

Blakeney

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DIVISION II

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STATE OF WASHINGTON
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DEPUTY

NO. 36950-8-II (Consol.)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

FARAJI O. BLAKENEY, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Blakeney's motion to dismiss the charges for lack of evidence.
2. The trial court erred by convicting Mr. Blakeney of unlawful manufacturing of a controlled substance without sufficient evidence.
3. The trial court erred by convicting Mr. Blakeney of unlawful possession of a controlled substance with intent to deliver without sufficient evidence.
4. The trial court erred by convicting Mr. Blakeney of unlawful possession of a firearm without sufficient evidence.
5. The trial court erred by convicting Mr. Blakeney of unlawful possession of a controlled substance without sufficient evidence.
6. The trial court erred by convicting Mr. Blakeney of possession of stolen property without sufficient evidence.
7. The trial court erred by convicting Mr. Blakeney of identity theft without sufficient evidence.
8. The trial court erred by denying Mr. Blakeney's motion for mistrial when the prosecutor argued accomplice liability to the jury without a jury instruction.

9. The prosecutor committed misconduct by arguing accomplice liability to the jury when no accomplice liability instruction had been given.
10. The trial court erred by granting the prosecution's untimely motion to supplement the jury instructions to add the accomplice liability instruction after closing arguments had begun.
10. Mr. Blakeney was deprived of his due process right to a fair trial when the prosecution argued accomplice liability to the jury without a supporting instruction and then when the court supplemented the instructions after closing argument had begun.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by convicting Mr. Blakeney of the crime of unlawful manufacturing of a controlled substance where there is no proof Mr. Blakeney resided in the apartment, there is no proof that he exercised dominion and control over the apartment, and there is no direct proof of his involvement in the manufacturing operation?
2. Did the trial court err by convicting Mr. Blakeney of the crime of unlawful possession of a controlled substance with intent to deliver where the drugs were found hidden in the bedroom closet and there

is no proof that Mr. Blakeney exercised dominion and control over the bedroom or its closet?

3. Did the trial court err by convicting Mr. Blakeney of unlawful possession of a firearm where the firearm was found hidden in the bedroom closet and there is no proof that Mr. Blakeney exercised dominion and control over the bedroom or its closet?
4. Did the trial court err by convicting Mr. Blakeney of unlawful possession of a controlled substance where the drugs were found hidden in the bedroom closet and there is no proof that Mr. Blakeney exercised dominion and control over the bedroom or its closet?
5. Did the trial court err by convicting Mr. Blakeney of possession of stolen property and identity theft where the stolen property was found on a shelf in the corner of the bedroom and the evidence presented showed only that Mr. Blakeney and three others had slept in the bedroom the night before and there was no proof of Mr. Blakeney's dominion and control over the bedroom?
6. Did the trial court err by denying Mr. Blakeney's motion for mistrial when the prosecutor argued accomplice liability in closing argument without a jury instruction on accomplice liability and

then by changing the jury instructions to add accomplice liability in the middle of closing argument?

III. STATEMENT OF THE CASE

This case arises from a forcible search conducted at an apartment in Fife on December 8, 2006. RP2 203. At 6:45 a.m., the police department pounded on the apartment door and immediately forced entry. RP2 203, 206. They were there to exercise a search warrant for the residence.

Several people were found inside the two-bedroom apartment. A woman, Lerissa Iata was sleeping on the sofa in the living room. RP3 293. A man was sleeping on the floor in the hallway. RP2 222. A man and a woman were sleeping in the first bedroom. RP2 234. Faraji Blakeney was sleeping in the second bedroom, along with three juveniles. RP2 222-3.

Police found evidence in the kitchen that indicated crack cocaine had been manufactured. RP3 314-316, RP4 539-551. In the second bedroom, hidden away in the closet and in shoe boxes, crack cocaine and marijuana in small amounts, as well as some cash in various amounts. RP3 297-302. In addition, inside the bedroom closet, on the top shelf under a pile of clothing, police found a handgun. RP3 296, 309, 353.

Identification and a credit card with the name "Stacy Loepp" were also found in the bedroom. RP3 322.

In the second bedroom, where Mr. Blakeney and the minors were sleeping, they found male and female clothing and paperwork bearing various names, including Lerissa Iata, Casey Blakeney, Olujimi Blakeney, and Faraji Blakeney. RP3 313. One document listed Mr. Blakeney's residence as 3905 S. 30th St., Tacoma. RP3 313. There was also one bank statement found, which was addressed to Faraji Blakeney and Lerissa Iata at 2540 62nd Ave. E., Fife. RP3 314. A blue denim purse hanging inside the hall closet contained crack cocaine, a gun and Lerissa Iata's identification. RP3 307, 309.

