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STATE OF WASHINGTON

No. 37538-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

PARRISH GALE,

Appellant.

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

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

The Honorable Beverly Grant

APPELLANT'S REPLY BRIEF

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A. STATEMENT OF THE CASE

Appellate counsel assigned error to Jury Instruction 15, CP 52, but neglected to set forth the instruction in the Brief of Appellant or attach the instruction as an appendix. Jury Instruction 15 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 an inference is warranted under all the circumstances of the case.

CP 52.

B. ARGUMENT IN REPLY

MR. GALE'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS DENIED BY THE IMPROPER MISSING WITNESS INSTRUCTION AND THE PROSECUTOR'S CLOSING ARGUMENT

Parrish Gale argues this Court should reverse his conviction for possession of a stolen motor vehicle because the trial court incorrectly gave a missing witness instruction. The instruction told the jury it could infer Brandon Starks's testimony would have incriminated Mr. Gale from Mr. Gale's failure to call Mr. Starks as a witness and permitted the prosecutor to make a similar argument in closing. CP 52; Brief of Appellant at 7-17.

The Washington Supreme Court has set forth the requirements that must be met before a party may take advantage of a missing witness instruction. State v. Montgomery, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008); State v. Blair, 117 Wn.2d 479, 489-91, 816 P.2d 718 (1991). The three requirements are: (1) the witness must be peculiarly available to the party against whom the inference is to be drawn, (2) the testimony must be important and not cumulative, and (3) there must not be an explanation for the witness's absence, such as a testimonial privilege or incompetence. Montgomery, 163 Wn.2d at 598-99; Blair, 117 Wn.2d at 489-91. In addition, courts must exercise special caution in giving a missing witness instruction in a criminal case so that the instruction cannot be used to shift the burden of proof to the defendant or infringe upon his right to remain silent. Montgomery, 163 Wn.2d at 599; Blair, 117 Wn.2d at 491.

The State argues the trial court properly applied the above requirements in this case, focusing on the court's conclusion that the first requirement was met because the missing witness was particularly available to Mr. Gale. Brief of Respondent at 11-16. The State asserts Mr. Starks was particularly available to Mr. Gale because the two were friends and had spent time together in the

past. Brief of Respondent at 7, 12-15. The State's argument tells only part of the story.

In fact, Mr. Starks was in jail, and Mr. Gale could not speak to him. More importantly, Mr. Gale's attorney could not ethically contact Mr. Starks because Mr. Starks's attorney refused to let defense counsel interview her client. 3RP 199-200, 202-04; RPC 1.9(c). Mr. Starks's attorney had briefly represented Mr. Gale in this case and was therefore familiar with the facts; she had, in fact withdrawn from the case when Mr. Gale told her that he received the car from Mr. Starks. CP 13; 3RP 197-98. She believed Mr. Gale's attorney intended to make Mr. Starks "incriminate himself," and she "wasn't going to let that happen." 3RP 199. Thus, while the State is correct that Mr. Starks was not available to the State because the prosecutor had not heard of him until trial had commenced, Mr. Starks was similarly not available to the defense.

If there is a logical reason why a party cannot produce the missing witness, the inference supporting the missing witness instruction fails. State v. Russell, 125 Wn.2d 24, 90, 882 P.2d 747 (1994) (inference may only be drawn when failure to call witness is "unexplained."), cert. denied, 514 U.S. 1129 (1995); Blair, 117

Wn.2d at 489 (doctrine does not apply when witness's absence is "satisfactorily explained"). As the Supreme Court has explained,

The inference that witnesses available to a party and not called would have testified adversely to such party arises only where, under all the circumstances of the case, such unexplained failure to call the witnesses creates a suspicion that there has been a willful attempt to withhold competent evidence.

State v. Davis, 73 Wn.2d 271, 279, 438 P.2d 185 (1968) (citing Wright v. Safeway Stores, Inc., 7 Wn.2d 341, 109 P.2d 542 (1941)).

No such willful attempt can be seen in this case.

Mr. Gale's attorney did not call Mr. Starks as a witness because (1) he had been prohibited by Mr. Starks' attorney from talking to Mr. Starks, and (2) he deduced from the lawyer's refusal that Mr. Starks would incriminate himself if he spoke freely about the event. 3RP 199, 202, 203. In such a case, the failure to call Mr. Starks was based upon defense counsel's logical assumption that the witness would assert the Fifth Amendment. The State's argument that Mr. Gale's failure to call Mr. Starks as a witness "indicates the defendant knew that Starks would not corroborate defendant's testimony, or perhaps even implicate defendant to a greater degree" thus flies in the face of the facts actually before the trial court. Brief of Respondent at 15

It is the failure of the trial court to look at these facts in determining to give the jury a missing witness instruction that is critical. The missing witness doctrine is based upon that theory that a party would not fail to call a witness who is available to the party and would logically provide testimony that supports the party's position. Blair, 117 Wn.2d at 485-86. The inference that the missing witness's testimony would have been favorable thus "only arises where the witness is peculiarly available to the party, i.e., peculiarly within the party's power to produce." State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The party's relationship to the witness is a factor in deciding if the witness is particularly available to the party, but that does not mean physical presence and accessibility are to be ignored, as the State does here.

