89685-2

NO. 42865-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DERIK MAPLES,

Petitioner.

PETITION FOR REVIEW

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

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A. *IDENTITY OF PETITIONER*

DERIK MAPLES asks this court to accept review of the decision designated in Part B of this motion.

B. *DECISION*

Petitioner seeks review of each and every part of the decision of the Court of Appeals affirming the Clark County Superior Court judgment and sentence. A copy of the Court of Appeals decision is attached.

C. *ISSUES PRESENTED FOR REVIEW*

I. Is a buyer in an illegal drug transaction a "participant" in the seller's delivery under the felony-murder rule even though the buyer is not liable as an "accomplice" to the delivery under Washington law?

II. Does an objection to a trial court's ruling on a motion in limine that precludes the presentation of a valid defense preserve the error for appeal in spite of the failure to object to jury instructions which put the ruling in writing, and is a trial court's ruling which precludes the presentation of a valid defense a "manifest error affecting a constitutional right" that may be raised for the first time on appeal under RAP 2.5(a)(3)?

D. *STATEMENT OF THE CASE*

On December 1, 2009, the defendant and a friend named Justin met with a person named Aaron and agreed to go to a Minute Mart in Vancouver and sell cocaine to Aaron's friends. RP 775, 778-779, 804-809. Once at the minute mart, Aaron's two friends drove up in a vehicle and parked in a space near the area where the defendant and Justin were standing. RP 775, 778-779, 804-809. The defendant then got into the back seat of the car from the

passenger side while Justin walked around the area behind the car. *Id.* Once in the car, the defendant began a conversation with the front seat passenger. *Id.* After exchanging a few words, the defendant handed a baggie with the cocaine up to the passenger, who responded by handing over $300.00 in cash. *Id.* When the defendant looked down, he saw that the money was counterfeit. *Id.* Upon seeing this, he stated that the money was fake and tried to give the front seat passenger back the cash while at the same time trying to retrieve the baggie of cocaine. RP 778-779, 804-809. For a moment, both the defendant and the passenger had their hands on the baggie. *Id.* As they were both trying to take possession of it, the driver turned around and tried to backhand the defendant. *Id.* At this point, the defendant got out of the car and exclaimed "They robbed me." *Id.* As he got out, he believed the baggie of cocaine fell to the floor of the back seat. *Id.*

When the defendant got out and exclaimed "They robbed me," his friend Justin pulled out a handgun, stepped up to the driver's side of the car, and shot five times at the driver. RP 775-776. One shot entered the driver's skull behind his left ear and lodged in his brain. RP 376-381, 547-551. The vehicle then rolled slowly across the street and stopped when it hit a house on the other side. RP 347-350. Seeing this, the defendant and Justin fled the scene. RP 823-824. A clerk from the S&S Minute Mart looked out the window when he heard the shooting and saw the car travel slowly across the

street and stop. RP 347-450. As it stopped, he saw the front seat passenger get out, run over to the driver's side, and open the door. *Id.* When he did, the driver fell out to the ground. *Id.* The front seat passenger then also fled the scene. *Id.* The police arrived within a few minutes, and found the driver unresponsive. RP 376-381. Within a short time an aide crew arrived, examined the driver, and determined that he was dead. *Id.* A search of the vehicle uncovered $400.00 in counterfeit money and a baggie with 9.9 grams of cocaine in it. RP 312-319.

By information filed December 3, 2009, and later amended three times, the Clark County Prosecutor charged the defendant Derik Lee Maples with one count of first degree murder with an alternative charge of second degree felony murder for the killing of the driver of the car, and one count of attempted murder in the first degree with an alternative charge of first degree assault against the passenger in the car. CP 1-2, 4-5, 41-42, 137-139. Each charge and alternative included an allegation that the defendant committed the offenses while armed with a firearm. *Id.* The felony murder charge alleged the delivery of cocaine as the underlying offense and used the following language:

> That he, DERIK LEE MAPLES, AKA BABY D, DEREK LEE MAPLES, YOUNG D., in the County of Clark, State of Washington, on or about December 1, 2009, committed or attempted to commit or was an accomplice in the commission of the crime of Delivery of a Controlled Substance - Cocaine, a felony, and in the course of and in

furtherance of said crime or in immediate flight therefrom, the defendant or another participant caused the death of a person other than one of the participants: Clement Adams; contrary to Revised Code of Washington 9A.35.050(1)(b).

CP 136.

