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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30806-5-III

STATE OF WASHINGTON, Respondent,

v.

JOSE GARCIA MORALES, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Authorities Cited.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....10

VI. CONCLUSION.....21

CERTIFICATE OF SERVICE22

AUTHORITIES CITED

Federal Cases

District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).....21

Nye & Nissen v. U.S., 336 U.S. 613, 69 S. Ct. 766, 93 L. Ed. 919 (1949)..... 16

Washington State Cases

In re Welfare of Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979)..... 16

State v. Barnes, 153 Wn.2d 378, 103 P.3d 1219 (2005).....11, 12

State v. Britton, 27 Wn.2d 336, 178 P.2d 341 (1947).....12

State v. Gladstone, 78 Wn.2d 306, 474 P.2d 274 (1970).....16

State v. Griffin, 100 Wn.2d 417, 670 P.2d 265 (1983).....11

State v. Jackson, 137 Wn.2d 712, 976 P.2d 1229 (1999).....17

State v. Koch, 157 Wn. App. 20, 237 P.3d 287 (2010).....11, 12, 13

State v. Palmer, 1 Wn. App. 152, 459 P.2d 812 (1969).....14

State v. Redden, 71 Wn.2d 147, 426 P.2d 854 (1967).....14

State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974).....14

State v. Robinson, 73 Wn. App. 851, 872 P.2d 43 (1994).....18-19

State v. Rotunno, 95 Wn.2d 931, 631 P.2d 951 (1981).....15

State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997).....11

I. INTRODUCTION

Jose Garcia Morales¹ was convicted of the first degree murder of Alfredo Garcia and the first degree attempted murder of Maria Garcia, along with two counts of first degree assault against their daughters, Erika and Maricela Garcia, arising from a shooting inside the Garcias' home. At trial, the evidence tended to show that the shooter was Morales' brother, Ramon Garcia Morales. The defense challenged Jose's complicity, based on evidence of his lack of motive and statements made by the daughters shortly after the shooting that he shot no one, pointed a gun at no one, and stopped Ramon from shooting the daughters. In support of the theory of defense, Jose requested five instructions on accomplice liability, all of which were accurate statements of law. The trial court refused them all.

The refusal to give the defense's proffered instructions deprived Jose of a fair trial because it did not allow him to argue his theory of the case – namely, that Jose's involvement in the shooting did not rise to the level of criminal complicity. Moreover, the instructions given were ambiguous and confusing in defining criminal complicity, permitting the jury to convict based on legally insufficient grounds. The instructional

¹ Because the members of the Garcia family and the two Morales brothers respectively share last names, this brief will refer to the individuals involved by first name as needed for clarity. No disrespect is intended.

error was not harmless beyond a reasonable doubt. The jury's verdict should be reversed and the case remanded for a new trial.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in failing to give the defendant's proposed instructions on accomplice liability.

ASSIGNMENT OF ERROR 2: The trial court's failure to give the defendant's proposed instructions deprived him of due process of law by denying him the opportunity to present a defense.

ASSIGNMENT OF ERROR 3: The trial court's instructions on complicity, read in the context of the instructions as a whole, were ambiguous and misleading to the jury.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Did the defendant's proposed jury instructions on accomplice liability accurately state the law? YES.

ISSUE 2: Was there sufficient evidence presented to warrant giving the instructions requested by the defense? YES.

ISSUE 3: Were the defendant's proposed jury instructions necessary to allow the defense to properly argue its theory? YES.

ISSUE 4: Were the court's instructions on accomplice liability ambiguous, confusing and misleading, in the absence of the clarifying instructions proposed by the defense? YES.

ISSUE 5: Would the jury have reached the same conclusion beyond a reasonable doubt if the proposed instructions had been given? NO.

IV. STATEMENT OF THE CASE

On the night of December 10, 2008, police responded to a 911 call in Pasco reporting a shooting inside a home. III RP 448, 450-51. Inside the house, they found Alfredo Morales deceased, having been shot several times in the chest. III RP 451, 472. Maria Garcia was alive but unresponsive, also the victim of multiple gunshot wounds. III RP 451-52, 466.

