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SUPREME COURT

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Court of Appeals
Division I
State of Washington

SUPREME COURT NO. 92821-5

NO. 71112-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LARRY PAUL WILLIAMS,

Petitioner.

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

The Honorable Susan Cook, Judge

PETITION FOR REVIEW

DAVID B. KOCH
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER

Larry Williams, the appellant below, asks this Court to review the Court of Appeals opinion referred to in section B.

B. COURT OF APPEALS DECISION

Williams requests review of the Court of Appeals decision in State v. Williams, COA No. 71112-1-I, filed December 21, 2015.

C. ISSUES PRESENTED FOR REVIEW

1. Petitioner was charged with Manslaughter in connection with the death of his daughter, who died from hypothermia while in her mother's exclusive care. Petitioner was not present and had no knowledge of the events that caused his daughter's death that day. The Court of Appeals nonetheless upheld petitioner's Manslaughter conviction on a theory of accomplice liability based on petitioner's knowledge and actions prior to the day his daughter died. While this prior conduct could have resulted in conviction for *a crime*, it was insufficient to establish knowing participation in *the crime* of Manslaughter. Is review appropriate under RAP 13.4(b)(1) because the Court of Appeals' sufficiency analysis conflicts with several of this Court's prior decisions?

2. Through a combination of ineffective assistance of trial counsel and trial court error, jurors were never required to find that

petitioner proximately caused his daughter's death and, if so, whether his wife's actions were a superceding intervening proximate cause that terminated his criminal liability. The Court of Appeals found that any mistakes in this regard had no impact because these instructions were only required for principal liability and jurors found petitioner guilty as an accomplice. Where prosecutors argued both principal and accomplice theories and the evidence was insufficient to establish accomplice liability, did the Court of Appeals err in overlooking these significant mistakes?

3. Should this Court also review petitioner's exceptional sentence, under RAP 13.4(b)(1), where the special verdict forms are contrary to this Court's decision in State v. Hayes, 182 Wn.2d 556, 342 P.3d 1144 (2015)?

D. STATEMENT OF THE CASE

1. Trial Proceedings

The Skagit County Prosecutor's Office charged Larry and Carri Williams with Homicide By Abuse and, alternatively, Manslaughter in the First Degree in connection with the death of their daughter, Hana Williams, on May 12, 2011. CP 10-11; 4RP[1] 7, 9. Carri and Larry also

[1] This petition refers to the verbatim report of proceedings as follows: 1RP – 3/14/12; 2RP – 8/17/12, 11/28/12, 12/7/12, 1/2/13, 1/17/13, 7/16/13; 3RP – 12/13/12, 4/4/13 (date not noted on cover), 5/9/13; 4RP – 7/22/13; 5RP – 7/22-24/13; 6RP – 7/23/13; 7RP – 7/24/13; 8RP – 7/25/13; 9RP – 7/26/13; 10RP – 7/29/13; 11RP – 7/30/13; 12RP –

were charged with one count of Assault of a Child in the First Degree in connection with their son, I.W. CP 11; 4RP 8-10.

Evidence at trial established that Larry and Carri Williams married in 1990. 31RP 87. Larry worked for Boeing and Carri stayed at home to raise their children. 30RP 43-44. In 2003, the family moved to Sedro Woolley, where they built a home for their growing family. 30RP 43, 114; exhibits 108-109, 120. The Williams have seven biological children. 30RP 43-44.

Carri is fluent in American Sign Language and, in 2007, she and Larry decided to adopt I.W., a deaf child from Ethiopia. 30RP 47; 31RP 88-91. While watching a video of I.W. provided by the adoption agency, they saw a second child, Hana, and decided to adopt her as well. 30RP 47-48; 31RP 91. The seven biological children were thrilled and excited to welcome their two new siblings to the family. 22RP 64.

The children arrived from Ethiopia in August 2008. 31RP 88; exhibit 2. Hana, who may have been as young as 13 when she arrived or

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7/31/13; 13RP – 8/1/13; 14RP – 8/2/13; 15RP – 8/5/13; 16RP – 8/6/13; 17RP – 8/7/13 (labeled 8/7/14); 18RP – 8/8/13; 19RP – 8/9/13; 20RP – 8/13/13; 21RP – 8/14/13; 22RP – 8/15/13; 23RP – 8/16/13; 24RP – 8/19/13; 25RP – 8/20/13; 26RP – 8/21/13; 27RP – 8/22/13; 28RP – 8/23/13; 29RP – 8/26/13; 30RP – 8/27/13; 31RP – 8/28/13; 32RP – 8/29/13; 33RP – 8/30/13 (a.m.); 34RP – 8/30/13 (p.m.); 35RP – 9/4/13; 36RP – 9/5-6/13 and 9/9/13; 37RP – 7/26/13 and 10/29/13.

perhaps several years older,[2] integrated well. 15RP 24-25; 22RP 65; 30RP 49-51; 31RP 91-92, 102. I.W., however, who was 7 years old, presented challenges from the beginning. 10RP 15; 15RP 25; 30RP 51. He often would disobey or ignore other family members. He also would become violent toward his siblings, hitting and kicking them. 15RP 25-26; 22RP 87; 30RP 151-155; 31RP 46, 58, 100-101.

Despite the challenges I.W. presented, family members and friends reported seeing a happy and integrated family the first year following the adoptions; all of the children played together and joined in family activities. 10RP 146; 16RP 175; 17RP 97; 19RP 74; 22RP 155-160. Carri and Larry were openly affectionate with Hana and I.W., who appeared to enjoy their new parents and family. 10RP 146; 16RP 70-71; 17RP 40; 19RP 112; 22RP 183; 28RP 72-73; 30RP 50-51, 90.

Larry's shift at Boeing required him to leave home everyday around noon and he would not return until after midnight. 30RP 45. The 130-mile round trip commute to Everett required an hour and ten minute drive each way. 28RP 111, 118.

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[2] For international adoptions from Ethiopia, children are not always their stated age. 11RP 181-182. Hana's age was a point of contention at trial, and experts provided estimates suggesting her stated birth date may have been off by several years. See 19RP 32; 20RP 116; 27RP 45, 111-112; 28RP 41; 30RP 91; 32RP 24.

Carri home schooled the children. 30RP 44. And with Larry away during the week, a schedule for chores and studying was critical to maintaining order. 22RP 152-153; 30RP 44-45. When rules were violated, punishment followed. All seven of the Williams' biological children had experienced these punishments, which ranged from a verbal correction, to "boot camp" (extra chores), to light swats, to actual spanking. 15RP 54-56, 75-78; 30RP 192; 31RP 103-128. When spanking was deemed necessary, it was done with a "switch" (a piece of plumbing line), a "glue stick" (apparently the flexible type used for glue guns), or – in very rare circumstances – a belt. 15RP 54, 57, 120-121; 17RP 13, 48-50; 22RP 105-110, 173; 25RP 159-160; 31RP 114-117.

One undisputed issue is that punishments directed at Hana and I.W. eventually became excessive. While I.W. presented behavioral challenges from the beginning, even Hana became defiant after the first year or year and a half. 22RP 191-192; 23RP 40; 31RP 102-103. Both children were spanked frequently. 10RP 22-31, 38-53; 15RP 135-136; 17RP 13. And both children were sometimes excluded from family activities. 13RP 104.

