

No. 39027-2-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

ANTHONY McCHRISTIAN,
Appellant.

APPELLANT'S REPLY BRIEF

On Appeal from Pierce County Superior Court No. 08-1-00350-9
The Hon. Kitty-Ann Van Doorninck, Judge

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A. INTRODUCTION

Contrary to the express requirements of Washington’s accomplice liability statute, the prosecutor in this case urged that, according to the law, an accomplice automatically possess the *mens rea* of the principal, as long as both people plan to do some crime together—that under the law an accomplice automatically *knows* what his confederate intends. This is an incorrect statement of law.

In addition, the trial court imposed an increased sentence—precluding Mr. McChristian from earning any good time—despite the fact that the State did not provide McChristian any notice of the increased penalty, without a jury trial, and without any findings supporting the increased sentence. Perhaps most importantly, because the statute does not support the enhanced sentence based on accomplice liability, the facts were insufficient.

This Court should reverse and remand this case for a new trial because the prosecutor’s closing argument urged the jury to apply an incorrect understanding of accomplice liability. Alternatively, this Court should reverse and remand with instructions to vacate the “five year, no good time” portion of Mr. McChristian’s sentence.

In light of the Washington Supreme Court’s recent decision in *State v. Kelly*, ___ Wn.2d ___, ___ P.3d. ___ (Jan. 21, 2010), McChristian abandons his double jeopardy argument premised on the double counting of the weapons enhancement.

B. ARGUMENT

1. THE PROSECUTION’S ARGUMENT THAT ACCOMPLICE LIABILITY IN A FIRST-DEGREE ASSAULT DOES NOT REQUIRE PROOF THAT THE DEFENDANT KNOWINGLY ASSISTED IN AN ASSAULT WITH INTENT TO INFLICT GREAT BODILY HARM IMPERMISSIBLY LOWERED THE STATE’S BURDEN OF PROOF.

Introduction

If the State had sought to convict Mr. McChristian as a principal, the State would have been required to prove that he intended to inflict great bodily harm. Because he was charged as an accomplice, the State defends the argument it made to McChristian’s jury that it needed only prove that he intended to commit (with another) any assault and was thereafter automatically liable for the full extent of the assault committed by the other person—even if that person’s actions were unintended and unforeseeable by McChristian. In short, the State argues that “in for a dime, in for a dollar” theory of liability is alive and well, as long as the dime and the dollar are degrees of a crime that have the same name.

According to the State’s reasoning, a person who intends to commit with another only the most trivial assault is always guilty of the most serious form of an assault committed by the confederate. However, a person who commits with another a theft from a person is not guilty if that theft is transformed into a robbery (if he did not knowingly assist) because the name of the base crime has changed. Under the State’s reasoning, if the name of the crime changes as the conduct grows more serious, then the State is

required to prove “knowing” assistance by the accomplice. However, when the name of the crime stays the same, strictly liability attaches. This is an entirely artificial construct.

More importantly, it ignores the knowledge element of the accomplice liability statute.

The law never requires that a defendant have knowledge of the elements of a crime. However, Washington law unambiguously requires that an accomplice knowingly facilitate the crime charged. Thus, the statute requires a shared *mens rea*.

There Is a Reasonable Likelihood that the Jury Misunderstood the Law

The Due Process Clause requires a State to prove beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). Where there is a reasonable likelihood that a jury misunderstood the law in a manner that lowered the State's burden of proof on an essential element, the defendant is deprived of this clearly established constitutional right. *Estelle v. McGuire*, 502 U.S. 62, 73 n.4. (1991); *Francis v. Franklin*, 471 U.S. 307, 315-16 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979); see also *Bollenbach v. United States*, 326 U.S. 607, 611-13 (1946); *Sparf v. United States*; 156 U.S. 51, 73-74 (1895); *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (Story, J.).

