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JULY 16, 2013
Court of Appeals
Division III
State of Washington

NO. 308065-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JOSE GARCIA MORALES, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR FRANKLIN COUNTY

NO. 08-1-50496-3

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

On December 9, 2008, Ramon Garcia Morales told family members that he and his brother, the defendant herein, were planning to go to Alfredo Garcia's residence the next day. (RP¹ 1124). Ramon² blamed Alfredo for his desperate financial condition. (RP 1124). Ramon was going to demand money from Alfredo; if Alfredo did not pay, Ramon would kill him. (RP 1124).

Both brothers armed themselves with firearms, Jose with a .45 caliber, Ramon with a 9 millimeter. (RP 1125). Both brothers demanded money from Alfredo, and they both used loud and demanding voices and were ordering him to pay. (RP 518, 520, 547). Both demanded that Alfredo take them to a foreman's residence. (RP 522-23).

Alfredo's wife, Maria, went to call 911. (RP 524). That is the last she remembers of that night. (RP 524).

Maria was shot four times, once to the face, the right chest, the left chest, and the left lung. (RP 466). Maria's spinal cord was fractured,

¹ Unless dated, "RP" refers to the Verbatim Report of Proceedings, Volumes I-VII, filed by Court Reporter Patricia L. Adams.

² To make it easier to differentiate between Ramon Garcia Morales, Jose Garcia Morales, Alfredo Garcia, and Maria Garcia, the State will use their first names. We do not mean any disrespect. The child victims will be referred to as "E.G." and "M.G."

leaving her unable to walk. (RP 466, 527).

Alfredo was shot six times, including to the right thigh, the back of the right chest, the right back, twice in the trapezius, and in the right chest. (RP 472-73, 476, 479, 481, 483-84). He died as a result of the gunshots. (RP 487).

Alfredo and Maria's teenage daughters, E.G. and M.G., were home and heard the gunshots. (RP 604, 721). E.G. saw both Ramon and Jose shoot her parents. (RP 605). M.G. saw Ramon shoot her father. (RP 721). Both girls saw Ramon and Jose switch guns after Ramon had run out of bullets. (RP 607, 722-23). After doing so, either Ramon by himself, or both Ramon and Jose continued to shoot E.G. and M.G.'s parents. (RP 607-08, 723).

Both Jose and Ramon pointed their guns at E.G. and M.G. (RP 608). Alfredo asked them not to shoot his daughters. (RP 608). In response, Ramon shot Alfredo one final time. (RP 608, 1125).

Detective Thatsana believed that E.G. told him that Jose stopped Ramon from shooting her and M.G. (RP 1042). However, that statement is not in Thatsana's recorded interview with E.G. (RP 1044). It is possible that Detective Thatsana could have misheard E.G.'s statement about her father's plea that Ramon not shoot his daughters, and thought she was referring to Jose making that plea. (RP 1045).

In all interviews, E.G. was clear that Jose did not intervene to prevent Ramon from shooting her and/or M.G.:

- To Sgt. Monroe, first police officer on the scene: “They shot them.” RP (455).
- At Ramon’s trial: Jose did not respond when Ramon asked if they should shoot the girls. (RP 630).
- In an interview with Jose’s defense attorneys: Ramon asked Jose if they should shoot the girls. Jose did not respond, but went to the door. (RP 640).

At some point, both girls state that Jose went to the door, as if checking to see if the police were coming. (RP 608, 722). M.G. remembers that when Ramon asked if they should shoot her and E.G., the defendant responded, “of course.” (RP 739). They did not shoot the girls, because they thought the police were coming. (RP 743).

Whether or not both Ramon and Jose shot Alfredo, two guns were used to shoot him. (RP 768). Pathologist Dr. Brandon Selove recovered two bullets from Alfredo’s body. (RP 491). One bullet was from a .45 caliber firearm, while the other was from a .38 caliber firearm. (RP 772).

Jose carried the firearms out of the crime scene. (RP 1126). Jose and Ramon fled and were arrested in Elmore County, Idaho on December 11, 2008. (RP 560, 562). Jose was found guilty of Murder in the First

Degree regarding Alfredo, Attempted Murder in the First Degree regarding Maria, and two counts of Assault in the Second Degree regarding E.G. and M.G. (CP 10, 33, 35, 36, 39, 41).

II. ARGUMENT

A trial court's refusal to give a proposed jury instruction is reviewed for an abuse of discretion. *In re Detention of Pouncy*, 168 Wn.2d 382, 390, 229 P.3d 678 (2010). The Court reviews de novo alleged errors of law in jury instructions. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Garcia Morales does not argue that the given instruction was an error of law, but rather that his proposed instructions should have been given in addition to the WPIC for accomplice liability. Therefore, the Court should use the abuse of discretion standard.

The right to due process of law requires that the jury be fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Jury instructions are sufficient where they allow the parties to argue their theories of the case, are not misleading, and properly inform the jury of the applicable law. *Barnes*, 153 Wn.2d at 382. Moreover, the instructions must be read as a whole, and a requested instruction need not be given if the subject matter is adequately covered elsewhere in the instructions. *State v. Etheridge*, 74 Wn.2d 102, 110, 443 P.2d 536 (1968).

