NO. 42865-2-II

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

STATE OF WASHINGTON, Respondent

v.

DERIK LEE MAPLES, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-01984-3

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 20 TO THE JURY WHERE MAPLES AGREED TO THE INSTRUCTION AND THE INSTRUCTION DID NOT PRECLUDE HIM FROM ARGUING HIS THEORY OF THE CASE AND WAS A CORRECT STATEMENT OF THE LAW.

II. THE EVIDENCE IS SUFFICIENT TO SUSTAIN MAPLES' CONVICTION FOR FELONY MURDER IN THE SECOND DEGREE.

III. THE EVIDENCE IS SUFFICIENT TO SUSTAIN MAPLES' CONVICTION AS AN ACCOMPLICE TO ASSAULT IN THE FIRST DEGREE.

B. STATEMENT OF THE CASE

1. Summary of case

This case involves an argument in a car over a baggie of cocaine. The defendant, Maples, and his accomplice, Tyler, went to the S&S Mart in Vancouver to sell cocaine to Clement Adams and Tyshaun Foreman. An argument ensued when, after handing over the cocaine, Maples discovered that Foreman had paid him with counterfeit money. Maples got out of the car, telling Tyler (whom he knew to be carrying a gun) "they robbed me." Tyler then shot five times into the car, killing the driver Clement Adams. Tyler and Maples fled. Maples was convicted of felony murder in the second degree predicated on delivery of a controlled

substance and assault in the first degree. CP 287, 291. This timely appeal followed. CP 568-570.

2. *Factual statement*

On December 1, 2009 Derik Maples' friend Aaron called him and asked him if he could sell drugs to one of Aaron's friends. RP 775. Maples agreed, but felt like Aaron was acting funny. RP 775-780. Maples got $300 worth of cocaine from Alex Velasquez to sell to Aaron's friends, whom he didn't know. RP 806, 811. Maples stood to make $40 from the sale. RP 819. At Alex's house Maples spoke on the phone to the person who he ultimately believed was the passenger in the car, and Maples thought it strange that the call came from a restricted number and that Aaron was not the one calling. RP 778, 783 840-41. Maples told Alex and another friend named Justin Tyler that he thought something funny was going on and he asked Tyler to come with him to the drug deal. RP 783. Tyler asked Alex for a gun and Alex gave him one. RP 833. Maples said the gun was for "protection." RP 840. Maples arranged for the deal to take place at the S&S Mart in Vancouver. RP 803. When Maples arrived at the S&S he got into the victims' car but Tyler didn't. RP 841-42. Maples handed the cocaine to the front passenger (Foreman) and the passenger gave him some money, but Maples immediately saw that the money was fake. RP 843. An argument ensued where Maples tried to grab the drugs

back the bag and fell down in the back seat. RP 779, 843. Maples claimed the driver turned around and made a move that looked like he was going to hit Maples, so Maples jumped out of the car and exclaimed "they robbed me" to Tyler. RP 843-44. Justin began shooting at that point, firing five shots into the car. RP 301, 844-45. After the shooting Maples and Tyler fled the scene. RP 786-88. The car began rolling forward and rolled into a house across the road. RP 355-56, 787. Clement Adams died from a single gunshot wound to the left side of his head, behind his ear. RP 547.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 20 TO THE JURY WHERE MAPLES AGREED TO THE INSTRUCTION AND THE INSTRUCTION DID NOT PRECLUDE HIM FROM ARGUING HIS THEORY OF THE CASE AND WAS A CORRECT STATEMENT OF THE LAW.

Maples claims that he cannot be convicted of felony murder because his victim, a purchaser of controlled substances, was a participant in the crime of delivery of a controlled substance. Maples argues that because a person would meet the definition of an accomplice under RCW 9A.08.020 even when he is the purchaser of drugs, the case law interpreting the Uniform Controlled Substances Act to hold that a purchaser of drugs cannot be held criminally liable for delivery of the controlled substance he purchased does not apply to felony murder with

delivery of a controlled substance as the predicate crime. Thus, he argues, the trial court erred in giving Instruction 20, which stated: "A purchaser of controlled substances is not an accomplice in the crime of delivery of a controlled substance." Maples is incorrect.

