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THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CORY SUNDBERG,

Respondent.

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

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. INTRODUCTION

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). In such a case, reversal of a conviction is required if there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Belgarde*, 110 Wn.2d 504, 509-10, 755 P.2d 174 (1988).

The missing witness doctrine applies only if (1) the potential testimony is material and not cumulative, (2) the missing witness is peculiarly under the control of the party against whom the instruction is offered, (3) the witness's absence is not satisfactorily explained, and (4) the argument does not shift the burden of proof. *State v. Montgomery*, 163 Wn.2d 577, 598-599, 183 P.3d 267 (2008).

The missing witness rule does not apply to Cory Sundberg's case because elements (2) and (3) are met. *Montgomery*, 163 Wn.2d at 598-599. The Court of Appeals found the missing witness doctrine does not apply and properly followed the precedent set forth in *Montgomery* and its progeny and reversed

Sundberg's conviction for possession of methamphetamine.

The State asks this Court to reverse the Court of Appeals and proposes that *State v. Barrow* is controlling authority. This argument is based on an incorrect reading of *Barrow*, which pertains to cases in which a defendant presents exculpatory testimony, which is not present in this case. This Court should affirm the decision of the Court of Appeals.

B. ISSUES

1. A prosecutor commits misconduct by making a missing witness argument except in certain limited circumstances. Here, the State faulted Sundberg for failing to call a specific witness—Paul Wood—over which the defense had no control. Did the Court of Appeals correctly find that the missing witness doctrine was inapplicable because the potential witness's testimony would necessarily be self-incriminating and because Sundberg did not unequivocally imply that Wood would have corroborated his testimony?

2. Is the decision of Division One of the Court of Appeals in *State v. Barrow*, 60 Wn.App. 869, 809 P.2d 209 (1991) in conflict with the decision contained in the present case where Mr. Sundberg did not testify regarding an exculpatory theory, and where the State's questioning invoked the missing witness doctrine?

C. STATEMENT OF THE CASE

The State charged Cory Sundberg with possession of a controlled substance (methamphetamine). Clerk's Papers (CP) 131. Sundberg was tried by a jury on January 4, 2013 and was convicted of possession of methamphetamine as charged. Report of Proceedings (RP) at 209.¹

At trial, evidence was presented that Sundberg had been repairing a modular home for approximately ten days, and that he was assisted by Paul Wood. RP at 121, 122. Sundberg stated that when Wood was on the job, he frequently wore Sundberg's bib overalls to crawl under the modular home because Wood did not have the proper clothing to go under the structure. RP at 126. Sundberg stated that Wood borrowed the overalls four days out of the six days that he was on the jobsite. RP at 126.

Sundberg was arrested on June 6, 2012, pursuant to a Department of Corrections warrant. When arrested, Sundberg was wearing the bib overalls that Wood had borrowed during the project. Wood lost interest in the job and was not present on June 6 when Sundberg was arrested. Sundberg had not worn the overalls for a week until the time he was arrested. RP at 126,

¹The record of proceedings consists of the following:
RP— August 20, 2012, August 22, 2012, October 16, 2012, December 17, 2012,
December 24, 2012, December 31, 2012, January 2, 2013, January 4, 2013, January 8,
2013 (jury trial), January 9, 2013 (jury trial), January 28, 2013, February 19, 2013,

127. After Sundberg was arrested, an officer found a clear plastic baggie that contained a white crystal substance in the front pocket of the overalls while conducting an inventory search of his clothing. RP at 101, 112. Defense counsel stipulated that the substance was .01 gram of methamphetamine. RP at 116. Paul Wood did not testify at trial.

During closing argument the prosecutor argued that Sundberg should have subpoenaed Wood to corroborate his testimony that the methamphetamine found in the overalls did not belong to him. RP at 195. Defense counsel objected to the argument on the ground that it shifted the burden of proof to the defense. RP at 195. The court denied the objection, ruled that there had been no prosecutorial misconduct during closing argument and declined to give a curative instruction as requested by defense counsel. RP at 195, 201.

Sundberg filed a motion for a new trial pursuant to CrR 7.5 due to prosecutorial misconduct regarding the missing witness doctrine. RP at 262-67; CP 70-78. The court denied the motion, ruling that there was no prosecutorial misconduct pertaining to the missing witness and that the defense did not show there was a substantial likelihood the outcome of the trial would have been affected. RP at 267-68.

