NO. 31408-1-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD PERALES,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes one assignments of error with two issues pertaining to that assigned error. These can be summarized as follows;

1. There was insufficient evidence to prove beyond a reasonable doubt that appellant was guilty first degree rendering criminal assistance;

A. Did the court err when it did not give appellants proposed jury instruction regarding rendering criminal assistance?

B. Was the evidence presented insufficient where the State failed to show an affirmative act or statement on the part of Appellant demonstrating that he had "harbored or concealed" a person being sought of first degree murder?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was sufficient evidence to support the conviction.
2. The courts decision to not give the jury instruction was proper.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

The actions of the trial court were well within its discretion, were based on the rules of evidence and case law.

RESPONSE TO ALLEGATION 1 – A Sufficiency

Appellant challenges the sufficiency of the evidence to support his conviction for rendering criminal assistance in the first degree. In reviewing a challenge to the sufficiency of the evidence, this court will view the evidence 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. 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).

In this case, as is the fact with many cases, the defendant exercised his right to not testify therefore the testimony of the officers is unrefuted. RP 506. The totality of the testimony in this case was fairly minimal but 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. This is critical because the theory of the Appellant at trial was that he lived in the home and/or the Appellant was not required to call the police if Appellant was there. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). Here 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 Appellant states that testimony was that Marcus Torres lived at this address, however there was a divergence in the testimony regarding that. (Appellants Brief at 2) 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.

Obviously the jury was allowed to infer from this testimony that the Appellant had "rendered criminal assistance" to Marcus Torres. One of the means of "infer" is "to derive as a conclusion from facts or premises <we see smoke and infer fire. – L.A. White> (Merriam – Webster's Online dictionary) Once again direct and circumstantial evidence are given the same weight. CP 78

The jury was allowed to infer that when a person claims to live in a home but is not found there on more than one occasion but eventually arrested inside that home, the home of Appellant, and from that home there is a defined trail to a "foxhole" covered by an apple crate that is within sight of that persons home and in that hole is a sleeping bag, food wrappers, beer and a newspaper that was only one day old, that Marcus Torres was the person who had been hiding there. There were able to infer that the person who was spoken to by Appellant inside this residence was Marcus Torres. That the Appellant who had just come

home with hamburgers and beer and who admitted that he had given him alcohol in the residence after numerous warnings about the consequences of such action, the boyfriend of Marcus Torres' Mother – was in fact "rendering criminal assistance."

The totality of the evidence did demonstrate 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 State would posit that the court in State v. Budik, 173 Wn.2d 727, 272 P.3d 816 (Wash. 2012) would agree with the trial court that counsel was given the case "too broad a reading." RCW 9A.76.070 has six subsections. The court in Budik states at 734-5, "In this case we are **solely concerned with the fourth action**—" [p]revent[ing] or obstruct[ing], by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension" of a person sought by law enforcement officials....**In interpreting this portion of the statute**, we look to the statutory scheme as a whole." (Emphasis mine.) The trial judge in this case took note of the Conclusion of Budik, makes it explicitly clear that the court was ruling on only one specific subsection of the statute and the trial judge took

note of that, "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." RP 501. The court in Budik stated in that Conclusion:

> We hold that in order to prove that a defendant has rendered criminal assistance " **by use of ... deception," RCW 9A.76.050(4),** the State must show that the defendant has made some affirmative act or statement; mere false disavowal of knowledge is insufficient to sustain a conviction for rendering criminal assistance. There is no evidence that Budik did more than falsely deny knowledge of the identities of the assailants who had shot him and shot and killed his companion. Accordingly, insufficient evidence supported Budik's conviction. We reverse the Court of Appeals and vacate Budik's conviction. (Emphasis mine.)