The case later came on for trial before a jury, during which the state called 13 witnesses. RP 245-900. Just prior to opening statements, the prosecutor moved *in limine* to exclude the defense from asking any questions to support a claim or arguing that the decedent was a participant in the delivery of cocaine underlying the felony murder charge. RP 228. In support of this motion, the state presented a number of cases supporting an argument that a person who receives drugs from another person is not legally an "accomplice" to that other person's delivery of the drugs. RP 228-230. The trial court accepted this argument and granted the state's motion, thereby precluding the defense from eliciting any evidence, or arguing that the decedent had been a participant in the delivery charge underlying the felony murder charge. RP 230-232. The trial court also gave the jury two instructions without defense objection which had the effect of stating that the decedent was not a participant in the underlying felony of delivery. CP 224-225. These two instructions stated:

INSTRUCTION NO. 19

A "participant" in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice.

CP 224.

INSTRUCTION NO. 20

A purchaser of controlled substances is not an accomplice in the crime of delivery of a controlled substance.

CP 225.

Following the reception of the state's evidence, the defense rested without calling any witnesses. RP 901-904. The court then instructed the jury, after which the parties presented their closing arguments. RP 930-950, 950-996. During jury deliberations, the jury sent out a note with the following question:

> Regarding instruction #20 - ~~can we get clarification as to the definition of principal~~ - the instruction names an accomplice superficially, but does not exclude a "principal" or other "participant." Can a principal ~~in the crime of~~ in purchasing still be guilty of the crime of delivery.

CP 242 (strikeouts in the original).

The court responded as follows:

> Read the instructions as a whole.

CP 242 (underlining in the original).

Following further deliberation, the jury returned verdicts of "not guilty" to Murder in the First Degree, "guilty" to Felony Murder in the Second Degree, "not guilty" to Attempted Murder the First Degree, and "guilty" to Assault in the First Degree. CP 285, 287, 289, 291. The jury also returned special verdicts that the defendant had committed the two offenses for which

they convicted him while armed with a firearm. CP 288-292.

The court later sentenced the defendant within the standard range on both counts for which he was convicted, and ordered that those sentences run consecutively under RCW 9.94A.589(1)(b). CP 553-567. The defendant thereafter appealed, arguing in part that the trial court erred when it granted the state's motion in limine to preclude the defense from arguing that the decedent was a participant to the underlying felony of delivery. *See* Brief of Appellant. By unpublished opinion field December 10, 2013, the Court of Appeals Division II affirmed the defendant's convictions. The defendant now seeks review of this decision.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b)(3), this case presents a significant question of law under both Washington Constitution, Article 1, § 3, as well as United States Constitution, Fourteenth Amendment. In addition it provides this court with an opportunity to address the rules of appellate procedure under RAP 2.5(a) to clarify (1) whether or not an objection to a state's motion in limine which precluded the presentation of a specific defense is sufficient to preserve the issue for appeal, and (2) whether or not a court's ruling precluding the presentation of a valid defense is a "manifest error affecting a constitutional right" sufficient to allow argument of the error on appeal. The following addresses these arguments.

1. A Buyer of Illegal Drugs Is a "Participant" in the Delivery under the Felony Murder Rule Even Though the Buyer Is Not Liable as an "Accomplice" to the Crime of Delivery under Washington Law.

Under RCW 9A.32.050(1)(b) the legislature defined second degree felony murder as follows:

> (1) A person is guilty of murder in the second degree when:
>
> . . .
>
> (b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants;

RCW 9A.32.050(1)(b)(in part).

In spite of its double use of the word "participant" in this statute, the legislature did not provide a specific definition for the term. However, in *State v. Toomey*, 38 Wn.App. 831, 839-840, 690 P.2d 1175 (1984), this division of the Court of Appeals held:

> In the context use in [RCW 9A.32.050(1)(b)], and by dictionary definition, [the term "participant"] obviously means another person involved in the crime – *i.e.*, another principal or an accomplice.

State v. Toomey, 38 Wn.App. 839-840.

Based upon the *Toomey* case, the Washington Supreme Court Committee on Jury Instructions adopted the following patterned instruction defining the term "participant," for the purposes of the felony murder rule. It states:

WPIC 26.04.01
Felony Murder - Participant - Definition

> A "participant" in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice. *[A victim of a crime is not a "participant" in that crime.]*

11 Washington Practice, WPIC 26.04.01.

In the case at bar, the trial court used this language when it gave Instruction No. 19, which stated as follows:

INSTRUCTION NO. 19

> A "participant" in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice.

CP 224.

