

NO. 42864-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DERIK LEE MAPLES,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's refusal to allow the defense to argue that the decedent was a participant in the underlying felony denied the defendant a fair trial on the felony murder charge under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

2. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, substantial evidence does not support the defendant's conviction for felony murder because the decedent was a participant in the underlying felony.

3. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, substantial evidence does not support the defendant's conviction for first degree assault because the defendant was not an accomplice to the person who committed this crime.

Issues Pertaining to Assignment of Error

1. Does a trial court's refusal to allow the defense to argue that the decedent was a participant in the underlying felony deny a defendant a fair trial on a felony murder charge under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment when that claim is supported by the facts presented at trial?

2. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support a conviction for felony murder under circumstances in which the decedent was a participant in the underlying felony?

3. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support a defendant's conviction for first degree assault when the defendant was not an accomplice to the person who committed that crime?

STATEMENT OF THE CASE

Factual History

On December 1, 2009, Defendant Derik Lee Maples received a call from a long time friend by the name of Aaron, asking if the defendant could get some cocaine for two of his friends. RP 776-777.¹ Although the defendant was not acquainted with Aaron's two friends, he replied that he probably could. *Id.* The defendant then called his friend Alex Velasquez, who stated that he had 10 grams of cocaine that the defendant could sell to Aaron's friends. RP 782. The defendant then exchanged a number of calls with Aaron and arranged to meet his friends that evening in the parking lot of the S&S Minute Mart at 33rd and S Street in Vancouver to sell them 10 grams of cocaine for \$300.00. RP 774-775.

Once the deal was arranged, the defendant and his friend Justin went to Aaron's house to get the cocaine. RP 782-785, 809-811. Once at Alex's house, the defendant told both Alex and Justin that he was a little worried about the deal because he did not know Aaron's friends, and they had called him from a blocked number. *Id.* Alex responded by asking the defendant and Justin if either of them wanted to take a gun with them. *Id.* Justin

¹The record on appeal includes eight volumes of continuously numbered verbatim reports of the two CrR 3.5 hearings, the multi-day trial, and the sentencing hearing from this case. They are referred to herein as "RP [page #]."

responded that he did. *Id.* As a result, Alex went to his safe, retrieved a handgun, and gave it to Justin. *Id.* The defendant did not see what Justin did with the gun, but he assumed that Justin put it in his pocket. *Id.* Alex then gave the defendant 10 grams of cocaine and told him to bring back \$260.00 of the money and keep \$40.00 for his troubles. RP 804-806. The defendant and Justin then left Alex's house and walked a couple of blocks to the minute mart. RP 811.

Once at the minute mart, Aaron's two friends drove up in a vehicle and parked in a space near the area where the defendant and Justin were standing. RP 775, 778-779, 804-809. The defendant then got into the back seat of the car from the passenger side while Justin walked around the area behind the car. *Id.* Once in the car, the defendant began a conversation with the front seat passenger. *Id.* After exchanging a few words, the defendant handed a baggie with the cocaine up to the passenger, who responded by handing over \$300.00 in cash. *Id.* When the defendant looked down, he saw that the money was counterfeit. *Id.* Upon seeing this, he stated that the money was fake and tried to give the front seat passenger back the cash while at the same time trying to retrieve the baggie of cocaine. RP 778-779, 804-809. For a moment, both the defendant and the passenger had their hands on the baggie. *Id.* As they were both trying to take possession of it, the driver turned around and tried to backhand the defendant. *Id.* At this point, the

defendant got out of the car and exclaimed “They robbed me.” *Id.* As he got out, he believed the baggie of cocaine fell to the floor of the back seat. *Id.*

When the defendant got out and exclaimed “They robbed me,” his friend Justin pulled out the gun, stepped up to the driver’s side of the car, and shot five times at the driver. RP 775-776. One shot entered driver’s skull behind his left ear and lodged in his brain. RP 376-381, 547-551. The vehicle then rolled slowly across the street and stopped when it hit a house on the other side. RP 347-350. Seeing this, the defendant and Justin fled the scene. RP 823-824. A clerk from the S&S Minute Mart looked out the window when he heard the shooting and saw the car travel slowly across the street and stop. RP 347-450. As it stopped, he saw the front seat passenger get out, run over to the driver’s side, and open the door. *Id.* When he did, the driver fell out to the ground. *Id.* The front seat passenger then also fled the scene. *Id.* The police arrived within a few minutes, and found the driver unresponsive. RP 376-381. Within a short time an aide crew arrived, examined the driver, and determined that he was dead. *Id.* A search of the vehicle uncovered \$400.00 in counterfeit money and a baggie with 9.9 grams of cocaine in it. RP 312-319.