Hana snuck out of her bedroom at night and stole junk food from the kitchen. 30RP 178-179; 31RP 145; 33RP 54-56. To stop this and

other oppositional behavior, she often was required to sleep in a location where she no longer had access to the kitchen – a barn on the property (a few nights in the summer), the shower room (a few weeks), a nursery adjoining the master bedroom, or the closet in that same room, where she also was placed during the day. 13RP 36-48; 15RP 44-50; 23RP 157; 30RP 179-185; 31RP 141-151. Hana, who had chronic and contagious hepatitis B, created safety issues in the bathroom with intentional and unsanitary practices involving her menstruation. 13RP 121; 18RP 98, 132-133; 30RP 85-86; 31RP 130-131. Thereafter, she was required to use a port-a-potty on the property, which was serviced regularly, and she was sometimes required to shower outside using a hose. 22RP 16-17; 30RP 87-89; 31RP 129-136.

Meals also played a role in punishments. Hana and I.W. often were required to eat their meals away from the main dining table and the other children – usually at a kitchen table or a sheltered picnic table on the outside patio. 13RP 25-27; 17RP 67; 31RP 156-160. Hana and I.W. would sometimes receive sandwiches for lunch that had been made soggy with water. 13RP 29; 16RP 27; 31RP 153. They also were given unheated frozen vegetables with some of their meals. 13RP 27-28; 15RP 42; 16RP 24-25; 31RP 151-153. At other times, they were forced to skip a

meal altogether, although they were given extra food the following meal. 13RP 30-31; 15RP 42, 142-144; 24RP 10-11; 31RP 154-156; 33RP 66-67.

Hana's weight fluctuated following her arrival from Ethiopia. When she first arrived, her Body Mass Index was in the 50th percentile. 10RP 77. Later, it went up to the 90th percentile (85th percentile is considered overweight and 95th percentile is considered obese). 10RP 77, 130. By May 2011, however, it had fallen to below the 5th percentile. 10RP 78. Her weight loss was noticeable, but because it was gradual, it did not trigger concern from family members. 30RP 185-186; 31RP 161; 32RP 139-140; 33RP 58, 76.

Larry eventually realized the punishment regime established for Hana and I.W. was not working and that changes needed to be implemented. 30RP 106-107. He spoke to his brother-in-law, a school psychologist familiar with children's behavioral issues. 19RP 84-87. He also sought guidance from members of his carpool. 28RP 105-107, 119-120. He told Carri he wanted changes, which led to a disagreement. Ultimately, however, nothing changed. 30RP 108-109.

The Williams' oldest son overheard his parents' arguments and he recalled that, closer to the time of Hana's death, his parents began to argue more frequently concerning issues of discipline for Hana and I.W. 30RP

25-26. Moreover, in the last year of Hana's life, there seemed to be a shift in authority from his father to his mother concerning Hana's discipline, and the degree and frequency of that discipline continued in an upward trajectory. 30RP 32, 35-37.

Consistent with the usual practice, on the morning of May 11, Larry handled breakfast duties, feeding the children before he left for Boeing around noon. 22RP 60-61; 30RP 45, 109, 127; 31RP 161-162.

The following events then occurred entirely in Larry's absence.

During the several hours before lunch, Hana was in and out of the house with the other children. 31RP 162. She was wearing shorts and a short sleeve shirt, which Carri deemed appropriate for the weather that day. 32RP 141; 33RP 82-83; exhibit 50. The temperature when Hana first went out was in the mid to upper 50s. 33RP 92-93. Later, however, it would start to rain and become cold. 16RP 95-96; 31RP 165.

Hana would not use the port-a-potty unless escorted, and Carri took her there before lunch. 31RP 163. Hana was then served lunch outside around 3:00 or 3:30 p.m. 31RP 162-163. About an hour later, when Carri told Hana to come inside, Hana walked up to the door and just stood there, refusing to come in. 31RP 163-164. Carri closed the door and left her outside. 31RP 164; exhibit 116.

Carri could see Hana from the kitchen window and checked on her periodically. 31RP 164. She took Hana to the port-a-potty again around 6:00 p.m. As before, Carri then told her to come inside, but Hana did not come in. 31RP 164. It began raining outside, and Carri could see Hana walking around out back. 31RP 165. Additional attempts to convince Hana to come inside were not successful. 31RP 165.

Around 8:30 p.m., Carri again escorted Hana to the bathroom. 31RP 165. This time, however, Hana began throwing herself on the ground (including the gravel), crawling, getting up, and then repeating this behavior all the way to the port-a-potty.[3] 31RP 166, exhibit 127. Hana did the same thing on the way back to the house (this time on the gravel and cement). 31RP 166-167. When she threw herself down on the patio, she repeatedly hit her head on the cement. 31RP 167; exhibit 116. As Carri would later recall, she "couldn't watch" Hana do this to herself, so she went inside and continued to monitor Hana from there. 31RP 167.

Hana would not come inside and continued to "throw herself around" outside for twenty to thirty minutes. 31RP 167. Carri could see that Hana had scraped her knees and elbows and had a knot on her forehead. 31RP 168. Carri sent her oldest son outside and instructed him

[3] Altered mental status is a symptom of hypothermia. 29RP 25.

to tell Hana to come inside. If she refused, he was to swat her on the bottom and tell her to do some exercises to stay warm. Carri watched as her son swatted Hana three times on the bottom. Hana then began to do exercises (jumping jacks or sit-squats), but quickly stopped. 31RP 168, 200. Carri then sent her next oldest son outside. He also swatted Hana, who briefly began exercising again before stopping. 31RP 168-169. Carri then sent a third son, who also swatted Hana and caused her to exercise some more. 31RP 169.

It was now about 9:30 or 10:00 p.m. 31RP 200. Carri went outside again to convince Hana to come inside. She then served Hana her dinner outside. 31RP 170. Hana repeatedly put food on her fork, lifted it toward her mouth without eating, and then put the fork back down again. 31RP 171. Eventually, Carri decided to carry Hana inside. When she tried to lift her, however, Hana went limp. 31RP 171.

Hana was wet from the rain, which had washed blood from her scrapes down her legs and onto her socks and shoes. 31RP 172. Carri told two of the boys to go outside, pick Hana up, and bring her in. But first, Carri instructed one of the boys to put on rubber gloves (to avoid the blood) and remove her socks and shoes before bringing her inside. 31RP 171-172. As one of the sons went outside, Hana took off her pants and

underwear.[4] 15RP 104; 31RP 172-173; exhibit 105. With Hana now naked from the waist down, Carri sent her son back inside. 31RP 173-174.

Carri retrieved dry clothes for Hana, brought them outside, and told her to change. Carri then turned off the outside light so that Hana could change privately. 15RP 104; 31RP 174. When Carri turned on the light five to ten minutes later, Hana was on her hands and knees and reaching for a paper towel Carri provided to wipe her bloody knees and elbows. 31RP 174-175. Carri turned off the light again. 31RP 175. Ten minutes later, she had another daughter turn on the light and check on her. The daughter reported Hana was still changing. 31RP 175. Five to ten minutes later, Carri turned on the light again and saw Hana now completely naked and sitting on the patio. Carri turned off the light and turned her attention to helping another child with schoolwork. 31RP 175-176.

