

FILED  
Court of Appeals  
Division II  
State of Washington  
9/3/2020 4:10 PM

NO. 54103-3

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

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STATE OF WASHINGTON,

Respondent,

v.

GUANG ZHENG AND DAN YU,

Appellants.

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Appeal from the Superior Court of Pierce County  
The Honorable Kitty-Ann van Doorninck  
No. 18-1-01011-1  
No. 18-1-01012-0

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**AMENDED BRIEF OF RESPONDENT**

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## I. INTRODUCTION

The Defendant owners of a massage business were investigated for human trafficking where it was discovered that they procured non-English speaking employees through Los Angeles, housed them in tight quarters, transported them between work and the employer-leased apartments, and created no tax documentation or ledger of their wages. The Defendants knew their employees were not licensed to provide massage and needed to be licensed in the state of Washington. Nevertheless, they instructed them to perform foot and body massages and paid them only by the massage.

The Defendants were charged as accomplices in the unlicensed practice of massage and have been convicted of felony offenses. They assert that they should have been charged only with the misdemeanor offense of knowingly or negligently permitting employees to practice without a license. The statutes are not concurrent where merely permitting another to practice without a license within one's premises does not establish liability for unlicensed practice either as a principal or an accomplice. The lesser penalty is appropriate for the owner who turns a blind eye but does not direct or cause the crime so as to rise to the level of complicity. The lower court properly denied the motion to dismiss. The information is correctly charged.

## **II. RESTATEMENT OF THE ISSUES**

- A. Are RCW 18.108.035 and RCW 18.130.190(7) concurrent statutes where every violation of one statute does not amount to a violation of the other?
- B. Are the charges consistent with legislative intent which provides for a lesser penalty for owners who turn a blind eye to the licensing affairs of their masseuse employees and a greater penalty for third parties who are complicit in the unlicensed practice of a health professional?

## **III. STATEMENT OF THE CASE**

The Defendants Guang Zheng and Dan Yu are married to each other. CP 25, 141; 2RP<sup>1</sup> 3. They have each been convicted in a stipulated facts trial of four misdemeanor counts and four felony counts of complicity with the unlawful practice of massage. CP 72-81, 84-88; 187-96, 199-203. They argue that they should have been charged with knowingly permitting the unlicensed practice of massage within their business.

The Lakewood Police Department investigated the Defendants from 2015 to 2018. CP 8, 10, 65, 134, 136, 180. The Defendants owned and managed a massage business called Treat Your Feet. CP 8, 66, 134, 181. The front area of the store had reclining chairs for foot massages; the back had private rooms for body massages. CP 66, 181.

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<sup>1</sup> 1RP refers to the transcript from January 11, 2019. 2RP refers to the transcript from December 2, 2019.

The Defendants obtained their employees through a Los Angeles employment agency. CP 68-70, 183-85. The employees lived in tight quarters in two apartments: a two-bedroom apartment (sparsely furnished with mattresses on the floor) housed seven employees. CP 65, 69, 180, 184. The Defendants leased and furnished the apartments. CP 8-9, 65-66, 134-35, 180-81. They withheld rent, calculated per day of occupancy, from the employee's pay. CP 69, 184. And the Defendants transported employees from the apartments to Treat Your Feet. CP 8, 66, 134, 181.

The employees completed no tax forms; the business had no ledger documenting services provided, salaries paid, or tax withheld; and no tax documents or paycheck stubs were recovered. CP 67-68, 182-83. Employees were paid in cash only. CP 70, 185.

The employees performed janitorial and laundry services, but were paid per massage. CP 68-69, 183-84. The Defendants knew that none of their employees were licensed to practice massage, and, in fact, some received a little on-the-job training. CP 9, 68-70, 135, 183-85.

Only Mrs. Yu had a valid license to practice massage in Washington state. CP 9, 66, 135, 181. However, the only time police observed her taking any massage clients was on the day that she had been warned that only licensed practitioners could perform body massages. CP 66, 181. Instead, she and her husband Zheng met and greeted customers, discussed

services, escorted customers to the massage rooms, and procured payment. CP 8, 134.

Police arrested seven employees. CP 66-67, 181-82. A search warrant of the Defendants' home produced 17 firearms including a HK 9mm rifle modified to be fully automatic with the serial number removed or destroyed. CP 9, 135. The Defendants also possessed one or more military grade sets of body armor and numerous firearm accessories including suppressors (silencers). CP 9, 135.

