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Court of Appeals
Division II
State of Washington
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No. 53026-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

TESSITA WOODARD,

Appellant.

BRIEF OF RESPONDENT

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I. ANSWERS TO ASSIGNMENT OF ERROR

1. Defense counsel was not ineffective for not questioning Officer Dolan regarding her prior testimony.
2. The jury instructions were an accurate statement of the law and did not reduce the State's burden of proof.
3. Defense counsel's failure to object to pattern jury instructions that accurately stated the law was not ineffective assistance.
4. There was no error, thus the cumulative error doctrine does not apply

II. STATEMENT OF THE CASE

The Respondent generally accepts the Appellant's recitation of the facts and where different, such differences will be noted in the context of the argument.

III. ARGUMENT

A. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR NOT QUESTIONING OFFICER DOLAN REGARDING HER PRIOR TESTIMONY

Defense counsel was not ineffective in the performance of her duties at Appellant's jury trial, and the conviction should not be disturbed. Defense counsel is ineffective if the performance was both deficient and resulted in prejudice. *State v. McSorley*, 128 Wn.App. 598, 609, 116 P.3d 431 (2005), *citing State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Performance is deficient if, considering all the circumstances, "it falls below an objective standard

of reasonableness.” *Id.*, citing *State v. McFarland*, 127 Wn.2d at 335, 899 P.2d 1251. “Prejudice exists if the outcome of the trial would have been different but for counsel’s deficiencies.” *Id.*, citing *State v. McFarland*, 127 Wn.2d at 337, 899 P.2d 1251. There is a strong presumption that counsel’s performance was effective. *State v. McFarland*, 127 Wn.2d at 335, 899 P.2d 1251, citing *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2s 816 (1987). There is nothing in the record to support a finding that such a presumption was overcome by counsel’s conduct in this case and the conviction should be affirmed.

Officer Dolan did not testify that Appellant was “not squirrely” in the first trial. What Officer Dolan actually said was, “I don’t recall that being the case in this instance.” RP 163. Her failure to recall whether the person was squirrely or not, is not the same things as recalling that she was not squirrely. Not recalling whether something was the case is not the same as saying it didn’t happen and the court should certainly consider the level of recall when determining how much such testimony was likely to change the outcome of the trial. Given her actual words, the best cross-examination would establish that she didn’t recall that she “was” squirrely, but her lack of recall does not establish that Appellant wasn’t squirrely. It ends up amounting to nothing, one way or the other.

Further, looking to the cross-examination of Dolan in the first trial, her inability to recall the details of “squirrelly”-ness is apparent. She did not remember who Appellant handed the pills to (RP 168) or even if she was the person who processed Appellant following the search (RP 170). She did remember that Appellant did not try and fight her (RP 163), but that was never a point that was placed in direct contradiction. It’s not as though she testified in the second trial that Appellant’ tried to fight her, she just failed to highlight the absence of a fight.

This is the key difference between *McSorley* and this case, there was no direct opposition of facts that cross-examination would have fixed. It was not as though the State had proved in the second trial that Appellant HAD fought and HAD been squirrelly, which is where cross-examination based on the prior testimony would have shown some sort of inconsistent statement. At best, cross-examination on the issue would have yielded (1) that Dolan did not remember that Appellant was “squirrelly” and (2) that Appellant did not fight. Neither of those facts were suggested or argued by the State in the second trial, so there was no direct contradiction of facts like in *McSorley*.

At no point does Dolan’s testimony in the second trial directly contradict the testimony in the first trial. Appellant argues that the testimony on RP 163 and RP 456 represent completely contrary

versions of what happened, but a careful review, in context, reveals no contradiction. At RP 456, defense counsel, during the second trial, asked whether after Appellant removed her bra, “she handed you --- she handed you the tape?” Dolan’s reply was, “I don’t know that she just handed it to us.” This is actually completely consistent with the testimony in the first trial, where Dolan testified that she saw pills taped to Appellant’s chest, then she “believe[d] we asked her to remove them and hand them over.” RP 163. In both versions it is clear that Appellant did not just hand over the drugs. She had to be prompted, which is what Dolan’s statement at RP 456 suggested. There is no evidence, not even from Woodard’s own testimony, that she handed the pills over without prompting.

Another crucial distinction from *McSorley* is that the prejudice in that case was based on multiple failures by defense related to the same issue that compounded the problem. *McSorley*’s trial counsel failed get documentation about the actual time of the medical appointment at issue, then failed to object to hearsay evidence by the detective that directly contradicted the defendant’s testimony. *McSorley*, 128 Wn.App. at 609-610, 116 P.3d 431. No such conflict is present in this case, and thus, *McSorley* is of limited value.

Because of the lack of any direct contradiction in this case, there is no way to show prejudice, especially not prejudice sufficient to show that the outcome of the trial would likely be different if Dolan

had been cross-examined about the prior testimony. Ultimately, the State simply asks the court to carefully review RP 162-168 and RP 455-458. Based on that careful review, this court should find that defense counsel was not deficient for not cross-examining Officer Dolan about her testimony in the first trial, because it was (1) not inconsistent, (2) did not set up a contradiction between her testimony and the defendants, and (3) did not result in any prejudice.

