

NO. 36231-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

LOUIS FAZIO,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 MAR -5 PM 4:08

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

The Honorable Richard D. Hicks, Judge

FILED
COURT OF APPEALS
DIVISION II
08 MAR -7 PM 12:02
STATE OF WASHINGTON
DEPUTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. WHETHER FAZIO WAS CONVICTED AS A PRINCIPAL OR AN ACCOMPLICE, THERE WAS INSUFFICIENT EVIDENCE THAT HE WAS AWARE OF THE NATURE OF THE PLANNED CRIME.

Fazio was charged with conspiracy to commit first degree robbery.

The jury was instructed on the theory of accomplice liability. Whether Fazio was convicted as a principal or as an accomplice, the same standard applies -- he must have had "general knowledge of his coparticipant's substantive crime." State v. Rice, 102 Wn.2d 120, 125, 683 P.2d 199 (1984). Whether a person can be an accomplice to conspiracy, accomplice liability requires knowledge of "the crime" charged, not merely "a crime." See, e.g., United States v. Portac, Inc., 869 F.2d 1288, 1293 (9th Cir. 1989) (person can be accomplice to conspiracy); State v. Stein, 144 Wn.2d 236, 245, 27 P.3d 184 (2001) (citing State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000), and State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000)).

The evidence established that Fazio was not privy to many of the plan's key details. Although Fazio was at a party where Yeldon and Jones discussed the possibility of robbing Hamlin, and the possibility that Jones "could have roughed [Hamlin] up," Yeldon testified that Fazio was occupied with "flirting with [a] girl" at the time. 5RP 39-40, 64.

Similarly, although the evidence showed that Fazio was present in his car Skau allegedly handed a gun to Jones, Yeldon testified that Skau's gun was not visible when he entered the vehicle, as he "had his jacket on." 5RP 45, 67, 69. Moreover, Fazio was sitting in the front seat, while Jones and Skau were in the back. 5RP 45-46. Yeldon, who was likewise sitting in front, acknowledged that she did not observe the gun exchange directly. 5RP 69. Significantly, Yeldon testified that Skau did not make "any type of grand gesture" in handing over the gun to Jones, nor did Skau say anything about handing the gun to Jones. 5RP 69-79. Finally, Yeldon testified that *the plan changed* once the group arrived at the gas station where they planned to meet Hamlin. 5RP 46. This evidence does not demonstrate that Fazio had sufficient knowledge of the alleged plan to be convicted as a principal conspirator, or as an accomplice.

This case is distinguishable from State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984). In Davis, the defendant was convicted as an accomplice to robbery in the first degree, after the jury heard evidence that he stood as a lookout while the robbery was committed, even though Davis argued that he did not know that a gun would be used. 101 Wn.2d at 655-56. The Davis court stated:

[T]he new complicity statute, unlike the old one, made an accomplice equally liable only for the substantive crime. . .

As to the substantive crime, the law has long recognized that an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality.

101 Wn.2d at 665-666.

At the outset, it should be noted that Davis' holding has been narrowed somewhat: "knowledge by the accomplice that the principal intends to commit 'a crime' does not impose strict liability for any and all offenses that follow." Roberts, 142 Wn.2d at 513. Indeed, Washington has rejected the federal "Pinkerton¹ doctrine," under which a defendant is responsible for reasonably foreseeable acts committed by coconspirators. Stein, 144 Wn.2d at 244 ("No Washington case holds a defendant liable for the substantive acts of coconspirators without also satisfying the elements of accomplice liability and no Washington case cites Pinkerton as the basis for conspiratorial liability.") In Washington, a person is an accomplice only if he or she solicits, commands, encourages, or requests the commission of a crime, or aids or agrees to aid such other person in planning or committing it, "[w]ith knowledge that it will promote or facilitate the commission of the crime." RCW 9A.08.020.

¹ Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946).

