

NO. 38916-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

ISAAC LEE CAVIL,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

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

The Honorable John A. McCarthy

BRIEF OF APPELLANT

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Plm 10/12/09

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict appellant of three counts of assault in the first degree under accomplice liability.

2. The trial court erred in denying appellant's midtrial motion for a directed verdict and motion for arrest of judgment after the trial on the three counts of assault in the first degree.

Issue Pertaining to Assignments of Error

Was the evidence insufficient to convict appellant of assault in the first degree under accomplice liability when the evidence failed to prove beyond a reasonable doubt that appellant had knowledge that the principals intended to inflict great bodily harm?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On September 20, 2007, the State charged appellant, Isaac Lee Cavil, with three counts of assault in the first degree with firearm enhancements and one count of drive-by shooting under accomplice liability and two counts of unlawful possession of a firearm in the first

¹ There are twelve volumes of verbatim report of proceedings. In accordance with RAP 10.3(a)(4), the Statement of the Case contains facts and procedure relevant to the issues presented for review: 1RP - 09/20/07; 2RP - 06/16/08; 3RP - 07/07/08, 09/15/08; 4RP - 10/20/08; 5RP - 10/21/08; 6RP - 01/12/09; 7RP - 01/13/09; 8RP - 01/14/09; 9RP - 01/15/09; 10RP - 01/20/09; 11RP - 01/21/09; 12RP - 01/30/09, 02/20/09.

degree.² CP 1-4. Following a mistrial, the case proceeded to trial before the Honorable John A. McCarthy on January 12, 2009.³ 4RP 114-16, 6RP 2. The court granted defense counsel's motion to bifurcate the two counts of unlawful possession of a firearm. 10RP 536-38. Defense counsel moved for a midtrial directed verdict on the three counts of assault in the first degree which the court denied, and on January 21, 2009, a jury found Cavil guilty of three counts of assault in the first degree with firearm enhancements and one count of drive-by shooting. 10RP 543-50, 11RP 622-23; CP 127, 128, 129, 130, 131, 132. After the verdict, Cavil pled guilty to one count of unlawful possession of a firearm and the State dismissed the second count of unlawful possession of a firearm. 11RP 628-32. On February 20, 2009, the court denied defense counsel's motion for arrest of judgment and imposed an exceptional sentence below the standard range, sentencing Cavil to 342 months in confinement and community custody. 12RP 37-39; CP 158-61. Cavil filed a timely appeal. CP 168.

2. Substantive Facts

On the evening of September 17, 2007, Sergeant John Unfred of the Lakewood Police Department, responded to a report of a drive-by

² The three counts of assault in the first degree allege that Cavil intentionally assaulted R. Kindred, N. Stewart, and H. Stewart. CP 1-2.

³ Cavil was initially charged with co-defendants Amanda Jordan, Frederick Singleton, and two juveniles, J.J. and O.Y., who pled guilty. 6RP 5.

shooting at 4719 109th Street. 7RP 49-51. Unfred arrived shortly after Officer Lofland and they approached the apartment complex on foot. 7RP 51. As other officers arrived on the scene, Lofland conducted the primary investigation but Unfred assisted with interviewing witnesses. 7RP 52-54. Unfred spoke with Regis Kindred who was related to the tenants of the apartment. Kindred provided a description of the vehicle and named "Isaac" as the suspect. 7RP 60. Kindred said Isaac was "the boyfriend of a female named Amanda" and gave him Amanda's cell phone number. 7RP 60-81. Unfred called Amanda, who identified herself as Amanda Jordan. Jordan was not very cooperative initially but eventually said she knew Isaac Cavil. 7RP 61-63. Unfred gave Cavill's name to the other investigative officers and conducted a preliminary inspection of the area with Lofland. 7RP 56, 63. They located a bullet hole on the exterior wall of the apartment and another bullet hole in the interior wall below a staircase. 7RP 56-57.

Detective Bryan Johnson collected and documented evidence at the apartment on September 19, 2009. 7RP 79-82. He inspected the exterior and interior of the apartment and took photographs. 7RP 84. Johnson discovered bullet holes on the exterior vinyl siding and in the soffit of the front of the building. 7RP 87-90. He recovered a bullet fragment lodged

in the exterior wall and a bullet underneath the carpet in the apartment. 7RP 90-96.

