

No. 45535-8

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ROBERT LESTER MULLIGAN, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
THE HONORABLE JUDGE CULPEPPER

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
509.939.3038

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I. ASSIGNMENTS OF ERROR

- A. Mr. Mulligan's Conviction Should Be Reversed Because He Was Charged As An Accomplice But The Jury Was Not Instructed On Accomplice Liability.

Issues Relating to Assignments of Error

1. Where a criminal defendant is charged as an accomplice must the jury be instructed on accomplice liability?

II. STATEMENT OF FACTS

Robert Mulligan was charged by information in the Pierce County Superior Court based on events that occurred on March 11, 2013. He was charged as an accomplice in Count I: assault in the third degree against Officer Steven Butts. He was charged in Count II with assault in the third degree against Officer Brett Beall. CP 114-115.

On the evening of March 11, 2013, Robert and Elizabeth Mulligan celebrated with friends in Seattle. (3RP 381). Everyone in the party drank alcohol throughout the evening. (3RP 383). After the event, around 10:00 p.m. they arrived at the Flying Boots Tavern in Tacoma. (3RP 385). Mr. and Mrs. Mulligan and their friends, Mr. and Mrs. Anderson, found a booth and ordered drinks. (3RP 386; 388).

Within an hour Mr. Mulligan saw Mr. Anderson become angry and aggressive with his wife. He said Anderson “jumped out of the booth and grabbed his wife’s arm and started yanking on her...he was just yanking on her arm, assaulting her.” (3RP 389). Bartender Tami Kenan approached the party and told Anderson not to grab his wife. (1RP 44, 59). Mrs. Mulligan reacted to the situation and pushed Anderson away from his wife, saying “Leave her alone; don’t pull on her arm.” (3RP 392-93). In an effort to get control of the situation, the bartender got between Anderson and Mrs. Mulligan. The bartender and Mrs. Mulligan exchanged physical contact. Someone called the Tacoma police. (1RP 46-54).

Mr. Mulligan got involved after Anderson pushed Mrs. Mulligan. (3RP 395). He followed after Anderson and verbally confronted him. Anderson threw his left arm around Mr. Mulligan’s neck, dropped him to the floor, and hit him in the face. (3RP 396). Anderson then ran out the door. Id.

Mr. Mulligan stopped chasing Anderson, but Mrs. Mulligan continued to chase him down the street. (3RP 398). Mrs. Mulligan was wearing high heels, missed a step and dislocated her knee. Id.

Mr. Mulligan and Mrs. Anderson ran over to move her out of the street to the sidewalk. Id.

In an attempt to get her back on her feet, Mr. Mulligan put his arms around her waist to lift her. She fell down and he attempted to help her again. In the process of lifting her, he stuck out one of his hands. He was trying to keep his balance and keep everyone away from his wife. (3RP 404; 4RP 444).

He recalled that he touched something or someone, but did not grab onto anything. (3RP 418). Mr. Mulligan was then punched in the face by a police officer, fell, and hit his head on the ground. (3RP 405-06). Officers grabbed him, rolled him over, twisted his arm, handcuffed him and punched him in the head again. (3RP 406). As he was rolled over, he later reported he was in a daze and grabbed onto something. (3RP 418). Mr. Mulligan had grabbed the hand of one of the officers and the officer struck Mr. Mulligan in the head again. (3RP 409;418). Officers punched him in the head a total of three times.

Officers then picked him up by his arms, and sat him on the ground. (3RP 411-12; 4RP 456). Mr. Mulligan attempted to look at his wife, who was being attended to by another police officer and was told, "Don't pay attention to her.' And I said, 'That's my wife.'

And they said, 'I don't care who it is; that's none of your business.'" (4RP 457). They told him he was arrested for assaulting two police officers, to which he replied, "Oh, I grabbed his f-ing finger. Big F-ing deal." (10/02/13 Hearing RP 86; 2RP 146). As they put him in a patrol car, an officer slammed his head on the roof of it. (3RP 411-412). He was transported to the hospital. (3RP 413).

Officer Hayward of the Tacoma Police Department testified he came on the scene and saw Mrs. Mulligan hit Officer Butts, knocking his glasses off his face. He also testified he saw Mr. Mulligan grab Butts by the shoulders with both hands. (2RP 108-109). He saw Officer Beall punch Mr. Mulligan. (2RP 119). He testified he too grabbed Mr. Mulligan. (2RP 112).

Officer Butts testified Mrs. Mulligan hit him and knocked his glasses off. He immediately grabbed one of her arms and attempted to spin her around. (2RP 161). He reported that Mr. Mulligan grabbed his shoulder with one hand and pushed him to the left. He said Mr. Mulligan's hand remained on his shoulder for "only a couple of seconds." (2RP 201). He heard Officer Beall tell Mr. Mulligan to "let go", but Mr. Mulligan had already removed his hand from the officer's shoulder. (2RP 178).

Officer Popkov corroborated Mr. Mulligan's testimony, stating that she saw Mr. Mulligan attempting to help Mrs. Mulligan stand up and when she fell, he attempted to help her up again. (2RP 235).

