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NO. 35775-9-III

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

STATE OF WASHINGTON,
Respondent,

v.

JUSTIN LEWIS,
Appellant.

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

The Honorable Scott D. Gallina, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that Lewis committed Assault in the First Degree.
2. The State failed to prove beyond a reasonable doubt that Lewis is guilty of Assault in the First Degree as an Accomplice.

B. ISSUES PRESENTED ON APPEAL

1. Whether the State failed to prove beyond a reasonable doubt that Lewis committed Assault in the First Degree when there was no evidence he had the specific intent to inflict great bodily harm upon Evans?
2. Whether the State failed to prove beyond a reasonable doubt that Lewis was guilty of Assault in the First Degree as an accomplice when the State failed to present any evidence that Lewis knew he was promoting or facilitating Rickman's intent to inflict great bodily harm upon Evans?

C. STATEMENT OF THE CASE

1. Procedural History

Justin Lewis was charged with Assault in the First Degree

(RCW 9A.36.011(1)(a)) against Michael Evans with a special allegation that he or an accomplice was armed with a deadly weapon other than a firearm (RCW 9.94A.533(4)) (amended 2018 Wash. Legis. Serv. Ch. 7 (S.B. 5992) (WEST)). Lewis was also charged with Robbery in the First Degree (RCW 9A.56.200(a)) with a special allegation that he or an accomplice was armed with a deadly weapon other than a firearm (RCW 9.94A.533(4)); Possession of a Controlled Substance (RCW 69.50.4013(1)); and Possession of Drug Paraphernalia (RCW 69.50.412(1)). CP 1-4.

A jury convicted Lewis of all counts and answered yes to both special allegations. RP 347-48; CP 51. This timely appeal follows. CP 73.

2. Substantive Facts

On April 3, 2017, Michael Evans called Codi French for a ride from the Fair Bridge in Coeur d'Alene to Clarkston. RP 178. French was not able to go right away, so she had a friend take Evans to Spokane, where she agreed to meet him. RP 178. French drove to Spokane with Lewis' fiancé, Michelle Curran. RP 161-62. When the women arrived, about 4:00am on April 4, Evans purchased some heroin, he smoked some of the heroin with Curran

and then headed back to Clarkston. RP 164-65, 170. Evans drove French's white pickup truck. RP 162.

The three arrived in Clarkston in the early afternoon. RP 180, 198. Evans parted ways with the women and smoked some more heroin. RP 182, 199. Later that evening, French contacted Evans and they made an arrangement for Evans to sell her some hydrocodone. RP 163. French asked Lewis to pick up Evans in her truck to get the hydrocodone. RP 238. When Lewis met Evans at Albertson's he did not have the drugs in his possession. RP 238-39. Evans said he had to get the drugs from Idaho, so Lewis stopped at his apartment to drop off the methamphetamines he had in his pocket to avoid getting caught with them in Idaho. RP 238, 239-40.

When Lewis came out of the house, he went to the passenger's side of the truck to talk to Evans who sat sideways in the front seat. RP 167. Lewis had a BB gun in his hand and questioned Evans about why earlier a man answered French's phone and said Curran was not there. RP 166-67. While they were talking, Rickman hit Evans in the back of the head two times. RP 168.

Evans testified that he was unsure whether he exited the vehicle voluntarily or Lewis pulled him out of the truck to the ground, but when Evans was out of the truck, Lewis and Rickman started kicking him. RP 168. Evans thought Lewis and Rickman were trying to get his drugs. RP 169. Evans heard Curran say “that’s enough” and looked to her for help, but she did nothing to calm the situation. RP 170-71. Evans got up and ran and left his backpack in the truck. RP 194, 245-46.

Lewis testified that he did not see Rickman hit Evans, but Evans got out of the pickup on his own after he was struck and then became unconscious. RP 243-44. Lewis tried to help Evans up and told Rickman “that’s enough”. RP 244-45. When Evans came to, he was swinging everywhere and he hit Curran in the face. RP 244. Evan also testified that Curran said, “oh, he like – tried to hit me.” RP 170.