At this point, Larry called – as he usually did – once he had arrived with his vanpool at a local park and ride and was getting in his own vehicle for the relatively short drive home. 30RP 109, 144; 31RP 175. It was now around midnight. 30RP 144-145. Carri told him that Hana –

[4] The false sensation of warmth and removal of clothing – called "paradoxical undressing" – is also a common sign of hypothermia. 11RP 81.

whose usual bedtime was around 10:30 p.m. – was outside and refusing to come in. 17RP 47; 30RP 109. What Larry did not know is just how long she had been out there, but he told Carri to get her inside. 30RP 109-110, 144-145. One of the Williams' sons overheard the call and described it as an argument. He could hear Larry questioning Carri's assertion that Hana had been falling down on purpose. 22RP 185, 196; 31RP 191.

Carri asked a daughter to check on Hana again. The daughter turned on the light and saw that Hana was still completely naked, now face down, and lying partly on the patio and partly on top of a molehill in the grass. 15RP 70; 31RP 174. Carri grabbed a sheet, went outside, covered Hana, and tried to lift her with the assistance of her daughter. Carri was afraid they might drop Hana, so she called to two of her sons, who helped take Hana inside. 15RP 71-72; 31RP 176-177.

It appeared that Hana had no pulse. 31RP 178. Carri called Larry, who was still en route. 30RP 111; 31RP 178. Larry told her to hang up immediately and call 911, which she did. 30RP 111, 146; 31RP 178. With the operator's assistance, Carri began chest compressions. 31RP 178. She was still doing chest compressions when Larry arrived. 30RP 112; 31RP 178. The two then took turns with CPR until medics arrived.

30RP 147; 31RP 178-179. Larry was distraught and crying. 16RP 66-67; 30RP 112.

Hana was taken by ambulance to Skagit Valley Hospital. 18RP 146. The treating physician noted that while Hana was thin, she was not so thin that her appearance was concerning. 18RP 172. Hana could not be revived and was pronounced dead around 1:30 a.m. the morning of May 12th. 18RP 152.

Dr. Daniel Selove conducted an autopsy and concluded that Hana's cause of death was hypothermia, which led to cardiac arrest. 11RP 21, 82. Hypothermia is an acute condition (rather than chronic) that occurs during a period of exposure. 29RP 100-101. Dr. Selove also identified two conditions that may have potentially been contributing factors in Hana's death because they might have increased the risk for hypothermia: malnutrition and Helicobacter pylori gastritis. 11RP 21, 88.

Hana's malnutrition resulted in thinness, and thin people tend to lose heat faster, which makes them more susceptible to hypothermia. 11RP 89. Dr. Selove could not quantify the impact of Hana's thinness, but she was at much greater risk compared to a person of normal weight. 11RP 89-90. Even if she had been 30 lbs. heavier, however, she may have died of hypothermia under the circumstances on May 11. 11RP 90. Dr.

Selove also documented abrasions and bruises Hana suffered in her mother's presence while repeatedly throwing herself on the ground. 11RP 41-55.

A jury convicted Carri of all three crimes. 36RP 193-195. In light of her conviction for Homicide By Abuse, her Manslaughter conviction was vacated on double jeopardy grounds. 37RP 96. She was sentenced to 443 months. 37RP 142.

For Larry, jurors failed to reach a unanimous verdict on Homicide By Abuse, and the trial court declared a mistrial on that charge. 36RP 191, 195-196, 198-199; CP 313, 321-322. Jurors convicted him, however, of Manslaughter in the First Degree and found aggravating circumstances. 36RP 191-193; 37RP 141; CP 314, 319-320. Jurors also convicted Larry of Assault of a Child in the First Degree concerning I.W. 36RP 191; CP 316. Larry received an exceptional 210-month sentence for Manslaughter and 123 months for Assault of a Child, to run consecutively, for a total sentence of 333 months. 37RP 141; CP 371-372.

2. Court of Appeals

On appeal, Larry challenged the sufficiency of the evidence supporting his Manslaughter conviction. See Brief of Appellant, at 19-26. In response, the State abandoned any effort to defend the conviction under

an accomplice theory. Instead, the State argued Larry was guilty as a principal because his own reckless acts had caused Hana's death. See Brief of Respondent, at 28-33. Larry disagreed. See Reply Brief, at 1-6.

Larry also argued that his trial counsel was ineffective for (1) failing to ensure the jury instructions pertinent to Manslaughter had required the State to prove he proximately caused Hana's death and (2) for failing to require jurors to determine whether (assuming his actions were a proximate cause), Carri's actions on the day of Hana's death were a superceding intervening cause of her death. See Brief of Appellant, at 26-32; Reply Brief, at 6-10. In a related argument, Larry challenged the instruction on superceding intervening cause because its language deviated from the pattern instruction in such a way that, even if jurors had been told it applied to the Manslaughter charge for Larry, it excluded any possibility jurors could find that Carri's conduct was a superceding cause. See Brief of Appellant, at 32-36; Reply Brief, at 10-13.

Finally, Larry argued that the jury instructions pertaining to the aggravating circumstances for Manslaughter were inconsistent with State v. Hayes because jurors may have found the circumstances established based merely on his complicity as an accomplice. See Brief of Appellant, at 36-40; Reply Brief, at 13-15.

The Court of Appeals affirmed. Although there was no evidence Larry did anything wrong the day Hana experienced the hypothermia that killed her, the Court found that his actions prior to that day made him Carri's accomplice to Manslaughter. Slip op., at 7-12. And because it found the evidence sufficient to convict Larry as an accomplice, the Court of Appeals concluded that none of the mistakes in the jury instructions on causation (which only impacted Larry's liability as a principal) required a new trial. Slip op., at 12-17. The Court also upheld the instructions pertaining to the aggravating circumstances. Slip op., at 17-20.

E. ARGUMENT

1. REVIEW OF THE COURT OF APPEALS ACCOMPLICE LIABILITY ANALYSIS IS APPROPRIATE BECAUSE IT CONFLICTS WITH DECISIONS OF THIS COURT.

The Court of Appeals found the evidence at trial sufficient to support Larry's Manslaughter conviction under a theory of accomplice liability. In order to be an accomplice, however, an individual must have the purpose to promote or facilitate the conduct forming the basis for the charge. State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000) (citing Model Penal Code § 2.06 cmt. 6(b) (1985)). Stated another way, an individual cannot be an accomplice unless "he associates himself with the undertaking, participates in it as something he desires to bring about, and

seeks by action to make it succeed." In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (quoting State v. J-R Distribs., Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)). Prior participation in some type of criminal activity will not suffice; he must knowingly promote or facilitate the particular crime at issue. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); State v. Bauer, 180 Wn.2d 929, 943-944, 329 P.3d 67 (2014); Roberts, 142 Wn.2d at 509-513. Moreover, foreseeability that another might commit a crime is insufficient. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001).

In finding the evidence sufficient to establish that Larry was an accomplice to Carri's acts on May 11, 2011, the Court of Appeals focused on Larry's conduct well prior to that date, noting that he knew of and participated in various punishments that had been imposed on Hana and had led to her decreased weight. He also knew that Hana was sometimes forced to eat outside, sometimes spent significant time outside, and sometimes refused to come back inside the house once outside. See slip op., at 10-11. Therefore, concluded the Court, the evidence was sufficient to establish Larry had participated in conduct that promoted and encouraged Carri's reckless actions that caused Hana's death. Id. at 10-11.

