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

STATE OF WASHINGTON,

Respondent,

v.

RICARDO MALDONADO,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the court's instruction on accomplice liability deprive the Defendant of effective assistance of counsel?
2. Did the court's instruction on accomplice liability deprive the Defendant of his right to present a defense?

IV. STATEMENT OF THE CASE

The Defendant Ricardo Maldonado has been convicted of attempted murder in the second degree with a firearm enhancement. CP 66-67, 88. The offense is yet another¹ shooting in Walla Walla motivated by a desire to

¹ *State v. Dodd*, 181 Wn. App. 1029 (2014); *State v. Arroyo*, No. 34593-9, 2017 WL 5046370 (Wn. App. filed Nov. 2, 2017) (unpublished, nonbinding but citable authorities under GR 14.1).

silence someone believed to be a witness. CP 76-77, 176. The parties are associated with the 18th Street gang. RP 145-49, 261-63.

Mr. Rivera and Raul Madrigal-Corona both testified at trial that on July 26, 2016, they had traveled to Fish Hook Park with the Defendant and Leonardo Corona Venegas. RP 151-67, 265-78. On the way back, they testified that the four stopped by some grain elevators where Mr. Rivera was shot in the back. RP 162-65, 169-72, 272, 278-81. Mr. Madrigal testified that he saw the Defendant shoot Mr. Rivera, then pass the gun to Mr. Venegas who tried to shoot Mr. Rivera as well, only to find (and complain) that the Defendant had used all the bullets. RP 172-73. Mr. Rivera survived being shot by eight bullets, but is paralyzed from the chest down. RP 289-91, 376. His recollection of what he saw before he passed out was that Mr. Venegas shot first and that the Defendant tried second. RP 281-82, 287-88.

The Defendant did not call any witnesses. RP 325-27. The jury was then excused while the parties discussed jury instructions. RP 327-28. The State proposed an accomplice liability instruction. CP 38-39; RP 329.

Defense counsel complained that such an instruction was an “unfair surprise,” claiming that “there is probably more testimony I could have gotten out of the [State’s] witnesses as to whether they saw Ricardo do anything to

be considered even an accomplice.” RP 329.

The prosecutor pointed out there was no credible claim of unfair surprise. While the attorneys can never be certain that the evidence will come out at trial exactly as it had in the pretrial investigation, in this case, the witnesses had in fact “stayed consistent with what they told the police and in the interviews.” RP 330.

... we all knew that the one witness was going to say the defendant shot first and we all knew that the other witness was going to say Leonardo shot first. So there is no surprise there. And I don't think it should be a surprise at this point that, you know, we're now going to be looking at jury instructions and for the State to submit as a potential, based on the facts of the case as it came out, that accomplice is a potential theory.

RP 330. The defense did not dispute these facts. RP 332. And in fact the record demonstrates that the testimony was consistent with police reports. CP 1-3 (the Certificate of Probable Cause provides a summary of the earliest police reports); CP 74-77 (the first section of the presentencing investigation summarizes all the police reports).

The prosecutor reminded the court that an accomplice is treated the same as a principal. RP 329. *See also State v. McDonald*, 138 Wn.2d 680, 687, 981 P.2d 443, 448 (1999) (“principal and accomplice liability are not alternative means of committing a single offense”). The court confirmed that

complicity is not an element of the crime. RP 330. *See also State v. Gamboa*, 38 Wn. App. 409, 413-14, 685 P.2d 643 (1984) (elements remain the same whether charge is as a principal or accomplice).

The court instructed the jury on accomplice liability, stating: “It makes a lot of sense in the context of this case.” CP 58; RP 332.

The appeal challenges the giving of this instruction.

V. ARGUMENT

A. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL’S STRATEGY WAS NOT DEPENDENT ON AN ASSUMPTION OF PRINCIPAL LIABILITY AND THE DEFENDANT DEMONSTRATES NO PREJUDICE.

The Defendant’s claim is that his attorney was unable to provide effective assistance of counsel in the face of the jury instruction. Brief of Appellant (BOA) at 6-10.