As an initial matter, Maples claims that he was denied his catch-all "right to a fair trial" because the trial court "granted" the State's motion to preclude him "from asking any questions to support a claim or arguing the decedent was a participant in the delivery of cocaine underlying the felony murder charge." See Brief of Appellant at 9. This statement from appellate counsel is, unsurprisingly, false. The court did not grant the State's motion. The court said it "agreed" with the State's position (which was that a purchaser of a controlled substance cannot be an accomplice to, or participant in, the crime of delivery of a controlled substance), but the court ultimately demurred:

> Counsel, I agree with the State on this one. But, the reason why you see a confused look on my face is that I don't know how far on the path I can go. I can say, "Yes, I agree with the State" and the Defense now knows I agree with the State. And, I'm cautioning the Defense. But, at the same time, I'm not trying to eliminate your ability to put your theory before the – the jury.
> ...
> So, you can renew the objection if he does something that crosses the line that you think is there. I realize that doesn't give you a whole lot of direction. But, I think, putting the question before I have really heard what someone is

> looking for is kind of hard for me to – to hold it to a line other than to give you a general instruction.

RP 231-32.

The prosecutor then said "Okay. Perhaps we can address that issue once we do our jury – jury instructions...Because that may clarify this." The court replied "That may be the best way to resolve it, too." RP 232. Clearly the trial court did not "grant" the State's motion, as appellate counsel claims without any regard to the actual record in this case. To the extent any part of this assignment of error is predicated on that misrepresentation, it should be disregarded.

If this assignment of error is predicated solely on the trial court giving Instruction 20, Maples has not demonstrated that this issue should be reviewed for the first time on appeal. Maples fails to mention that his counsel agreed to both instructions 19 and 20. When the court reviewed the instructions for objections and exceptions, defense counsel said this about Instruction 19: "That's good." Regarding Instruction 20, defense counsel said: "Collectively good. Next one?" RP 912. Maples was very happy to have these instructions below, calling them "good."

a. *RAP 2.5*

"The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the

presence of a 'manifest error affecting a constitutional right.' *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) and *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Robinson* at 305, *McFarland* at 333; *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). "[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources." *Robinson* at 305.

As explained in *McFarland*, supra RAP 2.5(a)(3) is "not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court." *McFarland* at 333. In order to obtain review under RAP 2.5, the error must be "'manifest,'—i.e. it must be 'truly of constitutional magnitude.'" *Id.*; *State v. Scott* at 688. To be deemed manifest constitutional error, a defendant must identify the error and show how, in the context of the trial, the alleged error actually affected the defendant's rights. *McFarland* at 333. "It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record." *Id.* at 334. Further,

if the facts necessary to adjudicate the claimed error are not adequately presented in the record on appeal, a defendant cannot show prejudice and the error is not manifest as a matter of law. *McFarland* at 333; *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). "If a court determines the claim raises a manifest constitutional error, it may still be subject to a harmless error analysis." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); *McFarland*, supra, at 333.

In this case, Maples' argument is entirely unclear. Is he arguing that Instruction 20 denied him his Sixth Amendment right to present a defense? If so, he fails to clearly articulate that. Moreover, Maples was not denied his right to present a defense. Maples did not deny that he was a purchaser of drugs rather than a seller. Rather, he argued that the jury could still find him to be a "participant" in the crime because although the jury instructions told them they could not find he was an accomplice to delivery of a controlled substance, the instructions nevertheless allowed them to find he acted as a *principal* in that crime:

> I submit to you that's your decision [whether Adams was a principal]. That's your call. Because there's no jury instruction saying the purchaser of a controlled substance is not a principal in the crime of delivery. Okay? So, I submit to you, that given the fact--not given the fact that Mr. Clement Adams was purchasing cocaine or wanted to but that Mr. Clement Adams was a major actor in this case in that he brought muscle and he brought phony money. Okay?

