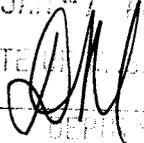


COURT OF APPEALS
STATE OF WASHINGTON

No. 36479-4-II

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STATE OF WASHINGTON

BY  DEPUTY

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH RAYMOND MAYS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 06-1-03118-2
The Honorable Brian Tollefson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Appellant was denied his constitutional right to effective assistance of counsel because his attorney failed to object to the court's instruction on accomplice liability (Instruction 10).
2. Instruction 10 was improper under the facts of this case.
3. The State's evidence did not establish that appellant acted as an accomplice to another individual in the delivery of a controlled substance.

B. Issues Pertaining to the Assignments of Error

1. Was there substantial evidence to support a finding that Appellant acted as an accomplice to another individual in the delivery of a controlled substance? (Assignments of Error 1, 2 & 3)
2. Did trial counsel's failure to object to the accomplice liability instruction, in the absence of any evidence to support a finding that Appellant acted as an accomplice in the delivery of a controlled substance, constitute ineffective assistance of counsel, and prejudice Appellant's right to a fair trial? (Assignments of Error 1, 2 & 3)

II. STATEMENT OF THE CASE

A. Procedural History

The State charged Kenneth Raymond Mays by Amended Information with one count of unlawful delivery of a controlled substance (RCW 69.50.401(1)(2)(a)). (CP 3) The State also alleged that the crime occurred within 1000 feet of school grounds or a school bus stop, which would add additional time to Mays' presumptive sentence (RCW 9.94A.533(6)). (CP 3)

A jury convicted Mays as charged. (RP4 168¹; CP 27-28) The trial court denied Mays' request for entry into the special Drug Offender Sentencing Alternative program. (RPS 6, 10, 14) The court sentenced Mays within his standard range to a total of 120 months of confinement. (RPS 15; CP 284, 287) This appeal timely follows. (CP 295)

B. Substantive Facts

In the Summer of 2006, Tacoma Police engaged in "Operation Hard Rock," an undercover program aimed at the identification and eventual arrest of street-level drug dealers. (RP3

¹ Citations to the trial proceedings, contained in volumes numbered 1 through 4, will be to RP# followed by the page number. Citations to the sentencing proceeding, contained in the volume labeled Sentencing (June 1, 2007) will be to RPS followed by the page number.

29-32, 62, 66) Confidential informants used undercover police vehicles outfitted with surveillance equipment to engage in drug deals. (RP3 29, 30-31, 47-48) Police then identified the dealers, and arrested them some time later. (RP3 62, 66, 101-02)

On June 5, 2006, professional informant James Josey participated in the program, and engaged in several street-level drug deals in exchange for monetary payment. (RP3 75, 76, 82) Both Josey and the vehicle were searched for drugs and contraband, then Josey drove to the area of 19th Street and Martin Luther King Way in Tacoma. (RP3 50-51, 82, 83) Josey made contact with a potential dealer using recognized hand signals. (RP3 84) According to Josey, the dealer sold him several rocks of crack cocaine in exchange for cash provided by the police. (RP3 85, 86) Josey identified the dealer as Kenneth Mays. (RP3 89)

Several officers were stationed in nearby vehicles, and observed the transaction via a live video feed. (RP3 32, 52, 102-03) They observed a man approach Josey's vehicle, but were unable initially to get a clear picture of the dealer's face. (RP3 32, 103) Officer Von Narcisse decided to drive past Josey's vehicle during the transaction, and was able to get a view of the dealer. (RP3 103-04, 107) Narcisse testified that he recognized the dealer

from prior contacts as Kenneth Mays. (RP3 99-100, 105)

After the transaction, Josey returned to a designated meeting place, turned over the rocks obtained during the transaction, and was searched again for any additional drugs or contraband. (RP3 54-55, 87-88) The rocks later tested positive as crack cocaine. (RP 60)

III. ARGUMENT & AUTHORITIES

Trial counsel provided ineffective assistance when she failed to object to Jury Instruction 10 because there was no evidence to support the theory of accomplice liability, and counsel's failure to object to the instruction was prejudicial to Mays' defense.

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings

would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). A “reasonable probability” means a probability “sufficient to undermine confidence in the outcome.” *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case.” *Strickland*, 466 U.S. at 693. Both prongs of the *Strickland* test are met here.

1. *Trial counsel’s performance was deficient.*

The State charged Mays as a principal in the delivery of a controlled substance. (CP 3) The to-convict instruction also presented the case as one of principal liability. (CP 21) But Instruction 10 submitted the theory of accomplice liability to the jury. (CP 20 and attached in Appendix)

A person acts as an accomplice when "(a) with knowledge that it will promote or facilitate the commission of the crime he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3). The trial court may instruct the jury on both theories only if the evidence could support either accomplice or principal liability. *State v. Petrich*, 101 Wash. 2d

566, 569, 683 P.2d 173 (1984); *State v. Munden*, 81 Wash. App. 192, 196-97, 913 P.2d 421 (1996).

In this case, there was no evidence presented at trial to support the theory that Mays acted as an accomplice. Neither Josey nor the observing officers testified that they saw any other individual involved in the transaction. There was no evidence that more than one individual participated. If the jury believed the defense theory of the case, that Josey and the officers misidentified Mays as the suspect (RP3 139-46), there was still no evidence whatsoever to establish that Mays acted as an accomplice to the true suspect. But trial counsel did not object to the accomplice instruction despite the clear lack of evidence showing that Mays acted as an accomplice to the delivery of cocaine. (RP3 111, 112)

In *State v. Ermert*, the Court held that the failure to object to a jury instruction that incorrectly listed the elements of the offense of welfare fraud was ineffective assistance of counsel because it “allowed Ms. Ermert to be convicted of a crime she could not have committed under the facts presented by the State in support of the prosecution.” 94 Wn.2d 839, 850, 621 P.2d 121 (1980). As in *Ermert*, trial counsel’s failure to object to Instruction 10 in the absence of any evidence establishing his liability as an accomplice

constituted deficient performance.

2. *Trial counsel's deficient performance was prejudicial to Mays' defense.*

In *State v. Amezola*, 49 Wn. App. 78, 741 P.2d 1024 (1987), co-defendant Ramirez regularly did housework at the scene of a heroin distribution operation. The trial court submitted her case to the jury with instructions detailing both: (1) her liability as a principal on a constructive possession theory; and (2) her liability as an accomplice. The jury returned a general verdict finding Ramirez guilty. *Amezola*, 49 Wn. App. at 82-83, 85. The court reversed and remanded for a new trial, finding that there was insufficient evidence to support the accomplice instruction, noting:

Since, as analyzed above, the evidence was insufficient to support the accomplice alternative, the error cannot be said to be harmless and the conviction must be reversed and the case remanded for retrial on the State's constructive possession theory only.

Amezola, 49 Wn. App. at 90 (footnote and citations omitted).

Because, as discussed above, the evidence presented in this case was insufficient to support the theory that Mays acted as an accomplice, “the error cannot be said to be harmless and the conviction must be reversed.” *Amezola*, 49 Wn. App. at 90.

APPENDIX
JURY INSTRUCTION NUMBER 10

INSTRUCTION NO. 10

A person is guilty of a crime if it is committed by the conduct of another person for which 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.