During the next few days, two detectives in charge of the case developed a number of leads, and came to believe that the defendant and Justin were the two persons involved in incident. RP 732-737, 775-776.

Four days later, these two Vancouver detectives responded to a location in Portland where Portland Police Officers had pulled the defendant and Justin over and arrested both of them. RP 712-715. Within an hour, these two detectives held separate interviews with the defendant and Justin. RP 712-715, 738-739. The interview with the defendant ran for about one hour and twenty minutes and was video and audio taped. *Id.* During this interview, the defendant gave the police a statement about what had happened that night. RP 745-862. According to one of the officers, he believed that the defendant was truthfully trying to explain the events of the evening from his perspective. RP 772-773.

Procedural History

By information filed December 3, 2009, and later amended three times, the Clark County Prosecutor charged the defendant Derik Lee Maples with one count of first degree murder with an alternative charge of second degree felony murder for the killing of the driver of the car, and one count of attempted murder in the first degree with an alternative charge of first degree assault against the passenger in the car. CP 1-2, 4-5, 41-42, 137-139. Each charge and alternative included an allegation that the defendant committed the offenses while armed with a firearm. *Id.* The felony murder charge alleged delivery of cocaine as the underlying offense and used the following language:

That he, DERIK LEE MAPLES, AKA BABY D, DEREK LEE MAPLES, YOUNG D., IN THE County of Clark, State of Washington, on or about December 1, 2009, committed or attempted to commit or was an accomplice in the commission of the crime of Delivery of a Controlled Substance - Cocaine, a felony, and in course of and in furtherance of said crime or in immediate flight therefrom, the defendant or another participant caused the death of a person other than one of the participants: Clement Adams; contrary to Revised Code of Washington 9A.35.050(1)(b).

CP 136.

Prior to trial, the court held a hearing under CrR 3.5 to determine the admissibility of the statements the defendant made to the two detectives at the Portland Police Department shortly after his arrest. RP 1-174. During this hearing the state called as witnesses the two detectives who interrogated the defendant. RP 6-126, 127-140. The state also played a portion of the video-taped interview, during which the officer's read the defendant his *Miranda* rights and the defendant waived those rights. RP 42-109. Following this evidence, the defendant testified, disputing a portion of the officers' testimony. RP 141-149. The court then listened to the argument of counsel and ruled that the defendant had been properly advised of his *Miranda* rights, that he had knowingly waived those rights, and that he had voluntarily spoken with the police. RP 164-174. As a result, the court ruled that all of the defendant's statement was admissible at trial. *Id.* The court later entered Findings of Fact and Conclusions of Law in support of this ruling. CP 547-551.

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Just prior to trial, the court held a second hearing under CrR 3.5 to determine the admissibility of two subsequent statements the defendant made to the police pursuant to a plea agreement his first attorney had negotiated with the state whereby the defendant would plead to a reduced charge and testify against Justin. RP 464-535. During the first interview, the defendant answered questions propounded by the state. RP 463-465. During the second interview, the defendant answered questions propounded by Justin's attorney. RP 511-512. The defendant was in custody in jail during both of these interviews and his attorney was present. RP 463-465, 511-512. After a lengthy hearing on the admissibility of these two statements, the prosecutor withdrew his request to use either of these statements in his case-in-chief and neither statement was ever mentioned in front of the jury. CP 624-625.

Following the second hearing under CrR 3.5, the case finally came on for trial before a jury, during which the state called 13 witnesses, including the two police detectives who interrogated the defendant. RP 245-900. The state also played the defendant's entire 1 hour 40 minute first interview for the jury without objection from the defense. RP 758-862. However, the state did not call three potential witnesses: Justin Tyler, Alex Velasquez or the front seat passenger from the decedent's vehicle. RP 1-900. The record before the trial court is silent on the reason the state did not call Justin Tyler or Alex Velasquez. *Id.* The state did not call the front seat passenger

because the police were unable to locate him. RP 718. As a result, the only evidence presented at trial concerning what happened before the defendant and Justin went to the minute mart and what happened in the decedent's vehicle came from the defendant's first statement to the police, later played for the jury. RP 758-862.