In order to show ineffective assistance of counsel, the Defendant has the burden of showing both (1) that his attorney’s performance was deficient and (2) that this deficiency prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Deficient performance is that which falls “below an objective

standard of reasonableness based on consideration of all the circumstances.”
State v. McFarland, 127 Wn.2d at 334-35.

To demonstrate prejudice, the Defendant must show a reasonable probability that but for the deficient performance, the outcome of the trial would have been different. *In re Crace*, 174 Wn.2d 835, 843, 280 P.3d 1102 (2012). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

The analysis of any claim of ineffective performance begins with a “strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The Defendant bears the burden of proving that “there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland v. Washington*, 466 U.S. at 689 (1984).

The Defendant frames this challenge as being about the amendment of the charging information. There was no amendment. No clerk’s paper and

no part of the transcript indicate the information was amended. Nor was there any need for an amendment. The state is not required to charge theories of liability.

[A]n information that charges an accused as a principal adequately apprises him of his potential liability as an accomplice. As stated in *State v. Rodriguez*, “ ‘The complicity rule in Washington is that any person who participates in the commission of the crime is guilty of the crime and is charged as a principal’ .”

State v. Lynch, 93 Wn. App. 716, 722, 970 P.2d 769, 772 (1999)(citing *State v. Rodriguez*, 78 Wn.App. 769, 773–74, 898 P.2d 871 (1995), *review denied*, 128 Wn.2d 1015, 911 P.2d 1343 (1996).) *See also State v. Brecklin*, 163 Wn.2d 519, 182 P.3d 944 (2008) (in absence of accomplice liability instruction, judge properly answered jury question that offense could be accomplished through an act of a third party).

The Defendant claims he received ineffective assistance because his attorney was “completely unaware throughout the trial that the State might pursue a theory of accomplice liability.” BOA at 8. Given the law, his attorney’s experience (RP 394-95), and the comprehensive defense his counsel provided, this is not the case. *State v. McFarland*, 127 Wn.2d at. at 335 (competency of counsel is determined based upon the entire record). The defense which counsel provided his client was exhaustive, expert, and

heartfelt.

Mr. Madrigal was 17 at the time of the shooting and had witnessed up close and personal what happens to a suspected “snitch.” RP 183, 212-13. Although not a gang member, he was familiar with gang culture. RP 209-13. Mr. Rivera was a gang member who nearly lost his life on mere suspicion that he had “snitched.” RP 205. In a case like this, it would not be unusual for a defendant to choose trial over a deal, because the odds are that the witnesses will not cooperate with the prosecution.

When the witnesses showed up, defense counsel challenged every part of the State’s evidence. RP 397, 403. Counsel painted Mr. Madrigal as selfish and callous (RP 404, 406), an unreliable witness who had given inconsistent statements and whose memory only improved after he had taken a deal (RP 209, 213-14, 221-27, 229-30, 400, 409). He discredited Mr. Madrigal for his gang association and minor age consumption of alcohol and marijuana. RP 204-05, 210-14, 407. He played to people’s prejudices by smearing Mr. Madrigal with his immigration² status and right to counsel. RP 227, 406-07.

Defense counsel also undermined the victim’s testimony. He argued

² Under the new evidence rule 413, which will be effective September 1, 2018, this kind of question will be presumptively inadmissible.

that Mr. Rivera had a blurry memory for events, not just because of his injuries, but from drinking too many beers. RP 260 (while under 21), 303. He argued that Mr. Rivera was untrustworthy, having previously lied to police in a sworn statement (RP 310, 414-16) and that he was biased, having an axe to grind against his gang (RP 311-12, 413). He insinuated Mr. Rivera crafted his statement to match what he read in the newspaper. RP 301-02.

Counsel belittled the “additional,” “invented” accomplice instruction. RP 416. He suggested that Mr. Venegas acted alone, a gun-carrying gang member. RP 304, 307. He argued that the physical evidence contradicted the testimony that anyone stood beside the shooter. RP 417-18.