Regis Kindred testified that in September 2007, he was spending the summer with his sister, Heidi Stewart, at her home in Tacoma when “[m]y house got shot up.” 9RP 444-47. Kindred received a phone call from Cavil who wanted to fight him for “messaging with” his girlfriend, Amanda. 9RP 447-48. They “were just talking crazy to each other” and Cavil said he was coming right over. 9RP 451. Kindred never met Cavil but his friend Tyrone, who knew Cavil, told him his name. 9RP 448. Kindred was “kind of” fooling around with Amanda in a sexual way. 9RP 459.

Kindred and Tyrone were sitting outside on the porch eating when Cavil drove by in a black Jeep. 9RP 452-53. Kindred went into the house to put the dishes away and use the bathroom, “As I was coming downstairs, bullets started going through the house.” 9RP 453. He heard gunfire for about seven seconds and then he went outside. 9RP 456-57. The police arrived quickly and he told them what happened. 9RP 458-59.

Heidi Stewart testified that Kindred was living with her and her husband, Nathaniel, and their three children. 10RP 521-23. They had just finished dinner and she was walking toward the kitchen when she heard a loud sound. Stewart thought the cupboard in the dining room fell over but

then she realized that somebody was shooting at the house, “We all freaked out.” 10RP 524-25, 531. Stewart was terrified and started screaming for her daughter to get down. 10RP 532. Her husband started screaming, “I don’t think he was scared. I think he was angry.” 10RP 532. Stewart could not see Kindred who had gone upstairs. 10RP 533. The gunfire “wasn’t very long, maybe a matter of 30 seconds, if that.” 10RP 533. Her husband called the police and they gave statements to the officers who arrived on the scene. 10RP 534-44.

Amanda Jordan testified that in September 2007, she was living with her father, his girlfriend, and her two brothers. 8RP 265-66. Cavil was staying with them because “he didn’t have anywhere else to live.” 8RP 266-67. Jordan and Cavil were dating. 8RP 268. On September 17, 2009, Jordan, Cavil, Freddie Singleton, Jordan’s little brother J.J., and O. Y., went to Kindred’s house in Cavil’s Jeep. 8RP 268-69, 282-86. Cavil drove, with Singleton in the passenger seat, and she sat in the back seat with J.J. and O.S. 8RP 290. As they approached the apartment, she saw Kindred and his friend Tyrone standing outside talking. Cavil drove past the apartment and made a U-turn. 8RP 290-92. O.Y. asked what they were going to do and Cavil said “they were going to shoot the house, the apartment.” 8RP 293. Jordan was surprised and scared when J.J. and O.Y.

got out guns because she was afraid they were going to “[s]hoot at the house.” 8RP 296-97.

Jordan attempted to dissuade them by telling them that she knew there was a little girl in the house. Singleton assured her “that it was a one in ten percent chance of hitting somebody” and Cavil said that “it’s because there’s no accuracy because they are moving.” 8RP 298-99. As they approached the house, the four of them pulled up bandannas to cover their faces. Cavil drove by the house and J.J. started shooting but his gun jammed so O.Y. began shooting. 8RP 300-01. Jordan saw people ducking down but did not believe anyone was shot as they drove away. 8RP 303-04.

The State initially charged Jordan with three counts of assault in the first degree, drive-by shooting, and unlawful possession of a firearm in the second degree. In exchange for her testimony, the State amended the charges and allowed her to plead guilty to drive-by shooting and unlawful possession of a firearm in the second degree. The court sentenced her to 27 months in confinement. 8RP 331.

Seventeen-year-old J.J. testified that on September 17, 2007, he was “hanging out” with Cavil at their house. 9RP 375-76. They left and drove around then picked up Singleton, Jordan, and O.Y. 9RP 376-77, 378, 388-89. Cavil started talking to someone on the phone and “after he

got done talking to them, he told us like something [was] about to happen, like a fight.” 9RP 384-85. Cavil said someone “called him a bitch.” 9RP 385. They drove to a house but J.J. did not know the people who lived there. 9RP 392-93. Cavil drove by the apartment and made a U-turn. 9RP 395-97. Cavil said “we were just gonna do a drive-by, and he passed me a gun.” 9RP 397. Cavil had the 9-millimeter pistol underneath the passenger seat. 9RP 397-400.