...

> So is he a principal? That will be your decision. I submit to you he was. And hence, I submit to you, that as a principal in this case, he was a participant. Okay? "A participant in a crime is a person who was involved in the commission of the crime either is [sic] a principal or an accomplice," Instruction 19. "A purchaser of a controlled substance is not an accomplice in the delivery." And then, we go on to 21, the definition – the 'to convict' instruction. Nothing about him not being a principal.

RP 982-83. Although defense counsel's argument strains credulity (one would need to be both sides of the coin (buyer *and* seller) in order to be a "principal," whereas one would need only be half of the coin to be an accomplice), it was nevertheless an available argument under the instructions. Instruction 20 did not deprive Maples of his ability to argue his theory of the case. He was not actually prejudiced, and he may not complain about this instruction for the first time on appeal.

Alternatively, is Maples simply arguing that Instruction 20 is an incorrect statement of the law? If so, he still hasn't proved he was actually prejudiced in the context of the trial, which he must do to be able to raise this claim for the first time on appeal. Maples appears to assume that an incorrect statement of the law in a jury instruction *automatically* denies him due process. He makes this leap without adequate argument or citation to authority. The appellate court does not consider conclusory

arguments unsupported by citation to authority. See RAP 10.3(a)(6), 10.4. "Such '[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" *State v. Mason*, 284 P.3d 155, 159 (August 2012), citing *West v. Thurston County*, 168 Wn.App. 162, 187, 275 P.3d 1200 (2012) (alteration in original) (quoting *Holland v. City of Tacoma*, 90 Wn.App. 533, 538, 954 P.2d 290 (1998).

In the context of jury instructions, the following errors have been held to be manifest constitutional error: directing a verdict, shifting the burden of proof to the defendant, failing to define the "beyond a reasonable doubt" standard, failing to require a unanimous verdict, and omitting an element of the crime charged. *O'Hara*, supra, at 100-101 (internal citations omitted). Conversely, errors such as failing to instruct on a lesser included offense or failing to define individual terms do not constitute manifest constitutional error. *Id.* Here, Instruction 20 did not constitute manifest constitutional error. Maples does not argue that Instruction 20 directed the verdict on felony murder; rather, he says that it precluded him from arguing that Mr. Adams was a "participant" in the crime of delivery of a controlled substance (which, as noted above, is not true). See Brief of Appellant at 20. This argument is not the same as arguing that the instruction directed the jury to return a guilty verdict.

The central problem is that Maples doesn't even acknowledge in his brief that he agreed to Instruction 20 (as well as Instruction 19), and that he must make certain showings in order to have this claim reviewed for the first time on appeal. He doesn't even mention RAP 2.5 in his brief, evidently hoping that this Court simply wouldn't notice his assent to this instruction. As the *O'Hara* Court observed, defense counsel could have been justified in agreeing to an instruction or failing to object to an instruction, "[t]hus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." *O'Hara* at 100. Because this claimed error did not fall under one of five categories identified by the *O'Hara* Court as manifest constitutional error, the trial court acted properly in deferring to counsel and could not have corrected this error absent an objection from defense counsel. For the reasons set forth above, this Court should decline to review this claimed error for the first time in this appeal.

b. *Instruction was not erroneous*

The crime of felony murder is defined by the predicate felony. In other words, the State must prove the predicate felony and then prove that in the course of and in furtherance of the predicate crime or in immediate

flight therefrom, the defendant or another participant caused the death of a person who wasn't a participant in the crime. *State v. Kosewicz*, 174 Wn.2d 683, 691, 278 P.3d 184 (2012). A participant in the crime is defined as one who is a principal or an accomplice. *State v. Carter* 154 Wn.2d 71, 79, 109 P.3d 823 (2005); *State v. Toomey*, 38 Wn.App. 831, 840, 690 P.2d 1175 (1984). In this case the predicate felony was delivery or attempted delivery of a controlled substance. The purchaser of drugs cannot be deemed a participant in, accomplice to, or coconspirator in the crime of delivery of a controlled substance. *State v. Catterall*, 5 Wn.App. 373, 486 P.2d 1167 (1971); *State v. Warnock*, 7 Wn.App. 621, 622-23, 501 P.2d 625 (1972); *State v. Morris*, 77 Wn.App. 948, 896 P.2d 81 (1995).