Counsel described his own client as honest and helpful, providing a DNA sample and electronic evidence without a warrant, and aspiring to go to school, “go into the service, [and] take care of his family.” RP 422-23. The jury would not hear of the Defendant’s dishonest or other criminal behavior. CP 78-80, 83. Defense counsel claimed his client was a scapegoat, lacking the gang connections of others. RP 206, 408 (“throw somebody up ... just don’t make it a gang member”), 419. Defense counsel argued that the Defendant was not a gang member, but merely an associate, such that Mr. Madrigal would suffer no repercussions for testifying against him in

exchange for a deal. RP 231-32, 305. Defense even suggested the State may have conspired to gin up false testimony. RP 228-30, 308-09, 412-13.

And counsel was very personable. He made emotional appeals for his client, repeatedly expressing “care” for “Ricardo” and comparing him to his own child Annie. RP 394, 424. He invited the jury to join him in caring and in making a decision that would not cause them to lose any sleep. RP 409.

This was not a defense built entirely, or even significantly, around the theory that only the actual shooter could be held liable. This was a zealous and compelling defense.

Trial counsel claimed that if he had anticipated the instruction, he might have elicited more damning evidence of the State’s witnesses. RP 329 (“there is probably more testimony I could have gotten out of the [State’s] witnesses as to whether they saw Ricardo do anything to be considered even an accomplice”). Just as he had exaggerated his surprise despite the consistency of witnesses’ statements, this was probably another exaggeration by an avid advocate. RP 332 (“I think anything further would just probably get me in trouble, which I have a tendency to do”). Why would counsel want to elicit more damning evidence than the prosecutor had already presented?

Of course counsel anticipated the accomplice liability argument. It has long been the law that accomplice liability inheres in a charge as a principal. Even before the enactment of the current statute, this has been the law. *State v. Olson*, 50 Wn.2d 640, 643, 314 P.2d 465 (1957) (one who aids or abets or counsels or encourages the commission of a crime may be proceeded against as a principal by indictment or information). And counsel has significant experience. RP 394-95 (25 years of trial experience).

Defense counsel may have hoped the prosecutor would fail to request an accomplice instruction. To that end, in cross-examination, he emphasized that there was no pause between gunshots, such that only one person was the shooter. RP 200-01, 204. Defense counsel knew from the police reports and pretrial interviews that the two witnesses had different recollections of who was the primary shooter. CP 2, 76; RP 330. He used this fact in cross-examination and in his half-time motion. RP 204, 317. And he elicited and then argued that the physical evidence contradicted the testimony and proved that the shooter stood alone with no other body to block the shower of spent cartridges. RP 417-18.

The Defendant cannot show prejudice. He argues that prejudice is met by comparing the State's case with and without the accomplice liability

theory. BOA at 9. But because the State is not required to charge accomplice liability, this is not the proper comparison. The question is only whether the Defendant is prejudiced by his counsel's failure to address accomplice liability in greater depth in cross-examination of the State's witnesses.

The Defendant claims his attorney was not given time to prepare. BOA at 10. This is inaccurate. His attorney did not ask for any more time to prepare. Certainly his counsel could have asked to reopen his case and recall the State's witnesses to ask any further questions. *Hyak Lumber & Millwork v. Cissell*, 40 Wn.2d 484, 486, 244 P.2d 253, 254 (1952) (the trial court has discretion to reopen a case); *United States v. Nunez*, 432 F.3d 573, 579 (4th Cir. 2005) (a party may reopen a criminal case with a reasonable explanation). He did not. Nor did he ask for a continuance to prepare to reopen his case. *State v. Purdom*, 106 Wn.2d 745, 748, 725 P.2d 622 (1986) (the trial court has discretion to grant a continuance).

Counsel did not ask for more time for two reasons. First, he was not surprised. The attorney had notice that by law anyone charged as a principal may be convicted as an accomplice. *State v. Lynch*, 93 Wn. App. at 722. And he had constructive notice under the facts in the case. And second, he had already performed a thorough cross-examination of all the State's witnesses.