There was never any evidence introduced about who had leased the apartment or who had lived there. Other than Mr. Blakeney and his co-defendant, Ms. Iata, none of the other five individuals found sleeping in the apartment on the day of the raid were named or identified at trial. No fingerprints were found on the guns or the drug manufacturing equipment. RP3 401, 417.

Stacy Loepp testified that the identification and Macys credit card found at the apartment were hers. RP3 429. She did not know Mr. Blakeney or Ms. Iata, but did not testify as to whether she knew any of the other five individuals at the apartment where the cards were found. RP3

429. Her wallet had, apparently, been stolen by persons unknown. RP3
431.

Procedural History:

Faraji Blakeney was charged with one count of unlawful manufacturing of a controlled substance, one count of unlawful possession of a controlled substance with intent to deliver (cocaine), one count of unlawful possession of a firearm in the first degree, and one count of unlawful possession of a controlled substance (oxycodone)¹, one count of possessing stolen property (credit card), one count of identity theft (identification), and one count of unlawful possession of a controlled substance (marijuana). CP 5-8.

At the close of the State's evidence, Mr. Blakeney moved to dismiss the charges for lack of evidence that he lived at the apartment, or had exercised dominion and control over it. RP5 629. The motion was denied. RP5 637.

The State argued in closing that the one piece of mail with Mr. Blakeney and Ms. Iata's names at the apartment's address, was sufficient to demonstrate dominion and control, either as an accomplice or a principal to the illegal activities conducted within. RP6 687.

¹ This count was later dismissed at the request of the State for lack of evidence. RP5 622.

The defense moved for a mistrial because during closing, the State argued accomplice liability and displayed accomplice liability law to the jury when the jury instructions did not instruct the jury on accomplice liability, nor were the defendants charged as accomplices. RP6 689, 690-91. The motion for mistrial was denied. RP6 694. The State requested additional instructions be given to the jury on accomplice liability. RP6 695. The jury was then given additional instructions on accomplice liability, over defense objection.² RP6 705.

The jury convicted on all charges:

Count	Charge	Verdict	Firearm Enhance.	School Bus Enhance.
I	UMCS	Guilty	X	X
II	UPCS w/ intent to del. (Cocaine)	Guilty	X	X
III	UPF	Guilty		
V	Poss. Stolen Property	Guilty		
VI	ID Theft	Guilty		
VII	UPCS (Marijuana)	Guilty		

² Instructions numbers 8A, 12A, 27. RP6 705.

RP7 797-98.

The trial court sentenced Mr. Blakeney as follows:

<u>Count</u>	<u>Range</u>	<u>Sentence</u>	<u>Firearm Enhance.</u>	<u>School Bus Enhance.</u>
I	100+ - 120m.	110 m.	72 m.	24 m.
II	100+ - 120m.	110 m.	72 m.	24 m.
III	87 – 116m.	116 m.		
V	22 – 29m.	29 m.		
VI	43 – 57m.	57 m.		
VII		90 days		

CP 97, 99. The court ran all base sentences concurrent to count III, 116 months, plus 144 months, plus 48 months, consecutive for the enhancements. CP 99-100.

Following sentencing, DOC requested the court to clarify community custody sentence on count VI and the total sentence imposed. RP 5/2/08 3-4. The State asked the court to reduce the base sentences imposed on counts I and II because the total sentence, plus enhancements, exceeded the statutory maximum sentence of 20 years (240 months). RP 5/2/08 4-5.

Mr. Blakeney also argued that counts I and II constituted the same criminal conduct. RP 5/2/08 8.

The court ruled that the underlying sentences on counts I and II would be reduced to 48 months, plus the consecutive enhancements, which would cap these sentences at their statutory maximum of 240 months. RP 5/2/08 11, Supp. CP. None of the counts were found to be the same criminal conduct. Supp. CP.