In March of 2018, the Defendants were charged with multiple counts of violating RCW 18.130.190 by complicity. CP 1-7, 127-33; 1RP 5-6 (two counts each for seven employees for a total of 14 counts). As charged in the informations, the basic elements of the offense are the unlawful practice of a profession specified in RCW 18.130.040. CP 1-7, 57-60, 127-33, 172-75. Massage therapy is a specified profession. RCW 18.130.040(2)(a)(4).

The Defendants used Mandarin interpreters throughout this case. CP 10, 13, 14, 136, 139, 140; 1RP 1; 2RP 3-4. While Ms. Yu is a US citizen; her husband is a lawful permanent resident. CP 19. The couple obtained joint counsel, a team of attorneys (William Frick, Douglas Mulkoff, and John Sheeran) with experience in criminal law and immigration law. CP 16-17, 19, 42-44, 50, 141, 158-60, 168; 2RP 3.

The Defendants filed a motion to dismiss, alleging that they had been charged under the general statute, rather than the specific statute. CP 28-41, 144-57. They claimed that the State should have charged them under RCW 18.108.035. CP 36, 152. This law criminalizes the knowing or negligent allowance of unlicensed massage within one's business. RCW 18.108.035(1).

The prosecutor explained that the State was not alleging that the Defendants merely *allowed others* to practice in their establishment without a license. RP (1/11/19) at 13-14. The employees would never have violated the law on their own. *Id.* Rather the Defendants were complicit in the unlawful practice, because they directed or caused the violations to take place. *Id.* See also CP 68-70, 183-85.

Huaqing "Lucy" Chen told police through an interpreter that she did the massages to "help out" and because the boss "instructed" them to. CP 68, 183. Through her attorney, Yangmei "Mei" Zhang told police that she had inquired about an ad for massage therapists and was told "if she did not know how to give massage, she would be trained to do it." CP 69-70, 184-85. After she took the job, she "'trained' with another employee for a while, then began to give body massages to customers by herself." CP 70, 185.

So [the Defendants] are charged as accomplices to the crime of the actual massage.

They are not being charged as the owner of the business who negligently or with knowledge allowed the practice of the profession. They are charged with the actual practice of the profession.

...

And that's the way this business -- these businesses work -- bring in folks who don't have a job and who don't have licenses, charge a customer \$60, give the employee 20 or 30, and let them earn their tips. Take the rest of the money for the house. So when -- when the State charged -- I'm fully aware of both of these statutes, and I know that I could charge -- and, quite frankly, I believe I could add counts against the owners for actually the misdemeanor/gross misdemeanor statute where they also with negligence and -- with knowledge and with criminal negligence allowed for that to happen. So they could, in theory, be charged both as the owners who were allowing it to happen and also as the manager and owner who were actively making it happen. What I'm suggesting to you is without the defendants' involvement, none of the women who were giving massages at this place could have been giving them because they were sent their clients by the defendants -- and in particular Mr. Zheng working at the manager at the front counselor, but also on occasion Ms. Yu.

RP (1/11/19) at 13-14.

The superior court denied the Defendants' motion to dismiss the charges. CP 118-22, 233-37. The parties then agreed to a stipulated facts trial on an amended information of only four misdemeanor counts and four felony counts. CP 57-64, 172-79. The court convicted the Defendants on the amended information. CP 65-70, 107-17, 180-85, 222-32. The court imposed sentences of credit for the one day served with conditions that they

do not contact their former employees or be involved with the massage industry. CP 72-81, 84-88, 187-96, 199-203.

The Defendants relitigate the dismissal motion on appeal. CP 89-105, 204-220.

#### IV. ARGUMENT

**A. The statutes are not concurrent, because business owners who allow or permit practitioners to conduct unlicensed massage have not practiced massage without a license either as principals or accomplices.**

The Defendants allege that RCW 18.108.035 is the specific crime to the more general crime of RCW 18.130.190(7). This is not the case. The statutes are not concurrent.

For statutes to be labeled the specific or general of each other, they must first be determined to be concurrent statutes. *State v. Datin*, 45 Wn. App. 844, 845-46, 729 P.2d 61 (1986). Statutes are deemed concurrent if the general statute will be violated in each instance in which the special statute has been violated. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984); *State v. Jendry*, 46 Wn. App. 379, 381-85, 730 P.2d 1374 (1986). If one statute is the more specific concurrent statute, the prosecutor may not charge the general concurrent statute. *Id.*

The rule fetters prosecutorial discretion so as to minimize disparate treatment. *State v. Albarran*, 187 Wn.2d 15, 20, 383 P.3d 1037, 1039 (2016). It also prevents prosecutors from usurping legislative authority. *State v.*

*Shriner*, 101 Wn.2d 576, 582, 681 P.2d 237, 241 (1984) (explaining that, given a choice, the prosecutor is likely to choose the offense with fewer proof elements, thereby effectively repealing a more complex statute).