Sundberg appealed and the Court of Appeals found that the State committed prosecutorial misconduct by improperly invoking the missing witness doctrine. *State v. Sundberg*, No. 45081-0-II, slip op. (Wn. App. February 10, 2015). The Court found that there is a substantial likelihood that the improper argument affected the verdict and therefore reversed Sundberg's conviction and remanded the matter for new trial. Slip op. at 10.

D. ARGUMENT

1. THE COURT OF APPEALS PROPERLY FOLLOWED THIS COURT'S DECISION IN STATE V. MONTGOMERY AND FOUND THAT THE MISSING WITNESS DOCTRINE DOES NOT APPLY.

The state and federal constitutions guarantee an accused the right to a fair trial. U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. "Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial." *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Where there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict, the defendant is deprived of a fair trial. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *In re Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012).

To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704.

“A criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise.” *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). Generally, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence. *State v. Cleveland*, 58 Wn.App. 634, 647, 794 P.2d 546 (1990). It is misconduct for a prosecutor to point out an accused person's failure to call a witness unless the missing witness doctrine applies. *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009).

Under the doctrine, if a party fails to call a witness to provide testimony that would properly be part of the case, the testimony would naturally be in the party's interest to produce, and the witness is within the control of the party, the jury may be allowed to draw an inference that the testimony would be unfavorable to that party. *State v. Blair*, 117 Wn.2d 479, 485–86, 816 P.2d 718 (1991). If a witness's absence can be satisfactorily

explained, however, no inference is permitted. *E.g., State v. Lopez*, 29 Wn. App. 836, 631 P.2d 420 (1981) (missing witnesses were transients who left town and could not be located).

a. Applicability the of the missing witness doctrine

If the missing witness doctrine applies, the prosecutor may comment on the defense's failure to call a witness. *Montgomery*, 163 Wn.2d at 597–98. The missing witness rule only applies in limited circumstances. *Id.*, 163 Wn.2d at 598. The inference only arises where the witness is peculiarly available to the party, *i.e.*, within the party's power to produce. In addition, the testimony must concern a matter of importance as opposed to a trivial matter, it must not be merely cumulative, the witness's absence must not be otherwise explained, the witness must not be incompetent or his or her testimony privileged, and the testimony must not infringe a defendant's constitutional rights. *Blair*, 117 Wn.2d at 489–91.

In this case, during closing, the prosecutor's argument directed the jury to infer that Wood would have contradicted Sundberg's defense and that if Sundberg's defense were true, he would have produced Wood to corroborate his story. RP at 195-96. Because the State was not entitled to that inference, which unfairly undermined Sundberg's defense, the prosecutor's argument

constitutes reversible misconduct.

Sundberg's defense rested upon his testimony that he allowed Wood to use his overalls during the job, that Sundberg did not wear them for approximately a week, and that he did not know that there was methamphetamine in the pocket until they were searched incident to an arrest on a DOC warrant. RP at 184-92. Over Sundberg's timely objection, the prosecutor improperly disparaged this defense by implying if it were true, Sundberg would have produced Wood's testimony to corroborate his story.

The prosecutor argued:

Mr. Rider testified that the--this enigmas—mysterious mystery man named Paul Wood—he might as well be called John Doe—shows up at the house and he's in his 20's. But that's inconsistent with what the defendant said. He said he was in his 40's.

Now it's the defendant's burden—and this is the reason I asked the defendant these questions. I asked him okay, tell us about Paul Wood; describe him for us, do you know him, how do you know him. He says he sees him about twice a week. He says he can get a hold of him. Why isn't he here testifying? It's their burden. He's not here.

RP at 195. Defense counsel objected and was overruled. RP at

195. The State continued:

Now let's go to the defendant. The defendant is also

inherently biased. He has a stake in the outcome. That gives him bias to lie. The testimony was obviously self-serving, it was obviously designed to tell a story to corroborate his defense. And again, it was his burden. He didn't bring in Paul Wood.

RP at 195-96.

As noted *supra*, the missing witness doctrine allows the jury to draw an inference that testimony of certain missing witnesses would be adverse to the party that logically would have called those witnesses had the party believed the testimony would be favorable. *Blair*, 117 Wn.2d at 485-86. By arguing "[w]hy isn't he here testifying?" and "[i]t's their burden," the State unquestionably asked the jury to make the missing witness inference that the witness would not corroborate Sundberg's defense.

