

NO. 37538-9-II

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

PARRISH GALE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly Grant

No. 07-1-04289-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant's missing witness peculiarly available to defendant when the State had no knowledge of the missing witness until defendant testified during his case-in-chief?
2. Was defendant's witness unavailable to defendant when there is only speculation that the witness would have invoked his Fifth Amendment privilege and when defendant's own testimony fails to establish a valid Fifth Amendment privilege for his missing witness?
3. Given all the circumstances, did the Court properly instruct the jury as to defendant's missing witness and, if not, was any error harmless beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

1. Procedure

On August 17, 2007, the Pierce County Prosecutor's Office filed an information charging PARRISH SYRON GALE, hereinafter, "defendant," with one count of Unlawful Possession of a Stolen Vehicle and one count of Driving While in Suspended or Revoked Status in the Third Degree. CP 1-2. The matter proceeded to a jury trial on March 12, 2008. RP(3/12/08) 4. The jury found defendant guilty as charged on

March 19, 2008. RP (3/19/08) 4; CP 82-83. Defendant was sentenced on March 28, 2008, to fifty-five (55) months in the Department of Corrections for the charge of Unlawful Possession of a Stolen Vehicle and ninety (90) days confinement for the charge of Driving While in Suspended or Revoked Status in the Third Degree. RP(3/28/08) 15-16; CP 101-105. This timely appeal followed.

2. Facts

On August 13, 2007, Kenneth Johnson (“Ken”) borrowed his father’s vehicle so that Ken could move his belongings from Tacoma to Seattle. RP(3/13/08) 52. Ken gave a ride to two young women. RP(3/13/08) 53. On the way to the young women’s destination, Ken stopped at his Tacoma residence to use the restroom. RP(3/13/08) 55. He allowed the two young women to stay in the car and listen to music, leaving the keys in the car. *Id.* When Ken emerged from his home a few minutes later, the women and his father’s car were gone. *Id.* Ken searched for his father’s car and the young women to no avail. RP(3/13/08) 55-56. He reported the theft of his father’s vehicle to the police. RP(3/13/08) 56.

Ronald Johnson (“Ron”), Kenneth Johnson’s father and the owner of the stolen car, testified. RP(3/17/08) 130. Ron testified that he loaned his car to his son on August 13, 2007, so that his son could move to Seattle. RP(3/17/08) 131. Ron testified that he had not given permission to anyone other than his son to drive Ron’s car. RP(3/17/08) 132. Ron

did not know defendant and did not give defendant permission to drive Ron's car. *Id.* On August 16, 2007, Ron's stolen car was recovered three days after its theft. *Id.*

On August 16, 2007, Tacoma Police Officer Kevin Wales was working routine patrol in his fully-marked patrol car, which was equipped with overhead lights. RP(3/13/08) 88. As Officer Wales traveled along South 8th Street in Tacoma he observed a green Honda CR-V approaching his vehicle. *Id.* Officer Wales used his mobile computer to run the license plates on the vehicle and learned that it had recently been reported stolen. RP(3/13/08) 89. Officer Wales executed a U-turn so that he could stop the stolen vehicle. RP(3/13/08) 90. Wales noted that his brake lights would have illuminated as he executed the U-turn. *Id.* While conducting the U-turn, Wales watched as the stolen Honda turned off South 8th Street and turned southbound on Ferry Street. *Id.* When Officer Wales turned on to Ferry Street a few seconds later, he saw the Honda had been parked very abruptly, roughly four (4) feet from the curb. RP(3/13/08) 91. The rear of the car was sticking way out from the curb. *Id.*

Officer Wales stopped his patrol car and checked on the stolen car, finding it empty. RP(3/13/08) 92-93. As Wales checked on the car, defendant walked out from between two houses near where the car had been abruptly parked. *Id.* Wales confronted defendant, who stated he had been driving the car. RP(3/13/08) 94. Wales did not see any other individuals walking in the area. RP(3/13/08) 95. Wales took defendant

into custody, at which point defendant asked Wales to retrieve defendant's cell phone and identification from the car. *Id.* After securing defendant in Officer Wales' patrol car, Wales retrieved defendant's cell phone from the cup holder inside the stolen car and defendant's identification from the driver's seat. *Id.* During a search of defendant incident to arrest, Wales located a cell phone charger in defendant's pocket. RP(3/13/08) 97. The cell phone charger matched defendant's cell phone found in the stolen car. *Id.*