Even in the light most favorable to the State, however, this evidence fell short of establishing Larry's guilt as an accomplice to Manslaughter. When Larry left for work, Hana was not suffering any effects of hypothermia, which is an acute condition. He was not there (and there is no evidence he knew) when Carri repeatedly failed to take appropriate measures to bring Hana inside after 8 hours or more outside. He was not there (and there is no evidence he knew) when Carri failed to act as it began to rain, turned cold, and Hana's already inadequate clothing became wet. He was not there (and there is no evidence he knew) when Hana showed signs of hypothermia to the point she could not feed herself, was falling to the ground, was slamming her head against the cement, and removed all of her clothing ("paradoxical undressing"). And he was not there (and there is no evidence he knew) when Hana still was left outside thereafter, eventually fell to the ground, and went into cardiac arrest.

The Court of Appeals ruled that jurors were not limited to considering what happened in Larry's absence on May 11 and the early morning hours of May 12 despite language in the "to convict" instruction limiting jurors' consideration to Larry's conduct "on or about May 12, 2011." Slip. op. at 11. As support, the Court of Appeals cited solely to State v. Hayes, 81 Wn. App. 425, 432, 914 P.2d 788 (1996), a case that

stands for the well-established principle that "on or about" language in the information is sufficient to permit proof of a criminal act at any time within the statute of limitations in the absence of an alibi defense. Slip op., at 11. The difficulty for the State in this case, however, is that, although the language in the information did not limit the State's proof at trial, the "to convict" instruction was never amended to reflect a larger period of conduct. It still required jurors to examine Larry's conduct "on or about the 12th day of May, 2011." CP 286. Under this Court's decision in State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998), this limitation became law of the case. Hayes did not involve or address this issue. Hickman controls.

But even if jurors could consider all of Larry's conduct in the months and years before May 11, 2011 when assessing his liability as an accomplice to Manslaughter, the State had to prove his knowing involvement in a reckless act and that Hana died as a result of that reckless act. CP 286, 282. Hana did not die from malnutrition or the result of any other punishment in which Larry may have been involved. Rather, her established cause of death was hypothermia, an acute condition that developed when her mother (and only her mother) left her exposed to the elements the afternoon of May 11th and early morning of May 12th, a

period during which Larry was never home and did not know what was happening.

The Court of Appeals' analysis in this case marks a return to a time – prior to this Court's decisions in State v. Roberts, 142 Wn.2d at 509-513, and State v. Cronin, 142 Wn.2d 568, 578-582, 14 P.3d 752 (2000) – when juries could convict a defendant as an accomplice based merely on involvement in "a crime" instead of knowing participation in "the crime" charged. In the light most favorable to the State, Larry's treatment of Hana prior to May 11, 2011 may have been sufficient to support a conviction for " a crime," meaning Criminal Mistreatment in the Third or Fourth Degrees. See RCW 9A.42.035; RCW 9A.42.037 (negligently withholding a basic necessity of life and creating a substantial risk of bodily harm or injury). But this is not the same as participation in "the crime" of Manslaughter, which required proof of his knowing participation in his wife's reckless conduct on May 11, conduct that caused Hana's hypothermia and, ultimately, her death. This evidence was absent.

Review is appropriate because the Court of Appeals decision conflicts with this Court's decisions in Hickman, Roberts, Cronin, and every case since Roberts and Cronin confirming an accomplice must actually know he is promoting the charged crime. Under a theory of

accomplice or principal liability, the evidence is insufficient to sustain Larry's Manslaughter conviction. It should be vacated.

2. THIS COURT SHOULD ALSO DECIDE WILLIAMS' CHALLENGES TO THE JURY INSTRUCTIONS.

The Court of Appeals did not disagree that the language of the jury instructions excluded jurors' proper consideration of proximate cause and superceding intervening proximate cause in deciding whether Larry was guilty of Manslaughter as a principal. Instead, citing this Court's opinion in State v. McDonald, 138 Wn.2d 680, 689-690, 981 P.2d 443 (1999), the Court of Appeals reasoned that, because Larry was guilty as an accomplice, there was no reversible error. See Slip op., at 12-17.

But jurors were never asked to identify the theory on which they found Larry guilty. For the reasons argued, and unlike McDonald, the accomplice liability theory failed in this case. Indeed, in its Court of Appeals briefing, the State abandoned accomplice liability in favor of arguing principal liability to sustain the Manslaughter conviction. Jurors may have done the same. And if jurors convicted Larry only as a principal – short of outright dismissal of the conviction for lack of evidence under either theory of liability (which Larry still maintains is the proper remedy) – he is at least entitled to a new trial because these faulty instructions denied him a fair one.

3. REVIEW IS ALSO APPROPRIATE BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S DECISION IN HAYES.

For Manslaughter, jurors were told to consider five aggravating circumstances:

> (1) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim;
>
> (2) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance;
>
> (3) That the victim and the defendant were family or household members; and
>
> (i) That the offense was part of an ongoing pattern of psychological or physical abuse of a victim manifested by multiple incidents over a prolonged period of time . . . .;
> (ii) That the offense was committed within sight or sound of the defendant's child or children who were under the age of 18 years; or
> (iii) That the defendant's conduct during the commission of the offense manifested deliberate cruelty or intimidation of the victim;
>
> (4) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense; and
>
> (5) The offense involved a destructive and foreseeable impact on persons other than the victim.

RCW 9.94A.535(3)(a), (b), (h), (n), and (r); CP 11-12, 303-308, 311-312.

As previously discussed, the State argued Larry was Carri's accomplice. During the discussion of the alleged aggravating circumstances,

defense counsel argued that the circumstances could not apply under a theory of accomplice liability. 29RP 159. Defense counsel was correct.

In State v. Hayes, this Court held that aggravating circumstances aimed at the current offense cannot be applied to a defendant based merely on his complicity as an accomplice. Rather, for such aggravating circumstances to apply to an accomplice, "the jury must find that the defendant had some knowledge that informs that factor," which "ensures that the defendant's own conduct formed the basis of the sentence." 182 Wn.2d at 566. For example, addressing the aggravating circumstances at issue in Hayes, where the aggravating circumstance was that the offense involved multiple victims, jurors should have been asked expressly whether Hayes knew the offense involved multiple victims. And where the aggravating circumstance was that the offense involved a high degree of sophistication or planning or would occur over a lengthy period of time, jurors should have been asked expressly whether Hayes knew this to be true. Id. Because this language was not used in Hayes' case, jurors may have simply found the aggravating circumstances satisfied based on his guilt as an accomplice rather than his own conduct. Thus, his exceptional sentence could not stand. Id. at 566-567.

The same critical language is missing in Larry's case for most of the

aggravating circumstances. The special verdict form contains the following questions:

> Were Larry Williams and Hana Williams members of the same family or household?
>
> Did Larry Williams's conduct during the commission of the crime manifest deliberate cruelty to the victim?
>
> Did Larry Williams know, or should he have known, that the victim was particularly vulnerable or incapable of resistance?
>
> As to the defendant Larry Williams, was this offense an aggravated domestic violence offense?
>
> Did Larry Williams use his position of trust to facilitate the commission of the crime?
>
> As to the defendant Larry Williams, did the crime involve a destructive and foreseeable impact on persons other than the victim?

