

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

STATE OF WASHINGTON,

Respondent,

v.

MARCUS LANGFORD,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

This case involves a child, Marcus Langford, convicted of felony murder as an accomplice after his friend shot and killed a man. The jury struggled for days because it had difficulty determining whether Marcus was “merely present” or “ready to assist through presence.”

In his opening brief, Marcus argued that a new trial is required because a highly unreliable and damaging hearsay statement was improperly admitted, his constitutional right to the effective assistance of counsel was violated, and the trial court improperly coerced a verdict by ordering the jury to continue deliberating after it was deadlocked.

In response, the State presents cursory arguments on some issues and fails to address several arguments altogether. The State’s refusal to take this case seriously is troubling and should not be condoned by this Court. If the State wishes to imprison a child for decades it may do so only after a fair trial, not one undermined by the substantial errors that occurred in this case. This Court should reverse.

B. ARGUMENT

1. **A new trial should be granted because the court erred in denying Marcus’s motion to strike Tajanae Williams’s statement that J.J. Stimson “said that him and Marcus were going to rob this guy and take his truck, but they didn’t.”**

a. The admission of Tajanae Williams’s testimony about J.J. Stimson’s statement violated the rule against hearsay.

i. *J.J.’s statement was inadmissible hearsay, not an adoptive admission, and the State fails to address the fact that Marcus was not a participant in the conversation.*

As explained in the opening brief, Tajanae Williams’s statement that J. J. Stimson “said that him and Marcus were going to rob this guy and take his truck, but they didn’t,” was inadmissible hearsay and should have been stricken. Br. of Appellant at 17-25. The adoptive admission exemption to the rule against hearsay does not apply. Marcus was not a participant in the discussion between J.J. and his girlfriend, and did not “adopt” J.J.’s statement by sitting with a blank stare and failing to interject himself into someone else’s conversation.

The State utterly fails to address this important distinction between Marcus’s case and Neslund and Cotten, which was discussed in the opening brief. See Br. of Appellant at 21-25 (citing State v. Neslund, 50 Wn. App. 531, 550, 749 P.2d 725 (1988); and State v. Cotten, 75 Wn.

App. 669, 689, 879 P.2d 971 (1994)). Again, in each of those cases the witness who testified at trial was a person who had been a silent third party listener during the earlier conversation between the defendant and a second person. The third-party listener in each case was later permitted to testify about both halves of the earlier conversation, because, as a participant, the defendant would have corrected any misstatements made by the person with whom he was talking. See id.

The analogous situation here would be if Marcus and J.J. were sitting next to each other talking back and forth about the attempted robbery, and Tajanae had been the one sitting on the other side with blank stare. Under those circumstances, Tajanae would be permitted to testify about J.J.'s half of his conversation with Marcus, because Marcus would naturally have corrected any misstatements. But that is not what happened. Marcus was not part of the conversation between J.J. and Tajanae, and it would not have been natural for him to interject himself into their discussion in order to correct a pronoun.

The State's attempt to expand the "adoptive admission" exemption to this situation is dangerous and undermines the reliability of trials. If a person makes a statement agreeing with another's declaration, then the reliability concerns underlying the rule against hearsay are mitigated and the adoptive admission exemption applies. Courts have also held that an

affirmative gesture, like a nod of the head, can indicate adoption of another's statement. But where there is no statement and no gesture, the circumstances under which a person can be said to have adopted another's statement must be severely restricted to avoid unfair and unreliable trials.

Courts have recognized as much: "Evidence of 'tacit' or 'adoptive' admissions is replete with possibilities for misunderstanding, and the cases repeatedly emphasize the need for careful control of this otherwise hearsay testimony." Holmes v. United States, 580 A.2d 1259, 1263 (D.C. 1990). The Neslund court agreed that silence is "inherently equivocal," and therefore evidence of a statement and its silent response "must be received with caution." Neslund, 50 Wn. App. at 551. But instead of urging caution and control, the State asks this Court to expand the adoptive admission exemption in a manner this Court has never endorsed. This Court should reject the invitation.

The improper admission of this prejudicial hearsay statement requires reversal, and the Court need not reach the alternative arguments discussed below and in the opening brief.