Meanwhile, a nearby resident, David Schmursal, waived Officer Wales over. *Id.* Schmursal told the officer what he had seen. RP(3/13/08) 98. Schmursal testified that he was babysitting some grandkids when he saw someone he had never seen before running down his driveway. RP(3/13/08) 67. Schmursal saw the person, later identified as defendant, running from the street to the trailer. RP(3/13/08) 71, 72, 98. Schmursal went to the window, but by the time he got there, defendant was now gone from view. RP(3/13/08) 67-68. As Schmursal was walking back from his window, he saw defendant again, but this time defendant was throwing something into the back of Schmursal's utility trailer, which was parked in Schmursal's driveway. RP(3/13/08) 68.

After seeing defendant hide the key in the trailer, Schmursal went out to investigate. RP(3/13/08) 72. As he went outside, Schmursal saw the police officer arresting defendant. RP(3/13/08) 72-73. Schmursal told the officer what he had seen. RP(3/13/08) 97-98. Officer Wales retrieved

the key defendant had hidden in Schmersal's trailer and confirmed it fit the stolen car. RP(3/13/08) 98.

Officer Wales testified that he ran a computer check on defendant while the two were in the officer's patrol car. RP(3/13/08) 98-99. While doing this, Wales learned over the radio from other officers that another subject had been seen running between houses near where defendant was arrested. RP(3/13/08) 99. Wales also learned through his mobile computer that defendant's brother had warrants. *Id.* Wales then broadcast this information, including the name of defendant's brother, to the other officers in the area. RP(3/13/08) 99-100. Wales believed the brother may have been the other person seen running from the area. RP(3/13/08) 100.

Defendant was sitting in the back seat of the patrol car and could hear the communications between the officers. RP(3/13/08) 101. Wales noted that, while communicating over the radio, defendant had initially told him that "someone" had run from the car. *Id.* When Wales mentioned defendant's brother over the radio, defendant then said the person who had run from the car was his brother. *Id.* As part of the routine records check of defendant, Wales learned that defendant's license was suspended in the third degree. RP(3/13/08) 102.

At trial, defendant testified in his defense. RP(3/17/08) 135-187. Defendant called no other witnesses. Defendant started his testimony by acknowledging he had previously been convicted of two counts of second degree Possessing Stolen Property. RP(3/17/08) 135. Defendant testified

that he called his friend, Brandon Starks, whom he had known for seven or eight years, to get a ride. RP(3/17/08) 136. Defendant testified he still considered Starks a friend. *Id.* Defendant said Starks agreed to give him a ride, but when defendant arrived at Starks' residence, Starks told defendant that Starks would have to loan him a car instead. RP(3/17/08) 137-138. Defendant claimed that Starks told him that the car, the green Honda CR-V, was Stark's "girl's" car and that defendant would have to bring it back before Starks had to go to work. RP(3/17/08) 139. Defendant even asserted that Starks gave him the insurance card to the car. RP(3/17/08) 140.

Defendant testified about his contact with Officer Wales. RP(3/17/08) 142-150. He said that he saw the police car as he was stopped at an intersection. RP(3/17/08) 141-142. Defendant admitted he watched his rearview mirror as the officer turned around. RP(3/17/08) 142. Defendant asserted that Officer Wales had made eye contact with him as the officer drove by and that the officer knew him by sight. *Id.* Defendant testified that he parked the car and that he and his friend hopped out and his friend ran. *Id.* Defendant testified that this is the point at which he thought about his license being suspended and that he was not supposed to be driving. RP(3/17/08) 143.

Defendant next testified that he did not want the officer to know he was driving, so he hid the key in the trailer. *Id.* Defendant said the officer arrived and only asked him if he was a resident of one of the homes in the

area. RP(3/17/08) 144. Defendant said the officer then arrested him without any further discussion regarding the car or defendant's connection to it. *Id.* Defendant admitted he asked the officer for his belongings from the car after he was arrested. *Id.*

Defendant testified about the officer's radio communications that occurred while the two were in the patrol car. RP(3/17/08) 146-148. Defendant admitted he could hear the officer's communications, but defendant denied that he had adapted his statements to what he heard on the radio. RP(3/17/08) 146-149.