Evans ran and hid in a field for a few minutes and then he ran to Robert Bevins’ residence. RP 173. Evans asked Bevins to call an ambulance. RP 209-10. Bevins called 911. RP 211. Asotin County Sheriff Detective Nathan Conley arrived within minutes. RP 8, 211. When Conley arrived, Evans was sitting with a cold

bandage to his head that was bleeding and had an abrasion on his hip. RP 10.

Evans told Conley he was walking down the street and was rushed by two white males he did not know, who beat him and took his backpack. RP 13, 14, 15. Evans also reported seeing a white Chevrolet pickup driving up and down the road and thought it was involved in the incident. RP 16. Evans described Lewis and Rickman and Deputy Vargas and Sergeant Jackson searched the area. RP 17. Evans did not mention that he had heroin on him, that he had recently smoked heroin, or that he knew Lewis, Rickman, or French. RP 124-25.

Officer Vargas spotted the white pickup truck after a couple minutes and made a traffic stop. RP 219, 222. Lewis was driving the truck and French, and her daughter Erica were passengers. RP 223.

When Vargas approached the vehicle, he saw a table leg in the back of the pickup with something metal at the end of it. RP 225. Vargas observed a backpack inside the vehicle, which matched the description of Evans' backpack. RP 225-26. Vargas notified Conley that he detained a white Chevrolet pickup and the

driver had a backpack matching the description of Evans' backpack. RP 18, 22.

Evans refused further medical treatment and instead rode with Conley to the scene for a show up identification. RP 18. Evans identified Lewis and his backpack and Vargas arrested Lewis. RP 22-23, 227.

When Conley searched the vehicle he found a black BB gun pistol inside the passenger compartment. RP 70-71. The table leg in the truck bed had a hex nut at the top and Evans believed it was the weapon Rickman used to hit him. RP 28. However, Conley did not observe any blood on it and no forensic testing was done. RP 135. Similarly, there were no visible blood stains to Evans' clothes and no physical evidence at the scene of the assault. RP 137. The only blood was a small spot on Lewis' shirt, which was later identified as Evans' blood, although, the DNA expert, Brittany Noll, was not qualified to determine if the blood was transferred or splattered. RP 116, 118.

After the show up identification, Evans went to the emergency room, but received no stitches. RP 79, 177. The next evening, Conley went to Evans' residence to follow up and Evans

told Conley the incident had actually arisen out of a drug deal and that he knew Lewis and Rickman. RP 100-01, 102-03.

At trial, the State did not present any medical expert. Evans testified that he still had a mark on his hip, but it was “doing better” and he had no long-term physical difficulties with regard to his injuries. RP 176-77.

The jury found Lewis guilty of Assault in the First Degree and answered yes to the special allegation that Lewis or an accomplice assaulted Evans with a deadly weapon. RP 347-48.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT LEWIS WAS GUILTY OF ASSAULT IN THE FIRST DEGREE.

In a criminal prosecution, the State must prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. *State v. Sundberg*, 185 Wn.2d 147, 152, 370 P.3d 1 (2016) (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (quotations omitted)).

Evidence is sufficient to support a conviction if when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a

reasonable doubt. *State v. Salina*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If there is insufficient evidence to prove an element of a crime, the reviewing court must reverse the conviction. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005); *State v. Irby*, 187 Wn. App. 183, 204, 347 P.3d 1103 (2015).

To convict Lewis of first degree assault, the State had to prove the defendant or an accomplice assaulted Michael Evans; the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death; and the defendant or the accomplice acted with intent to inflict great bodily harm. RCW 9A.36.011(1)(a).

An assault is an intentional touching or striking with unlawful force. *State v. Elmi*, 166 Wn. 2d 209, 215, 207 P.3d 439 (2009). Proof the defendant intended to act in a way likely to bring the specific result is insufficient. *State v. Mancilla*, 197 Wn. App. 631, 647, 391 P.3d 507, *review denied*, 188 Wn. 2d 1021, 398 P.3d 1145 (2017). Instead, the State must prove the defendant intended a specific result; i.e., the infliction of great bodily harm.” *Mancilla*, 197 Wn. App. at 647 (*citing Elmi*, 166 Wn.2d at 216). Although credibility issues are for the finder of fact to decide, the existence of

facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

Instruction number 7 defined great bodily harm as follows:

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

CP 29.