- ii. *The trial court erroneously instructed the jury that it could consider J.J.'s out-of-court statement for its truth regardless of whether Marcus adopted it, and the State does not address this problem.*

Even if the admission of the statement were proper, reversal would be required because the trial court erroneously instructed the jury that it could consider J.J.'s out-of-court statement for its truth regardless of whether Marcus adopted it. See Br. of Appellant at 25-27 (setting forth the improper instruction given in this case and contrasting it with an example of a proper instruction). The instruction given here is an incorrect statement of the law, because the statement was inadmissible hearsay **unless** Marcus adopted it as his own. See id. The instruction the court gave is one used to address an alleged accomplice's **in-court** statements, for which there is no hearsay problem. It was improper for the court to instruct the jury that it could use another person's out-of-court statement for a hearsay purpose.

The State does not address this problem. See Br. of Respondent at 12-13. It simply repeats the instruction and states, "This instruction properly informed the jury what it had to consider in order to determine if defendant adopted the Stimson's [sic] statement as his own and whether the statement was truthful." Br. of Respondent at 13.

The problem, again, is that the instruction does not tell the jury to disregard the statement if it determines that Marcus did **not** adopt J.J. Stimson's statement as his own. The instruction does not tell the jury the significance of this determination at all. The only clear instruction is that the jury can consider J.J.'s out-of-court statement if it is satisfied of its truth – but that is exactly the type of statement that is inadmissible under the rule against hearsay. ER 801, 802. The State's failure to address the issue should be interpreted as a tacit acknowledgment of the error, and a second independent basis for reversal.

iii. *This Court should hold that the question of whether a party adopted a statement is an issue for the judge under ER 104(a).*

In his opening brief, Marcus presented an extensive analysis urging the Court to hold that the question of whether a party adopted another's statement is an issue for the judge under ER 104(a), rather than a question for the jury under ER 104(b). Brief of Appellant at 27-31 (citing numerous authorities). The Court need not reach this issue if it agrees with Marcus that a new trial is required because of the first error discussed above and in the opening brief. If this Court agrees with the State on the first issue, however, then it must reach Marcus's alternative argument regarding ER 104.

In light of this fact, it is perplexing that the State did not address the ER 104 issue at all. Perhaps the State tacitly recognizes that reversal is required for the hearsay violation. In any event, the failure to present argument on the ER 104 issue should be considered an implicit concession. See In re J.J., 96 Wn. App. 452, 454 n.1, 980 P.2d 262 (1999) (failure of reply brief to address findings filed following opening brief constitutes concession that there was no prejudice); United States v. Real Property Known as 22249 Dolorosa Street, 190 F.3d 977, 983 (9th Cir. 1999) (failure of government to defend district court's ruling in appellate brief constitutes implicit concession of error).¹

iv. *This Court should reject the “tacit admission” rule.*

In the opening brief, Marcus also argued that this Court should consider rejecting the “tacit admission” exemption altogether. In other words, although a person may adopt another's statements through words or gestures, passive silence should never constitute an adoptive admission. In support of this argument, Marcus cited multiple out-of-state cases as well as the plain language of the Washington rule and a Washington case

¹ The State would no doubt object to its silence being treated as an adoptive admission of Marcus's argument in the opening brief. Presumably, the irony is not lost on the prosecution.

emphasizing the heightened reliability requirements that exist in this state. See Brief of Appellant at 32-25.

As with the ER 104 issue, the Court need not reach this issue if it agrees that reversal is required for another reason; it need only reach the issue if it agrees with the State on all other issues. Yet, as with the ER 104 issue, the State fails to present argument on this issue. Again, the failure to present counter-argument should be considered a tacit agreement with Marcus's argument. J.J., 96 Wn. App. at 454 n.1; Dolorosa Street, 190 F.3d at 983.

b. The admission of Tajanae Williams's testimony about J.J. Stimson's statement violated ER 403.

As explained in the opening brief, even if the admission of Tajanae Williams's repetition of J.J. Stimson's statement did not violate ER 802, it did violate ER 403. See Brief of Appellant at 35-37 (discussing ER 403 and caselaw). As with the above two issues, the State once again fails to present any argument on the ER 403 issue, and its refusal to address the issue should again be considered a concession of error.²

² The State does address the Confrontation Clause issue briefly, citing Neslund. Br. of Respondent at 10. Marcus will rest on his opening brief for that issue.

2. Marcus was deprived of his constitutional right to the effective assistance of counsel because his attorney failed to make a timely objection to the hearsay statement, helped craft an erroneous jury instruction, and failed to request an instruction on the applicable affirmative defense.

