No. 45509-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAYLIN JEROME IRISH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Even when construed liberally, the information is constitutionally deficient because it did not convey the essential element that Mr. Irish knew he was rendering criminal assistance to a person whom he *knew* had committed an assault

The State contends the information is constitutionally sufficient because the phrase "unlawfully and feloniously" adequately conveys the "guilty knowledge" element of the charged crime of rendering criminal assistance. SRB at 12-13. The State urges, "When the terms 'unlawfully and feloniously' are read in context with the description of the alleged crime, a common sense understanding conveys that the defendant is being charged with knowingly assisting another criminal in some way." SRB at 14.

The State's argument is inconsistent with the case law. To prove the crime of rendering criminal assistance, the State must prove not only that the defendant knew he was "assisting another criminal in some way," SRB at 14. The State must also prove the defendant knew he was assisting a person who had committed a specific crime. State v. Anderson, 63 Wn. App. 257, 260, 818 P.2d 40 (1991). In Anderson, this Court plainly held that knowledge of the specific crime committed

by the principal is an essential element of the crime of rendering criminal assistance. Id. The State ignores this case law.

As argued in the opening brief, the crime of rendering criminal assistance is like accomplice liability.[1] Id. Both concepts are means of imposing criminal liability on one person for the actions of another. Id. Both concepts rest on the notion that a person should not be held criminally liable for conduct committed by another person about which he had no knowledge. Id. Thus, to prove a person guilty as an accomplice, the State must prove he had actual knowledge of the specific crime committed by the principal. State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000). The accomplice must have acted with the purpose to promote or facilitate the particular conduct committed by the principal and cannot be held liable for conduct that did not fall within that purpose. Id.

Similarly, to prove the crime of rendering criminal assistance, the State must prove the defendant acted with the purpose of assisting the principal to avoid apprehension or prosecution for a specific

[1] The crime of rendering criminal assistance, which was created by the Legislature in 1975 as part of the criminal code, replaced the concept of accessory after the fact. State v. Budik, 173 Wn.2d 727, 736, 272 P.3d 816 (2012). The crime embodies many of the same principles as did its predecessor. Id.

crime—not just any crime. Anderson, 63 Wn. App. at 260; RCW 9A.76.050. The defendant cannot be held liable for assisting the principal to avoid apprehension or prosecution for criminal conduct about which he had no knowledge. Anderson, 63 Wn. App. at 260.

The Washington pattern "to-convict" jury instruction reflects the understanding that knowledge of the specific crime committed by the principal is an essential element the State must prove:

> **Rendering Criminal Assistance—First Degree—Elements**
>
> To convict the defendant of the crime of rendering criminal assistance in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about (date)_____, the defendant rendered criminal assistance to a person;
>
> (2) That the person [had committed][or][was being sought for](fill in the blank with the applicable charge from the information)_____;
>
> (3) *That the defendant knew that the person [had committed][or][was being sought for](fill in the blank with the applicable charge from the information)*_____; and
>
> (4) That any of the defendant's acts occurred in the [State of Washington][City of][County of]. . . .

WPIC 120.11 (emphasis added).

The phrase "unlawfully and feloniously" contained in the information in this case was not sufficient to convey the essential element that Mr. Irish acted with knowledge he was assisting a person

who had committed *a particular crime* rather than just *a* crime. See CP 12-13. Washington courts hold the term "feloniously" contained in a charging document means "with intent to commit a crime." State v. Nieblas-Duarte, 55 Wn. App. 376, 380-81, 777 P.2d 583 (1989) (quoting State v. Smith, 31 Wash. 245, 248, 71 P. 767 (1903)). It does not mean "intent to commit a specific crime." Thus, the phrase "unlawfully and feloniously" in the information was sufficient to allege that Mr. Irish acted with knowledge he was assisting a person who had committed a crime. But it was not sufficient to allege that he acted with knowledge he was assisting a person who had committed *an assault.*

The delivery of a controlled substance cases cited by the State support Mr. Irish's argument that the information omitted an essential element. To prove the crime of delivery of a controlled substance, the State must prove the defendant knew he was delivering a "controlled substance." State v. Johnson, 119 Wn.2d 143, 146, 829 P.2d 1078 (1992); State v. Boyer, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979). The State need not prove the defendant knew he was delivering a *specific* controlled substance. State v. Nunez-Martinez, 90 Wn. App. 250, 254, 951 P.2d 823 (1998) ("the guilty knowledge required by Boyer is

knowledge that the substance being delivered is a controlled substance. It is not knowledge of the substance's exact chemical or street name."). Thus, an information that alleges the defendant "did feloniously deliver amphetamine, knowing such substance to be a controlled substance" is sufficient to convey the essential "knowledge" element of the crime. Id.; see also Nieblas-Duarte, 55 Wn. App. at 380-81 (information that alleged defendant "unlawfully and feloniously did deliver to another a certain controlled substance, and a narcotic drug, to-wit: cocaine" sufficient to allege defendant knew he was delivering a controlled substance).

But if the crime of delivery of a controlled substance required proof that the defendant knew the specific nature of the controlled substance he delivered, an information alleging that the defendant "did feloniously deliver amphetamine, knowing such substance to be a controlled substance," see Nunez-Martinez, 90 Wn. App. at 254, would be constitutionally deficient. Such language would be sufficient only to convey the notion that the defendant knew he was delivering a "controlled substance." It would not be sufficient to convey that he knew the substance was amphetamine.

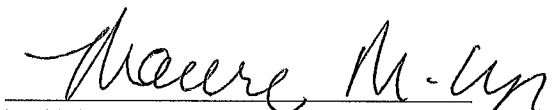
Similarly, the information in this case, which alleged that Mr. Irish "did unlawfully and feloniously render criminal assistance to Demarcus Pate, a person who committed or was being sought for First Degree Assault, a Class A felony," was not sufficient to allege the essential element that Mr. Irish acted with knowledge that Mr. Pate had committed a particular crime. The phrase "unlawfully and feloniously" conveyed only that Mr. Irish intended to assist a person who had committed *a* crime. See Nieblas-Duarte, 55 Wn. App. at 380-81. It did not convey the essential element that he intended to assist a person who had committed *an assault*. Because the information omitted an essential element of the crime, it is constitutionally deficient.

B. CONCLUSION

For the reasons given above and in the opening brief, the information is constitutionally deficient because it omitted the essential element that Mr. Irish acted with knowledge of the specific crime committed by the principal. Therefore, the conviction must be reversed. Also, the guilty plea was not knowing, intelligent and voluntary because Mr. Irish was not informed of this "critical element" of the crime and therefore did not fully understand the nature of the charge to which he pled guilty. Finally, an actual conflict of interest

occurred between Mr. Irish and his attorney, requiring reversal of the conviction.

Respectfully submitted this 2nd day of September, 2014.



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

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