Here, in the light most favorable to the State Lewis only committed two acts of touching that could form the basis of an assault –pulling Evans out of the truck and kicking Evans. RP 168. Neither of these show an intent to inflict great bodily harm.

Although kicking formed the basis of a first degree assault in *State v. Pierre*, 108 Wn. App. 378, 385, 31 P.3d 1207 (2001), the attack on the victim in that case was much more severe because the victim was on the ground bleeding, unresponsive, and defenseless while four to five men surrounded him and each kicked him about fifteen (15) times in the head. The men kicked the victim in a stomping manner and caused permanent brain damage. *Pierre*, 108 Wn. App. at 385-86. This was sufficient to establish both intent to cause great bodily harm and the infliction of great

bodily harm.

In contrast here, Evans could not say for sure whether he voluntarily got out of the truck or Lewis took him out. RP 168. And unlike in *Pierre*, the State presented no evidence that Lewis repeatedly or forcefully kicked Evans. RP 170. Evans' impression was that the defendant and Rickman were trying to get his drugs. RP 169. Lewis even put a stop to the assault, showing that he did not intend to inflict great bodily harm. In the light most favorable to the State, the State did not establish that Lewis intended to inflict great bodily harm upon Evans.

The State also failed to prove that Lewis in fact inflicted significant bodily harm because the injury here, unlike the brain damage in *Pierre* was limited to a cut on the head and a hip abrasion without any visible blood stains on Evans' clothes, no blood at the scene of the assault and no physical evidence of bodily injury that created a probability of death, or caused significant serious permanent disfigurement, or that caused a significant permanent loss or impairment of the function of any bodily part or organ. RP 137. No expert testified about the extent of Evans' injuries and Evans himself testified that he had no long-term

difficulties regarding his injuries. RP 176-77.

“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). Based on insufficient evidence of both the intent to cause great bodily injury and such injury, this Court must reverse Lewis’ conviction and remand for dismissal with prejudice.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT LEWIS WAS GUILTY OF ASSAULT IN THE FIRST DEGREE THROUGH ACCOMPLICE LIABILITY.

To be legally culpable for the actions of another, the State must prove beyond a reasonable doubt that the person is guilty as an accomplice. RCW 9A.08.020; *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2001); U.S. Const. Amend. XIV; Wash. Const. art. I, §§ 21, 22. A person may be convicted as an accomplice to another’s crime only if:

- (a) With the knowledge that it will promote or facilitate the commission of the crime, he or she:
 - (i) Solicits, commands, encourages, or requests such other person to commit it; or
 - (ii) Aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020(3)(a). For accomplice liability to attach, “a defendant must not merely aid in any crime but must knowingly aid in the commission of the specific crime charged.” *State v. Dreewes*, 2 Wn. App. 2d 297, 317, 409 P.3d 1170 (2018) (citing *State v. Brown*, 147 Wn.2d 330, 338, 58 P.3d 889 (2002) (citing *Roberts*, 142 Wn.2d at 509-13)).

Knowing the principal intends to commit “a crime” does not attach accomplice liability for any and all offenses ultimately committed by the principal. *Dreewes*, 2 Wn. App. 2d at 317. The State must prove the defendant acted with actual knowledge that Lewis was promoting or facilitating first degree assault, which requires specific intent. *Dreewes*, 2 Wn. App.2d at 317 (citing *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000)).

A person has actual knowledge if that person “has information which would lead a reasonable person in the same situation to believe” he or she was promoting or facilitating the crime charged. *Dreewes*, 2 Wn. App. 2d at 318 (citing RCW 9A.08.010(1)(b)(ii)). Actual knowledge of accomplice liability may be proved through circumstantial evidence. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

Brown, Cronin, and Dreewes establish that in order for Lewis to be charged with accomplice liability, he had to know that he was aiding in first degree assault knowing Rickman was armed with a deadly weapon with intent to cause significant injury to Michael Evans. *Dreewes*, 2 Wn. App.2d at 318. In other words, he had to know that Rickman intended to inflict great bodily harm on Evans.