In his opening brief, Marcus argued he was deprived of his constitutional right to the effective assistance of counsel in three respects: (1) his attorney initially failed to object to the hearsay statement discussed above; (2) his attorney helped craft the erroneous jury instruction discussed above; and (3) his attorney failed to request an instruction on the applicable affirmative defense. Br. of Appellant at 39-49. Any of these deficiencies alone would compel reversal, and they were even more prejudicial in the aggregate. See Woods v. Sinclair, ___ F.3d ___, 2014 WL 4179917 at *23 (9th Cir. Aug. 25, 2014) (quoting Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978)) (“prejudice may result from the cumulative impact of multiple deficiencies”).

As to the first failure, the State again claims that the statement at issue was not hearsay, and therefore counsel’s performance was not deficient when he failed to move to exclude the statement or to object in a timely manner. The merits of the hearsay issue are addressed at length above and in the opening brief.

On the prejudice prong, the State claims that even if counsel had made a timely motion to exclude the hearsay statement, such motion would have been denied. Br. of Respondent at 17-18. The State is of course correct that the trial court ultimately denied Marcus's motion to strike the statement, but, as the State acknowledges, the trial court also indicated that it **would have** excluded the statement had a timely objection been lodged. See id.; Br. of Appellant at 44 (citing 7/29/13 RP 610; 7/30/13 RP 652). Furthermore, in the absence of the statement it is reasonably probable that the outcome would have been different. This is shown by the fact that even after hearing this extremely prejudicial statement, the jury indicated it was deadlocked and having trouble determining whether Marcus was merely present or was guilty as an accomplice. Br. of Appellant at 44-45; CP 45, 47; 8/1/13 RP 730; 8/2/13 RP 735. Thus, reversal is required for this deficiency alone. See State v. Saunders, 91 Wn. App. 575, 579-81, 958 P.2d 364 (1998) (reversing for ineffective assistance of counsel where attorney introduced evidence that "would probably have been ruled inadmissible if challenged" and there was a "reasonable probability that the outcome would have been different but for the introduction of" the evidence at issue).

As to the second deficiency, the State once again fails to address this argument at all. It is understandable that the State cannot muster a

response, because it cannot reasonably be disputed that the jury instruction counsel helped craft was erroneous. The instruction told the jury that it could use J.J. Stimson's out-of-court statement for its truth regardless of whether Marcus adopted the statement as his own. In other words, the jury was explicitly instructed that it could use this highly damaging declaration even if it was hearsay and not an adoptive admission. For this reason, too, a new trial should be granted. See Br. of Appellant at 25-27, 43-45.

As to the third deficiency, Marcus's attorney was obviously unaware of the affirmative defense the legislature enacted for precisely this type of case, and therefore failed to request the appropriate instruction. See Br. of Appellant at 45-49 (discussing RCW 9A.32.030(1)(c)). This was an extraordinary oversight. Moreover, had counsel requested the instruction, there is a reasonable probability that the jury would have found the affirmative defense applied.

The State asserts that counsel's performance was reasonable because the affirmative defense would have conflicted with his "general denial" theory of the case. Br. of Respondent at 20-22. There are two problems with this claim. First, it is well-settled that a defendant is not limited to a single defense, and instead has a right to have the jury fully instructed on his theory of the case even if one theory conflicts with an

alternate theory. State v. Fernandez-Medina, 141 Wn.2d 448, 459-61, 6 P.3d 1150 (2000). Second, the affirmative defense in this case does not conflict with the “general denial” defense. It is logical and consistent to say that Marcus had no idea that J.J. planned to commit any crime at all, but that even if he learned J.J. wanted to try to steal this man’s truck, he had no idea that J.J. was armed or would engage in conduct likely to cause death. See RCW 9A.32.030(1)(c)(iii), (iv). And there was never any evidence that Marcus himself was armed or committed the homicidal act. See RCW 9A.32.030(1)(c)(i), (ii). The affirmative defense in felony-murder accomplice cases is really a subset of the “mere presence” defense. As such, it is not a conflicting theory but a consistent theory, and there is no excuse for the failure to request the relevant jury instruction.

In fact, the scenario here is parallel to that at issue in State v. Powell, 150 Wn. App. 139, 206 P.3d 703 (2009) and In re the Personal Restraint of Hubert, 138 Wn. App. 924, 158 P.3d 1282 (2007). In those cases, the defense theory at trial was that the victim was not physically helpless, which was an element of the crime of second-degree rape as charged. See Powell, 150 Wn. App. at 151. But this Court held counsel was ineffective for failing to request an instruction on the affirmative defense, under which even if the victim is physically helpless, a defendant is not guilty if he can show he reasonably believed the victim was not

physically helpless. Id. at 157-58; Hubert at 930. Under the State's argument here, Powell and Hubert were wrongly decided because under one theory the victim is actually physically helpless and under the alternate theory she is not, so the theories "conflict" and counsel was not ineffective. The State's myopic view is not the law. Rather, "[w]here counsel in a criminal case fails to advance a defense authorized by statute, and there is evidence to support the defense, counsel's performance is deficient." Hubert, 138 Wn. App. at 926. Counsel's performance in this case was deficient.