CP 319-320.

Only the circumstance focusing on particular vulnerability included the necessary language requiring jurors to focus on Larry's own knowledge. Therefore, jurors' verdicts on four of five circumstances must be vacated. And because it is impossible to conclude that Judge Cook would have imposed the same sentence based on one circumstance, resentencing is required if Larry's Manslaughter conviction is not reversed. See State v. Cardenas, 129 Wn.2d 1, 12, 914 P.2d 57 (1996) (resentencing necessary unless reviewing court satisfied judge would have imposed precisely the

same sentence based on one aggravating circumstance).

In rejecting this argument, the Court of Appeals relied on Division Two's decision in State v. Weller, 185 Wn. App. 913, 344 P.3d 695 (2015), review denied, 183 Wn.2d 1010, 344 P.3d 695 (2015), where the court held that simply referring to "the defendant" in a special verdict question satisfies Hayes. The flaw in this reasoning is that reference even to "the defendant's conduct" still does not reveal whether jurors are assessing the question with reliance on principles of accomplice liability, i.e., jurors may simply be determining "the defendant's conduct" through the lense of accomplice liability. Only by asking – as Hayes requires – what the defendant knew can we be certain his own conduct informs the aggravating factor.

F. CONCLUSION

Larry Williams respectfully asks this Court to grant review.

DATED this 20th day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

DAVID B. KOCH, WSBA No. 23789
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

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

STATE OF WASHINGTON, Respondent,	)	No. 71112-1-I
v.	)	
LARRY PAUL WILLIAMS, Appellant.	)	UNPUBLISHED OPINION FILED: December 21, 2015

2015 DEC 21 AM 9:41
COURT OF APPEALS DIV I
STATE OF WASHINGTON

VERELLEN, A.C.J. — An accomplice to manslaughter is legally responsible for the principal's acts that proximately caused the victim's death. When the accomplice acknowledges that the principal's acts caused the victim's death, the accomplice has no viable theory that the accomplice was not a proximate cause of the death, or that the principal was a superseding cause. The same is true even if the accomplice might also have been found guilty as a co-principal.

Larry Williams appeals his manslaughter conviction. He asserts his wife Carri Williams caused the death of their adopted daughter H.W. from hypothermia after the young girl spent approximately nine hours outside with inadequate clothing in rainy, cold weather.[1] But Larry and Carri both engaged in a regimen of punishment that deprived H.W. of food, required her to eat meals outside in all kinds of weather, and placed her at

[1] For ease of reference, we refer to Larry Williams and his wife Carri Williams by their first names.

a severe risk of hypothermia. He promoted and participated in Carri's reckless acts that he contends resulted in H.W.'s death from hypothermia. We conclude sufficient evidence supports Larry's conviction as an accomplice to manslaughter.

If guilty as an accomplice under these facts, Larry has no viable theory that he was not a proximate cause of H.W.'s death, or that Carri's conduct was a superseding cause. The same is true even if Larry might also have been found guilty as a co-principal.

Therefore, we conclude Larry does not establish prejudice to support his claim that his attorney was ineffective for failing to request a proximate cause instruction on the manslaughter charge. Neither was he prejudiced by the trial court's refusal to give his proposed superseding cause instruction.

Finally, the plain language of the special verdict form adequately tied Larry's own conduct to the aggravating factors relied on to impose an exceptional sentence.

We affirm Larry's convictions and exceptional sentence.

FACTS

Larry and Carri married in 1990. They have seven biological children. In August 2008, they adopted two children from Ethiopia, H.W. and I.W., who is deaf.

Larry worked a swing shift at his job, leaving home at noon and returning around midnight. Larry cooked the children breakfast every morning before work. He was frequently home on weekends. Carri, fluent in sign language, raised and home schooled the children and made them do chores around the house. She also made the children do "boot camp," a form of punishment consisting of extra chores both inside and outside the house.[2]

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[2] Report of Proceedings (RP) (Aug. 5, 2013) at 55.

When H.W. first arrived at the Williamses' home, she behaved and integrated well. After the first year, she occasionally disobeyed the Williamses, such as taking food without permission. As a result, H.W. was not allowed to participate in some holiday activities and family events.

Larry acknowledges that the punishment directed at H.W. and I.W. "eventually got way out of hand."[3] Both Carri and Larry disciplined their children. The Williamses punished I.W. and H.W. more than the other children, and their punishments increased in "severity" and "frequency" over time.[4] Punishments included spankings with a belt, a wooden stick or a glue stick, and being hosed down with cold water outside.

The Williamses used food deprivation as punishment. They served cold food and leftovers, frozen vegetables, and sandwiches soaked in water to I.W. and H.W., but not to the other children. They forced H.W. and I.W. to eat some of their meals outside in "any kind of weather."[5] During the last six months of her life, H.W. ate breakfast and other meals outside "more times than not."[6] H.W. and I.W. were denied the most meals out of all the children. Larry knew H.W. was denied meals for her "oppositional behavior at the meal table."[7] When H.W. was placed outside, she would not come back inside sometimes "even though she was allowed back inside."[8] She would stay outside "for

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[3] Appellant's Br. at 8.

[4] RP (Aug. 27, 2013) at 32.

[5] RP (Aug. 1, 2013) at 26.

[6] RP (Aug. 27, 2013) at 103.

[7] RP (Aug. 28, 2013) at 155.

[8] RP (Aug. 27, 2013) at 135.

long periods of time."[9] The Williamses sometimes "didn't let her into the house to warm up."[10] Larry knew H.W. "was sent outside as punishment."[11]

The Williamses used isolation as punishment. At times, the Williamses forced H.W. to stay and to sleep alone in the barn outside without electricity and to take cold showers outside. Other times, the Williamses forced H.W. to stay and to sleep alone in a shower room. Beginning in late 2010, and up until her death, the Williamses forced H.W. to stay in and to sleep alone in a closet at "night and during the day sometimes."[12] The closet measured "two foot by four foot three inches."[13] H.W. "wasn't able to stretch" or to "change her position significantly" inside it.[14] None of the other children were forced to sleep in the closet. The closet door was locked from the outside, and Larry "installed the lock in the closet."[15] Larry knew that for the last six months of her life, the closet served as H.W.'s bedroom.

In Ethiopia, H.W. had "a healthy size and stature" for her age.[16] "There was no evidence of malnutrition."[17] When she first arrived at the Williamses' home, H.W. "had fairly normal height and weight."[18] During the first two years, H.W.'s weight increased

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[9] RP (Aug. 20, 2013) at 50.

[10] RP (Aug. 1, 2013) at 20.

[11] RP (Aug. 27, 2013) at 132.

[12] RP (Aug. 5, 2013) at 49.

[13] RP (Aug. 7, 2013) at 127.

[14] RP (Aug. 2, 2013) at 28.

[15] RP (Aug. 28, 2013) at 147.

[16] RP (Aug. 13, 2013) at 87.

[17] Id. at 98.