B. THE JURY INSTRUCTIONS WERE AN ACCURATE STATEMENT OF THE LAW AND DID NOT REDUCE THE STATE'S BURDEN OF PROOF

The jury instructions accurately represented the state of the law and it was not error to issue them. Appellant's reliance on *State v. Allen* is misplaced because of the fundamental difference in legal issues presented in that case. In *Allen*, the Court was faced with the question of a "should have known" standard as it applied to accomplice liability. *State v. Allen*, 182 Wn.2d 364, 369, 341 P.3d 268 (2015). The question is unique accomplice liability, because of the specific requirements of that statute. RCW 9A.08.020(3), *id.* at 374, *citing State v. Shipp*, 93 Wn.2d 510, 514, 610 P.2d 1322 (1980). The concern in such a situation is an accomplice could only be an accomplice if they had actual knowledge and in this very specific circumstance, a "should have known" instruction was specifically unconstitutional. *Id.* Nor did the prosecutor argue that "under the law, even if he *doesn't actually know*, if a reasonable person would have known, he's guilty." *Quoting Allen*, 182 Wn.2d at 374-375, 341 P.3d 268.

Appellant's citation to *State v. Drewery* suffers from the same defect, as in that case as well, the issue was accomplice liability. 8 Wn.App.2d 1080, 2019 WL 1490620 (2019) (unpublished). Applying these facts to the knowledge element in this case would be a significant extension of *Allen*.

The facts in the present case present a completely different circumstance. The pills were physically taped to Appellant's body, so there is no danger of her being convicted of crime that she did not know happened based on accomplice liability. It is simply not an analogous situation. Moreover, the instructions were accurate reflections of the law, based on pattern jury instructions and statutory definitions. RCW 9A.08.010 (1)(b), WPIC 10.02. *State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990) (holding that the instruction corrected the constitutional problem from an earlier case), *State v. Bryant*, 89 Wn.App. 857, 872, 950 P.2d 1004 (1998) (noting that the instruction has been repeatedly upheld).

The jury was permitted to infer from the fact that the pills were taped to her body that she knowingly possessed them in a correctional facility. She had turned herself in to that facility, and it is reasonable to make such an inference. If it were not, then it would be nearly impossible to prove "knowledge" without a confession of knowledge. This does not reduce the State's burden to prove knowledge beyond a reasonable doubt, since the law allows such an inference. There is no caselaw that supports the application of *Allen* and accomplice liability issues to the case at the bar. Yet, there is specific caselaw that upholds this language. *Bryant*, 89

Wn.App. at 872, 950 P.2d 1004. The court should affirm the conviction of the Appellant.

C. DEFENSE COUNSEL'S FAILURE TO OBJECT TO PATTERN JURY INSTRUCTIONS THAT ACCURATELY STATED THE LAW WAS NOT INEFFECTIVE ASSISTANCE

The jury instructions were pattern instructions that accurately reflected the law and it was not error to fail to object. Essentially the same analysis applies from the ineffective argument under section A, as well as the legal analysis from section B. Counsel was effective and this court should affirm the conviction.

D. THERE WAS NO ERROR, THUS THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY

If the errors alleged are actually found to be error by this court, such error would likely be reversible for each issue in its own right. The cumulative error doctrine does not really apply in this circumstance. Moreover, the State maintains that no error was committed and thus the cumulative error doctrine should not apply. The conviction should be affirmed.

IV. CONCLUSION

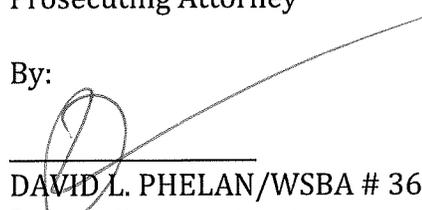
The appellant's conviction should be affirmed. Defense counsel is presumed effective and that presumption should not be disturbed in this case. The jury instructions presented an accurate statement of the law and there is no reason this court should extend the unique issue in accomplice liability jurisprudence to the well settled definition of "knowingly" as it applies in all other instances.

Nor was defense counsel ineffective for not objecting to such pattern instructions. Because there was no error, the cumulative error doctrine should not apply and the conviction should be affirmed.

Respectfully submitted this 10th day of April, 2020.

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Prosecuting Attorney

By:



DAVID L. PHELAN/WSBA # 36637
Deputy Prosecuting Attorney
Representing Respondent

APPENDIX

RCW 9A.08.010

General requirements of culpability.

(1) Kinds of Culpability Defined.

(a) INTENT. A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

(c) RECKLESSNESS. A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

(2) Substitutes for Criminal Negligence, Recklessness, and Knowledge. When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

(3) Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed intentionally, knowingly, recklessly, or with criminal negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

(4) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

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 10.02 Knowledge—Knowingly—Definition
11 WAPRAC WPIC 10.02 Washington Practice Series
TM Washington Pattern Jury Instructions--Criminal
11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.02 (4th Ed)

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Washington Pattern Jury Instructions--Criminal

October 2016 Update

Washington State Supreme Court Committee on Jury Instructions

Part III. Principles of Liability

WPIC CHAPTER 10. General Requirements of Culpability

WPIC 10.02 Knowledge—Knowingly—Definition

A person knows or acts knowingly or with knowledge with respect to a [fact] [circumstance] [or] [result] when he or she is aware of that [fact] [circumstance] [or] [result]. [It is not necessary that the person know that the [fact] [circumstance] [or] [result] is defined by law as being unlawful or an element of a crime.]

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

[When acting knowingly [as to a particular fact] is required to establish an element of a crime, the element is also established if a person acts intentionally [as to that fact].]

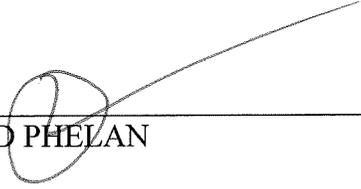
CERTIFICATE OF SERVICE

DAVID PHELAN, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 4th, 2020.



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COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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