71112-1

NO. 71112-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY PAUL WILLIAMS,

Appellant.

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

The Honorable Susan Cook, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN LARRY WILLIAMS' MANSLAUGHTER CONVICTION.

The State points to no evidence in the record indicating that Larry Williams knew about – much less supported or encouraged – his wife's multiple failures throughout the day and evening of May 11, 2011. As the State acknowledges, it was Carri "who left [Hana] outside for hours on end." Brief of Respondent, at 39.

Since Larry was not present for events the day Hana died, at trial the State asked jurors to find him guilty of manslaughter as Carri's accomplice. See 35RP 57-58; 36RP 133-136, 141, 143; CP 282, 286. The State's brief on appeal does not even mention, much less argue, principles of accomplice liability in its attempt to defend the verdict. See Brief of Appellant, at 28-33. This is not entirely surprising given the absence of any evidence Larry had the purpose to promote or facilitate Carri's conduct on May 11, that he actively participated in her conduct that day, or that he in any way sought to help her succeed in that conduct.

Instead, on appeal, the State appears to argue that Williams is guilty of Manslaughter as a principle. The State relies solely on a parent's duty to summon medical care for a dependant child, a duty

that if recklessly breached can support a conviction for Manslaughter in the First Degree. Brief of Respondent, at 30-33. This theory was barely mentioned during the State's closing argument. See 36RP 149. And it does not withstand scrutiny as to Larry.

Jurors were instructed, "[t]he duty to provide medical care is activated at the time when an ordinarily prudent person, solicitous for the welfare of his or her child and anxious to promote his/her recovery, would deem it necessary to call in medical assistance." CP 288. The State argues that because Larry participated in depriving Hana of food prior to May 11, which led to her weight loss, which made her more susceptible to hypothermia, jurors could find that a breach of the duty to seek medical attention recklessly caused Hana's death. See Brief of Respondent, at 30-33.

The problem with this argument, of course, is that Hana did not suffer from hypothermia (an acute condition) at any time when Larry was home on May 11 or any other time when he was home. She suffered from that condition only on May 11 while Larry was gone for the day at work. Because he was absent and unaware of what was happening in his absence, there was nothing to activate his duty to seek medical care for hypothermia, and no jury could

reasonably find otherwise. Notably, as soon as Larry *did* receive information that Hana was outside in the cold and wet – and shortly thereafter that she was nonresponsive – he acted consistently with this duty of care, telling Carri to bring Hana inside and then telling her to call 911 immediately. 30RP 109-111, 144-146; 31RP 178.

In nonetheless arguing Larry breached his duty to obtain medical assistance for Hana, the State relies on two cases: State v. Norman, 61 Wn. App. 16, 808 P.2d 1159, review denied, 117 Wn.2d 1018, 818 P.2d 1099 (1991), and State v. Williams, 4 Wn. App. 908, 484 P.2d 1167 (1971). Brief of Respondent, at 30-31. These cases, however, merely serve to confirm the absence of any breach by Larry.

In Norman, the father of a 10-year-old boy refused to take his son to the hospital despite clear signs he was suffering the effects of untreated diabetes. The boy's condition worsened over the course of several days, yet the father still refused to take him to the hospital even when others suggested he do so. Norman, 61 Wn. App. at 18-20. The father was convicted of Manslaughter in the First Degree based on his reckless breach of the duty to seek medical care. Id. at 18, 24-26. Norman highlights *Carri* Williams' failures on May 11 because, like the defendant in that case, Carri

should have been aware her daughter was experiencing a medical emergency (hypothermia) and should have called for help well before Larry learned what was happening and convinced her to do so. The facts in Norman contrast starkly with Larry's conduct and underscore that he did not breach his duty of care on May 11.

In Williams, the parents of a 17-month-old child declined to take the child to a doctor despite clear signs of a serious infection from an abscessed tooth. Williams, 4 Wn. App. at 910, 917-918. The infection eventually spread to the child's cheek, turning the cheek "bluish," and became gangrenous, causing an odor that would have been present for ten days preceding the child's eventual death. Id. at 917-918. Although the parents had access to medical care for their child, one factor in their inaction was fear a doctor would report the child's condition to the State and the child would be removed from their home. Id. at 918-919. Both parents were convicted of Manslaughter for breaching their duty to seek medical care. Id. at 910-911, 919.