The statute which the prosecutor charged reads:

(7)(a) Unlicensed practice of a profession or operating a business for which a license is required by the chapters specified in RCW 18.130.040, unless otherwise exempted by law, constitutes a gross misdemeanor for a single violation.

(b) Each subsequent violation, whether alleged in the same or in subsequent prosecutions, is a class C felony punishable according to chapter 9A.20 RCW.

RCW 18.130.190.

As the Defendants observe, this is a strict liability offense. Opening Brief of Appellant<sup>2</sup> (OBA) at 14. Although there is no case law directly on point, the courts have frequently held regulatory crimes or public welfare offenses to be strict liability offenses. *See e.g. State v. Mertens*, 148 Wn.2d 820, 64 P.3d 633 (2003) (fishing without a license); *State v. Wiggins*, 114 Wn. App. 478, 485, 57 P.3d 1199, 1202 (2002) (unlawful possession of explosives); *State v. Whitney*, 78 Wn. App. 506, 514, 897 P.2d 374, 378 (1995) (driving with a suspended license); *City of Seattle v. Koh*, 26 Wn. App. 708, 714, 614 P.2d 665 (1980) (building code violation). In a recent opinion, the Washington Supreme Court held that the unauthorized practice

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<sup>2</sup> The Brief of Appellant for Yu is identical to Zheng's with the exception of the caption and signature line.

of law is a strict liability crime. *State v. Yishmael*, 195 Wn.2d 155, 456 P.3d 172 (2020) (performing an 8-factor analysis). The unauthorized practice of health professions is sufficiently analogous for the parties to be confident that legislative silence on a mens rea has created a strict liability offense.

RCW 18.130.190(7) is violated when the defendant practices the profession without a license, or the defendant operates a business without a license.<sup>3</sup>

The statute the Defendants believe they should have been charged under, RCW 18.108.035, prohibits business owners from knowingly or negligently allowing or permitting someone else to practice massage on their premises without a license.

But the negligent or knowing allowance of another person to practice massage without a license on the defendant's premises does not violate RCW 18.130.190(7). RCW 18.108.135 does not require proof that the business was unlicensed. And it does not require proof that the defendants gave massages or were complicit in the giving of massages.

Here the crimes were charged under the theory of accomplice liability. Accomplice liability is not an element that must be charged in an information, and it is not an alternative method of committing the crime.

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<sup>3</sup> Here the second means is not relevant; the Defendants had a *business* license for Treat Your Feet. RP (1/11/19) at 4. They were alleged to have violated the first means only, i.e. they were complicit in the practice of the profession without a *therapist* license.

*State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974, 977 (2004). “[T]he elements of a crime are considered the same for a principal and an accomplice.” *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974, 977 (2004). A defendant is an accomplice if, “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).

Under this theory, the Defendants are held to the same liability as the party which practiced massage without a license. It is not that they permitted massages by others to occur. It is that they are liable as if they themselves had given the massages, because they knowingly caused them to occur.

Negligent (or even knowing) permission to another does not establish that the defendants were accomplices to unlawful practice. It does not require proof that the owners caused the act to occur by directing others to give massages knowing that such command would result in the directive being carried out.

Because a violation of RCW 18.108.035 does not establish a violation of RCW 18.130.190(7), the statutes are not concurrent. Neither law is the special to the other more general statute. Therefore, the State was

not required to charge under RCW 18.108.035. And the court made no error in denying the motion to dismiss.

**B. The charges are consistent with legislative intent to hold practitioners responsible for their licensing and to provide tools to regulate the massage industry and support investigations of human trafficking by creating a new class of defendant, the owner who is not complicit but merely condones unlicensed practice.**

The Defendants claim that, in enacting RCW 18.108.035, the legislature intended to treat the unlawful practice of massage therapy more leniently than the unlawful practice of other health professions. OBA at 16. If anything, the opposite is true. The legislature intended to provide additional tools to regulate the massage industry more rigorously in order combat human trafficking.

