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DIVISION II

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No. 37538-9-II

STATE OF WASHINGTON

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

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STATE OF WASHINGTON,

Respondent,

v.

PARRISH GALE,

Appellant.

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

The Honorable Beverly Grant

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by instructing the jury it could infer that missing witnesses would testify against Parrish Gale from his failure to call witnesses. Jury Instruction 15 (CP 52).

2. The trial court erred by permitting the prosecutor to argue the jury could infer guilt from Parrish Gale's failure to call witnesses.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

In a criminal case, the court must cautiously review the State's request for a missing witness instruction based upon the defendant's failure to present a witness. The court must conclude (1) the witness is peculiarly available to the defense, (2) the testimony would be important and not cumulative, (3) there is no explanation for the witness's absence, such as a testimonial privilege, and (4) the instruction would not impact the defendant's constitutional rights. In a prosecution for possessing a stolen motor vehicle, Mr. Gale testified he did not know the car, which he borrowed from a friend, was stolen, but did not call the friend as a witness. Where the circumstances demonstrate the witness's testimony would have been self-incriminatory, did the trial court err by (1) instructing the jury it could infer the witness's testimony

would be prejudicial to Mr. Gale from Mr. Gale's failure to call the witness and (2) permitting the prosecutor to make this argument?

C. STATEMENT OF THE CASE

Ronald Johnson loaned his Honda to his son to use in moving from Tacoma to Seattle on August 13, 2007. 2RP 52; 3RP 131.<sup>1</sup> While driving his father's car, Kenneth Johnson picked up two young women he saw near the Tacoma Library who looked like they needed help; the young women asked for a ride to the Taco Bell. 2RP 53, 58-60.

The young women first directed Kenneth to stop at a house where one obtained a bag of clothing. 2RP 53-54, 59-60. As they continued to the Taco Bell, Kenneth stopped at his apartment to go to the bathroom, leaving the keys in the car so the girls could listen to music. 2RP 55, 60. When Kenneth returned, however, the car was gone. 2RP 55. Kenneth searched for the young women in the neighborhood where they had stopped and at the Taco Bell, but he never found them. 2RP 56, 63.

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<sup>1</sup> The verbatim report of proceedings contains eight volumes. The trial transcripts are referred to as follows:

1RP - March 12, 2008

2RP - March 13 (marked Trial, Day 2)

3RP - March 17, (marked Trial, Day 3).

Any other volumes are referred to by date.

Three days later while on patrol, Tacoma Police Officer Kevin Wales checked the license plate number of a Honda that he passed and learned the car was reported stolen. 2RP 84, 87-89. The officer made a u-turn to follow the Honda, which had turned south onto Ferry Street. 2RP 90. When the officer reached Ferry Street, he found the car parked a little way down the street with its doors closed and no one inside. 2RP 90-91.

Parrish Gale walked towards the car as Officer Wales was looking at the car and calling for backup. 2RP 92-93. In response to the officer's questions, Mr. Gale said he did not live in the block and that he had been driving the Honda. 2RP 94. The officer therefore arrested Mr. Gale and placed him in the back of his patrol car. 2RP 96. Mr. Gale asked the officer for his cellular telephone, which was inside the Honda along with Mr. Gale's identification. 2RP 96, 98-99.

Officer Wales did not observe anyone else in the neighborhood, but David Schmersal came out of a house and waved the officer over. 2RP 74-75, 97. From inside his home, Mr. Schmersal had seen Mr. Gale trot up the driveway, drop something into a utility trailer Mr. Schmersal kept in the driveway, and then walk back down the driveway to the street. 2RP 67-69, 71, 73-75.

Mr. Schmersal took the officer to the trailer where they found the Honda key. 2RP 74, 98.

The Tacoma County Prosecutor charged Mr. Gale with possession of a stolen motor vehicle under the newly enacted RCW 9A.56.068 and with driving with a suspended operator's license in the third degree under RCW 46.20.342(1)(c).<sup>2</sup> CP 1-2. At his jury trial, Mr. Gale admitted he did not have a valid driver's license but explained that he was unaware the Honda was a stolen car.

Mr. Gale had asked his friend Brandon Starks for a ride that evening and, because Mr. Starks was to return it. 3RP 136-39. Mr. Gale had never seen the car before. 3RP 139. Mr. Starks said the car belonged to his girlfriend, who was at work, and he gave Mr. Gale the key. 3RP 139, 140. Mr. Gale was accompanied by another friend, Ariel Marino. 3RP 138, 152-53.

