

NO. 39128-7-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID FRASQUILLO,

Appellant.

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT 1

 1. WHERE THE ACCOMPLICE LIABILITY INSTRUCTION WAS ERRONEOUS, DAVID FRASQUILLO WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL..... 1

 a. The court failed to accurately instruct the jury on the essential requirements of accomplice liability. 1

 b. Misstating the mental element of accomplice liability is manifest constitutional error. 2

 c. The erroneous instruction was not harmless. 4

 2. WHERE THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT DAVID FRASQUILLO'S CONVICTION FOR ATTEMPTED ASSAULT IN THE SECOND DEGREE AGAINST JACOB KNOWLTON, REVERSAL IS REQUIRED. 5

 a. The State failed to prove that Mr. Frasquillo acted with the specific intent to assault Jacob Knowlton. 5

 b. The doctrine of transferred intent does not apply and State v. Elmi is distinguishable. 5

 c. Reversal and dismissal is the appropriate remedy. 7

B. CONCLUSION 7

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984)..... 1

State v. Bergeron, 105 Wn.2d 1, 71 P.2d 1000 (1985)..... 2

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 1, 2

State v. Byrd, 125 Wn.2d 707, 887 P.2d 1229 (1995) 2

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) 1, 2

State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577 (1996) 2

State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009)..... 6

State v. Johnson, 100 Wn.2d 607, 674 P.2d 145 (1983) 1

State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000) 2, 3

State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994)..... 5, 6

Washington Court of Appeals

State v. Salamanca, 69 Wn. App. 817, 851 P.2d 1242 (1993) 6

State v. Spruell, 57 Wn.App. 383, 788 P.2d 21 (1990) 7

United States Supreme Court

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)
..... 1

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d
39 (1979) 1

Statutes

RCW 9A.08.020..... 2
RCW 9A.48.070..... 5

Rules

RAP 2.5..... 2

A. ARGUMENT

1. WHERE THE ACCOMPLICE LIABILITY INSTRUCTION WAS ERRONEOUS, DAVID FRASQUILLO WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL.

a. The court failed to accurately instruct the jury on the essential requirements of accomplice liability. The State must prove every essential element of a crime beyond a reasonable doubt. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000) (citing inter alia In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d (1970)); Wash. Const. Art. I, § 3; U.S. Const. Am. XIV; Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). Where the jury is instructed in a manner that relieves the State of its burden of proving the defendant knew he was facilitating the crime charged, the error is presumed prejudicial. State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002).

The Washington Supreme Court has made clear that the omission of an element of the crime from a jury instruction is an error of constitutional magnitude reviewable when raised for the first time on appeal. State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), overruled on other grounds by State v. Bergeron,

105 Wn.2d 1, 71 P.2d 1000 (1985); State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 1229 (1995). Accordingly, this issue is a manifest constitutional error, which is appropriate for review. RAP 2.5(a)(3); State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000); State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996).

b. Misstating the mental element of accomplice liability was manifest constitutional error. The particular *mens rea* for accomplice liability is a requirement that the accused knew he was facilitating the commission of the specific crime charged. RCW 9A.08.020(3)(a); Roberts, 142 Wn.2d at 500; Cronin, 142 Wn.2d at 580. An instruction that merely speaks to knowledge that the accused facilitated any crime is constitutionally deficient, requiring reversal. Cronin, 143 Wn.2d at 580-82. As the Washington Supreme Court said in Brown,

It is a misstatement of the law to instruct a jury that a person is an accomplice if he or she acts with knowledge that his or her actions will promote any crime.

147 Wn.2d at 338 (emphasis in original).

Here, the accomplice liability jury instruction repeatedly asked the jury to consider only whether the accused person was an

accomplice in “an assault,” as opposed to the specific type of assault with which he was charged. CP 539.

In order to prove David Frasquillo was an accomplice to an assault in the second degree, the State was required to show he possessed knowledge he was aiding in the commission of that specific crime. His conviction may not be sustained by a general knowledge he was aiding in other types of assault, such as merely going to the Knowlton property to join a fistfight, or to taunt and threaten this family, as numerous witnesses testified was being planned throughout the evening. 1/26/09 RP 545, 1/27/09 667-68, 1/28/09 RP 835-37. See Roberts, 142 Wn.2d at 512.