During cross-examination of defendant, he identified for the first time by name his passenger in the stolen car, "Ariel". RP(3/17/08) 152-153. Defendant testified he still knew where Brandon Starks lived, which was the same location where defendant said he picked up the car. RP(3/17/08) 154. Defendant admitted that he had even spoken with Starks after the arrest and told him that the car was stolen. RP(3/17/08) 155. Defendant testified that when he confronted Starks about the stolen car, Starks said "I didn't know." *Id.*

Defendant testified he is friends with Starks and has played basketball and gone to clubs and parties with him. RP(3/17/08) 156. Defendant also said he had borrowed several cars from Starks in the past. RP(3/17/08) 157. Starks loaned defendant cars despite Starks' knowledge that defendant did not have a valid license. RP(3/17/08) 158. Defendant said that Starks was careful to give him the insurance card for the stolen

car in case defendant was stopped. RP(3/17/08) 158-159. However, defendant did not look at the card to see if the name on it was a woman's or a man's name. RP(3/17/08) 159.

During further cross-examination defendant admitted that he was not doing anything illegal that would warrant an officer's stop. RP(3/17/08) 164. When confronted with an explanation for why the officer would stop him, defendant asserted it was "racial profiling." RP(3/17/08) 166. However, defendant admitted that the officer testified he had not seen defendant driving. RP(3/17/08) 167. In fact, the officer had previously testified that his focus was on the car's license plates, not who was driving or how many people were in the car. RP(3/13/08) 108. Furthermore, the officer did not activate his lights or sirens when he conducted the U-turn after running the plates on the stolen car. RP(3/13/08) 90.

After the State's cross-examination, during re-direct examination, defendant changed his story regarding when he first contemplated the fact that he was driving with a suspended license. On re-direct, defendant testified that after he had stopped the car, but while he was still in the car, he was thinking that "I am going to go to jail for driving." RP(3/17/08) 184. He had previously testified that this thought did not occur until after he had exited the vehicle. RP(3/17/08) 143.

After defendant's testimony, the parties addressed the State's proposed jury instructions. RP(3/17/08) 187-214. Defendant objected to

the State's proposed "missing witness" instruction on the sole theory that Brandon Starks was not peculiarly available to or under defendant's control. *Id.* Defendant's counsel argued that Starks was not peculiarly available to defendant because Starks' appointed counsel (who was representing Starks on an unrelated matter) would not allow defendant's counsel to interview Starks. RP(3/17/08) 189-190. However, defendant's counsel admitted that he never subpoenaed Starks, even though he was "an extremely helpful witness." RP(3/17/08) 190.

Defendant's counsel explained that Starks' counsel believed that Starks could be charged with Unlawful Possession of a Stolen Vehicle. *Id.* Therefore, defendant's counsel believed that Starks had an "absolute right under the Fifth Amendment" and that he could not call Starks as a witness because of "[Starks'] *lawyer's assertion* of [Starks'] *potential* Fifth Amendment right." *Id.* (emphasis added). The State responded that, until defendant had testified, the State was unaware of Brandon Starks' existence. RP(3/17/08) 192. The State further argued that, according to defendant's testimony, defendant and Starks had been friends for six or seven years, that they are still in contact and that they play basketball, etc., and that the State was never told by defense about this witness. RP(3/17/08) 193. The State also noted that, based on defendant's testimony, Starks would not have a valid Fifth Amendment privilege because Starks neither knew the car was stolen nor was he the passenger in the car that fled after defendant stopped. RP(3/17/08) 194. The State

argued there was no factual basis to prove that Starks knew the car was stolen, a necessary element of the crime of Unlawful Possession of a Stolen Vehicle. RP(3/17/08) 195.

The trial court then took testimony from Starks' counsel, Attorney Helene Chabot. RP(3/17/08) 195-205. Attorney Chabot testified that she precluded defendant's counsel from speaking with Starks because she was concerned defendant's counsel would try to get Starks to implicate himself. RP(3/17/08) 199. When asked by the State's attorney whether Starks had provided her with information that would have implicated Starks' Fifth Amendment privilege, Attorney Chabot responded: "No." RP(3/17/08) 200. Chabot confirmed that Starks was never subpoenaed by defendant. RP(3/17/08) 201. When asked whether Starks would have exercised his Fifth Amendment privilege had he been subpoenaed as a witness, Attorney Chabot stated: "I have no idea what he would have done." RP(3/17/08) 204.

Argument regarding the missing witness instruction followed. RP(3/17/08) 207-214. The Court found that Starks was peculiarly available to the defense and allowed the State's proposed "missing witness" instruction. RP(3/17/08) 211-214.

