

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

STATE OF WASHINGTON,  
Respondent,  
v.  
JORDAN DIXON,  
Appellant.

FILED  
COURT OF APPEALS  
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STATE OF WASHINGTON  
BY *[Signature]*  
CERILLY

ON APPEAL FROM THE SUPERIOR COURT OF GRAYS HARBOR  
COUNTY OF THE STATE OF WASHINGTON

The Honorable F. Mark McCauley

REPLY BRIEF

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## A. REPLY ARGUMENT

1. **CONTRARY TO THE STATE'S ARGUMENTS, THE OFFICER'S TESTIMONY THAT THE CO-PERPETRATOR NAMED THE DEFENDANT AS THE OTHER SUSPECT WAS ERROR, WAS MANIFEST, AND REQUIRES REVERSAL.**

Respondent State of Washington responds only in part to Mr.

Dixon's assignment of error no. 1, which addressed the following issues:

Where a police officer testified twice that the alleged co-perpetrator, Mr. Thomas, stated that the defendant Mr. Dixon was with him on the night of the incident, and named him as the other suspect involved,

(a) did the officer's hearsay testimony violate Mr. Dixon's Sixth Amendment and Article 1, § 22 confrontation rights under Crawford?<sup>1</sup>

(b) Was this "manifest constitutional error" under RAP 2.5(a)(3) for purposes of preservation of the error for appeal?

(c) Does the error require reversal where the untainted evidence was not overwhelming?

See Appellant's Opening Brief, at pp. 1-2, 6-7, 10, 12-20; see Brief of Respondent, at pp. 2-3. In response to Mr. Dixon's thorough, but concise argument on these issues in his Appellant's Opening Brief, the Respondent first argues that the officer's testimony did not repeat any "statement" made by the alleged co-perpetrator, and therefore did

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<sup>1</sup>Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004).

not constitute “hearsay” at all. Brief of Respondent, at p. 3, ¶¶ 1 and 2.

This argument is confounded by the Respondent’s own briefing, wherein the State writes that “the detective merely stated that . . . Jason Thomas told him who was with him.” Brief of Respondent, at p. 3. The State is absolutely correct - the officer said what he heard Mr. Thomas say. This is, of course, classic “hearsay.” (Emphasis added.) ER 401; ER 402. The officer’s testimony (as to what he heard Mr. Thomas say) was admitted for the truth of the matter asserted, and the State’s untenable claim that this statement had to be repeated (twice) by the officer on the stand in order to “explain” to the jury why he contacted the defendant has been rejected soundly in State v. Aaron, 57 Wn. App. 277, 280, 787 P.2d 949 (1990).

In Aaron, the State tried to justify a hearsay statement about the defendant having a blue jacket on the basis that it was offered “to show the officer’s state of mind in explaining why he acted as he did.” Aaron, 57 Wn. App. at 280-81. The Court of Appeals quite correctly rejected this ancient, hackneyed argument, holding that the testimony was irrelevant because the officer’s state of mind or his reasoning was completely irrelevant and the hearsay served only to prejudice the defendant. Aaron, 57 Wn. App. at 281 (citing prior existing case law).

As suggested by one commentator, if necessary at trial

for the officer to relate historical facts about the case, it would be sufficient for him to report he acted upon "information received."

Aaron, at 281 (citing E. Cleary, McCormick on Evidence § 249, at 733 (3d ed. 1984); see also 4 J. Weinstein & M. Berger, Weinstein's Evidence § 801(c) [01] (1988); 6 J. Wigmore, Evidence § 1789 (Chadbourn rev. 1976)).

The same is true in this case. The jury did not need an explanation of 'why the officer contacted the defendant.' This is all the more true because this was a case where, in fact, the defendant came to the police station rather than the police contacting him, as the Respondent would like now to contend. 6/10/09RP at 66.

Next, the Respondent argues that any hearsay and constitutional error was harmless. Brief of Respondent, at p. 3, ¶ 3 and 4. The State's argument is this – the defendant admitted to police that he was at the scene of the robbery, therefore it was merely duplicative and harmless to violate the confrontation clause by allowing hearsay that Mr. Thomas said that the defendant was present.

The State completely ignores the gravamen of precisely what the alleged co-perpetrator said. He did not merely tell the officer that the defendant was 'present.' Rather, the officer testified that Mr. Thomas told him that Mr. Dixon was the "second party involved" in the

robbery. (Emphasis added.) 6/10/09RP at 72.

This is much more than a statement merely that the defendant was 'present.' It is highly prejudicial and plainly not harmless beyond a reasonable doubt (the Respondent apparently concedes that any error was constitutional, and manifest, and thus both appealable and subject to this reversible error standard). This is particularly true given that this case involved the somewhat nuanced legal difference (for a lay jury) between a person being merely present at a scene, and being involved as an accomplice (and thus guilty of a crime).

