

COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

NO. 35623-6-II
STATE OF WASHINGTON,

Respondent.

vs.

TERRANCE E. ROBINSON
Appellant.

BY _____
STATE OF WASHINGTON
CO. JUDGE, TERRY S. GOSWAMI
COURT REPORTERS
ACCEPTED FOR
FILING 1/25/08

STATE'S RESPONSE BRIEF

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STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

A. THE TRIAL COURT DID NOT ERR WHEN IT DECLARED A MISTRIAL IN ROBINSON'S FIRST TRIAL.

In general, a trial court is allowed wide discretion in ruling on a motion to for a mistrial. State v. Avendano-Lopez, 79 Wn. App. 706, 721, 904 P.2d 324 (1996). The standard of review of a trial court's decision regarding a mistrial is an abuse of discretion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A reviewing court will find abuse of discretion only when "no reasonable judge would have reached the same conclusions." State v. Rodriguez, 146 Wn.2d 260, 269-270, 45 P.3d 541 (2002). The court's decision as to granting a mistrial is normally given great deference. State v. Jones, 26 Wn.App. 1, 5, 612 P.2d 404, review denied, 94 An.2d 1013 (1980). A trial judge should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) State v. Hopson, 113 Wn.2d 273, 778 P.2d 1014 (1989). When a mistrial is granted over the defendant's objection and after jeopardy has

attached, a retrial is barred by double jeopardy principles unless the mistrial was justified by a manifest necessity. State v. Graham, 91 Wn.App. 663, 667, 960 P.2d 457 (1998). "A trial judge's decision to declare a mistrial without the defendant's consent after jeopardy has attached but before the jury reaches a verdict will not in every instance bar retrial." State v. Sheets, 128 Wn.App. 149, 154-155, 115 P. 3d 1004 (2005). Moreover, a trial court's failure to make express findings on manifest necessity is not necessarily fatal. Arizona v. Washington, 4334 U.S. 497, 516-17, 98 S.Ct. 824, 837, 54 L. Ed. 2d 717 (1978).

In the present case, the trial judge was put in a difficult situation when it came to the court's attention that the bailiff in the first trial relayed a message from the jury to the prosecutor (via the bailiff). 9/8/06 RP 68-72. In granting the motion for a mistrial based upon this misconduct the trial judge stated:

I'm going to grant the motion for mistrial and declare a mistrial of the case. I understand that that raises jeopardy issues, but that can be dealt with at a later time. The reason being that, number one, the jury has been admonished four or five times, every recess when they're excused for the evening and so forth, that they not discuss the case with anyone or discuss the case amongst themselves. There's also been a communication from a bailiff about the jury's desires to counsel which clearly affects the strategy of the case, if you will, and also what the jury is looking at. . . .

Under those circumstances, I feel that a mistrial is warranted.

9/8/06 RP 71. Because the trial court found that there had been multiple "incidences of misconduct" on the part of the jury and the bailiff, it does not appear that the trial court had *any choice* but to declare a mistrial once it had information that the jury was already improperly discussing additional evidence it would like to be shown.

11/14/06 RP 16. In other words, the jury asking the bailiff to see additional evidence plus the bailiff's taking that question first to the State and then to defense counsel shows that the jury was already *not following* the court's instructions and such facts also constitute a "manifest necessity " to grant a mistrial. In short, under these facts it does not appear that there could be any remedy other than a mistrial.

Robinson also claims that the facts surrounding the mistrial amounted to "bad faith conduct by judge or prosecutor." Brief of Appellant, 6. But there is no evidence whatsoever in this record showing that the court or the prosecutor acted with bad faith or that the State somehow orchestrated the facts forming the basis for the motion for a mistrial. The record shows that the State was just as surprised as anyone else was about the information coming from

the jury via the bailiff. Under the facts here, the trial court simply had no other choice but to declare a mistrial. 9/8/06 RP 68-72; 11/14/06 RP 4,5. Robinson's arguments to the contrary are without merit.

B. THE ACCOMPLICE INSTRUCTION WAS PROPER.

Robinson also claims the accomplice instruction used in this case was defective because it did not require an "overt act" and that the instruction violates due process. Brief of Appellant 8-11. Robinson is wrong. None of the cases cited by Robinson hold that the accomplice instruction embodied in WPIC 10.51 is unconstitutional because it fails to instruct the jury that the defendant must complete an "overt act" before accomplice liability will attach. Brief of Appellant 8.

