IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PARRISH SYRON GALE, Appellant.	No. 37538-9-II UNPUBLISHED OPINION

Van Deren, C.J. — Parrish Syron Gale appeals his conviction for possession of a stolen motor vehicle,[1] arguing that the trial court erred in allowing a jury instruction and closing argument permitting jurors to infer that a missing defense witness's testimony would have been adverse to Gale. We agree and reverse Gale's conviction and remand for a new trial.

FACTS

On August 13, 2007, Kenneth Johnson borrowed a sport utility vehicle (SUV) from his father, Ronald Johnson,[2] to facilitate his move from Tacoma to Seattle. While driving home,

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[1] RCW 9A.56.068; RCW 9A.56.140; 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 77.20, at 176 (3d ed. 2008) (WPIC).

[2] Kenneth Johnson and Ronald Johnson share the same last name; for clarity we refer to them by their first names. We mean no disrespect.

At trial, Ronald testified that he loaned the SUV to his son on August 13 so that he could move to Seattle. Ronald did not give permission for anyone else to drive his vehicle.

Kenneth met two young women on the street and agreed, as a favor, to give them a ride. On the way to their destination, Kenneth stopped at his Tacoma apartment. The women remained in the vehicle to listen to music and Kenneth left the keys in the ignition. When Kenneth returned a few minutes later, the women and his father's SUV were gone. He searched the immediate area and then he reported the incident to the police.

Three evenings later, Tacoma Police Officer Kevin Wales was driving his marked police car performing routine patrol work. As Wales traveled along South 8th Street in Tacoma, he saw an SUV approaching. Wales entered the license plate number into his lap top computer and learned that the SUV had recently been reported stolen.

Wales executed a U-turn to follow the vehicle. As he turned, he saw the vehicle turn southbound on Ferry Street. Wales also turned on Ferry Street a few seconds later and found the SUV parked haphazardly, approximately four feet from the curb with the rear of the vehicle protruding into the road. He called for additional units to the area, parked his patrol car, and checked the stolen vehicle. As he did, Gale emerged from between two nearby houses. Wales confronted Gale, who stated that he had been driving the SUV. Wales did not see any other individuals in the area.

Wales took Gale into custody. After placing Gale in the patrol car, Wales removed Gale's cellular telephone and driver's license from the SUV at Gale's request. During a search of Gale incident to his arrest, Wales found a cellular telephone charger in Gale's pocket that matched the telephone he retrieved from the stolen vehicle.

Meanwhile, a nearby resident, David Schmersal, motioned for Wales to speak with him. Schmersal explained that he saw a stranger, whom he later identified as Gale, run down his

driveway and throw something into the back of Schmersal's utility trailer. Wales investigated and found a key that Gale had hidden in the trailer and confirmed that the key fit the stolen SUV.

Wales ran Gale's name in his computer and discovered that Gale's brother had pending arrest warrants.[3] Believing that Gale's brother could be the suspect that other witnesses saw fleeing the area, Wales broadcast this information over the radio to other officers. According to Wales, Gale eventually stated that his brother was driving the vehicle. The State charged Gale with unlawful possession of a stolen motor vehicle (count I) and third degree driving while in suspended or revoked status (count II).[4]

At trial, Gale testified that he had called his close friend, Brandon Starks, for a ride. Gale had borrowed several vehicles from Starks during their friendship, even though Starks knew that Gale did not have a valid license. Starks agreed but, when Gale arrived at Starks's home, Starks loaned him the stolen SUV instead. Starks said that the SUV belonged to his girl friend and gave Gale the SUV's insurance card. Gale did not read the insurance card to determine who was shown as its owner for insurance purposes.

Gale took the vehicle, accompanied by his friend, Ariel Marino. While stopped at an intersection, Gale saw Wales's police car. He testified that Wales knew him by sight and that they made eye contact. When Gale parked the SUV, he and Marino exited the SUV and ran.

Gale testified that, after fleeing, he remembered that his license was suspended and realized that he should not be driving. To conceal the fact that he was driving, he threw the key into Schmersal's trailer. According to Gale, Wales asked him if he lived in one of the nearby

[3] Wales also learned that Gale's license was suspended.

[4] Former RCW 46.20.342(1)(c) (2004).

homes but not about the stolen vehicle. Gale admitted that he asked Wales to retrieve his belongings from the SUV but denied that he made any statements in the patrol car about his brother.