Williams – a case where *both parents* knew of a serious and urgent medical condition yet failed to seek medical assistance – does not assist the State in this appeal, either. Just the opposite. The Williams court recognized, "If the duty to furnish such care was

not activated until after it was too late to save the life of the child, failure to furnish medical care could not be said to have proximately caused the child's death." Id. at 916. Larry was not aware his daughter was suffering from life-threatening hypothermia until it was too late to save her life.

One final point on this issue. In arguing Larry's guilt for the events of May 11, the State asserts, "H.W.'s eventual death outside was after behavior and punishment that did not surprise Larry because she 'was having one of her episodes that day.' 8/27/13 RP 145-6, 184." Brief of Respondent, at 33.

This assertion – which is written in such a way to imply that Larry was not surprised by what happened to Hana while he was away at work on May 11 – is not supported by the record generally or the State's citations specifically. At 30RP 145-146, Larry merely testified he was not surprised to learn of Hana's behavior on May 11 when he finally spoke to his wife on the phone from the park and ride that night. The "behavior" he referenced is that discussed earlier in the same transcript volume; i.e., that Hana was outside and refusing to come in. See 30RP 109. Larry testified he was not told other details, such as how long she had been out there, whether she had eaten, or that she had been spanked. 30RP 110.

Despite the State's implication, the record does not support the notion Larry was unsurprised by events involving his wife and daughter throughout the course of the day on May 11.

Because the State failed to establish that Larry was guilty of Manslaughter as an accomplice or principle, his conviction must be vacated.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE JURORS WERE INSTRUCTED ON TWO PRIMARY TRIAL DEFENSES CONCERNING CAUSATION.

The State argues defense counsel was not ineffective for failing to ensure jurors were instructed on the State's duty to prove proximate cause for Manslaughter because, as a matter of law, Larry proximately caused Hana's death on May 11, 2011. See Brief of Respondent, at 34. For support, the State cites a single case, State v. Dennison, 115 Wn.2d 609, 613, 623-625, 801 P.2d 193 (1990), where the defendant broke into a home and then killed an individual who interrupted the burglary, leaving no possible dispute on the issue of causation.

The definition of "proximate cause" is worth recalling: "The term 'proximate cause' means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and

without which the death would not have happened." CP 284. The State's position that no juror could have found proof of proximate causation lacking as to Larry is fairly astonishing in light of the State's total failure of such proof below.

In any event, Dennison makes clear that the issue of proximate cause is generally left to the jury. Dennison, 115 Wn.2d at 624. Indeed, *the State* recognized Larry's jury would need to decide proximate causation for the homicide charges and submitted an instruction on the issue. Supp. CP 98. Unfortunately, the instruction mistakenly omitted any reference to the Manslaughter charges, a mistake defense counsel failed to recognize. But the court gave the instruction, also recognizing the issue was very much in dispute. See CP 284; see also 35RP 71-77, 99, 119-123 (defense contests proximate causation).

The evidence supporting an instruction is viewed in the light most favorable to the requesting party. State v. Fernandez-Medina, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000). Had defense counsel requested that the proximate cause instruction also apply to the Manslaughter charges, the trial court would have been obligated to grant the request because the instruction would have correctly stated the law and was necessary to argue the defense

theory of the case. The State has presented no plausible reason why the court would have refused.

Alternatively, the State argues Larry was not prejudiced by his attorneys' mistake because defense counsel told jurors during closing arguments the analysis of whether Larry caused Hana's death was the same for Manslaughter as it was for Homicide by Abuse. Brief of Respondent, at 36-37 (citing 35RP 119-120). This argument did not solve the problem, however. Larry's jury was expressly instructed to disregard any argument not supported by the law contained in the instructions. See CP 273 ("It is important, however, for you to remember that the lawyers' statements are not evidence. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions."). An attorney's argument, without a correct supportive instruction, is meaningless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). And there were no other instructions that would have told or permitted jurors to consider proximate cause for Manslaughter.