The State relies heavily upon the facts underlying Blair, supra, to support its argument. Brief of Respondent at 13-14. In that case, the defendant called only one of several people listed on a "crib sheet" found in his apartment; the State utilized the "crib sheet" to argue the defendant was a drug dealer. Blair, 117 Wn.2d at 482. The State was permitted to argue the jury could infer the defendant's failure to call others on the list meant the witnesses would not be favorable to the defense. Id. at 483-85. In that case,

however, the defendant testified that he could have located other people on the list to testify on his behalf. Id. at 490. In Mr. Gale's case, defense counsel made it clear to the trial court that he was unable to talk to the missing witness and thus did not call him as a witness, rendering the inference inapplicable.

Given Mr. Starks's attorneys refusal to let him interview Mr. Starks, Mr. Gale's attorney logically assumed Mr. Starks would assert his Fifth Amendment privilege if called to testify. In addition, it is a commonly-held rule of trial practice never to call a witness to testify if the attorney does not know the witness will say. See Robert E. Oliphant, ed., Trial Techniques with Irving Younger at 25 (National Practice Institute 1978).

The trial court, however, reasoned that Mr. Gale's attorney should brought Mr. Starks's attorney's refusal to let him interview the witness to the attention of the trial court or subpoenaed Mr. Starks so that the court could determine if the witness had a constitutional right to remain silent. 3RP 212-13. The State argues Mr. Starks could not assert a blanket Fifth Amendment privilege, but would have to decide on a question by question basis whether to assert his rights. Brief of Respondent at 17-19. As the State recognizes, however, in some circumstance a witness may indeed

need to assert a general privilege. State v. Levy, 156 Wn.2d 709, 731-32, 132 P.3d 1076 (2006); Brief of Respondent at 19.

The facts before the court show the failure to call Mr. Starks was not based upon defense counsel's belief his testimony would incriminate Mr. Gale. The missing witness instruction was thus improper and misleading.

The prosecutor's argument was similarly misleading in these circumstances. The prosecutor waited until his rebuttal closing argument, shortly before the jury retired to deliberate, before discussing the missing witness instruction. 3RP 262-64. The prosecutor first argued Mr. Gale did not tell the arresting officer about Mr. Starks.¹ The prosecutor went on to tell the jury it could infer Mr. Stark's testimony would not be favorable because Mr. Gale did not call him as a witness. 3RP 263-64. While the argument is consistent with the court's jury instruction, it is not consistent to what the prosecutor actually knew – Mr. Gale's attorney did not call Mr. Starks because his attorney because he was prohibited by Mr. Starks's attorney from even talking to the witness, who may well assert his Fifth Amendment privilege not to answer incriminating or potentially incriminating questions.

¹ The prosecutor's discussion of the missing witness inference begins before the section quoted in the Brief of Respondent. 3RP 262-63.

The missing witness doctrine is inapplicable when the defendant is unable to call a witness to the stand to incriminate himself. Montgomery, 163 Wn.2d at 599; United States v. Glenn, 64 F.3d 706, 109-10 (D.C.Cir. 1995). Here, the court and the prosecutor knew Mr. Gale did not call Mr. Starks at trial because Mr. Starks's attorney refused to let defense counsel speak to him, leading to the conclusion that Mr. Starks would assert his Fifth Amendment right to remain silent. Thus, Mr. Gale's failure to call the witness was the result of the witness's privilege or counsel's ineffective failure to subpoena the witness to determine if he would assert the privilege. By giving a missing witness instruction, however, the court permitted the jury to make the incorrect inference that Mr. Gale knew Mr. Starks's testimony would not be favorable to the defense. The error undermined Mr. Gale's defense and was not harmless beyond a reasonable doubt.

C. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Parrish Gale requests this Court reverse his conviction for possession of a stolen motor vehicle and remand his case for a new trial. Montgomery, 163 Wn.2d at 600-01.

DATED this 30th day of April 2009.

Respectfully submitted,



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Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 37538-9-II
v.)	
)	
PARRISH GALE,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF APRIL, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] RICHARD LEECH PIERCE COUNTY PROSECUTING ATTORNEY 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF APRIL, 2009.

X _____ 

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

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