

NO. 36479-4-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH RAYMOND MAYS, APPELLANT

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DIVISION II
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Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 06-1-03118-2

BRIEF OF RESPONDENT

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A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the defendant receive effective assistance of counsel when any objection to the accomplice liability jury instruction would have been overruled, and, even if the instruction was given in error, the defendant cannot establish any resulting prejudice? (Appellant's Assignments of Error 1, 2, 3).

B. STATEMENT OF THE CASE.

1. Procedure

On July 10, 2006, the State charged Kenneth Raymond Mays, hereinafter "defendant," with one count of unlawful delivery of a controlled substance pursuant to RCW 69.50.401(1)(2)(a). CP 1. On September 19, 2006, the State filed an Amended Information alleging that the crime was committed while within 1,000 feet of the perimeter of school grounds or a school bus route stop, contrary to RCW 69.50.435. CP 3-4.

The case proceeded to trial. At trial, the court accepted the State's proposed jury instructions, and the defense did not have any objection to any of them. CP 8-26; RP 111.

The jury found defendant guilty. CP 27. The jury also found, in a special verdict, that defendant delivered a controlled substance within

1,000 feet of a school bus route stop designated by a school district or within 1,000 feet of the perimeter of a school ground. CP 28.

The defendant had the offender score of 10. CP 281-294. The court sentenced him to 96 months plus 24 months for the school zone enhancement, for a total of 120 months. CP 281-294.

The defense filed a timely notice of appeal. CP 295.

2. Facts

In the summer of 2006, in response to citizen complaints, the Tacoma Police Department launched Operation Hard Rock that targeted an open-air drug market in the area of the upper Tacoma. RP 26, 29, 47, 78. Hard Rock consisted of multiple street-level operations, during which the police had a confidential informant make hand-to-hand drug purchases from street-level drug dealers. RP 42, 47-48, 78-79. The purchases were videotaped, and the drug dealers subsequently arrested. RP 39, 48, 66. Daryl Higgins, Aaron Quinn, and Van Narcisse were the law enforcement officers who took part in Operation Hard Rock, including the drug buy in question. RP 29, 48, 101.

Agent Quinn testified that, to preserve the integrity of the operation, a confidential informant and an undercover police vehicle were always searched prior to the drug purchase. RP 48. The informant

remained under constant surveillance until after the drug buy and after the informant arrived at a prearranged location where the police again searched him, and the vehicle, and took the purchased drugs. RP 48-49.

Detective Higgins testified that on June 5, 2006, he set up an undercover police vehicle with surveillance equipment to be used in the police drug buy. RP 30. In that particular car, the camera showed primarily the passenger's side of the vehicle's interior and the area immediately outside the passenger's door. RP 31-32; CP 5 (Exhibit 2).

Agent Quinn testified that the police followed the standard procedure as to the informant's and the vehicle's search and surveillance before, during, and after the drug transaction. RP 50, 53. The police provided the informant with the typical amount of money to make the drug buy. RP 51.

According to Agent Quinn, the informant made contact with the target, identified as defendant, on the corner of 20th Street and Martin Luther King Way in Tacoma, Washington. RP 52, 62, 89, 104. The informant pulled up in the undercover police vehicle, contacted defendant, and purchased a substance later confirmed to be crack cocaine. RP 53-54, 104. Agent Quinn stated that the informant was under surveillance at all times, and had absolutely no opportunity to acquire the crack cocaine from any other source without the officers' knowledge. RP 55.

Defendant was initially identified by Officer Von Narcisse, a community liaison officer, who participated in the operation in question

because of his familiarity with the community where the operation took place. RP 101. His main function was to identify the subjects of the operation. RP 101-102. Officer Narcisse testified that on June 5, 2006, he had driven by the target and was able to identify him as Kenneth Mays. RP3 103-104. Officer Narcisse was a 100 percent positive that the defendant was the individual that did the illegal transaction. RP 104. He had known the defendant before June 5, 2006, and had previously contacted him at least 50 times. RP 98-99, 105.

