

COURT OF APPEALS NO. 47057-8-II

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

STATE OF WASHINGTON

V.

JARROD WIEBE,

Appellant.

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

The Honorable Scott Collier, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court violated appellant's Sixth Amendment right to control his defense by instructing the jury on an affirmative defense over his objection.

Issue Pertaining to Supplemental Assignment of Error

Where the court instructed the jury on the "withdrawal defense" to accomplice liability over appellant's objection, did the court violate his Sixth Amendment right to control his defense?

B. FACTS PERTAINING TO SUPPLEMENTAL ISSUE

Following a jury trial in Clark County Superior Court, appellant Jarrod Wiebe was convicted of numerous charges, including burglary, robbery, extortion, criminal impersonation and ten counts of theft of a firearm. CP 176; RP 1040-41, 1124-26. Five of the charges carried firearm enhancements. Id.

The state's theory at trial was that Wiebe acted as an accomplice by standing outside and acting as a lookout, while three other men barged into the home of Casimiro Arellano and Manatalia Arevalos and committed the aforementioned crimes. RP 1082. There was no allegation or evidence Wiebe was armed. RP 1077.

At the state's request and over defense counsel's objection, the court gave the following instruction:

A person is not an accomplice in a crime committed by another person if 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.

CP 48 (Instruction 8); RP 931; RCW 9A.08.020(5)(b).

Defense counsel argued he was not raising this affirmative defense and did not want to be limited as to why the jury should doubt Wiebe acted as an accomplice:

-- the reason I would object to that, Your Honor -- I think that, first of all, I'm not raising that as a defense. I think that's kind of a -- that's almost like an affirmative defense. I'm not raising that as a defense here, that, you know, he terminated his complicity and gave a timely warning or made an effort to prevent the commission of that crime. The danger that comes in, though, is that I don't want the jury to think that this is the only way that somebody could not be an accomplice here, in that, if that isn't shown, then nothing else makes any difference. I think it adds confusion to it. And so I would ask that that not be submitted to the jury.

RP 95.

In closing, the prosecutor referred to Instruction 8 and argued:

Now, Instruction 8 defines for you or tells you when a person is not an accomplice to a crime: If he

or she terminates his or her complicity prior – before the commission of a crime, okay, and either gives timely warning to law enforcement or somehow makes a good-faith effort to prevent the commission of the crime. Did this happen in this – in the case? Is there any evidence of that happening in this case?

Okay. Remember Detective Stevens testified yesterday. I asked him, Did the defendant have a cell phone? Yes. Did you take it from him? Yes. Did you search it? Yes. Did you look for when phone calls were made or text messages and things like that surrounding this time period? Yes. Any phone calls, text messages, whatnot to 911 or police? No.

So if the defendant didn't do any of that – and there's no evidence that he did any of that to either prevent the crimes from happening or give law enforcement notice or head up that, Hey, something is about to go down. Okay. I've got a bad feeling about this. I'm calling to let you know. I don't want to be any part of this. That's what it – that's what it means to not be an accomplice. That clearly did not happen in this case.

RP 1000.

C. SUPPLEMENTAL ARGUMENT

THE TRIAL COURT VIOLATED WIEBE'S RIGHT TO CONTROL HIS DEFENSE BY INSTRUCTING THE JURY ON AN AFFIRMATIVE DEFENSE OVER HIS OBJECTION.

Implicit in the Sixth Amendment¹ is the criminal defendant's right to control his defense. See Faretta v. California, 422 U.S.

¹ The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (“Although not stated in the [Sixth] Amendment in so many words, the right ... to make one's own defense personally [] is thus necessarily implied by the structure of the Amendment.”); State v. Jones, 99 Wash.2d 735, 740, 664 P.2d 1216 (1983) (“Faretta embodies ‘the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount.’” (quoting United States v. Laura, 607 F.2d 52, 56 (3d Cir.1979))). The defendant's right to control his defense is necessary “to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy.” State v. Coristine, 177 Wash.2d 370, 376, 300 P.3d 400 (2013).

“Instructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense.” Id. at 375, 300 P.3d 400; see also State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013); Jones, 99 Wash.2d at 739, 664 P.2d 1216 (trial court violated defendant's right to control his defense by forcing the defendant to enter a not guilty by reason of insanity plea and appointing amicus counsel to argue the insanity defense over

process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

defendant's objections); State v. McSorley, 128 Wash.App. 598, 605, 116 P.3d 431 (2005) (trial court violated defendant's right to control his defense by instructing the jury on an affirmative defense to the crime of child luring over defendant's objection).

In State v. Lynch, the trial court instructed the jury on the affirmative defense of consent to a charge of rape over Lynch's objection. Lynch, 178 Wn.2d 490. Lynch objected on grounds he had the right to control his defense and because he did not want to bear the burden of proving consent. Lynch argued he introduced evidence that T.S. had consented in order to create a reasonable doubt about whether the state had proved the element of forcible compulsion. Id.

