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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT G. ISABEL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A mistrial is warranted when a witness' remark, viewed against the backdrop of all the evidence, is so prejudicial that it prevents the defendant from having a fair trial. Here, when defense counsel asked for a witness' address the victim declined to provide it explaining that Isabel's family had been threatening the victim's family and friends. The remark was not attributed to Isabel, and the evidence against Isabel was so overwhelming that the jury's verdict without the comment would have been the same. Did the trial court correctly deny Isabel's motion for a mistrial?

2. A criminal defendant is entitled to a missing witness instruction when: 1) the missing witness is peculiarly available to the State; 2) the witness' testimony is important and not cumulative; or 3) the circumstances establish, as a matter of reasonable probability, that the State knowingly failed to call the witness to avoid unfavorable testimony. Here, the State was unable to locate a former police officer, and all of the evidence he would have provided was elicited through the cross-examination of the victim and the testimony of the lead detective. Did the trial court correctly deny a missing witness instruction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Robert G. Isabel, with one count of drive-by shooting, and one count of first degree unlawful possession of a firearm. CP 1-7. A jury trial was held in January of 2013 before the Honorable Mariane Spearman. At the conclusion of the trial, the jury convicted Isabel of both counts. CP 54-55. The trial court imposed a standard range sentence. CP 150-58. Isabel now appeals.

2. SUBSTANTIVE FACTS

Sometime in 2008, Marion Tucker began a dating relationship with Letina Bacani. 3RP 51-53.¹ The two lived together for about a year until Bacani ended their relationship after reconciling with her ex-boyfriend, Isabel. 3RP 58, 67. The break-up was simultaneous to the birth of Bacani's daughter, who was born on June 10, 2009. 3RP 52-53. Bacani, who was living at Tucker's residence, left for the hospital to give birth and never

¹ The Verbatim Report of this Jury Trial consists of six volumes referred to in this brief as: 1RP (January 7, 2013), 2RP (January 8, 2013), 3RP (January 10, 2013), 4RP (January 14, 2013), 5RP (January 15, 2013), 6RP (January 16, 2013) and the sentencing hearing 7RP (May 31, 2013).

came back. 3RP 52-53. Even though paternity was never legally established, and Isabel claimed he was the child's father, Tucker paid child support.² 3RP 53-54, 57, 60. Despite the lack of a romantic relationship with Bacani, she would call Tucker to arrange for him to see the child, but sometimes Tucker would take the initiative. 3RP 54, 68. Tucker would typically meet Bacani at her residence on Sundays to give her the child support money, and see the baby. 3RP 54.

One day in the summer of 2011, Tucker called Bacani to arrange a visit, but was unsuccessful in making the arrangements because Isabel got on the phone and argued with Tucker about who was the child's father. 3RP 58-59, 63-64. Tucker simply stated that all he wanted to do was see the baby, to which Isabel responded, "you're going to make me mad, stop calling." 3RP 63. Tucker had never met Isabel, and after Isabel's belligerent attitude, Tucker decided to look for Isabel on Bacani's Facebook page to determine what Isabel looked like.³ 3RP 62, 69.

² It is not clear if Tucker continued to pay child support after the shooting. However, as of January 2, 2012, Tucker was making payments regularly. 3RP 54, 56.

³ Tucker identified Isabel in court and noted that his hair was a little different from the Facebook photo. 3RP 70. Tucker also picked Isabel from a six-person photomontage that had been prepared by Detective Hughey. 4RP 134.

The second time Tucker had any type of conversation with Isabel, was on December 29, 2011, just a few days before Isabel shot at Tucker's vehicle. 3RP 60, 62, 71. Similar to the first interaction, Tucker called Bacani to arrange for a meeting so that he could give her the child support money and Christmas presents. 3RP 60, 62, 71. Isabel jumped on the phone claiming again that the child was not Tucker's daughter, followed by, "stop calling" and "you better watch your back." 3RP 60, 71, 114. Tucker hung up the phone but did not take the threats to heart. 3RP 60, 62.