Gale also stated that, after his arrest, he confronted Starks about the stolen SUV and Starks said, "I didn't know." Report of Proceedings (RP) (Mar. 17, 2008) at 155. Gale called no other witnesses.

After both sides rested, the State proposed the following missing witness instruction: [5]

> 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.

Clerk's Papers (CP) at 30. Gale's counsel objected to this instruction, arguing that Starks was

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[5] The given jury instruction is substantially similar to WPIC 5.20:

> If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:
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> (1) The witness is within the control of, or peculiarly available to, that party;
> (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
> (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
> (4) There is no satisfactory explanation of why the party did not call the person as a witness; and
> (5) The inference is reasonable in light of all the circumstances.
>
> The parties in this case are the [State of Washington] . . . and [Parrish Syron Gale].

11 WPIC 5.20, at 177 (emphasis omitted) (some alterations in original). The given instruction only omitted language about the importance of the testimony, which, as the only corroborating evidence, is quite plain here.

not available to Gale or under his control because Starks's assigned counsel in an unrelated matter refused to allow Gale's counsel to interview Starks.

Starks's attorney had earlier withdrawn as Gale's assigned counsel in this case because she represented Starks. She testified at a hearing outside the jury's presence that she refused to allow anyone to interview Starks because she was concerned that counsel would try to make Starks incriminate himself. She believed that the State could charge Starks with unlawful possession of a stolen motor vehicle as a result of Gale's testimony. Starks had not provided her any information that triggered his Fifth Amendment[6] privilege but she refused to speculate about whether he would have exercised this privilege if subpoenaed.

Gale's counsel argued that Starks had an absolute Fifth Amendment right and that he could not call Starks as a witness because of his "lawyer's assertion of his potential fifth amendment right." RP (Mar. 17, 2008) at 190. Neither the State nor Gale's counsel subpoenaed Starks nor did he testify or appear in court

The State was unaware that Starks played any role in this case until Gale testified at trial. Based on Gale's testimony, the State maintained that Starks had no privilege because he did not know the SUV was stolen and was not the second suspect who fled the vehicle. Without evidence that Starks knew the SUV was stolen, the State argued that it could not prove a necessary element of unlawful possession of a stolen motor vehicle.

The trial court ruled that Starks was not under Gale's control but was nevertheless "peculiarly available" to him. RP (Mar. 17, 2008) at 214. Accordingly, the trial court gave the missing witness instruction. In closing, Gale's counsel asked the jury to consider the

[6] U.S. Const. amend. V.

circumstances under which Gale borrowed the vehicle from his friend. During its rebuttal closing, the State argued:

> Now, obviously the defendant has a right to remain silent. He enjoys the presumption of innocence and he has 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, that 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? Is it complete? Does it persuade you? Ask yourselves why Brandon Starks is not here to testify I loaned that car to my good friend [Gale] 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 the defendant, hey, this car is hot so be careful. Ariel knew something. He ran quickly. The defendant knew something too. He knew the car was stolen. That's why he got out of that 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.
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> Well, unfortunately the defendant couldn't get his stories straight either then or now and the fact of the matter is the defendant was all over the board.

RP (Mar. 17, 2008) at 263-64.

The jury convicted Gale as charged. Gale appeals.

ANALYSIS

Missing Witness Doctrine

Gale argues that the trial court erred by giving a missing witness jury instruction[7] and

[7] The missing witness doctrine is an evidentiary rule that applies in civil and criminal cases and to the prosecution and defense alike. *See, e.g.*, *State v. Blair*, 117 Wn.2d 479, 487-88, 816 P.2d 718 (1991); *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977); *State v. Davis*, 73 Wn.2d 271, 276-78, 438 P.2d 185 (1968); *Harold v. Toomey*, 92 Wash. 297, 299-300, 158 P. 986 (1916). Although the argument on appeal is often framed as one of prosecutorial misconduct, objection to the trial court's missing witness instruction need not be so framed. *See, e.g.*, *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008); *Blair*, 117 Wn.2d at 488. Here, neither side engages in a prosecutorial misconduct analysis; thus, we review it solely as an evidentiary ruling by the trial court.

permitting the State to argue to the jury that Starks's testimony would have been adverse because it violated Gale's constitutional right to a fair trial.[8] Specifically, Gale maintains that, where counsel for a potential defense witness refuses to allow the witness to cooperate based on Fifth Amendment grounds, the witness is not under the control of or peculiarly available to the defendant and, therefore, the trial court cannot apply the missing witness doctrine.[9] The State contends that, because Gale did not subpoena Starks[10] and Starks did not invoke his privilege, we can only speculate about what he would have done. Moreover, the State argues that Starks was peculiarly available to Gale because the State had no knowledge of Starks until Gale's trial testimony.[11] We agree with Gale.