This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY CONVICTING MR. BLAKENEY OF THE CRIME OF UNLAWFUL MANUFACTURING OF A CONTROLLED SUBSTANCE WHEN THERE IS INSUFFICIENT EVIDENCE THAT HE HAD DOMINION AND CONTROL OF THE APARTMENT AND NO EVIDENCE THAT HE PARTICIPATED IN ANY WAY IN THE CRIME.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Mr. Blakeney was charged with manufacturing cocaine, a schedule II drug. CP 5, RCW 69.50.401. There was ample evidence in this case that crack cocaine was being manufactured in the kitchen at the apartment.

RP3 314-16. However, there is no evidence that Mr. Blakeney was involved, either as a principle or an accomplice, in that illegal activity.

Mere physical presence at the scene, even if coupled with assent, is insufficient to establish accomplice liability. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Rather, the State must prove the defendant was ready to assist in the crime. *Luna*, 71 Wn. App. at 759 (citations omitted). A person is culpable as an accomplice if, knowing that it will facilitate the commission of the crime, he or she “aids or agrees to aid” another person in planning or committing the crime. RCW 9A.08.020(3)(a)(ii). “It is the intent to facilitate another in the commission of a crime by providing assistance through his presence or his act that makes the accomplice criminally liable.” *State v. Galisia*, 63 Wn. App. 833, 840, 822 P.2d 303 (1992). Other than his physical presence sleeping in the apartment, there is no evidence of Mr. Blakeney’s involvement in the manufacturing operation.

The State attempted to prove Mr. Blakeney’s involvement by arguing that he exercised dominion and control over the premises where the illegal activity occurred. Even evidence that the defendant lived on the premises merely raises a rebuttable presumption of dominion and control of the contents. *State v. Perry*, 10 Wn. App. 159, 162, 516 P.2d 1104 (1973).

In this case, there is no direct evidence that Mr. Blakeney was involved, either as a principal or an accomplice, in the manufacturing operation. Therefore, the State had to show constructive possession of the premises such that a presumption would arise that he was taking part in the illegal activity. There was no testimony that Mr. Blakeney knew about the operation or had ever assisted in the illegal activities in any way. There was no evidence presented that Mr. Blakeney resided at the apartment. Mr. Blakeney was not found anywhere near the manufacturing operation in the kitchen, nor were his fingerprints found on any of the items with cocaine residue.

The only evidence, in the light most favorable to the prosecution, was that Mr. Blakeney had slept in the apartment the night before the search, had left some of his mail on the floor beside the bed he slept in, and that he had used the apartment as a mailing address at some point in the past—as evidenced by one bank statement.³ Several other people were also found sleeping in the apartment. RP2 208, 222, 234. Mail addressed to several individuals was also found. Moreover, the mail found in Mr. Blakeney's name was addressed to more than one address. RP3 313, 314.

³ Police found DSHS paperwork in Mr. Blakeney's name, with another address listed, and one Bank of America statement, jointly in Mr. Blakeney and Ms. Iata's name at the apartment's address. RP3 313. Documents belonging to several other people were also found. RP3 313.

This does not prove Mr. Blakeney had dominion and control of the entire apartment and cannot raise a rebuttable presumption of his involvement in the illegal activity. Consequently, there is insufficient proof to support Mr. Blakeney's conviction for unlawful manufacturing of a controlled substance.

ISSUE 2: THE TRIAL COURT ERRED BY CONVICTING MR. BLAKENEY OF UNLAWFUL POSSESSION OF COCAINE WITH INTENT TO DELIVER WITHOUT PROOF THAT HE HAD DOMINION AND CONTROL OVER THE BEDROOM CLOSET IN WHICH THE DRUGS WERE FOUND.

The State asserted that Mr. Blakeney unlawfully possessed crack cocaine with intent to deliver. CP 6. The crack cocaine was found inside a shoe box in the closet of the bedroom where Mr. Blakeney and three juveniles were found sleeping. RP3 296.

Again, with the evidence viewed in the light most favorable to the State, the State failed to prove Mr. Blakeney had dominion and control over the apartment. The only evidence that Mr. Blakeney possessed the cocaine was that he was found sleeping in the bedroom at the time of the search. As discussed above, there is no proof that Mr. Blakeney had dominion and control of this apartment. Moreover, there is no proof that Mr. Blakeney had dominion and control over the bedroom in which he was sleeping. Mr. Blakeney was one of four individuals found sleeping in that room. Clothing for both a man and a woman was found throughout

the room. RP3 296. In short, the evidence of who actually lived in that bedroom was inconclusive.