A few days after the second phone call, on January 3, 2012, at approximately 2:00 a.m., Tucker was driving his Mercedes to his house, which was the same residence he once shared with Bacani. 3RP 72, 74-75. As he was driving, his cousin Willie Watson called and invited him to his place. 3RP 80; 4RP 29-31, 34. As Tucker passed his own house he saw a "green Suburban"⁴ with a missing headlight, behind him revving its engine. 3RP 80, 82. He didn't think much of it and continued to Watson's residence. 3RP 80. The Suburban continued to follow Tucker for some distance. 3RP 80. Tucker then accelerated to get away from the Suburban

⁴ The vehicle was a 1996 Turquoise Chevrolet Suburban, with license plate 180 WQJ, which officers had stopped on three different occasions with Isabel in it either as a driver or as a passenger. 4RP 172.

and as he turned from East Jefferson Street onto 23rd Avenue, he heard the sound of the shots, “pop, pop, pop, pop.” 3RP 81, 86. Tucker looked in the Suburban’s direction, and with no other traffic in the area, he saw Isabel through the Suburban’s rolled down passenger window. 3RP 81, 83, 86-87, 129.

Tucker recognized Isabel, who was directly under a street light, from the Facebook photo with 100% certainty. 3RP 81, 87, 122. The bullet left a hole in the passenger side of the Mercedes, leaving a bullet strike at the door seam, pretty close to where a person would sit in the vehicle. 4RP 142-43.

As Isabel fired the shots, Tucker was still talking on the phone to Watson. 3RP 89-90; 4RP 33. Tucker dropped the phone momentarily, and then picked it up telling Watson he had just been shot. 3RP 89-90; 4RP 33. Tucker continued driving towards Watson’s house. 3RP 88-89. As soon as Tucker arrived at the house, he told Watson, “this nigger, Robert, just shot me.” 4RP 33. They called 911. 3RP 92, 133.

Former SPD Officer Connors was the first officer to respond to the scene and talk with Tucker. 3RP 92, 133; 4RP 125; 5RP 29, 48. Tucker told the officer that “Robert” was the person who had shot him but did not provide the shooter’s last name at that time.

3RP 93. Connors jotted some notes down but never took an actual statement from Tucker. 3RP 134. Connors then wrote a police report, which was reviewed by the lead detective in the case, Detective Hughey. 4RP 124-25.

On January 6, 2012, after Detective Hughey had reviewed Connors' report, he contacted Tucker. 4RP 125. At that time Tucker told Detective Hughey that Robert Isabel had shot him and provided a statement. 4RP 125. Detective Hughey noticed some discrepancies between Tucker's statement and Connors' report, and pointed this out to Tucker. 4RP 126. Although "it wasn't a huge discrepancy" to Detective Hughey, it was enough for him to wonder why it was different. 4RP 126. The discrepancies involved the number of people in Isabel's car and the exact location of the shooting. 5RP 28. Tucker told Detective Hughey that Connors' report was mistaken and that he must have misinterpreted the information provided.⁵ 3RP 91-95; 4RP 126.

After speaking with Tucker, Detective Hughey went to the crime scene and located two shell casings. 4RP 149, 151, 155-56. The location where the shell casings were recovered was

⁵ The details of the discrepancies between Connors' report and Tucker's statement is discussed more fully in section C.2 of this brief, infra.

consistent with Tucker's statement that the shooting had taken place on East Jefferson Street. 4RP 151. At this point, Detective Hughey considered Isabel a suspect but wanted to look for further evidence. 4RP 170. In doing so, Detective Hughey realized that Providence Market, located at 1625 East Jefferson Street, six blocks from where the incident took place, had cameras facing directly towards East Jefferson and along the path Tucker had described driving. 4RP 165, 185-88. The video from the surveillance cameras showed Isabel's Suburban following Tucker's Mercedes, with no other traffic in the area, just moments before 2:44 a.m. on January 3, 2012.⁶ 4RP 189-90; 5RP 17.

Isabel's distinct turquoise Suburban was well-known to the police in the area. Detective Hughey knew Isabel, and dealt with him on December 14, 2011, during a traffic stop, during which Isabel was driving the same Suburban, and said he had purchased it just a few days earlier but hadn't transferred the title yet. 4RP 120-22. Officer Blaise also contacted Isabel in that same Suburban on December 28, 2011. 4RP 70-71. At the time, Isabel was a

⁶ The date and time on the surveillance video was erroneous. Detective Engstrom testified as to his calculations to determine the correct date and time based on the live feed monitor and his experience with surveillance equipment. 4RP 101-02.

passenger. 4RP 71. On January 21, 2012, Officer Blackburn contacted Isabel during a traffic stop, and he was driving the same Suburban. 4RP 74. On January 25, 2012, Officer Floyd arrested Isabel on the sidewalk standing next to his Suburban. 4RP 81.