Two of the Garcias' daughters, Erika and Maricela, were in the home and witnessed the shooting. IV RP 602-03, 605; 719-21. They both identified Ramon and Jose from a photo montage the morning after the shooting. IV RP 574-77. Both Maricela and Erika described Ramon to police as the person who shot Alfredo and Maria. IV RP 577. They described Jose as "the guy that was standing by the door holding the gun acting like a lookout." IV RP 579-80.

Jose and Ramon were arrested the day after the shooting in Elmore County, Idaho, after a locate was put out on their vehicle. IV RP 560-62. Jose was charged with the first degree murder of Alfredo Garcia, the first degree attempted murder of Maria Garcia, and two counts of second degree assault against Erika and Maricela, with firearm enhancements as to each charge.² III CP 401-04.

At trial, the State presented evidence that Jose and Ramon went to the Garcias' house and were arguing loudly with Alfredo about money. III RP 518-19. Alfredo was in charge of compiling a list of workers at an onion packing facility and the Morales brothers had not been put on the crew. III RP 519, 521-22. Maria testified that Ramon was demanding to go to the foreman's house immediately and Jose was reminding Alfredo of numerous jobs they had worked on together, encouraging Ramon by stating that everything he was saying was true. III RP 523, 543. She then heard Alfredo say, "[Y]ou don't need that, Ramon. You don't need that gun. We can just talk with words." III RP 524. She then went to call the police and did not remember anything that happened afterward. III RP 537. On cross-examination, she acknowledged that Ramon was the one

² The State also charged Jose with first degree rendering criminal assistance, but withdrew the charge at the close of its case. VI RP 1067.

asking for money and that Jose was working in the onion fields at the time. III RP 531, 534.

The testimony of Erika and Maricela differed from each other, as well as from earlier statements, in several critical respects. A detective presented evidence that immediately after the shooting, Erika told him that Jose stopped Ramon from shooting them. VI RP 1038-40, 1042. She also told the detective in that initial interview that Jose did not shoot Alfredo or Maria. VI RP 1050.

According to Erika's trial testimony, however, both Jose and Ramon were shooting her parents when she came into the room. IV RP 605. They switched guns while pausing to reload and went back to shooting them. IV RP 607. Jose then went to the door and opened it to look outside before coming back in. IV RP 608. Erika did not know what he was doing, and he did not say anything about the police. IV RP 609. She testified that Jose and Ramon pointed the gun at her and her sisters when Alfredo told them not to shoot, and Jose and Ramon went back to shooting them. IV RP 608-09. Jose and Ramon then went back towards the girls, but then left. IV RP 640. As soon as they left, Erika called 911. IV RP 648.

On cross-examination, Erika admitted previously stating that Ramon had asked whether they should shoot the girls and Jose responded that he didn't know. IV RP 627. On another occasion, Erika stated that Jose did not answer Ramon's question because he went to the door. IV RP 629. She also said previously that only one person was doing the shooting and the other was reloading. IV RP 628. Later she stated that Ramon took and reloaded the gun and gave another gun to Jose. IV RP 636.

Likewise, the detective who questioned Maricela immediately after the shooting testified that she said Jose did not fire or point a gun at anybody, and also told Ramon that the girls should not be shot. VI RP 1056-58. However, Jose did nothing to stop Alfredo and Maria from being shot by Ramon. VI RP 1059.