During closing argument, the State made the following argument regarding the "missing witness" instruction:

Now, obviously, defendant has a right to remain silent. He enjoys the presumption of innocence and he had absolutely zero burden here. I have got all the burden of proof here, but when a defendant chooses to put on a case, take the witness stand or put witnesses up there to testify on his behalf to refute or disprove the state's allegations, then they are going to put on their best case and you can analyze that defense just like you would my case in chief. Look at it. You can consider it. Is it reasonable? Is it logical? Ask yourselves why Brandon Starks is not here to testify "I loaned that car to my good friend Parrish and I didn't know the car was stolen and he didn't know if the car was stolen either." Ask yourself why. And according to Instruction No. 15, you can make a reasonable inference that that testimony would not have been favorable and maybe when you look at this in the context of all the facts and all the circumstances, maybe that's why Ariel ran when that car got stolen. Because Brandon told defendant, "Hey, this car is hot so be careful." Ariel knew something. He ran quickly. Defendant knew something too. He knew the car was stolen. That's why he got out of the car so fast. That's why he ran and hid the keys: Because he thought he would get away with that and be able to dupe the officer in to believing that he was not the proper suspect.

RP(3/17/08) 263-264.

C. ARGUMENT.

1. THE COURT PROPERLY GAVE THE MISSING WITNESS INSTRUCTION BECAUSE BRANDON STARKS WAS PECULIARLY AVAILABLE TO DEFENDANT; THE CLOSING ARGUMENT BY THE STATE WAS PROPER.

- a. Missing Witness Instruction

Under the missing witness instruction, where a party fails to produce otherwise proper evidence within his or her control, the jury may

draw an inference unfavorable to that party. WPIC 5.20¹; *State v. Russell*, 125 Wn.2d 24, 90, 882 P.2d 747 (1994).

The missing witness doctrine does not apply if the witness is equally available to both parties. *State v. Blair*, 117 Wn.2d 479, 490, 816 P.2d 718 (1991). A witness is not equally available merely because he or she is physically present or subject to the subpoena power. *State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185 (1968)"**Error! Bookmark not defined.** A witness's availability may depend upon his or her relationship to one or the other of the parties, and the nature of the testimony that he or she might be expected to give. *Davis*, 73 Wn.2d at 277. This instruction is appropriate only when an uncalled witness is "peculiarly available" to one of the parties. *Cheatam*, 150 Wn.2d at 652. Accordingly, a party seeking the benefit of the inference must show the missing witness was "peculiarly within the other party's power to produce." *Blair*, 117 Wn.2d at 491 (quoting *United States v. Williams*, 739 F.2d 297, 299 (7th Cir. 1984)). Being "peculiarly available" to a party means:

[T]here must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in

¹ The standard missing witness instruction, set forth in WPIC 5.20, is: "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."

ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.

Blair, 117 Wn.2d at 490 (quoting *State v. Davis*, 73 Wn.2d 271, 277, 438 P.2d 185 (1968)). Availability “is to be determined based upon the facts and circumstances of that witness’s ‘relationship to the parties, not merely physical presence or accessibility.’” *Cheatam*, 150 Wn. 2d at 654, (quoting Thomas E. Zehnle, 13 CRIM. JUST. 5, 6 (1998)).

As the court explained in *Blair*, 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. The decision to call or not to call a witness is for counsel to make. *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 735, 16 P.3d 1 (2001).

In *State v. Blair, supra*, the trial court allowed argument by the prosecutor regarding the defendant’s failure to call witnesses who were listed only by first names on a “crib” sheet. *Blair*, 117 Wn.2d at 481. The defendant was charged with delivery of cocaine and possession of cocaine. *Id.* A search warrant was served on the defendant’s residence, where the officers found the “crib” sheet containing first names and other information supporting the State’s contention that the defendant was a

drug dealer. *Id.* at 482. The defendant testified at trial that the names and numbers on the sheets of paper represented personal loans and amounts owed him from card games. *Id.* at 482-83. The defendant also testified that he could have located the people named on the list. *Id.* at 490. However, the defendant called only one of the people on the list to support his contention. *Id.* at 483. The prosecutor argued in closing the inference that the other people were not called because they would not have supported the defendant's testimony. *Id.* at 483-85.