A. Standard of Review

We review a trial court's choice of jury instructions for an abuse of discretion. *State v. Douglas*, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005). But we review de novo "whether legal error in jury instructions could have misled the jury." *State v. Montgomery*, 163 Wn.2d 577, 597,

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[8] U.S. Const. amend XIV, § 1; Wash. Const. art. I, § 3.

[9] Gale points out that Starks's counsel was also assigned as Gale's counsel in this case before she discovered the conflict and withdrew. Gale argues that we should determine Starks's likelihood of self-incrimination in light of (1) counsel's decision to prohibit access to Starks and (2) counsel's unusual and clear understanding of what was at stake should Starks testify. Gale also notes the movement nationwide to abandon use of the missing witness inference against criminal defendants. But our Supreme Court has not done so and we are bound to follow its guidance. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006).

[10] Gale did not subpoena Starks because of the "commonly-held rule of trial practice never to call a witness to testify if the attorney does not know [what] the witness will say." Reply Br. of Appellant at 6.

[11] We agree with the State that Starks did not establish a Fifth Amendment privilege. But the missing witness doctrine does not require such a showing. *See State v. Gregory*, 158 Wn.2d 759, 845-46, 147 P.3d 1201 (2006); *State v. Dixon*, 150 Wn. App. 46, 55, 207 P.3d 459 (2009).

183 P.3d 267 (2008).

B. Control over Missing Witness

"A criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise." *Montgomery*, 163 Wn.2d at 597; *see State v. Toth*, No. 38223-7-II, 2009 WL 3086492, at *2 (Wash. Ct. App. Sept. 29, 2009). The missing witness doctrine permits the jury to scrutinize the defendant's theory of the case just as it does the prosecution's theory. *Montgomery*, 163 Wn.2d at 598. "The State may point out the absence of a 'natural witness' when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable." *Montgomery*, 163 Wn.2d at 598 (quoting *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991)). Such an argument does not necessarily shift the State's burden of proof and the State may argue this inference to the jury under proper circumstances. *Montgomery*, 163 Wn.2d at 598; *Blair*, 117 Wn.2d at 491.

But "limitations on the missing witness doctrine are particularly important when, as here, the doctrine is applied against a criminal defendant." *Montgomery*, 163 Wn.2d at 598. The State may argue this inference only if (1) the missing witness is peculiarly under the defendant's control, not equally available to the State; (2) the defendant does not satisfactorily explain the witness's absence; (3) the inference would not infringe on a defendant's constitutional right to silence or shift the burden of proof; and (4) the witness's testimony would be material and not

cumulative.[12] *Montgomery*, 163 Wn.2d at 598-99. The presence of any one of these considerations is sufficient to preclude use of the missing witness instruction or argument by the State. *Blair*, 117 Wn.2d at 488-90.

A witness is equally available to both parties when neither has control over the individual. *See Montgomery*, 163 Wn.2d at 598-99. We determine availability "based upon the facts and circumstances of that witness's 'relationship to the parties, not merely physical presence or accessibility.'" *State v. Cheatam*, 150 Wn.2d 626, 653, 81 P.3d 830 (2003) (internal quotation marks omitted) (quoting Thomas E. Zehnle, *Genie in a Bottle*: *Using the Missing Witness Instruction*, 1998 A.B.A. Sec. Crim. Just. 13, 3 at l6. Availability means more than being subject to either side's subpoena power:

> "[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 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."