But at trial, Maricela testified that she saw Ramon shooting her parents before approaching her and Erika and pointing the gun at them. IV RP 721. She said Alfredo told Ramon not to shoot them, and Jose gave his gun to Ramon to shoot Alfredo again. IV RP 722-23. But she testified previously that Jose gave Ramon some bullets and later acknowledged she did not remember whether it was a gun or bullets. IV RP 737-38. She also said that while Ramon was asking if he should shoot them, Jose was

just standing there. IV RP 735. In a prior statement, she said that in response to Ramon's question, Jose said, "Duh," and Ramon said, "[B]ut they're young." IV RP 736. And in a previous trial, Maricela said that Jose answered, "Of course." IV RP 739. She was adamant that Jose did not point a gun at her or her sisters at any point. IV RP 740.

The defense presented evidence that Ramon had run out of money and was issued a three-day notice to pay or vacate at his apartment. V RP 866. At the time of the shooting, he had a negative balance in his bank account. V RP 926-27. Ramon and Jose's sister, Virginia, testified that Ramon was considered the head of the family. V RP 868-69. A few days before the shooting, she had been unable to reach Ramon by phone, which was unusual. V RP 869-71. When she saw him, the day of the shooting, he was not acting normally and said that he was going to "chat with Alfredo." V RP 875-76. Another relative testified that on the day of the shooting, Ramon's wife Estella called and asked if they could stay at the relative's apartment for a few days, but only Estella arrived. V RP 914-15, 917. The defense also presented Ramon's confession, in which Ramon stated that he was in financial trouble and blamed Alfredo. VI RP 1124. He told Virginia and Jose that he was going to approach Alfredo to pay part of what he missed out on for not working or he would kill him. VI RP 1124. Ramon said that both he and Jose were carrying guns but

Jose never fired a shot. VI RP 1125. At the house, they were talking for a long time when Alfredo and Maria lunged at him and Jose, so he began shooting, took Jose's gun and continued shooting. VI RP 1126. Ramon denied pointing the guns at Maricela and Erika and said that as they left, Jose went back to get the guns. VI RP 1126.

Following the close of evidence, the defense requested five instructions on accomplice liability as follows:

- Mere assent to the commission of a crime is not enough to make someone an accomplice. CP 115;
- Neither is presence at the scene of a crime sufficient, even when coupled with knowledge that the presence aides [sic] in the crime's commission. CP 116;
- For presence to rise to the level of complicity, the defendant must be ready to assist in the commission of the crime. CP 117;
- Failure to act does not establish complicity. This remains true even if the person had a duty to act. For example a person's failure to protect his or her child from assault does not make the person an accomplice in that assault. CP 118;
- A person is also not an accomplice if that person's sole involvement with the crime arises after the crime was committed. CP 119.

The trial court refused to give the defense instructions, stating that giving WPIC 10.51 was adequate instruction. VI RP 1092. The court's instruction on accomplice liability read:

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. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of criminal activity of another must be shown to establish that a person present is an accomplice.

I CP 57-58.

In closing argument, the State immediately highlighted the complicity instruction as "the key instruction in the case," arguing that accomplice liability is "very broad." VI RP 1157-58. The State emphasized the testimony of multiple witnesses who testified that both

brothers had guns at the time in support of its argument that Jose knew that the shooting was planned. VI RP 1160-61.

The jury convicted Jose of first degree murder, first degree attempted murder, and two counts of second degree assault, all carrying firearm enhancements. VI RP 1191-94. He was sentenced to 906.5 months imprisonment, and now appeals. CP 9, 14.

V. ARGUMENT

When Jose Garcia Morales's case was brought to trial, more than three years after the events to which the witnesses testified, it is natural and understandable that the recollections of such a traumatic event would be inconsistent, as the witnesses would have told their stories numerous times and incorporated new information into their frightened recollections over time.³ The eyewitnesses in this case, Erika and Maricela, were only teenagers when they saw their parents attacked and their father killed. Thus, pointing out the inconsistencies in their testimony is in no way intended to suggest that they consciously tailored their testimony or engaged in any type of deception in recounting what they remembered.