Cavil said he did not feel like fighting anymore, “let’s just do a drive-by.” 9RP 402. O.Y. had Singleton’s .25 caliber pistol and as they approached the apartment, J.J., O.Y., Cavil, and Singleton covered their faces with black bandannas. 9RP 401, 405-06. While passing the apartment, J.J. fired about three or four shots before his gun jammed. 9RP 408. J.J. did not see anybody, “I was just, kind of just aiming the gun at the apartment complex and pulling the trigger.” 9RP 409. He believed people were within the area that he was shooting and he intended to shoot in that area. 9RP 410. O.Y. began firing a few seconds after J.J. started shooting. 9RP 410. The gunfire lasted 15 to 30 seconds. 9RP 413. As they drove off, Cavil said “good job and stuff like that.” 9RP 413-14. No one told him to shoot at people to hurt them. 9RP 437.

The State initially charged J.J. with three counts of assault in the first degree, drive-by shooting, and unlawful possession of a firearm in the

second degree. When he agreed to testify for the State, the charges were amended to three counts of assault in the second degree, conspiracy to commit a drive-by, and unlawful possession of a firearm in the second degree. J.J. pled guilty to the reduced charges and the court sentenced him to confinement until the age of twenty-one. 9RP 373-74.

Seventeen-year-old O.Y. testified that Cavil called him and asked him to back him up in a fight. O.Y. agreed to help Cavil and met him, Singleton, Jordan, and J.J. at the Lakewood Towne Center. 8RP 131-34, 138, 140-41. O.Y. brought a shotgun that Cavil asked him to bring but it had no ammunition so he thought it was for intimidation. 8RP 137-40. They all got into Cavil's Jeep and drove about ten minutes to an apartment complex. Jordan pointed out the apartment and he saw two or three black males standing outside. 8RP 145-49. Cavil drove past the apartment, made a U-turn, and stopped. Cavil said, "You guys know what to do," so O.Y. thought they "were going to get out and somebody was gonna fight." 8RP 150-51.

Suddenly, J.J. pulled out a 9-millimeter handgun and Singleton handed him a .25 semi-automatic. 8RP 152-55. Cavil said, "All right. You guys get ready," so O.Y. and J.J. put up bandannas to cover their faces as Cavil drove past the house. 8RP 156-58. J.J. started shooting then O.Y. fired four or five shots. O.Y. aimed toward two males who ran

in the house. 8RP 159-60. He shot toward them but was hoping that he did not hit them. 8RP 168. When he stopped shooting, he dropped the gun on the floor because he was scared. As they drove away, "I was silent, and everybody just looked kind of shocked." 8RP 163. Nobody told him to shoot at people or at the house and no one said, "[y]ou guys did a good job," after the shooting. 8RP 185, 194.

The State initially charged O.Y. with three counts of assault in the first degree, drive-by shooting, and unlawful possession of a firearm. 8RP 175. The prosecutor told him that he was facing a sentence of more than 30 years. 8RP 195. O.Y. agreed to testify in exchange for reduced charges. He pled guilty to three counts of assault in the second degree, conspiracy to commit drive-by shooting, and unlawful possession of a firearm and would be confined in juvenile detention for four years until the age of twenty-one, so he "got a good deal." 8RP 174-76, 195.

C. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT CAVIL OF THREE COUNTS OF ASSAULT IN THE FIRST DEGREE UNDER ACCOMPLICE LIABILITY.

Reversal is required because the evidence was insufficient to convict Cavil of three counts of assault in the first degree where the

evidence failed to prove beyond a reasonable doubt that he had knowledge that the principals intended to inflict great bodily harm.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, sect. 3. “[T]he reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.’ ” State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970));⁴ Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); State v. Williams, 144 Wn.2d 197, 212, 26 P.3d 890 (2001). A claim of

⁴ The United States Supreme Court noted, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty.” In re Winship, 397 U.S. at 364.

insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. DeVries, 149 Wn.2d at 849.

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1996), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

Washington's legislative history surrounding the accomplice liability statute does not reflect an intention to create "strict liability" for accomplices. State v. Borrero, 147 Wn.2d. 353, 385, 58 P.3d 245 (2002). The accomplice liability statute, RCW 9A.08.020, requires knowledge of the specific crime, and not merely any foreseeable crime committed as a result of the complicity. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001). Absent that knowledge, Washington law does now allow conviction for crimes committed by co-conspirators, whether or not they are foreseeable. Id. at 248. The statute requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate the crime for which he or she is eventually charged.

State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000)(citing State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000)).

A person is an accomplice in the commission of 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. Jury Instruction 7; CP 96. A person commits the crime of drive-by shooting when he or she recklessly discharges a firearm in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge. Jury Instruction No. 23; CP 113. A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. Recklessness also is established if a person acts intentionally. Jury Instruction No. 24; CP 114. A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with a firearm. Jury Instruction No. 8; CP 97. Great bodily harm means bodily injury that creates a probability of

death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ. Jury Instruction No. 10; CP 100.