Just prior to opening statements at trial, the state moved *in limine* to exclude the defense from asking any questions to support a claim or arguing that the decedent was a participant in the delivery of cocaine underlying the felony murder charge. RP 228. In support of this motion, the state presented a number of cases supporting an argument that a person who receives drugs from another person is not legally an "accomplice" to that other person's delivery of the drugs. RP 228-230. The trial court accepted this argument and granted the state's motion, thereby precluding the defense from eliciting any evidence, or arguing that the decedent had been a participant in the delivery charge underlying the felony murder charge. RP 230-232. The trial court also gave the jury two instruction, numbers 19 and 20, which had the effect of stating that the decedent was not a participant in the underlying felony of delivery. CP 224-225. These two instructions stated:

INSTRUCTION NO. 19

A "participant" in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice.

CP 224.

INSTRUCTION NO. 20

A purchaser of controlled substances is not an accomplice in the crime of delivery of a controlled substance.

CP 225.

Following the reception of the state's evidence, the defense rested without calling any witnesses. RP 901-904. The court then instructed the jury, after which the parties presented their closing arguments. RP 930-950, 950-996. During jury deliberations, the jury sent out a note requesting permission to again view the defendant's video taped statement to the police officers. CP 149. In response and without objection from the parties, the court brought the jury back into the courtroom and played the requested portion of the video. RP 1,003-1,013. Later, the jury sent out the following question:

Regarding instruction #20 - ~~can we get clarification as to the definition of principal~~ - the instruction names an accomplice superficially, but does not exclude a "principal" or other "participant." Can a principal ~~in the crime of~~ in purchasing still be guilty of the crime of delivery.

CP 242 (strikeouts in the original).

The court responded as follows:

Read the instructions as a whole.

CP 242 (underlining in the original).

Following further deliberation, the jury returned verdicts of “not guilty” to Murder in the First Degree, “guilty” to Felony Murder in the Second Degree, “not guilty” to Attempted Murder the First Degree, and “guilty” to Assault in the First Degree. CP 285, 287, 289, 291. The jury also returned special verdicts that the defendant had committed the two offenses for which they convicted him while armed with a firearm. CP 288-292.

The court later sentenced the defendant within the standard range on both counts for which he was convicted, and ordered that those sentences run consecutively under RCW 9.94A.589(1)(b). CP 553-567. The defendant thereafter filed timely notice of appeal. CP 568-570.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENSE TO ARGUE THAT THE DECEDENT WAS A PARTICIPANT IN THE UNDERLYING FELONY DENIED THE DEFENDANT A FAIR TRIAL ON THE FELONY MURDER CHARGE.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense, and to argue any legally available conclusion from that evidence. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). In the case at bar, the court denied the defendant this constitutional right to present and argue a valid defense when it granted the state's motion to preclude the defendant from arguing that the decedent was a participant in the underlying felony, and when it gave the jury instruction 20. The following sets out this argument.

In the case at bar, the state charged the defendant under RCW 9A.35.050(1)(b) with second degree felony murder with the underlying felony being the delivery of cocaine. The third amended information alleged

as follows:

That he, DERIK LEE MAPLES, AKA BABY D, DEREK LEE MAPLES, YOUNG D., IN THE County of Clark, State of Washington, on or about December 1, 2009, committed or attempted to commit or was an accomplice in the commission of the crime of Delivery of a Controlled Substance - Cocaine, a felony, and in course of and in furtherance of said crime or in immediate flight therefrom, the defendant or another participant caused the death of a person other than one of the participants; Clement Adams; contrary to Revised Code of Washington 9A.32.050(1)(b).

CP 136.

The cited statute defines second degree felony murder as follows:

(1) A person is guilty of murder in the second degree when:

. . . .

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants;

RCW 9A.32.050(1)(b)(in part).

In spite of its double use of the word “participant” in this statute, the legislature did not provide a specific definition for the term. However, in *State v. Toomey*, 38 Wn.App. 831, 839-840, 690 P.2d 1175 (1984), this division of the Court of Appeals held:

In the context use in [RCW 9A.32.050(1)(b)], and by dictionary definition, [the term “participant”] obviously means another person involved in the crime – *i.e.*, another principal or an accomplice.

State v. Toomey, 38 Wn.App. 839-840.