The accomplice liability instruction given in our case is the standard one set forth by WPIC 10.51. (CP 57).

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 the criminal activity of another must be shown to establish that a person present is an accomplice.

(CP 57-58).

This WPIC instruction mirrors the language of the statute, except that it contains a further definition of the word “aid.” *See State v. Aiken*, 72 Wn.2d 306, 349, 434 P.2d 10 (1967). Washington’s accomplice liability statute permits the jury to convict a defendant as an accomplice of the principal crime only when the defendant knew that he or she was promoting or facilitating “the crime.” RCW 9A.08.020; *State v. Cronin*,

142 Wn.2d 568, 579, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 510, 14 P.3d 713 (2000). In addressing the issue of “a crime” vs “the crime” language in *State v. Roberts*, the Court affirmed its holding in *State v. Davis*, 101 Wn.2d 654, 656, 682 P.2d 883 (1984), which approved of an instruction that mirrored the language of the accomplice liability statute. *Roberts*, 142 Wn.2d at 512.

The instruction was also approved in *State v. Williams*, 28 Wn. App. 209, 662 P.2d 885 (1981). In *Williams*, the Court addressed the same issue present here: Should the trial court have given supplemental language to the accomplice liability instruction? *Id.* at 211. The trial court in *Williams* provided the exact same instruction for accomplice liability used in our case. *Id.* The defendant in *Williams* proposed the same instruction, but with the following sentence added to the last paragraph:

However, a person does not “aid” unless, in some way, he associates himself with the undertaking, participates in it as something he desires to bring about, and seek by his action to make it succeed.

Id.

Similarly here, the defendant appears to argue that because the language he proposed was found in appellate decisions, the court was required to include them. However, as the Court in *Williams* noted, “The

fact that certain language is used in an appellate court decision does not mean that it must necessarily be incorporated into a jury instruction.” *Id.* at 212 (citing *Turner v. Tacoma*, 72 Wn.2d 1029, 1034, 435 P.2d 927 (1967); *State v. Alexander*, supra at 335, 499 P.2d 263). The Court ultimately found that WPIC 10.51 adequately allowed the defense theory of the case to be argued to the jury and was not erroneous. *Williams*, 28 Wn. App. at 212.

A. STATE’S RESPONSE TO DEFENDANT’S PROPOSED JURY INSTRUCTIONS

1. FIRST INSTRUCTION

The defendant requested five separate instructions to supplement the accomplice liability instruction. (CP 115-19). The first requested instruction was “mere assent to the commission of a crime is not enough to make someone an accomplice.” (CP 115). The defendant argues that this language is “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.” (App. Brief at 14).

The defendant also states his instruction is necessary because the accomplice liability statute is ambiguous; however, the instruction has been approved over and over by Appellate Courts and he fails to cite any case law in support of his position that WPIC 10.51, as it is currently

written, is inherently ambiguous. *See generally, State v. Hoffman*, 116 Wn.2d 51, 102-03, 804 P.2d 577 (1991); *State v. O'Neal*, 126 Wn. App. 395, 418-19, 109 P.3d 429 (2005), *Affirmed*. 159 Wn.2d 500, 150 P.3d 1121 (2007); *State v. Moran*, 119 Wn. App. 197, 209-10, 81 P.3d 122 (2003); *State v. Allen*, 116 Wn. App. 454, 464-65, 66 P.3d 653 (2003). The State does not disagree that more than “mere assent” is necessary to find complicity, and this legal standard is clearly stated in WPIC 10.51. This instruction satisfies completely the point the defendant was trying to make. The language from WPIC 10.51 includes: “However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.” The State fails to see how the defendant’s instruction could have added anything of value considering the appropriate language was already contained within WPIC 10.51.

The defendant’s proposed instruction was superfluous at best and not necessary for him to argue his theory of the case. The court’s decision to not include that instruction because it was found in another instruction was within its discretion. *Etheridge*, 74 Wn.2d at 110.

The trial court’s instruction allowed the defendant to argue his theory of the case, that he was present, but did not assist his brother in shooting the victims.

2. SECOND INSTRUCTION

The defendant's second proposed instruction states: "Neither is presence at the scene of a crime sufficient, even when coupled with knowledge that the presence aides in the crime's commission." (CP 116). Again, this principle is already covered within WPIC 10.51, and the case the defendant cites to doesn't support his position that his language should have been included.

The defendant relies upon *State v. Rotunno*, 95 Wn.2d 931, 631 P.2d 951 (1981), in support of his argument that this instruction should have been used. However, in *Rotunno* the error was that the trial court failed to use the entire WPIC 10.51 instruction, leaving out the following language: "A person who is present at the scene and is ready to assist by his or her presence is aiding in the commission of the crime." *Id.* at 933. The State used the entire WPIC instruction and did not have any omissions found in *Rotunno*. (CP 57-58).

3. THIRD INSTRUCTION

The defendant's third proposed instruction stated: "For presence to rise to the level of complicity, the defendant must be ready to assist in the commission of the crime." (CP 117). This legal principle was already addressed within the WPIC given, which stated "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.” (CP 57; WPIC 10.51). Using the defendant’s instruction to supplement the WPIC would have been redundant.

