

Nº. 35182-3-III

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

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STATE OF WASHINGTON  
Respondent,

v.

RICARDO MALDONADO,  
Appellant.

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OPENING BRIEF OF APPELLANT

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Appeal from the Superior Court of Walla Walla County,  
Cause No. 16-1-00274-8  
The Honorable John Lohrmann, Presiding Judge

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**TABLE OF CONTENTS**

	<u>Page</u>
<b>A. ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</b>	
1. Mr. Maldonado’s due process rights to effective assistance of counsel were violated by the trial court’s granting of the State’s request to have the jury instructed on accomplice liability.....	1
2. Mr. Maldonado’s due process rights to present a defense were violated by the trial court’s granting of the State’s request to have the jury instructed on accomplice liability.....	1
<b>C. STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>D. ARGUMENT</b>	
1. Instructing the jury on accomplice liability violated Mr. Maldonado’s due process rights to effective assistance of counsel and to present a defense. ....	6
A. Deciding to instruct the jury on accomplice liability after both sides had rested and where the Amended Information did not assert a theory of accomplice liability violated Mr. Maldonado’s right to effective assistance of counsel.....	6
B. Deciding to instruct the jury on accomplice liability after both sides had rested and where the Amended Information did not assert a theory of accomplice liability violated Mr.	

Maldonado’s right to present a defense .....10

**E. CONCLUSION .....11**

## TABLE OF AUTHORITIES

	<u>Page</u>
 <b><u>Table of Cases</u></b>	
<b><u>Federal Cases</u></b>	
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	6
 <b><u>Washington Cases</u></b>	
<i>In re Wilson</i> , 91 Wn.2d 487, 588 P.2d 1161 (1979).....	9
<i>State v. Allyn</i> , 40 Wn. App. 27, 696 P.2d 45 (1985).....	7, 8
<i>State v. Boast</i> , 87 Wn.2d 447, 553 P.2d 1322 (1976).....	9
<i>State v. Cronin</i> , 142 Wn.2d 568, 14 P.3d 752 (2000).....	9
<i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983) .....	10
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	11
<i>State v. Luna</i> , 71 Wn.App. 755, 862 P.2d 620 (1993).....	9
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	6
<i>State v. Purdom</i> , 106 Wn.2d 745, 725 P.2d 622 (1986) .....	7
<i>State v. Sain</i> , 34 Wn.App. 553, 663 P.2d 493 (1983).....	6
<i>State v. Schaffer</i> , 120 Wn.2d 616, 845 P.2d 281 (1993).....	8
<i>State v. Thompson</i> , 60 Wn. App. 662, 806 P.2d 1251 (1991).....	7
 <b><u>Other Authorities</u></b>	
U.S. Const., 6 <sup>th</sup> Amend. ....	10

WA Const., Art. 1 § 22 .....10  
CrR 2.1 .....7

A. ASSIGNMENTS OF ERROR

Mr. Maldonado's due process rights were violated when the trial court agreed to give the State's requested jury instructions on accomplice liability.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Maldonado's due process rights to effective assistance of counsel were violated by the trial court's granting of the State's request to have the jury instructed on accomplice liability.
2. Mr. Maldonado's due process rights to present a defense were violated by the trial court's granting of the State's request to have the jury instructed on accomplice liability.

C. STATEMENT OF THE CASE

**Factual and Procedural Background**

On July 26, 2016, Diego Rivera went to Fishhook Park in Walla Walla County, Washington, with his acquaintances, Ricardo Maldonado, Leonardo Venegas, and Raul Madrigal.<sup>1</sup> The men stayed at the park about an hour then left and drove to some grain elevators.<sup>2</sup>

At the grain elevators, all the men got out of their car and Mr. Rivera went to urinate by a concrete wall.<sup>3</sup> While he was urinating, Mr. Rivera was shot twice in the back.<sup>4</sup> Mr. Rivera turned around and saw Mr. Venegas shooting at him, then stop shooting and hand the gun to Mr.

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<sup>1</sup> RP 143-153, 261-277.

<sup>2</sup> RP 272-279.

<sup>3</sup> RP 279-281.

<sup>4</sup> RP 281.