The State's claim that the deficiency did not prejudice Marcus is meritless. "Where defense counsel fails to identify and present the sole available [affirmative] defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial." Hubert, 138 Wn. App. at 932. The State points out that the jury viewed the surveillance video, heard Marcus's statements to police, and learned that Marcus "was quiet" at Tajanae Williams's apartment after J.J. killed the victim. Br. of Respondent at 22-23. From the State's point of view, this is "overwhelming evidence" of Marcus's guilt as an accomplice, and there is no reasonable probability that the result would have been different had the affirmative defense been presented to the jury. But of course the **jury** did not agree with the State that there was overwhelming evidence of

Marcus's guilt. It deliberated for days, told the judge it was hopelessly deadlocked, and requested clarification on the difference between "mere presence" and "present and ready to assist." This record demonstrates a reasonable likelihood that the result would have been different had the jury been instructed on the applicable defense.

Finally, as mentioned above, even if each of these deficiencies alone were not prejudicial, they certainly are in the aggregate. Woods at *23. Marcus was deprived of his right to a fair trial as a result of ineffective assistance of counsel. This Court should reverse. Br. of Appellant at 39-49.

3. The trial court violated Marcus's constitutional right to a fair and impartial jury by ordering the jury to continue deliberating after it unequivocally stated it was hopelessly deadlocked following 11 hours of deliberations.

As explained in the opening brief, the trial court violated Marcus's constitutional rights by ordering the jury to continue deliberating after it informed the court it was hopelessly deadlocked. Br. of Appellant at 49-53. The State claims the order was proper because, even though the jury had been deliberating for 11 hours at this point, the trial involved a serious crime with a lot of evidence and had "lasted a full week." Br. of Respondent at 25.

The State is incorrect. As the minutes and transcripts show, the trial lasted only about three and a half days. While there were arguably three full days of trial on July 24, 25 and 29,³ only one hour of trial occurred on July 23 and trial finished before lunch on July 30. Thus, the fact that the jury deliberated for 11 hours over three days is significant relative to the length of the trial.

More importantly, the State fails to address the **manner** in which the court instructed the jury. After the jury sent a note stating it did not appear possible to come to a consensus, the court asked the foreperson, in front of the rest of the jurors, whether there was a reasonable probability of their reaching an agreement within a reasonable time. The foreperson said, “No.” 8/1/13 RP 733. In response, the court said: “Okay. At this point in time, I am going to ask the jury to continue deliberating at this point in time, and so I am going to excuse you back to the jury room and ask you to continue your discussions and deliberations.” 8/1/13 RP 733.

The problem with this instruction is its clear implication that failing to agree was not an option. As the Supreme Court has stated, an instruction that suggests the jury is required to reach an agreement violates

³ It is arguable because, for example, on July 25 the jury was excused from 10:46 a.m. to 1:20 p.m. The point is that in total trial was at most three and a half days, and the State’s characterization of the trial as a “full week” is disingenuous.

the constitutional right to a jury trial, “however subtly the suggestion may be expressed.” State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). Here, the suggestion was not even subtle; any reasonable juror would understand the court’s order to require agreement, because the jurors had already twice told the court they could not agree after lengthy deliberations, and yet they were told they were not finished with their job.

As explained in the opening brief, the proper course would have been either to grant the defense motion to dismiss the jury and declare a mistrial, or to grant the State’s motion to order the jury to continue deliberating, but to make clear to the jury that it was not required to come to an agreement. See Br. of Appellant at 51 (discussing procedures endorsed in State v. Dykstra, 33 Wn. App. 648, 656 P.2d 1137 (1983) and State v. Lee, 77 Wn. App. 119, 889 P.2d 944 (1995), rev’d on other grounds, 128 Wn.2d 151)). The trial court here did neither. The jury told the court it was hopelessly deadlocked, and the court simply ordered it to continue deliberating. The order coerced a verdict in violation of the Sixth Amendment and article I, sections 21 and 22. This error constitutes another independent basis for reversal. Br. of Appellant at 49-52.