Cheatam, 150 Wn.2d at 653 (internal quotation marks omitted) (quoting *Blair*, 117 Wn.2d at 490). Special relationships bearing the type of mutual interests that make a would-be witness available include those between family members and codefendants. *See Montgomery*, 163 Wn.2d at 604 (J.M. Johnson, J, concurring); *State v. Cozza*, 19 Wn. App. 623, 627, 576 P.2d 1336 (1978). Here, we hold that Starks was equally available to the State and not peculiarly under Gale's control and that Gale satisfactorily explained Starks's absence to the trial court. These factors are dispositive.

[12] We further note that if Starks had testified for the defense, his testimony would have been material and not cumulative because it could have corroborated Gale's story and he would have been the only defense witness besides Gale; nor would it have violated Gale's constitutional rights or shifted the burden of proof.

Several cases discuss the application of the missing witness instruction. *Blair* demonstrates a situation where the witnesses were peculiarly available to the defendant. 117 Wn.2d at 491. Police arrested Daniel Blair for unlawful delivery of a controlled substance. *Blair*, 117 Wn.2d at 481. While executing a search warrant in Blair's home, officers found slips of paper with handwritten names and notations. *Blair*, 117 Wn.2d at 482. A prosecution witness testified that these items constituted a business ledger for drug transactions with some notations including only a first name. *Blair*, 117 Wn.2d at 482-83, 490. Blair admitted that some entries involved drug transactions but testified that most represented merely personal loans or money won playing cards. *Blair*, 117 Wn.2d at 482-83. Blair called only one witness listed on these slips of paper to corroborate his story. *Blair*, 117 Wn.2d at 483. In closing, the State pointed out that the remaining witnesses did not testify that they owed Blair gambling debts. *Blair*, 117 Wn.2d at 483. Blair did not object, but claimed on appeal that this argument constituted prosecutorial misconduct. *Blair*, 117 Wn.2d at 484. Our Supreme Court disagreed, holding that the State did not commit prosecutorial misconduct and that the missing witness doctrine could properly be invoked because the witnesses, all personal and business acquaintances known only to Blair and identified solely by first name, were peculiarly available to him. *Blair*, 117 Wn.2d at 490-92. The court also noted that "there [wa]s no indication that any of the uncalled witness[es'] testimony, if *favorable* to the defense, would be self-incriminatory." *Blair*, 117 Wn.2d at 490.

State v. Gregory, 158 Wn.2d 759, 845-46, 147 P.3d 1201 (2006), illustrates when the missing witness instruction is unavailable because self-incrimination is likely. In *Gregory*, the State remarked in closing that, although Allen Gregory suggested that the decedent's former boy friend, Mike Barth, was actually responsible for aggravated first degree murder, Gregory did not

call Barth to testify at trial. 158 Wn.2d at 777, 845. On review, our Supreme Court held that "[t]he missing witness doctrine would not apply here where, if Barth's testimony were favorable to Gregory, it would have incriminated Barth." *Gregory*, 158 Wn.2d at 846. Although ruling the State's argument improper, the court ultimately held that the remarks did not prejudice Gregory and thus did not constitute prosecutorial misconduct. *Gregory*, 158 Wn.2d at 846.

In *State v. Carter*, 74 Wn. App. 320, 323-24, 875 P.2d 1 (1994), *aff'd on other grounds*, 127 Wn.2d 836, 904 P.2d 290 (1995), Division One dealt with a case involving similar facts where the missing witness's counsel said that the witness would invoke her Fifth Amendment privilege at the defendant's trial. Police arrested Nicole Carter and another woman, Sonya Smothers, after they sold cocaine to an undercover officer in a drug operation. *Carter*, 74 Wn. App. at 322-23. The State charged both Carter and Smothers with delivery of a controlled substance and Smothers pleaded guilty. *Carter*, 74 Wn. App. at 323. Smothers's attorney told Carter's counsel that Smothers would invoke her Fifth Amendment privilege and refuse to testify at Carter's trial. *Carter*, 74 Wn. App. at 323. Carter moved to continue her trial until after Smothers's sentencing and the trial court granted this motion, agreeing that the witness would retain her privilege against self-incrimination until after sentencing. *Carter*, 74 Wn. App. at 323-24. The trial court granted Carter several continuances to permit her additional time to obtain Smothers's testimony who, because she failed to appear, had not been sentenced. *Carter*, 74 Wn. App. at 324. On Carter's final trial date, she requested another continuance because Smothers had again failed to appear for sentencing and the trial court issued the material witness warrant for Smothers but denied Carter's motion to continue. *Carter*, 74 Wn. App. at 324.