Dreewes is illustrative. In that case, several items were stolen from Jennifer Dreewes' truck parked outside her home, including a credit card. *Dreewes*, 2 Wn. App. 2d at 300. Although Dreewes reported the theft to police, she conducted her own investigation and learned a girl named Nessa used her credit card. *Dreewes*, 2 Wn. App. 2d at 301-02. Dreewes learned of an address connected to Nessa and recruited Michelle Thomas and Don Parrish to break into the house with firearms and to give Nessa "two black eyes." *Dreewes*, 2 Wn. App. 2d at 301-03. When Thomas and Parrish broke into the house, Nessa was not there. Instead, there were four other adults including the homeowner, Marty Brewer-Slater, her husband, her daughter, and her daughter's boyfriend. *Dreewes* 2. Wn. App. 2d at 304. While Parrish pointed his rifle at the daughter, Brewer-Slater ran from the

upstairs bedroom carrying bear mace. Parrish aimed his rifle at Brewer-Slater and pulled the trigger, but the safety was on and did not fire. *Dreewes*, 2 Wn. App. 2d at 304.

A jury convicted Dreewes as an accomplice to the crime of assault in the second degree with a deadly weapon against Marty Brewer-Slater. The Court of Appeals reversed Dreewes' conviction for insufficient evidence although there was overwhelming evidence that Dreewes was guilty as an accomplice of the more generic crime of assault in the second degree with a deadly weapon of another. The State failed to provide sufficient evidence beyond a reasonable doubt that Dreewes acted with the knowledge that she was promoting or facilitating the specific crime with which she was charged – assault in the second degree with a deadly weapon of Marty Brewer-Slater. *Dreewes*, 2 Wn. App. 2d at 324.

Here, according to Evans, Rickman was the one who hit him from behind with what he thought was the table leg. RP 28, 167. This was consistent with Lewis's testimony that he did not see Rickman hit Evans because Evans was sitting sideways in the front seat of the truck, which could have blocked Lewis' view. The white pickup truck belonged to French, who was in the process of moving

out of her apartment. Some of her belongings were in the back of the truck, including the table leg. RP 251.

There is no evidence Rickman or Lewis had specific knowledge the table leg was in the truck prior to Rickman using it to hit Evans. Rickman simply grabbed what was immediately available in the back of the pickup truck. There was no blood on the table leg, no blood on Evans' clothes, and no physical evidence of a fight at the scene where the incident took place, which all suggests the force was not intended to do great bodily harm. RP 28, 135, 137. Notably, Lewis is the one who stopped the attack by shouting, "that's enough!" RP 245. The trial court even used this as a mitigating factor at sentencing. RP 362.

In short there was no evidence that Lewis knew Rickman intended to cause significant bodily injury. The testimony about the severity of Evans' wounds was also insufficient to establish significant bodily injury. The evidence showed Evan's head was bleeding and he had an abrasion on his hip, but Evans refused immediate medical care and was able to ride with Conley to conduct a show up prior to going to the hospital. RP 10, 126. These facts also undermine the state's position that Lewis or Rickman

possessed intent to create significant bodily injury.

Here, as in *Dreewes*, even if Lewis knew he was aiding Rickman in committing a crime, or even an assault, there was insufficient evidence that Lewis had knowledge he was promoting or facilitating the specific crime with which he was charged – first degree assault of Evan. There is no evidence Lewis had actual knowledge of Rickman’s specific intent, and no evidence of significant bodily injury. Therefore, even in the light most favorable to the State, the evidence is insufficient to prove Lewis acted with the knowledge that he was promoting or facilitating assault in the first degree.

“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *Hickman*, 135 Wn.2d at 103 (*quoting State v. Hardesty*, 129 Wn.2d at 309). Therefore, this Court must reverse Lewis’ conviction and remand for dismissal with prejudice.

E. CONCLUSION

Justin Lewis respectfully requests this Court reverse his conviction for Assault in the First Degree and the accompanying

deadly weapon enhancement and remand for dismissal with prejudice based on insufficient evidence.

DATED this 19th day of April 2018.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Asotin County Prosecutor's Office bnichols@co.asotin.wa.us and Justin Lewis/DOC#403565, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed on April 19, 2018. Service was made by electronically to the prosecutor and Justin Lewis by depositing in the mails of the United States of America, properly stamped and addressed.



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