

No. 43870-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KISHA LASHAWN FISHER,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 11-1-01011-4
The Honorable Vicki Hogan, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that Kisha Fisher acted as an accomplice to felony murder as charged in Count 1.
2. The State failed to prove beyond a reasonable doubt that Kisha Fisher acted as an accomplice to second degree murder as charged in Count 2.
3. Trial court erred when it refused Kisha Fisher's request to instruct the jury on the affirmative defense to felony murder and second degree murder.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Is evidence that Kisha Fisher overheard her boyfriend and another man or men discuss the possibility of robbing Lenard Masten, and that Kisha Fisher placed a three-way phone call to Lenard Masten a few minutes before he was shot by one of those men, sufficient to prove beyond a reasonable doubt that Kisha Fisher intended to assist the men in robbing Lenard Masten and that she therefore acted as an accomplice to the robbery, and is therefore guilty of first degree felony murder? (Assignment of Error 1)
2. Where there was no evidence that any participant discussed

or intended in advance to commit an assault, and no evidence that the idea of an assault was ever discussed in Kisha Fisher's presence, did the State fail to prove beyond a reasonable doubt that Kisha Fisher acted as an accomplice to the assault that formed the basis for the second degree murder charge alleged in Count 2? (Assignment of Error 2)

3. The trial court's refusal to include Kisha Fisher's affirmative defense jury instruction denied her constitutional right to present a defense, and to have the jury fully informed of the applicable law. (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Kisha Lashawn Fisher as an accomplice to one count of first degree felony murder (RCW 9A.32.030) and as an accomplice to one count of second degree murder (RCW 9A.32.050), in connection with the death of Lenard Masten, and alleged that Fisher or an accomplice was armed with a firearm at the time of the offense (RCW 9.94A.530, .533). (CP 25-26) Mario Steele and Corey Trosclair were charged as co-defendants for the murder of Masten. (CP 25-26)

Fisher moved, under Washington's privacy statute (RCW

9.73.090), to suppress the recordings made during her two interviews with investigators, but the trial court denied the motion. (CP 43-52, 232-41; 07/12/12 RP 222-31) Fisher and Trosclair were subsequently tried together after the State agreed with Fisher's request to sever her trial from Steele's. (CP 8-23; 04/05/12 RP 3)¹ The trial court refused to give Fisher's proposed affirmative defense jury instruction, and the jury found Fisher guilty of both murder charges and the firearm allegation. (CP 5, 198-200; RP14 1684-1704; RP15 1829; RP16 1867, 1986-88)

The trial court entered an order dismissing the second degree murder conviction in order to avoid violating Fisher's double jeopardy protections. (CP 213-15; RP17 2006, 2011) Because of a 2009 conviction for taking a motor vehicle without permission, Fisher's offender score was one. (CP 216-17, 221) The trial court imposed a standard range sentence of 290 months plus a 60-month firearm enhancement, for a term of confinement totaling 350 months. (RP17 2009; CP 217, 224) This appeal timely follows. (CP 242)

¹ The trial transcripts, labeled Volumes I through XVII, will be referred to by volume number. The remaining transcripts will be referred to by the date of the proceeding contained therein.

B. SUBSTANTIVE FACTS

In January of 2011, Lenard Masten lived with his girlfriend, Michelle Davis, in an apartment in Lakewood, and made his living by selling drugs. (RP5 381-82; RP6 559) He had two cell phones, one that he used for “work” calls and one that he used for personal calls. (RP5 380-81, 392-93) Masten once dated Kisha Fisher, but Fisher now lived with her current boyfriend, Mario Steele. (RP7 746, RP8 794; RP14 1609) Masten and Fisher had recently reconnected after they encountered each other at a local bar. (RP8 794)

Sometime around 8:30 PM on January 16, 2011, Masten was shot in the parking lot of his apartment complex. (RP5 400, 409) Neighbors Shannon Henderson, Nadise Davis, and Denise Davis² heard the gunshot and saw a man leaning over Masten, apparently searching Masten’s pockets. (RP5 433, 434, 435, 479, 480, 510; RP10 1045) Henderson observed a second man walking up a stairway towards Masten’s apartment. (RP5 434) Nadise saw the man come back down the stairs, and noticed he was holding a gun. (RP5 480) The two men ran past Nadise, and left together in

² Nadise and Denise are Michelle Davis’ sisters. Michelle Davis died before trial due to circumstances unrelated to this case. (RP5 475, 506) In the interest of clarity, the Davis sisters will be referred to by their first names in this brief.