These issues were all thoroughly briefed for this Court, but most potent is the fact that this testimony, where one perpetrator implicates another person as a coperpetrator but cannot be cross-examined, carries the extreme prejudice of similar errors under Bruton v. United States, 391 U.S. 123, 126, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Such a circumstance, of a criminal's hearsay 'fingering' the accused on trial, is "powerfully incriminating" evidence. In re Hegney, 138 Wn. App. 511, 546, 158 P.3d 1193 (2007). See Appellant's Opening Brief, at pp. 18-19. The error requires reversal because it cannot be said, beyond a reasonable doubt, that it was harmless, since a review of the relatively short record indicates that the State's trial evidence was plainly not overwhelming. See Appellant's Opening Brief, at pp. 19-20.

**2. IT IS INCORRECT TO SAY THAT THE 'DEFENDANT COULD ONLY HAVE BEEN FOUND GUILTY AS A PRINCIPAL,' AND THUS IT IS UNTENABLE FOR THE RESPONDENT TO ARGUE THAT THE ERRONEOUS ACCOMPLICE LIABILITY INSTRUCTION WAS HARMLESS TO THE OUTCOME.**

The jury instruction on accomplice liability entirely failed to include the requirement of RCW 9A.08.020 that an accomplice must engage in some conduct "with knowledge that [this conduct] will promote or facilitate" the principal's commission of the crime, and thus failed to completely inform the jury of the law that the accused cannot be convicted merely for being present at the scene. See Appellant's Opening Brief, at pp. 1-2, 6, 20-33. The State apparently concedes that the challenged instruction (1) misstated the law of accomplice liability, (2) was not invited error, and (3) may be appealed (or that defense counsel was ineffective), having offered no arguments to the contrary in its Brief of Respondent.

The State urges, however, that the error does not require reversal. Brief of Respondent, at pp. 4-5. Mr. Dixon argued that it does, because the defective instruction allowed the jury to convict him as an accomplice based solely on his brief presence at the scene and knowledge that the crime was occurring, even though he did not do any act to assist Mr. Thomas's criminal undertaking. See Appellant's

Opening Brief, at pp. 20-33.

The State's argument is as follows: the victim confidently testified that Mr. Dixon was the primary robber of him, therefore the case stood or fell on whether the jury believed the victim's particular account, and if it did, the defendant is guilty, and any defect in the accomplice liability instructions is inconsequential. See Brief of Respondent, at pp. 4-5.

But the State's characterization of the evidence and its own case is highly inaccurate. The evidence allowed the jury to find that the defendant was guilty as an accomplice, under the theory that he was at the scene and somehow criminally aided the perpetrator, Mr. Thomas. Of course, Mr. Thomas himself named the defendant as being "involved" with him in the crime (although this evidence was inadmissible, it was unfortunately admitted). The complainant himself was tremendously unsure as to who of the two men did what to him. As set forth in the Opening Brief, the victim's account was as follows:

Mr. Calloway testified that "**they**" said, "Hello. What's up." 6/10/09RP at 12. Mr. Calloway responded similarly and kept walking. He said that he then heard **someone** say, "Empty your pockets." 6/10/09RP at 13. Mr. Calloway was **not sure** who had spoken, but he **believed** he recognized the voice as Mr. Dixon's. 6/10/09RP at 13. He turned around and said, "Fuck you." 6/10/09RP at 14. At that point, he claimed, **one of the males swung at him -- he was unsure which male swung first**, but eventually they both did.

6/10/09RP at 14.

(Emphasis added.) Appellant's Opening Brief, at pp. 7-8. For his part, Mr. Dixon told the police that he did not play any part in Mr. Thomas's attempt to rob Mr. Calloway, instead, he quit the scene and did not assist in the crime. 6/10/09RP at 77; State's exhibit 1 (defendant's statement). It is beyond cavil that this was an "accomplice liability" case – it was so much so, that the trial court took the unusual step of sua sponte telling the parties that an accomplice liability instruction was missing and clearly had to be given under the facts adduced. 6/10/09RP at 25. The State cannot revise this history of the case.

The case therefore warranted at least a functionally correct "accomplice liability" instruction, but instead it received one that was deeply erroneous, in outcome-determinative ways. Mr. Dixon admitted he was briefly present at the scene of Mr. Thomas's crime and was aware of what Thomas was attempting to perpetrate (and apparently did nothing to stop it). The great problem is that, although these facts do not satisfy the law of accomplice liability under RCW 9A.08.020(3)(a), they did allow conviction under the erroneously-worded accomplice liability instruction, as was extensively argued in the Opening Brief. Appellant's Opening Brief, at pp. 26-30. Because the erroneous instruction allowed Mr. Dixon to be convicted based on these legally inadequate facts, it was prejudicial to "the final outcome

of the case." State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970). This Court should reverse.