Where dominion and control over the premises cannot be proved, constructive possession of the substance generally requires proof that the defendant was in physical proximity to the contraband. *See e.g. State v. Galbert*, 70 Wn. App. 721, 728, 855 P.2d 310 (1993) (defendant was present in home at time of search, but not in close enough proximity to marijuana for constructive possession).

In this case, the cocaine was found in a shoe box in the closet. RP3 293. Mr. Blakeney's mere presence in the bedroom, along with three other people, does not place him in close enough proximity to prove that he possessed the cocaine. The cocaine was hidden—not in plain sight. Nothing in the closet identified Mr. Blakeney. Any of the four individuals found in the bedroom could have placed the cocaine in the closet, as could have any one else, including whoever actually lived in this apartment. There is simply insufficient evidence to connect the cocaine to Mr. Blakeney and his conviction must therefore be reversed.

ISSUE 3: THE TRIAL COURT ERRED BY CONVICTING MR. BLAKENEY OF UNLAWFUL POSSESSION OF A FIREARM WITHOUT PROOF THAT HE HAD DOMINION AND CONTROL OVER THE BEDROOM CLOSET IN WHICH THE GUN WAS FOUND.

Mr. Blakeney was also found guilty of unlawful possession of a firearm. RP7 797. Two firearms were found in the apartment. A colt revolver was found on the top shelf of the bedroom closet under a pile of jeans. RP3 307. This was in the second bedroom, where Mr. Blakeney and the three juveniles were sleeping. A Smith and Wesson revolver was also found inside a purse in the hall closet. RP3 309.

There is insufficient evidence to prove that Mr. Blakeney possessed either firearm. As is discussed above, there is no proof that Mr. Blakeney exercised dominion and control over either the apartment or the bedroom in which he slept. The gun found in the bedroom was in the closet on a top shelf and not in plain sight. Merely sleeping in the bedroom does not show his knowledge or possession of that gun hidden in the closet. There was no evidence presented to connect Mr. Blakeney to the closet or its contents. Therefore, the State has failed to prove Mr. Blakeney's possession of the firearms.

ISSUE 4: THE TRIAL COURT ERRED BY CONVICTING MR. BLAKENEY OF UNLAWFUL POSSESSION OF MARIJUANA WITHOUT PROOF THAT HE HAD DOMINION AND CONTROL OVER THE BEDROOM CLOSET IN WHICH THE DRUG WAS FOUND.

Mr. Blakeney was convicted of unlawful possession of a controlled substance—Marijuana. RP7 798. The marijuana was also found in a shoe box located inside the bedroom closet on the top shelf. RP3 301-2.

Again, as discussed in detail above, the State failed to show either possession or constructive possession. Like the firearm and the cocaine, the drugs were hidden inside the closet on the top shelf. The State has failed to present facts sufficient to support Mr. Blakeney's conviction and it should be reversed.

ISSUE 5: THE TRIAL COURT ERRED BY CONVICTING MR. BLAKENEY OF POSSESSING STOLEN PROPERTY AND IDENTITY THEFT WITHOUT PROOF THAT HE HAD CONSTRUCTIVE POSSESSION OF THE IDENTITY CARDS AND CREDIT CARD.

On a shelf in the corner of the bedroom, police found a military identification card, a social security security card, and a Washington ID card, and a Macys credit card all belonging to Stacy Loepp. RP3 322. Ms. Loepp testified that her wallet had been stolen and that all of these cards were inside it. RP3 431. She did not know or recognize Mr. Blakeney or Ms. Iata. RP3 429. Mr. Blakeney was convicted of possessing stolen property and identity theft. RP7 798.

Again, there is no direct evidence that Mr. Blakeney possessed the cards and the State's case hinges on his presence in the room in which the cards were found. Because there is not sufficient evidence to show Mr. Blakeney's dominion and control over the bedroom, there is not sufficient evidence to support his convictions of possession of stolen property and identity theft.

ISSUE 6: THE TRIAL COURT ERRED BY DENYING MR. BLAKENEY'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR ARGUED ACCOMPLICE LIABILITY IN CLOSING ARGUMENT WITHOUT ANY JURY INSTRUCTION ON ACCOMPLICE LIABILITY AND BY THEN BY CHANGING THE JURY INSTRUCTIONS TO ADD ACCOMPLICE LIABILITY.

The information charging Mr. Blakeney in this case charged him as a principal, not as an accomplice. CP 5-8. After the parties had rested, RP5 640, they agreed on a set of jury instructions that did not include accomplice liability instructions. RP6 644-70, CP 14-16. These instructions were read to the jury. RP6 670.