The United States Supreme Court clearly established in *Winship* that the Due Process Clause of the Fourteenth Amendment guarantees a

defendant the right not to be convicted unless the jury finds “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. at 364. An omission or misdescription of an element of the charge, or an instruction that lowers or eliminates the government's burden of proof on an element, denies the defendant the constitutional right to insist upon a jury finding on each element beyond a reasonable doubt. *See Neder v. United States*, 527 U.S. 1, 10 (1999) (“misdescriptions and omissions ... preclude [] the jury from making a finding on the *actual* element of the offense”); *California v. Roy*, 519 U.S. 2, 5 (1996) (*per curiam*) (erroneous instruction is “as easily characterized” either as a “misdescription of an element” or an “error of omission”) (internal quotations omitted); *Francis*, 471 U.S. at 318 (improper instruction on burden for proving intent).

A clearly established corollary of *Winship* is that a defendant is denied Due Process where there is a “reasonable likelihood” that the jury misunderstood the instructions in a manner that resulted in it not finding every fact necessary to constitute the crime beyond a reasonable doubt. *Estelle*, 502 U.S. at 72 (quoting *Boyde*, 494 U.S. at 380); *Francis*, 471 U.S. at 318 (holding that instruction that altered burden of proof “with respect to the element of intent” was unconstitutional); *Carella v. California*, 491 U.S. 263, 265-67 (1989) (*per curiam*) (same with respect to instructions on other elements of the crime); *Sandstrom*, 442 U.S. at 521 (improper instruction on

intent); *cf. Phillip Morris USA v. Williams*, 127 S. Ct. 1057, 1064-65 (2007) (holding states cannot permit a “significant” risk that a jury's misunderstanding deprived a civil defendant of Due Process).

The “reasonable likelihood” standard is clearly established to be a likelihood of jury confusion greater than a bare “possibility,” yet *less* than “more likely than not.” *Boyd*, 494 U.S. at 380.

It is “self-evident” that the Due Process right, under *Winship* and its progeny, to a jury that understands the elements of the charged offense is “interrelated” with the Sixth Amendment right to a jury trial. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *Carella*, 491 U.S. at 268 (Scalia, J., joined by Brennan, Marshall, and Blackmun, J.J., concurring in judgment); see also *Sandstrom*, 442 U.S. at 523 (erroneous instruction impaired jury's constitutionally-assigned “factfinding function”).

Justice Story described the right to a jury that understands and follows the law as “most sacred”: Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it....[This] is his privilege and truest shield against oppression and wrong.....” *Battiste*, 24 F. Cas. at 1043.

Accomplice Liability Law

An unfortunate amount of ambiguity still exists in Washington law about the exact scope of accomplice liability. However, it is clear that the

Washington Supreme Court has repudiated the “in for a dime, in for a dollar” theory.

In *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2001), the Washington Supreme Court wrote, “The Legislature ... intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has ‘knowledge,’ In contrast, jury instruction 7 here essentially allowed the jury to impose strict liability on Roberts. The instruction, therefore, improperly departed from the language of the statute.” *Id.* at 735-36. In *State v. Cronin*, 142 Wash.2d 568, 14 P.3d 752 (2000), the Washington Supreme Court “adhere[d]” to its decision in *Roberts*: “[T]he 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.” *See Roberts*, 14 P.3d at 736. “In our judgment, 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.” *Id.* at 758 (emphasis in original).

In *Sarausad v. State*, 109 Wash.App. 824, 39 P.3d 308, 313-14 (2001), the case most identified with the “in for a dime, in for a dollar” theory, the Court of Appeals rejected Sarausad’s PRP by holding, “the prosecutor did *not* in fact argue that even if Sarausad drove to Ballard High School the second time having the purpose to facilitate only another shoving match or a

fist fight, he nevertheless was guilty of murder.” *Id.* at 318 (emphasis in original). It added: “Not once did the prosecutor suggest to the jury that it could or should convict Sarausad even if it believed that he returned to Ballard High School for the purpose of facilitating nothing more than another shoving match or a fistfight....” *Id.* at 319. *See also In re Domingo*, 155 Wash.2d 356, 367-368, 119 P.3d 816, 822 (2005) (“[N]either *Davis* nor any of this court's decisions subsequent to *Davis* approves of the proposition that accomplice liability attaches for any and all crimes committed by the principal so long as the putative accomplice knowingly aided in any one of the crimes”).