Detective Hughey obtained two search warrants as part of his investigation, one for the Suburban and one for Isabel's phone records. Prior to searching the Suburban, Detective Hughey took photographs of the car and noticed that the passenger headlamp was out, consistent with the reports to the 911 operator the day of the incident. 4RP 176-77, 179. The search of the Suburban produced two auto receipts signed "Rob Isi." 4RP 173-75. At the time of Isabel's arrest, officers seized his cellular phone and Detective Hughey obtained a search warrant for the phone records. 4RP 81 (Officer Floyd); 5RP 10-11 (Detective Hughey). The records revealed that there was an outgoing call at 1:43 a.m. to Bacani, and an incoming call at 2:52 a.m. 5RP 18-20. Triangulation of the calls indicated the two calls were within less than a mile from where the shooting took place. 5RP 24-26.

During Tucker's cross-examination, when discussing the location of the events, defense counsel asked Tucker where his cousin, Watson, lived. 3RP 123. Tucker replied he wouldn't

provide that information because Isabel's family had been threatening his friends, his family, and his kids. 3RP 123. The defense never asked the trial court to strike the answer or for a curative instruction, but instead, moved for a mistrial. 3RP 136-37; 4RP 2-10. The trial court denied the motion for a mistrial finding that because Tucker's statement was not attributed to Isabel, but rather to his family, it was not inherently prejudicial. 4RP 10.

At the commencement of trial, Isabel's counsel advised the court that former SPD Officer Connors had not been available for an interview, and that the State had not made any attempts to locate him or provide a forwarding address. 2RP 64-65. The State took issue with counsel's misrepresentations that the State had not made any attempts to locate Connors, and informed the trial court that it had tried numerous times to find him without success. 2RP 67. The prosecutor indicated that, "SPD doesn't even know where Officer Connors is at this time." 2RP 67. The prosecutor further indicated that Connors was under subpoena. 2RP 68. The trial court inquired as to the last known address for Connors and commented that although the State does not have the obligation to hunt down defense witnesses, they should at least have the last known address. 2RP 68-69. The prosecutor indicated he would

continue to contact SPD in order to obtain that information.

2RP 69.

Complying with the trial court's request, on January 10, 2013, the prosecutor indicated he had sent an electronic mail to the precinct lieutenant inquiring as to Connors' last known address, with no response. 3RP 5. As of January 15, 2013, the State had not heard back from the lieutenant. 5RP 5. Given SPD's lack of response, the judge stated that she would sign an order compelling SPD to provide Connors' last known address. 5RP 6. Defense counsel never presented an order for the court to sign.⁷ 5RP 78.

At the conclusion of trial, Isabel requested a missing witness instruction. The trial court denied the request finding that: Connors was not available to the prosecutor, that Connors would have not provided any substantive evidence, and that the State had provided a satisfactory explanation as to why Connors was not called to testify. 5RP 78-79.

⁷ Neither the court file nor the verbatim report of proceedings shows that such an order was signed.

C. ARGUMENT

Isabel makes two arguments on appeal. First, he argues that the trial court erred in failing to grant a mistrial after Tucker explained he was reluctant to give his cousin's address on the record as a result of threats that Isabel's family had made to Tucker's friends and family. This argument should be rejected because the remark was not attributed to Isabel and the statement, viewed against the backdrop of all the evidence, was not so prejudicial that it prevented Isabel from having a fair trial.

Second, Isabel contends that the trial court erred in refusing to give a missing witness instruction. This argument should also be rejected because the missing witness was not peculiar to the State, the substance of his testimony was elicited through Detective Hughey, and the prosecutor explained that the reason for not calling the witness to the stand was his inability to locate him. Therefore, Isabel's convictions should be affirmed.

1. TUCKER'S STATEMENT THAT ISABEL'S FAMILY HAD MADE THREATS WAS NOT SO PREJUDICIAL AS TO WARRANT A MISTRIAL.

Isabel argues that Tucker's response to a question during cross-examination was so prejudicial that it denied him his right to a

fair trial. Defense counsel asked Tucker where Watson's house was located. Tucker responded, "Well, I can't tell you that, actually tell you where he lives at. Mr. Isabel's family has been threatening my friends and my family and my kids. So I can't tell you that."

3RP 123. This remark was not about Isabel or his conduct.

Rather, the remark was about his family's behavior. Thus, the statements did not prejudice Isabel and his argument should be rejected.

