No. 43720-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

DANIEL HOLCOMB,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: _____
JASON F. WALKER
Deputy Prosecuting Attorney
WSBA #44358

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **Defendant's right to a unanimous jury verdict was not violated by the court's instruction regarding accomplice liability (response to assignment of error No. 1).**

2. **Washington's accomplice liability statute is not impermissibly overbroad (response to assignment of error No. 2).**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

On February 22, 2011 Charles Burnett and his girlfriend, Jennifer Mingler, had just arrived home and Mr. Burnett was out on the front porch. (RP 70.) While Mr. Burnett was standing outside, two men came up to him and began a conversation. (RP 72.) Jennifer Mingler was standing on the deck at this time. She observed that both men had stick-type weapons, and both men struck Mr. Burnett. (RP 73.) Mr. Burnett was injured and fell to the ground, but he managed to pull out his pistol and shoot. (RP 94.) Daniel Holcomb, hereinafter Defendant, fell to the ground. *Id.* The other man ran off. (RP 74.)

Hoquiam Police were called to the scene. (RP 6.) They observed Defendant lying on the ground with a wooden stick next to him. (RP 7.) Defendant had been shot. As a result of this incident, Charles Burnett suffered injuries to his forehead and cheek. (RP 96.)

A mixture of DNA profiles were obtained from the wooden stick. (RP 41-42.) One of the profiles matched Defendant. (RP 42.) A jury convicted Defendant of Assault in the Second Degree.

ARGUMENT

1. Defendant's right to a unanimous jury verdict was not violated by the court's accomplice liability instruction.

Prosecutors need not plead, and juries need not decide, how a defendant participated in a crime because there is no distinction between accomplice and principle liability in Washington law. In repeated cases the Washington Supreme Court has recognized that a defendant's constitutional jury trial right is not implicated by the accomplice liability statute. These decisions were explicitly based on the state constitution so Defendant's proposed *Gunwall* analysis is inapplicable. Defendant's right to a unanimous jury verdict was not violated.

a) Washington juries are not required to decide between principle and accomplice because there is no distinction between the two under Washington criminal law.

Defendant claims that his constitutional right to a unanimous jury verdict was violated because the trial court did not ask the jury to decide how Defendant participated in the crime. It is a long-settled matter of Washington law "that every person concerned in the commission of a felony, whether he directly commits the act constituting the offense or aids and abets in its commission, is a principal and shall be proceeded against and punished as such." *State v. Carothers*, 84 Wash.2d 256, 260-61, 525 P.2d 731 (1974) *disapproved on other grounds by State v. Harris*, 102 Wash.2d 148, 153–54, 685 P.2d 584 (1984). *Carothers* was the first in a line of cases on this issue, and subsequent cases have affirmed the point of

law. "[I]t is not necessary that jurors be unanimous as to the manner of an accomplice's and a principal's participation as long as all agree that they did participate in the crime." *State v. Hoffman*, 116 Wash.2d 51, 104, 804 P.2d 577 (1991).

The *Carothers* and *Hoffman* decisions were more recently affirmed in *State v. Haack*. In *Haack* the defendant and his brother broke into the apartment of one Ernie Castro and assaulted him with a knife. *State v. Haack*, 88 Wash.App. 423, 426, 958 P.2d 1001 (1998). At trial the "to convict" jury instructions were modified to read "That… the defendant *or an accomplice* assaulted Ernie Castro…" *Haack* at 427 (emphasis supplied.) The jury convicted and the defendant appealed, claiming that this modification to the jury instruction deprived him of his right to a unanimous jury verdict because the jury might not have agreed on the way he participated in the crime.

The court rejected the argument, citing to *Carothers* and *Hoffman* and stating that "[j]urors need only conclude unanimously that both the principal(s) and the accomplice(s) participated in the crime, but need not be unanimous as to the manner of that participation." *Haack* at 428.

In the instant case Defendant was one of two men who attacked the victim. (RP at 71-72.) The jury was instructed that an element of the crime was "[t]hat… the defendant *and/or an accomplice* intentionally assaulted Charles Burnett with a deadly weapon…" Instruction No. 8, Supp. CP. (Emphasis added). In closing argument the State argued that

the jurors did not "…have to determine whether he's [Defendant] an accomplice or the principal." (RP at 161-62.) The jury convicted.

Because the court's instructions were proper under the accomplice liability statute, as affirmed by *Carothers*, *Hoffman* and *Haack,* Defendant's conviction should be affirmed.

b) A *Gunwall* analysis is unnecessary because *Carothers* was decided on the basis of the Washington state constitution's jury trial right.

Defendant erroneously asserts that *Carothers* should not control because *Carothers* predates *State v. Gunwall* and therefore the court in *Carothers* did not have the benefit of *Gunwall* to correctly decide the issue.

A *Gunwall* analysis is used determine "whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution[.]" *State v. Gunwall*, 106 Wash. 2d 54, 59, 720 P.2d 808 (1986). However, *Carothers* was explicitly decided on the Washington state constitutional right to a jury trial. *Carothers* at 262. In *Carothers*, explaining why the issue, which was raised for the first time on appeal, was decided, said "The Court of Appeals considered and decided the question, nevertheless, since it relates to the constitutional right to jury trial. Const. art. 1, s 21; *State v. Badda*, 63 Wash.2d 176, 385 P.2d 859 (1963)." *Id.* (emphasis added, citation in original.)