Based upon the *Toomey* case, the Washington Supreme Court Committee on Jury Instructions adopted the following patterned instruction defining the term “participant,” for the purposes of the felony murder rule.

It states:

**WPIC 26.04.01
Felony Murder - Participant - Definition**

A “participant” in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice. *[A victim of a crime is not a “participant” in that crime.]*

11 Washington Practice, WPIC 26.04.01.

In the case at bar, the trial court used this language when it gave Instruction No. 19, which stated as follows:

INSTRUCTION NO. 19

A “participant” in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice.

CP 224.

As is apparent, Instruction No. 19 follows WPIC 26.04.01 verbatim. The defendant does not assign error to the trial court’s use of this WPIC. However, what the defendant does assign error to is the trial court’s next instruction, which told the jury that the decedent in this case was not, by definition, a “participant” in the defendant’s delivery of cocaine to the decedent and the front seat passenger. This instruction stated as follows:

INSTRUCTION NO. 20

A purchaser of controlled substances is not an accomplice in the crime of delivery of a controlled substance.

CP 225.

The trial court based this instruction on its misapplication of the decision in *State v. Morris*, 77 Wn.App. 948, 896 P.2d 81 (1995), in which this court held that the purchaser of a controlled substance should not be punished as an accomplice to the delivery pursuant to the intent of the Uniformed Controlled Substances Act. The following examines this decision.

In *State v. Morris, supra*, the state convicted the defendant of delivery of a controlled substance upon proof that she purchased a small amount of cocaine from an undercover police officer. The defendant then appealed, arguing that under the Uniform Controlled Substances Act, a person who purchased drugs should only be punished for possession, not delivery. The state responded in part by arguing that the defendant was guilty as an accomplice to the delivery, since she had solicited the act of delivery. Although the court rejected this argument, it did not do so because the state's analysis of accomplice liability was incorrect. Rather, it did so because it was plain that under the Uniform Controlled Substances Act the legislature did not intend to punish the transferees of controlled substances as harshly

as it did the transferors.

In coming to this conclusion, the court in *Morris* relied upon the earlier decision by Judge Horowitz in *State v. Catterall*, 5 Wn.App. 373, 486 P.2d 1167 (1971), which interpreted the predecessor statute to the Uniform Controlled Substances Act. The *Morris* court stated as follows concerning that decision:

Judge Horowitz acknowledged in *Catterall* that a purchase and sale are different sides of the same transaction, that a purchaser must cooperate with the seller in order to effect a sale, and that “[a]s a matter of abstract logic, that cooperation requires that the purchaser aid or abet the seller in making the sale.” Nonetheless, Judge Horowitz concluded that since the Legislature had not chosen to criminalize the purchase itself, it would frustrate the legislative intent to hold that the purchaser becomes liable through the general aiding and abetting statute. The same logic applies with full force to the Uniform Act. The Legislature defined the crime as “delivery” or “transfer” and it would frustrate that definition to impose liability on the transferee through the accomplice statute.

State v. Morris, 77 Wn.App. at 954-955 (footnotes omitted) (emphasis added).

As should be clear from the underlined portion of this quote, the court in *Morris* was not saying that a person who purchases a controlled substance is not an “accomplice” to the delivery as that term is defined in RCW 9A.08.020. Indeed, the court’s decision acknowledges that the transferee of controlled substances is inevitably an “accomplice” to the delivery by the transferor. Rather, what the court is saying is that it would frustrate the intent

of the legislature under the Uniform Controlled Substances Act to punish the transferee in the same manner as the transferor even though the transferee is an “accomplice” to the transfer under RCW 9A.08.020. A closer look at this statute supports this conclusion.

In RCW 9A.08.020(3)(a), the legislature as defined the term “accomplice” as follows:

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it;

RCW 9A.08.020(3)(a).

In the case at bar, the evidence presented at trial reveals that the decedent and passenger in the vehicle had contacted the defendant’s friend Aaron and asked him to help them obtain cocaine. The passenger and decedent then participated in a number of telephone calls with the defendant in order to negotiate the amount, price and place for the transaction. The decedent then drove the vehicle with the passenger to the location for the sale, and tried to assault the defendant in order to keep control over the cocaine that the defendant handed the passenger. Under these facts there

should be no question that both the driver and the passenger of the vehicle solicited, encouraged, and requested that the defendant commit the crime of delivery of cocaine, and that they aided in the planning of that offense. As the courts in both *Morris* and *Catterall* both recognized, they squarely fell under the legislature's definition for "accomplices" under RCW 9A.08.020.