The trial court ruled as follows;

> The Burdick (It should be noted that the case name "Budik" is spelled numerous ways throughout this verbatim report of proceedings.) 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 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 was correct in making this determination. The State was not required to show the added step that Appellant argued below, and now argues here, was necessary to prove the commission of this crime. In Budik there was no act on the part of the defendant. In that case there was a disavowal by Budik about knowing the identity of a person or persons involved in a shooting and nothing more. Budik is therefore both legally and factually distinguishable from this case. While clearly the State was not required to prove this crime under the subsection Perales was charged under this court can take note of the fact

that the State did prove that Appellant did make an "affirmative act" when he harbored Torres. By his own admission he gave him beer on the day of the arrest. While this may appear to be a de minimis violation in and of itself it was an act and coupled with the additional circumstantial evidence presented regarding the path, the food and shelter in the foxhole near Perales home it clearly supports the verdict in this case. Appellant intended to do what he did, criminal intent may be inferred only where the conduct of the defendant is "'plainly indicated as a matter of logical probability.'" State v. Johnson, 159 Wn.App. 766, 774, 247 P.3d 11 (2011) (quoting Delmarter, 94 Wn.2d at 638).

The facts presented meet the test set forth in, State v. Bucknell, 183 P.3d 1078, 1080 (WA 2008);

> In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.. The elements of a crime may be established by either direct or circumstantial evidence, and one type is no more valuable than the other. "Credibility determinations are within the sole province of the jury and are not subject to review." Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. (Citations omitted.)

State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990) "Deference must be given to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence."

RESPONSE TO ALLEGATION 1 –B – Jury Instruction.

The jury instruction proposed by Appellant was based on an incorrect interpretation of Budik therefore the trial court did not err when it refused to give that instruction. A party does not have the legal right to instruct the jury with law that is incorrect or inapplicable to his case. The incorrect interpretation of Budik was discussed in the last section of this brief and will not be repeated here. Suffice it to say that Budik was read correctly by the trial court and it specifically applies to a separate section of the rendering statute than was used in this case.

The law in this area is well settled, jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. State v. Dana, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). While it is obvious that Perales wanted to argue that the State was required to prove some "act" on his part in order to find him guilty as charged that is not the ruling in Budik. The trial court also is granted broad discretion in determining the wording and number of jury instructions and did so correctly in this case. Petersen v.

State, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). The trial court analyzed the cases cited by Perales and used its discretionary powers, this discretion was not abused. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)

Appellant is entitled to an instruction on the defendant's theory of the case if the evidence supports the instruction. State v. Werner, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). Failure to provide such an instruction is reversible error. See State v. Redmond, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003).

The fact is that if the court would have given the proposed instruction it easily could have been claimed as error on appeal. Generally, this court will review the adequacy of jury instructions de novo as a question of law. State v. Cross, 156 Wn.2d 580, 617, 132 P.3d 80 (2006) and an instruction that contains an erroneous statement of the applicable law is reversible error when it prejudices a party. Cox v. Spangler, 141 Wash.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury, and when taken as a whole, properly inform the jury of the law to be applied. Cox, 141 Wash.2d at 442, 5 P.3d 1265.

> An erroneous instruction is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. State v. Brown, 147 Wash.2d 330, 332, 58 P.3d 889 (2002).

While it is true that it is reversible error to instruct the jury in a manner that would relieve the State of its burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995) See also, State v. Brown, 132 Wn.2d 529, 617, 940 P.2d 546 (1997) "An instruction must correctly state applicable law."

The State proved each element as charged, Appellant was able to ague his theory of the case based on the instructions that were given to the jury. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)

> Each side is entitled to have the trial court instruct upon its theory of the case if there is evidence to support the theory. On the other hand, it is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it.
> (Footnotes omitted.)

Appellant did object to this instruction. However a party does not have the right to an instruction that is based on law which is not applicable to the case and the facts before the jury. In this case, as pointed out above, the "prong" under which Perales was charged is not the prong considered by the court in Budik. The Budik court obviously meant to limit its ruling

to that specific subsection when it stated without equivocation "In this case we are solely concerned with the fourth action" Budik supra.

V. CONCLUSION

This courts "role as the reviewing court is not to reweigh the evidence and substitute our judgment for that of the jury. State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). For the reasons set forth above this court should deny allegations set forth in this appeal, the actions of the trial court should be affirmed and this appeal should be denied.

Respectfully submitted this 28th day of January 2014,

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DECLARATION OF SERVICE

I, David B. Trefry state that on January 28, 2014 I emailed a copy, by agreement of the parties, of the Respondent's Brief , Mr. Kenneth Kato at khkato@comcast.net and by United States mail, first class, to Richard Perales, # 749004, Olympic Corrections Center, 11235 Hoh Mainline, Forks, WA 98331;

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of January, 2014 at Spokane, Washington.

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