Nothing about the car suggested to Mr. Gale that it was stolen. 3RP 149. For example, there was no damage to the steering column, no broken windows, and no damage to the locks. 2RP 112-13; 3RP 133, 140-41. The key fit the car and was not a "shaved" key. 2RP 114-15; 3RP 140. Mr. Gale, however, did not have a valid driver's license, and he panicked when he noticed he

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<sup>2</sup> RCW 9A.56.068 became effective on July 22, 2008. Laws of 2007 ch. 199. Mr. Gale was arrested on August 16, 2007. 2RP 86-87.

was being followed by the patrol car, parked the Honda, walked away, and then impulsively tried to dispose of the key. 3RP 142-43, 150, 156, 160, 183-85.

Mr. Starks was incarcerated at the time of Mr. Gale's trial and represented by counsel who refused to permit Mr. Gale's attorney to interview her client. 3RP 199, 202, 203. The trial court gave the State's proposed missing witness instruction. CP 52. Although the trial court did not find Mr. Starks was within Mr. Gale's control, the court reasoned the witness was nonetheless particularly available to Mr. Gale because his counsel could have subpoenaed Mr. Starks to determine if he would have asserted his Fifth Amendment right to remain silent if called as a witness. 3RP 211-14.

I can appreciate Mr. Renda's [defense counsel] best efforts. He went to the counsel of record; he asked if he could speak to Mr. Stark's [sic]. At that point in time if there was any inclination [sic] that you needed to speak to that witness or that that witness needed to be summoned, it should have been brought to the attention of the Court so for those reasons I am finding that it is not certainly [sic] the witness was not within the control – I do believe in part this was a way that the witness was in control, if the witness had been subpoenaed, but I am not going to find that the witness was in your control. I believe you have satisfied that requirement but the second prong of the requirement is or peculiarly available.

Now the peculiarly available could have been accomplished simply by way of subpoena to this Court or at least giving notice with regard to that. So for that reason that will be allowed.

3RP 213-34. The trial court did not consider whether, based upon Mr. Gale's testimony, the missing witness's testimony was likely to be self-incriminatory or whether the inference that the missing witness's testimony would harm Mr. Gale was logical under the circumstances.

In his rebuttal closing argument, the deputy prosecuting attorney argued the jury should infer guilt from Mr. Gale's failure to call Mr. Starks. 3RP 262-64. Specifically, the prosecutor theorized that Mr. Gale tried to avoid the police officer because Mr. Starks told him the car was stolen. 3RP 264.

Mr. Gale was convicted as charged. CP 82-83; 3/19/08RP 4-5. The trial court imposed a 55-month standard range prison term for possession of a stolen motor vehicle, followed by a 90-day suspended sentence for driving with a suspended operator's license. CP 89-98, 101-05; 3/28/08RP 16, 17. This appeal follows. CP 109.

D. ARGUMENT

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

Mr. Gale testified that he borrowed the Honda he was driving from Brandon Starks and did not know it was a stolen car, but he was unable to call his former friend as a witness because Mr. Starks's attorney would not permit him to discuss the incident. The jury was given a missing witness instruction, and the prosecutor argued the jury could infer from Mr. Stark's absence that his testimony would have harmed Mr. Gales. The circumstances show Mr. Starks's testimony would be self-incriminatory, and the trial court thus erred by concluding he was an available witness and giving the missing witness instruction. Mr. Gale's conviction must be reversed and remanded for a new trial.

a. The missing witness doctrine may only be applied against a criminal defendant in limited circumstances. In a criminal case, the burden of proof is on the State to prove every element of the crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 22. The accused

has no obligation to testify or present any evidence, and it is error for State to suggest otherwise. State v. Montgomery, 163 Wn.2d 577, 597, 183 P.2d 267 (2008); U.S. Const. amends. 5, 14; Wash. Const. art. 1 §§ 9, 22. Thus, the prosecutor may not argue in a manner that suggests the defendant has the duty to present exculpatory evidence. State v. Cleveland, 58 Wn.App. 634, 647-48, 794 P.2d 546, rev. denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). When the defendant testifies or presents witnesses to advance an exculpatory theory, however, the prosecutor may point out any failure to corroborate the defense. State v. Contreras, 57 Wn.App. 471, 476, 788 P.2d 1114, rev. denied, 115 Wn.2d 1014 (1990).

In Washington, the court may instruct the jury that it may draw the inference that a missing witness's testimony would be unfavorable to a party who did not call a witness if the witness is within that party's control and the testimony would logically support that party's position. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). The Blair Court described the "missing witness" or "empty chair" doctrine as follows:

[W]here evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and . . . he fails to do

so, -- the jury may draw an inference that it would be unfavorable to him.

Id. (quoting State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968)).

Three important requirements must be met before a party may utilize the missing witness doctrine: (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. These limitations are especially important when the State seeks to utilize the missing witness doctrine in a criminal case. Montgomery, 163 Wn.2d at 598; Blair, 117 Wn.2d at 488; State v. Velasquez, 918 A.2d 45, 54-56 (N.J.Super 2007). In addition, the doctrine may not be applied if to do so would shift the burden of proof to a criminal defendant and infringe upon his right to remain silent. Montgomery, 163 Wn.2d at 599; Blair, 117 Wn.2d at 491.