Nevertheless, the State argues that the *Roberts* court’s reference to “the crime charged,” did not mean “the crime charged,” but instead “any degree of a crime that bears the same name as the crime charged.” According to this reasoning, the line of cases rejected and overruled in *Cronin* have been revived. 142 Wn.2d at 763 (Tallmadge, J., dissenting) (arguing that Court should not overrule cases that have consistently held that accomplices not need to share *mens rea* of principal, but admitting that drafters of statute intended to require that accomplice must act with knowledge that he is facilitating crime charged). Admittedly, there is some support in the caselaw for the State’s position, just as there is contrary precedent.

Under the State's theory an accomplice still assumes the risk for the unforeseen acts of another, as long as those unforeseen acts share the general name of the crime. Thus, it does not matter if a crime jumps the line from misdemeanor to felony, as long as the name stays the same. Thus, an accomplice is strictly liable for a first-degree assault if he commits a misdemeanor assault with another. On the other hand, a person committing an unlawful imprisonment does not assume the risk that his partner in crime will commit a kidnapping because the name changes. The same would be true for several additional crimes (reckless burning/arson; child molestation/rape of a child; and trespass/burglary).

The problem with the State's argument is that reads the knowledge requirement out of the law.

Instead, the statute clearly makes an accomplice responsible for the *actions* of another as long as the accomplice knowingly facilitated those actions. Admittedly, the definition of "knowingly" allows jurors to infer knowledge. RCW 9A.08.010. The only reasonable interpretation of the knowledge requirement of the statute is that an accessory must share the criminal intent of the principal. *See e.g., State v. Carrasco*, 124 N.M. 64, 946 P.2d 1075, 1079 (1997).

If the actions of C.J. Valliant were unintended and unforeseen by McChristian, then McChristian did not did not knowingly facilitate the crime charged. However, the State argued that the requirement of knowledge in

this case was “nonexistent.” RP 198-200. Instead, according to the prosecutor’s closing argument the law of accomplice liability eliminated the requirement of knowledge.

Given the misleading nature of the prosecutor’s argument, this Court should ask, as the United States Supreme Court did in *Bollenbach*: “What reason is there for assuming that the jury did not also fail to appreciate these factors which the Government, in an elaborate argument, explains as requisite for a proper understanding of that which at best was dubiously expressed?” 326 U.S. at 613.

Reversal is required.

2. THE SENTENCING COURT IMPOSED A MANDATORY MINIMUM THAT ELIMINATED THE POSSIBILITY OF GOOD TIME DESPITE THE COMPLETE ABSENCE OF NOTICE, THE RIGHT TO A JURY TRIAL, THE RIGHT TO A FINDING, AND WHERE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW.

McChristian made four arguments all arising from the imposition of a mandatory “five-year, no good time” sentence by the trial court:

1. No pre-sentencing notice was given by the State that it was seeking this mandatory sentence;
2. McChristian was denied his Constitutional right to a jury trial because the maximum sentence authorized by the jury verdict was increased when the Court directed that McChristian be automatically denied good time for five years;
3. No findings were made by any factfinder prior to the imposition of the increased punishment;
4. The evidence was insufficient as a matter of law to prove that McChristian *himself* acted with the requisite intent.

Like any other increased punishment, the imposition of a mandatory minimum, a sentence depriving McChristian of any “earned early release” for the first five years of his sentence, implicates Due Process and the right to a jury trial. However, none of those protections were afforded McChristian. Frankly, it would be hard to draft a law school examination question that involves a more substantial denial of due process.

Nevertheless, in *Response* the State argues that because the statute does not specify these requirements, the Constitution does not impose these requirements either. The State is mistaken.