In *State v. Catterall*, 5 Wn.App. 373, 486 P.2d 1167 (1971) the Court of Appeals held that a person who drove a purchaser to a drug deal could not be convicted for aiding and abetting the delivery of a controlled substance under former RCW 9.01.030 (the former aiding and abetting statute) because under former RCW 69.40 (the former dangerous drug act), a purchaser of drugs was exempted from liability in delivery cases.[1] The State argued in *Catterall* that the defendant was liable as an aider or abettor in spite of RCW 69.40.060 because the aiding and abetting statute

[1] The Court noted that the result would be the same under the current Uniform Controlled Substances Act. *Catterall* at 376, n.2.

contained no such exception, and because the defendant was not the actual purchaser but merely a facilitator of the purchase. *Catterall* at 375-76. The Court of Appeals considered the relationship between the two statutes and held that the defendant could not be punished as an aider or abettor for facilitating the purchase of drugs under one statute (RCW 9.01.030) because such conduct was specifically exempted from criminal liability under another (RCW 69.40.060). *Catterall* at 376-77. The Court said:

> The consensual nature of the purchase-sale transaction requires that the purchaser cooperate with the seller in effecting the sale. As a matter of abstract logic, that cooperation requires that the purchaser aid or abet the seller in making the sale. If, however, the substantive statute defining the crime separates the sale transaction into its component parts, punishing only the seller and not the purchaser, then the legal consequences intended by this separation in treatment creates a problem of determining legislative intent. The separation suggests that the legislature may have intended the purchaser, who is directly exempted, *should not lose his exemption by indirection* through application of a prior general aiding and abetting statute. To permit the exemption to be *lost by indirection* would prevent the accomplishment of those very policies intended to be effectuated by the direct exemption granted.

Catterall at 377 (emphasis added). In other words, the legislature did not intend for one statute to circumvent an exemption it crafted in another statute. Maples makes precisely the same argument that the State made in *Catterall* – that the conduct proscribed (causing the death of another who was not a participant in the felony) should be controlled by one statute (the

accomplice liability statute) without regard to another statute (the Uniform Controlled Substances Act) under which the purchaser of drugs cannot be deemed an accomplice to delivery of a controlled substance.

In *State v. Warnock*, 7 Wn.App. 621, 622-23, 501 P.2d 625 (1972), which Maples ignored both at the trial court level and in his appellate brief, the Court of Appeals held that the purchaser of a controlled substance cannot be a coconspirator to its sale under the conspiracy statute, nor can he be an accomplice to the delivery under the accomplice statute. The Court said:

> An accomplice to the commission of a substantive crime is one who aids and abets in its perpetration. RCW 9.01.030. In *State v. Emmanuel, 42 Wn.2d 799, 821, 259 P.2d 845 (1953)* the Supreme Court stated: "The 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."

Warnock at 623. Here, Maples argues that Clement Adams was a participant in the predicate felony, delivery of a controlled substance, because he was an accomplice to that crime under the accomplice statute although not under the Uniform Controlled Substances Act. This argument is meritless, however, because Clement Adams could not be deemed an accomplice to the delivery of a controlled substance under the accomplice liability statute unless he could be charged with that crime under the

Uniform Controlled Substances Act, which he could not. See *Emmanuel*, supra.

In *State v. Morris*, 77 Wn.App. 948, 896 P.2d 81 (1995), this Court reiterated that under both the former Dangerous Drugs Act and the current Uniform Controlled Substances Act the purchaser of a controlled substance cannot be held liable for the sale of the controlled substance and held that it would frustrate the intent of the legislature to impose liability on the seller through the accomplice liability statute. Maples argues that the trial court misapplied *Morris* but his argument is predicated upon the same argument that has been made and rejected in each of these cases, namely that a purchaser of drugs can be held liable under the accomplice or conspirator statutes (and, in this case, the felony murder statute) for conduct that he expressly *cannot* be held liable under the Uniform Controlled Substances Act. The trial court did not err in instructing the jury that if it found that Clement Adams was a purchaser of controlled substances rather than the seller, he could not be deemed an accomplice to the crime of delivery of a controlled substance. This was a correct statement of the law.