a black SUV. (RP5 435, 436, 481, 510; RP10 1048-49) Neighbor Aaron Howell also saw a man standing at the bottom of Masten's stairway, and saw the man get into a dark SUV and drive away. (RP10 1048-49) Masten died at the hospital later that night, as a result of the gunshot wound. (RP9 1016, 1030)

Detectives investigating the shooting reviewed Masten's cellular phone records and noticed several incoming calls from one particular phone number in the minutes before Masten was shot. (RP6 687; RP8 774-77, 786-87) This same phone number had also placed a number of calls to one of Masten's cellular phones earlier in the afternoon of January 16, 2011. (RP8 784-88) The Detectives traced those calls and determined that two of the phone numbers were registered to Mario Steele, and one was registered to Cory Trosclair. (RP8 784, 785, 786-87, 791)

There were three calls placed after 8:00 PM from Steele's cellular phone to Masten's cellular phone. (RP8 786-87, 788) The last call received on Masten's cellular phone was placed at 8:24 PM, and was a three way call initiated by Trosclair's cellular phone, then connected to Masten's phone through Steele's cellular phone. (RP8 789-90)

Subsequently obtained cellular phone tower data indicated

that the calls made in the afternoon connected through towers near Masten's apartment. (RP8 826, 827-28; RP10 1117, 1123, 1147-48; Exhs. 90-107) This same data indicated that, for the 8:24 PM call, Trosclair's cellular phone connected through a tower near Masten's apartment, and Steele's cellular phone connected through a tower near Steel's apartment. (RP8 813, 829-30; RP10 1132-33, 1148) Masten received all of these calls through a connection from a tower located near his apartment. (RP8 827-28; RP10 1117, 1157) Generally, when a cellular phone initiates or receives a call, it will connect through the nearest cellular phone tower. (RP7 702-04)

Detectives interviewed Steele, Trosclair and Fisher. In her first interview, Fisher said she called Masten on the afternoon of January 16, 2011, because Steele wanted to purchase drugs. (RP8 794-95) Fisher placed a call to Masten, and then Steele and another man went to Lakewood to meet Masten and purchase drugs. (RP8 795) Fisher also initially told the Detectives that Steele went out again that evening, but that he did not tell her what he did. (RP8 797-98, 816-17; RP13 1570)

Witness Aaron Howell indentified Trosclair from a photo montage. (RP8 855-56; RP10 1059) Trosclair was arrested and

booked into the Pierce County Jail. (RP8 832; RP11 1235; RP13 1581) While he was there, he was confronted by Joseph Adams, who was a close friend of Masten. (RP12 1314, 1334) In fact, Adams lived with Masten a few months before the shooting, was his drug dealing partner and, in the hours after the shooting, drove to Lakewood and picked up Michelle Davis and two backpacks containing Masten's gun, money, and drug supply. (RP12 1317, 1322-23, 1327-28; RP13 1427, 1462) Adams testified that Trosclair admitted to him that he shot Masten. (RP13 1338)

According to Adams, Trosclair said it was an accident, and that he did not mean to shoot Masten. (RP13 1338) Trosclair told him that he and Steele decided to rob Masten because they felt the drugs he sold them earlier in the day were of poor quality. (RP13 1338)

In his interview with the Detectives, Steele indicated to investigators that Fisher knew more than she had initially indicated, so the Detectives eventually arrested and re-interviewed Fisher. (RP8 817; RP13 1585, 1587) In her second interview, Fisher acknowledged that she overheard Steele and another man discussing the idea of robbing Masten, but that the discussion did not take place directly in front of her and she did not participate.

(RP14 1628, 1638, 1644, 1646; CP 134, 135, 137) When the men left the apartment on the night of January 16th, she assumed they might rob Masten. (RP14 1629, 1638, 1641, 1643; CP 137) She told Steele not to get involved, but Steele said he was only going to show the men where to go so she did not think Steele was going to rob Masten. (RP14 1642, 1643, 1646; RP15 1796; CP 137, 151-52, 155)

Steele left his cellular phone at the apartment he shared with Fisher, and when he called her on Trosclair's phone and asked her to pass his call through to Masten, she complied thinking that Steele was only trying to set up another drug purchase. (RP14 1645; CP 131, 144) She assumed Masten would not answer his phone if he saw an unfamiliar number, so she connected Steele's call to Masten's phone. (RP14 1617) She told the Detectives that she did not speak directly with Masten, and only overheard Steele tell Masten that he was "about to be there." (RP14 1617; CP 125) When Steele came home, he told her that Masten had been shot. (RP14 1617; CP123) Fisher repeatedly denied any involvement in the planning of the robbery or shooting. (RP14 1609; CP 116)

IV. ARGUMENT & AUTHORITIES

- A. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT FISHER ACTED AS AN ACCOMPLICE TO FELONY MURDER OR TO SECOND DEGREE MURDER.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, 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. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn there from.” Salinas, 119 Wn.2d at 201.

