NO. 100057-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GUANG ZHENG AND DAN YU,

Petitioner.

Petition for Review

STATE'S ANSWER

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I. INTRODUCTION

The Petitioners/Defendants owners of a massage business were investigated for human labor trafficking where it was discovered that they procured non-English speaking employees through Los Angeles, housed them in tight quarters, transported them between work and the employer-leased apartments, and created no tax documentation or ledger of their wages. The Defendants knew their employees were not licensed to provide massage and needed to be licensed in the state of Washington. Nevertheless, they instructed them to perform foot and body massages and paid them only by the massage.

The Defendants were charged as accomplices in the unlicensed practice of massage and have been convicted of felony offenses. They assert that they should have been charged only with the misdemeanor offense of knowingly or negligently permitting employees to practice without a license. The statutes are not concurrent where merely permitting another to practice without a license within one's premises does not establish

liability for unlicensed practice either as a principal or an accomplice. The lesser penalty is appropriate for the owner who turns a blind eye but does not direct or cause the crime so as to rise to the level of complicity.

II. RESTATEMENT OF THE ISSUES

A. Have the Defendants identified any conflict with a published case?

B. Have the Defendants identified any RAP 13.4(b) consideration in their discussion of legislative intent?

III. STATEMENT OF THE CASE

The Defendants/Petitioners Guang Zheng and Dan Yu have each been convicted in a stipulated facts trial of four misdemeanor counts and four felony counts of complicity with the unlawful practice of massage. CP 72-81, 84-88; 187-96, 199-203.

From 2015 to 2018, the Lakewood Police Department investigated the Defendants and the massage business, Treat Your Feet, which the Defendants owned and managed. CP 8, 10, 65-66, 134, 136, 180, 181. Mrs. Yu and her husband Zheng met

and greeted customers, discussed services, escorted customers to the massage rooms, and procured payment. CP 8, 134. Employees provided the massages. CP 66, 181. The Defendants knew that none of their employees were licensed to practice massage. CP 9, 68-70, 135, 183-85.

The Defendants obtained their employees through a Los Angeles employment agency. CP 68-70, 183-85. They housed their employees in crowded quarters (seven employees in two bedrooms) with mattresses upon the floor. CP 65, 69, 180, 184. They transported employees between the apartments and business. CP 8, 66, 134, 181.

The employees were paid only for the massages they performed and only in cash. CP 70, 185. They were not paid for janitorial and laundry services they were expected to perform. CP 68-69, 183-84. And rent was withheld from their pay. CP 69, 184.

A search warrant of the Defendants' home produced 17 firearms including a HK 9mm rifle modified to be fully

automatic with the serial number removed or destroyed. CP 9, 135. The Defendants also possessed one or more military grade sets of body armor and numerous firearm accessories including suppressors (silencers). CP 9, 135. There were no records of employment: no tax documents; no paycheck stubs; no ledger documenting services provided, salaries paid, or tax withheld. CP 67-68, 182-83.

The Defendants were charged with multiple counts of violating RCW 18.130.190 by complicity. CP 1-7, 127-33; 1RP 5-6. As charged in the informations, the basic elements of the offense are the unlawful practice of a profession specified in RCW 18.130.040. CP 1-7, 57-60, 127-33, 172-75. Massage therapy is a specified profession. RCW 18.130.040(2)(a)(4).

The Defendants filed a motion to dismiss, claiming that the State should have charged them under RCW 18.108.035 for the knowing or negligent allowance of unlicensed massage within one's business. CP 36, 152.

The prosecutor explained that the State was not alleging that the Defendants merely allowed others to practice in their establishment without a license. RP (1/11/19) at 13-14. The employees would never have violated the law on their own. *Id*. Rather the Defendants were complicit in the unlawful practice, because they directed or caused the violations to take place. *Id*. See also CP 68-70, 183-85.

Huaqing "Lucy" Chen told police through an interpreter that she did the massages because the boss "instructed" them to. CP 68, 183. Through her attorney, Yangmei "Mei" Zhang told police that she had inquired about an ad for massage therapists and was told "if she did not know how to give massage, she would be trained to do it." CP 69-70, 184-85.

> So [the Defendants] are charged as accomplices to the crime of the actual massage.
>
> They are not being charged as the owner of the business who negligently or with knowledge allowed the practice of the profession. They are charged with the actual practice of the profession.
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> …
>
> And that's the way this business -- these businesses work -- bring in folks who don't have a

> job and who don't have licenses, charge a customer $60, give the employee 20 or 30, and let them earn their tips. Take the rest of the money for the house. So when -- when the State charged – I'm fully aware of both of these statutes, and I know that I could charge -- and, quite frankly, I believe I could add counts against the owners for actually the misdemeanor/gross misdemeanor statute where they also with negligence and -- with knowledge and with criminal negligence allowed for that to happen. So they could, in theory, be charged both as the owners who were allowing it to happen and also as the manager and owner who were actively making it happen. What I'm suggesting to you is without the defendants' involvement, none of the women who were giving massages at this place could have been giving them because they were sent their clients by the defendants -- and in particular Mr. Zheng working at the manager at the front counselor, but also on occasion Ms. Yu.

RP (1/11/19) at 13-14.

When the motion to dismiss was denied, the Defendants agreed to a stipulated facts trial on fewer charges. CP 57-64, 118-22, 172-79, 233-37. The court convicted the Defendants on the amended information. CP 65-70, 107-17, 180-85, 222-32. The Defendants were sentenced to credit for the one day served with conditions that they not contact their former employees or

be involved with the massage industry. CP 72-81, 84-88, 187-96, 199-203.