[18] RP (July 29, 2013) at 70.

steadily and overall "she was generally healthy."[19] Her body weight was in the "90th percentile" of the body mass index chart (BMI), which is considered "overweight."[20] H.W. was described as "quite chubby."[21] By 2011, H.W.'s weight dropped from 110 pounds to around 80 pounds. Larry acknowledged that he "noticed" H.W.'s "weight loss."[22] When H.W. died, her weight was in the "third percentile" of the BMI.[23]

Several experts testified that H.W.'s malnutrition put her at a severe risk of hypothermia. Dr. Frances Chalmers testified that extreme weight loss made a person "more susceptible to hypothermia."[24] Dr. Rebecca Weister testified that H.W.'s starvation and extreme malnutrition put her at a "high risk" of hypothermia.[25] Dr. Daniel Selove testified that H.W.'s "thinness made her [at] increased risk to die of hypothermia"[26] and that the principal cause of H.W.'s death was "hypothermia."[27] He noted that the "prolonged exposure to rain and wintery weather with inadequate clothing and chronic malnutrition were significant contributing factors" in H.W.'s death.[28]

On May 11, 2011, Larry left for work as usual around noon. Carri sent H.W. outside around 3:00 p.m. Initially, H.W. wore sweatpants and a long-sleeve shirt. The

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[19] Id.

[20] Id. at 130.

[21] RP (Aug. 2, 2013) at 126.

[22] RP (Aug. 28, 2013) at 41.

[23] RP (July 29, 2013) at 75.

[24] Id. at 82.

[25] RP (Aug. 26, 2013) at 41.

[26] RP (July 30, 2013) at 57.

[27] Id. at 21, 81.

[28] RP (Aug. 26, 2013) at 46.

temperature was "in the mid- to upper fifties."[29] A few hours later, H.W. ate dinner outside.

It started to rain later that evening, and the temperature became "cold."[30] Carri told H.W. to do exercises to keep warm. Carri told H.W. multiple times to come inside during the evening, but she refused. Carri also told one of her daughters to check on H.W. every 10 or 15 minutes. Carri placed dry clothes outside for H.W. because the rain had soaked her clothes.

Around 8:30 p.m., Carri told H.W. to go to the port-a-potty. H.W. "took about ten or twenty steps, and she began throwing herself down" on her hands and knees.[31] H.W. repeated this behavior all the way to the port-a-potty. H.W. did the same thing on the way back to the house, hitting her forehead on the concrete patio several times. H.W. continued to "throw herself around" for "twenty or thirty minutes."[32] H.W. "had skinned up her knees and her elbows quite a bit" and "had a knot on her forehead."[33] Each time that one of Carri's daughters looked outside to check on H.W., she had removed pieces of clothing until she was naked.[34]

Shortly before midnight, one of Carri's daughters saw H.W. lying naked, face down in the grass. Carri went to check on H.W. She tried to carry H.W. inside, but failed. Carri grabbed a sheet to cover H.W.'s naked body. Carri's sons helped carry

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[29] RP (Aug. 30, 2013) at 92.

[30] RP (Aug. 6, 2013) at 96.

[31] RP (Aug. 28, 2013) at 166.

[32] Id. at 167.

[33] Id. at 168.

[34] The false sensation of warmth and removal of clothing, called "paradoxical undressing," is common to hypothermia. RP (July 30, 2013) at 81.

H.W. inside. Carri did not feel a pulse. She performed cardiopulmonary resuscitation (CPR), called Larry, and then called 911. Larry arrived and helped perform CPR until medics arrived. H.W. died at the hospital at 1:30 a.m.

A jury convicted Larry of first degree manslaughter and first degree assault of a child. The trial court imposed an exceptional sentence based on several aggravating factors.

Larry appeals.

ANALYSIS

Sufficiency of the Evidence

Larry contends insufficient evidence supports his manslaughter conviction as an accomplice. We disagree.

Evidence is sufficient to support a conviction if any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt.[35] We view the evidence and all reasonable inferences in the light most favorable to the State.[36]

A person commits first degree manslaughter in the first degree when he or she either "recklessly causes" or was an accomplice to another who recklessly causes "the death of another person."[37] A person is "reckless" or "acts recklessly" "when he or she knows of and disregards a substantial risk that a [death] may occur and his or her

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[35] State v. Condon, 182 Wn.2d 307, 314, 343 P.3d 357 (2015) (quoting State v. Luvene, 127 Wn.2d 690, 712, 903 P.2d 960 (1995)).

[36] State v. Ozuna, 184 Wn.2d 238, 359 P.3d 739, 744 (2015).

[37] RCW 9A.32.060(1)(a).

disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation."[38]

The trial court instructed the jury on accomplice liability:

> A person is guilty of a crime if it is committed by the conduct of another person for whom he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.[39]

"An accomplice must have actual knowledge that the principal was engaged in the charged crime."[40] But an accomplice "need not have specific knowledge of every element of the crime,"[41] nor "share the same mental state as the principal";[42] "general knowledge of 'the crime' is sufficient."[43] The accomplice need only have "encouraged,

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[38] RCW 9A.08.010(1)(c).

[39] Clerk's Papers (CP) at 328.

[40] State v. Clark, 2015 WL 6447738, at *14 (Wash. Ct. App. Oct. 26, 2015).

[41] State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000).

[42] State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003).

[43] State v. McChristian, 158 Wn. App. 392, 400, 241 P.3d 468 (2010).

rendered assistance, or aided in the planning or commission of the crime."[44] A person "may become an accomplice without actually rendering physical aid to the endeavor."[45] An accomplice need not be present at the commission of the crime and is "equally culpable as the principal," regardless of who "actually performed the harmful act."[46] At a minimum, there must be proof that the accomplice "did something in association with the principal to accomplish the crime."[47]

Accomplice liability is "derivative."[48] Criminal liability is the same whether one acts as a principal or an accomplice.[49] Accomplice liability is not an element or alternative means of committing a crime but is an alternative theory of liability.[50] The jury is "not required to determine which participant acted as a principal and which acted as an accomplice" in the crime.[51] Nor is the jury required to unanimously agree on the

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[44] State v. McDonald, 90 Wn. App. 604, 611, 953 P.2d 470 (1998), aff'd, 138 Wn.2d 680, 981 P.2d 443 (1999); see also RCW 9A.08.020(3)(a)(ii).

[45] WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.2(a), at 338 (2d ed. 2003) (citing RCW 9A.08.020).

[46] McDonald, 90 Wn. App. at 611.

[47] State v. Boast, 87 Wn.2d 447, 455-56, 553 P.2d 1322 (1976).

[48] State v. Davis, 35 Wn. App. 506, 510, 667 P.2d 1117 (1983) (to establish an accomplice's derivative liability for first degree robbery, the State need not prove beyond a reasonable doubt that the accomplice knew his co-participant was armed).

[49] State v. Silva-Baltazar, 125 Wn.2d 472, 480-81, 886 P.2d 138 (1994).

[50] State v. Teal, 152 Wn.2d 333, 338, 96 P.3d 974 (2004).

[51] State v. Haack, 88 Wn. App. 423, 428, 958 P.2d 1001 (1997); see also State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004) (stating that a jury need not determine whether a defendant acted as a principal or an accomplice in a crime if it is convinced that the defendant participated in the crime); State v. Baylor, 17 Wn. App. 616, 618, 565 P.2d 99 (1977) ("[W]hen it cannot be determined which of two defendants actually committed a crime, and which one encouraged or counseled, it is not necessary to establish the role of each. It is sufficient if there is a showing that each defendant was involved in the commission of the crime.").

theory underlying the conviction.[52]

Larry asserts "the evidence at trial fell well short of establishing [his] guilt as an accomplice to [m]anslaughter."[53] We conclude a rational trier of fact could have found that Larry was Carri's accomplice regardless of whether he was present when H.W. developed hypothermia.