Maldonado.<sup>5</sup> Mr. Maldonado appeared to try to keep shooting but the gun was out of bullets.<sup>6</sup> Mr. Rivera was shot in his head, his neck, his abdomen, his right leg, above his right knee, his left knee, and his back.<sup>7</sup> When the shooting ended, Mr. Venegas, Mr. Madrigal, and Mr. Maldonado got back into the car and drove away.<sup>8</sup>

After the men drove away, Mr. Rivera pulled out his cell phone and called 911.<sup>9</sup> Police and paramedics responded and Mr. Rivera was taken to the hospital.<sup>10</sup>

At the hospital, Mr. Rivera told his brother that “Chato” had shot him.<sup>11</sup> Mr. Rivera told his brother that Mr. Madrigal was driving and that “Spike” was also present.<sup>12</sup> “Chato” is another name for Mr. Venegas and “Spike” is another name for Mr. Maldonado.<sup>13</sup> Mr. Rivera also told his brother that Mr. Madrigal was present when he was shot.<sup>14</sup> Mr. Rivera’s brother gave this information to Det. Colin who then relayed the information to Det. Good.<sup>15</sup>

On July 27, 2016, Det. Good obtained arrest warrants for Mr.

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<sup>5</sup> RP 282.

<sup>6</sup> RP 282.

<sup>7</sup> RP 80.

<sup>8</sup> RP 285.

<sup>9</sup> RP 286.

<sup>10</sup> RP 26, 35-38, 56-59, 64, 69-75, 128-130, 289.

<sup>11</sup> RP 300.

<sup>12</sup> RP 300-301.

<sup>13</sup> RP 140, 142, 194, 213, 250-252, 266.

<sup>14</sup> RP 292.

<sup>15</sup> RP 254-256, 300-301.

Maldonado and Mr. Venegas.<sup>16</sup> That same day, Det. Good contacted Mr. Madrigal during a traffic stop and convinced him to go to the police station to answer questions.<sup>17</sup> Det. Good interviewed Mr. Madrigal and Mr. Madrigal eventually provided a recorded statement.<sup>18</sup> At the end of the interview, Det. Good arrested Mr. Madrigal for “attempted homicide.”<sup>19</sup>

On July 28, 2016, Mr. Maldonado was charged by information with one count of attempted murder in the first degree.<sup>20</sup>

In September of 2016, Det. Good received information indicating that Mr. Maldonado was in Kentucky, so he informed the Kentucky authorities and Mr. Maldonado was taken into custody.<sup>21</sup>

Mr. Madrigal was charged with attempted first-degree murder,<sup>22</sup> but pleaded guilty to rendering criminal assistance<sup>23</sup> in exchange for testifying against Mr. Maldonado.<sup>24</sup>

On January 1, 2017, the charge against Mr. Maldonado was amended to attempted murder in the first degree while armed with a

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<sup>16</sup> RP 248, 252.

<sup>17</sup> RP 240.

<sup>18</sup> RP 240-241.

<sup>19</sup> RP 244.

<sup>20</sup> CP 4-5.

<sup>21</sup> RP 248-249.

<sup>22</sup> RP 221.

<sup>23</sup> RP 222-224.

<sup>24</sup> RP 226.

firearm.<sup>25</sup> Mr. Maldonado was not charged as an accomplice.<sup>26</sup>

Mr. Maldonado's trial began on February 7, 2017.<sup>27</sup>

Mr. Madrigal testified and claimed that he saw Mr. Maldonado shoot Mr. Rivera and then pass the gun to Mr. Venegas.<sup>28</sup> Mr. Madrigal testified that Mr. Venegas tried to shoot Mr. Rivera but the gun was empty and Mr. Venegas complained to Mr. Maldonado that Mr. Maldonado had wasted all the bullets.<sup>29</sup>

Mr. Rivera testified that it was Mr. Venegas who shot him and then passed the gun to Mr. Maldonado but he did not know if Mr. Maldonado shot him or if the gun was out of bullets.<sup>30</sup>

After the State had rested, Mr. Maldonado brought a motion to dismiss the charge against Mr. Maldonado on the basis that the State had failed to present sufficient evidence of premeditation to permit the case to go to the jury.<sup>31</sup> The trial court denied the motion.<sup>32</sup>

After the State<sup>33</sup> and Mr. Maldonado<sup>34</sup> had rested, the parties

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<sup>25</sup> CP 6-7.

<sup>26</sup> CP 6-7.

<sup>27</sup> RP 25.

<sup>28</sup> RP 172-173.

<sup>29</sup> RP 172-173.

<sup>30</sup> RP 281-282.

<sup>31</sup> RP 316-319, 321-322.

<sup>32</sup> RP 323-325.

<sup>33</sup> RP 316.

