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COURT OF APPEALS
DIVISION II

11 FEB -2 AM 11:12

No. 40836-8-II STATE OF WASHINGTON
BY CR DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

JUAN BELTRAN,
Appellant.

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

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Factual Background.

On July 15, 2009, at about 3:48 a.m., Officer Parkinson of the Aberdeen Police Department was dispatched to an assault that had just occurred in South Aberdeen. He arrived a few minutes later. (RP 22). Upon arrival, he saw Leslie Smith sitting on the steps of a building in an apartment complex. (RP 23). Parkinson observed that Mr. Smith had blood on his face, a laceration under his right cheek and in the area of his mouth. It was difficult for Parkinson to see the extent of the injuries because of the amount of blood on Mr. Smith's face. Parkinson also saw blood on Smith's shirt. (RP 23-24). Mr. Smith told Parkinson that he had been beaten and kicked. (RP 24). He told Parkinson that they had beaten him up for no reason. (RP 29). Mr. Smith's van was parked in the lot nearby. (RP 22).

Mr. Smith was seen in the emergency room at Grays Harbor Community Hospital later that morning by Dr. Bessie McCann. She observed abrasions to his forehead, bruising and swelling to his face, a contusion to the back of his head, as well as a laceration to his lip and

several teeth that were now missing. (RP 80-81). She related that Mr. Smith had symptoms that were consistent with a concussion and that he would have been uncomfortable for at least a week and a half from the injuries she observed. (RP 82-83). The following day, Officer Ellis observed that the defendant had a black eye. Photographs were taken of the injuries. (RP 98, Exhibits 1-6).

At the time of his incident, Leslie Smith was fifty-nine years of age. He was retired from running a small car dealership in Aberdeen. (RP 30). On the afternoon of July 14, 2009, he played golf with friends and then went to a friend's house. (RP 31-32). Eventually, he went to the Northwest Passage, a bar in South Aberdeen, where he played pool. (RP 32-34). He played pool with the defendant. At one point, the defendant asked Mr. Smith for a ride home. (RP 34-35). Mr. Smith recalls going to an after hours party at an apartment in South Aberdeen with the defendant. (RP 35-36). They were there for a while until the defendant and Mr. Smith left to go to a local convenience store and get some beer. (RP 36). Evidence at trial showed the defendant and Mr. Smith together at the convenience store at around 1:22 a.m. on July 15, 2009. (RP 105-08, 7, Exhibits 18-20).

The next thing Mr. Smith recalled was sitting in his van with the defendant in a parking lot. (RP 39). Smith recalls that for no apparent reason the defendant, who was sitting next to him in the van, hit him. He

remembers being pulled out of the driver's side of the van and being beat up. The assailants took his wallet and his ring. (RP 39-41, 43).

Robert Nylander was in his apartment watching television in his room. (RP 57). He heard a car pull up. About 20 seconds later he heard arguing. (RP 59-60, 71). He went to the window and looked outside. He saw three individuals. One man punched the driver of the van through the open door. A second individual who was standing outside the van yelled at the person who had hit the driver to "get him." (RP 62). The second individual was carrying a half-case of beer. (RP 63). Nylander left to call 911. When he came back Mr. Smith was walking across the parking lot and the two assailants were gone. (RP 61, 64). Mr. Nylander spoke to Parkinson when he arrived at the scene.

Detective Ellis later examined Mr. Smith's vehicle. He found blood stains on the dash, steering wheel, center console, and on the inside of the driver's door. (RP 102-03). Blood was also found on the exterior of the van. (RP 104). Blood stains were also found on the shoes the defendant was wearing when he was arrested. (RP 111-12). A blood stain on one of the shoes was later examined by Jeremy Sanderson of the Washington State Patrol Crime Laboratory and found to be Mr. Smith's blood. (RP 135).

The defendant, for his part, when later interviewed, admitted being at the Northwest Passage with his "Uncle Quinn." The defendant said that he left with a guy who had bought him drinks, describing him as a man

who used to own a used car lot. (RP 117). The defendant denied being present at the assault.

Procedural History.

The defendant was charged by Information on January 7, 2010, with Assault in the Second Degree, RCW 9A.36.021(1)(a). (CP 1). The matter was tried to a jury on May 5, and 6, 2010. The jury returned a verdict of guilty.

RESPONSE TO ASSIGNMENTS OF ERROR

The accomplice liability statute, RCW 9A.08.020, is not overbroad. (Response to Assignment of Error No. 1).

The defendant alleges that RCW 9A.08.020 is overbroad and facially unconstitutional because it criminalizes speech and conduct that the First Amendment protects. A statute is unconstitutionally overbroad only if it prohibits a substantial amount of protected speech and conduct in addition to legitimately prohibited unprotected speech or conduct. City of Seattle v. Webster, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990). The Washington accomplice statute is not overbroad. It requires that the accomplice act with specific criminal intent, not simply passive assent. It further requires that the accomplice be ready to assist or actually assist by his presence. State v. Coleman, 155 Wn.App. 951, 123 P.3d 456 (2010).

In the case at hand, there is no dispute that the accomplice instruction given by the court complies with current Washington law. The instruction, as given, required that the jury find beyond a reasonable doubt that the defendant acted with knowledge that his conduct would promote and facilitate the crime of Assault in the Second Degree. State v. Roberts, 142 Wn.2d 471, 510-13, 14 P.3d 713 (2000). There was ample evidence in the case to support a finding that the defendant acted with such knowledge. He actually physically assaulted Mr. Smith while sitting in the van with him. A moment later he was standing outside the van with the other assailant telling him to “get him” as Smith was being hit. The instruction, as given, in no way allows the defendant to be convicted for exercising First Amendment rights.. On the facts of this case, it is apparent that the defendant participated in the assault with another individual. See State v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989).

When two individuals participate in the commission of a crime, the State need not “establish which defendant was the principal and which was the [accomplice] so long as each defendant was shown to have participated in the crime and committed at least one overt act. State v. Matthews, 28 Wn.App. 198, 203, 624 P.2d 720 (1981). In the case at hand, the instruction given by the court properly informed the jury that the defendant’s mere presence and knowledge of the criminal activity was insufficient to find the defendant guilty as an accomplice. See State v. Luna, 71 Wn.App. 755, 759, 862 P.2d 620 (1993). In other words, the

instruction told the jury that the defendant could not be convicted of the crime of Assault in the Second Degree as an accomplice for simply exercising protected First Amendment rights. State v. Renneburg, 83 Wn.2d 735, 739, 522 P.2d 835 (1974).

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

DATED this 1 day of February, 2011.

Respectfully Submitted,

By: *Gerald R. Fuller*
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/jab

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STATE OF WASHINGTON,

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No.: 40836-8-II

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DECLARATION OF MAILING

JUAN BELTRAN,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 1ST day of February, 2011, I mailed a copy of the **Brief of Respondent** to Jodi R. Backlund and Manek R. Mistry; Backlund & Mistry; P. O. BOX 6490; Olympia, WA 98507-6490, and Juan Beltran, 1404 Pacific Avenue; Aberdeen, WA 98520, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 1ST day of February, 2011, at Montesano, Washington.

Barbara Chapman