The appellate court reviews the decision to grant or not to grant a mistrial under an abuse of discretion standard. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190, 192 (1987). As a general rule, the trial courts have wide discretionary powers in conducting a trial and dealing with irregularities which arise. State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). To determine whether a trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). A mistrial should be granted only when "nothing the trial court could have said or done would have remedied the harm done to the defendant." Gilcrist, 91 Wn.2d at 612. In other words, a mistrial should be granted only when the defendant has been so prejudiced that

nothing short of a new trial can insure that the defendant will be tried fairly. Only those errors, which may have affected the outcome of the trial, are prejudicial. Id.

In deciding if a witness statement or remark prejudiced the jury, courts examine whether the remark, "viewed against the backdrop of all the evidence," was so prejudicial that it denied the defendant his right to a fair trial. Escalona, 49 Wn. App. at 254. The trial judge is best suited to determine the prejudice of a statement. Id. at 254-55. In making such determinations, courts consider the seriousness of the claimed trial irregularity, whether it was cumulative of other properly admitted evidence, and whether it could be cured by an instruction to disregard. Escalona, 49 Wn. App. at 254.

In Escalona, the defendant was charged with assault in the second degree while armed with a deadly weapon. 49 Wn. App. at 252. Before trial, the court granted a motion in limine to exclude any testimony regarding the defendant's prior conviction for the same crime. Id. At trial, the victim testified that he was nervous when the defendant threatened him with a knife because the defendant had a record and had stabbed someone before. Id. at 253. This Court concluded that the combination of the serious

irregularity, coupled with the weakness of the State's case and the relevance of the victim's statement, prejudiced the defendant. Id. at 256.

This case is distinguishable from Escalona for three reasons. First, Tucker's statement was not in violation of a motion in limine, 4RP 7, 10; second, the comment did not relate to Isabel's propensity to commit a crime, nor propensity to commit the crime for which he was on trial; and third, there was ample evidence from which the jury could convict Isabel. In Escalona, the Court noted that the improper testimony was "particularly serious considering the paucity of credible evidence against [the defendant]." 49 Wn. App. at 255.

By contrast, in State v. Hopson, 113 Wn.2d 273, 778 P.2d 1014 (1989), the court affirmed the denial of a mistrial because "the jury had overwhelming evidence favoring conviction." Id. at 286. Similar to Hopson, there was overwhelming evidence presented here to support Isabel's convictions. The surveillance video from Providence Market showed a Suburban known to be associated with Isabel following Tucker's Mercedes moments before the shooting; the evidence of Isabel's cellular phone through triangulation placed Isabel within less than a mile from the area,

shortly before and shortly after Tucker was shot; only a few days before the shooting Isabel was angry with Tucker's involvement with Bacani and told Tucker "you better watch your back"; two shell casings were located at the location where Tucker said he had been shot; Tucker first noticed the Suburban following him by his residence, an address which was known to Bacani; and Tucker identified Isabel as the shooter. Even though Tucker was the only eyewitness to the shooting, unlike in Escalona, the evidence substantially corroborated his testimony. Thus, the strength of the evidence against Isabel mitigates the seriousness of Tucker's testimony. Moreover, as the trial court properly noted, "The statement is not attributed necessarily to Mr. Isabel. It's attributed to Mr. Isabel's family. And presumably, Mr. Isabel doesn't have 100 percent control of his family members." 4RP 10.

Isabel puts great weight in the trial court's failure to give a curative instruction. He argues the trial court "inexplicably refused *sua sponte* to admonish the jury to ignore his inflammatory comments." App. Br. 7. This argument misstates the record and obfuscates his failure to timely seek redress for Tucker's remark.

On Thursday, January 10, 2014, after Tucker responded during cross-examination that he could not give Watson's address

because of the threats made by Isabel's family, counsel objected to the answer as "nonresponsive." 3RP 123. The trial court instructed counsel to "ask another question" and counsel asked if Watson lived in the general area of 23rd and Jefferson, specifically, if he lived "one block of 23rd and Jefferson." 3RP 123. Tucker replied again "I don't want to put this guy in danger." 3RP 123. Counsel objected again and the court said, "you don't have to give an address." 3RP 123. Tucker replied that by giving a distance, a person could pinpoint to Watson's house, to which defense counsel said: "Your Honor, I don't believe that Mr. Watson is going to be in any danger."⁸ 3RP 123-24.

