NO. 42425-8-II

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

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL KERBY,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON GODFREY, JUDGE

BRIEF OF RESPONDENT

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RESPONDENTS COUNTER STATEMENT OF THE CASE

The pertinent facts are set forth in the Brief of Respondent in State v. Strickland. Additional facts are set forth herein, as necessary, to address issues raised by the defendant.

RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not "close" the courtroom during the voir dire. (Response to Assignment of Error No. 1)

First of all, this court must understand the jury selection process in this case. At the beginning of the trial the parties were provided with the questionnaires that the jurors previously returned to the clerk. The parties were also provided with a separate list in which each juror was assigned a number, beginning with one and continuing to the end of the list. (CP 96-97). The jurors, when they arrived for trial, were seated in the courtroom and arranged according to their numbers. Following general questions from the court, each party was allowed a period of time to question the panel as a whole, directing questions to either all the jurors or to any particular juror. Challenges for cause are exercised during this time.

Once the parties completed the questioning, peremptory challenges were exercised by striking jurors from the original list maintained by the court. In this particular case, the judge, the attorneys, and the defendants were at a table in the open courtroom. The list was passed back and forth as each party exercised its challenges. (RP 6/28/11, p. 24-25). When that process was complete, the jurors who were selected to serve on the jury

were called and placed in the jury box. (CP 98-99). This was all done in the presence of the jurors and anyone else who wished to be present in the courtroom. Once the jury was empaneled, the jury was sent out and the court made a record of what had occurred during the selection process. (RP 6/28/11, Pages 24-27).

The courtroom was never closed. No one was asked to leave. No one was prevented from entering the courtroom. No portion of the process was conducted outside the view of individuals in the courtroom. No portion of the process took place in chambers or outside the courtroom.

The procedure used herein, was not a "closure" of the courtroom. Persons were not excluded. A "closure" occurs, for instance, when all spectators are barred from the courtroom during voir dire In re the Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). A "closure" may also occur when a portion of the voir dire examination is conducted in chambers away from the public. People v. Harris, 10 Cal.App. 4th 672, 12 Cal.Rptr. 2d 758 (1993); (Contrary to the assertion of the defendant at page 16 of Brief of Appellant, the trial court in Harris directed the parties to exercise their peremptory challenges in chambers, outside the courtroom); State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).

Not all actions done in chambers constitute a "closure." State v. Sublett, Wash. Sup. Ct., No. 84856-4, decided 11/21/12 (2012). The

Washington Supreme Court has recently defined what constitutes a "closure." State v. Lormor, 172 Wn.2d 85, 93.257 P.3d 624 (2011):

> Rather, a "closure" of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave. This does not apply to every proceeding that transpires within a courtroom but certainly applies during trial, and extends to those proceedings that cannot be easily distinguished from the trial itself. This includes pre- and posttrial matters such as voir dire, evidentiary hearings, and sentencing proceedings.

Nothing like that happened here.

To expand the definition of "closure" in this fashion, would lead to an absurd result. Apparently now the public would be entitled to not only be present during all of the proceedings, but also be privy to all conversations taking place in the courtroom. Perhaps members of the public are entitled to hear the conversation between the prosecutor and the lead investigator concerning who should be stricken from the jury, or, for that matter, the conversation between the attorney and his client over how to best exercise a peremptory challenge. Does case law require, then, that members of the public be able to hear each party make each peremptory challenge or see each individual written strike as it is placed on paper? This would lead to an absurd result.

This assignment of error must be denied.

2. The defendant did not make an unequivocal request to represent himself. (Response to Assignment of Error No. 2)

Shortly before trial, the defendant sent a letter to Judge Godfrey. The court (CP 84). In that letter, he said that he was dissatisfied with his attorneys and ". . . wished to be among the free and see my twins and live life like I was 4 (sic) last 14 months before this misjustice to me started." The defendant also made a number of allegations against the prosecution and investigating officers. He demanded dismissal of the charges.. At one point he wrote that he wanted his current attorneys replaced with different attorneys. In the next sentence he stated that he wanted to represent himself. The trial court provided copy of this letter to counsel and a hearing was scheduled for June 17, 2011, eleven days prior to trial. (CP 85). The court reasonably determined, given the letter and its rambling nature, that it would be appropriate to speak to the defendant in court regarding his wishes.

The Judge heard from both counsel and the defendant. Mr. Debray indicated that he was prepared for trial on June 28. (RP 617, 2011 p. 6). Attorney Keehan's law partner, David Hatch, appeared on behalf of Mr. Keehan to affirm that Mr. Keehan was prepared to begin with trial on June 28. (RP 617, 2011 p. 7). When the defendant addressed the court he told the Judge that he was ready to proceed, "I am ready. You say tomorrow, I

will be here." (RP 617, 2011 p. 8). Defendant Kerby continued, telling the court the following (RP 617, 2011 at p. 9).