The court of appeals affirmed their convictions.

IV. ARGUMENT

A. The Published Opinion does not conflict with *Elliott*, which only held that the accomplice liability is always a "general" statute because it does not in itself prohibit any conduct but only defines complicity as a theory of liability.

A party seeking review must establish a condition under RAP 13.4(b). The Defendants assert a consideration under RAP 13.4(b)(2), i.e. that the published opinion conflicts with another court of appeals' opinion. Petition at 15 (referencing *State v. Elliott*, 54 Wn. App. 532, 774 P.2d 530 (1989), *aff'd,* 114 Wn.2d 6, 785 P.2d 440 (1990)). In fact, there is no conflict.

The published opinion references the *Elliott* case a single time.

> As an initial matter, we reject Zheng and Yu's contention that we do not consider the requirements of accomplice liability in determining what elements the State would need to show in this case to obtain a conviction under the gross misdemeanor/felony statute. Rather, we follow

> Division One's approach in *State v. Elliott*, 54 Wn. App. 532, 534-35, 774 P.2d 530 (1989). There, Division One applied the general-specific concurrency test and included the elements of accomplice liability in assessing what the State needed to prove to convict the defendant of being an accomplice to prostitution. *Id.*

Pub. Op. at 7.

The Defendants claim that, in considering the crime as it was actually charged, the court of appeals "added" an element. Petition at 15; CP 1-7, 127-33 (charged under the theory of complicity). The court disagreed. Complicity is simply a theory of liability and not a crime unto itself. Whether a crime (any crime) is committed as the principal or an accomplice, the liability is the same. RCW 9A.08.020. Complicity alone (unattached to any other statute) will always be the more general statute. *Elliott*, 54 Wn. App. at 535. It does not add an element.

The Defendants argue that the holding in *Elliott* was that a "defendant could not add accomplice liability to try to fit within the general statute." Petition at 15. This is incorrect. The *Elliott* court specifically looked at the accomplice liability statute,

because that is the statute which the defendant alleged to be the more specific statute. The opinion found the accomplice liability statute was not a specific statute, but a general statute. *Elliott*, 54 Wn. App. at 535.

The Defendants complain that the published opinion is the "reverse" of *Elliott*. Petition at 16. It is not. *Elliott* compared the accomplice liability statute to the statute criminalizing the promotion of prostitution. Zheng and Yu did not ask the court to consider the accomplice liability statute alone or even at all. The only value of *Elliott* to our discussion is that which the court of appeals identified: it is not offensive to consider accomplice liability when comparing two other statutes, because accomplice liability is always more general, never more specific. It does not add an element.

The general-specific rule applies only when two statutes are concurrent. Pub. Op. at 5 (citing *State v. Numrich*, 197 Wn.2d 1, 13, 480 P.3d 376 (2021)). RCW 18.130.190(7) and RCW 18.108.035 are not concurrent statutes. Pub. Op. at 8. The

former statute prohibits the *practice* of massage without a license. The other prohibits defendants who *own* a business from *permitting* another to practice massage without a license therein. Each statute has different elements not included in the other. Neither is a subset of the other. *See also* Pub. Op. at 8, n.2. One can practice massage without owning a business. And one can knowingly or negligently permit another's unlawful practice without oneself practicing unlawfully.

Because the Defendants were not the principals in the practice of massage without a license, they should want the courts to consider complicity. This allows the courts to consider the closer question of whether complicity is equivalent to allowing or permitting. It is not. Complicity is more than simply allowing another to act. An accomplice actively promotes or facilitates the unlawful practice by soliciting, commanding, encouraging, requesting, or aiding. RCW 9A.08.020(3). Therefore, whether charged as principals or accomplices, the

unlawful practice of massage is not concurrent with the allowing another's unlawful practice of massage within your business.

The Defendants have not identified a conflict with a published case.

B. The prosecutor's charging decision does not offend legislative intent where the Defendants' conduct was not fully described in the lesser offense.

The Defendants argue that the Legislature did not intend for the Defendants' conduct to be prosecuted as a felony. Petition at 11-12, 16-18. They do not identify how this allegation satisfies a consideration under RAP 13.4(b). It does not.

"The general-specific rule is a means of answering the question, Did the legislature intend to give the prosecutor discretion to charge a more serious crime when the conduct at issue is fully described by a statute defining a less serious crime?" *State v. Albarran*, 187 Wn.2d 15, 26, 383 P.3d 1037, 1042 (2016) (emphasis added). Here the Defendants' conduct was not fully described in the lesser statute. The facts did not describe that the Defendants merely permitted unlicensed

massage within their premises. The Defendants directed and caused that practice to take place. Their employees came to Washington expecting that their employers would train them and assist them to become licensed. Zheng and Yu did not do this. Rather they demanded that their employees practice massage without training or a license in order to pay the Defendants rent. The Defendants did not merely *allow* the crime to take place within their business; they *caused* it to take place.

The Defendants argue that RCW 18.108.035 expresses the legislative intent to treat massage business owners more leniently than health care practitioners and owners of other health care businesses. Petition at 11-12. This is not what the various statutes reflect. The statutes criminalize behavior, not status.

No RAP 13.4(b) consideration is present.

V. CONCLUSION

The State respectfully requests this Court deny review where no consideration under RAP 13.4(b) is present.

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RESPECTFULLY SUBMITTED this 7th day of September, 2021.

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9-7-21 *s/Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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