The Supreme Court in *Blair* upheld the defendant's convictions, holding that the prosecutor's arguments were proper under the circumstances. *Id.* at 491-493. The Court noted that the people on the list were peculiarly available to the defendant because, as in the case at bar, he was in the best position to identify and locate them, most of whom were only mentioned by first names. *Id.* Furthermore, as in the case at bar, the defendant's own testimony supported the fact that he alone knew the identities of the people named on the list. *Id.*

Here, the State was unaware that Brandon Starks had any involvement in this case until after the State rested. The arresting officer was never told about Brandon Starks. The State first learned that Brandon Starks existed when defendant testified in his case-in-chief. Everything regarding Brandon Starks's involvement in this case was provided through the testimony of defendant. Defendant knew where Starks lived and had been friends for many years with Starks. Defendant had spoken with

Starks after defendant's arrest on this case. Defendant testified that Starks was not aware the car was stolen. Clearly, this evidence was important to the defense if it were true.

Based on defendant's testimony at trial, had Starks been called as a witness, Starks could have exonerated defendant. However, this did not occur. Defendant never subpoenaed Starks, despite defendant's knowledge of Starks' whereabouts and the information about which defendant alleged Starks could testify. Accordingly, defendant had a "superior [] opportunity for knowledge of a witness" as well as a "community of interest" with Brandon Starks, making Starks "peculiarly available" to defendant. *Blair*, 117 Wn.2d at 490. The trial court properly made this finding.

Defendant testified he had spoken with Starks about the arrest after it occurred. He said Starks told him that he did not know the car was stolen. This fact corroborates the rationale behind the giving of the missing witness instruction as stated in *Blair*: a party with a close connection to a witness would normally call that witness unless the party knew the witness' testimony would be unfavorable.

Defendant's failure to produce this witness indicates defendant knew that Starks would not corroborate defendant's testimony, or perhaps even implicate defendant to a greater degree. Based on this information, the jury was entitled to make the reasonable inference that Starks' testimony would have been unfavorable to defendant. This is further

corroborated by defendant's own actions surrounding the arrest and his contradictory statements to the police officer.

b. Prosecutor's Argument

Under proper circumstances, the prosecutor may comment on a defense failure to call a witness under the missing witness doctrine. Under this doctrine, a party's failure to produce a particular witness who would "ordinarily and naturally testify raises the inference . . . that the witness's testimony would have been unfavorable." *State v. David*, 118 Wn. App. 61, 66, 74 P.3d 686 (2003) (quoting *State v. McGhee*, 57 Wn. App. 457, 462-63, 788 P.2d 603 (1990)); *State v. Cheatam*, 150 Wn.2d 626, 652-653, 81 P.3d 830 (2003), *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991); *State v. Davis*, 73 Wn.2d 271, 277, 438 P.2d 185 (1968).

While a prosecutor cannot point to the lack of defense evidence as proof of guilt, "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *United States v. Hiatt*, 581 F.2d 1199, 1204 (5th Cir. 1978)). A rule prohibiting the State from ever commenting on the defendant's failure to call witnesses or produce evidence is overly broad, nor is such a comment always an impermissible shifting of the burden of proof. *Blair*, 117 Wn.2d at 491.

In *Blair*, the Supreme Court found that a missing witness inference was properly argued where the defendant testified in a drug delivery case that names and other information on "crib" sheets related to lawful debts

owed him, but called only one of several people on the sheets. *Id.* at 491-92. The prosecutor argued in closing that there was a reasonable inference that the uncalled witnesses would not have supported the defendant's testimony. *Id.* at 491. The court held that the prosecutor did not argue that the defendant had to present evidence of his innocence, and was, therefore, not burden shifting. *Id.*

Like *Blair*, the State's argument in the present case was proper. The State's closing argument regarding defendant's failure to produce Brandon Starks was made in the context of the jury's duty to evaluate defendant's evidence in the same manner it evaluates the State's evidence. *See State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). The State prefaced its argument by reminding the jury that defendant may remain silent and has no burden of proof in a criminal trial. The State did not make a comment on defendant's right to remain silent since defendant waived this right and testified in his own defense. As in *Blair*, the State's argument was proper and did not shift the burden of proof to defendant.

