No. 100831-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARIAH JOLEENE BOUDRIEAU,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

WASHINGTON STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

The defendant committed a robbery with another person. The other person shot the victim, and the defendant took the victim's property. Based on these facts, the defendant asks this court to review three issues.

The first issue is whether the defendant is entitled to dismissal under the "law of the case" doctrine. The "to convict" instructions required the State to prove that "the defendant" committed certain acts. Another instruction said that the defendant was guilty of a crime if it was committed by an accomplice. Under a comparable combination of instructions, this court has already held that the defendant could be convicted for acts committed by an accomplice.

The second issue relates to the law of accomplice liability. The defendant claims that a person cannot be convicted if she commits *some* of the acts constituting a crime, while an accomplice commits the remaining acts.

As she acknowledges, this court has consistently held to the contrary. The legislature has acquiesced in that holding for over 35 years. Moreover, the defendant has provided no explanation of why it would make any sense to allow criminals to escape liability by dividing responsibility for the crime. The defendant has therefore not shown that the existing rule is either wrong or harmful.

Finally, the defendant claims that the charging document was insufficient because it failed to allege that force or fear was used to obtain possession of the property. The Information alleged, however, that "the defendant ... did unlawfully take personal property ... by the use or threatened use of immediate force, violence, and fear of injury." Particularly when the challenge is raised for the first time on appeal, this allegation covered the "missing" element. None of the issues raised by the defendant warrant review.

II. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied.

III. STATEMENT OF THE CASE

The facts are correctly set out in the Court of Appeals opinion.

IV. ARGUMENT

A. THIS COURT HAS ALREADY HELD THAT UNDER THE "LAW OF THE CASE DOCTRINE," A DEFENDANT CAN BE CONVICTED BASED ON ACTS OF THE ACCOMPLICE.

In her first issue, the defendant seeks to invoke the "law of the case" doctrine. Her argument turns on the unusual language in the jury instructions used in this case. Such an issue does not warrant review.

Under the "law of the case" doctrine, "the State assumes the burden of proving unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). That

doctrine does not, however, require that the "to convict" instruction be considered in isolation. When an accomplice liability instruction is given, a defendant can be convicted on the basis of an accomplice's acts. This remains true even though the "to convict" instruction only refers to acts of "the defendant." State v. Teal, 152 Wn.2d 333, 96 P.3d 974 (2004).

The defendant nonetheless argues that in this case, the State was required to prove that all of the acts constituting the crimes were committed by the defendant personally. According to the defendant, this result follows because one of the to-convict instructions included one reference to a "co-defendant." A "co-defendant" is not the same as an accomplice. Nothing in the "to convict" instructions negated the clear statement in the accomplice liability instruction: "A person is guilty of a crime if it is committed by the conduct of another person

for which he or she is legally accountable." 1 CP 81, Inst. no. 11.

The defendant claims that the instructions were unclear. Lack of clarity in jury instructions can be grounds for reversal. State v. Weaver, 198 Wn.2d 459, 465-66 ¶ 12, 496 P.3d 1183 (2021); State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). The remedy for that error is a new trial. See State v. Studd, 137 Wn.2d 533, 552, 973 P.2d 1049 (1999). The extreme remedy of dismissal does not apply to instructions that are merely ambiguous.

The defendant criticizes the Court of Appeals for treating the reference to "co-defendant" as superfluous. The defendant fails to acknowledge, however, that her interpretation of the jury instructions renders the entire accomplice liability instruction superfluous. There is no authority that the inclusion of superfluous language in a "to convict" instruction is a sufficient basis for invoking the "law of the case" doctrine.

The defendant claims that the Court of Appeals decision conflicts with State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005). That case dealt with a firearm enhancement. Because the jury instruction dealing with that enhancement did not include the phrase "or an accomplice," the State was required to prove that the defendant was personally armed. Id. at 374-75.

