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NO. 91664-1

THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD PERALES,

Appellant.

ANSWER TO PETITION FOR REVIEW BY YAKIMA COUNTY

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ORIGINAL

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A. INTRODUCTION

Petitioner/Appellant Perales was convicted of first degree rendering criminal assistance by a jury of his peers. This charge arose from acts of Perales which led to his arrest for rendering criminal assistance in connection to investigation of a first degree murder, first degree kidnapping and first degree robbery.

This petition arises from the decision of the Court of Appeals upholding the Petitioners conviction, this decision was filed on April 2, 2015. Perales challenged the alleged error on the part of the trial court to use two of his proposed jury instruction and the sufficiency of the evidence presented.

B. ISSUE PRESENTED BY PETITION

Mr. Perales petitions this court requesting review of the decision of the Court of Appeals. Petitioner alleges;

1. Did the court err by failing to give the defendant's proposed instruction?
2. Was the evidence presented sufficient to support a conviction for first degree rendering criminal assistance?

ANSWER TO ISSUES PRESENTED BY PETITION

1. This request for review of the Court of Appeals decision does not meet the requirements of RAP 13.4.
2. The Court of Appeals was correct when it determined that the trial court properly denied the defendant's request to submit his proposed jury instruction.

3. The Court of Appeals determined that the evidence present was sufficient to support the charge of first degree rendering criminal assistance.

C. STATEMENT OF THE CASE

D. ARGUMENT

In this case the defendant exercised his right to not testify the testimony of the officers was unrefuted. (RP 506) The record indicated that Appellant and the mother of Marcus Torres, the person to whom Appellant rendered aid, lived at 121 Aerosmith Rd. but Marcus Torres did not reside there. (RP 419-21) The State presented evidence that there was an ongoing investigation and search for Marcus Torres. That the roommate of the Appellant was the mother of Marcus Torres, a person wanted for first degree murder. (RP 420-21) The testimony was that the day before Appellant was arrested one other suspect and the brother of Marcus Torres was arrest at this very residence. (RP 419) Det. Perrault testified that he believed that Marcus was staying at the home "occasionally" but his report stated that the "basement" of the residence was rented to Rose, Marcus and Isaac Torres and the Appellant. (RP 423-4) Det. Steadman testified that the address was one the police had for Marcus Torres. (RP 451-2)

The testimony was that there was a hole found under an apple crate located in the orchard yards away from Appellant's home, that in the hole

there was a sleeping bag, a bag from McDonald's some unopened beer...and a newspaper from the 18th (of) April" (RP 464) The closest McDonald's was approximately five miles away. (RP 465) At the time Appellant was arrested and made his statement to the officers he stated that he had recently purchased food from another fast food location and had purchased two different types of beer. The testimony was that Marcus Torres was arrested from the interior of the residence occupied by Appellant and Ms. Torres. There was testimony that at times while this location was under surveillance an individual was seen coming to a door area and who Ms. Torres and the Appellant both had conversations with. There was testimony that this "foxhole" was within sight of the residence and that there was a "very distinct trial" from the apple bin hideout to Appellant's home, a trail that so distinct the officer who took the appellant into custody followed when he approached Appellant (RP 464) It was also clear that Appellant had been warned about the consequences of helping Marcus Torres and that Torres was being sought for murder by the police.

The jury was instructed that direct and circumstantial evidence are given the same weight. (CP 78)

The jury was instructed that the state had to present evidence, beyond a reasonable doubt, that Perales with "intent to prevent, hinder, or delay the apprehension or prosecution of another person who he

knows is being sought by law enforcement officials for the commission of a crime, [Perales] harbors or conceal(ed) [Marcus Torres] (CP 73)

The trial judge in this case took note of the Conclusion of Budik; "Okay and just so in that same regard the conclusion and the majority opinion says we hold that in order to prove that a defendant has rendered criminal assistance by use of deception that State must show that the defendant has made some affirmative act or statement." (RP 501)

> The Burdick [1] rule if you would doesn't apply to this particular prong of the statute. So I think it's sufficient in this instance looking at the evidence point most favorable to the nonmoving party, to the State, to I think that there is sufficient evidence for this matter to go forward and go forward, so I am denying the motion to dismiss. RP 499
> ...
> JUDGE: Okay and just so in that same regard the conclusion and the majority opinion says we hold that in order to prove that a defendant has rendered criminal assistance by use of deception that State must show that the defendant has made some affirmative act or statement.
> THERRIEN: Oh you're just saying that's what I've said is dicta?
> JUDGE: Well this is I mean this is ---
> THERRIEN: Yea okay.
> JUDGE: What they sum up, I don't think I think that inherent in the issue of concealing and harboring is the issue of you know an affirmative act.
> THERRIEN: Okay.
> JUDGE: You know just having you know somebody stay in your barn and you don't know he's there kind of thing. So but that's not harboring somebody. Anyway do you want I my strong preference now would be to go through