At trial, Carter argued that police mistook her for another woman who, with Smothers,

actually sold drugs to the officer. *Carter*, 74 Wn. App. at 324. Carter testified that she was at the motel only to pick up Smothers on the way to meet a date. *Carter*, 74 Wn. App. at 324. No other witnesses testified to confirm Carter's story. *Carter*, 74 Wn. App. at 324. In closing, the State commented, "Conveniently, nobody is here to — there's Sonya, certainly. . . . She's unobtainable by any party. Maybe she would have come in here and taken the fall for her friend, but she's not present." *Carter*, 74 Wn. App. at 331. The trial court overruled Carter's objection and the jury found Carter guilty as charged. *Carter*, 74 Wn. App. at 324, 332.

Carter argued on appeal that because she adequately explained Smothers's absence, the State's closing argument constituted prosecutorial misconduct. *See Carter*, 74 Wn. App. at 330-32. Citing *Blair*, Division One ruled that Carter indeed gave a satisfactory explanation because she "tried to produce Smothers for trial but was unsuccessful." *Carter*, 74 Wn. App. at 332. It held that the missing witness inference instruction was improper under the circumstances, but that Carter could not demonstrate prejudice arising from the prosecutor's wrongful invocation of the instruction. *Carter*, 74 Wn. App. at 332.

Montgomery, addressed a defendant's control over and explanation for missing witnesses. 163 Wn.2d at 599. Police arrested Virgil Montgomery for possession of pseudoephedrine with intent to manufacture methamphetamine. *Montgomery*, 163 Wn.2d at 583. Although Montgomery and his friend had just purchased most of the ingredients used to manufacture methamphetamine, Montgomery gave police several legitimate reasons for purchasing these various items.[13] *Montgomery*, 163 Wn.2d at 584-85, 587. Montgomery's daughter corroborated

[13] For example, Montgomery claimed that he purchased a gallon of acetone to repair his trailer and hydrogen peroxide to treat his dog's open wounds. *Montgomery*, 163 Wn.2d at 585-86.

some of his explanations but his son, grandson, and landlord, whom he contended could provide further corroboration, did not testify. *Montgomery*, 163 Wn.2d at 596-97. While conceding that his son was not a natural witness as a result of a stroke, the State successfully argued that it was entitled to a missing witness instruction regarding Montgomery's failure to call his grandson and landlord as witnesses. *Montgomery*, 163 Wn.2d at 597.

On appeal, Montgomery argued that the missing witness inference was improper. *Montgomery*, 163 Wn.2d at 583. Our Supreme Court agreed, holding that Montgomery adequately explained why his 14 year old grandson failed to testify—he was in school during trial. *Montgomery*, 163 Wn.2d at 599. The court also held that Montgomery did not control his landlord, noting that "few tenants believe they control their landlords."[14] *Montgomery*, 163 Wn.2d at 599.

Finally, in *State v. Dixon*, 150 Wn. App. 46, 55, 207 P.3d 459 (2009), we addressed circumstances relating to control over a potential witness. Police arrested Corinne Dixon for driving with a suspended or revoked license. *Dixon*, 150 Wn. App. at 49. In a search incident to arrest, the officer found drugs in Dixon's purse. *Dixon*, 150 Wn. App. at 49. Dixon had a male passenger in her car who denied that the drugs were his. *Dixon*, 150 Wn. App. at 51. The officer did not record the passenger's name. *Dixon*, 150 Wn. App. at 51. At trial, Dixon declined to testify and her counsel argued in closing that a question remained about whether she actually had control over her purse. *Dixon*, 150 Wn. App. at 52. In rebuttal, the State asked the jury why Dixon never prokduced the passenger to testify. *Dixon*, 150 Wn. App. at 52. The jury convicted

[14] The *Montgomery* court restated the general rule categorizing a witness's self-incriminating testimony as a satisfactory explanation for his or her absence, "if the witness is not competent or if testimony would incriminate the witness, the absence is explained and no instruction or argument is permitted." 163 Wn.2d at 599.

Dixon of unlawful possession of methamphetamine and bail jumping (for her pretrial failure to appear). *Dixon*, 150 Wn. App. at 52.