Detective Higgins testified that the contact took place in the early afternoon hours. RP 31. During the buy, Higgins was in another police vehicle, about one block away, observing the live feed from the informant's vehicle. RP 32-33. According to Detective Higgins, defendant did not get into the car and initially stood outside in a way that made it difficult for the police camera to photograph his face. RP 32. However, at some point, when defendant came back to the vehicle and was handing the informant a controlled substance, the police camera got a clear shot of his face. RP 32. The State introduced a copy of the video at trial. RP 34; CP 5 (Exhibit 2). The State also introduced defendant's booking photographs. CP 5 (Exhibit 5).

The DVD introduced at trial has two files: file Title1 contains a recording of the whole operation in question from the time the officers show the date of June 5, 2006, and the operation case number, to the time when the informant brings the car and the drugs back to the officers; file

Title 2 is a short excerpt of the operation depicting the actual drug transaction (this file does not have sound and is of a much poorer quality). CP 5 (Exhibit 2).

At about the 18th minute of Title 1, the voice of the driver-informant says, "I want to spend 40," and then another voice responds from outside the vehicle. *Id.* A few seconds later, defendant's torso appears outside the car, on the passenger's side of the vehicle. *Id.*

The informant's voice says, "You are going to bring me another one?" *Id.* Defendant says, "Give me the 20, I'll bring you another one." *Id.* He then disappears out of the camera's view for about one minute. *Id.* During this time, the informant describes defendant on the video and says, "He is bringing me another 20." *Id.* When defendant comes back, he leans forward into the car and puts something on the seat. *Id.* The camera clearly captures his face. *Id.* At some point, the money is depicted in defendant's hand. *Id.*

Defendant asks the informant for five dollars, and the informant responds, "No, I don't have five dollars;" then, after a short pause, "Man, this is a 30. Give me my ten dollars back." *Id.* Defendant responds, "It's not my dope, man." *Id.* The informant says, "I am not dealing with you no more." *Id.* Defendant responds, "It's not me, it's the punk youngsters I am getting it from. You see I am going (back and forth gesture with his hand)." *Id.* The informant then drives away. *Id.*

According to Agent Quinn, a middle-man, called “middler,” is a common actor in street-level drug deals. RP 43. Agent Quinn explained that a middler normally contacts a customer, takes the money, goes to another individual that has the drugs, gives him the money, gets the drugs, and then delivers the drugs to the customer. RP 43. Middlers are typically compensated either with money or drugs. RP 44.

At trial, in addition to showing the video, the State presented the testimony of James Edward Josey, Confidential Informant Number 163, who was the drug buyer on June 5, 2006. RP 63-64, 75. Josey testified that he started working for the police department as an informant in 1996. RP 75. During his cooperation with the Tacoma Police Department, he participated in about 20 or 30 operations as a confidential informant. RP 77. He also worked for other law enforcement agencies. RP 77.

Josey corroborated the testimony of Agent Quinn about the details and the search and surveillance procedures of Operation Hard Rock. RP 82-84, 87-88. Josey identified defendant in open court as the individual he purchased a few pieces of rock cocaine from on June 5, 2006, in the State of Washington. RP 85, 89, 91.

Finally, Ms. Kelleher, the Tacoma School District employee who oversees the transportation and placement of bus stops for basic education and special needs students, testified that there are at least three school bus stops, and McCarver Elementary school, within 1,000 feet of the corner of South 20th Street and Martin Luther King Way, where the drug transaction

took place. RP 16-18. She also testified that the school was in session on January 5, 2006. RP 20. According to Agent Quinn's measurements, the distance between one of the school bus stops and the street corner in question was 322 feet. RP 61-62.

C. ARGUMENT.

1. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE ANY OBJECTION TO THE ACCOMPLICE LIABILITY INSTRUCTION WOULD HAVE BEEN OVERRULED AND, EVEN IF THE INSTRUCTION WAS GIVEN IN ERROR, THE DEFENDANT CANNOT ESTABLISH ANY RESULTING PREJUDICE.

A claim of ineffective assistance of counsel is based on the premise that when counsel fails to render adequate legal assistance so as to "undermine the proper functioning of the adversarial process," "the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052; 80 L.Ed.2d 674 (1984).

To show that the counsel's assistance was so ineffective that a reversal is required, defendant must prove both prongs of the *Strickland* test: (1) that the counsel's performance was deficient; and (2) that the counsel's deficient performance prejudiced the defense. 466 U.S. 666, 687; *State v. McFarland*, 127 Wn.2d 322, 335, 337, 899 P.2d 1251 (1995).