The evidence supports the jury's finding that Cavil, as an accomplice, committed the crime of drive-by shooting because J.J. and O.Y. discharged a firearm in a reckless manner which created a substantial risk of death or serious physical injury but there was insufficient evidence that Cavil had knowledge that they intended to inflict great bodily harm. The record reflects that J.J. testified that they went to the apartment for a fight but when they got there, Cavil said he did not feel like fighting anymore, "let's just do a drive-by." 9RP 384-85, 402. When Cavil passed him the gun, he said, "we were just gonna do a drive-by." 9RP 397. No one told him to shoot at people to hurt them:

Q. You figured, all right. All right. I just want to be perfectly clear on this issue of your intent. Nobody told you to shoot at any people?

A. No.

Q. You were told to shoot at the building, the house?

A. Yes.

Q. Nobody told you that people were inside?

A. No.

Q. You just assumed people were inside?

A. Yes.

Q. Nobody told you it was anybody's intent to hurt anyone?

A. Yes.

Q. You just decided that was your intent?

A. Yes.

Q. Nobody told you that?

A. No.

9RP 437.

Consistent with J.J.'s testimony, O.Y. testified that Cavil called to ask him to back him up in a fight and he agreed to help Cavil. 8RP 133-34. When Cavil drove past the apartment and made a U-turn, he said, "You guys know what to do," so O.Y. thought they "were going to get out and somebody was gonna fight." 8RP 150-51. As they passed by the apartment, J.J. suddenly pulled out a 9-millimeter handgun and Singleton handed him a .25 semi-automatic. Cavil said, "All right. You guys get ready," but O.Y. did not hear anything else. 8RP 152-55, 156-58, 185.

No one told him to start firing:

Q. Were you ever instructed by anyone, Freddie Singleton, Amanda Jordan, [J.J.], Isaac Cavil or anybody else, were you ever instructed to shoot at people?

A. No.

Q. Did anyone tell you to shoot at the house?

A. No.

Q. So you just made up your mind when you had the gun in your hand that you were going to shoot at the people?

A. Yes.

8RP 185-86.

Furthermore, Jordan testified that when they approached the apartment, Cavil said “they were gonna shoot the house, the apartment.” 8RP 293. She was surprised and scared when J.J. and O.Y. pulled out guns because she was afraid they were going to “[s]hoot at the house.” When she tried to dissuade them by telling them that she knew there was a little girl in the house, Singleton assured her “that it was a one in ten percent chance of hitting somebody” and Cavil said that “it’s because there’s no accuracy because they are moving.” 8RP 298-99.

The record clearly substantiates that Cavil expected to do a drive-by but had no knowledge that J.J. and O.Y. intended to inflict great bodily harm. Both J.J. and O.Y. admitted that no one told them to shoot at people but they intended to shoot at them. As the State Supreme Court emphasized in State v. Cronin, “the fact that a purported accomplice knows that the principal intends to commit ‘a crime’ does not necessarily

mean that accomplice liability attaches for any and all offenses ultimately committed by the principal.” 142 Wn.2d at 579. The Court concluded that “in order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged.” 142 Wn.2d at 579 (emphasis added by the court). Even when viewing the evidence in the light most favorable to the State, the evidence fails to show that Cavil was promoting or facilitating the crime of assault in the first degree which requires the intent to inflict great bodily harm. Accomplice liability “requires knowledge of the specific crime, not merely any foreseeable crime committed as a result of the complicity.” Stein, 144 Wn.2d at 246.

Reversal and dismissal is required because there was insufficient evidence to convict Cavil of the three counts of assault in the first degree beyond a reasonable doubt.

D. CONCLUSION

For the reasons stated, this Court should reverse and dismiss Mr. Cavil's first degree assault convictions because affirming his convictions would constitute adherence to the long abolished "in for a dime, in for a dollar" theory of complicity.

DATED this 23rd day of October, 2009.

Respectfully submitted,



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DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Isaac Lee Cavil, DOC # 877610, Unit G Tier W Cell 110, Washington State Penitentiary, 1313 N 13th Avenue, Walla Walla, Washington 99362.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of October, 2009 in Kent, Washington.



Valerie Marushige
Attorney at Law
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COURT REPORTERS
DIVISION II
09 OCT 26 AM 9:58
STATE OF WASHINGTON
BY  DEPUTY