

No. 32735-3-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

**FILED**  
**Jun 19, 2015**  
Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON,  
Appellant,

vs.

MARCOS AVALOS BARRERA,  
Respondent.

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APPEAL FROM THE GRANT COUNTY SUPERIOR COURT  
Honorable Evan E. Sperline, Judge

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. APPELLANT’S ASSIGNMENT OF ERROR.....1

B. RESPONDENT’S ISSUE PERTAINING TO  
ASSIGNMENT OF ERROR.....1

C. COUNTERSTATEMENT OF THE CASE.....1

    1. Procedural facts.....1

    2. Substantive facts.....2

D. ARGUMENT.....6

    The court properly granted Avalos Barrera’s CrR 8.3(c) motion to  
    dismiss where the facts, taken in a light most favorable to the State,  
    did not establish a prima facie case of accomplice liability for  
    assault in the first degree.....6

E. CONCLUSION.....15

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>In re Wilson</i> , 91 Wn.2d 487, 588 P.2d 1161 (1979).....	7, 8, 10, 11
<i>State v. Alires</i> , 92 Wn. App. 931, 966 P.2d 935 (1998).....	9, 10
<i>State v. Asaeli</i> , 150 Wn. App. 543, 208 P.3d 1136, <i>review denied</i> , 167 Wn.2d 1001 (2009).....	13, 14
<i>State v. Amezola</i> , 49 Wn. App. 78, 741 P.2d 1024 (1987).....	8
<i>State v. Freigang</i> , 115 Wn. App. 496, 61 P.3d 343 (2002).....	6
<i>State v. Jackson</i> , 82 Wn. App. 594, 918 P.2d 946 (1996), <i>review denied</i> , 131 Wn.2d 1006 (1997).....	7
<i>State v. Knapstad</i> , 107 Wn.2d 346, 729 P.2d 48 (1986).....	<i>passim</i> , 2, 6
<i>State v. Luna</i> , 71 Wn. App. 755, 862 P.2d 620 (1993).....	8
<i>State v. McCreven</i> , 170 Wn. App. 444, 284 P.3d 793, <i>review denied</i> , 176 Wn.2d 1015, 297 P.3d 708 (2012).....	11, 12
<i>State v. Montano</i> , 169 Wn.2d 872, 239 P.3d 360 (2010).....	7
<i>State v. Rotunno</i> , 95 Wn.2d 931, 631 P.2d 951 (1981).....	11
<i>State v. Snedden</i> , 112 Wn. App. 122, 47 P.3d 184 (2002), <i>aff'd</i> , 149 Wn.2d 914, 73 P.3d 995 (2003).....	7
<i>State v. Sullivan</i> , 143 Wn.2d 162, 19 P.3d 1012 (2001).....	6
<i>State v. Wilson</i> , 95 Wn. 2d 828, 631 P.2d 362, 364 (1981).....	12

**Statutes**

RCW 9A.08.020.....7

**Court Rules**

CrR 8.3(c).....1, 2  
CrR 8.3(c)(3).....6

**Other Resources**

Karl B. Tegland, 4A Wash. Prac., Rules Practice CrR 8.3 (7th ed.).....2  
Karl B. Tegland, 11 Wash. Prac., Pattern Jury Instr. Crim.  
WPIC 10.51 (3d ed.).....7

**A. APPELLANT’S ASSIGNMENT OF ERROR**

The trial court erred in dismissing the Assault in the First Degree charges against Marcos Avalos Barrera.

**B. COUNTERSTATEMENT OF THE ISSUE**

Whether the court properly granted Avalos Barrera’s CrR 8.3(c) motion to dismiss where the facts, taken in a light most favorable to the State, did not establish a prima facie case of accomplice liability for assault in the first degree.