> Mr. Kerby: I am ready for trial, and I would like to dismiss DeBray, keep Hatch and Keehan, for all the reasons I mentioned in there. For me, it was, I haven't seen anybody since I have had two lawyers. They have been to court twice in three months together. That's crazy. He comes back, he leaves for ten days. I don't know what's going on. You know, and out of respect for him and Keehan, for him telling me that he is still on vacations, still doing work, that's good enough for me. But, you know, for me not to hear anything. And, you know, everything that is done in this case, I did. If I didn't have any law books, I would be sitting doing life right now. That's a fact. You know, but I have to fight for myself and fight for my co-defendant, because it's crazy. That's all. I just wish that you would let -- keep him, I just don't see any reason for me to put my life in someone -- I don't trust looking at life in prison.

In the end, the court recognized the letter for what is was, the complaint of a defendant who was upset because he faced the possibility of conviction and a sentence of life in prison without parole. The court said as much in its remarks to the parties. (RP 617, 2011 p. 9-10). When asked what he wanted to tell the Judge, the defendant didn't ask to represent himself. He said, "I would like to dismiss DeBray, keep Hatch and Keehan." In short, the defendant did not ask to represent himself. He vented about Mr. DeBray, but told the court that he was ready to proceed with co-counsel, Mr. Keehan.

A criminal defendant does have the right to waive the assistance of counsel and represent himself. Faretta v. California, 422 U.S. 806, 95 Sup. Ct. 2525, 45 L.Ed.2d 562 (1975). A defendant's request must be both timely and stated unequivocally. State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991). See also State v. Stenson, 132 Wn.2d 668, 740-741, 940 P.2d 1239 (1997):

> To protect defendants from making capricious waivers of counsel and to protect trial courts from manipulative vacillations by defendants regarding representation, the defendant's request to proceed pro se must be unequivocal. While a request to proceed pro se as an alternative to substitution of new counsel does not necessarily make the request equivocal, *Johnstone v. Kelly*, 808 F.2d 214, 216, n. 2 (2d Cir.1986), such a request may be an indication to the trial court, in light of the whole record, that the request is not unequivocal. *Hamilton v. Groose*, 28 F.3d 859, 862 (8th Cir.1994); see also *Adams v. Carroll*, 875 F.2d 1441, 1445 (9th Cir.1989); *People v. Williams*, 220 Cal.App.3d 1165, 269 Cal.Rptr. 705, 707-08 (1990).
>
> The Eighth Circuit considered a similar factual situation in the *Hamilton* case where the defendant wanted new counsel but would proceed pro se if denied a change of counsel. The court concluded that the trial court must indulge in every reasonable presumption against a defendant's waiver of his right to an attorney and require the defendant to make a knowing, intelligent, voluntary and unequivocal request before concluding that he has waived his right to counsel and invoked his right to represent himself. The court explained:

> The equivocal way in which [the defendant] made his motion to represent himself ... would provide the basis for a colorable Sixth Amendment claim regardless of how the trial judge had ruled. Had [the defendant] been found guilty after the trial judge allowed him to proceed pro se, [he] undoubtedly would have sought to overturn his conviction by arguing that he was denied his Sixth Amendment right to counsel because his waiver of the right was equivocal and "not very serious." ... The probability that a defendant will appeal either decision of the trial judge underscores the importance of requiring a defendant who wishes to waive his right to counsel to do so explicitly and unequivocally. Here, [the defendant's] asserted waiver of his right to counsel was far from explicit and unequivocal, and his Sixth Amendment right to represent himself was not denied.

Hamilton, 28 F.3d at 862-63.

The court in Stenson was presented with facts similar to those in the case at hand, in Stenson there was a long colloquy between the court and the defendant in which the defendant talked about his dissatisfaction with his attorney. The defendant in Stenson made a direct request to represent himself, saying that he was "forced" to make the request because the court would not assign new counsel. The Supreme Court held that the

trial court properly determined that this was not an unequivocal request for self representation. Stenson, supra, 132 Wn.2d at 739-40.

Indeed, in the case at hand, Judge Godfrey might very well have found himself on the horns of a dilemma. See Hamilton v. Groose, supra. The court had a letter which, on its face, was equivocal. The court considered the remarks that the defendant made in open court. The defendant stated, in essence, when asked, that he was unhappy with Mr. DeBray and was ready to proceed to trial with attorney Keehan. This was not a request for self-representation. Had the court allowed the defendant to proceed pro se, we would undoubtedly be looking at a situation where the defendant, following his conviction, would then assert that his request to represent himself was equivocal and should not have been granted. The court was in a no win situation.

