

## “Missing Witness Abuse”

By: Monte E. Hester; June 2008

Our Supreme Court, in an opinion filed May 15, 2008 and authored by Justice Chambers, State v. Montgomery, Docket #79564-9, found that the trial court’s giving of a missing witness instruction, followed by the State’s argument regarding the missing witnesses, was an abuse of discretion which was not harmless.

During his testimony the defendant described his conduct, giving an innocent explanation to all of his acts. In doing so, he indicated that his grandson and landlord were witnesses to certain aspects of his conduct. Neither were called as witnesses. The prosecution requested a missing witness instruction, which was given, and made multiple references to the missing witnesses and the instruction during its closing argument.

The Supreme Court, in a very instructive opinion, identified the significance of the error and held that the missing witness instruction is only appropriate in limited circumstances. Those circumstances are as follows:

First, the doctrine applies only if the potential testimony is material and not cumulative. Second, the doctrine applies only if the missing witness is particularly under the control of the defendant rather than being equally available to both parties. Third, the doctrine applies only if the witness’s absence is not satisfactorily explained. For example, if the witness is not competent or if testimony would incriminate the witness, the absence is explained and no instruction or argument is permitted. Finally, the doctrine may not be applied if it would infringe on a criminal defendant’s right to silence or shift the burden of proof.

In applying the doctrine to the facts in Montgomery, the Court found that the grandson’s absence was explained because he was 14 years old and in school. Furthermore, the defendant on direct did not assert that the grandson would provide corroborating testimony; it was the prosecution that asked on cross if the grandson could provide corroboration.

The Court is to be applauded for its sensitivity in this matter which is so important to the right of a defendant not to testify and keep the prosecution from switching the burden of proof from the State to a defendant.

The Court indicated that a landlord is not under the control of a tenant and that the prosecution hadn’t raised the landlord as a missing witness until after both side had rested, which eliminated the potential of the defendant evidencing an explanation of the landlord’s absence as a witness.