In this case, the trial court improperly permitted the State to take advantage of the missing witness doctrine. While the court concluded the missing witness was particularly available to Mr.

Gale, a witness is not available if his testimony would be self-incriminatory. The instruction thus improperly shifted the burden to Mr. Gale to call a witness who was not available to him.

b. A witness is not available to the defendant if, in order to help the defendant, the witness would incriminate himself. The missing witness doctrine is based upon the assumption that a party will call an important witness who will support the party's version of the events. Blair, 117 Wn.2d at 485-86; United States v. Pitts, 918 F.2d 197, 200 (D.C.Cir. 1990). The instruction is only used against a party who "has it particularly within his power to produce witnesses whose testimony would elucidate the transaction." Graves v. United States, 150 U.S. 118, 120, 14 S.Ct. 40, 37 L.Ed. 1021 (1893). The doctrine thus does not apply when the witness's absence can be "satisfactorily explained." Blair, 117 Wn.2d at 489; see Graves, 150 U.S. at 120 (defendant not obligated to bring wife to courts, as she was not competent witness), Montgomery, 163 Wn.2d at 599 (error to give instruction where defendants did not produce their grandson; grandson's absence adequately explained because he was 14 years old and in school); State v. Cheatam, 150 Wn.2d 626, 654, 81 P.3d 830 (2003) (adult witness's problems obtaining child care did not adequately explain her absence).

Both the United States and the Washington Constitution protect an individual from incriminating himself. U.S. Const. amends. 5, 14; Wash. Const. art. 1 § 9. A party may not call a witness who the party knows will exercise his Fifth Amendment privilege not to answer questions. State v. Nelson, 72 Wn.2d 269, 282-83, 432 P.2d 857 (1967). It is thus obvious that a witness is not available if the witness's testimony would be self-incriminatory. Montgomery, 163 Wn.2d at 599; Blair, 117 Wn.2d at 489-90; see State v. Cozza, 19 Wn.App. 623, 627, 576 P.2d 1336 (1978) (witness was available who had pled guilty to one crime and obtained immunity agreement as to other crimes for which defendant on trial).

The missing witness doctrine may not be applied when the defendant fails to call a witness to the stand in order to incriminate himself. United States v. Glenn, 64 F.3d 706, 709-10 (D.C.Cir. 1995); Pitts, 918 F.2d at 200. "A witness who has been identified by the defendant as the perpetrator of the crime or who has a fifth amendment privilege as to the testimony in question is not considered available to either party." Lawson v. United States, 514 A.2d 787, 791 (D.C.App. 1986) (internal citations omitted). Similarly, the missing witness doctrine is inapplicable when a

defendant fails to call an alleged accomplice. Christensen v. State, 274 Md. 133, 333 A.2d 45, 49 (1975).

In this case, the court considered the three prongs of the Blair test, but did not apply them in light of the reasoning behind the missing witness doctrine. Looking at the availability prong, the trial court concluded Mr. Starks was available to Mr. Gale because his attorney could have called Mr. Starks to a pre-trial hearing to determine if he would assert his Fifth Amendment privilege. 3RP 214. Of course, Mr. Starks would not have been available if he had asserted his Fifth Amendment privilege.

Focusing on defense counsel's failure to subpoena Mr. Starks, the court did not consider the probable content of Mr. Starks's testimony. Both Mr. Gale's testimony and Mr. Starks's attorney's decision to forbid him to speak about the incident demonstrate Mr. Starks would have refused to testify. Mr. Starks's attorney was in the unusual position of being familiar with the facts of Mr. Gale's case because she had represented Mr. Gale earlier. In fact, she had been granted permission to withdraw from Mr. Gale's case after interviewing him about the case because of her attorney-client relationship with Mr. Starks. CP 13 3RP 197-98, 201-03; RPC 1.9(c). Although the attorney claimed she had no

idea what Mr. Starks would testify to, she prohibited defense counsel from interviewing Mr. Starks specifically to protect her client from incriminating himself. 3RP 199, 204. Thus, it was likely that Mr. Starks's testimony would have incriminated Mr. Starks for the crime of possessing the stolen car.

The defendant's testimony may also demonstrate a potential witness would either assert the Fifth Amendment or try to shift the blame to the defendant. In Pitts, the police searched a bus and found cocaine and heroin in a bag that contained the defendant's identification. Pitts, 918 F.2d at 198-99. The defendant, however, testified the drugs belonged to his traveling companion, Polk, who had been seated next to him. Id. at 199. The court gave a missing witness instruction and the government argued that if the defendant had been telling the truth he would have called Polk as a witness. Id. The Pitts Court explained that defense counsel's efforts to locate the missing witness were not determinative. Instead, when a witness's testimony is self-incriminatory, the reasoning behind the missing witness doctrine fails. Id. at 200.