³ The subject of memory fluidity has received considerable attention in the courts, most notably in the context of eyewitness identifications. See *State v. Cheatam*, 150 Wn.2d 626, 644-46, 81 P.3d 830 (2003). Stress can affect a witness's ability to accurately perceive and recall events; the "assimilation factor" can cause witnesses to incorporate subsequently-obtained information into their memories; and discussions with other witnesses can reinforce faulty memories through the "feedback factor." See *U.S. v. Downing*, 753 F.2d 1224, 1230-31 (3rd Cir. 1985).

Rather, the inconsistencies, considered in light of the passage of time and the age of the participants, illustrate precisely why, in light of the lack of clarity concerning the role that Jose played in the shooting, the trial court's refusal to fully instruct the jury on accomplice liability as requested by the defense seriously undermined his ability to obtain a fair trial.

Each side of a criminal case is entitled to have the jury instructed on its theory of the case if there is evidence to support the theory, and failure to so instruct is reversible error. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (citing *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983)). “Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact.” *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010) (citing *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005)). Consequently, an instruction that presents a defense theory of the case should be refused only where the theory is completely unsupported by the evidence. *Koch*, 157 Wn. App. at 33.

Alleged errors in instructing the jury are reviewed *de novo* to determine whether the instructions given permit the parties to argue their

theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *Barnes*, 153 Wn.2d at 382. When an instructional error jeopardizes the constitutional right to present a defense, the burden is on the State to show beyond a reasonable doubt that the jury's verdict would not have been different. *Koch*, 157 Wn. App. at 40 (citing *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)).

In *Koch*, the State charged the defendant with manslaughter and criminal maltreatment for failing to provide necessary care to his elderly father, who had a history of vehemently refusing assistance and treatment. 157 Wn. App. at 26-27. Koch's theory of defense was that forcing unwanted treatment upon his father would have constituted an assault and requested an instruction on language derived from case law that forcing unwanted treatment could constitute an assault. *Koch*, 157 Wn. App. at 28. The trial court declined the instruction and instructed the jury according to the Washington Pattern Jury Instructions. *Id.*

In reversing Koch's conviction, the Court of Appeals observed that the instructions did not allow the jury to consider the ramifications of the history between the parties and the possibility of a defense to the charge. *Koch*, 157 Wn. App. at 35. It noted that the language in the definitional instructions did not adequately inform the jury that it could consider the

past history of refusal, and failed to inform the jury that the decedent had a right to be free from unwanted bodily invasion through forced care. *Id.* at 37. Furthermore, the refusal to give the instruction rendered the defendant unable to negate the mental state element. *Id.* at 39-40.

In the present case, as stated by defense counsel in closing argument, there was no question who shot Alfredo and Maria Garcia – Ramon did. VI RP 1180. Thus, the primary issue presented to the jury to consider was the nature and extent of Jose’s complicity with Ramon. In considering this issue, the jury was necessarily required to grapple with multiple conflicting facts presented at trial, such as:

- Whether Jose stopped Ramon from shooting Erika and Maricela, or said “of course” he should shoot them;
- Whether Jose ever shot Alfredo or Maria or pointed his gun at Erika and Maricela, or was simply present;
- Whether Jose acted “as a lookout” for Ramon during the shooting, or only took the guns and left town with Ramon after the shooting occurred;
- Whether Jose had foreknowledge of Ramon’s intentions; and
- Whether Jose gave a gun or bullets to Ramon during the shooting, or Ramon took Jose’s gun from him.

In light of the conflicting trial testimony, there was sufficient evidence to support the defense theory that Jose was merely present at the shooting, failed to stop Ramon from acting, and rendered assistance after the fact. Thus, if the proffered instructions on the limitations of accomplice liability were accurate statements of the law, the trial court should have given them.

The first instruction proffered, “Mere assent to the commission of a crime is not enough to make someone an accomplice,” is derived from *State v. Renneberg*, 83 Wn.2d 735, 739, 522 P.2d 835 (1974). The *Renneberg* Court relied upon the holdings of *State v. Redden*, 71 Wn.2d 147, 426 P.2d 854 (1967) and *State v. Palmer*, 1 Wn. App. 152, 459 P.2d 812 (1969) in expounding this statement of law, although the *Renneberg* Court’s holding rejected the defendant’s proposed instruction that required an “overt act” to find complicity. 83 Wn.2d at 470.