Chapters specific to other health professions regulated under Chapter 18.130 RCW, such as dental hygienists, ocularists, dietitians, or genetic counselors, do not include provisions similar to RCW 18.108.035 which would punish owners for their employees' licensing issues. Chapter 18.29 RCW; Chapter 18.55 RCW; Chapter 18.138 RCW; Chapter 18.290 RCW. Perhaps this is because these professionals tend to be found in offices owned and run by a higher tier of health professionals -- dentists or doctors who are themselves heavily regulated. Chapter 18.32 RCW; Chapter 18.71 RCW.

But another reason, articulated in Judge Arend's order, is the association between massage and human trafficking. CP 118-22, 233-37. Unlike or at least more than other health-related businesses, massage is used as a cover for the human trafficking of laborers and sex workers. Chapter 18.108 RCW has the purpose of providing "additional tools so that the regulatory agency has authority to make reasonable inspections of the premises in which services subject to this chapter are being provided in order to [...] support state investigations of human trafficking and other illicit activity." Laws of 2012, c. 137, sec. 1.

The focus in the Uniform Disciplinary Act (Chapter 18.130 RCW) is on the practitioners only. Thus RCW 18.130.190(7) punishes the practitioner (and accomplices).

But the focus of RCW 18.108.035 is not practitioners. It punishes the owner of the business where the practitioner practices. The statute "furthers the legislative intent of combatting human trafficking by creating a *new* category of persons who are subject to criminal prosecution: the absentee owners of massage parlors who employ people that are giving unlicensed massage, but *only* those that do so with knowledge or negligently." CP 120-21, 235-36. In other words, this statute captures those owners whose acts do not rise to the level of complicity.

The Defendants Yu and Zheng are not members of this class. They were not absentee owners who permitted unlawful practices to take place. They were accomplices to the unlawful practice of massage.

The Defendants allege that “massage without a license is not as inherently dangerous as the unlicensed practice of other healthcare professions.” OBA at 18-19. This is not plausible, as one of the other healthcare professions licensed under RCW 18.130.040 is animal massage therapists. RCW 18.130.040(2)(a)(xx) (regulated under Chapter RCW 18.240). The animal massage therapist chapter does not include a section comparable to RCW 18.108.035.

The Defendants argue that “the practice of massage without a license is not nearly as dangerous as the practice of medicine without a license.” OBA at 19. There are several problems with this argument.

First, medicine is not regulated by Chapter RCW 18.130. RCW 18.130.040(1). Therefore, any comparison is unhelpful.

Second, the Defendants provide no authority to support this claim. Our supreme court has noted that untrained neck massage can result in serious injury. *Myrick v. Bd. of Pierce Cty. Comm'rs*, 102 Wn.2d 698, 707, 677 P.2d 140, 145 (1984), *amended*, 102 Wn.2d 698, 687 P.2d 1152 (1984). Massage can also result in disc herniation, soft tissue trauma, neurologic compromise, spinal cord injury, and even dissection of the vertebral

arteries. Ping Yin et al., *Adverse Events of Massage Therapy in Pain-Related Conditions: A Systematic Review*, EVID BASED COMPLEMENT ALTERNAT MED, Aug. 12, 2014.<sup>4</sup> The worst injuries are caused by untrained or lay persons. E. Ernst, *The Safety of Massage Therapy*, RHEUMATOLOGY, May 30, 2003 (listing cerebrovascular accidents, displacement of a ureteral stent, embolization of a kidney, haematoma, leg ulcers, nerve damage, posterior interosseous syndrome, pseudoaneurism, pulmonary embolism, ruptured uterus, strangulation of neck, thyrotoxicosis and various pain syndromes).<sup>5</sup>

And third, what the policy should be is immaterial to what the policy actually is as enunciated in the law. RCW 18.130.190(7) punishes the practitioner (and accomplices), where RCW 18.108.035 punishes the owner of the business where the practitioner practices. RCW 18.130.190(7) provides for felony penalties; RCW 18.108.035 provides for misdemeanor penalties only. From this it is apparent that the legislature intends to hold the health profession practitioner more responsible for maintaining the practitioner's own license than the business person who merely hires the practitioner. This is appropriate. The person who holds (or should hold) the license is primarily responsible for maintaining his or her license.

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<sup>4</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4145795/>

<sup>5</sup> <https://pubmed.ncbi.nlm.nih.gov/12777645/>

The trial court's ruling furthers the legislative intent.

**V. CONCLUSION**

For the above-stated reasons, the State asks the Court to affirm the Defendants' convictions and sentences.

RESPECTFULLY SUBMITTED this 3rd day of September, 2020.

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**PIERCE COUNTY PROSECUTING ATTORNEY**

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**Superior Court Case Number:** 18-1-01011-1

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