This is precisely why the trial court erred in the case at bar when it instructed the jury that "[a] purchaser of controlled substances is not an accomplice in the crime of delivery of a controlled substance." This statement is erroneous because, under the accomplice liability statute, a "purchaser of controlled substances" is an "accomplice" to the crime of delivery under every alternative of the accomplice liability act. The correct statement of law under *Morris* and *Catterall* is not that the purchaser is not an accomplice to the delivery. Rather, the correct statement of law under *Morris* and *Catterall* is as follows: "The purchaser of a controlled substance is an accomplice to the delivery, however it would frustrate the purposes of the Uniform Controlled Substances Act to punish the purchaser as an accomplice to the delivery."

While it would frustrate the purpose of the legislature in the Controlled Substances Act to punish the transferee of controlled substances as an accomplice to the transferor, there is no similar frustration of legislative intent to recognize that, for the purposes of the felony-murder rule in

Washington, a person who solicits and participates in the delivery of a controlled substance is an accomplice to that delivery. The purpose of the felony-murder rule is to hold those who commit felonies strictly liable for the unintentional deaths of a non-participant in the felony.² *State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990) In other words, the purpose of the rule is to prevent the death of innocent persons by punishing those who participate in felonious acts for the causally related unintentional death of innocent persons. *See, i.e., State v. Contreras*, 118 Nev. 332, 46 P.3d 661, 664 (2002) (Maupin, C.J. concurrent) (“To me, the fundamental purpose of the felony-murder rule is to prevent innocent deaths likely to occur during the commission of inherently dangerous felonies.”); *State v. Williams*, 254 So.2d 548 (Fla.App. 1971) (purpose of the felony-murder rule is to punish the unintentional killing of innocent parties).

Had the legislature wanted to expand the felony murder rule to include liability for the unintentional death of “participants” in the underlying felony, it could easily have done so. However, the legislature chose to include the limitation that only creates strict liability for the death of those who don’t participate in the underlying felony. Thus, even though it would

²While the decedent in this case undoubtedly died from an intentional shooting perpetrated by Justin Tyler, the jury rejected the state’s claim that the defendant was an accomplice to Justin Tyler’s intentional killing of the driver of the car. Thus, for the purposes of the felony murder charge against the defendant, the death of the driver was unintentional.

frustrate the purpose of the legislature to punish the transferee of controlled substances as an accomplice of the transferor, it is in keeping with the intent of the legislature to preclude felony murder liability for the unintentional killing of the transferee of the controlled substances as one who was participating as an accomplice to the transfer. Thus, in the case at bar, the trial court erred when it gave Instruction No. 20, which precluded the defense from arguing that the decedent in this case was a “participant” in the underlying felony of delivery of cocaine.

II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT’S CONVICTION FOR FELONY MURDER BECAUSE THE DECEDENT WAS A PARTICIPANT IN THE UNDERLYING FELONY.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla

of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence 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.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar, the state charged the defendant in the alternative in Count I with the felony murder of the driver of the vehicle under RCW 9A.32.050(1)(b). Under this statute, the state has the burden of proving beyond a reasonable doubt that the decedent was not a participant in the offense because the decedent’s status as a non-participant is an element of the

offense. *State v. Goodric*, 72 Wn.App. 71, 76, 863 P.2d 599 (1993). In the case at bar, the undisputed facts presented to the jury show that the driver and passenger of the vehicle were participants to the defendant's delivery of cocaine to them. *See* Argument I. Thus, the evidence at trial fails to prove beyond a reasonable doubt that the decedent was not a "participant" in the defendant's delivery of cocaine. As a result, the trial court erred when it entered judgment against the defendant for felony murder.

The evidence presented at trial also fails to prove another essential element of the felony murder charge. That element is that the killing occurred "in the course of and in furtherance of such crime or in the immediate flight therefrom." The requirement that the state prove this element is taken directly from the felony murder statute, which states:

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants;

RCW 9A.32.050(1)(b)(in part) (emphasis added).