II. THE EVIDENCE IS SUFFICIENT TO SUSTAIN MAPLES' CONVICTION FOR FELONY MURDER IN THE SECOND DEGREE.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

"Criminal intent may be inferred from circumstantial evidence or from conduct, where the intent is plainly indicated as a matter of logical probability." *State v. Billups*, 62 Wn.App. 122, 126, 813 P.2d 149 (1991),

citing *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) and *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The appellate court's role does not include substituting its judgment for the jury's by reweighing the credibility of witnesses or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "'It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable jury could come to this conclusion.'" *United States v. Enriquez-Estrada*, 999 F.2d 1358 (9th Cir. 1993), (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)).

The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

a. *Adams was not a participant in the crime of delivery of a controlled substance.*

Maples relies upon the arguments he made in Section I of his brief to support his claim that the evidence is insufficient to prove that Adams was not a participant in the crime of felony murder. The State similarly

relies on the arguments it made in Section I (b) of its response. The purchaser of a controlled substance is not a principal, accomplice, or coconspirator to the crime of delivery of a controlled substance. See Section I (b), supra.

b. *Jury properly found Maples' accomplice shot Mr. Adams in the course and in furtherance of, or in immediate flight from the crime of delivery of a controlled substance.*

Maples and Tyler went to the S &S Mart to sell cocaine to Adams and Foreman. Prior to going there, Tyler armed himself with a gun and Maples knew it, because Maples was suspicious of the buyers. Maples described the gun as "protection to make sure nothing went wrong." RP 840. When they arrived Maples got into Adams's car and Tyler stayed outside the car in a position of cover. After handing over the cocaine initially, Maples got into a tussle over the baggie because he realized the money he had been given was counterfeit. He tried to grab the drugs back and the baggie fell down between the seats. Maples leapt out of the car and exclaimed to Tyler, whom he knew to be carrying a gun, that Adams and Foreman "robbed" him. After he was safely out of the car Tyler began shooting into the car. When the bullets stopped flying Maples and Tyler fled the scene.

Under RCW 9A.32.050(1)(b), one is guilty of felony murder in the second degree if he or she commits any felony (excluding those

enumerated in RCW 9A.32.030(1)(c)) and in the course and in furtherance of, or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than a participant in the crime. The State need not elect, and the jury need not find, whether the homicide occurred in the course and in furtherance of the predicate crime *or* in immediate flight from the predicate crime. *State v. Whitfield*, 129 Wash. 134, 139, 224 P.559 (1924). In *Whitfield*, a rape case, the Supreme Court held that "proof of the killing, together with the fact that it was committed in connection with a rape, is sufficient to constitute murder in the first degree." *Whitfield* at 139. "From the very nature of things...it is often impossible for the state to know at just what instant a killing was committed, whether it was done in the commission of a felony, or in attempting to commit a felony, or while withdrawing from the scene of a felony." *Whitfield* at 139. Thus, the Court held, it was immaterial whether the defendant was committing the rape, attempting to commit the rape, or withdrawing from the scene of the rape as long as the murder took place while he was "concerned in a rape." *Whitfield* at 139.

It is for the jury to assess the credibility of any witness and the weight to be given his or her testimony. *State v. Perez-Cervantes*, 141 Wn.2d 468, 6 P.3d 1160 (2000); *State v. Smith*, 90 Wn. App, 856, 954 P.2d 362 (1998). Applying the standard for sufficiency of the evidence,

supra, the evidence overwhelmingly supports the jury's conclusion that Maples' accomplice killed Adams during the course and in furtherance of, or in immediate flight from the crime of delivery of a controlled substance. Tyler and Maples were both clearly in immediate flight from the predicate crime, if not still in furtherance of it. Although Maples attempts to break the crime into discrete stages, arguing that the delivery was completed the moment that Maples handed over the cocaine (and thus arguing that neither he nor Tyler were in "immediate" flight from the crime because an intervening argument ensued over money), this is precisely the type of parsing disavowed by the Supreme Court in *Whitfield*, supra. Maples' conviction for felony murder in the second degree should be affirmed.