In the instant case (unlike Davis), there was insufficient evidence that Fazio expressly agreed to the conspiracy, or was sufficiently involved in the planning or commission of the crime to be an accomplice to the crime of first degree robbery. Fazio was not present when the plan was discussed in Skau's residence, and was occupied with "flirting" at the time the plan was first discussed. Furthermore, the plan changed at the gas station where the group was to meet Hamlin, long after Fazio had agreed to lend his car to the group. The evidence demonstrates that Jones's actions went beyond the scope of any actions that Fazio either allegedly knew about or agreed to participate in.

2. THE PROSECUTOR UNFAIRLY BOLSTERED THE CREDIBILITY OF A WITNESS AND IMPLIED THAT FAZIO HAD A CRIMINAL BACKGROUND BY REFERENCING THE WITNESS'S LACK OF CRIMINAL HISTORY.

The state claims that because the majority of the defendants and witnesses had criminal and drug backgrounds, that jurors would not have been influenced by the prosecutor's reference to Skau's lack of criminal history. However, the unfavorable inferences that jurors were likely to draw from the defendants' backgrounds are precisely why the comment would have influenced the jurors. The reference to Skau's lack of criminal background not only impermissibly bolstered his testimony, it also likely

caused jurors to wonder why he was not prosecuted for his role in the crime, while others, such as Fazio were. The jurors were likely to infer that Fazio, unlike Skau, had a criminal background.

It is precisely because several witnesses were questioned in depth about their criminal backgrounds, and because the jury knew of Fazio's long-time drug use that the prejudicial impact of the evidence was so great. See, State v. Perez-Mejia, 134 Wn. App. 907, 919, 143 P.3d 838 (2006).

In Perez-Mejia, the appellate court reversed a first-degree murder conviction on the basis of improper argument. In evaluating the prejudicial impact of the prosecutor's argument, the Perez-Mejia court noted:

. . . although gang-related evidence was central to the State's theory of culpability, this evidence was, by its nature, highly prejudicial. The trial court carefully circumscribed the admissibility of this prejudicial evidence and based its evidentiary rulings on proper considerations of the State's need to present probative evidence balanced against Soto-Rodriguez's right to a trial free from unfair prejudice. Unfortunately, the prosecutor's closing argument put before the jurors several of the most problematic types of prejudice . . . This misconduct upset the balance struck by the trial court's principled evidentiary rulings. Accordingly, in view of the issues in the case, the misconduct likely affected the jury's verdict.

134 Wn. App. at 919.

Similarly, in this case, the state's theory of culpability inevitably involved the interactions of a group of individuals with histories of alleged

drug use, and some with alleged criminal backgrounds. Given that backdrop, the trial court set a boundary that would allow the state to argue its case, without referring to improperly prejudicial evidence. It was on this basis that the trial court ruled that the prosecution would not be allowed to present Skau's lack of a criminal record to the jury.

The prosecutor's reliance on such inadmissible evidence also indicates that the prosecutor was concerned that Fazio's was a close case, and that such a reference was necessary to convict him. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) ("prosecutors presumably do not risk appellate reversal . . . by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.").

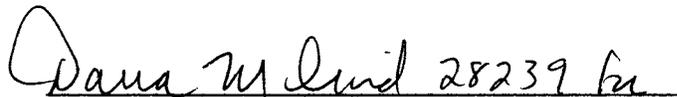
B. CONCLUSION

For the reasons stated herein and those stated in appellant's opening brief, this Court should reverse appellant's conviction.

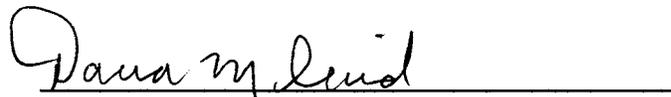
DATED this 5th day of March, 2008.

Respectfully submitted,

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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 5TH DAY OF MARCH 2008, 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.

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SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF MARCH 2008.

x Patrick Mayovsky