**C. COUNTERSTATEMENT OF THE CASE**

1. Procedural facts. On August 7, 2013, a Grant County Deputy Prosecutor charged respondent Marcos Avalos Barrera with two counts of first degree assault committed as principal or accomplice, and two counts of felony harassment (threat to kill). CP 1–4. The Information was supported by a report prepared and finalized by Detective Sal Mancini of the Quincy Police Department. CP 5–137. The detective’s report is comprehensive and contains multiple reports and supplemental reports of other law enforcement officer involved in the investigation of this incident occurring on June 22–23, 2013. *Id.* Detective Mancini’s recommendations for charges against Avalos Barrera only referenced Harassment (threats to kill) and misdemeanor Riot. CP 16. On August

13, 2013, the Honorable Judge John Antosz reviewed Detective Mancini's report and made a finding of probable cause as to the felony harassment counts, but did not find probable cause as to the first degree assault counts. Suppl. CP 385–86.<sup>1</sup>

2. Substantive facts.

This is the State's appeal from the dismissal of Avalos Barrera's charges of first degree assault for lack of evidence of accomplice liability pursuant to CrR 8.3(c)<sup>2</sup>. CP 379–80, 383; RP 23; Brief of Appellant at 5. The State's alleged facts as set forth below are presumed true for purposes of the underlying motion to dismiss and this appeal.

On June 23, 2013, about 7:40 PM, there was a fight at a local convenience store in which Avalos Barrera was knocked to the ground by a member of the Munoz family and was seriously injured. When a police officer arrived to investigate and asked what happened, Avalos Barrera responded, "Don't worry about it, I'll take care of it, street justice," and

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<sup>1</sup> The Order Determining Probable Cause was ordered by Respondent's Designation of Clerks Papers filed on June 15, 2015. Respondent anticipates the assigned page numbers will be as shown herein.

<sup>2</sup> CrR 8.3(c) provides in part: "The defendant may, prior to trial, move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged." "A common defense motion to dismiss is termed a *Knapstad* motion, which is roughly the equivalent of a motion to dismiss for failure to state a claim in a civil case. The motion is normally made prior to trial, as assumed by CrR 8.3(c). See *State v. Knapstad*, 107 Wn. 2d 346, 729 P.2d 48 (1986)." Karl B. Tegland, 4A Wash. Prac., Rules Practice CrR 8.3 (7th ed.).

then walked away. While walking to Humberto Davalos' house, Avalos Barrera passed by the Munoz house and exchanged some heated words with the family. CP 295–96. At least one Munoz family member reported Avalos Barrera making a threat, saying, "...all of you are dead. You guys are all dead" and "...none of you will come back alive tonight." CP 162 The threat formed the basis for felony harassment charges. Court's Oral Ruling at RP 20–21; CP 3, 162.

Later Avalos Barrera went to the hospital where he received medical treatment for his injuries. He told investigating officer Sgt. Snyder of the Quincy Police Department he would take care of the situation, but that nothing would happen that evening. CP 313–14

"The shootout happen[ed] later that evening between the two groups and two homes that are located diagonally across an intersection from each other, Mr. Barrera in the Davalos home area and the Munoz family and their friends at their home across the street and just down the block." Court's Oral Ruling at RP 21; Brief of Appellant at 2.

The Davalos house had a four-camera video security system that recorded portions of their group's part in the shooting. CP 78; Brief of Appellant at 2. According to a summary of police observations of the video contents, the Davalos group was making or returning taunting

gestures towards the Munoz house. Avalos Barrera arrived. At some point he walked up behind Humberto Davalos, who was armed. He yelled something and then withdrew towards the back of the house. The Munoz group fired the first shot and the two groups exchanged gunfire. CP 79–82 at paragraph 13, 16, 17, 20, 25, 31, 34, 39, 40, 46, 48, 49, 50, 53, 54, 56, 57, 64, 65, 68–72, 75. When Davalos was shot in the leg Avalos Barrera came back briefly. After appearing to try to help him up, Avalos Barrera left the property. CP 82 at paragraph 60, 61, 62, 77, 78; Brief of Appellant at 4. Avalos Barrera was unarmed at the time of the gunfire exchange. RP 14, 16; Brief of Appellant at 11. Police subsequently arrived. CP 83 at paragraph 82.