The adverse inference rests on the assumption that a party will call important witnesses who support that party's version of the events. But in this case there is no reason to suppose anything of the sort. If Polk were solely responsible for the drugs, as Pitts

claimed, there was scant likelihood of his assisting the defense. A witness may not be put on the stand for the purpose of allowing the jury to watch him “take the Fifth.” Only by waiving his Fifth Amendment privilege and incriminating himself could Polk have supported the defense. The probability of that event was, to say the least, low. If he chose to testify at all, it was far more likely that Polk would have been a hostile witness, intent on saving himself by shifting the blame back to Pitts. Polk was, in short, a witness who could not be expected to support the defendant’s version even if it were accurate.

Id. Similarly, Mr. Gale should not have been expected to call a witness who would have asserted the Fifth Amendment or shifted blame to Mr. Gale.

Here, it is clear that Mr. Starks would more likely be a hostile witness than a friendly one to the defense. While it is possible Mr. Starks could have testified he also did not know the Honda was stolen, this hardly seems likely in light of his attorney’s refusal to permit Mr. Gale’s attorney from even talking to him about the case. The trial court’s finding that Mr. Starks was particularly available to Mr. Gale is thus incorrect. Mr. Gale had no power to force Mr. Starks to incriminate himself, and thus the inference that he did not call Mr. Starks only because Mr. Starks’ testimony would not help the defense is false. Not only was Mr. Starks not peculiarly available to Mr. Gale, the inference that Mr. Gale did not call Mr.

Starks because he would testify against him is incorrect. The court's reasoning thus flies in the face of the reasoning supporting the missing witness doctrine.

c. Mr. Gale's conviction must be reversed. A growing number of states have abandoned this missing witness doctrine in criminal cases. See State v. Tahair, 172 Vt. 101, 772 A.2d 1079, 1083-84 (Vt. 2001) (and cases cited therein); State v Malave, 250 Conn. 722, 737 A.2d 442, 447 (Conn. 1999) (and cases cited in n.8), cert. denied, 528 U.S. 1170 (2000). Some courts note many of the historical reasons behind the rule are inapplicable due to modern discovery practices. Tahair, 772 A.2d at 1084; Malave, 737 A.2d at 447-49. Others focus on unfairness to criminal defendants because the doctrine permits the prosecutor to create evidence from the defendant's failure to produce it. State v. Brewer, 505 A.2d 774, 776-77 (Me. 1985); C. Edwards, Speak of the Missing Witness, and Surely He Shall Appear: The Missing Witness Doctrine and the Constitutional Rights of Criminal Defendants, 67 Wash.L.Rev. 691, 698 (1992). Washington has not abandoned the missing witness doctrine, but the trial court must carefully consider whether or not to give such an instruction in a criminal case and may not give the instruction if it would shift the

burden of proof or infringe upon the defendant's right to remain silent. Montgomery, 163 Wn.2d at 599.

When the trial court incorrectly instructs the jury that it may draw an adverse inference from the defendant's failure to call a witness, the jury is improperly instructed on the burden of proof. Montgomery, 160 Wn.2d at 600. The appellate court must reverse the conviction unless the court finds beyond a reasonable doubt that the error did not contribute to the verdict. Id.

In Montgomery, the court found the missing witness instruction was not harmless where "the jury was presented with two competing interpretations of the undisputed events . . . and what those events indicated about Montgomery's intent." Id. Here, too, the events were not in dispute; Mr. Gale was in possession of the stolen automobile, but Mr. Gale had the car key and there was nothing about the car's condition that showed it had been stolen. The only real issue for the jury was whether Mr. Gale knew the car was stolen. In these circumstances, this Court cannot conclude beyond a reasonable doubt that the erroneous missing witness instruction and the prosecutor's argument did not contribute to the guilty verdict. Mr. Gale's conviction for possession of a stolen

motor vehicle must be reversed. Montgomery, 160 Wn.2d at 600-01.

E. CONCLUSION

Parrish Gale did not call as a witness Brandon Starks, a former friend who loaned Mr. Gale the stolen car. Although Mr. Starks's attorney refused to let defense counsel interview him because she was concerned her client would incriminate himself, the trial court erroneously concluded the witness was particularly available to Mr. Gale, gave a missing witness instruction, and permitted the prosecutor to argue they could infer Mr. Starks would have incriminated Mr. Gale. The State cannot demonstrate beyond a reasonable doubt that the incorrect instruction did not impact the jury verdict, and Mr. Gale's conviction for possession of a stolen motor vehicle must be reversed and remanded for a new trial.

DATED this 1<sup>st</sup> day of December 2008.

Respectfully submitted,



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