The State then began closing argument. At the start of closing argument, the prosecutor began to argue accomplice theory, both verbally and through a power-point visual presentation. RP6 689. Her argument began as follows:

Now, as we go through each of these charges, one thing to keep in mind is that an individual can be guilty either as a principal or as an accomplice. You can be guilty of a crime if you personally committed the crime that you're charged with or if you knowingly aid anyone else to commit the crimes, if you're working together, acting in concert. . . .

RP6 677-78. Then, again, the prosecutor tells the jury that to convict Mr. Blakeney of possession of a controlled substance, it has to find that: "on September 8th, 2006, on or about that date, the defendant or an accomplice possessed a controlled substance." RP6 685. At the same time, the jury

was shown a slide with the same language, language that was not in the jury instruction. RP6 689, 694.

The defense objected—passing a note to the court indicating the need to be heard outside the presence of the jury. RP6 688-89. The defense specifically objected the State arguing accomplice liability because neither the information, nor the jury instructions, includes accomplice liability, and asked for a mistrial. RP6 689-90, 691.

The court denied the motion for mistrial, but agreed to give a limiting instruction to the jury. RP6 694. As the defense attorneys discussed the language of a limiting instruction, the State made a motion to belatedly include accomplice instructions in the jury instructions for the manufacturing and possession with intent to deliver charges. RP6 694-95, 699, 701-2. The defense objected to this action as a “cure” for the misconduct and to instructing the jury again after argument has begun. RP6 700. The Court then replaced the existing jury instructions 8 and 12, substituting 8A and 12A, and added 45, all to add the legal theory of accomplice liability. RP6 704, CP 14-16, CP 30, 34, 77. The defense took exception to giving these instructions. RP6 705.

When the jury returned to the courtroom, the judge instructed them as follows:

We are making a substitution of some instructions that were inadequate, so each of you will have two packets face down on the seat behind you. The one on the top of the packet is three sheets that go into Mr. Blakeney's set of instructions that you have, which is the larger set. . . .

RP6 710-11. The judge then read all three instructions to the jury, instructing them to replace instructions 8 and 12. RP6 712. The State then resumed closing argument.

1. The Prosecutor committed misconduct by arguing to the jury a legal theory that was not included in the instructions.

It is prosecutorial misconduct for a prosecutor to argue accomplice liability to the jury without a jury instruction supporting the theory. *State v. Ransom*, 56 Wn. App. 712, 785 P.2d 469 (1990), *State v. Davenport*, 100 Wn.2d 757, 764-65, 657 P.2d 1213 (1984).

Attorneys "have the right to argue all the issues and theories covered by the instructions, whether raised by that lawyer or the opposing lawyer, but may not argue theories not covered by the instructions." *Ransom*, at 714.

Accomplice liability is a distinct theory of criminal culpability. If the State elects to pursue that theory, it has an obligation to offer timely and appropriate instructions. A defendant has the right to rely on the fact that the State elected not to pursue that theory.

Ransom, at 714 (citing *State v. Davenport*, 100 Wn.2d 757, 760-61, 675 P.2d 1213 (1984)).

In *Davenport*, as in this case, neither the information nor the jury instructions included accomplice liability. 100 Wn.2d at 758. Also, like this case, there was no direct evidence introduced that Davenport himself committed the crime. *Davenport*, at 758. In rebuttal argument, the prosecutor argued to the jury that Davenport could be found guilty based on accomplice liability. *Davenport*, at 759. Davenport objected and moved for mistrial, but was denied. *Davenport*, at 759. Then, after the jury began deliberation, it submitted a question to the court regarding accomplice liability. *Davenport*, at 759. The court instructed the jury to rely on the instructions given. *Davenport*, at 759. The jury convicted Davenport. *Davenport*, at 759.

The Supreme Court reversed Davenport's conviction, holding that "The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." *Davenport*, at 763. Reversing the appellate court's finding of harmless error, the Court held that "the ultimate inquiry is not whether the error was harmless or not harmless, but rather did the impropriety violate the petitioner's due process rights to a fair trial." *Davenport*, at 763.