As discussed in Larry's opening brief, the mistake in instruction 11 also infected instruction 12, which instructed jurors on superseding proximate causation. By its terms, instruction 12 only

applied to Larry if jurors found that he proximately caused Hana's death. And, under instruction 11, that inquiry was only relevant to Homicide by Abuse. Thus, like proof of proximate cause, the possibility of superseding proximate cause was removed from jurors' consideration of the Manslaughter charges. See Brief of Appellant, at 30-31.

The State responds primarily by noting that instruction 12 does not mention a particular charge and, therefore, jurors would not have limited its application to Homicide by Abuse. See Brief of Respondent, at 38. When, however, the instructions are considered as a whole, the State's position is not reasonable. Instruction 11 limited proof of proximate causation to Homicide by Abuse. Jurors are presumed to follow jury instructions absent contrary evidence. State v. Lamar, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Instruction 12 immediately followed instruction 11 and both instructions immediately followed the "to convict" for Homicide by Abuse. Moreover, like instruction 11, instruction 12 addresses proximate causation. See CP 283-285. Under these circumstances, it is not reasonable to assume jurors believed instruction 12 should apply to the Manslaughter charges.

Finally, the State argues that even if defense counsel was ineffective and even if jurors did not consider issues of proximate causation before convicting Larry of Manslaughter, there was no reasonable likelihood it affected the outcome in light of what it describes as "overwhelming" evidence of his guilt. See Brief of Respondent, at 38-40. For the reasons already discussed at length, the evidence of Larry's guilt on the homicide charges was anything but overwhelming. In fact, it was insufficient. But even assuming evidentiary sufficiency, causation was a critical trial issue, and depriving Larry of the benefit of instructions 11 and 12 undermines confidence in the outcome below. Prejudice has been established.

3. THE TRIAL COURT ERRED WHEN IT REJECTED DEFENSE COUNSELS' PROPOSED INSTRUCTION ON SUPERSEDING INTERVENING CAUSE IN FAVOR OF THE STATE'S INCORRECT INSTRUCTION.

Defense counsel proposed an instruction based on WPIC 25.03, a pattern instruction on superseding proximate causation. That instruction would have terminated Larry's criminal liability – even if jurors found his acts were a proximate cause of Hana's death – if either "the deceased or another" subsequently committed an independent intervening act that proximately caused the death. See CP 231. Unfortunately, the State successfully argued for a

modified version of the WPIC deleting from consideration the act of "another" as a superseding intervening cause of death and also indicating that any act of "his accomplice" was disqualified from consideration as well. See 34RP 84; Supp. CP 99; CP 285.

As given, the instruction provides:

> If you are satisfied beyond a reasonable doubt that the acts or omissions of the defendant or his accomplice were a proximate cause of the death, it is not a defense that the conduct of the deceased may also have been a proximate cause of the death.
>
> However, if a proximate cause of the death was a new independent intervening act of the deceased which the defendant, or his accomplice, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's, or his accomplice's, acts are superseded by the intervening cause and are not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's, or his accomplice's acts or omissions have been committed.
>
> However, if in the exercise of ordinary care, the defendant or his accomplice should reasonably have anticipated the intervening cause, that cause does not supersede defendant's or his accomplice's original acts and defendant's or his accomplice's acts are a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the defendant or his accomplice should have reasonably anticipated.

CP 285 (emphasis added).

As discussed in the opening brief, under this instruction, the only individual capable of severing proximate causation is the deceased, since every reference to "or another" has been removed.[1] This necessarily excludes consideration of whether Carri's acts could have terminated Larry's liability since she would qualify as "another." See Brief of Appellant, at 33-34.

Moreover, the added references to "or his accomplice" further precluded consideration of Carri's acts, since she is the only one who could be considered an accomplice to Larry. The State argues this language is not a problem because jurors could have concluded Carri was not Larry's accomplice, thereby preserving the ability to argue that Carri's acts were a superceding proximate cause of Hana's death.[2] The trial court took this same position. See 34RP 85.