In the present case, the requested instruction was necessary to dispel confusion in the pattern instruction concerning the sufficiency of Jose’s presence at the scene and verbal support for his brother’s arguments. The instruction given advised the jury that more than mere presence and knowledge of another’s criminal activity must be shown to establish complicity. However, in apparent contraction, the instruction

defines a person as an accomplice if he aids in the commission of the crime, and further defines “aid” as “all assistance, whether given by words, acts, encouragement, support, or presence.” I CP 57-58. As a result of this plain contradiction, the instructional language is at best ambiguous as to whether presence alone can constitute sufficient “aid” to establish complicity. The proffered instruction would have served to clarify this ambiguity by establishing for the jury that to be convicted, Jose had to do more than allow the shooting to occur. Consequently, if the jury found Jose’s involvement was limited to being present, supporting his brother’s argument, and failing to stop the shooting from happening, there would be insufficient grounds to convict him as an accomplice.

The second instruction proffered, “Neither is presence at the scene of a crime sufficient, even when coupled with knowledge that the presence aides [sic] in the crime’s commission,” is a nearly direct quotation from *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). Notably, the *Rotunno* Court reversed the defendant’s conviction based on the accomplice liability instruction failing to adequately inform the jury that presence alone was insufficient to establish criminal complicity. 95 Wn.2d at 935.

Here, the pattern instruction given by the court does correctly state that mere presence and knowledge of criminal activity is insufficient. However, as described above, the court's pattern-based instruction directly contradicts the language of *Rotunno* cited in the proffered instruction by providing in the definitional provisions that presence at the scene can be sufficient "aid" to give rise to accomplice liability. The court's instruction further fails to establish for the jury that "encouragement" alone, when based solely on one's presence at the scene of a crime, is insufficient; there must be some evidence that the intent of the person present is to encourage the criminal act. *In re Welfare of Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979). Here, Jose's proffered instruction attempted to more clearly delineate the limits of accomplice liability by instructing the jury, correctly, that even presence that actually serves to assist in the crime being committed is insufficient to establish complicity without adequate proof that the defendant "associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed." *State v. Gladstone*, 78 Wn.2d 306, 311, 474 P.2d 274 (1970) (quoting *Nye & Nissen v. U.S.*, 336 U.S. 613, 619, 69 S. Ct. 766, 93 L. Ed. 919 (1949)).

The third instruction proffered, "For presence to rise to the level of complicity, the defendant must be ready to assist in the commission of the

crime,” was arguably addressed in that portion of the court’s instruction that reads, “A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.” Again, however, in light of the ambiguities resulting from the court’s pattern instruction defining sufficient “aid” as including “presence” and “encouragement,” the defense’s instruction would have provided additional clarity that the defendant’s intention to participate in bringing about the crime is the crux of accomplice liability.

The fourth instruction proffered stated, “Failure to act does not establish complicity. This remains true even if the person had a duty to act. For example a person’s failure to protect his or her child from assault does not make the person an accomplice in that assault.” This legal principle is nowhere addressed in the court’s instruction. The proffered instruction correctly states that Washington’s accomplice liability statute does not permit imposition of liability for failing to perform an act. *State v. Jackson*, 137 Wn.2d 712, 722, 976 P.2d 1229 (1999).

In the present case, there was evidence of numerous failures to act on Jose’s part that the jury could have relied upon to establish his complicity. He did not stop Ramon from shooting Alfredo and Maria. He did not stop Ramon from taking his gun to continue shooting them. He

did not prevent Ramon from leaving the house until the police arrived. And while it is unquestionable that such failures to act are deeply unfortunate, and certainly contributed to the commission of the crime, the failures in and of themselves are insufficient evidence of criminal complicity. Under the court's pattern instruction, the jury could have convicted Jose for such failures to act as a type of "aid" rendered to Ramon, even if it determined that Jose did not know about Ramon's plans or intend to facilitate them. The proffered instruction would have precluded this possibility.