The trial court in the case at hand, properly exercised its discretion. The trial court was under no obligation to tell the defendant that he had the right to represent himself. State v. Bolar, 92 Wn.2d 647, 654, 600 P.2d 1010 (1979). The trial court judge recognized that, in reality, the defendant's letter was not a request to represent himself, but, rather, a statement about his frustration concerning how the case was proceeding and the potential consequences to him. A trial court's denial of request for self representation is reviewed for abuse of discretion. State v. Breedlove, 79 Wn.App. 101, 106, 900 P.2d 586 (1995). The trial court did not abuse

its discretion. In the end, the trial court properly determined that the defendant was not asking to represent himself.

3. The trial court properly declined to instruct regarding the testimony of an accomplice. (Response to Assignment of Error 3)

It was the theory of defendant Kerby's case, apparently, that Kerby's girlfriend was the shooter or handed defendant Kerby the gun immediately prior to the shooting. (RP 7/1/11 p. 205). He wanted to paint her as an accomplice in order to raise a doubt about who pulled the trigger. (RP, Volume 5, p. 99). Defendant Kerby asked for an instruction in the language of WPIC 6.05. The trial court properly denied such an instruction.

(a) There was insufficient evidence to establish that Jeri Chrisman was an accomplice.

WPIC 10.51 sets forth how the jury should decide who is an accomplice in the commission of a crime. WPIC 10.51 provides, in part, as follows:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement,

> support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

An individual's "mere presence" at the scene of the crime is insufficient to establish accomplice liability. State v. Landon, 69 Wn.App. 83, 848 P.2d 724 (1993). Nor is mere presence at the scene, combined with assent sufficient. State v. Ferreira, 69 Wn.App. 465, 850 P.2d 541 (1993). Likewise, mere presence combined with knowledge is not sufficient to establish a person as an accomplice. State v. Galisia, 63 Wn.App. 833, 840, 822 P.2d 303 (1992).

Mere presence and assent to a crime is insufficient to show accomplice liability. State v. McDaniel, 155 Wn.App. 829, 863, 230 P.3d 245, review denied 169 Wn.2d 1027, 241 P.3d 413 (2010). A defendant must have associated himself with the criminal conduct, participated in the criminal conduct and sought to make the crime successful by his actions. State v. Robinson, 73 Wn.App. 851, 855, 872 P.2d 43 (1994). Thus, for example, an individual who is present at the scene of a crime, has no idea that the crime will occur before it actually occurs, but helps his friend, the person who committed the crime, escape afterward is not guilty as an accomplice. Robinson 73 Wn.App. at page 855.

There is no evidence that anyone anticipated that there was going to be a shooting at Mac's Tavern. Defendant Kerby and defendant Strickland did not go to the tavern looking for either victim. They had never met either victim. While Ms. Chrisman may have seen Kerby in possession of what she believed was a firearm prior to leaving the residence, she had no reason to expect that there would be any problem at Mac's Tavern.

The difficulties began when defendant Kerby and defendant Strickland got into an argument with Eugene Savage outside the tavern, because Savage spoke to them in Spanish, and "disrespected" them. Their meeting outside was pure happenstance. They never spoke while inside the tavern.

There is no testimony that Ms. Chrisman was involved in the argument. Ms. Chrisman denies participating in the argument. She heard the argument and was upset. She wanted to leave, thinking ". . . it's not worth it." (RP Vol. II, p. 363). Neither Mr. Savage nor Mr. Ivy identified her as a participant in the argument. Michael Murphy saw her standing away from the argument, "quite a ways back." (RP Vol. III, p. 529). Murphy's observation was that she wanted nothing to do with the argument. He heard her say ". . . it's just not worth it." (RP Vol III, p. 530). Ms. Chrisman headed in the opposite direction (east) just before the shootings. The defendants walked toward the parking lot on the west of

the building. (RP Vol. III p. 546). The only testimony was that, at some point, Mr. Ivy heard a woman's voice yell "shoot his ass."

Her alleged participation as an accomplice in the commission of this crime is based solely on the testimony by Mr. Ivy that he heard a female say "shoot his ass." Ms. Chrisman had no motive to be involved. She was not involved in the argument. No one "disrespected" her. In short, the evidence at trial was not sufficient to establish that she was an accomplice. The court properly denied a request to give WPIC 6.05.

(b) The testimony of Jeri Chrisman was corroborated by other witnesses.