Because this issue was decided on the basis of the Washington state constitution a *Gunwall* analysis is not applicable. *Carothers*' and *Hoffman*'s holdings are not antiquated or outmoded. Defendant's constitutional jury trial rights are not at issue.

c) *State v. Gifford* is inapposite and limited to its facts.

Defendant claims that *State v. Gifford* should be the recognized as somehow abrogating *Carothers, Hoffman* and *Haake* before they were even decided. However this reliance is misplaced because a) *Gifford* was decided on the basis of lack of notice, not jury unanimity and b) *Gifford* has been recognized as an unusual case that is limited to its facts.

In *Gifford* the defendant was accused of rape by information stating, "the said defendant… unlawfully and feloniously did carnally known *[sic]* one Flossie Fuller… a female child under the age of eighteen years." *State v. Gifford*, 19 Wash. 464, 465, 53 P. 709 (1898). The facts adduced at trial indicated that the defendant was actually an accomplice to the rape, that he "acted as a procurer; that he sent men to the rooms of the prosecuting witness," rather than having "carnal knowledge" of Ms. Fuller himself. *Id*. at 465. "[T]he defendant was found guilty as charged in the information, and was sentenced to the penitentiary for life." *Id*. at 464.

The Supreme Court of Washington overturned the conviction, stating that "…the indictment should have charged the Defendant with the crime of rape, 'committed as follows: By procuring,' etc." *Gifford* at 468. The court stated that the "indictment" provided no notice to the defendant,

who could not be "…called upon to blindly defend against a crime of which he had no notice." *Id.* The court never addressed how the jury in *Gifford* was instructed, or even if there was a jury at all.

The court in *Carothers* distinguished *Gifford*, saying "the prosecutor, in drawing up an information, is not bound to elect between charging a defendant as a principal or as an accessory before the fact; that he may charge all defendants as principals, except in an unusual situation such as that presented in *State v. Gifford*… the defendants are thereby put on notice as to the nature of the charge." *Carothers* at 263.

In *Gifford* the issue was purely notice, and in the instant case there is no indication Defendant lacked sufficient notice. *Gifford* is inapposite. *Carothers* and *Hoffman* are on point. Defendant's conviction should be affirmed.

d) It would be bad policy to require jury unanimity as to a defendant's level of participation because it would reward criminals whose participation in crime is obscured.

As the court in *Haack* noted, "Where several people beat up on a victim at the same time and the victim suffers great bodily injury from the beating, it may not be possible for the State to prove which person was responsible for inflicting the life-threatening injury…." *Haake* at 428. However it is still important to prosecute those who harm others. Requiring the State to prove which member of a masked group of attackers actually caused substantial bodily harm, and which merely acted as a lookout, would reward criminals for obscuring their identities when

committing crimes. When assaults occur they are often sudden and victim and witness recollection is often unclear. Washington's accomplice liability law, which does not require the State to prove each defendant's role and level of participation, is good public policy.

2. Washington's accomplice liability statute is not overbroad and Defendant's 1st Amendment rights could not be at issue because there was no speech involved in this case.

Defendant appears to argue that his 1st Amendment rights were somehow violated by the accomplice liability statute, despite recent case law to the contrary. In 2011 this court noted with approval Division One's recent holding on ths issue and held that "Agreeing with and adopting Division One's rationale in *Coleman*, we also hold that the accomplice liability statute is not unconstitutionally overbroad." *State v. Ferguson*, 164 Wash.App. 370, 376, 264 P.3d 575 (2011) (citing *State v. Coleman*, 155 Wash.App. 951, 961, 231 P.3d 212 (2010).) The Supreme Court has denied review of this issue. *State v. Coleman*, 170 Wn.2d 1016, 245 P.3d 772 (2011).

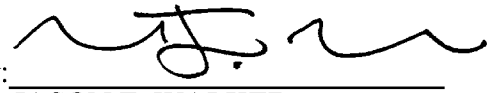
Additionally, in the instant case, there is no record of Defendant saying anything during the commission of the crime that could be construed as accomplice behavior. Because Defendant was not criminally liable for anything he said during the incident his 1st Amendment rights could not be logically implicated.

CONCLUSION

Defendant's arguments are not supported by law. Washington courts have ruled repeatedly that neither the state constitution nor the accomplice liability statute require the jury to choose and agree on a defendant's level of participation in a felony. These decisions were based on the Washington State constitution, not the federal, and so Defendant's attempt to distinguish his argument with a *Gunwall* analysis is in error. More recent decisions rule directly and clearly on Defendant's other argument; the accomplice liability statute does not violate the 1st Amendment. Defendant's free speech rights were never in contention and were most certainly not violated. This court should reject Defendant's arguments and affirm his conviction.

DATED this 5th day of June, 2013.

Respectfully Submitted,



By:_____
JASON F. WALKER
Deputy Prosecuting Attorney
WSBA #44358

JFW/ws

GRAYS HARBOR COUNTY PROSECUTOR

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