<sup>34</sup> RP 328.

discussed jury instructions.<sup>35</sup> The State requested the court instruct the jury on accomplice liability, even though the charge against Mr. Maldonado had not been amended to include an accomplice liability theory.<sup>36</sup> Trial counsel for Mr. Maldonado objected to the accomplice liability instruction arguing that if he had known the State was asserting accomplice liability that he would have questioned the witnesses differently and conducted more in-depth examination about whether Mr. Maldonado was an accomplice.<sup>37</sup> The trial court gave the instruction over Mr. Maldonado's objection.<sup>38</sup>

Mr. Maldonado also requested the court instruct the jury on rendering criminal assistance as a lesser-included crime to attempted first-degree murder.<sup>39</sup> The trial court refused to give such instructions.<sup>40</sup>

The jury found Mr. Maldonado guilty of attempted second-degree murder and also found by special verdict that he was armed with a firearm at the time of the shooting.<sup>41</sup>

The trial court sentenced Mr. Maldonado to 206 months imprisonment followed by 36 months community custody.<sup>42</sup> Notice of

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<sup>35</sup> RP 329-348.

<sup>36</sup> RP 329-333.

<sup>37</sup> RP 329.

<sup>38</sup> RP 332-333.

<sup>39</sup> RP 350-351.

<sup>40</sup> RP 352.

<sup>41</sup> CP 66-67; RP 436-437.

<sup>42</sup> CP 94.

Appeal was filed on April 5, 2017.<sup>43</sup>

D. ARGUMENT

**1. Instructing the jury on accomplice liability violated Mr. Maldonado's due process rights to effective assistance of counsel and to present a defense.**

A. Deciding to instruct the jury on accomplice liability after both sides had rested and where the Amended Information did not assert a theory of accomplice liability violated Mr. Maldonado's right to effective assistance of counsel.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel.<sup>44</sup> The constitutional right to have the assistance of counsel, Art. I, § 22, carries with it a reasonable time for consultation and preparation, and a denial is more than a mere abuse of discretion; it is a denial of due process of law in contravention of Art. I, § 3 of the Washington State Constitution.<sup>45</sup>

The Amended Information charged Mr. Maldonado with having committed attempted first-degree murder as the primary actor and did not mention accomplice liability.<sup>46</sup> After both parties had rested, the State

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<sup>43</sup> CP 111-129.

<sup>44</sup> *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

<sup>45</sup> *State v. Sain*, 34 Wn.App. 553, 558, 663 P.2d 493 (1983).

<sup>46</sup> CP 6-7.

requested the court instruct the jury on accomplice liability and the court granted the request over Mr. Maldonado's objection.<sup>47</sup>

The trial court may permit the State to amend the information any time before verdict or finding if the substantial rights of the defendant are not prejudiced or the amendment is one of mere form, not substance.<sup>48</sup>

"The defendant has the burden of showing specific prejudice to a substantial right."<sup>49</sup> A defendant might be prejudiced if the amendment leaves him without adequate time to prepare a defense to the charge.<sup>50</sup> In *State v. Purdom*,<sup>51</sup> for example, the State originally charged the defendant with conspiracy to deliver a controlled substance. But on the first day of trial, the State amended the information, replacing the conspiracy charge with an accomplice charge.<sup>52</sup> Our Supreme Court concluded that the trial court should have granted the defense's request for a continuance to prepare to defend against this new charge.<sup>53</sup>

By contrast, in cases where the amendment was not material, courts have properly allowed the State to amend the information while

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<sup>47</sup> RP 329-333.

<sup>48</sup> CrR 2.1(d); *State v. Allyn*, 40 Wn. App. 27, 35, 696 P.2d 45 (1985).

<sup>49</sup> *State v. Thompson*, 60 Wn. App. 662, 666, 806 P.2d 1251 (1991).

<sup>50</sup> *State v. Purdom*, 106 Wn.2d 745, 749, 725 P.2d 622 (1986).

<sup>51</sup> 106 Wn.2d 745, 746, 725 P.2d 622 (1986).

<sup>52</sup> *Purdom*, 106 Wn.2d at 746.

<sup>53</sup> *Purdom*, 106 Wn.2d at 749.

denying the defense's continuance request.<sup>54</sup> For example, in *State v. Schaffer*,<sup>55</sup> the court correctly permitted a midtrial amendment that added an additional theory of criminal liability when the defendant was aware that the State might pursue that theory before the amendment, the theory arose from the same general factual circumstance, and the defendant had the opportunity to cross-examine the key witness with full knowledge of the proposed amendment.