Larry participated in conduct that promoted and encouraged Carri's reckless acts that resulted in H.W.'s death. Larry participated in and promoted a regimen of punishment that decreased H.W.'s body weight to the third percentile of the BMI and placed H.W. at a severe risk of hypothermia. Larry participated in and knew about the corporal punishment, including spankings with a belt and a glue stick and forcing H.W. to stay in and to sleep in a small, locked closet.

Larry cooked breakfast for H.W. during the weekdays, and he was generally at home on weekends. Larry knew H.W. was often forced to eat breakfast and other meals outside, H.W. was fed cold and frozen food and sandwiches soaked in water, and H.W. was denied meals for her "oppositional behavior at the meal table."[54] Larry knew H.W. spent significant amounts of time outside in all kinds of weather, H.W. often remained outside after eating, H.W. was sent outside as punishment, and that she sometimes refused to return inside upon request. Larry knew H.W. was forced to use the port-a-potty outside and to take cold showers outside since he built the shower. Larry knew H.W. was forced to occasionally stay in and to sleep in the barn outside

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[52] See State v. Carothers, 84 Wn.2d 256, 261, 525 P.2d 731 (1974), overruled on other grounds by State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984).

[53] Appellant's Br. at 22; see also id. at 37 ("[H]e was tried and convicted as an accomplice to Carri.").

[54] RP (Aug. 28, 2013) at 155.

without electricity and was forced to stay in and to sleep in a locked shower room. Larry installed the lock on the closet. He knew H.W. was forced often to stay in and to sleep in a small locked closet, which served as her bedroom for the last six months of her life.

Contrary to Larry's argument, the "[o]n or about May 12, 2011" charging period for the manslaughter charge does not limit the charge only to events when Larry was not home on May 11 and 12, 2011.[55] Accomplice liability extends to all acts leading up to the charged crime. "[W]here time is not a material element of the charged crime, the language 'on or about' is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi."[56] Time is not a material element of first degree manslaughter.[57] The conduct here also falls well within the statute of limitations period, and Larry did not rely on a true alibi defense. The jury was not limited in determining Larry's guilt to the events that occurred while he was not home on May 11 and 12, 2011.

Larry also argues that any role he had in H.W.'s malnourishment "misses the mark" because the State's expert indicated that malnourishment was only a possible contributing factor in her death.[58] But ample expert testimony supports that H.W.'s extreme weight loss put her at a severe risk of hypothermia.

Because Larry participated in the punishment that placed H.W. at severe risk of hypothermia, and he promoted and encouraged Carri's reckless acts that resulted in

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[55] CP at 11.

[56] State v. Hayes, 81 Wn. App. 425, 432, 914 P.2d 788 (1996).

[57] See RCW 9A.32.060.

[58] Appellant's Br. at 25.

H.W.'s death, we conclude sufficient evidence supports Larry's manslaughter conviction as an accomplice.

Ineffective Assistance

Larry contends his counsel was ineffective when he failed to request a proximate cause instruction for the manslaughter charge. We disagree.

We review ineffective assistance claims de novo.[59] For an ineffective assistance claim, a defendant must show deficient performance and resulting prejudice.[60] Counsel's performance is deficient if it falls "below an objective standard of reasonableness."[61] We strongly presume that counsel's performance was reasonable and effective.[62] To establish prejudice, the defendant must show there is a reasonable probability that, but for the deficient performance, the outcome would have been different.[63] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[64] The defendant's burden to show prejudice is "based on the record developed in the trial court" and not on hypothetical theories that could have been advanced at trial.[65]

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[59] State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

[60] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P .3d 1122 (2007).

[61] State v. Townsend, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001).

[62] Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

[63] Nichols, 161 Wn.2d at 8.

[64] Strickland, 466 U.S. at 694; see also State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) ("'reasonable probability'" means "by less than a more likely than not standard").

[65] McFarland, 127 Wn.2d at 337.

Larry asserts the failure to instruct on proximate cause for the manslaughter charge precluded him from arguing that his conduct did not proximately cause the hypothermia and resulting death. But this overlooks the fact that the State did not need to prove that Larry's acts proximately caused H.W.'s death; it only needed to prove that Larry "aided" Carri in the commission of the crime.[66]

An accomplice "is considered to have actually committed the crime" and is "subject to all the legal consequences of [the] crime" because the accomplice's liability "'is the same as that of the principal.'"[67] Accomplice liability is derivative, based on the principal's conduct whose acts proximately caused the unlawful result.[68] Therefore, an accomplice to manslaughter is legally responsible for the principal's acts that proximately caused the victim's death. So long as the principal's acts proximately caused the death, an accomplice may not argue that his own acts did not proximately cause the death. Our Supreme Court in State v. McDonald rejected a similar argument that an accomplice's act must be the proximate cause of the principal's act which, in turn, must be the proximate cause of the death.[69]

Larry acknowledges that Carri's acts proximately caused H.W.'s hypothermia and resulting death. Consistent with the record developed below, his theory at trial and on appeal is not that H.W.'s own conduct or someone other than Carri proximately caused H.W.'s death. If he was convicted as an accomplice to Carri's acts, he has no viable

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[66] Strickland, 466 U.S. at 690.

[67] State v. Carter, 154 Wn.2d 71, 78, 109 P.3d 823 (2005) (quoting State v. Graham, 68 Wn. App. 878, 881, 846 P.2d 578 (1993)).

[68] Davis, 35 Wn. App. at 510-11.

[69] 138 Wn.2d 680, 689-90, 981 P.2d 443 (1999).

theory that he was not a proximate cause of the death.

At oral argument, Larry suggested that he was entitled to a proximate cause instruction because he may have been found guilty of manslaughter as a principal. Generally, a principal charged with manslaughter would be entitled to a proximate cause instruction to argue that his conduct did not proximately cause the death.[70] But there is no reasonable probability that Larry was found guilty as the sole principal. The facts that could support Larry's guilt for manslaughter as a principal also reasonably establish Carri's guilt as a co-principal. In turn, those same facts would necessarily support Larry's guilt as an accomplice. Stated differently, there is no reasonable probability that Larry could be guilty as a principal without also being an accomplice to Carri's acts as a co-principal. Even if Larry is guilty as both an accomplice and a co-principal, he remains legally responsible for the consequences of Carri's acts. There is no reasonable probability that his counsel's failure to request a proximate cause instruction for the manslaughter charge changed the outcome. Therefore, Larry's ineffective assistance claim fails.

Superseding Cause Instruction

Larry challenges the trial court's denial of his proposed superseding cause instruction. He contends he was entitled to such an instruction to argue that Carri's conduct was a superseding cause. We disagree.

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[70] See State v. Christman, 160 Wn. App. 741, 754, 249 P.3d 680 (2011) ("resulting in the death" language in elements instruction for controlled substances homicide charge requires proof of proximate cause).

