

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

STATE OF WASHINGTON,

Respondent,

v.

AMY N. MELAND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Timothy B. Fennessy

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE THE JURY INSTRUCTION DEFINING MANUFACTURE COMPOUNDED BY THE PROSECUTOR'S MISSTATEMENT OF THE LAW DENIED MELAND HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

First and foremost, the State's argument relying on *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988), is misplaced because unlike in *Ng*, the jury instructions as a whole do not cure the ambiguity of the instruction defining manufacture and the prosecutor's misstatement of the law.

The State argues further that *State v. Roberts*, 80 Wn. App. 342, 908 P.2d 892 (1996), "is distinguishable" because the error committed in that case was denying the defendant the right to argue that the marijuana grow belonged to the subtenant but Meland was allowed to argue the grow belonged to a subtenant, her boyfriend. Brief of Respondent at 7 citing *Roberts*, 80 Wn. App. at 344. The State's argument falls short where it distinguishes the issues but does not argue that consequently *Roberts* is inapplicable because it cannot do so. *Roberts* clearly supports appellant's argument that the trial court and the prosecutor misinterpreted the meaning of "indirect." Both the court and prosecutor likened Meland to a landlord, but as the *Roberts* Court concluded, "[a] landlord, knowing that a tenant possesses contraband but failing to evict the tenant, does not, by that failure,

exercise dominion and control over the contraband.” *Roberts*, 80 Wn. App. at 345.

The State argues additionally that there was no error but under a harmless error analysis, any error was harmless and the untainted evidence would “necessarily lead to a finding of guilt.” Brief of Respondent at 9-10.¹ The record belies the State’s argument. Detective Willard testified that there was no evidence of Meland being involved with the marijuana grow other than living at the house. 03/07/17 RP 162-64. Willard checked the electric company records which named Meland as the subscriber, but the power usage did not indicate that marijuana was grown in the house. 03/07/17 RP 161-62, 167.

Where there was no evidence that Meland directly manufactured the marijuana, the ambiguity of the jury instruction compounded by the prosecutor’s misstatement of the law denied Meland her constitutional right to a fair trial.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE STATE’S REQUEST FOR AN ACCOMPLICE LIABILITY INSTRUCTION.

The State argues the trial court “misunderstood the law regarding accomplice liability, stating the State needed to have alleged accomplice

¹ It should be noted that the State fails to comply with RAP 10.3(a)(6) which requires references to the record.

liability in its information.” Brief of Respondent at 11. The State is mistaken because the record reflects that the trial court did not determine that the State must allege accomplice liability in its information:

THE COURT: Thank you. In reviewing the comment section, the court is aware that accomplice liability attaches only when the accomplice acts with knowledge of the specific crime that is eventually charged, rather than with the knowledge of a different crime or a generalized knowledge of criminal activity. And I, it seems to me, Mr. Nelson, *that the Information would read differently*. So, I’m inclined not to give the accomplice instruction.

The Information indicates that, and we told this jury that she knowingly manufactured a controlled substance, so I’m of the opinion that you will have the rules or, pardon me, the instructions to argue your theory of the case, particularly with the indirect or direct portion of the instruction as it’s given. So I’m not going -- I’m not going to give the accomplice instruction at this time.

03/07/17 RP 138 (emphasis added).

The court observed that the information “would read differently,” which does not constitute a misunderstanding of the law. Furthermore, in declining to give the accomplice instruction, the court pointed out that the State could argue its theory of the case using the instruction defining manufacture, which the State did in fact do. In any event, any error was harmless because the jury convicted Meland without the accomplice instruction. *See State v. Harvill*, 169 Wn.2d 254, 263-64, 234 P.3d 1166 (2010), where in contrast, the trial court’s error in failing to instruct the jury

on duress based on an erroneous view of the law was not harmless because the verdict may have been different absent the error.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Meland's conviction.

DATED this 9th day of February, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Spokane County Prosecutor's Office at SCPAAppeals@spokanecounty.org by agreement of the parties.

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

DATED this 9th day of February, 2018

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