4. FOURTH INSTRUCTION

The defendant’s reliance upon *State v. Jackson*, 137 Wn.2d 712, 976 P.2d 1229 (1999) in support of his fourth proposed instruction is misplaced. The defendant argues it was error for our court to not include language including the following: “Failure to act does not establish complicity.” (App. Brief at 17). *Jackson*, however, does not stand for the proposition that this language is required. In *Jackson*, the Court used a modified and incorrect version of WPIC 1051. Their instruction included the following modification, with the modified part in italics:

Unless there is a legal duty to act, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice; a legal duty exists for a parent to come to the aid of their small children if physically capable of doing so.

Jackson, 137 Wn.2d at 720-21.

The addition of the language shown in italics was an error of law by having liability based upon omission liability, since Washington’s accomplice liability is not that broad. *Id.* at 725. The issue in *Jackson* was not that the trial court failed to include the language requested by the defendant, but that it included additional language stating accomplice liability could be predicated on a failure to act. Our instruction was not

modified in any such manner, and *Jackson* does not provide the defendant any relief.

5. FIFTH INSTRUCTION

The defendant's fifth proposed instruction states the following: "A person is also not an accomplice if that person's sole involvement with the crime arises after the crime was committed." (CP 119). This language is based upon the holding in *State v. Robinson*, 73 Wn. App.851, 857, 872 P.2d 43 (1994). *Robinson*, however, did not address jury instructions, but rather was a review to the sufficiency of the evidence. Nowhere in *Robinson* does the Court reject WPIC 10.51, or state that Garcia-Morales's proposed instruction is required.

The trial court's instructions did not misstate the law and were not misleading; they made the legal standard clear to the jury. The addition of five jury instructions to supplement WPIC 10.51 would be superfluous at best, and at worst would have served to confuse the jury.

In closing, Defense Counsel said, "There is a reasonable doubt. There are several reasons to doubt that Jose Morales did anything other than to go over to that house that day with his brother to talk to Alfredo." (RP 1186). That was the theory of their case, that the defendant was present, but did not assist in the crimes. The defendant was able to argue his theory of the case fully and completely to the jury with the instructions

given. The defendant's proposed instructions, therefore, were unnecessary. Accordingly, the trial court did not abuse its discretion by declining to give the proposed instructions.

**B. EVEN IF THE COURT FINDS ERROR, IT
WAS HARMLESS BEYOND A
REASONABLE DOUBT.**

To warrant reversal, an error must be prejudicial to a substantial right of the party convicted. *State v. Britton*, 27 Wn.2d 336, 338, 178 P.2d 341 (1947). If the Court finds a constitutional error, the State must prove that the error was not prejudicial by showing, beyond a reasonable doubt, that the jury would have reached the same verdict even if the trial court had given the disputed instruction. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The five proposed instructions presented by the defendant all addressed the question of what the defendant's liability was for assisting his brother in the crimes charged. He argues that the failure to give these instructions allowed the jury to find him guilty if they believed he was simply present.

This argument, however, disregards the evidence presented at trial. The State argued the defendant was culpable for the crimes charged, based on evidence that in addition to being present and providing verbal support to his brother, he 1) carried a firearm into the victim's home, 2) handed his

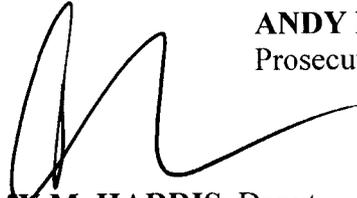
brother a firearm or ammunition, allowing his brother to shoot additional shots into the victims, 3) fired a gun at the victims, and 4) acted as a lookout for his brother. (RP 1157-79).

Much of the State's evidence was based upon three eye witnesses inside the home. The eyewitness testimony of Maria Garcia was that the defendant verbally supported his brother while he was making demands for money. (RP 1159-60). The testimony of E.G. and M.G. was that the defendant was holding a gun while his brother was shooting her parents. (RP 1161). There was further testimony that the defendant handed either a firearm or ammunition to his brother once his brother's firearm ran out of ammunition. (RP 1162). Then his brother fired additional shots into the victims. (RP 1162). It was this testimony that established the defendant was present. It isn't within the realm of imagination that the jurors believed these witnesses regarding the defendant's presence, but not his other actions, and found him guilty based upon mere presence alone. Because the jury would have come to the same conclusion, beyond a reasonable doubt, any error was harmless.

III. CONCLUSION

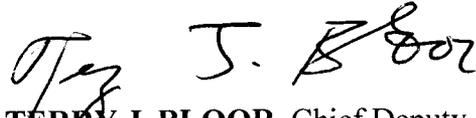
Based on the foregoing argument, the State respectfully requests this Court to affirm the defendant's convictions.

RESPECTFULLY SUBMITTED this 16th day of July 2013.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

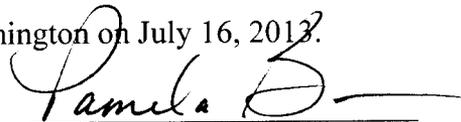
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