III. THE EVIDENCE IS SUFFICIENT TO SUSTAIN MAPLES' CONVICTION AS AN ACCOMPLICE TO ASSAULT IN THE FIRST DEGREE.

Maples argues that the evidence is insufficient for a rational trier of fact to have found that his accomplice, Tyler, intended to assault Mr. Foreman. The State references the legal analysis regarding sufficiency of the evidence outlined in Section II and incorporates the argument and citation to authority into this section.

Maples argues first that there was no evidence that Tyler, who was standing by the driver's door, could even see that there was a passenger in

the car. This argument is meritless. Again, the jury is to decide the weight to be given to the evidence and the credibility of the witnesses, and a rational trier of fact could conclude from the evidence that Justin Tyler knew there were two men in the front seat of the car. It was not necessary for the State to produce Justin Tyler to say that he did, in fact, see two people in the car. Further, under the doctrine of transferred intent, it doesn't matter whether Justin Tyler saw another passenger in the front seat of the car.

In *State v. Elmi*, 166 Wn.2d 209, 216, 207 P.3d 439 (2008) the defendant shot into the living room of the home in which his estranged wife was living, intending to kill her. Unbeknownst to the defendant, there were four children in the living room with the intended victim. *Elmi* at 212, 216. The Court held that first degree assault requires the State to prove the defendant had the specific intent "to produce a specific result," but that "assault does not, under all circumstances, require that the specific intent match a specific victim." *Elmi* at 216. See also *State v. Frasquillo*, 161 Wn.App. 907, 915-16, 255 P.3d 813 (2011). Under RCW 9A.36.011, the Court held, "once the specific intent to inflict great bodily harm is established, this intent may transfer to any unintended victim." *Elmi* at 217-18. "Where a defendant intends to shoot into and hit someone occupying a house, tavern, or a car, she or he certainly bears the risk of

multiple convictions when several victims are present, regardless of whether the defendant knows of their presence." *Elmi* at 218.

This case is legally indistinguishable from *Elmi*. Justin Tyler's intent to shoot and inflict great bodily harm upon Clement Adams transferred to Tyshaun Foreman.

Second, Maples argues that the evidence did not support a rational trier of fact finding that he acted as Justin Tyler's accomplice to the shooting. This appears as a throwaway argument for Maples, as he devotes only a paragraph to it, cites no authority, and simply says that although Maples was the person delivering the drugs and knew that Tyler had brought a gun in case something went wrong (because Maples raised the alarm bell that something was amiss with the arrangement), "the defendant did not do any act that by definition creates accomplice liability under RCW 9A.08.020(3)." Brief of Appellant at 25. This is the functional equivalent of an argument to the effect that even though all the evidence submitted at a trial proves the world is round, there is no evidence to prove the world is round. It is impossible to respond to such an absurd argument. The evidence overwhelmingly supports the jury's conclusion that Maples acted as Justin Tyler's accomplice in the shooting. Indeed, Maples *conceded* this during the trial. See Maples' closing argument at RP at 971-991.

Maples' conviction for assault in the first degree should be affirmed.

D. CONCLUSION

Maples' convictions of felony murder and assault first degree should be affirmed.

DATED this 27th day of October, 2012.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

October 29, 2012 - 1:23 PM

Transmittal Letter

Document Uploaded: 428652-Respondent's Brief.PDF

Case Name: State v. Derik Lee Maples

Court of Appeals Case Number: 42865-2

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Jennifer M Casey - Email: jennifer.casey@clark.wa.gov

A copy of this document has been emailed to the following addresses:

jahayslaw@comcast.net