Sundberg established several reasons why the missing witness argument was inappropriate. The inference is prohibited when "a witness's absence can be satisfactorily explained." *Blair*, 117 Wn.2d at 489 (citing *State v. Lopez*, 29 Wn. App. 836, 631 P.2d 420 (1981)). In this case, there is a substantial likelihood that any testimony in Sundberg's favor would have caused Wood to incriminate himself. See *Montgomery*, 163 Wn.2d at 599. The State's argument was improper because Wood was not available because he would have incriminated himself if he had testified that he put the methamphetamine

in Sundberg's overalls. If the witness's testimony would be favorable to the defendant but self-incriminatory to the witness, the inference is not available. *Blair*, 117 Wn.2d at 489-90. To corroborate Sundberg's story, Wood would have to admit to illegal activity that could subject him to prosecution, and therefore the missing witness inference was prohibited.

Second, the State failed to raise the missing witness issue early enough in the case to permit Sundberg to either produce the witness or explain his absence. *Montgomery*, 163 Wn.2d at 599. The State's argument was not raised until the 11th hour—after the evidence had been presented and both parties had rested---at which time Sundberg had no opportunity for rebuttal or explanation. RP at 195-96.

In addition, in order to assert the missing witness doctrine, the State would have had to prove that Wood was "peculiarly" available to the defense. *State v. Cheatam*, 150 Wn.2d 626, 653-54, 81 P.3d 830 (2003); *Blair*, 117 Wn.2d at 490- 91 (citing *United States v. Williams*, 739 F.2d 297, 299 (7th Cir. 1984)).

A witness is equally available to both parties when neither has control over the individual. *See Montgomery*, 163 Wn.2d at 598-99. In *Cheatam*, the potential alibi witness had a "community of interest" with

Cheatam because she was a member of Cheatam's family and because the defense called another witness who said the potential witness called Cheatam at his house at the time of the commission of the crime. *Cheatam*, 150 Wn.2d at 653-54. In *Blair*, this Court found this requirement satisfied because Blair claimed an ongoing business relationship with the witnesses and said he knew how to locate them. *Blair*, 117 Wn.2d at 491-92.

In this case, however, Sundberg had no ongoing relationship with Wood. He knew Wood through "some other acquaintances" and was told the Wood needed work. He did not know Wood prior to hiring him for the modular home renovation project. RP at 122. The relationship was so attenuated that Wood left before the project was completed. RP at 124. The witness was not "peculiarly available" to Sundberg when he was in no better position to locate him than the State. Therefore the inference was not proper.

b. State v. Barrow

Contrary to the State's assertion, *State v. Barrow*, 60 Wn.App.869 (1991) is not in conflict with Division Two's decision in Sundberg. In *Barrow*, the court correctly noted that in some limited circumstances it is permissible for a prosecutor to inquire into a defendant's failure to present evidence without necessarily triggering the missing witness doctrine. *Barrow*, 60 Wn.App. 872-

73. See also, *State v. Contreras*, 57 Wn.App. 471, 788 P.2d 1114, review denied, 115 Wn.2d 1014, 797 P.2d 514 (1990).

A review of the facts of *Contreras* and *Barrow* reveals that they are inapposite to the present case. In *Contreras*, the defendant testified at his trial for assault that he was with a friend, Brandy Hoskins, at the time the assault took place. However, Contreras did not call Hoskins to testify. The prosecutor questioned Contreras in cross-examination as to why Hoskins had not testified, and he also commented in closing argument about Contreras' failure to call Hoskins. *Contreras*, 57 Wn. App. at 472-73.

Contreras argued on appeal that the prosecutor's comments constituted misconduct, but the Court found no impropriety.

“When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence. The prosecutor may comment on the defendant's failure to call a witness so long as it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness's ability to corroborate his theory of the case.”

Contreras, 57 Wn. App. at 476.