As is apparent, Instruction No. 19 follows WPIC 26.04.01 verbatim. The defendant did not assign error to the trial court's use of this WPIC. However, what the defendant did argue was that the trial court's next instruction was error. It told the jury that the decedent in this case was not, by definition, a "participant" in the defendant's delivery of cocaine to the decedent and the front seat passenger. This instruction stated as follows:

INSTRUCTION NO. 20

> A purchaser of controlled substances is not an accomplice in the crime of delivery of a controlled substance.

CP 225.

The trial court based this instruction on its misapplication of the decision

in *State v. Morris*, 77 Wn.App. 948, 896 P.2d 81 (1995), in which the Court of Appeals held that the purchaser of a controlled substance should not be punished as an accomplice to the delivery pursuant to the intent of the Uniform Controlled Substances Act. The following examines this decision.

In *State v. Morris*, *supra*, the state convicted the defendant of delivery of a controlled substance upon proof that she purchased a small amount of cocaine from an undercover police officer. The defendant then appealed, arguing that under the Uniform Controlled Substances Act, a person who purchased drugs should only be punished for possession, not delivery. The state responded in part by arguing that the defendant was guilty as an accomplice to the delivery, since she had solicited the act of delivery. Although the court rejected this argument, it did not do so because the state's analysis of accomplice liability was incorrect. Rather, it did so because it was plain that under the Uniform Controlled Substances Act the legislature did not intend to punish the transferees of controlled substances as harshly as it did the transferors.

In coming to this conclusion, the court in *Morris* relied upon the earlier decision by Judge Horowitz in *State v. Catterall*, 5 Wn.App. 373, 486 P.2d 1167 (1971), which interpreted the predecessor statute to the Uniform Controlled Substances Act. The *Morris* court stated as follows concerning that decision:

> Judge Horowitz acknowledged in *Catterall* that a purchase and sale are different sides of the same transaction, that a purchaser must cooperate with the seller in order to effect a sale, and that "[a]s a matter of abstract logic, that cooperation requires that the purchaser aid or abet the seller in making the sale." Nonetheless, Judge Horowitz concluded that since the Legislature had not chosen to criminalize the purchase itself, it would frustrate the legislative intent to hold that the purchaser becomes liable through the general aiding and abetting statute. The same logic applies with full force to the Uniform Act. The Legislature defined the crime as "delivery" or "transfer" and it would frustrate that definition to impose liability on the transferee through the accomplice statute.

State v. Morris, 77 Wn.App. at 954-955 (footnotes omitted) (emphasis added).

As should be clear from the underlined portion of this quote, the court in *Morris* was not saying that a person who purchases a controlled substance is not an "accomplice" to the delivery as that term is defined in RCW 9A.08.020. Indeed, the court's decision acknowledges that the transferee of controlled substances is inevitably an "accomplice" to the delivery by the transferor. Rather, what the court is saying is that it would frustrate the intent of the legislature under the Uniform Controlled Substances Act to punish the transferee in the same manner as the transferor even though the transferee is an "accomplice" to the transfer under RCW 9A.08.020. A closer look at this statute supports this conclusion.

In RCW 9A.08.020(3)(a), the legislature has defined the term "accomplice" as follows:

(3) A person is an accomplice of another person in the commission

of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it;

RCW 9A.08.020(3)(a).

In the case at bar, the evidence presented at trial reveals that the decedent and passenger in the vehicle had contacted the defendant's friend Aaron and asked him to help them obtain cocaine. The passenger and decedent then participated in a number of telephone calls with the defendant in order to negotiate the amount, price and place for the transaction. The decedent then drove the vehicle with the passenger to the location for the sale, and tried to assault the defendant in order to keep control over the cocaine that the defendant handed the passenger. Under these facts there should be no question that both the driver and the passenger of the vehicle solicited, encouraged, and requested that the defendant commit the crime of delivery of cocaine, and that they aided in the planning of that offense. As the courts in both *Morris* and *Canterall* both recognized, they squarely fell under the legislature's definition for "accomplices" under RCW 9A.08.020.

This is precisely why the trial court and the Court of Appeals erred in the

case at bar when it instructed the jury that "[a] purchaser of controlled substances is not an accomplice in the crime of delivery of a controlled substance." This statement is erroneous because, under the accomplice liability statute, a "purchaser of controlled substances" is an "accomplice" to the crime of delivery under every alternative of the accomplice liability act. The correct statement of law under *Morris* and *Catterall* is not that the purchaser is not an accomplice to the delivery. Rather, the correct statement of law under *Morris* and *Catterall* is as follows: "The purchaser of a controlled substance is an accomplice to the delivery, however it would frustrate the purposes of the Uniform Controlled Substances Act to punish the purchaser as an accomplice to the delivery."