In any event, her testimony was overwhelmingly corroborated by the testimony of other witnesses. An instruction in the form of WPIC 6.05 need not be given where there is substantial corroborating evidence. State v. Harris, 102 Wn.2d 148, 153, 685 P.2d 584 (1984):

> Where the testimony of an accomplice is uncorroborated, a cautionary instruction must be given, *State v. Troiani, supra* 129 Wash. at 229, 224 P. 38; *State v. Pearson, supra* 37 Wash. at 415 79 P.985. Yet, where the accomplice testimony is corroborated by independent evidence, failure to give the instruction may not be error. The court will first look to whether the failure to give the instruction prejudiced the defendant before making this determination. *Troiani*, 129 Wash. at 229, 224 P. 388. *Gross* and *Carothers* are both susceptible to contrary interpretations. To the extent that *Gross* implies that failure to give a cautionary instruction in cases where the accomplice testimony is wholly uncorroborated may not be reversible error, it is disapproved. To the

> extent that *Carothers* implies that it is error not to give a cautionary instruction, even where accomplice testimony is substantially corroborated, it is disapproved.

In short, WPIC 6.05 is not required in every case in which an accomplice testifies. Harris, 102 Wn.2d at page 155. Such an instruction is required if the conviction is based solely on the testimony of an accomplice State v. Sherwood, 71 Wn.App 481, 484-85, 860 P.2d 407 (1993). WPIC 6.05 is not required when the testimony is substantially corroborated. Sherwood, supra 73 Wn.App at 485.

Ms. Chrisman's explanation of the circumstances leading up to the shooting are corroborated through the testimony of Michael Murphy, Daniel Ivy, and Eugene Savage. No one identified her as a participant in the argument or the shooting. She saw defendant Kerby with the taser in his hand, as did Caitlin Atwood, who was looking out the window. (RP Vol. II, p. 230). Defendant Strickland admitted that both he and Kerby had tasers. (RP 7/1/11, p. 72).

While she did see what she thought had to be the gun in defendant Kerby's hand, she did not see the shooting. She was walking away when the shots were fired. (RP 7/1/11, p. 546). Mr. Ivy and Mr. Savage identified defendant Strickland as the shooter. Defendant Strickland denied the shooting, claiming that he had already left when the shooting occurred. (RP 7/1/11 p. 61). Neither Kerby nor Strickland implicated Ms. Chrisman as being involved in any way.

Ms. Chrisman's testimony concerning defendant Kerby's possession of the firearm was corroborated by the admissions made by Kerby to the Aberdeen Police (RP 579). Initially, Kerby denied having seen a gun. (RP 579-80). Eventually, he told Sgt. Laur that "he didn't pull the trigger," but when asked if he had a gun in his hands at any time during the incident, defendant Kerby admitted that he did have a gun in his hand at one point but then he got rid of it. Defendant Kerby stated that the gun never went off in his hand. (RP 582-83). Defendant Kerby ended by stating that if there was a gun, he got rid of it (RP 581-83).

These remarks clearly presented evidence from which the jury could conclude that defendant Kerby was in possession of the firearm immediately before the shooting. That testimony, along with the identification of Strickland as the shooter provides evidence from which the jury could conclude that Strickland received the gun from defendant Kerby.

In short, the defendant's guilt did not rely solely on the testimony of Ms. Chrisman. Even if she was found by this court to be an accomplice, her testimony was substantially corroborated by other evidence presented at trial.

This assignment of error must be denied.

CONCLUSION

For the reasons set forth, the convictions must be affirmed.

DATED this 12 day of February, 2013.

Respectfully Submitted,

By: Gerald R Fuller
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GRF/ws

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

STATE OF WASHINGTON, Respondent, v. MICHAEL KERBY, Appellant.	No.: 42425-8-II **DECLARATION OF MAILING**

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 13th day of February, 2013, I mailed a copy of the Brief of Respondent to Casey Grannis, Neilsen Broman & Koch, PLLC., 1908 East Madison Street, Seattle, WA 98122-2842, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 13th day of February, 2013, at Montesano, Washington.

Barbara Chapman

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

STATE OF WASHINGTON, Respondent, v. MICHAEL KERBY, Appellant.	No.: 42425-8-II **DECLARATION OF MAILING**

DECLARATION

I, Barbara Chapman, hereby declare as follows:

On the 14TH day of February, 2013, I mailed a copy of the BRIEF OF RESPONDENT to Jodi R. Backlund, Backlund & Mistry, P.O. Box 6490, Olympia, WA 98507-6490, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 14th day of February, 2013, in Montesano, Washington.

Barbara Chapman

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