Finally, the fifth requested instruction stated, "A person is also not an accomplice if that person's sole involvement with the crime arises after the crime was committed." In the present case, the jury could have inferred from the conflicting evidence that Jose did not initially participate in the shooting, but provided assistance to Ramon after the fact by retrieving the guns and/or accompanying him to Idaho after the shooting. But the case relied upon by the defense in proposing the instruction, *State v. Robinson*, 73 Wn. App. 851, 872 P.2d 43 (1994), establishes that assistance after the fact does not establish complicity in the commission of the antecedent crime.

In *Robinson*, the defendant was driving a car when his friend jumped out, grabbed a woman's purse, and then got back into the car. 73 Wn. App. at 852. The defendant saw the purse and drove off, let the friend off at another friend's house, and did not report the incident to the police. *Id.* The court of appeals reversed Robinson's conviction for second degree robbery as an accomplice, concluding that because the principal had completed the robbery at the time he got back into Robinson's car, Robinson had not "associated himself with [the] undertaking, participated in it with the desire to bring it about, nor sought to make the crime succeed by any actions of his own." *Id.* at 857. Instead, the court concluded, Robinson's likely culpability was for rendering criminal assistance, which was not charged. *Id.* at 858.

Similarly here, a jury could have found that Jose did not assist Ramon until after the crimes were already committed. Consequently, the jury should have been instructed that it could not convict Jose for the crimes based solely on any assistance he gave to Ramon after the shootings already occurred.

Because the court refused the defense's proffered instructions, it deprived the jury of the legal standards necessary to fully and fairly evaluate Jose's criminal responsibility. It further precluded the defense

from being able to fully develop the argument that even if Jose was present, even if his presence was helpful to Ramon in committing the crime, and even if he provided assistance after the fact, as a matter of law, those facts alone would be insufficient to convict him as an accomplice. Under *Koch*, the instructions were legally accurate, supported by the evidence, and should have been given to allow the defense to fully and fairly develop its theory of the case. The failure to do so is a denial of Jose's constitutional right to present a defense to the charges against him.

Accordingly, the burden is upon the State to prove beyond a reasonable doubt that the jury's verdict would not have differed had it been correctly instructed. In light of the conflicting evidence presented in this case and the many possible permutations of what the jury could have believed, this showing cannot be made. Because the jury was instructed to consider any assistance in committing the crime, including assistance comprising mere presence, there is virtually no interpretation of the facts presented at trial that would have precluded conviction. The instructions given would have permitted conviction if the jury concluded Jose was complicit merely by being present at the scene with his brother, being armed with a handgun,⁴ or providing assistance after the fact. Although a

⁴ Defendant notes that merely carrying and possessing a handgun, absent more, is a constitutional right protected under the Second Amendment to the U.S. Constitution.

verdict based on such factors would have been contrary to law, because the instructions given permitted such conclusions, there can be no assurance that the jury's verdict was actually based on the more stringent, but accurate, legal standards of complicity.

VI. CONCLUSION

For the reasons set forth herein, Morales respectfully contends that the trial court erred in denying his requested instructions clarifying the nature and extent of accomplice liability. In refusing to give the instructions, the trial court deprived Morales of his ability to present a meaningful defense to the charge. Moreover, the instructions given failed to adequately circumscribe the limits of accomplice liability, which were tested by the facts in this case. Based on the instructional error, which was not harmless, this court should vacate the conviction and sentence, and remand the case to the trial court for a new trial.

RESPECTFULLY SUBMITTED this 22nd day of April, 2013.



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District of Columbia v. Heller, 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (“Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.”).

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 22nd day of April, 2013 in Walla Walla, Washington.



Andrea Burkhart