The court explained its basis for granting the *Knapstad* motion and dismissing the assault charges. “The video record of this incident is apparently the only evidence available to the State in regard to who did what when, other than an electronic recording device [] called a shot spotter that purports to have established that the first shots were fired from the Munoz home. What that videotape demonstrates is visual and not audio, but it []demonstrates that Mr. Barrera approached someone else who had a gun drawn and said something to him, and then as best I can

tell, left the area, at least left the area depicted on the video where the disputants were ultimately firing their firearms at the Munoz group.”

“There is no evidence of what Mr. Barrera said to the other participant, there is no evidence that Mr. Avalos Barrera did anything to solicit others to engage [ ]in that assault, that he encouraged them to engage in the assault, that he solicited them to engage in the assault, or that he requested or commanded that anyone engage in an assault. His presence as depicted on the videotape did not do any of those things, [ ]that is, this is not somebody standing there saying, ‘Yeah, go for it,’ or pumping a fist or doing something to encourage the action.”

“If there was any evidence available to the State of what Mr. Avalos Barrera said, and if what he said could be seen as establishing any of the prongs of accomplice liability, the motion should be denied. But apparently there is no evidence available to the State as to what the Defendant said. There is no evidence that his presence at the scene showed that he was ready to assist in an assault. He said something and departed from the area where the shooting occurred. ... [U]nfortunately for the State, [ ]*the bottom line is the jury is asked ultimately to just speculate about that from the fact that Mr. Avalos Barrera was there and from the fact that he had a motive, then we’re, we’re asking the trier of*

*fact to speculate about his conduct, and that the jury is not permitted to do.”* RP 21–23 (emphasis added).

#### **D. ARGUMENT**

**The court properly granted Avalos Barrera’s *Knapstad* motion to dismiss where the facts, taken in a light most favorable to the State, did not establish a prima facie case of accomplice liability for assault in the first degree.**

When the defendant brings a *Knapstad* motion to dismiss the charges against him, “the court shall grant the motion if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt.” CrR 8.3(c)(3). In determining defendant’s motion, the court shall view all evidence and make all reasonable inferences in the light most favorable to the prosecuting attorney. CrR 8.3(c)(3); *State v. Sullivan*, 143 Wn.2d 162, 171 n.32, 19 P.3d 1012 (2001); *State v. Knapstad*, 107 Wn.2d 346, 356, 729 P.2d 48 (1986). When evaluating the State’s evidence on a *Knapstad* motion, the court may only consider competent evidence, i.e. that which would be admissible at trial. *State v. Freigang*, 115 Wn. App. 496, 503, 61 P.3d 343 (2002). The court may not weigh conflicting statements and base its decision on the statement it finds the most credible. CrR 8.3(c)(3). The trial court assumes, for the sake of

argument, the truth of the facts alleged by the State. *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 946 (1996), *review denied*, 131 Wn.2d 1006 (1997).

Similar to reviewing for sufficiency of the evidence, “[a]n appellate court will uphold the trial court’s dismissal of a charge pursuant to a *Knapstad* motion if no rational finder of fact could have found beyond a reasonable doubt the essential elements of the crime.” *State v. Snedden*, 112 Wn. App. 122, 127, 47 P.3d 184 (2002), *aff’d*, 149 Wn.2d 914, 73 P.3d 995 (2003). Given that no facts are in dispute for purposes of a *Knapstad* motion, review by this Court is de novo. *State v. Montano*, 169 Wn.2d 872, 876, 239 P.3d 360 (2010).

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 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. See Karl B. Tegland, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.51 (3d Ed) and RCW 9A.08.020.

