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Division III
State of Washington
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

AMIE N. MELAND, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The ambiguity of the jury instruction defining manufacture compounded by the prosecutor's misstatement of the law denied Meland her constitutional right to a fair trial.

2. In the event the State substantially prevails on appeal this Court should deny any request for costs.

II. CROSS-APPELLANT'S ASSIGNMENT OF ERROR

The trial court erred by failing to give the State's requested accomplice instruction.

III. ISSUES PRESENTED

1. Is Jury instruction number 7, which states, "Manufacture means the direct or indirect production, preparation, propagation or processing of any controlled substance" a correct statement of the law?

2. Did the trial court err when it failed to give the State's requested accomplice instruction?

3. Is it proper to award the prevailing party costs on appeal?

IV. STATEMENT OF THE CASE

1. The Investigation.

Christina Rosman owned the property located at East 3117 Carlisle in Spokane, Washington, since 2008, and had allowed Amie Meland to live there since that time. RP 48-49. Meland's father was Rosman's ex-husband

and Rosman had known Meland since 1990. RP 48. They had no written rental or lease agreement. RP 50. Meland lived there with her two children, her boyfriend Devon Porter, as well as Devon's brother, Darrell Porter. Devon had lived in the residence since January 2013. RP 176-77.¹

Officer Strassenberg of the Spokane Police Department was investigating an assault complaint involving Meland and the complainant reported there was a marijuana grow at Meland's home. RP 67-68. While checking the address on his computer, Strassenberg found there was a warrant for Meland's arrest. He asked Officers Huett and Valencia to assist him. RP 68-69. Meland's local information and driver's license check came back to East 3117 Carlisle. RP 68. Meland's driver's license was later found by police in the house, with an address of 3117 East Carlisle on it. RP 78.

On September 21, 2015, officers went to the East Carlisle residence to investigate. RP 67-69. Officer Huett approached the west side of Meland's house. He could see into the backyard and saw a marijuana grow. RP 55. Officer Strassenberg called Officer Willard to write a search warrant for the marijuana grow. RP 71. The warrant was served and the grow was recovered from the backyard. RP 72-73. Twenty-seven plants were recovered. RP 86-87.

¹ Devon Porter and Darrell Porter will be referred to herein by their first names for clarity. No disrespect is intended.

Pursuant to the search warrant, the inside of the house was searched as well. What appeared to be marijuana was lying next to a crock pot in the kitchen. RP 75. Scissors with green smudging or residue on the blades consistent with the cutting of marijuana plants were also located in the kitchen. RP 76. On a table in the northeast basement bedroom, officers located drug paraphernalia, glass pipes and a bong. RP 77. Another bong was found in Meland's bedroom, the southwest basement bedroom. RP 77, 81-82. Drying marijuana plants were found hanging from a pipe in the southeast basement bedroom. RP 78. The Washington State Patrol Crime Lab tested the evidence and determined it was marijuana. RP 119-21. Meland also admitted to personal use of marijuana and to purchasing the drug paraphernalia. RP 181, 186.

2. Jury Instructions.

During the jury instruction conference, the State argued for use of WPIC 50.12. The State argued that use of the bracketed term "direct or indirect" was appropriate under the facts. The State had produced evidence that Meland had allowed the use of the backyard to grow the marijuana, as well as use of the house for drying and processing marijuana. The State asserted that Meland was basically the landlady and had control of the house. RP 132. The court agreed with the State that, based on the evidence, it was an appropriate instruction to give. RP 133.

The State also requested an accomplice instruction, WPIC 10.51. The State argued Meland provided aid “by providing a locus for the growing of marijuana,” and a house in which to process it. RP 135. The court denied the State’s request, saying the information would have had to read differently if Meland were charged as an accomplice. The court said the State could argue the same theory given the “direct or indirect” portion of WPIC 50.12. RP 135, 138.

3. State’s Closing Argument.

The State argued, based on instruction number 7, that Meland had “direct or indirect” involvement in the manufacture of the marijuana grow because she had dominion and control over the house, and because she also allowed the use of her backyard to grow the twenty-seven marijuana plants, she allowed the use of her house to dry two of the marijuana plants, and she allowed the use of her house where marijuana was being “processed, chopped up, dried and prepared in the house.” RP 211-13.

V. ARGUMENT

A. THE JURY INSTRUCTION DEFINING MANUFACTURE, BASED ON WPIC 50.12, WAS PROPERLY GIVEN AND BASED UPON THE LAW. THE PROSECUTOR DID NOT MISSTATE THE LAW.

The court gave instruction number 7, which states, “‘Manufacture’ means the direct or indirect production, preparation, propagation or

processing of any controlled substance.” This is directly from WPIC 50.12.

WPIC 50.12 is based on RCW 69.50.101(v), which states:

“Manufacture” means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term does not include the preparation, compounding, packaging, repackaging, labeling, or relabeling of a controlled substance.