The Sixth Amendment Mandates a Jury Trial

The State fails to acknowledge that the trial court’s unstated, but implicit finding resulted in the automatic denial of good time to McChristian. This distinction clearly invokes the Sixth Amendment right to a jury trial.

The first-degree assault mandatory minimum finding is not coextensive with a first-degree assault verdict. *In re Pers. Restraint of Tran*, 154 Wn.2d 323, 111 P.3d 1168 (2005). In other words, an additional finding beyond the jury verdict is required prior to imposing the mandatory minimum.

The State argues that a jury is not required to make this finding because no increased punishment follows—the finding only authorizes a minimum that is within the statutorily authorized sentence range. The State’s

argument completely ignores the automatic deprivation of good time. *See Tran, supra* (“DOC's determination that Tran and Roberts must serve five years of ‘flat time’ for their first degree assault convictions leaves them ineligible for the earned early release credit of which they might otherwise take advantage. *As a result, the petitioners are likely to spend substantially more time in DOC custody than their sentences should allow.*”); *State v. Conley*, 121 Wash. App. 280, 87 P.3d 1221 (2004) (“...the statutory prohibition against earned early release credit for the period of the mandatory minimum sentence had a definite, immediate, and automatic effect on the range of Mr. Conley's sentence.”).

Blakely and its progeny make it clear that the right to a jury trial attaches whenever the sentence imposed is greater than authorized by the jury verdict alone. Based on the jury verdict alone, the sentencing court did not have the authority to automatically deny good time. *See In re West*, 154 Wn.2d 204, 110 P.3d 1122 (2004).

Thus, McChristian was entitled to a jury trial. However, he was also entitled to some form of pre-trial or pre-sentencing notice.

Due Process Mandates Notice

Even if the statute does not specify, Due Process requires notice. *See Lankford v. Idaho*, 500 U.S. 110 (1991). Fair notice is the bedrock of any constitutionally fair procedure. The Supreme Court made it clear in *State v. Theroff*, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980), “(w)hen prosecutors seek

enhanced penalties, notice of their intent must be set forth in the information.” The State’s *Response* suggests no reason why this case should be exempt from that clear rule. Because the State did not allege facts supporting the increased sentence in the *Information* and because McChristian has now been tried, mandatory joinder prohibits remand for a retrial on this issue.

No Finding

Tran, supra, makes it clear that a finding is required before DOC can deny good time. Because the sentencing court did not make such a finding, the portion of McChristian’s sentence relating to the mandatory minimum must be reversed.

Insufficiency of the Evidence

The State does not contest McChristian’s reading of the statute, *i.e.*, that the increased sentence can only be applied to an actor, not an accomplice. Instead, the state posits since it is unclear who did what, this Court can conclude the evidence is sufficient. That is not the standard of review. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (in all sufficiency-of-the-evidence challenges, reviewing court must determine whether, viewing the trial testimony and exhibits in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt); *Brown v. Palmer*, 441 F.3d 347, 352 (6th Cir.2006) (even habeas court must “distinguish reasonable

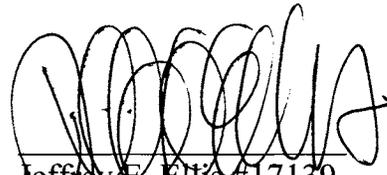
speculation from sufficient evidence”).

C. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial. Alternatively, this Court should vacate McChristian’s sentence and remand for resentencing without imposing the mandatory minimum.

DATED this 1st day of February, 2010.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read "Jeffrey E. Ellis", written over a horizontal line.

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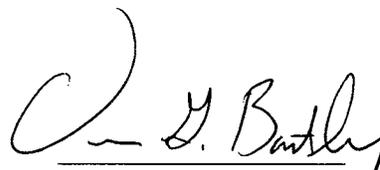
CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on February 1, 2010 I served the parties listed below with a copy of *Appellant's Reply Brief* as follows:

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