[1] It should be noted that the case name "Budik" is spelled numerous ways throughout this verbatim report of proceedings.

the jury instructions I know I gave them to you yesterday, have you had a sufficient time to look at them?
(RP 501-2)
...
JUDGE: So, but I your exceptions are noted I think that my reading of Butick, you know I don't read it as broadly as you do, I think that the definition of harboring and concealing is and with the necessity that proof be that Mr. Perales acted intentionally to prevent hinder or delay the apprehension or prosecution of Mr. Torres. Inherent in all that is that he acted knowingly intentionally concealing the that giving shelter or refuge to somebody or to place
(RP 504)

The court also refused to give two instructions proposed by Mr. Perales. (RP 503)The first instruction proposed stated:

> To harbor or conceal another is to provide shelter or lodging in order to conceal another clandestinely for the purpose of concealment. It is not enough to fail to disclose the location of the person sought or provide minimal financial assistance. Clerk's Papers (CP) at 61.

The second tracked the statutory definition of rendering criminal assistance as including harboring or concealing a suspect, and added,

> There must be an affirmative act or affirmative statement by the accused which sheds light on the nature of the affirmative act or statements relating to the harbor or concealment of the person sought. CP at 63.

The court gave an instructions based on WPIC 120.10, 120.11 and 120.16. The court modified WPIC 120.16 which is the WPIC defining "rendering criminal assistance." This modification defined "harbor" to

mean "to give shelter or refuge to somebody" and "conceal" to mean "to place out of sight." (CP at 73)

1. Standards of Review.

RAP 13.4(b) Considerations Governing Acceptance of Review set forth that the Supreme Court will accept review of a decision of the court of appeals terminating review only if:

> (1) The decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) The decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) A significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) The petition involves an issue of substantial public interest that should be determined by the Supreme Court.
> RAP 13.4(b).

This decision of the Court of Appeals in this case does not **1**) Conflict with any decision by this court, the claim by Perales that the Court of Appeals ruling is incorrect is unfounded.; **2**) This ruling does not conflict with any ruling by any other division of the Court of Appeals or for that matter any court. The decision in State v. Budik, infra, which Perales claims conflicts with this decision was addressed and the alleged conflict was dismissed by the Court of Appeals. **3**) The ruling of the Court of Appeals does not raise a significant question under either the State or

Federal Constitution; the ruling merely reiterates the standard of proof necessary to convict an individual of the crime charged.

Perales can not demonstrated that he has met his burden that one of the reasons set forth in RAP 13.4 has been met. This court should deny review.

FIRST BASIS FOR REVIEW.

There is no basis to review the decision by the Court of Appeals regard the trial court's refusal to give Defendant's proposed jury instruction.

The opinion issued by the Court of Appeals is supported by the facts and case law. Nothing in the opinion issued by the Court of Appeals conflicts with any of the cases cited by Perales in his opening brief nor in this motion. In fact the Court of Appeals clearly considered the opinion of this court in State v. Budik, 173 Wn.2d 727, 272 P.3d 816 (2012) and incorporated that decision. As the Court of Appeals stated;

> The State argues that the holding of Budik does not apply to this case because the Budik court was solely concerned with the fourth statutory means of rendering criminal assistance, not "harboring or concealing," which is the first. We disagree. The Supreme Court spoke of all the statutory means as requiring an affirmative act or statement and the discussion is not dicta, because that commonality in the means was a basis on which the Supreme Court interpreted the statute. Id. at 735. (Slip opinion at 9-10)

The Court of Appeals decision does not conflict with Budik it is clear from the above portion of that ruling that the court in fact adopted the ruling as a part of its decision.

The Court of appeals, following Budik went on to rule that "[i]t would be a correct statement of law, in light of Budik, to say that "for harboring or concealing a person to constitute rendering criminal assistance, it requires some affirmative act or statement"-although the Supreme Court's reasoning in Budik views that proposition as self-evident, with the result that jury instruction on that score is unnecessary."