When applying the *Strickland* test, the court must engage in a strong presumption that the counsel's assistance was reasonable and

effective and scrutinize the counsel's performance with a high degree of deference. *See Strickland*, 466 U.S. at 699; *McFarland*, 127 Wn.2d 322, 335; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

- a. Trial counsel's performance was adequate, when she did not object to the accomplice liability instruction, because the State presented significant evidence of accomplice liability.

To show that the counsel's performance was deficient, defendant must prove that his counsel made errors so serious that his representation "fell below an objective standard of reasonableness" so as to render it below the level of counsel representation guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 688; *State v. Davis*, 119 Wn.2d 657, 665, 835 P.2d 1039 (1992).

More specifically, when assigning an error to defense counsel's failure to object, defendant must show that his trial counsel knew, or should have known, that the matter was objectionable, and that the court would likely have sustained the proposed objection. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

In this case, the trial court would not have sustained an objection to the accomplice liability instruction because the State was entitled to such instruction. A party is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Stanley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

In relevant part, the accomplice instruction states that one acts as an accomplice if “with knowledge that it will promote or facilitate the commission of the crime, he ... solicits, commands, encourages, or requests another person to commit the crime or aids or agrees to aid another person in planning or committing the crime.” CP 8-26, Instruction 10 (quoting RCW 9A.08.020(3)(a)).

While “it is error to submit to the jury a theory for which there is insufficient evidence,” in this case, an instruction on accomplice liability was warranted because the State presented sufficient evidence proving that defendant facilitated the commission of the crime of delivery of a controlled substance or aided another person in committing it. *State v. Munden*, 81 Wn. App. 192, 195, 913 P.2d 421 (1996).

First, the State presented a video of the whole operation that was taken from inside of the undercover police vehicle driven by the informant. CP 5 (Exhibit 2). The video establishes that the defendant acted as a middleman in the drug transaction. *Id.* The defendant made two contacts with the informant. *Id.* Defendant first contacted the informant after the informant stopped his car, made his order by saying “I want 40” and handed money to defendant. *Id.* After being absent for about a minute, defendant returned and handed the drugs to the informant. *Id.*

Moreover, the recorded conversation between the defendant and the informant proves that defendant got the drugs from somebody else,

and that he delivered the drugs knowingly. *Id.* When the informant was dissatisfied with the quantity of the drugs and said to defendant “this is a 30, give me my ten dollars back,” the defendant responded, “it’s not my dope...it’s not me, it’s the punk youngsters I am getting it from.” *Id.* Then, defendant said, “you see I am going” and made a back and forth gesture, which can reasonably be interpreted to mean that defendant was merely a go-between and did not control the amount of drugs to be delivered to a customer. *Id.* In addition, the context of the contact, defendant’s use of a word “dope” and his asking for a five-dollar “tip” clearly indicate that he knew he was delivering drugs and that he had obtained them from another person. *Id.*

Second, the State presented testimony of Agent Quinn who explained that a middle-man called “middler” was a usual participant of a street-level drug deal. RP 43. A middler takes the money from a customer, brings it to a drug dealer, gets the drugs, and then delivers them to the customer. RP 43. Usually, a middler is rewarded for his services with money or a portion of drugs. RP 44. The defendant’s conduct clearly indicates he was acting as a “middler,” an intermediary between the informant (customer) and the drug supplier.

- b. Even if the evidence of accomplice liability was weak, trial court would have denied the objection to the accomplice liability jury instruction because it was legally permissible.

The Court of Appeals has held that, “when the evidence did not exclude the possibility that [defendant] acted both as principal and accomplice,” the trial court did not err in permitting the jury to convict him as an accomplice even if “the State’s evidence tended to show that he and two others accomplished the burglary as principals.” *Munden*, 81 Wn. App. 192, 193. In other words, the court in *Munden* held that defendant can be convicted as an accomplice, even if the State primarily argued principal liability, when the evidence supports an inference that the defendant was both the principal and the accomplice. *Id.* See also *State v. McDonald*, 128 Wn.2d 680, 689, 981 P.2d 443 (1999) (“[a]ccomplice liability represents a legislative decision that one who participates in a crime is guilty as a principal, regardless of the degree of the participation”).