While it would frustrate the purpose of the legislature in the Controlled Substances Act to punish the transferee of controlled substances as an accomplice to the transferor, there is no similar frustration of legislative intent to recognize that, for the purposes of the felony-murder rule in Washington, a person who solicits and participates in the delivery of a controlled substance is an accomplice to that delivery. The purpose of the felony-murder rule is to hold those who commit felonies strictly liable for the unintentional deaths of a non-participant in the felony.[1] *State v. Leech*, 114

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[1] While the decedent in this case undoubtedly died from an intentional shooting perpetrated by Justin Tyler, the jury rejected the state's claim that

Wn.2d 700, 790 P.2d 160 (1990). In other words, the purpose of the rule is to prevent the death of innocent persons by punishing those who participate in felonious acts for the causally related unintentional death of innocent persons. *See, i.e., State v. Contreras*, 118 Nev. 332, 46 P.3d 661, 664 (2002) (Maupin, C.J. concurrent) ("To me, the fundamental purpose of the felony-murder rule is to prevent innocent deaths likely to occur during the commission of inherently dangerous felonies."); *State v. Williams*, 254 So.2d 548 (Fla.App. 1971) (purpose of the felony-murder rule is to punish the unintentional killing of innocent parties).

Had the legislature wanted to expand the felony murder rule to include liability for the unintentional death of "participants" in the underlying felony, it could easily have done so. However, the legislature chose to include the limitation that only creates strict liability for the death of those who don't participate in the underlying felony. Thus, even though it would frustrate the purpose of the legislature to punish the transferee of controlled substances as an accomplice of the transferor, it is in keeping with the intent of the legislature to preclude felony murder liability for the unintentional killing of the transferee of the controlled substances as one who was participating as an

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the defendant was an accomplice to Justin Tyler's intentional killing of the driver of the car. Thus, for the purposes of the felony murder charge against the defendant, the death of the driver was unintentional.

accomplice to the transfer. Thus, in the case at bar, the trial court erred when it gave Instruction No. 20, which precluded the defense from arguing that the decedent in this case was a "participant" in the underlying felony of delivery of cocaine, and the Court of Appeals erred when it affirmed this ruling.

2. The Defendant's Objection to the State's Motion in Limine Precluding the Presentation of a Specific Defense Was Sufficient to Preserve the Issue for Appeal and the Court's Ruling Precluding the Presentation of a Valid Defense Is a "Manifest Error Affecting a Constitutional Right" Sufficient to Allow Argument of the Error on Appeal.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense, and to argue any legally available conclusion from that evidence. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). In the case at bar, the court denied the defendant this constitutional right to present and argue a valid defense when it granted the state's motion to preclude the defendant from arguing that the decedent was a participant in the underlying felony, and when it gave the jury Instruction 20.

In this case the Court of Appeals held that the defense did not preserve this error for appeal because it failed to object to Instruction No. 20. While the court was factually correct that the defense did not object to this instruction, a ruling that the error was not preserved elevates form over function in this case. The fact is that the trial court granted a state's motion in limine which specifically precluded the defense from arguing that the decedent was a participant in the underlying felony. This was the only defense to the crime of felony murder. The defendant did not argue that he was not present, that he did not know that the shooter had the gun, or that he was not a participant in the attempted delivery. Rather, he argued from the inception of the case that he was not guilty of felony murder because the decedent was a participant in the crime.

Given the defense presented, the state's motion in limine placed the issue squarely before the court and the court's decision to grant the motion over defense objection preserved this issue for the purposes of appeal. The trial court's decision to give the proposed instruction was no more than a written memorialization of an issue already argued and lost by the defense. A second objection at that point would have been superfluous given the trial court's prior ruling. Thus, the failure to object at that point did not waive the issues. Indeed, even if the failure to object to the instruction did waive any argument from the instruction, the defense had still preserved the underlying error,

which was the trial court's ruling on the motion in limine that precluded the defense from eliciting any evidence or arguing that the defendant was not guilty of felony murder because the decedent was a participant in the underlying felony. The Court of Appeals failed to even address this error.