The issue the Court of Appeals had with the instructions proposed by Perales were the instruction were "not supported by Budik and [were] not a correct statement of the law and that the "...confusing proposed instruction suggests, misleadingly, that the State must prove multiple layers of affirmative conduct, *viz.*, there must be:

> • An affirmative act or affirmative statement by the accused[,]
> • Which sheds light on the nature of the affirmative act or statements[,]
> • Relating to the harbor or concealment of the person sought. (Slip at 10-11)

The trial court as well did not abuse its discretion when it denied Perales' request to submit this instruction that was later determined by the Court of Appeals to be unsupported by the facts, confusing and an incorrect statement of the law as set forth in Budik. This standard was set

forth by the State in its briefing and by the Court of Appeals, "State v. Hathaway, 161 Wn. App. 634, 647, 251 P.3d 253 (2011). Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly inform the jury of the applicable law. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). It is not error for a trial court to refuse a specific instruction where a more general instruction adequately explains the law and allows each party to argue its case theory. Hathaway, 161 Wn. App. at 647."

Once again the opinion issued by the Court of Appeals does not fall within any requirements of RAP 13.4 and especially not under RAP 13.4(b)(1) as alleged by Perales.

SECOND BASIS FOR REVIEW.
Sufficiency of the evidence.

Once again there is nothing within this portion of the opinion of the Court of Appeals upon which Perales can base a claim that is supported by any section of RAP 13.4. There is no reason nor basis for this court to grant review of the opinion issued by Division III. As that court stated;

> Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, it allows any rational trier of fact to find all of the elements of the crime charged beyond a reasonable

> doubt." State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Bucknell, 144 Wn. App. 524, 528, 183 P.3d 1078 (2008). Perhaps most important, given the nature of the State's evidence in this case, is that "[i]n determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." State v. Delmarter, 94 Wn.2d 634,638,618 P.2d 99 (1980). (Slip opinion at 11-12)

It is well settled law that when a court of appeal reviews a challenge to the sufficiency of the evidence, that court must view the evidence presented at trial in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In this case the fact that the elements of a crime can be established by both direct and circumstantial evidence is of great importance. This was specifically stated in the Court of Appeal's decision. (Slip opinion at

11-12) See State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). The introduction and use of direct and circumstantial evidence are equal; one is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), aff'd, 136 Wash.2d 939, 969 P.2d 90 (1998).

The facts and law were reviewed by the trial court at the time of the motion to dismiss at the close of the State's case. The court determined that there were sufficient facts to support the "harbor and conceal" section of the rendering statute. (RP 494-501) These same facts were reviewed by the Court of Appeals and while that court based its analysis on a broader reading of Budik the result is that same, the evidence presented by the State was sufficient. In the Court of Appeals determination the proof of the "act" was inherent in the charge and that was met by the State's presentation. This is supported by language in this court's opinion in Budik, "The five other means of rendering criminal assistance *require some affirmative act or statement, be it harboring or concealing the person sought,* RCW.9A.76.050(1)" Id at 753-4 (Emphasis added) (Slip opinion at 10)

This is not a case where there was an enormous amount of evidence but as the Court of Appels stated it did indicate;

(1) "...that Mr. Perales was aware that Marcus was being sought in connection with a homicide";

(2)"[T]hat Mr. Perales had been cautioned that he would be arrested if he harbored or concealed" (Marcus or other wanted for the homicide.);

(3) "[T]hat when Mr. Perales returned home from running errands on the night before Marcus's arrest, he visited with Marcus twice and provided him with beer on both occasions."

(4) That "Detective Tucker...testified that as he lay in the orchard waiting and watching on the morning of April 19, he saw Mr. Perales and Ms. Cruz-Torres outside, speaking with each other and to another male who was inside the home and appeared at the back door";

(5) "...not long thereafter that Marcus came out of the home in response to police demands and surrendered."

This was supported by "circumstantial evidence that Marcus had been hiding out in a shelter constructed in the orchard north of the Cruz-Torres/Perales home;

[T]hat he had provisions there, and;

[T]hat there was a "very distinct trail" running from the back of the Arrowsmith Road home to the area of the orchard where the shelter was located. (Slip opinion at 12)

Based on the Court of Appeals interpretation of Budik the State did prove through direct and circumstantial evidence that Petitioner had both harbored and concealed the suspect, Marcus who was sought by the police in connection with a murder committed in Yakima County. The jury looked at the totality of the evidence and rendered a just verdict.

Once again there is nothing in this portion of the opinion that would fall within the criterion of RAP 13.4.

E. CONCLUSION

Peralas' claims do not meet the requirements of RAP 13.4. The actions of the trial court and the Court of Appeals well-reasoned decision should not be disturbed.

Respectfully submitted this 15th day of June 2015.

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Certificate of Service

I, David B. Trefry, hereby certify that on this date I emailed a copy of this motion, by agreement of the parties to Kenneth Kato at khkato@comcast.net

Dated at Spokane, WA this 15th day of June, 2015.

s/ David B. Trefry

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Please find attached the State's response to Mr. Perales Petition for Review.

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