Defense counsel never moved to strike Tucker's answers from the record. Cross-examination continued and at the end of the day Isabel's attorneys moved for a mistrial. 3RP 136-37. During argument for a mistrial there was a disagreement as to whether the remark was made during direct examination or cross-examination. The trial court ordered a transcript of the

⁸ Tucker's concerns were valid. Isabel's brother, who was in the courtroom during the trial, and another individual, were involved in an altercation with Watson and Tucker at the conclusion of Tucker's testimony. This fight took place in the courthouse, just outside the courtroom as Watson waited to be called to the witness stand. Detective Hughey and the prosecutor were assaulted as they intervened in an attempt to stop the altercation. Detective Hughey was slightly injured. 4RP 23-24.

relevant portion, and reserved ruling until Monday after the parties had an opportunity to review the record. 3RP 137.

On Monday, January 14, 2014, the parties addressed the motion for a mistrial. 4RP 3. In reviewing the transcript to determine whether a mistrial was necessary, the court stated:

And during the course of the witness answering the question of how far to Mr. Watson's house, the witness blur[t]s out, Mr. Isabel's family has been threatening my friends, my family and my kids. Then there's an objection... and her objection is nonresponsive, which it was.

But there was no concurrent request to strike the answer or for me to perhaps tell the jury to disregard the statement, nothing. So at this point, if someone had requested that, I could have corrected it at the time it occurred. But there wasn't any motion to do that.

4RP 9-10 (italics added).

After the court denied the defense motion for a mistrial, the trial court said, "At this point, I don't think it would be in the defendant's best interest to admonish the jury about it and bring it [the comment] up again." 4RP 10. If the attorneys disagreed with the trial court's position of not bringing up an isolated comment that had been made four days prior, they could have at that point requested a curative instruction but they did not do so. Thus, the record shows that the trial court did not "inexplicably refuse" to

admonish the jury. Rather, the trial court reasonably believed that telling the jury to disregard something it heard four days earlier would draw more attention that it was worth. Isabel's attorneys agreed, as they said nothing.

In sum, Tucker's remark, although regrettable, was insignificant because it was not attributed to Isabel's behavior or prior bad acts, but rather to his family. Viewed against the backdrop of all the evidence, it was not so prejudicial that it denied Isabel a fair trial. The jury was not admonished to disregard the comment four days after it was made for sound reasons recognized by the trial court and defense counsel. This Court should hold that the trial court did not err in denying the defense motion for a mistrial, and that the trial court was not required *sua sponte* to give a curative instruction.

2. ISABEL WAS NOT ENTITLED TO A MISSING WITNESS INSTRUCTION BECAUSE NO PARTY HAD ACCESS TO A FORMER POLICE WITNESS.

Isabel assigns error to the trial court's refusal to give a missing witness instruction. His argument should be rejected because he was not entitled to such an instruction given that:
1) nobody had access or was able to locate Connors; 2) the

testimony that Connors would have provided was elicited through the testimony of Detective Hughey; and 3) the State gave an explanation for its failure to call Connors as a witness.

A trial court's denial of a defendant's request for a jury instruction is reviewed for abuse of discretion. State v. David, 118 Wn. App. 61, 67, 74 P.3d 686 (2003), rev. on other grounds on recons., 130 Wn. App. 232, 122 P.3d 764 (2005). When a party fails, without explanation, to call a witness it would naturally call if the witness' testimony would be favorable, the "missing witness" doctrine permits an inference that the uncalled witness' testimony would have been unfavorable. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). The doctrine, however, does not require the instruction when (1) the witness is not peculiarly available to the party failing to call the witness; (2) the witness' testimony is unimportant or cumulative; or (3) the circumstances do not establish, as a matter of reasonable probability, that the party would not knowingly fail to call the witness in question unless the witness' testimony would be damaging. Id. at 488-90. Whether a witness is peculiarly available to a party depends upon the nature of the relationship between the witness and that party.

State v. Reed, 168 Wn. App. 553, 572, 278 P.3d 203, rev. denied, 290 P.3d 995 (2012).

First, former SPD Officer Connors was not peculiarly available to the State because he was no longer employed with the police department and his whereabouts were unknown. Isabel relies on State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968) overruled on different grounds by State v. Abdulle, 174 Wn.2d 411 (2012). In Davis, the defendant requested a missing witness instruction due to the State's failure to call a law enforcement officer to testify at trial. The court found that the officer was "peculiarly available" to the prosecution because the uncalled witness was on the same force as another testifying officer. Id. at 277-78. Connors' former employment does not automatically render him "peculiarly available" to the State. It is very apparent from the record that neither the State, or the defense, or even the lead detective knew how to contact him. Thus, Connors was not peculiarly available to the State.