In *Munden*, Munden denied any involvement in the crime and claimed that he had left the scene when his two acquaintances tried to kick out the front window of a market. *Id.* at 193. However, the owner of the market identified Munden as the person who he had seen jump out of the market window; in addition, the defendant had two generic lighters in his

pockets of the type sold in the store. *Id.* at 193-194. The trial court, over the defendant's objection, gave an instruction on accomplice liability. *Id.*

Although the court acknowledged that the evidence in support of accomplice liability was "thin," it found no need to determine whether *that* evidence was sufficient because there was sufficient evidence to find that the defendant was a principal. *Id.* at 196. The court held that "from the evidence that Munden was inside the store, the jury was entitled to find both that he committed burglary as a principal and that he simultaneously assisted, or stood ready to assist, the acts of burglary being committed by his companions." *Id.*

The case at bar is similar to *Munden*. Even if this court decides that the evidence of accomplice liability was thin, the State presented evidence that the defendant acted both as a principal and as an accomplice. Thus, knowingly acting as a middleman in a drug transaction is a classic scenario where the "middler" would always be both the principal and the accomplice in the delivery "regardless of the degree of the participation." *See McDonald*, 128 Wn.2d 680, 689. Even if this court holds that the defendant was not a middleman, his two contacts with the informant and his absence for about one minute, "does not exclude the possibility" that he acted both as principal and accomplice. In addition, as discussed below, the State presented sufficient evidence that defendant was a principal in the crime of delivery of a controlled substance.

For the foregoing reasons the trial court would have properly denied objection to the accomplice liability instruction; therefore, the defendant cannot establish that he received ineffective assistance of counsel.

- c. Defendant was not prejudiced by the accomplice liability instruction because there was overwhelming evidence to convict him as a principal.

Even if defendant proves deficient representation, he must also prove that he was prejudiced by the counsel's error. *See Strickland*, 466 U.S. 666, 687. To prove that he was prejudiced, it is not enough for the defendant to show that the error had some effect of the outcome of the proceeding: defendant must show that his counselor's errors were so serious that there is a reasonable probability that, absent the errors, the result of the proceedings would have been different. *Id.* at 693, 694; *State v. Davis*, 119 Wn.2d 657, 665.

While, under Washington law, counsel's representation is deficient so as to result in a judgment reversal when she fails to object to erroneous oral instructions to the jury, the judgment should not be reversed if the error was "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *State v. Townsend*, 142 Wn.2d 838, 848, 15 P.3d 145 (2001) (internal citations omitted).

As argued above, because the accomplice instruction was properly given, defendant did not suffer prejudice when his attorney failed to object. However, if this court finds that the instruction was erroneous and defendant's counsel should have objected, the judgment still should not be reversed because the error did not affect the outcome of the trial. *See Strickland*, 466 U.S. at 691.

The State presented evidence that the defendant was acting as a principal. The evidence was so overwhelming that, even if the accomplice liability instruction had not been given, the defendant would have been convicted. The operation was shot by a hidden camera, and defendant's face is visible on several occasions. CP 5 (Exhibit 2). The video depicts an exchange of money and drugs between the defendant and the informant. *Id.* The police officers and the informant testified at trial that the crime took place in Tacoma, Washington on June 5, 2006. RP 52, 62, 89, 104. Moreover, Officer Quinn testified that the informant was under constant surveillance and could not have gotten the drugs from anybody else other than the defendant. RP 48-49, 50, 53, 55. Finally, the taped dialogue between the defendant and the informant confirms that defendant knew he was delivering a controlled substance. CP 5 (Exhibit 2).

Because the evidence offered at trial, especially the videotape showing the defendant delivering the cocaine, clearly proved principal liability, the jury would have found defendant guilty of the crime of delivery of a controlled substance even if accomplice liability instruction

had not been given. Therefore, the defendant cannot establish any prejudice.

D. CONCLUSION.

The State respectfully requests that this court affirm the defendant's conviction. The defendant cannot establish that he received ineffective assistance of counsel and cannot establish prejudicial error.

DATED: March 12, 2008.

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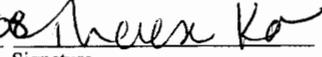


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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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