Robinson is correct that mere knowledge or physical presence at the scene of a crime is not sufficient to establish accomplice liability. State v. J-R Distrib., Inc. 82, Wn.2d 485, 593, 512 P.2d 1049 (1973); State v. Sanchez, 60 Wn.App. 687, 693-94, 806 P.2d 782 (1991). Accomplice liability attaches only when the accomplice acts with knowledge of the specific crime that is eventually charged, rather than with knowledge of a different crime or generalized knowledge of criminal activity. State v. Carter, 154

Wn.2d 71, 109 P.3d 823 (2005); State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000); State v. Roberts, 142 Wn.2d 471 512, 14 P.3d 713 (2000).

The instruction used in this case was modeled on WPIC 10.51 (Instruction no. 5 herein) and this instruction using updated language was approved by State v. Moran, 119 Wn.App. 197, 209-10, 81 P. 3d 122 (2003), review denied, 151 Wn.2d 1032, 95 P.3d 351 (2004); CP 28-60. Robinson did make a general objection to WPIC 10.51 below. 11/212/06 RP 69. However, on appeal, Robinson does not cite any on-point authority which stands for the proposition that WPIC 10.51 is unconstitutional based upon the "overt act" grounds. "Where no authorities are cited in support of a proposition the court is not required to search out authorities but may assume that counsel, after diligent search, has found none." State v. Logan, 102 Wn.App. 907, 10 P.2d 504 (2000). It is clear that mere presence at the scene of the crime is insufficient to establish accomplice liability. State v. Landon, 69 Wn.App. 83, 848 P.2d 724 (1993). But the instruction here did not allow conviction in the absence of an overt act. "Aiding" in a crime includes "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 . . . presence is aiding in the commission of the crime. State v. Dove, 52 Wn.App. 81, 87, 757 P.2d 990 (1988) quoting WPIC 10.51).

The State has not found any case law which states that WPIC 10.51 violates due process or that this instruction is somehow missing the term "overt act," as Robinson urges us to find now. The jury instruction given in this case is modeled on WPIC 10.51, and this instruction contains language that "aid" includes presence but the instruction also goes on to state, "[h]owever, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. Instruction No. 5, Supp. CP.; WPIC 10.51.

If the jury in the present case followed this instruction --and juries are *presumed* to have followed the instructions--then the jury did not convict Robinson based solely upon his mere presence at the scene. State v. Lord, 117 Wn.2d 829, 861, 822 P.2d 177 (1991) (juries are presumed to have followed the instructions given by the court). Robinson cites to several older cases in support of his argument that the accomplice instruction was improper. However, none of those authorities explicitly examine WPIC 10.51

in terms of instructing on an "overt act" of an accomplice. Indeed, WPIC 10.51 has been the subject of a fair amount of court attention in fairly-recent years. See e.g., State v. Carter, 154 Wn.2d 71, 109 P.3d 823 (2005); State v. Cronin, 142 Wn.2d 471, 512, 578-79, 14 P.3d 752 (2000); State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000). The current WPIC 10.51 (used in this case) was cited with approval by State v. Moran, 119 Wn.App. 197, 209-10, 81 P.3d 122 (2003) review denied, 151 Wn.2d 1032, 95 P.3d 351 (2004). In sum, the jury instruction in the present case specifically instructed the jury that "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice" Instruction No. 5, Supp CP. Robinson's argument to the contrary is without merit and should be disregarded.

C. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED A TRANSCRIPT OF TESTIMONY OF A WITNESS FROM THE PREVIOUS TRIAL BECAUSE THE WITNESS WAS NOW UNAVAILABLE AND BECAUSE ROBINSON HAD A FULL OPPORTUNITY TO CROSS EXAMINE THE WITNESS AT HIS PREVIOUS TRIAL.

Robinson also claims it was error for the trial court to admit the testimony of a State's witness who was not present at this trial

but who had testified in Robinson's first trial. Robinson's argument is without merit.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. State v. Neal, 144 Wn.2d 600, 609(2001). ER 804(a) states in pertinent part that "unavailability as a witness" includes situations in which the declarant . . . [i]s absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance. . . . by process or other reasonable means." ER 804(a)(5). Additionally, the confrontation clause places two conditions on the admission of former testimony. The State must show that the declarant is "unavailable" at the time of trial and the statement must bear sufficient "indicia of reliability." State v. Santiago, 149 Wn.2d 402, 411-415, 68 P.3d 10675 (2003). However, "[i]n procuring the live testimony of a witness "[t]he State is not required to perform a 'futile act,' . . . but 'if there is a possibility albeit remote that affirmative measures might produce the witness, the obligation of good faith may demand their effectuation.'" State v. Young, 129 Wn.App. 468, 481, 119 P.3d 870 (2005), quoting State v. Smith, 148 Wn.2d 122, 132, 59 P.3d 74 (2002).