This holding appears to reflect a basic distinction between elements and enhancements: "When reviewing a sentence aggravator or enhancement, in the absence of express triggering language, we look to the defendant's own misconduct to satisfy the operative language of the statute." State v. Hayes, 182 Wn.2d 556, 563 ¶ 11, 342 P.3d 1144 (2015). This is because the accomplice liability statute refers to accountability for *crimes*—not penalties. State v. McKim, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982). Similarly, the standard accomplice liability instruction (WPIC 10.51) says that a person is guilty of a

crime committed by an accomplice. The instruction does not say that a person is also liable for enhancements that were solely accomplished by an accomplice. Since the present case involves the elements of a crime, the holding in Willis has no application here. There is no conflict with the decision in that case.

B. THERE IS NO BASIS FOR DEPARTING FROM THIS COURT'S CONSISTENT HOLDING THAT A PERSON CAN BE GUILTY AS AN ACCOMPLICE FOR COMMITTING SOME OF THE ACTS CONSTITUTING A CRIME, WHILE SOME OTHER PERSON COMMITS THE REMAINING ACTS.

The defendant next argues that the elements of a crime cannot be "split" among multiple participants. As she acknowledges, this court has consistently held to the contrary. See, e.g., State v. Dreewes, 192 Wn.2d 812, 924 ¶ 26, 432 P.2d 795 (2019); State v. Walker, 182 Wn.2d 463, 483, 341 P.3d 976 (2015); State v. Davis, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984). These cases can be overruled only on "a clear showing that the established rule is incorrect and harmful." In re Yates, 177

Wn.2d 1, 25 ¶ 33, 296 P.3d 872 (2013). The defendant has not made either showing.

1. This Court's Interpretation Of The Accomplice Liability Statute Is Consistent With The Legislative History Of That Statute.

To begin with, the defendant has not shown that the existing rule is clearly incorrect. This court's interpretation of the accomplice liability statute has stood unchallenged for over 35 years. The legislature has never taken any action to change that interpretation. "This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." City of Federal Way v. Koenig, 167 Wn.2d 341, 348 ¶ 12, 217 P.3d 1172 (2009).

The defendant claims that these cases were mistakenly based on cases decided under the 1909 Criminal Code. State v. Carothers, 84 Wn.2d 256, 525

P.2d 731 (1974); see State v. Moe, 174 Wash. 303, 306, 24 P.2d 638 (1933) (applying same rule). There is no indication that the 1973 Code was intended to change the prior rule. In 1970, the Judiciary Committee of the Legislative Council published the proposed criminal code, with explanations of its provisions. Legislative Council Judiciary Committee, Revised Washington Criminal Code (1970) (hereinafter "Orange Code"). In discussing the provision that became RCW 9A.08.020, the Committee made it clear that it was not intended as a major change to Washington law.[1]

The Committee began by explaining that the proposed code abolished the common law classification of "accessory." That was not, however, a change from

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[1] The discussion is attached to the Petition for Review as Appendix B. In the Orange Code, the relevant provision was numbered as 9A.08.060. It was ultimately enacted as RCW 9A.08.020. The only substantial changes involved subsection (5), which sets out

Washington law, which had "long since abolished the distinction between accessories-before-the-fact and principals." Orange Code at 45. The Committee went on to discuss the provision dealing with accomplices:

> Subdivision (3)(a), aside from language, varies from [the existing accomplice liability statute, RCW 9.01.030] only in its requirement of intent to promote or facilitate the commission of the offense. Two Washington cases on this point indicate that in spite of the lack of explicit reference to intent in the present statute, some such mental state is necessary in order to sustain a conviction under the section.

Orange Code at 45-46.

The Committee went on to discuss State v. Hiatt, 187 Wash. 226, 60 P.2d 71 (1936); and State v. Hinkley, 52 Wn.2d 415, 325 P.2d 889 (1958). It concluded:

> Putting these cases together, it is apparent that the Washington court has found some required culpable mental state to be an element of the accessorial liability set out in RCW 9.01.030, and as such, the difference in wording on this point between this new

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circumstances under which a person is not an accomplice.