It is clear under both *Davenport* and *Ransom*, that it was prosecutorial misconduct for the prosecutor to have argued accomplice liability to the jury without having proposed supporting instructions on

that theory. Just like *Davenport*, the State presented no direct proof of Mr. Blakeney's involvement in any of the crimes and merely argued circumstantially that either he or Ms. Iata was the principal and the other was the accomplice. It was clear, especially to the State, that it could not secure convictions without arguing accomplice liability. Yet, the State had not proposed and the trial court had not given accomplice liability instructions—this legal theory was not a part of the law of the case. Consequently, this error deprived Mr. Blakeney of his right to a fair trial and therefore it was error for the trial court to deny his motion for mistrial.

2. *It was error for the trial court to give additional instructions to the jury on a new legal theory after the start of closing arguments.*

“While it is not unconstitutional to charge a person as a principal and convict him as an accomplice, the *court must instruct* the jury on accomplice liability.” *State v. Davenport*, 100 Wn.2d 757, 764-65, 657 P.2d 1213 (1984). In this case, the jury instructions were read to the jury prior to closing argument—instructions that did not include accomplice liability. It was only after the defense pointed out the prosecutorial misconduct during closing argument that the prosecutor proposed accomplice liability instructions. It was error for the court to give

supplemental instructions at that time because there is no procedure in place for giving supplemental instructions during closing argument.

CrR 6.15(a) provides that proposed jury instructions that can be reasonably anticipated shall be served and filed when the case is called. See also CR 51(a). CrR 6.15(a) also states that additional instructions shall be served and filed “at any time before the court has instructed the jury.” CrR 6.15(d) provides that the court “shall” instruct the jury prior to beginning closing argument.⁴ The language used in CrR 6.15(a) and (d) is mandatory—“shall”—making it clear that the instructions must be filed before the instructions are read to the jury and the instructions must be read to the jury before closing argument. After that point, the court rule only provides for supplemental instructions in answer to jury questions. CR 51(i); CrR 6.15(f). There is no procedure in place for supplementing

⁴ CR 50 also provides:

(g) Instructing the jury and argument After counsel have completed their objections and the court has made any modifications deemed appropriate, the court shall then provide each counsel with a copy of the instructions in their final form. The court shall then read the instructions to the jury. The plaintiff or party having the burden of proof may then address the jury upon the evidence, and the law as contained in the court's instructions; after which the adverse party may address the jury; followed by the rebuttal of the party first addressing the jury.

the jury instructions to include new legal theories in the middle of closing argument.

As *Ransom* stated, “A defendant has the right to rely on the fact that the State elected not to pursue that theory.” 56 Wn. App. at 714. The defense in this case was entitled to rely on the fact that the State had not proposed accomplice liability instructions in preparing its closing argument. All of the charging documents indicated only liability as a principal. Completely changing this theory literally minutes before the defense presented closing argument seriously compromised the fairness of the trial.

There is no reason for this to have happened. If the State intended to rely on accomplice liability, then it should have submitted timely instructions. Having failed to do so, either through error or purposeful omission, it was error for the trial court to permit the State to spring these instructions on the defense in an untimely manner after argument has begun. The court rules do not give the trial court the authority to do that.

Furthermore, by giving these jury instructions after the packet had already been read gives the accomplice instructions undue emphasis and could serve to influence the jury’s verdict. It was therefore error for the trial court to add a new legal theory through supplemental instructions given in the middle of closing argument. Moreover, both this error and

the prosecutorial misconduct deprived Mr. Blakeney of his due process right to a fair trial. Therefore, his convictions must be reversed and remanded for new trial.

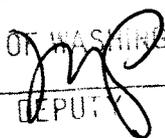
V. CONCLUSION

The trial court erred by convicting Mr. Blakeney of these charges because the State failed to prove beyond a reasonable doubt that he was involved in any of the criminal activity. Mere presence at the scene of a crime is not sufficient evidence of involvement. And the State did not prove that Mr. Blakeney exercised dominion and control over either the apartment or the bedroom. Therefore, his convictions must be dismissed due to insufficient evidence.

Moreover, Mr. Blakeney was deprived of his due process right to a fair trial when the prosecutor argued accomplice liability during closing argument without any jury instructions on accomplice liability. The trial court compounded that error when it denied the motion for mistrial and then granted the State's untimely motion to supplement the jury instructions, adding this legal theory. There is no court rule that gives the trial court authority to supplement jury instructions to add a new legal theory in the middle of closing argument. Consequently, because the trial was irreparably tainted by these errors, all the convictions must be reversed and the case remanded for a new trial.

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DATED: July 7, 2008

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CERTIFICATE OF SERVICE

I certify that on July 7, 2008, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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