The Supreme Court held the trial court violated Lynch's Sixth Amendment right to control his defense:

By "[i]mposing a defense on an unwilling defendant," the trial court "impinge[d] Lynch's autonomy to conduct his defense. Id. [Coristine, 177 Wn.2d at 376]. The State argues that the consent instruction was justified because Lynch introduced evidence that T.S. consented. But in Coristine, we rejected a similar argument made by the State that evidence presented by Coristine bolstering his case somehow justified instructing the jury on an affirmative defense. In accordance with Coristine, we hold that the trial court violated Lynch's Sixth Amendment right to control his defense by instructing

the jury on the affirmative defense of consent over Lynch's objection.

Lynch, 178 Wn.2d at 493.

Despite the state's arguments, the Lynch Court held the state failed to prove the error was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (if trial error is constitutional in magnitude, prejudice is presumed and the state bears the burden of proving it was harmless beyond a reasonable doubt). First, the court rejected the state's argument that there was no inconsistency between the consent instruction and the defense Lynch advanced with respect to second degree rape. As the court reasoned, instructing the jury that Lynch had the burden of proving consent imposed a burden on Lynch that was greater than the burden necessary to create a reasonable doubt about forcible compulsion. Lynch, at 495.

Second, assuming arguendo there was no inconsistency, the Sixth Amendment would have little meaning if the trial court could chose a defendant's trial strategy so long as it correctly instructed the jury on the defense it chose. Id.

Finally, the court rejected the state's argument the error was harmless because the instruction outlining the state's burden (to prove all the elements of the offense) was accurate. Id.

As in Lynch, the trial court here instructed the jury on an affirmative defense over the defendant's objection. That RCW 9A.08.020(5)(b) provides a statutory defense to accomplice liability is established by case law. See e.g. State v. Handley, 115 Wn.2d 275, 293, 796 P.2d 1266 (1990)). In that case, the Supreme Court expressly recognized the "withdrawal defense" to accomplice liability:

While a "withdrawal defense to accomplice liability is expressly recognized by statute, RCW 9A.08.020(5)(b), it is unclear whether a similar defense to anticipatory offenses is available.

Handley, 115 Wn.2d at 293.

That RCW 9A.08.020(5)(b) provides a statutory defense the defense bears the burden of proving is also implied by Division One's decision in State v. Whitaker, 133 Wn. App. 199, 135 P.3d 923 (2006). There, the court noted the jury was instructed on when a person is "not an accomplice" and in an effort *to prove it*, the defendant testified in his own defense:

The jury was instructed that a person is not an accomplice if he terminates his complicity prior to the

commission of the crime and makes a good faith effort to prevent the commission of the crime. In an effort to prove that he made a good faith effort to prevent the killing, Whitaker testified that he asked Anderson not to kill Burkheimer.

Whitaker, 133 Wn. App. at 235.

Moreover, Division One held the prosecutor did not improperly shift the burden of proof by arguing Whitaker's claim was unsupported:

In closing, the prosecutor argued that Whitaker's claim to have asked Anderson not to kill Burkheimer was unsupported by the testimony of other witnesses. Whitaker contends this statement was misconduct because it shifted the burden of proof. We disagree. The prosecutor merely pointed out that Whitaker's claim contradicted the accounts of other eyewitnesses. The prosecutor also argued that, given the circumstances, merely asking Anderson not to kill Burkheimer would not be enough to constitute a good faith effort to prevent the commission of the crime. What constituted a good faith effort was a question for the jury, and the prosecutor was entitled to argue what might and might not constitute such an effort. The prosecutor did not commit misconduct.

Whitaker, 133 Wn. App. at 235.

This passage further indicates that in the court's view, it was Whitaker's burden to prove his actions constituted a good faith effort. Thus, the "withdrawal defense" is a statutory defense the law requires the defendant to prove.

Like Lynch, Wiebe objected to the court instructing the jury on this affirmative defense. Wiebe's counsel stated it was not a defense he was raising and did not want the jury to think the instruction described the only way in which one could not be an accomplice. As in Lynch, by imposing the defense on an unwilling defendant, the trial court impinged Wiebe's autonomy to conduct his defense.

For the same reasons as in Lynch, the state cannot prove the constitutional error was harmless beyond a reasonable doubt. First, the instruction imposed a burden of proof on Wiebe where none otherwise would have existed. As defense counsel posited, it could have caused jurors to believe "withdrawal" was the only means by which one could be considered not an accomplice. And while the instruction did not impose a specific degree of proof on Wiebe to establish the defense, it was inconsistent with his theory he was not an accomplice based on the state's failure to prove knowledge.

That the instruction likely caused jurors to believe Wiebe was an accomplice unless he showed he was not by virtue of having done one of the enumerated acts in the "withdrawal" defense is supported by the state's closing argument in this case.

RP 1000 (directing jurors to the “not an accomplice” instruction and pointing out Wiebe never called police or 911). As a result, the state cannot prove the constitutional error was harmless.

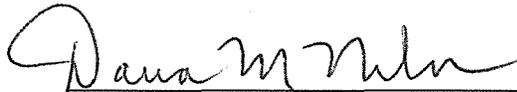
D. CONCLUSION

Because Wiebe was denied his Sixth Amendment right to control his defense, this Court should reverse his convictions.

Dated this 19th day of November, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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DIVISION TWO**

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)	
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v.)	COA NO. 47057-8-II
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)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF NOVEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JARROD WIEBE
DOC NO. 379320
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF NOVEMBER 2015.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

November 20, 2015 - 3:42 PM

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