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COURT OF APPEALS  
DIVISION II

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NO. 38916-9-II

STATE OF WASHINGTON

BY *Ca*

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

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STATE OF WASHINGTON,

Respondent,

v.

ISAAC LEE CAVIL,

Appellant.

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

The Honorable John A. McCarthy

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE'S STATEMENT OF THE CASE DOES NOT CONSTITUTE A FAIR STATEMENT OF THE FACTS AS REQUIRED UNDER RAP 10.3(a)(4).

RAP 10.3(a)(4) requires that the Statement of the Case provide “[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.” The record substantiates that the State omitted and misstated relevant facts.

The State refers to O.Y.’s testimony and states that Cavil requested that he bring the shotgun so O.Y. put his shotgun in his car and when he arrived Cavil confirmed that he had brought the shotgun. Brief of Respondent at 4-5. However, the State omits the fact that O.Y. said he had no ammunition for the shotgun, he never intended to use the shotgun, and he brought it because Cavil asked him to but thought it was “[m]aybe to intimidate or something.” 8RP 137-40.

The State refers to J.J.’s testimony and states that “[d]efendant pulled a 9 millimeter pistol from under the seat and handed it to Jacob.” Brief of Respondent at 5. The State omits O.Y.’s contrary testimony that J.J. pulled out a 9 millimeter handgun which he had never seen before. 8RP 152. Brief of Respondent at 5 states that “[a]ll of the males in the car

pulled black bandanas over the lower half of their faces,” but the State omits the fact that O.Y. testified that only he and J.J. pulled up bandannas to hide their faces. 8RP 156-57. While stating that “[d]efendant told J.J. and O.Y, “you know what to do,” the State omits the fact that O.Y. said his understanding was that Cavil meant “we were going to get out and somebody was gonna fight.” Brief of Respondent at 5; 8RP 151-52.

The State refers to J.J.’s testimony and states that once the car was past the apartment, Cavil told J.J. and O.Y. that they had done a “good job.” Brief of Respondent at 7. However, the State omits O.Y.’s contrary statement that no one told them that “you guys did a good job.” 8RP 194.

The State claims that Amanda testified that when she told Cavil that the police were coming, “defendant instructed Jacob to hide his car.” Brief of Respondent at 7. The record reflects that Amanda actually said she, Cavil, and J.J. discussed hiding the car but she could not remember who actually said to hide the car. 8RP 325. The State also claims that Cavil told Amanda to deny everything “and threaten the officers with a lawsuit if pressed.” BOR at 7. The record reflects no testimony about a threat but Amanda stated that Cavil told her that if the officers kept asking her questions, just say some word like harassment, “It wasn’t exactly harassment, but I can’t remember what the word was.” 8RP 326.

2. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CONVICT CAVIL OF THREE COUNTS OF ASSAULT IN THE FIRST DEGREE UNDER ACCOMPLICE LIABILITY.

The State claims that it provided ample evidence for the jury to determine that Cavil had knowledge that J.J. and O.Y. were committing first degree assault and that Cavil solicited, commanded, encouraged, and aided them in committing the crime. Brief of Respondent at 13-14. The State cites State v. Rice, 102 Wn.2d 120, 683 P.2d 199 (1984), State v. Whitaker, 133 Wn. App. 199, 135 P.3d 923 (2006), and State v. Salamanca, 60 Wn. App. 817, 851 P.2d 1242 (1993), but fails to provide any analysis as to how these cases relate to the case here. Brief of Respondent at 11-12. In any event, the State's claim is unsubstantiated by the record and the holdings in Rice, Whitaker, and Salamanca do not support the State's argument.

The State asserts that Cavil "directed" J.J. and O.Y. to shoot and that he knew "there was a logical probability that shooting at people and into an occupied apartment could likely cause great bodily harm." Brief of Respondent at 13. The record belies the State's argument. J.J. testified that no one told him to shoot at people to hurt them and O.Y. testified that no one told him to shoot at people or at the house. 8RP 185, 9RP 437. Furthermore, Jordan testified that Singleton assured her that "it was a one

in ten percent chance of hitting somebody” and Cavil agreed, telling her that “it’s because there’s no accuracy because they are moving.” 8RP 298-99. J.J. acknowledged that he heard the discussion that it was unlikely that anybody would get hit or hurt. 9RP 435.

The State argues further that the evidence supports “a reasonable inference that defendant’s intent was to commit assault in the first degree” and “indicative of his intent to inflict great bodily harm.” Brief of Respondent at 13-14. To the contrary, O.Y. testified that Cavil called and asked him to back him up in a fight. 8RP 133. Cavil asked O.Y. to bring his shotgun but O.Y. had no bullets for the shotgun and thought it was for intimidation. 8RP 137-40. J.J. testified that after the phone call, Cavil told them “like something [was] about to happen, like a fight.” 9RP 384-85. According to J.J., when they drove back to the house, Cavil told him, “we were just gonna do a drive-by, and he passed me a gun.” 9RP 397. Cavil said he did not feel like fighting anymore, “let’s just do a drive-by.” 9RP 402. Kindred testified that he and Cavil were supposed to meet up to fight and he told Cavil, “You guys can come to my house and we can get down.” 9RP 450-51. Jordan testified that Cavil said they were going to fight at Kindred’s house and when asked about Cavil’s demeanor, Jordan replied, “He was okay with it. He was happy.” 8RP 281.

The State claims that Cavil told J.J. and O.Y. to shoot at the apartment and “both juveniles understood that defendant meant them to shoot at people.” Brief of Respondent at 14. To the contrary, J.J. testified that no one told him to shoot at any people, no one told him that people were in the house, and no one told him that the intent was to hurt them. 9RP 437. O.Y. testified that no one told him to shoot at people and no one told him to shoot at the house. 8RP 185. When Cavil said, “You guys know what to do,” O.Y. thought they “were going to get out and somebody was gonna fight.” 8RP 150-51.

Contrary to the State’s assertions, even when viewing the evidence in the light most favorable to the State and leaving determinations of credibility to the jury, 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. The accomplice liability 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)). The evidence only supported the jury’s finding that Cavil, as an accomplice, committed the crime of drive-by shooting. See Brief of Appellant at 9-16.

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 and the trial court therefore erred in denying Cavil's motion for a directed verdict and motion for arrest of judgment.

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should reverse and dismiss Mr. Cavil's first degree assault convictions because after viewing the evidence in the State's favor and admitting the truth of the State's evidence and all reasonable inferences, no rational trier of fact could have found that all the elements of the crime were proven beyond a reasonable doubt. State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

DATED this 4<sup>th</sup> day of March, 2010.

Respectfully submitted,

  
VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Isaac Lee Cavil

**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 Kimberley DeMarco, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 4<sup>th</sup> day of March, 2010 in Kent, Washington.

  
Valerie Marushige  
Attorney at Law  
WSBA No. 25851

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