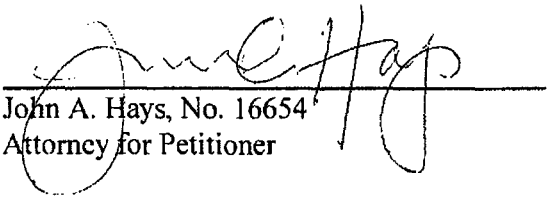
Finally, as was argued herein, a defendant has a due process right to present evidence for a valid defense and then argue that defense to the jury. The denial of this fundamental right to present a defense and argue it to a jury is a "manifest error" such that it may be raised for the first time on appeal under RAP 2.5(a). Thus, in this case, the Court of Appeals ruling that the defendant did not preserve this error for appeal is erroneous.

F. *CONCLUSION*

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeal.

Dated this 14th day of December, 2013.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Petitioner

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

WPIC 26.04.01 Felony Murder – Participant – Definition

A "participant" in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice. [A victim of a crime is not a "participant" in that crime.]

INSTRUCTION NO. 20

A purchaser of controlled substances is not an accomplice in the crime of delivery of a controlled substance.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DERIK MAPLES, Appellant.	No. 42865-2-II UNPUBLISHED OPINION

PENOYAR, J. — Derik Maples appeals his convictions for second degree felony murder and first degree assault arising from a controlled substance delivery where his accomplice fired shots into the buyers' car. He argues that (1) the trial court erred by instructing the jury that a buyer is not an accomplice to the crime of delivery of a controlled substance, (2) there is insufficient evidence to support his murder conviction, and (3) there is insufficient evidence to support his assault conviction. He also includes a statement of additional grounds (SAG), arguing that his Sixth Amendment rights were violated because the assault victim did not testify at trial. Washington courts have determined that a buyer is not an accomplice to delivery of a controlled substance and the trial court's instructions appropriately reflected that. Further, there is sufficient evidence that the shooting occurred during the course of the delivery, the shooter intended to assault the victim, and Maples was an accomplice to the assault. Finally, Maples's Sixth Amendment rights were not violated because the State did not attempt to introduce any of the witness's statements and the witness's failure to appear was not the result of State action. We affirm.

FACTS

On December 1, 2009, Aaron Scott called Maples and asked if he would sell cocaine to some of Scott's friends, Clement Adams and Tyshaun Foreman. Maples agreed and obtained $300 of cocaine from Alex Velasquez. While at Velasquez's, Maples mentioned that Scott and his friends were acting "funny" and had called Maples from a restricted number. 5 Report of Proceedings (RP) at 780. Maples asked his friend, Justin Tyler, to come with him to the sale. Tyler agreed and asked Velasquez for a gun. Maples said that he thought the gun was for "protection" and "to make sure that nothing went wrong." 6A RP at 840.

Maples agreed to meet Scott's friends at the S&S Mart in Vancouver. When Maples and Tyler arrived, Maples got into the back seat of a waiting car with Adams and Foreman. He gave the passenger, Foreman, a baggie of cocaine and Foreman attempted to give him counterfeit cash in exchange. Maples protested and attempted to retrieve the cocaine. Adams acted like he was going to hit Maples, so Maples jumped out of the car and said, "They robbed me." 6A RP at 844. Tyler then fired five shots at the car, one of which hit Adams in the head, killing him. Maples and Tyler fled.

The State charged Maples with (1) first degree murder or, in the alternative, second degree felony murder and (2) first degree attempted murder or, in the alternative, first degree assault. Before trial, the State made a motion in limine to prohibit Maples from arguing that Adams was a participant in the underlying felony, delivery of a controlled substance. It argued that a drug buyer is not an accomplice under Washington case law. The trial court did not make a clear ruling at that point, instead telling Maples, "I'm not trying to eliminate your ability to put

your theory before the . . . jury. . . . But, I think you need to be in conformity with what the State is saying about the use of the term 'participant.'" 2 RP at 231. The trial court admitted that this "doesn't give you a whole lot of direction." 2 RP at 231-32. The State then suggested that the issue could be clarified when the parties discussed jury instructions, and the trial court agreed.

The trial court later instructed the jury that "[a] 'participant' in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice" and that "[a] purchaser of controlled substances is not an accomplice in the crime of delivery of a controlled substance." CP at 224-25. Maples did not object to either instruction at trial.

The jury found Maples guilty of second degree murder and first degree assault and it returned a special verdict finding that he or an accomplice was armed with a firearm at the time of both crimes. The trial court sentenced him to a total of 456 months of confinement. Maples appeals.

ANALYSIS

I. PARTICIPANT

Maples first argues that the trial court violated his due process rights when it refused to allow him to argue that Adams was a participant in the felony underlying the murder charge. The distinction is critical because, as this case was charged, the State was required to prove that the victim was not also a participant in the underlying crime, delivery of a controlled substance. Because Washington case law holds that a controlled substances buyer is not an accomplice to the crime of delivery of a controlled substance, we affirm the trial court.

