinton, 25 Wn. App. 400, 404, 606 P.2d 1240 (1980). All three prongs must apply in order for the instruction to be given. WPIC 5.20 (Note on Use).

This court should affirm Hamlet's conviction because the three requirements for the missing witness instruction are not met. First, although the witness in question was essentially in control of the State since he/she was a cooperating witness, the defense could have made a motion for disclosure of the witness' identity, but never did. RP 6, 15-16, 22-24. Defense counsel at trial specifically stated that she would request the identity of the cooperating witness only if that witness' statements were elicited by the State during trial. RP 23.

Even if the court were to find that the first prong of the test was met, neither the second nor third prongs are met. As to the second prong of the test, the cooperating witness' potential testimony did not relate to an issue of fundamental importance. In order to prove that Hamlet committed the crime with which he was charged, the State was required to prove only that he possessed methamphetamine with the intent to deliver it, in King County, on a date certain. RCW 69.50.401(1), (2)(b); CP 25.

Evidence presented at trial included Officer Lazarou's testimony that he obtained Hamlet's telephone number from the cooperating witness, and that Lazarou himself then called the phone number and arranged to buy a 40 bag from the person who answered the phone. RP 32, 48, 49. Lazarou spoke to the same individual on three separate calls, arranging to meet for the transaction and discussed the fact that the drug dealer would be in a silver Volkswagen in a Safeway parking lot. RP 32-37, 58. Within one hour of the first three phone calls, Lazarou drove to the agreed upon meeting location, where he saw a man get out of the passenger seat of a silver Volkswagen, and answer a cell phone when Lazarou called the same phone number he had called the previous three times. RP 41-42. That same individual (later

identified as Hamlet) was holding two baggies of methamphetamine in his hand when the anti-crime team arrested him moments later. RP 71-73, 77. The cell phone that the dealer had used to communicate with Lazarou was found in the passenger seat of the car--the same seat in which Hamlet was seated. RP 45.

The appellant notes that Hamlet was unable to test the credibility or reliability of the cooperating informant, which were "critical to the jury's determination of Mr. Hamlet's guilt." Appellant's Brief at 8. However, even absent any testimony regarding the cooperating witness' provision of the telephone number, a plethora of evidence existed to support Hamlet's conviction. Hamlet arranged a drug deal directly with a police officer, and met with the officer to close the deal. The cooperating witness' testimony was not related in any way to an issue of fundamental importance.

Similarly, as to the third prong, there was no circumstance at trial that established as a matter of reasonable probability that the confidential informant's testimony would have been unfavorable or damaging to the State. On the contrary, Officer Lazarou testified that he had worked with the confidential informant for a year, over which period of time the informant was 90 to 95 percent reliable and had provided good information several times. RP 48, 57.

No inference that the witness' testimony would be damaging or unfavorable to the State is permitted if the witness' absence can be satisfactorily explained. State v. Montgomery, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). In Montgomery, the court held that the missing witness instruction was not properly given in relation to the defendant's 14 year old grandson as the boy's unavailability was adequately explained by the fact that trial was on a school day and the witness was in school. 163 Wn.2d at 599. In Davis, the victim did not appear at a defense interview and could not be located before trial. The prosecutor at trial explained to the trial court that the victim advised the victim advocate that Davis had threatened her with regard to her children if she testified, and that the State did not know where the victim was living because the victim and her children were involved in a house fire two weeks before. The Davis court held that this was a fully adequate explanation. Id. at 89.

Similarly, in this case, the State had compelling reasons to withhold the identity of the cooperating witness. The cooperating witness was working reliably and directly with the police for one year, and the State had an interest in preserving his/her identity in order to facilitate further use of that particular individual in his/her

work with law enforcement and to ensure the witness' safety in any future work with law enforcement. RP 48-49, 111.

D. CONCLUSION

The trial court correctly ruled that Hamlet was not entitled to a missing witness instruction. This court should therefore affirm the conviction.

DATED this 18th day of March, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ANDRE HAMLET, JR., Cause No. 65822-1-I, in the Court of Appeals, Division I, 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.

April W.
Name

Done in Seattle, Washington

3/18/11
Date