> subdivision and present RCW 9.01.030 is substantially reduced. The difference which is left, as stated above, is due to the consistent use of language and principles of culpability set out in earlier sections of Chapter 9A.08.

Orange Code at 46.

Contrary to the defendant's claim, this discussion shows that the Judiciary Committee did not intend any drastic change in Washington law. Although the language of the new statute was different, the effect was largely the same. There is no indication that the Committee wanted to grant immunity for crimes in which different participants perform different roles. This court's adherence to the "split elements" rule is not clearly wrong.

2. It Is Not Clearly Harmful To Hold A Person Responsible For A Crime That She Knowingly Commits In Combination With Another Person.

Nor is there any showing that this rule is clearly harmful. Under RCW 9A.08.020(3)(a), a person can be guilty of a crime as an accomplice if she encourages or aids another person in committing it. There is no

requirement that the person personally commit *any* of the acts constituting the crime. There is no reason why a person who commits *some* of those acts should be less culpable that someone who commits *none* of them.

The defendant's proposed rule would provide a recipe for criminals to minimize their culpability. In a robbery, for example, one person could threaten or injure the victim, while another takes the victim's property. Under the defendant's theory, *neither one* would be guilty of robbery. The defendant provides no explanation of why such a rule would make any sense. The existing rule is not harmful. Rather, overruling it would be extremely harmful.

In short, there is no basis for departing from existing case law concerning accomplice liability. The defendant's request to do so does not warrant review.

C. UNDER ANY REASONABLE INTERPRETATION, THE CHARGING DOCUMENT IN THIS CASE SET OUT ALL ELEMENTS OF FIRST DEGREE ROBBERY.

Finally, the petitioner contends that the crime of first degree robbery includes an element that "[s]uch force or fear must be used to obtain or retain possession of the property." RCW 9A.56.190. She argues that the charging document was insufficient for omitting "that element." In fact, that requirement was alleged in the Information.

The Information included the following allegation:

> [T]he defendant ... did unlawfully take personal property ... by the use or threatened use of immediate force, violence, and fear of injury...

1 CP 282. To "take" property is one way of "obtaining" it. The Information thus alleged that the defendant obtained property "by the use of immediate force ... and fear."

When a charging document is challenged for the first time on appeal, it is sufficient if (1) "the necessary facts appear in any form or by fair construction on the face of the charging document" and (2) the defendant was

not actually prejudiced by any inartful language. State v. Hugdahl, 195 Wn.2d 319, 325-26 ¶ 11, 458 P.3d 760 (2020). Here, a fair construction of the Information includes an allegation that the defendant obtained property through force or fear. The defendant has not contended that the lack of more specific language resulted in any prejudice. Even if the language in RCW 9A.56.190 is considered to be an "element," the Information adequately alleged that element. Review of this issue is therefore unwarranted.

V. CONCLUSION

The petition for review should be denied.

This Answer contains 2109 words (exclusive of title sheet, table of contents, table of authorities, certificate of service, and signature blocks).

Respectfully submitted on May 12, 2022.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, MARIAH JOLEENE BOUDRIEAU, Petitioner.	No. 100831-7 DECLARATION OF DOCUMENT FILING AND E-SERVICE

DECLARATION OF DOCUMENT FILING AND SERVICE

I, DIANE K. KREMENICH, STATE THAT ON THE 12th DAY OF MAY, 2022, I CAUSED THE ORIGINAL: ANSWER TO PETITION FOR REVIEW TO BE FILED IN THE COURT OF APPEALS – DIVISION ONE AND A TRUE COPY OF THE SAME TO BE SERVED IN THE FOLLOWING MANNER INDICATED BELOW:

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wapofficemail@washapp.org;
nancy@washapp.org;

[X] E-SERVICE VIA PORTAL

SIGNED IN SNOHOMISH, WASHINGTON, THIS 12th DAY OF MAY, 2022.

DIANE K. KREMENICH
APPELLATE LEGAL ASSISTANT
SNOHOMISH COUNTY PROSECUTOR'S OFFICE

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

May 12, 2022 - 10:42 AM

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