First, the trial court did not actually rule on the State's motion in limine, and Maples does not make a substantive argument in his brief about the trial court's ruling, instead focusing on jury instruction 20—"A purchaser of controlled substances is not an accomplice in the crime of delivery of a controlled substance." Appellant's Br. at 15. But Maples did not object to the challenged jury instruction at trial.

Generally, a defendant cannot raise an error for the first time on appeal. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). The purpose behind this rule is to encourage the "'efficient use of judicial resources'" by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011) (quoting *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). But, a defendant may raise particular types of errors for the first time on appeal, including "manifest error[s] affecting a constitutional right." RAP 2.5(a)(3). Here, Maples fails to argue that any of the exceptions listed in RAP 2.5(a) apply. Accordingly, he has not preserved this argument for appeal. Even assuming Maples preserved this alleged error, his argument still fails because the trial court did not err by giving instruction 20.

A person is guilty of second degree murder when he commits or attempts to commit any felony and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants. RCW 9A.32.050(1)(b). Here, the underlying felony was delivery of a controlled substance. Generally, a "participant" is "another person involved in the crime—i.e., another principal or accomplice." *State v. Toomey*, 38 Wn. App. 831, 840, 690 P.2d 1175 (1984). But Washington case law has determined that a controlled substances buyer—such as Adams—is not an accomplice to delivery. *State v. Morris*, 77 Wn. App. 948, 954-55, 896 P.2d 81 (1995) (interpreting the

delivery of a controlled substance statute and holding that that a buyer cannot be charged with delivery of a controlled substance, even as an accomplice); *State v. Warnock*, 7 Wn. App. 621, 623, 501 P.2d 625 (1972) (reasoning that, since a buyer cannot be charged with delivery, he cannot, therefore, be an accomplice to delivery); *State v. Catterall*, 5 Wn. App. 373, 376, 486 P.2d 1167 (1971) (noting that the legislature intended to treat buyers and sellers differently and holding that a buyer is not an accomplice to delivery of a controlled substance).[1] Relying on this case law, the trial court instructed the jury that a controlled substances buyer is not an accomplice to the crime of delivery of a controlled substance.

Using the courts' logic in *Catterall* and *Warnock*, it follows that Adams was not a "participant," i.e., a principal or accomplice, in the delivery of a controlled substance. We noted in *Warnock* that "'[t]he test in this state as to whether a witness is an accomplice or not is whether he could be indicted for the same crime for which the defendant is being tried.'" 7 Wn. App. at 623 (quoting *State v. Emmanuel*, 42 Wn.2d 799, 821, 259 P.2d 845 (1953)). In *Catterall* we stated, "The abettor, within the meaning of the statute, must stand in the same relation to the crime as the criminal—approach it from the same direction, touch it at the same point." 5 Wn. App. at 378 (quoting *State v. Teahan*, 50 Conn. 92, 101 (1882)). Adams could not have been indicted for delivery of a controlled substance. *See Morris*, 77 Wn. App. at 951 ("The person

[1] *Catterall* involved offenses under the repealed Dangerous Drug Act, but this court held in *Warnock* that the result would be the same under both the Dangerous Drug Act and the Uniform Controlled Substances Act because both punish possession separately from delivery. 7 Wn. App. at 622-23. Divisions 1 and 3 have held that the "purchaser-agent distinction" did not survive the repeal of the Dangerous Drug Act. *See State v. Ramirez*, 62 Wn. App. 301, 308-09, 814 P.2d 227 (1991); *State v. Sherman*, 15 Wn. App. 168, 170, 547 P.2d 1234 (1976). But those cases involved "procuring agents" rather than ultimate buyers. *Ramirez*, 62 Wn. App. at 308-09; *Sherman*, 15 Wn. App. at 170. Here, Adams did not deliver or transfer the cocaine, he only received the cocaine. Accordingly, these facts are most similar to *Morris* where we held that a buyer is not an accomplice to delivery. 77 Wn. App. at 954.

who takes control does not 'transfer' or 'deliver[,]' but accepts the transfer or delivery."). As a buyer, he did not "stand in the same relation to the crime" as the seller Maples or "approach it from the same direction." *Catterall*, 5 Wn. App. at 378 (quoting *Teahan*, 50 Conn. at 101). Although Adams's and Maples's intents were compatible—each needed the other to accomplish their respective goal—their intents were not the same.