2. BRANDON STARKS NEITHER INVOKED HIS FIFTH AMENDMENT PRIVILEGE NOR HAD A VALID FIFTH AMENDMENT PRIVILEGE

The privilege against self-incrimination includes the right of a witness not to give incriminatory answers in any proceeding. *State v. Lougin*, 50 Wn. App. 376, 379, 749 P.2d 173 (1988) (citing *Kastigar v.*

United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L.Ed.2d 212 (1972)). As to the scope of this privilege, "[a] witness does not have the absolute right to remain silent when called to testify, as does a defendant . . . on trial." *Lougin*, 50 Wn. App. at 381 (citing *State v. Parker*, 79 Wn.2d 326, 331, 485 P.2d 60 (1971)). "In general, a claim of privilege may be raised only against specific questions, and not as a blanket foreclosure of testimony." *Lougin*, 50 Wn. App. at 381 (citation omitted); *United States v. Moore*, 682 F.2d 853, 856 (9th Cir. 1982).

The risk of self incrimination must be real. Unless the answer to a question would obviously and clearly incriminate the witness, a claim of privilege must be supported by facts which, aided by the "use of 'reasonable judicial imagination,'" show the risk of self- incrimination. *Lougin*, 50 Wn. App. at 381 (citation omitted). "The answer need only 'furnish a link in the chain of evidence needed to prosecute the witness for a crime.'" *State v. Hobble*, 126 Wn.2d 283, 290, 892 P.2d 85 (1995), (citations omitted). The danger of incrimination must be substantial and real, not merely speculative. *Hobble*, 126 Wn.2d at 291. The power to decide whether the hazards of self-incrimination are "genuine and not merely illusory, speculative, contrived or false, must rest with the trial court before whom the witness is called to give evidence" and will not be reversed absent an abuse of discretion. *Parker*, 79 Wn.2d at 332. When

testimony of a witness may be self-incriminatory, but the testimony would be *adverse to the party not calling the witness*, the use of the missing witness instruction is proper. *Blair*, 117 Wn.2d at 490 (emphasis in the original).

An exception allowing a blanket privilege applies where, "based on its knowledge of the case and of the testimony expected from the witness, the trial court can conclude that the witness could legitimately refuse to answer essentially all relevant questions." *Moore*, 682 F.2d at 856 (quoting *United States v. Tsui*, 646 F.2d 365, 367-68 (9th Cir.1981), *cert. denied*, 455 U.S. 991, 102 S. Ct. 1617, 71 L.Ed.2d 852 (1982)). "This exception, however, is a narrow one, only applicable where the trial judge has some special or extensive knowledge of the case that allows evaluation of the claimed Fifth Amendment privilege even in the absence of specific questions to the witness." *Moore*, 682 F.2d at 856.

Here, defendant asserts that the trial court committed reversible error by instructing the jury about a permissive inference the jury may make based on defendant's failure to call witness Brandon Starks, the man defendant alleges loaned defendant the stolen car. Defendant argues that Brandon Starks was unavailable to him because Starks' attorney on an unrelated matter refused to allow defendant's attorney to interview Starks. Defendant further speculates that Starks would have invoked his Fifth Amendment privilege had Starks been called as a witness.

However, there is no basis to claim Starks would have invoked his Fifth Amendment privilege. Starks was never subpoenaed to trial and was never listed as a witness by defendant, who was the only one who knew of Starks' involvement in the case. While Starks' attorney on an unrelated matter testified she would have advised Starks to invoke his Fifth Amendment privilege, it is unknown whether Starks would have followed this advice. Starks' attorney even noted that she had no idea whether the defendant would invoke his Fifth Amendment privilege and that Starks had not given her any information that would have implicated his privilege against self-incrimination. Starks did not testify before the court, thereby depriving the trial court of the ability to make an appropriate inquiry.

Based on defendant's testimony, there was no basis for the State to charge Starks with a crime related to the stolen car. Defendant testified that Starks loaned defendant one of Starks' girlfriend's cars and gave defendant the key and an insurance card for the car. Defendant even testified he had spoken with Starks after defendant was arrested for possessing the stolen car, and defendant said Starks did not know the car was stolen.

In order for one to be charged with the crime of Unlawful Possession of a Stolen Vehicle, one must know the car was stolen. RCW 9A.56.068; WPIC 77.06. While there is substantial evidence to support this element as to this defendant, there was no evidence that Starks was aware the car was stolen. Therefore, even if Starks had been called as a

witness at trial, he would have been unable to invoke his Fifth Amendment privilege. Since Starks was never called as a witness, the parties can only speculate that Starks would have exercised his privilege, which is insufficient under the case law to make Starks “unavailable.”