**3. IN A VACUUM, IT IS CERTAINLY PROPER TO ARGUE THAT "FLIGHT" IS EVIDENCE OF GUILT, BUT THE IMPROPRIETY OF THE PROSECUTOR'S CLOSING ARGUMENT WAS BASED ON FAR MORE EXTENSIVE MISCONDUCT THAT CANNOT SO EASILY BE EXPLAINED AWAY.**

Mr. Dixon's briefing regarding prosecutorial misconduct in closing argument, by the prosecutor's comments on the defendant's exercise of several constitutional rights. was thorough, and the appellant relies primarily on that argument here in reply, believing it to address the State's contentions in its Brief of Respondent. Appellant's Opening Brief, at pp. 33-49. The State's apparent sole response is to point out that it is proper to argue in closing that 'flight is evidence of guilt.' Brief of Respondent, at pp. 9-10. This is of course correct, and was acknowledged by the appellant.<sup>2</sup> Appellant's Opening Brief, at p. 39-40.

But the prosecutor's closing argument was extensively

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<sup>2</sup>Mr. Dixon wrote:

Importantly, this Court should reject the likely effort by the Respondent to contend that this entire argument was merely an invitation to the jury to infer guilt based on the defendant's alleged flight from the scene.

Appellant's Opening Brief, at p. 39.

improper for reasons separate and independent from any proper argument about flight that would have been unobjectionable if viewed in theory. The Respondent's selective dissection of the closing argument to focus myopically on the prosecutor's mention of "flight" and hold it up to view in total isolation, fails to respond to Mr. Dixon's arguments pointing out how the State's closing as a whole commented on the defendant's pre-arrest silence, in violation of the Fifth Amendment and Article 1, § 22, and on the defendant's failure to testify at trial, also in violation of the Fifth Amendment and Article 1, § 22. The block quote at page 35 of the Opening Brief is only one small representative portion of the State's improper closing argument – and on appeal, the State now asks this Court to read only the first sentence (*italicized* below) and to ignore the rest of the remarks:

*Flight is the ultimate evidence of guilt. Only after three hours does the defendant decide to come in and tell his version of the story. Time enough to think up a version of the story. Time enough to get it straight in your head. **Innocent people stay on scene and cooperate with the police.** They don't wait around to see if the police actually have developed them as a suspect. They don't wait around until they find out that the police, in fact, knows his name. **Innocent people wait on scene and help the police.** So that's what you have, you have a credible person [the victim Mr. Calloway] sitting in **this** chair and his credibility is open for you to determine.*

(Emphasis added.) Appellant's Opening Brief, at p. 42 (quoting 6/10/09RP at 89). Mr. Dixon wholeheartedly agrees with the

Respondent's point that the closing argument must be read as a whole to determine if it was improper. See Brief of Respondent, at p. 10; see Appellant's Opening Brief, at p. 42 (noting that "[a]llegedly improper comments are reviewed 'in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given.' " (quoting State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998))).

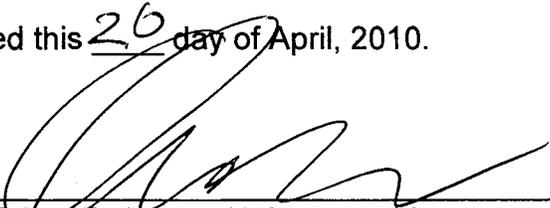
The best reply that Mr. Dixon can offer to the Brief of Respondent on this issue is by reference to the Appellant's Opening Brief, and by review of the closing argument as a whole. It is simply untenable for the Respondent to contend that the prosecutor merely innocuously commented that flight is evidence of guilt. Mr. Dixon believes this Court will agree that the State's improper theme of boosting its witnesses because they testified, and deprecating the defendant's failure to come forward, help the police, or be a witness at trial, became a constitutionally objectionable lens through which the jury viewed the entire proceeding. Mr. Dixon's trial was fundamentally unfair as a result of individual, and/or cumulative errors, and reversal is required under the constitutional error standard, in this case where

the State's evidence was nowhere near overwhelming.<sup>3</sup>

## **B. CONCLUSION**

Based on the foregoing, and on the previously submitted Appellant's Opening Brief, Mr. Dixon respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 26 day of April, 2010.



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<sup>3</sup>Incredibly, the victim actually identified someone in a photomontage as the second perpetrator who was completely uninvolved in the incident. 6/10/09RP at 72.

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 39466-9-II
	)	
JORDAN DIXON,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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102 W. BROADWAY AVENUE, ROOM 102	( )	_____
MONTESANO, WA 98563-3621		

**SIGNED** IN SEATTLE, WASHINGTON THIS 20<sup>TH</sup> DAY OF APRIL, 2010.

X \_\_\_\_\_  
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