"ER 804 indicates that a witness is unavailable if the State has been unable to procure their presence "by process or other

reasonable means." But "[u]ltimately, the "lengths to which the prosecution must go is a question of reasonableness." Young, 129 Wn.App. at 481 (citations omitted). Furthermore, the United States Supreme Court has recognized an "established rule that prior trial testimony is admissible upon retrial if the declarant becomes unavailable." Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980). Young, supra, quoting Roberts 48 U.S. at 75. Because the witness, Mr. Daniel Steel, was "unavailable" to testify at Robinson's second trial and because Robinson had a full opportunity to cross examine Steel at Robinson's first trial, the trial court properly admitted the transcript of Steel's testimony from the first trial. Ohio v. Roberts, 448 U.S. 56, 74, 100 S.Ct. 2381, 65 L.Ed.2d 597 (1980) overruled on other grounds.

In the present case according to the deputy prosecutor, the missing witness, Mr. Steel, "was in Florida during the [first] trial." 11/14/06 RP 15. The deputy prosecutor explained to the trial court the efforts used by the State to get the witness into court--all efforts that were to no avail. 11/17/06 RP 14. -16. The deputy prosecutor also noted that the State had no means to reach Mr. Steel the entire month of November. The deputy prosecutor noted, "[t]he state has no means to reach him . . . [h]e was away from both

phone numbers that we had for him. . . . He just said out of the country, but there was no way for us to contact him. 12/14/07 RP 21, 22. The State used "untiring efforts in good earnest" in its attempts to locate the witness Mr. Steel. State v. Rivera, 51 Wn.App. 556, 559, 754 P.2d 701 (1988). But the State is not required to perform a futile act. State v. Young, 129 Wn.App. 458, 481, 119 P.3d 870 (2005). During another hearing regarding the unavailability of the witness the trial court noted, "As far as I'm concerned, based upon what I've read and what I've heard argued by the state, it appears to me that Mr. Steel [the witness] is unavailable. The state is not aware of where Mr. Steel is, and [f]or all we know, he may be somewhere with the U.S. Military working on a submarine, 11/17/06 RP 20. Then, just before the second jury trial began, the trial court stated "the jury will be instructed by me that Mr. Steel is unavailable today and that his sworn testimony from a prior proceedings will now be read for their purpose by Detective Wallace." 11/20/06 RP 7.

The trial court's decision to admit the prior testimony of Mr. Steel from Robinson's first trial was proper, given the State's efforts and inability to locate witness Steel.

CONCLUSION

The trial court did not err when it declared a mistrial in Robinson's prior jury trial due to juror/bailiff misconduct. Furthermore, Appellant's claim that the accomplice liability instruction was erroneous because it did not require an "overt act" is misplaced and has no support in our case law and this argument, too, should be disregarded. Finally, the trial court did not err when it admitted the prior testimony of witness Mr. Steel because the witness was "unavailable" and because Robinson had an opportunity to cross examine Steel at the first trial. Accordingly, Robinson's convictions should be affirmed in all respects..

DATED this 7th day of January, 2008.

L. MICHAEL GOLDEN
Lewis County Prosecutor

by:


LORI SMITH, WSBA 27961
Deputy Prosecutor

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY LS

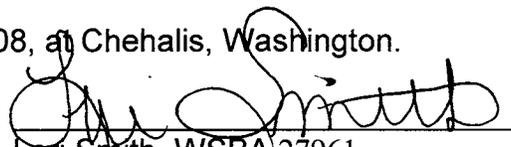
**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,)	NO. 35623-6-II
Respondent,)	
vs.)	
)	
TERRY ROBINSON.)	
Appellant.)	DECLARATION OF
_____)	MAILING

I, LORI SMITH, Deputy Prosecutor for Lewis County, Washington, declare under penalty of perjury of the laws of the State of Washington that the following is true and correct: On January 8, 2008, I mailed a copy of the Respondent's Brief by depositing same in the United States Mail, postage pre-paid, to the Attorney for Appellant at the name and address indicated below:

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DATED this 8 January 2008, at Chehalis, Washington.


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