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[1] The State's recitation of this instruction in its brief mistakenly retains "or another" in the first paragraph. See Brief of Respondent, at 41. This language is not found in the instruction the State proposed or the instruction jurors received. See Supp. CP 99; CP 285.

[2] The State cites State v. Berube, 150 Wn.2d 498, 507, 510-512, 79 P.3d 1144 (2003), a Homicide by Abuse case in which the court found the evidence sufficient to convict the mother of a child as an accomplice to the father where she was present for the final beating, she had a history of abusing her son, and she had long encouraged the child's father to do the same. Brief of Respondent, at 46-47. The relevance of this case to the issue at hand is not apparent. There is no indication the case even involved an instruction on superseding proximate causation.

Even if jurors retained this ability, however, the critical point remains: assuming jurors concluded Carri was not Larry's accomplice on May 11, the omission of all references in instruction 12 to the acts "of another" *still* precluded jurors from finding that Carri's acts on that date were an intervening cause of Hana's death because the instruction only permitted jurors to find that the acts of "the deceased," i.e. Hana, were a superseding proximate cause. This was a serious mistake.

The trial court erred when it used the State's modified instruction. Moreover, as argued in the opening brief, competent defense counsel would have specifically identified all deficiencies with instruction 12. To the extent counsel failed to do so and any aspect of this challenge was waived, Larry has suffered a violation of his Sixth Amendment rights that can only be remedied with consideration of the issue on appeal.

4. BECAUSE THE EXCEPTIONAL SENTENCE FOR MANSLAUGHTER MAY BE BASED ON ACCOMPLICE LIABILITY, IT MUST BE VACATED.

The State contends it is not necessary to ask jurors about a defendant's knowledge for aggravating circumstances. Rather, citing State v. Weller, 185 Wn. App. 913, 344 P.3d 695, review denied, 183 Wn.2d 1010, 352 P.3d 188 (2015), the State argues

that merely asking about the defendant's "conduct" will suffice. See Brief of Respondent, at 49-50.

The majority opinion in State v. Hayes, 182 Wn.2d 556, 342 P.3d 1144 (2015), indicates otherwise. See id. at 566 ("We hold that for aggravating factors that are phrased in relation to 'the current offense' to apply to an accomplice, the jury must find that the defendant had some knowledge that informs that factor."); id. ("the jury's special verdict should have asked whether Hayes had *knowledge* that informs the factors on which they were instructed: for example, whether Hayes knew that the offense would have multiple victims or multiple incidents per victim, or whether Hayes knew the offense involved a high degree of sophistication . . . ."). The three dissenting judges agreed. See id. at 572 (Stephens, J., dissenting) (lamenting new requirement for instructions regarding what a defendant knew).

Moreover, as discussed in the opening brief, merely asking jurors about the "defendant's conduct," a method approved in Weller, does not preclude jurors from assessing that conduct with notions of accomplice liability. Nor does any other method short of asking jurors what the defendant knew. Assuming jurors convicted Larry of Manslaughter as an accomplice, his "conduct" would

include his actions as an accomplice to Carri. With the exception of one aggravating circumstance, nothing in the jury instructions or special verdict form prevented this scenario. Therefore, the exceptional sentence must be vacated. See Brief of Appellant, at 40.

5. STATE V. LOVE SETTLES THE ISSUES PERTAINING TO JURY SELECTION.

In State v. Love, 183 Wn.2d 598, 354 P.3d 841(2015), the Supreme Court rejected arguments, under circumstances similar to those here, that the defendant had been denied his right to public trial and right to be present for trial. Love controls.

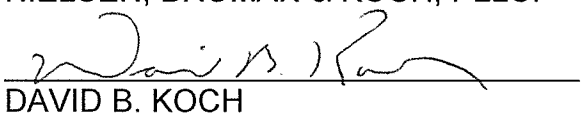
B. CONCLUSION

For all of the reasons discussed in Larry Williams' opening brief and above, this Court should reverse his Manslaughter conviction.

DATED this 9th day of October, 2015.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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DIVISION ONE

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LARRY WILLIAMS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF OCTOBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LARRY WILLIAMS
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P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF OCTOBER 2015.

X Patrick Mayovsky