Maples contends that the felony murder rule was designed to protect innocent persons and Adams was not innocent in this case. But Washington has applied the felony murder statute to situations where the victim was not an innocent party. For example, felony murder victims who were involved in fights that ultimately led to their deaths are not considered "participants" in the underlying assault. *See State v. Brigham*, 52 Wn. App. 208, 210, 758 P.2d 559 (1988); *State v. Langford*, 67 Wn. App. 572, 579-80, 837 P.2d 1037 (1992). Similarly, here, Adams was involved in the drug deal, but he was not an accomplice to the underlying felony, delivery of a controlled substance. Therefore, the trial court did not err when it instructed the jury that a controlled substance buyer is not an accomplice to delivery.

II. INSUFFICIENT EVIDENCE FOR SECOND DEGREE MURDER

Maples next argues that there is insufficient evidence to support his second degree murder conviction because the State did not prove that Adams was not a participant or that the shooting occurred during or in immediate flight from the cocaine delivery. Both arguments fail.

Evidence is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420-21, 5 P.3d

1256 (2000). We interpret all reasonable inferences in the State's favor. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Direct and circumstantial evidence carry the same weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Credibility determinations are for the trier of fact and are not subject to review. *State v. Cantu*, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

First, Maples argues that there is insufficient evidence that Adams was not a participant in the crime of delivery of a controlled substance. As discussed above, a buyer is not an accomplice to delivery of a controlled substance. Maples argues several facts that show Adams's involvement in the drug deal; however, none of the facts establish that Adams was acting as the seller or deliverer rather than the buyer. Therefore, there is sufficient evidence that Adams was not a participant.

Second, Maples argues that there is insufficient evidence that the shooting occurred in the course of or in flight from the crime. Because there was close proximity in distance and time between the crime and the shooting and the shooting was a result of the crime, there is sufficient evidence that it occurred during the course of the crime.

To establish that a murder occurred in the course of or in immediate flight from a felony, there must be an "intimate connection" between the killing and the felony. *State v. Brown*, 132 Wn.2d 529, 607-08, 940 P.2d 546 (1997) (quoting *State v. Golladay*, 78 Wn.2d 121, 132, 470 P.2d 191 (1970)). The murder must be in "close proximity in terms of time and distance." *State v. Leech*, 114 Wn.2d 700, 706, 790 P.2d 160 (1990). A causal connection must be clearly established between the felony and the murder such that there is "more than a mere coincidence of time and place." *Brown*, 132 Wn.2d at 608 (quoting 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.5, at 225 (1986)). When an intervening cause is

involved, courts consider whether the intervening cause was foreseeable in determining whether a causal connection exists.[2] *See Leech*, 114 Wn.2d at 704-05.

Here, there is close proximity in time and distance between the delivery and the shooting—Tyler fired shots into the car immediately after Maples handed the drugs to Foreman and while the car was still in the parking lot where the delivery occurred. There is also a causal connection between the shooting and the delivery. The shooting resulted from the delivery—Tyler shot into the car because the buyers robbed Maples during the delivery. Arguably, the robbery was an intervening cause of the shooting, but, because it was foreseeable, it does not break the causal connection. Maples's statements to police indicate that he thought a robbery might occur at the delivery. Before he left for the delivery, Maples told Tyler and Velasquez that the buyers were "acting funny," and he asked Tyler to come with him. 5 RP at 780. Maples said that they brought the gun for protection in case something went wrong. A detective asked if they brought the gun because Maples was concerned about "getting jacked," and Maples answered, "Yeah." 5 RP at 783. Accordingly, there is sufficient evidence of an "intimate connection" between the shooting and the crime.

III. INSUFFICIENT EVIDENCE FOR ASSAULT

Finally, Maples argues that there is insufficient evidence to support his conviction for first degree assault because the State failed to prove that Tyler meant to shoot at Foreman or that Maples was an accomplice to Tyler's actions. We disagree.

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[2] The *Leech* court noted that courts have required a closer causal connection when the intervening cause is a mere coincidence rather than a response to the defendant's actions. 114 Wn.2d at 705 (quoting 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.5, at 214 (1986)). Where the intervening cause is coincidental, foreseeability is required; where it is a response to the defendant's actions, the question is whether the intervening act was abnormal. *Leech*, 114 Wn.2d at 705 (quoting 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.5, at 214 (1986)).

First, Maples argues that there is insufficient evidence that Tyler intended to shoot Foreman because there is no evidence that Tyler knew there was a passenger in the car. Because the first degree assault statute does not require that the specific intent to inflict great bodily harm match a specific victim, Maples's argument fails.