The Defendant has not shown what evidence his attorney could have elicited if he had asked to reopen. Indeed, his trial counsel only claimed he might have asked more questions of the State's witnesses, which would have emphasized the facts which supported accomplice liability and solidified the State's case against his client.

If Mr. Madrigal had been pressed, he was prepared to provide additional details of complicity. He had informed police that Mr. Venegas and the Defendant sat in the back seat speaking in low voices, giving each other hand signals, and exchanging looks. CP 75. At their first visit to the grain elevators, Mr. Venegas and the Defendant stepped out for two minutes to walk behind the elevators "acting weird." CP 75. At the park, the two continued to whisper to each other. CP 2, 75-76. After the shooting, Mr. Venegas complained the Defendant had used up all the bullets instead of saving one for Mr. Rivera's head. CP 76. The Defendant responded that Mr. Venegas had not told him to save any bullets. CP 76. Mr. Venegas removed the magazine and handed the gun back to the Defendant – demonstrating their partnership. CP 76.

It is not reasonable that defense counsel should want to re-open in order to give the State further opportunity to elicit these facts.

There was strong evidence that the Defendant was the shooter. The Defendant wore a long-sleeved shirt on a hot day in order to conceal the gun, while Mr. Venegas went swimming. RP 167, 269, 276. Mr. Madrigal, who was not injured or intoxicated, witnessed the Defendant shoot the victim and then discuss what he had done. RP 172, 188. And the Defendant fled the jurisdiction, evidencing a guilty mind. RP 248-49.

And, if the jury lacked confidence as to which of the two was the shooter, there was more than enough information on the record to show that the Defendant had accomplice liability. He and Mr. Venegas whispered secretly before attempting to lure the victim behind a grain elevator. RP 162, 164, 186. After the shooting, Mr. Venegas criticized the Defendant for not saving some bullets for him and for leaving behind a phone – demonstrating conspiracy and premeditation. RP 188. They both told Mr. Madrigal to get in the car, and both told him not to say anything – demonstrating action in concert. RP 176, 209.

On this record, the Defendant has not demonstrated a reasonable probability that further questioning of the State's witnesses would have resulted in a different outcome. The Defendant received effective assistance of counsel.

B. THE COURT DID NOT VIOLATE THE DEFENDANT’S RIGHT TO PRESENT A DEFENSE BY PROPERLY INSTRUCTING THE JURY ON ACCOMPLICE LIABILITY.

Citing *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010), the Defendant claims he was prevented from presenting a defense. BOA at 11. His case is unlike *Jones*. There the defendant complained that he was prevented from presenting his version of events. Here the Defendant only complains that the State was permitted to present its version of events. The defendant’s right to present a defense is not a right to prevent the State from making its case.

In *Jones*, the defendant complained that the trial court prevented him from testifying that he engaged in consensual sex with K.D. in “a nine-hour alcohol- and cocaine-fueled sex party” during which K.D. and another woman “danced for money and engaged in consensual sexual intercourse with all three males.” *State v. Jones*, 168 Wn.2d at 717. The trial judge had believed this defense would have violated the rape shield act. *State v. Jones*, 168 Wn.2d at 718. The supreme court held that excluding this testimony violated the defendant’s right to present a defense where there is “a clear distinction between evidence of the general promiscuity of a rape victim and evidence that, if excluded would deprive defendants of the ability to testify to

their versions of the incident.” *State v. Jones*, 168 Wn.2d at 720-21.

In our case, from the record, it is apparent that defense counsel prepared and executed a defense of general denial. The Defendant was not prevented from telling his version of events or from making the argument he intended.

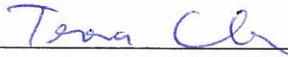
The Defendant did not at trial, and does not on appeal, explain what other argument he wanted to make or what other evidence he wanted to bring in. He did not ask for the opportunity below. He does not explain what he would make of that opportunity now. The claim is without merit.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant’s conviction.

DATED: November 13, 2017.

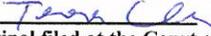
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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
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