Second, the jury heard Tucker's contradictory statements contained in Connors' report. The following exchange took place during Detective Hughey's cross-examination:

Q: There was also a discrepancy as to the exact location of the shooting.

A: I'm not sure about the location not being the same.

Q: Let me get a little bit more specific here. That his driving lane was different on 23rd; that he was on the inside lane, and the Suburban was on the outside lane closest to the sidewalk.

A: Yes according to the report, that is how it was written.

Q: And according to that report, he was able to observe Mr. Isabel through the rear driver side window; is that correct?"

A: I believe that's how the report was written.

Q: You spoke to Mr. Tucker, and he gave you a different story of where his car was in relation to where the Suburban was?

A: In relation to Officer Connors' report, yes.

Q: In his story to you, there was only one person in that Suburban?

A: Correct.

Q: But originally there were two individuals in the Suburban, in Officer Connors' synopsis?

A: In Officer Connors' synopsis, yes, that is how it was written.

Q: So Mr. Tucker's story to you, then, was only he was on 23rd and the Suburban was on East Jefferson?

A: Correct.

Q: And then he stated he heard shots, he said he had followed the Suburban going northbound on 23rd?

A: I actually wrote that in my report. And upon reviewing our transcript, I misinterpreted what Mr. Tucker told me, from the interview I took with Mr. Tucker. So that is an error I made in what you are referring to.

Q: And you recovered two shell casings?

A: Correct.

Q: That where in the area that Mr. Tucker directed you to during your investigation?

A: He didn't necessarily direct me. But based on his story and what I know about how weapons work, I believe I should be looking in this location.

Q: Based on what Officer Connors' report states, looking at South Jefferson Street, you would've not been looking in that area as much as you would have been looking at the actual 23rd Avenue?

A: Yes.

5RP 28-30. Isabel was able to present to the jury through Detective Hughey the same impeaching evidence he would have elicited from Connors. The "missing witness" would have not provided any new evidence favorable to the defense or damaging to the State. As the trial court correctly pointed out, the only thing Connors could do, would be to impeach Tucker, which the defense had already done in front of the jury. 5RP 78.

Lastly, Isabel cites State v. McGhee, 57 Wn. App. 457, 462-63, 788 P.2d 603, rev. denied, 115 Wn.2d 1013 (1990), for the rule of law which states that a party's failure to produce a witness who would naturally testify raises the inference the witness' testimony would have been unfavorable. However, Isabel does not make a showing that the State knowingly failed to call Connors because his testimony would be damaging. The record is clear in that the State did not call Connors because the prosecutor could not locate him. More importantly, as already noted, the potential

unfavorable testimony from Connors was elicited during the testimony of Detective Hughey and Tucker. During cross-examination of Tucker, defense questioned him at length about his statements to Connors, which differed from his statements to Detective Hughey, his testimony at trial, and his statements during the defense interview. 4RP 13-16.

Isabel further contends that the trial court improperly infringed on his right to present a defense when it refused to give a missing witness instruction. This argument is meritless because Isabel was able to present and argue his defense: that Tucker had a motive to frame Isabel as a result of a custody battle. 6RP 33-34. This theory was bolstered during closing arguments by highlighting evidence of the conflicting statements Tucker had given to Connors, and emphasizing the impeachment evidence with the remark: "it is really convenient to simply claim that Connors' report was wrong." 6RP 34-35, 38.

In sum, Isabel was not entitled to a missing witness instruction. If a witness' absence can be explained a missing witness inference is not permitted. Blair, 117 Wn.2d at 489. Connors was not called to testify because he was no longer with the Seattle Police Department and the prosecutor was unable to

locate him. Furthermore, the jury heard all of the impeaching evidence that Connors would have provided through the cross-examination of Tucker and Detective Hughey. Therefore, this Court should hold that the trial court correctly denied Isabel's request for a missing witness instruction.

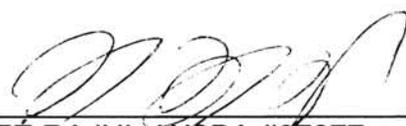
D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Isabel's convictions of drive-by shooting and first degree unlawful possession of a firearm.

DATED this 10th day of March, 2014.

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 M. 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. ROBERT G. ISABEL, Cause No. 70462-1 -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.

Dated this 10 day of March, 2014



Bora Ly
Done in Seattle, Washington