The State must demonstrate something more than presence alone plus knowledge of ongoing criminal activity to establish the intent requisite to finding Avalos Barrera to be an accomplice. *In re Wilson*, 91

Wn.2d 487, 492, 588 P.2d 1161 (1979). “One does not aid and abet unless, in some way, he 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. Amezola*, 49 Wn. App. 78, 89, 741 P.2d 1024 (1987) (quoting *In re Wilson*, 91 Wn.2d at 491). “Aid” means all assistance whether given by words, acts, encouragement or support. *Amezola*, 49 Wn. App. at 88. Thus, the defendant must be ready to assist in the crime. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). “Even though a bystander's presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt. It is not the circumstance of ‘encouragement’ in itself that is determinative, rather it is encouragement plus the intent of the bystander to encourage that constitutes abetting.” *In re Wilson*, 91 Wn.2d at 492.

The State concedes there is no direct evidence Avalos Barrera solicited, commanded or asked another person to commit the assault or aided another person in planning the assault. *See* Brief of Appellant 7–12. The State maintains circumstantial evidence shows Avalos Barrera assisted and encouraged the assault (1) because he yelled toward the opposing group and “assisted” Davalos after he was shot (Brief of

Appellant at 9) and (2) because of his earlier threats he “must have known” about the assault and “[i]t is not ‘speculation’ to conclude that Avalos Barrera did exactly what he said he would do.” Brief of Appellant at 10–11.

The trial court correctly decided that because there is no audio component to the surveillance video, one cannot determine whether Avalos Barrera was encouraging an assault by saying, for example, “Yeah, go for it.”<sup>3</sup> Nor did the video depict him displaying any encouragement-type gestures such as pumping his fist. RP 22. The court concluded there was no evidence that Avalos Barrera’s presence at the scene as depicted on the video showed he was ready to assist in an assault. RP 23.

The State responds that by yelling and appearing to help his friend Davalos after he was shot, Avalos Barrera demonstrated assistance to and the encouragement of an assault. The case upon which the State relies, *State v. Alires*, 92 Wn. App. 931, 966 P.2d 935 (1998), does not support its position. Brief of Appellant at 9. In *Alires*, the defendant was burglarizing a building, and fled with a companion when the police showed up. Alires denied any connection with or acting in concert with the companion. The State’s evidence consisted of the flight with a

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<sup>3</sup> As defense counsel suggested, Avalos Barrera could have been saying something like, “You guys put your guns away. This is crazy.” RP 14.

companion, some white paint on his shirt that matched a windowsill at the building where the burglary took place, and profuse sweat on the defendant after running the short distance back to police when ordered to come back or be shot. The court held that “[g]iven Mr. Alire’s appearance, presence at the scene and his behavior, it is reasonable to infer Mr. Alire knowingly aided in the commission of the offense.” *Alire*, 92 Wn. App. at 935–36. Here, the State’s evidence does not call into question appearance of Avalos Barrera’s clothing or behavior upon arrival of police. The only thing in common with the *Alire* case is that Avalos Barrera was present at the scene, a circumstance that does not support accomplice liability. *In re Wilson*, 91 Wn.2d at 492. The State’s reliance upon *Alire* is misguided.

The State cites no authority for its argument that an unarmed Avalos Barrera coming out to help his injured friend while shots are being fired around them is evidence of assisting in or encouraging the commission of an assault against the Munoz family. The State presented no evidence Avalos Barrera acted with intent to encourage Avalos’ continued participation in the gunfight rather than with concern for an injured comrade. See, *In re Wilson*, 91 Wn.2d at 492.

Further, to prove that one present is an aider, it must be established that one is “ ‘ready to assist’ ” in the commission of the crime. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951, 952 (1981), citing *In re Wilson*, 91 Wn.2d at 491 (emphasis added). In *In re Wilson*, a juvenile seemed to be part of a group which had stolen weather-stripping, tied it into a rope, and had strung the rope across a road. Sometimes the rope was held taut. Wilson was never actually seen holding the rope nor participating in the theft. He was merely seen with the group, all of whom were charged with reckless endangerment. Wilson's accomplice conviction was reversed because of the absence of testimony that Wilson was seen holding the rope. There was no evidence he aided in the commission of the crime. *In re Wilson*, 91 Wn.2d at 491–92. Here, there is similarly no evidence that Avalos Barrera aided in the commission of assault.