3. THE COURT PROPERLY INSTRUCTED THE JURY REGARDING DEFENDANT’S FAILURE TO CALL BRANDON STARKS, LAWYER’S ARGUMENTS, THE BURDEN OF PROOF AND THE PRESUMPTION OF INNOCENCE; ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

As argued above, the trial court properly instructed the jury regarding defendant’s failure to produce Brandon Starks. However, should this Court find that the trial judge abused its discretion regarding the missing witness instruction, any error was harmless beyond a reasonable doubt.

An improper jury instruction may be harmless error so long as the jury is properly instructed on the State’s burden. *State v. Montgomery*, 163 Wn.2d 577, 600, 183 P.2d 267 (2008) (citing *State v. Frost*, 160 Wn.2d 765, 780, 161 P.3d 361 (2007)). “An erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ Whether a flawed jury instruction is harmless error depends on the facts of a particular case.” *State v. Carter*, 154 Wn.2d 71, 81, 109

P.3d 823 (2005)(alteration in the original)(quoting *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 89 (2002)).

Here, the jury was properly instructed on the State's burden of proof. Regarding the burden of proof, the trial court instructed the jury as follows:

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Instruction 2; WPIC 4.01, CP 35-56. The trial court also correctly instructed the jury regarding remarks of counsel:

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.

Instruction 1; WPIC 1.02; CP 35-56. *See Blair*, 117 Wn.2d at 491-492 (no error where trial court gave missing witness instruction, defendant testified, thereby waiving his Fifth Amendment privilege, court properly

instructed jury regarding burden of proof, presumption of innocence and lawyer's arguments not being evidence). No error has been claimed regarding either of these instructions. CrR 6.15.

Furthermore, WPIC 5.20 only grants the jury the option of inferring that defendant's missing witness would provide unfavorable testimony. The inference is permissive, and may only be made when the jury determines that the inference is warranted under all the circumstances of the case. There is no evidence that the jury exercised this inference against defendant.

The jury considered all the circumstances of the case:

- The fact that defendant abruptly turned down a side street and quickly abandoned the car after he saw the officer's patrol car conduct a U-turn;
- That the defendant paid special attention to the officer when he initially saw the patrol car, indicating the defendant knew he was engaged in wrongful conduct;
- That defendant ran from the car and hid the key to the car in a nearby trailer;
- That defendant's belongings were found in the stolen car and corresponded with property found on defendant's person;

- That defendant's story regarding who was in the car and who was driving the car was adapted to the radio communications of the arresting officer and the other officers in the area;
- That defendant initially testified he did not consider his license status until *after* he had stopped the car, indicating consciousness of guilt and an awareness that the car was, in fact, stolen;
- That defendant later testified that the reason he stopped the car was because of his suspended license, contradicting his earlier testimony;
- That the officer did not see who was driving the car or how many people were in the car and, therefore, could not have initiated a traffic stop on the basis that defendant's license was suspended (as defendant claimed at one point);
- That the only basis for the officer to stop the car was because he learned that it was stolen, which explains why defendant abruptly stopped the car and then ran from it after he saw the officer conducting a U-turn;
- That defendant's passenger immediately ran from the car once it was stopped, indicating that the passenger had a basis to flee the car and that defendant likely had the same basis (ie: knowledge that the car was stolen);
- That defendant's credibility was suspect, especially in light of his prior convictions for possessing stolen property, and that defendant

had a clear interest in the outcome of the case and had a motive to lie.

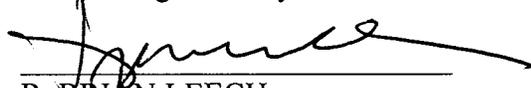
Under these circumstances, it cannot reasonably be claimed that the missing witness instruction contributed to the jury's verdict. The instruction merely gave the jury the option of inferring that Brandon Starks' testimony would not have been favorable to defendant. There was ample evidence for the jury to find defendant guilty of the crimes charged without having to make the permissive inferences allowed under WPIC 5.20. Accordingly, while the State believes there was no error by the trial court in giving the instruction, any possible error was harmless error beyond a reasonable doubt and would not have contributed to the jury's verdict in light of all the circumstances of the case.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's conviction.

DATED: March 27, 2009.

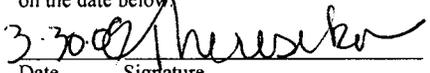
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below

3-30-09 
Date Signature

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