4. The State presented insufficient evidence to support the firearm enhancement.

As explained in Marcus's opening brief, the firearm enhancement should be reversed because the State presented insufficient evidence that Marcus knew J.J. had a gun. Br. of Appellant at 53-54. The State claims "it is not required that the State prove knowledge, just that there is a connection between [the] defendant, the crime, and the weapon." Br. of Respondent at 29. In so stating, the prosecutor ignores the rule for accomplice liability. The Supreme Court has made clear that in order to impose a firearm enhancement, "the evidence must support the conclusion that the accused was armed or that he **knew** an accomplice was armed." State v. Barnes, 153 Wn.2d 378, 386 n.7, 103 P.3d 1219 (2005) (citing State v. McKim, 98 Wn.2d 111, 653 P.2d 1040 (1982)) (emphasis added). There is no dispute here that the evidence does not support the conclusion that Marcus himself was armed; accordingly, the State was required to prove that Marcus knew J. J. was armed. Id. This it failed to do.

The State correctly notes that it is reasonable to infer that Marcus saw the gun once J.J. pulled it out a split second before shooting Mr. Watson. Br. of Respondent at 30; ex. 69. But last-second knowledge, at a point where it is impossible to separate oneself from the person with the gun, is insufficient. Accomplice liability requires knowing facilitation of

the crime; not post hoc awareness of someone else's crime. RCW 9A.08.020; State v. Cronin, 142 Wn.2d 568, 578, 14 P.3d 752 (2000). There is insufficient evidence that Marcus knowingly facilitated J.J.'s possession or use of a gun in this case. Accordingly, the firearm enhancement should be vacated.

5. The State properly concedes that the instruction and special verdict form for the firearm enhancement was erroneous, but wrongly argues that this constitutional error may not be raised for the first time on appeal.

As noted in the opening brief, the instruction and special verdict form for the firearm enhancement both told the jury it could answer "yes," i.e. guilty, but not that it could answer "no," i.e. not guilty. This was improper under the pattern instructions, the caselaw, the Fourteenth Amendment, and article IV, section 16. For this reason, too, the firearm enhancement should be vacated. Br. of Appellant at 54-62.

In response, the State concedes the error, but claims the error may not be raised for the first time on appeal. Br. of Respondent at 31-33. The State is wrong.

As already explained in the opening brief, RAP 2.5(a)(3) permits this Court to address in the first instance a manifest error affecting a constitutional right. The State avers that "[j]ury unanimity in special verdicts is not constitutional in nature." Br. of Respondent at 32. Marcus

disagrees, but the dispute is irrelevant. Marcus did not raise a claim under article I, section 22, which is the constitutional provision guaranteeing the right to a unanimous jury. Const. art. I, § 22; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). The State implicitly acknowledges that the Fourteenth Amendment and article IV, section 16 do apply to special verdicts. Thus, the issue is constitutional within the meaning of RAP 2.5(a)(3).

The State then claims that the error is not “manifest,” because the jury did not express confusion and answered “yes.” This is beside the point. The point is that the instructions and verdict form created a presumption of a “yes” answer, in violation of Marcus’s constitutional rights.

Furthermore, the State misunderstands the definition of “manifest.” “Manifest,” for purposes of RAP 2.5(a)(3), means “the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). “If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest.” Id. Whether an error is “manifest” is different from whether it is prejudicial; the RAP 2.5(a)(3) analysis should not be

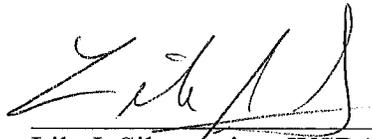
confused with harmless error analysis, under which the State must prove the absence of prejudice beyond a reasonable doubt. Id.; Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The constitutional error here is manifest because it is apparent on the record, just like in other cases where the constitutional error involves improper jury instructions. See Lamar, 180 Wn.2d at 586; State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996). Thus, this Court should review the claim under RAP 2.5(a)(3), and should reverse the firearm enhancement. Br. of Appellant at 54-62.

C. CONCLUSION

For the reasons set forth above and in the opening brief, Marcus Langford respectfully requests that this Court reverse his conviction and remand for a new trial. In the alternative, the firearm enhancement should be vacated, and the case remanded for resentencing.

Respectfully submitted this 2nd day of September, 2014.



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

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)	
Respondent,)	
)	
v.)	NO. 45391-6-II
)	
MARCUS LANGFORD,)	
)	
Appellant.)	

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