Officer Beall testified that he approached Mr. Mulligan as soon as he arrived on the scene. (2RP 266). He reported he saw Mr. Mulligan grab Officer Butts and that he and Officer Hayward pulled him to the ground. (2RP 271). Once Mr. Mulligan was on the ground, he grabbed onto the officer's forearm, so Officer Beall punched him in the head. (2RP 274). After the officer pulled Mr. Mulligan's arm over his head, Mr. Mulligan grabbed the officer's hand and squeezed, more than 10 seconds but less than 30 seconds. (2RP 154). The officer punched him in the head two more times. (2RP 275).

The jury was given Jury Instruction No. 22:

To convict Defendant Robert Mulligan of the crime of Assault in the Third Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 11th day of March, 2013, Defendant Robert Mulligan assaulted Steven Butts;
- (2) That at the time of the assault, Steven Butts was a law enforcement officer or other employee of a law

enforcement agency who was performing his official duties; and

- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 26.

No accomplice liability instruction was given to the jury. Mr. Mulligan was found guilty of two counts of assault in the third degree. CP 155-56. He makes this timely appeal. CP 188.

III. ARGUMENT

A. Mr. Mulligan's Conviction on Count I Should Be Reversed.

Under the Washington State Constitution, Article I, § 22, and the Sixth Amendment to the U.S. Constitution, an accused has a fundamental right to be informed of the criminal charge he must meet at trial, and cannot be tried for an offense not charged. *State v. Irizarry*, 111 Wn.2d 592, 763 P.2d 432 (1988).

A charging document is constitutionally adequate only if all the essential elements of the charged crime, whether statutory or non-statutory, are included so that the defendant may be informed of the charges against him and adequately prepare his defense. *State v. Bacani*, 79 Wn.App. 701, 703, 902 P.2d 184 (1995). A charging document adequately informs the defendant if it lists (1) the elements of the crime charged and (2) a description of the specific conduct that constituted the crime. *Auburn v. Brooke*, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

The State alleged in the information on Count I, under RCW 9A.36.031(1)(g), and RCW 9A.08.020(3)(a)(i-ii), that Robert Mulligan, acting as an accomplice, assaulted Officer Butts. (CP 114). In order for one to be deemed an accomplice, that individual must have acted with the knowledge that he was promoting or facilitating the crime for which he was eventually charged. *State v. Moran*, 119 Wn.App. 197, 210, 81 P.3d 122 (2003). Thus, for accomplice liability to attach, the State was required to prove that he gave aid, shared in the criminal intent, participated in the venture and acted with knowledge of the specific charged crime. *State v. Carter*, 154 Wn.2d 71, 109 P.3d 823 (2005). *State v. Trujillo*, 112 Wn.App. 390, 49 P.3d 935 (2002); *State v. Boast*, 87

Wn.2d 447, 456, 553 P.2d 1322 (1976). The State did not meet this burden.

In *Bui*, the defendant was charged, along with his codefendant, with three counts of first-degree assault. The issue in *Bui* centered on an erroneous accomplice liability instruction: allowing the State to secure a conviction without having to prove beyond a reasonable doubt that Bui knew he was facilitating the commission of the crime of assault. *State v. Bui*, 142 Wn.2d 568, 14 P.3d 752 (2000). The Court reasoned that in order to prove that Bui was an accomplice, the State was required to show that Bui possessed general knowledge that he was aiding in the commission of the crime of assault. *Id.* at 580.

Similarly here, in order to prove that Mr. Mulligan was an accomplice, the State was required to show that he possessed knowledge that he was aiding in the commission of the crime of assault. However, the State presented no evidence that Mr. Mulligan possessed any knowledge that he was aiding in the commission of the crime of assault of Officer Butts. Rather, the record demonstrated Mrs. Mulligan managed to stand up and under her own power made her way toward the officer; then, to everyone's surprise, she hit him. (2RP 105-06; 168, 210, 270).

By the time Mr. Mulligan briefly touched Officer Butts, the officer had already spun her around and was taking her to the ground. Her assaultive behavior had ended. Mr. Mulligan had no part in her impulsive action.

It is not unconstitutional to charge a person as a principal and convict him as an accomplice, but the court *must instruct the jury on accomplice liability*. *State v. Davenport*, 100 Wn.2d 757, 765, 675 P.2d 1213 (1984) (Emphasis in the original). In *Davenport*, the defendant was charged with burglary. The Court reasoned he could not constitutionally be convicted of that charge if the jury found he was an accomplice, most importantly, because it was never instructed on accomplice liability. Here, Mr. Mulligan was specifically charged as an accomplice, but the jury was not instructed on accomplice liability. As in *Davenport*, Mr. Mulligan could not constitutionally be convicted of the charge because the jury was not properly instructed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Mulligan respectfully asks this Court to reverse his conviction on Count I and dismiss with prejudice.

Respectfully submitted this 9th day of May 2014.

s/ Marie J. Trombley, 41410
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comast.net

CERTIFICATE OF SERVICE

I certify that on 05/09/2014, under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the brief of appellant was sent by first class mail, USPS, postage prepaid on May 9, 2014, to:

Robert L. Mulligan
3711 Tacoma Ave S
Tacoma, WA 98428

And by email per agreement between the parties to:

Email: PCpatcecf@co.pierce.wa.us
Kathleen Proctor
Pierce County Prosecuting Attorney's Office

s/ Marie J. Trombley, 41410
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comast.net

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PCpatcecf@co.pierce.wa.us

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