In *Barrow*, law enforcement found a narcotics pipe in Barrow's pocket, but no controlled substances. The pipe contained cocaine residue. *Id.*

at 870. At trial Barrow denied having knowingly possessed cocaine and “explained that he had surreptitiously taken the pipe from his brother in hopes of using it to get high with somebody,” and that he had not known the pipe contained cocaine residue. *Id.* at 871. During closing argument, the prosecutor questioned whether the jury believed Barrow's testimony that he had taken the pipe from his brother and rhetorically asked “Where is his brother” to provide testimony to support the story. *Id.* at 871. Relying on the above referenced passage from *Contreras*, the Barrow Court noted that a prosecutor can question a defendant's failure to provide corroborative evidence if the defendant testified about an exculpatory theory that could have been corroborated by an available witness. *Barrow*, at 872, (citing *Contreras*, at 476). Because “Barrow personally testified about an exculpatory theory that could have been corroborated by his brother,” and because nothing in the record indicated Barrow's brother could not testify, the Court concluded the prosecutor's comments did not constitute misconduct. *Barrow*, at 873.

In other words, in some limited circumstances the State may inquire regarding the lack of corroborating testimony or evidence where, as in *Barrow*, the defendant affirmatively testifies about an exculpatory theory. However, as

Division Two noted in *Sundberg*, that does not make the missing witness doctrine absolute. The Court of Appeals explicitly decided *Sundberg* not on the argument that the State's argument regarding the absence of Paul Wood shifted the burden of proof, but instead that the State's argument invoked the missing witness doctrine. *Sundberg*, slip. at 7. As the Court stated, "the State may comment on the defendant's failure to call a witness only where the defendant has unequivocally implied that the missing witness would have corroborated his theory of the case." *Sundberg*, slip op. at 7, (citing *Contreras*, 57 Wn. App. at 471). Unlike *Barrow*, *Sundberg* did not testify that Wood would say that methamphetamine belonged to him or make an exculpatory statement that Wood had put the substance in his pocket. Instead, *Sundberg* testified that he let Wood wear the overalls for several days during the project, and that he did not have any idea that there were drugs in the pocket of the overalls. RP at 125, 126.

Although the State would prefer to have the present case fall within the reasoning of *Barrow*, the facts of the case clearly invoke the missing witness doctrine. The Court decided *Sundberg* on the basis of the prosecution's argument would lead the jury to infer Wood's testimony would have contradicted *Sundberg*'s defense and explicitly rejected the appellant's contention that the State's argument shifted the burden of proof. *Sundberg*, slip

op. at 5-6.

This case is distinct from *Contreras* and *Barrow* because Sundberg did not *personally testify* about an exculpatory theory. Accordingly, the prosecutor's implication that Sundberg had an obligation to produce evidence does not fall under *Contreras* or *Barrow*.

c. Request for pretrial disclosure of witnesses

The State urges this Court to adopt a rule requiring pretrial disclosure of witnesses in support an affirmative defense. The State argues the adoption of the rule is necessitated by “tribulations of trial, where the defendant surprised the prosecutor and the court with the assertion of the existence of a potential witness, the existence of whom had been concealed until disclosed to the jury during the trial itself.” Petition for Review at 10-11. Counsel submits that not only is there a paucity of authority to support the State’s bold request, but that any “tribulations” suffered by the State were entirely self inflicted by reserving its argument regarding the missing witness until closing argument. In addition, the prosecutor did not first ask the court for a missing witness instruction, but instead ambushed the defense by making the argument without prior court approval. By not seeking the instruction, the prosecutor

prevented the defense from a fair opportunity to show the court why the inference was not proper.

Moreover, The State's request is already accommodated by existing rules and case law. The State and trial court are put on notice of any intended affirmative defense at the time of omnibus hearing.

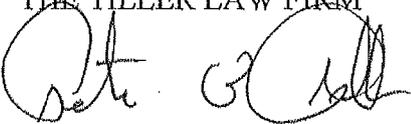
In addition, the bright line test for invocation of the missing witness rule is clearly set out in *Montgomery, Blair, Contreras* and their progeny.

The Court of Appeals correctly held the same in Mr. Sundberg's case, and this Court should affirm.

E. CONCLUSION

For the reasons set forth above, Cory Sundberg respectfully requests that this Court affirm the Court of Appeals.

DATED: November 9, 2015.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
Of Attorneys for Cory Sundberg

CERTIFICATE OF SERVICE

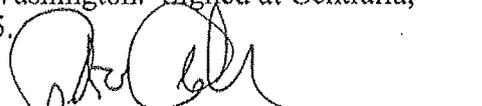
The undersigned certifies that on November 9, 2015, that this Supplemental Brief e-mailed Mr. Ronald Carpenter, Supreme Court Clerk,

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 9, 2015.



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Thank you,

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