Mr. Maldonado and his trial counsel were completely unaware throughout the trial that the State might pursue a theory of accomplice liability. In this case the State did not move to amend the charges, but instructing the jury on accomplice liability was tantamount to an amendment to the charges since it added an additional theory of criminal liability that Mr. Maldonado had not been aware he would have to defend against.

When objecting to the State's request for the accomplice liability instruction, counsel for Mr. Maldonado informed the court that if he had known the State was asserting accomplice liability that he would have questioned the witnesses differently and conducted more in-depth

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<sup>54</sup> See *State v. Schaffer*, 120 Wn.2d 616, 621–22, 845 P.2d 281 (1993); *Allyn*, 40 Wn. App. at 35.

<sup>55</sup> 120 Wn.2d 616, 622, 845 P.2d 281 (1993).

examination about whether Mr. Maldonado was an accomplice.<sup>56</sup> This is a critical area of inquiry in this case since the jury was presented with facts clearly indicating that Mr. Maldonado was present at the scene of the shooting but the degree of his involvement was the issue the jury was required to decide.

In this case, a continuance would not have cured the prejudice against Mr. Maldonado because both parties had rested. Further, Mr. Maldonado was deprived of the opportunity to cross-examine the State's witnesses with full knowledge that the State would assert a theory of accomplice liability. If the State was not allowed to pursue a theory of accomplice liability, the State's burden would have been to prove that Mr. Maldonado was the person who actually fired the gun. Instructing the jury on accomplice liability greatly reduced the State's burden since Mr. Maldonado could have been found guilty simply because he was present with readiness to help the shooting occur.<sup>57</sup>

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<sup>56</sup> RP 329.

<sup>57</sup> Guilt cannot be inferred by mere presence and knowledge of activity. *In re Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979). "[I]n order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged." *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). "Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime." *State v. Luna*, 71 Wn.App. 755, 759, 862 P.2d 620 (1993). Presence at the scene of an ongoing crime may be sufficient if a person is "ready to assist." *Wilson*, 91 Wn.2d at 491, 588 P.2d 1161. The accomplice must do something in association with the principal to accomplish the crime. *State v. Boast*, 87 Wn.2d 447, 455-56, 553 P.2d 1322 (1976).

Trial counsel for Mr. Maldonado was not given the opportunity to be fully prepared to defend Mr. Maldonado against a charge of being an accomplice to attempted first-degree murder. Depriving Mr. Maldonado's trial counsel of the ability to prepare to cross-examine the State's witnesses about Mr. Maldonado's role as an accomplice to the crime and to actually conduct such cross-examination violated Mr. Maldonado's constitutionally guaranteed right to effective assistance of counsel.

- B. Deciding to instruct the jury on accomplice liability after both sides had rested and where the Amended Information did not assert a theory of accomplice liability violated Mr. Maldonado's right to present a defense.

The right to present testimony in one's defense is guaranteed by both the United States and the Washington Constitutions.<sup>58</sup> The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor.” Similarly, article I, section 22 of the Washington Constitution guarantees that “[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf.”

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<sup>58</sup> *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983).

The Washington Supreme Court has held that the Sixth Amendment is violated where a defendant is effectively barred from presenting a defense due to the exclusion of evidence.<sup>59</sup>

As discussed above, the trial court permitted the State to assert an entirely new theory of criminal liability after both parties had rested despite Ms. Maldonado and his trial counsel being completely unaware that the State would pursue such a theory of liability. Also as pointed out above, trial counsel for Mr. Maldonado objected to the accomplice liability instruction and informed the court that he would have questioned the State's witnesses differently and more in-depth had he been aware he would have to defend Mr. Maldonado against a charge of being an accomplice to attempted first-degree murder rather than being the principle actor.

Permitting the State to add a theory of accomplice liability to the charge against Mr. Maldonado deprived Mr. Maldonado of the opportunity to present a full defense against the charge of being an accomplice to first-degree attempted murder.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Maldonado's conviction and remand his case for a new trial.

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<sup>59</sup> *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010).

DATED this 11<sup>th</sup> day of September, 2017.

Respectfully submitted,



Reed Speir, WSBA No. 36270  
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 11<sup>th</sup> day of September, 2017, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Walla Walla County Prosecutor  
Public Safety Building  
240 W. Alder Street, Suite 201  
Walla Walla, WA 99362

And to:

Mr. Ricardo Maldonado, DOC# 397047  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

Signed at Tacoma, Washington this 11<sup>th</sup> day of September, 2017.



Reed Speir, WSBA No. 36270

**LAW OFFICE OF REED SPEIR**

**September 11, 2017 - 7:49 AM**

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