A person is guilty of first degree assault if, with intent to inflict great bodily harm, he assaults another with a firearm. RCW 9A.36.011(1)(a). A person acts with intent when he acts with the objective or purpose to accomplish a result constituting a crime. RCW 9A.08.010(1)(a). Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). "Great bodily harm" means "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). An assault may be (1) an attempt to inflict bodily injury upon another, (2) an unlawful touching with criminal intent, (3) or putting another in apprehension of harm whether or not the actor intends to inflict harm. *Wilson*, 125 Wn.2d at 218 (quoting *State v. Bland*, 71 Wn. App. 345, 353, 860 P.2d 1046 (1993)). First degree assault does not, under all circumstances, require that the specific intent match a specific victim. *Wilson*, 125 Wn.2d at 218.

In *State v. Elmi*, 166 Wn.2d 209, 207 P.3d 439 (2009), our Supreme Court affirmed the defendant's convictions for first degree assault against three unintended victims. There, the defendant fired shots into a house where his estranged wife was staying with three children. *Elmi*, 166 Wn.2d at 212. The jury convicted him on four counts of first degree assault. *Elmi*, 166 Wn.2d at 213. The defendant argued that the State did not prove specific intent to assault the children. *Elmi*, 166 Wn.2d at 214. The court disagreed, holding that, where a defendant

intends to shoot into and to hit someone occupying a house or a car, he bears the risk of multiple convictions when multiple victims are present, regardless of whether the defendant knows of their presence. *Elmi*, 166 Wn.2d at 218.

Here, Maples does not dispute that Tyler fired five shots into the driver's side of the car specifically intending to inflict great bodily harm on the driver. Although Tyler may not have known of Foreman's presence, an assault may be committed by putting another in apprehension of harm, even if the actor does not intend to inflict harm. *See Wilson*, 125 Wn.2d at 218. Therefore, under *Elmi*, Tyler—and, through accomplice liability, Maples—bore the risk of assault convictions for any passengers in the car, whether or not they knew of their presence.

Next, Maples argues that there is insufficient evidence that he acted as an accomplice to Tyler's assault of Foreman. Because there is sufficient evidence for the jury to infer that Maples requested Tyler to act, we disagree.

A person is guilty of a crime committed by another if he is an accomplice to the commission of the crime. RCW 9A.08.020(1), (2)(c). A person is an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests the other person to commit the crime or aids or agrees to aid the other in planning or committing the crime. RCW 9A.08.020(3)(a). Physical presence and assent, without more, are insufficient to establish accomplice liability. *State v. Roberts*, 80 Wn. App. 342, 355-56, 908 P.2d 892 (1996).

There is sufficient evidence that Maples acted as an accomplice. Tyler was present at the drug deal only because Maples asked him to be. Maples knew that Tyler had a gun, and, in fact, Tyler brought the gun because Maples was concerned about the buyers' behavior and wanted some protection. Additionally, after Foreman attempted to pay with counterfeit money, Maples

got out of the car and told Tyler that he had just been robbed. It was reasonable for the jury to infer that this was a request for Tyler to act. Accordingly, there is sufficient evidence to support Maples's assault conviction.

IV. SAG

In his SAG, Maples argues that his right to confront his accuser was violated because Foreman did not testify at his trial. The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution to confront witnesses against him. *State v. Parris*, 98 Wn.2d 140, 144, 654 P.2d 77 (1982) (citing *Davis v. Alaska,* 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross examination." *Parris*, 98 Wn.2d at 144. Here, although Foreman did speak with police after the shooting, the State did not attempt to introduce any of his statements. Therefore, Foreman was not actually a witness against Maples and Maples's rights were not violated by Foreman's failure to appear at trial.

Further, the Sixth Amendment protects defendants from *government* interference with the right to conduct a defense. *State v. McCabe*, 161 Wn. App. 781, 787, 251 P.3d 264 (2011). Accordingly, a defendant's Sixth Amendment rights are not violated where "the obstacle to a defendant's getting what he perceives as the full benefit of his Sixth Amendment right is not government interference, but an uncooperative witness." *McCabe*, 161 Wn. App. at 787. Here, Maples's inability to confront Foreman was not due to any action or failure to act by the State or the trial court; rather, it was due to Foreman's lack of cooperation. In fact, the State obtained a material witness warrant for Foreman, but it could not locate him. Maples's argument fails.

Affirmed.

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 in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Johanson, A.C.J.

Bjorgen, J.

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