The State argues in its brief that no other crime was charged or proved, stating that this distinguishes the instant matter from Brown. Resp. Brief at 27. This is a mis-reading of Brown, however, as the record is replete with references to other criminal conduct transpiring among these parties throughout the evening in question. 1/26/09 RP 545, 1/27/09 667-68, 1/28/09 RP 835-37. The State argues that “there was ample evidence from which it could be concluded that the brothers were at the very least accomplices to the assaults.” Resp. Brief at 28. Under Brown, if David Frasquillo was only an accomplice and not the principal, the

instructional error was not harmless and reversal is required.

Brown, 147 Wn.2d at 341.

c. Reversal is required. David Frasquillo was nothing if not completely passive during the events of June 24, 2009. 1/27/09 RP 683, 1/28/09 844, 849. There was a lack of evidence indicating that David knew of any plan to commit assault on Ms. Luzik or Mr. Knowlton with a deadly weapon, or even that he understood what was going on that night.

As the prosecutor himself admitted during closing argument, it is not clear whether David Frasquillo pulled the trigger, or whether he was even in the van that drove by minutes before the shooting occurred. 2/19/09 RP 1906. Even the prosecutor could not assure the jury that David possessed the specific knowledge required to be an accomplice to second degree assault.

The jury instructions failed to inform the jury that accomplice liability required knowingly aiding in the particular type of assault charged, and this flaw undermines the verdict and impermissibly dilutes the prosecution's burden of proof. Accordingly, reversal is required.

2. WHERE THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT DAVID FRASQUILLO'S CONVICTION FOR ATTEMPTED ASSAULT IN THE SECOND DEGREE AGAINST JACOB KNOWLTON, REVERSAL IS REQUIRED.

a. The State failed to prove that Mr. Frasquillo acted with the specific intent to assault Jacob Knowlton. To convict Mr. Frasquillo of attempted assault in the second degree, the State was required to prove that Mr. Frasquillo specifically intended to assault Jacob Knowlton on the night of June 24, 2009. CP 548; RCW 9A.36.021; State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). Here, the State failed to meet its burden.

b. The doctrine of transferred intent does not apply and State v. Elmi is distinguishable. The State based its theory of prosecution for the three counts of attempted assault in the second degree on a theory of transferred intent, proposing Jury Instruction Number 17. CP 534. The problem with this argument is that without injury or actual battery to an unintended victim, the doctrine of transferred intent does not apply.

Washington courts have acknowledged that intent can be transferred to unwitting victims in assault cases where the

unintended victim was actually battered, but not in a case like the present one, where the only means charged are an apparent intent to injure or the causing of fear and apprehension. Wilson, 125 Wn.2d at 218; State v. Salamanca, 69 Wn. App. 817, 825-27, 851 P.2d 1242 (1993). Therefore, giving a transferred intent instruction in the present case was error.

The State now apparently concedes that the doctrine of transferred intent does not apply. Resp. Brief at 17-18. However, the State argues that the instant case is indistinguishable from State v. Elmi, 166 Wn.2d 209, 218, 207 P.3d 439 (2009) (holding that the assault statute encompasses transferred intent for the purposes of unintended victims).

Elmi is distinguishable from the instant case, however. Here, Jacob Knowlton expressed no fear or apprehension of bodily harm. He stated that he was awakened by his brother, not by the sound of the window breaking that night. 1/26/09 RP 460. He did not feel scared, angry, or in any emotional way whatsoever. In fact, he said nothing at all about fear. 1/26/09 RP 460. Without more, it is impossible to impute fear or apprehension from his testimony, and thus the case is unlike Elmi, 166 Wn.2d 209, and Wilson, 125 Wn.2d 212.

Since David plainly harbored no specific intent to harm Jacob Knowlton, and since Jacob Knowlton suffered no injury or apprehension from the incident, the State's burden was not met.

c. Reversal and dismissal is the appropriate remedy.

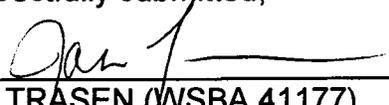
In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Mr. Frasquillo acted with specific intent, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990) (reversing conviction where State produced evidence of fleeting, but not actual, possession). The conviction should therefore be reversed and the charge dismissed.

B. CONCLUSION.

For the foregoing reasons, Mr. Frasquillo respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 23rd day of July, 2010.

Respectfully submitted,



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