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FEBRUARY 13, 2012

29555-9-III

COURT OF APPEALS

Court of Appeals  
Division III  
State of Washington

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LACEY HIRST-PAVEK, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF OKANOGAN COUNTY

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APPELLANT'S REPLY BRIEF

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## A. ARGUMENT

### 1. UNDER THE FACTS OF THIS CASE THE EVIDENCE IS INSUFFICIENT TO PROVE COMPLICITY.

The State relies on a statement in *State v. Thomas*, 166 Wn.2d 380, 387-88, 208 P.3d 1107 (2009), quoting a phrase from *State v. Guloy*, 104 Wn.2d 412, 431, 705 P.2d 1182 (1985): "To convict an accomplice of premeditated murder in the first degree, the State need not 'show that the accomplice had the intent that the victim would be killed.'" The issue in *Guloy* was whether the court erred in failing to instruct the jury that under the accomplice liability statute, the accomplice must share the same intent as the principal. The court held that identity of intent is not required under the accomplice liability statute.

The issue here is not the propriety of the accomplice liability statute but the sufficiency of the evidence to convict Ms. Hirst-Pavek. As the *Thomas* court went on to point out, to be liable for the principle's acts, the accomplice must know what crime the principal intends to carry out:

The prosecution need only prove that the defendant knew his actions would facilitate the crime for which he was eventually charged. *State v. Cronin*, 142 Wash.2d 568, 581-82, 14 P.3d 752 (2000) ("The State had to prove beyond a reasonable doubt that [the defendant] had general

knowledge that he was aiding in the commission of the crime of murder.”).

*Thomas, supra.*

The State does not attempt to claim that Ms. Hirst-Pavek is liable for premeditated first-degree murder as a principal, only as an accomplice. But, in order to be liable as an accomplice to murder, Ms. Hirst-Pavek would have to have had "knowledge that [s]he was aiding in the commission of the crime of murder." *State v. Cronin*, 142 Wn.2d at 581-82. When the evidence shows that an accomplice intends to aid in the commission of an assault, and the principal instead commits murder, the evidence is insufficient to support the accomplice's conviction of murder, premeditated or otherwise.

The State's evidence tended to show that Ms. Hirst-Pavek's involvement in the death of Ms. Kitterman consisted of her soliciting Ms. Mathis to threaten or assault Ms. Kitterman. Unless Ms. Hirst-Pavek intended Ms. Kitterman's death, and conveyed that intent to Ms. Mathis, she would have no reason to know that Ms. Mathis' actions would go far beyond the scope of assault. No reasonable trier of fact could have found beyond a reasonable doubt that Ms. Hirst-Pavek asked Ms. Mathis to commit an assault with knowledge that it would promote or facilitate the commission of a murder. *See State v. Salinas*, 119 Wn.2d 192,

829 P.2d 1068 (1992). The evidence Ms. Hirst-Pavek was an accomplice to first degree murder is insufficient to support her conviction.

2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE AGGRAVATING FACTOR DEFINED IN JURY INSTRUCTION NO. 31.

The court instructed the jury: “For any of the aggravating circumstance to apply, *the defendant must have been a major participant in acts causing the death* of Michelle Kitterman and the aggravating factor must specifically apply to the defendant’s actions.” (CP 87; RP 1689) Relying on the definition of accomplice, the State argues that because an accomplice is a participant in the crime, and Ms. Hirst-Pavek was convicted as an accomplice, then therefore she was a major participant in the acts causing the death of Ms. Kitterman. The State's argument overlooks the difference between a participant and a "major" participant, and the difference between participation in an crime and a participant in "the acts causing the death." (CP 87)

An accomplice is, by definition, a participant in the crime. But if the word "major" is to be given any meaning, then a major participant is necessarily one whose participation in the crime involves more than merely falling within the definition of an accomplice.

More significantly, the State fails to seriously address the issue of whether Ms. Hirst-Pavek was a major participant in the acts that caused Ms. Kitterman's death. Those acts are clearly identified in the testimony: according to Mr. Hohman, Ms. Mathis stabbed Ms. Kitterman with an ice pick, and Mr. Hohman stabbed her several more times, and then they drove away and left Ms. Kitterman to die. No testimony identifies Ms. Hirst-Pavek as a participant in those acts.

The State argues that Ms. Hirst-Pavek participated in the act of solicitation that constituted an aggravating factor. The State cites *State v. Thomas*, [1]66 Wn.2d 380, this time for the proposition that an aggravating factor does not apply to the commission of the murder but to the commission of the aggravating factor. But the issue in *Thomas* was whether the jury instructions should have required the jury to find the accused personally committed the aggravating factors. Here, the issue is whether the jury followed the court's instruction, which specifically did require the jury to find Ms. Hirst-Pavek was a major participant in the acts constituting the murder.

The State points out that existing case law does not clearly require the court to give the instruction used here. (Resp. Br at 31, n. 6). The instruction was, however, given. It was not objected to and became the

law of the case. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); *State v. Abuan*, 161 Wn. App. 135, 156, 257 P.3d 1 (2011).

In short, the issue is not whether the aggravating factor of solicitation applies in this case as a matter of law, but, rather, whether the jury could find the aggravating factor under the instructions given by the court. The court expressly instructed the jury: “For any of the aggravating circumstance to apply, *the defendant must have been a major participant in acts causing the death* of Michelle Kitterman and the aggravating factor must specifically apply to the defendant’s actions.” (CP 87; RP 1689)

There is no evidence Ms. Hirst-Pavek was a participant in the acts that caused Ms. Kitterman's death, let alone a major participant. The aggravating factor should not have been applied at sentencing.

## B. CONCLUSION

Evidence that Ms. Hirst-Pavek knew about and helped plan an assault is insufficient to support her conviction as an accomplice to first degree premeditated murder committed in the course of the assault. The first degree murder conviction should be reversed. Evidence that Ms. Hirst-Pavek participated in the death of Ms. Kitterman as an accomplice was insufficient to support finding that she was a major participant in the

acts that caused the death; the sentence of life without the possibility of parole should be reversed.

Dated this 13th day of February, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,            )  
  )  
                                  Respondent,    )       No. 29555-9-III  
  )  
                          vs.                    )       CERTIFICATE  
  )       OF MAILING  
LACEY HIRST-PAVEK,            )  
  )  
                                  Appellant.    )  
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I certify under penalty of perjury under the laws of the State of Washington that on February 13, 2012, I mailed copies of Appellant's Reply Brief in this matter to:

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Signed at Spokane, Washington on February 13, 2012.

  
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