Under RCW 9A.08.020(3)(a)(i)-(ii), an accomplice is one who, “[w]ith knowledge that it will promote or facilitate the commission of the crime ... encourages ... or aids” another person in committing a crime. The evidence must show that the accomplice aided in the planning or commission of the crime and that he had knowledge of the crime. State v. Berube, 150 Wn.2d

498, 511, 79 P.3d 1144 (2003). An accomplice must associate herself with the venture and take some action to help make it successful. In re Welfare of Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

Mere knowledge or presence of the defendant is not sufficient to establish accomplice liability. State v. Parker, 60 Wn. App. 719, 724-25, 806 P.2d 1241 (1991); Wilson, 91 Wn.2d at 491. Rather, the State must prove that the defendant was ready to assist the principal in the crime and that she shared in the criminal intent of the principal, thus “demonstrating a community of unlawful purpose at the time the act was committed.” State v. Castro, 32 Wn. App. 559, 564, 648 P.2d 485 (1982); see also State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); Wilson, 91 Wn.2d at 491.

1. *The State failed to prove beyond a reasonable doubt that Fisher acted as an accomplice to robbery and therefore failed to establish that she is guilty of first degree felony murder.*

When the crime charged is felony murder, then the State must prove that the defendant was an accomplice to the underlying felony. State v. Carter, 154 Wn.2d 71, 80-81, 109 P.3d 823

(2005).³ In this case, the State was required to prove that Fisher was an accomplice to an attempted or completed robbery of Masten.

In State v. Trout, the defendant, like Fisher, did not personally take part in the physical robbery or assault of the victim. 125 Wn. App. 403, 410-11, 105 P.3d 69 (2005). Trout appealed his convictions for first degree robbery and second degree assault, arguing that evidence was insufficient to establish that he acted as an accomplice to the crimes because he did not enter the apartment where the crimes occurred, and did not participate in the robbery or assaults that occurred inside the apartment. 125 Wn. App. at 410-11. The appellate court rejected his argument, because the State's evidence showed that Trout was present when the plan to rob the victim was hatched; he drove with the other participants to the apartment; he knew that several other participants had armed themselves with deadly weapons; he stood with the group as they pounded on the apartment door and forced their way inside; he watched from the doorway as the other

³ “[W]here an individual who is charged with first degree murder based on the felony murder provision of the first degree murder statute has not participated directly in the commission of the predicate felony, the State must establish that he or she was an accomplice to the predicate felony in order to sustain a conviction.” Carter, 154 Wn.2d at 81.

participants assaulted and robbed the occupants of the apartment; and he eventually told the other participants that it was time to go. 125 Wn. App. at 411.

In this case, there was also evidence that at least some discussion about robbing Masten occurred in Fisher's presence. (RP14 1619, 1620, 1628; CP 128, 135, 137) But unlike in Trout, Fisher did not drive to Masten's apartment and did not observe the altercation, and there is no evidence that she knew either man was armed.

In an attempt to establish that Fisher was an accomplice to the crime, the State relied entirely on the fact that Fisher facilitated the final call between Steele and Masten, and on Fisher's lack of candor during her interviews. (RP16 1883-84, 1888-90, 1892-94) The State theorized that the final three-way phone call was made with the purpose of luring Masten out of his apartment so that Steele and Trosclair could rob him. (RP16 1870, 1882, 1975-76) The State argued that Fisher's statements and explanations were contradictory, so therefore she must be guilty. (RP16 1883-84, 1888-90, 1892-94)

But State's theory is just that: a theory. And a theory alone, without supporting facts, does not establish that Fisher aided or

agreed to aid the other men in robbing Masten, and that she shared in their criminal intent. The fact of the phone call coupled with Fisher's reluctance to discuss the case with the investigating Detectives, does not amount to proof beyond a reasonable doubt. The State's evidence cannot justify Fisher's conviction for first degree felony murder, and this conviction must be reversed.