Other cases demonstrate the requisite “readiness to assist” and intent to encourage must be directly connected to commission of the crime. For example, in *State v. McCreven*, 170 Wn. App. 444, 478–79, 284 P.3d 793, *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2012), evidence was found sufficient to support the defendant’s conviction as an accomplice to felony-murder based on second degree assault. The

evidence showed that McCreven was the man who held his hand up to prevent another person from coming to the victim's rescue. The court concluded this was an overt act which aided and assisted others by allowing them to continue their assault on the victim unimpeded.

*McCreven*, 170 Wn. App.at 478–79.

Likewise, in *State v. Wilson* evidence was found sufficient to support defendant's conviction as an accomplice to delivery of a controlled substance. In addition to evidence that Wilson consented to the keeping of marijuana in his home for the purpose of sale, the evidence showed that when a purchaser remarked the price quoted by Wilson's brother seemed high, Wilson told him that it was very good "pot" and well worth the money. The court concluded the intent to encourage was manifest in Wilson's attempt to persuade an apparently reluctant prospect to make a drug purchase. 95 Wn. 2d 828, 832–33, 631 P.2d 362, 364 (1981).

Here, the video shows that Avalos Barrera approached his friend, briefly tried to help him up, and then left the property. Unlike in *McCreven* and *Wilson*, there is no evidence from which a readiness to assist in the commission of an assault or an intent to encourage an assault

could be inferred. The trial court correctly concluded the prima facie evidence was insufficient to support a finding of accomplice liability.

The State alternatively responds that because of his earlier threats Avalos Barrera “must have known” about the assault and “[i]t is not ‘speculation’ to conclude that Avalos Barrera did exactly what he said he would do.” Brief of Appellant at 10–11. The State cites as authority *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001 (2009), a consolidated homicide case where the Court of Appeals dismissed the case against the alleged accomplice, Darius Vaielua. In that case, the evidence presented at trial established that Vaielua spoke with his co-defendants prior to the shooting although the contents of these discussions were unknown, that he drove several of the aggressors to the scene, that he was present at the waterfront park murder scene, and he knew that members of his group were looking for the shooting victim prior to the incident. *Asaeli*, 150 Wn. App. at 568–69.

In reversing Vaielua's conviction, the court concluded that, “[a]t best, this evidence is sufficient to suggest that Vaielua and the others agreed to meet at the park after the bar closed and that Vaielua may have known that someone from his group was trying to locate [the victim]. But the record contains no evidence, direct or indirect, establishing that

Vaielua was aware of any plan ... to assault or shoot [the victim].” *Asaeli*, 150 Wn. App. at 569.

The State maintains it “has the important evidence that was missing in *Asaeli*: evidence of knowledge of the assaults and statements made [earlier in the evening] by Avalos Barrera that he would commit and/or support the assault[.]” Brief of Appellant at 11. However, both Vaielua and Avalos Barrera in fact had knowledge of the shooting or assaults because they were present at the respective scenes. Vaielua was not aware of any plan to assault or shoot the victim. Similarly, although he had made threats, there was no evidence Avalos Barrera planned or conspired, or was aware anyone else planned or conspired, to assault the Munoz family on the night in question. The State’s attempt to distinguish *Asaeli* fails.

In summary, the trial court determined the State’s bare evidence that Avalos Barrera had a motive and was present at the scene would require the trier of fact to impermissibly speculate about possible complicity in the assaults. The court correctly concluded “the evidence available to the State is not sufficient to support accomplice liability of the Defendant under Counts I and II” and that the charges should be dismissed. Court’s Oral Ruling at 23. The trial court did not err.

**E. CONCLUSION**

For the reasons stated, the order dismissing Avalos Barrera's charges of first degree assault should be affirmed.

Respectfully submitted on June 19, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 19, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of respondent:

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