We review a trial court's refusal to give a proposed instruction for abuse of discretion.[71] Jury instructions are adequate if, taken as a whole, they permit the defendant to argue his or her theory of the case, do not mislead the jury, and properly inform the jury of the applicable law.[72]

Larry's proposed superseding cause instruction states:

> If you are satisfied beyond a reasonable doubt that the acts of the defendant were a proximate cause of the death, it is not a defense that conduct of the deceased *or another* 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 *or another* which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant'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 acts have been committed.[73]

This proposed instruction omits any reference to an accomplice's acts and allows the jury to find that the defendant's acts may be superseded by an intervening act "of the deceased or another."

The trial court adopted with minor variations the State's proposed superseding cause instruction. That instruction mirrors the pattern instruction on superseding cause, but deleted the bracketed phrase "or another."[74] Instruction 12 states:

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[71] State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

[72] State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

[73] CP at 231 (emphasis added).

[74] Compare CP at 285, with CP Supp. at 99. Defense counsel did object. The pattern jury instruction states, "If you are satisfied beyond a reasonable doubt that the [acts] [or] [omissions] of the defendant were a proximate cause of the death, it is not a defense that the conduct *of [the deceased] [or] [another]* 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] [or] [another]* which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's acts are superseded by the intervening cause and are not a proximate cause

> 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 superceded 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 supercede 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.[75]

Instruction 12 precluded the jury from finding that acts by someone other than the deceased could constitute a superseding cause.

Larry claims that by failing to use the phrase "of another" after all references to "the deceased" and by including the phrase "or his accomplice" after all references to "the defendant," the jury was precluded from finding that Carri's conduct was a superseding cause. But he does not have a viable legal theory that Carri was a superseding cause of the death.

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of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's [acts] [or] [omissions] have been committed [or begun]." 11 WASHINGTON PRACTICE: PATTERN JURY INSTRUCTIONS: CRIMINAL WPIC 25.03 (3d ed. 2014) (emphasis added).

[75] CP at 285 (emphasis added).

Either Larry is, or is not, an accomplice to Carri's acts. Larry did not advance any theory below under which Carri is not legally responsible as a principal. As discussed earlier, if Larry was guilty as an accomplice to Carri's acts, then he is "equally culpable" for the consequences of those acts, and he has no viable theory that Carri's acts are a superseding cause of the death.[76] And if Larry was guilty as a co-principal, then he is also necessarily guilty as an accomplice to Carri's acts. On this record, Carri's acts as co-principal could never be a superseding cause of H.W.'s hypothermia and resulting death.

Because Larry did not have a viable theory that Carri's conduct was a superseding cause, we conclude he was not prejudiced by the trial court's refusal to give his proposed superseding cause instruction.

Exceptional Sentence

Larry contends the exceptional sentence for his manslaughter conviction must be vacated because it may have been based on principles of accomplice liability. We disagree.

In State v. Hayes, our Supreme Court determined that "a sentencing judge can impose an exceptional sentence on an accomplice only where the accomplice's own conduct informs the aggravating factor."[77] Because the Hayes court could not determine if the jury found that the defendant had any knowledge that informed the aggravating factors, the court vacated the defendant's exceptional sentence.[78] More

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[76] McDonald, 90 Wn. App. at 611.

[77] 182 Wn.2d 556, 563-64, 342 P.3d 1144 (2015).

[78] Id. at 567. Specifically, in Hayes, to conclude that the major economic offense aggravating factor applied to Hayes's identity theft charge, the jury had to find "at least one of two factors beyond a reasonable doubt: (1) the crime involved multiple victims or

recently, in State v. Weller, the Wellers were convicted of multiple offenses. For those offenses, a jury answered "yes" to the question, "Did *the defendant's conduct* during the commission of the crime manifest deliberate cruelty to the victim?"[79] The Weller court concluded the exceptional sentence was justified because the jury expressly found that each of the Wellers' own conduct, and not the Wellers' joint conduct, supported the exceptional sentence.[80]

The trial court here found several aggravating factors to justify the exceptional sentence: deliberate cruelty to the victim, victim vulnerability, abuse of trust, and destructive and foreseeable impact on persons other than the victim.[81] The statute on which Larry's exceptional sentence was based, RCW 9.94A.535(3), does not contain triggering language "that would extend its application to a conviction based on accomplice liability."[82] Nothing in RCW 9.94A.535(3) explicitly extends responsibility to an accomplice.[83] Therefore, the aggravating factors found by the jury here must be based on Larry's own misconduct or knowledge.

Consistent with Weller and Hayes, the jury could not have found the aggravating factors for one of the Williamses based on the conduct of the other. For Larry's

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multiple incidents per victim or (2) the crime involved a high degree of sophistication or planning or occurred over a lengthy period of time." Id. at 559 (citing RCW 9.94A.535(3)(d)(i), (iii)).

[79] 185 Wn. App. 913, 921, 344 P.3d 695 (2015), review denied, 183 Wn.2d 1010 (2015) (emphasis added).

[80] Id. at 928.

[81] See RCW 9.94A.535(3).

[82] State v. Hayes, 177 Wn. App. 801, 808, 312 P.3d 784 (2013), aff'd, 182 Wn.2d 556, 342 P.3d 1144 (2015).

[83] Id. at 809.

manslaughter conviction, the jury answered "yes" to these questions in the special verdict:

> (1) Were *Larry Williams* and [H.W.] members of the same family or household?
>
> (2) Did *Larry Williams's conduct* during the commission of the crime manifest deliberate cruelty to the victim?
>
> (3) Did *Larry Williams know, or should he have known*, that the victim was particularly vulnerable or incapable of resistance?
>
> (4) *As to the defendant Larry Williams*, was this offense an aggravated domestic violence offense?
>
> (5) Did *Larry Williams* use his position of trust to facilitate the commission of the crime?
>
> (6) *As to the defendant Larry Williams*, did the crime involve a destructive and foreseeable impact on persons other than the victim?[84]

Each question in the special verdict focused on Larry's "own misconduct" or his own knowledge.[85] Larry disputes Weller's holding, arguing that "merely asking about the 'defendant's conduct' . . . does not preclude jurors from assessing that conduct with notions of accomplice liability."[86] But we agree with Weller and disagree with any contention that the references to Larry's conduct in the special verdict form allowed the jury to apply principles of accomplice liability in finding the aggravating factors. The plain language of the special verdict form ties Larry's own conduct directly to the aggravating factors.

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[84] CP at 319-20 (emphasis added).

[85] Hayes, 182 Wn.2d at 563.

[86] Reply Br. at 14.

Therefore, we conclude the exceptional sentence imposed on Larry's manslaughter conviction was based on his own conduct or his knowledge of the principal's conduct that informed the aggravating factors.[87]

CONCLUSION

We affirm Larry's convictions for first degree manslaughter and first degree assault of a child and his exceptional sentence.

WE CONCUR:

Trickey, J

[87] Larry concedes the Supreme Court's recent decision in State v. Love, 183 Wn.2d 598, 354 P.3d 841 (2015), controls and settles the public trial issues raised in his opening brief.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. LARRY WILLIAMS, Petitioner.	)))))))))	SUPREME COURT NO. _______ COA NO. 71112-1-I

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 20TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LARRY WILLIAMS
DOC NO. 370101
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JANUARY 2016.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

January 20, 2016 - 2:26 PM

Transmittal Letter

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