This instruction was upheld in *State v. Stearns*, 59 Wn. App. 445, 799 P.2d 270 (1990), *affirmed* 119 Wn.2d 247, 830 P.2d 355 (1992).

Defendant argues that since the jury made two inquiries asking for a definition of “indirect,” CP 84-85, the instruction was misleading. The court properly directed the jury to “please review the jury instructions previously provided.” CP 84-85.

A trial court has discretion to give further instructions to a jury after it has begun deliberations. *State v. Studebaker*, 67 Wn.2d 980, 987, 410 P.2d 913 (1966); *State v. Langdon*, 42 Wn. App. 715, 718, 713 P.2d 120 (1986). For example, in *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988), the jury sent out a question asking whether “duress” applied to the lesser included charges. The trial court answered with: “Please refer to the instructions. The court cannot provide any additional

instructions or explanations.” Ng argued the trial court should have answered “yes” because it was an accurate statement of the law. Instead, the trial court concluded that:

In my opinion it would have been wrong for the court to further explain the instructions that had been given the jury. Since the instructions answered the [question] that was being asked of the court...

I am satisfied these twelve intelligent people, considering the instructions as a whole, would be aware of the fact that duress is a defense to the charge to the lesser included offense of robbery. Or any other lesser included offense set forth in the instructions as requested by the defendant.

Ng, 110 Wn.2d at 43.

As here, Ng argued that the jury’s question to the trial court manifested an ambiguity in the jury instruction. However, the individual or collective thought processes leading to a verdict “inhere in the verdict” and cannot be used to impeach a jury verdict. *State v. Crowell*, 92 Wn.2d 143, 594 P.2d 905 (1979); *State v. McKenzie*, 56 Wn.2d 897, 355 P.2d 834 (1960); *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1962). Here, the jury’s question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached. “[Q]uestions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict.” *State v. Miller*, 40 Wn. App. 483, 489, 698 P.2d 1123 (citing *State v. Bockman*, 37 Wn. App. 474, 493, 682 P.2d 925, review denied, 102 Wn.2d 1002

(1984)), *review denied*, 104 Wn.2d 1010 (1985). Based on the fact that a jury's questions inhere in the verdict, Ng was unable to demonstrate any abuse of discretion in the trial court's decision to refer the juror's to the instructions as given. *Ng*, 110 Wn.2d at 42-44.

The defendant cites *State v. Roberts*, 80 Wn. App. 342, 908 P.2d 892 (1996), as support that both the court and the prosecutor misinterpreted the meaning of "indirect" by stating that because defendant was essentially a landlady with dominion and control over the premises, she indirectly was manufacturing marijuana. *Roberts* is distinguishable because the error committed in that case was *denying* the defendant the right to argue that the grow belonged to a subtenant. *Roberts*, 80 Wn. App. at 344. Here, the defendant was allowed to argue the grow belonged to a subtenant, her boyfriend. Moreover, dominion and control over premises is one factor a jury may consider in determining whether the defendant had dominion and control, or constructive possession of drugs. *Id.* at 353, citing *State v. Callahan*, 77 Wn.2d 27, 30, 459 P.2d 400 (1969).

The defendant also cites the dissent in *State v. Renneberg*, 83 Wn. App. 735, 750, 522 P.2d. 835 (1974), for the proposition that mere presence or assent to illegal activity is not itself a crime. However, the defendant in *Renneberg* was charged with the crime of aiding and abetting.

Here, no accomplice instruction, though requested by the State, was given. RP 135, 138. The defendant was charged and convicted as a principal.

The defendant cites *State v. McLoyd*, 87 Wn. App. 66, 939 P.2d 1255 (1997), arguing that when jury instructions are ambiguous, the reviewing court cannot assume the jury followed the legally valid interpretation. *McLoyd*, however, concerned the giving of self-defense instructions and whether the jury followed the constitutional, rather than the unconstitutional, interpretation. *Id.* at 71.

Instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theory of the case, and when read as a whole properly inform the jury on the applicable law. *Id.* (citing *Flint v. Hart*, 82 Wn. App. 209, 223, 917 P.2d 590 (1996)). The instructions given, including instruction number 7, properly informed the jury of the applicable law. Because it is the trial court's duty to declare the law, a jury instruction that does no more than accurately state the law pertaining to an issue is proper. *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). A trial court has broad discretion in determining the wording of jury instructions. *State v. Walters*, 162 Wn. App. 74, 82, 255 P.3d 835 (2011). A trial court's decision not to give a proposed instruction is reviewed for abuse of discretion. *Rekhter v. DSHS*, 180 Wn.2d 102, 120, 323 P.3d 1036 (2014). A trial court abuses its discretion when its decision is manifestly

unreasonable or based on untenable grounds. *Terrell v. Hamilton*, 190 Wn. App. 489, 499, 358 P.3d 453 (2015).