Dixon argued on appeal that the missing witness argument constituted prosecutorial misconduct. *Dixon*, 150 Wn. App. at 53. Our court agreed. *Dixon*, 150 Wn. App. at 55. Noting that Dixon did not unequivocally imply that her male passenger would have corroborated her trial theory, we held that the inference was improper because the officer's guess that the two were friends insufficiently demonstrated Dixon's control over her passenger. *Dixon*, 150 Wn. App. at 55. Moreover, Dixon provided two satisfactory explanations for the witness's absence. *Dixon*, 150 Wn. App. at 55. First, neither party could locate this witness for trial and, second, "there [was] a substantial likelihood that any testimony in Dixon's favor would have caused the passenger to incriminate himself." *Dixon*, 150 Wn. App. at 55.

Here, the situation is similar to those in *Montgomery*, *Carter*, and *Dixon*. Like *Montgomery*'s absent landlord and *Dixon*'s missing passenger, we cannot say that Gale had any control over Starks where, through his lawyer, he steadfastly refused to cooperate. To obtain witness testimony, Gale need not have sought multiple continuances, as did Carter, or a material witness warrant. *See Carter*, 74 Wn. App. at 324. While Gale and Starks were friends at one time, this record reveals no community of interest or ongoing special relationship where Gale could count on Starks to appear and testify for him. *See Cheatam*, 150 Wn.2d at 653. Starks's testimony may have corroborated Gale's testimony, but we will not penalize Gale in his criminal trial where no bonds of affection existed between him and the recalcitrant missing witness. Although this case bears some similarity to *Blair*, given the State's inability to determine which defense witness might corroborate a defendant's testimony, we nevertheless conclude in this

instance that Starks was equally unavailable to Gale and the State. *See* 117 Wn.2d at 490-91.

Although the trial court characterized the "control" limitation on the missing witness jury instruction as a two part test, we conclude that it is not. RP (Mar. 17, 2008) at 213-14. A relationship must be demonstrated that makes the missing witness subject to the defendant's control such that the defendant could produce that witness at trial and it is unlikely that the State could produce the same witness.[15]

Accordingly, we hold that Gale did not control Starks under these circumstances and Starks was not "peculiarly available" to Gale. Thus, the trial court erred by giving the missing witness jury instruction and allowing the State to argue the inference that Starks was a witness who would have given evidence adverse to Gale.

C. Harmless Error

Having made this determination, we consider whether these errors were harmless under the facts of this case. An erroneous jury instruction may be harmless only if the jury instructions nevertheless explained the State's burden and "'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.'" *Montgomery*, 163 Wn.2d at 600 (alteration in original) (internal quotation marks omitted) (quoting *State v. Carter*, 154 Wn.2d 71, 81, 109 P.3d 823 (2005)). This analysis turns on the specific facts of a case. *Carter*, 154 Wn.2d at 81.

Here, the evidence suggested that Gale knew that the vehicle was stolen but also that he

[15] We note that this lack of control also gave Gale an adequate explanation for Starks's absence. *See State v. Lopez*, 29 Wn. App. 836, 839, 840-41, 631 P.2d 420 (1981). In *Lopez*, the State gave a satisfactory explanation for not producing two transient witnesses where it contacted them, could not initially subpoena them for lack of a trial date, explained their duty to remain in contact, and ultimately could not find them for trial after they left town. *See* 29 Wn. App. at 838-39, 841.

did not want to be cited for driving with a suspended license. From the moment Gale encountered Wales's police car at the intersection, he paid close attention to the officer's actions, consistent with a desire to not get caught driving with a suspended license. When Wales turned around, Gale immediately turned onto another road and hastily pulled the vehicle over, leaving it partly in the street; Gale and his passenger then fled on foot. He testified that, after he fled the vehicle, he tried to hide the key so it would not be found on his person and he would not be arrested for driving with his license suspended.

We compare these facts with *Montgomery*, where our Supreme Court found error was reversible because the defendant's intent to manufacture methamphetamine was tenuous and the prosecutor referred to missing witnesses in closing. *See* 163 Wn.2d at 600. We cannot say that, beyond a reasonable doubt, the jury instruction and prosecution's closing argument here were harmless.

We reverse Gale's conviction for possession of a stolen motor vehicle and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Houghton, J.

Bridgewater, J.