As the evidence adduced at trial sets out, the defendant completed the delivery of a controlled substance when he intentionally handed the baggie of cocaine to the front seat passenger. There is no requirement under the Uniform Controlled Substances Act that the defendant receive payment for

the drugs, and there is no exception from criminal liability should the defendant attempt to take the drugs back. Thus, at the point that the defendant got out of the back seat of the decedent's vehicle, he was no longer "in the course of" or "in the furtherance of" the delivery of cocaine. That crime was complete before he exited the car. In addition, when the defendant's companion pulled out the gun and started shooting, neither he nor the defendant were "in the immediate flight" from the delivery of cocaine. Thus, proof of this element is also missing from the evidence. As a result, the trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against him on the felony murder charge.

III. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR FIRST DEGREE ASSAULT BECAUSE THE DEFENDANT WAS NOT AN ACCOMPLICE TO THE PERSON WHO COMMITTED THIS CRIME.

In this case, the state also charged the defendant as an accomplice to Justin Tyler in the attempted murder of the passenger, or in the alternative, with the first degree assault of the passenger under RCW 9A.36.011(1)(a). Although the jury returned a verdict of "not guilty" on the attempted murder charge, the jury did convict on the alternative first degree assault charge. As the following explains, substantial evidence does not support this charge

against the defendant.

The legislature has defined the crime of first degree assault as follows:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

RCW 9A.36.011.

The deficiency in the state's evidence is twofold as far as the first degree assault charge is concerned. First, there is no evidence that Justin Tyler, who was standing on the driver's side of the car looking down at the driver, even knew that there was a passenger in the vehicle, much less that he was shooting at the passenger. While he did shoot five times, he did so in rapid succession pointing in the driver's direction, not the passenger's direction. Thus, absent evidence that Justin Tyler intentionally assaulted the passenger with a firearm, the defendant cannot be liable for a crime that the state failed to prove that Justin Tyler committed.

Second, even if substantial evidence supported a claim that Justin

Tyler did intentionally shoot at the passenger also and thereby committed the crime of first degree assault, there is no evidence to support the conclusion that the defendant in any way (1) solicited, commanded, encouraged, aided, agreed to aid, planned or requested Justin Tyler's actions, or that (2) the defendant had "knowledge" that any of his actions would "promote or facilitate" Justin Tyler's action in shooting at the passenger. Thus, even though the defendant was present and knew that Justin Tyler had a gun, the defendant did not do any act that by definition creates accomplice liability under RCW 9A.08.020(3). Consequently, the trial court erred when it entered judgment against the defendant on the offense of first degree assault.

CONCLUSION

Since substantial evidence does not support either charge in this case, the defendant's convictions for second degree felony murder and first degree assault should be vacated and the charges remanded with instructions to dismiss with prejudice.

DATED this 29th day of June, 2012.

Respectfully submitted,

A handwritten signature in black ink that reads "John A. Hays". The signature is written in a cursive, flowing style.

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

**RCW 9A.08.020
Liability for conduct of another – Complicity**

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct; or

(b) He or she is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He or she is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it; or

(b) His or her conduct is expressly declared by law to establish his or her complicity.

(4) A person who is legally incapable of committing a particular crime himself or herself may be guilty thereof if it is committed by the conduct of another person for which he or she is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his or her incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He or she is a victim of that crime; or

(b) He or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his or her complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

WPIC 26.04.01

WPIC 26.04.01 Felony Murder – Participant – Definition

A “participant” in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice. [A victim of a crime is not a “participant” in that crime.]

INSTRUCTION NO. 19

A “participant” in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice.

INSTRUCTION NO. 20

A purchaser of controlled substances is not an accomplice in the crime of delivery of a controlled substance.

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

STATE OF WASHINGTON, Respondent,		NO. 42864-2-II
vs.		AFFIRMATION OF OF SERVICE
DERIK LEE MAPLES, Appellant.		

Donna Baker states the following under penalty of perjury under the laws of Washington State. On June 29, 2012, I personally placed the United States Mail the following documents with postage paid to the indicated parties:

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

Derik Maples, Defendant Clallam Bay Correctional Center 1830 Eagle Crest Way Clallam Bay, WA 98326		Anne Mowry Cruser Deputy Prosecuting Attorney PO Box 5000 Vancouver, WA 98666-5000
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Dated this 29th day of June, 2012, at Longview, Washington.

/S/

Donna Baker

HAYS LAW OFFICE

June 29, 2012 - 1:51 PM

Transmittal Letter

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Case Name: State vs. Derik Maples

Court of Appeals Case Number: 42865-2

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- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
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