The defendant attempts to characterize her claim of error as an issue created by a dominion and control argument by the State; in effect saying since the defendant had dominion and control of the house, it meant she “indirectly” manufactured marijuana. However, both the State’s evidence and argument went far beyond simply dominion and control. While there was substantial evidence of dominion and control showing the defendant was the primary renter since 2008, the State also presented evidence and argued that Meland allowed her boyfriend to use the ground in the backyard to grow the marijuana, and presented considerable evidence of marijuana use inside the residence, including the harvesting and drying of marijuana plants inside the house, and the defendant’s admission that she used marijuana. There was no abuse of discretion or error of law.

B. ANY ERROR WAS HARMLESS.

The final measure of error in a criminal case is not whether a defendant was afforded a perfect trial, but whether he or she was afforded a fair trial. *State v. Green*, 71 Wn.2d 372, 373, 428 P.2d 540 (1967). If the record supports a finding that the jury verdict would be the same absent the error, harmless error may be found. *State v. Berube*, 150 Wn.2d 498, 506, 79 P.3d 1144 (2003). An omission or misstatement in a jury instruction is

subject to a harmless error analysis if it does not relieve the State of its burden of proving every essential element of the crime charged. *State v. Brown*, 147 Wn.2d 330, 339-340, 58 P.3d 889 (2002). In the case at bar, the jury instructions included each and every essential element and the State was not relieved of its burden. CP 75. Therefore, any instructional error was harmless.

Thus, the untainted evidence shows the defendant had dominion and control of the premises: she allowed her boyfriend to use her backyard to grow marijuana; marijuana was found inside her house; drug paraphernalia, which she admits buying, was in her bedroom; drying, harvested marijuana plants were hanging in her house; scissors with green residue on them, indicative of being used to harvest marijuana were in her house; and she admitted personal use of marijuana. The untainted evidence would necessarily lead to a finding of guilt.

C. THE TRIAL COURT ABUSED ITS DISCRETION, DUE TO A MISUNDERSTANDING OF THE LAW, WHEN IT FAILED TO GIVE THE STATE'S REQUESTED ACCOMPLICE INSTRUCTION, WPIC 10.51.

The State requested the trial court to instruct the jury on accomplice liability, asking for WPIC 10.51. The Court misunderstood the law regarding accomplice liability, stating the State needed to have alleged accomplice liability in its information. RP 138.

However, the State is not required to allege accomplice liability in the information. *State v. Teal*, 117 Wn. App. 831, 838, 73 P.3d 402 (2003). Criminal liability is the same whether one acts as a principal or as an accomplice. *State v. Carter*, 154 Wn.2d 71, 78, 109 P.3d 823 (2005). Accomplice liability is not an element or alternative means of committing a crime but, rather, is an alternative theory of liability. *Teal*, 117 Wn. App. at 838. “It is constitutionally permissible to charge a person as a principal and convict him as an accomplice, as long as the *court instructs* the jury on accomplice liability.” *State v. Bobenhouse*, 143 Wn. App. 315, 324, 177 P.3d 209 (2008).

A trial court abuses its discretion if its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). When a trial court’s decision is based on a misunderstanding of the law, it constitutes an abuse of discretion. *Vanderstoep v. Guthrie*, 200 Wn. App. 507, 525, 402 P.3d 883 (2017).

Here, the trial court misunderstood that an information need not charge a defendant as an accomplice in order for a trial court to instruct the jury on accomplice liability. Therefore, the trial court abused its discretion by failing to give the State’s requested accomplice instruction.

D. UNLESS THE DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT’S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HER APPEAL.

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual’s current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

(Emphasis Added).

The trial court determined the defendant to be indigent for purposes of her appeal on March 30, 2017, based on a declaration provided by the defendant. CP 106-11. The State is unaware of any change in the defendant’s circumstances. Should the defendant’s appeal be unsuccessful,

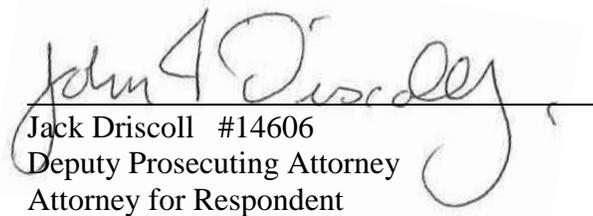
the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

VI. CONCLUSION

For the reasons stated, this Court should affirm Meland's conviction and, additionally find that the trial court abused its discretion when it failed to give the State's requested accomplice liability instruction. Should the defendant's appeal be unsuccessful, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

Dated this 10 day of January, 2018.

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

STATE OF WASHINGTON,

Respondent,

v.

AMY N. MELAND,

Appellant.

NO. 35208-1-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on January 10, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Valerie Marushige
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1/10/2018

(Date)

Spokane, WA

(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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