2. *The State failed to prove beyond a reasonable doubt that Fisher acted as an accomplice to the assault that formed the basis for the second degree murder charge.*

General knowledge by an accomplice that a principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow. State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). The statutory language requires that the accomplice must have acted with knowledge that his or her conduct would promote or facilitate the crime for which he or she is eventually charged. State v. Cronin, 142 Wn.2d 568, 578, 14 P.3d 752 (2000) (citing Roberts, 142 Wn.2d at 513).

Thus, "[w]hile an accomplice may be convicted of a higher degree of the general crime he sought to facilitate, he may not be convicted of a separate crime absent specific knowledge of that general crime." State v. King, 113 Wn. App. 243, 288, 54 P.3d

1218 (2002) (citing In re Pers. Restraint of Sarausad, 109 Wn. App. 824, 836, 39 P.3d 308 (2001)). The culpability of an accomplice cannot extend beyond the crimes of which the accomplice actually has knowledge. State v. Bolar, 118 Wn. App. 490, 502, 78 P.3d 1012 (2003) (citing State v. Roberts, 142 Wn.2d at 511).

The State charged Fisher in count two with second degree murder, pursuant to RCW 9A.32.050, alleging that:

While committing or attempting to commit assault in the second degree, and in the course of and in furtherance of said crime or in immediate flight therefrom, the defendant or an accomplice shot Lenard Masten, and thereby causing the death of Lenard Masten.

(CP 26) Second degree assault occurs when one “intentionally assaults another . . . or assaults another with a deadly weapon or assaults another with intent to commit a felony.” (CP 186)⁴

Accordingly, to convict Fisher of second degree murder, the State had to prove that Fisher acted with knowledge that the crime she was promoting or facilitating was an assault on Masten.⁵ But there is absolutely no evidence that any of the participants in this

⁴ See RCW 9A.36.021.

⁵ See e.g. Cronin 142 Wn.2d at 580 (in order to show that the defendant was an accomplice to first degree assault, the State had to prove beyond a reasonable doubt that the defendant possessed general knowledge that the crime he was facilitating was assault).

incident ever discussed assaulting Masten, or that Fisher had any indication that an assault was intended, planned, or even a possibility. The evidence indicated at most that the participants discussed committing a robbery, and only a robbery. (RP14 1628, 1638, 1644, 1646; CP 134, 135, 137) And even Adams testified that Trosclair told him that the shooting “wasn’t supposed to happen.” (RP13 1338) One can plan or commit a robbery without planning or committing an assault,⁶ so it cannot be presumed that Fisher knew that an assault could or would occur during the course of the robbery.

There is no evidence to support Fisher’s second degree murder conviction, and this conviction should be vacated and dismissed with prejudice.⁷

B. THE TRIAL COURT’S REFUSAL TO INCLUDE FISHER’S AFFIRMATIVE DEFENSE JURY INSTRUCTION DENIED HER CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE, AND TO HAVE THE JURY FULLY INFORMED OF THE APPLICABLE LAW.

Before trial, Fisher notified the State that she intended to present a “multiple participant” affirmative defense. (CP 5) Fisher

⁶ See RCW 9A.56.190, RCW 9A.56.200, RCW 9A.56.210.

⁷ Although the trial court entered an order dismissing count two on double jeopardy grounds (CP 213-15), a challenge to this conviction is still being raised to prevent the State, now or in the future, from attempting to revive this conviction.

also requested that the court include a jury instruction explaining this defense to felony murder and second degree murder,⁸ which is outlined in RCW 9A.32.030(1)(c) and RCW 9A.32.050(1)(b):

[I]n any prosecution under this subdivision . . . in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

- (i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
- (ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and
- (iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
- (iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

See *also* WPIC 19.01. The trial court denied Fisher's request for this instruction, finding that she did not provide sufficient proof of the elements of this defense. (RP14 1703-04; RP15 1829)

The Sixth Amendment to the United States Constitution and art. 1, § 22 of the Washington Constitution grant criminal defendants the right to present a defense. See Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983).

⁸ See RP14 1684-98, RP16 1867.

A defendant is also entitled to have the jury instructed on her theory of the case if there is evidence that supports the theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997) (citing State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)). And the defendant must prove an affirmative defense by a preponderance of the evidence. See State v. Riker, 123 Wn.2d 351, 366-67, 869 P.2d 43 (1994); State v. Rice, 102 Wn.2d 120, 125-26, 683 P.2d 199 (1984). It is reversible error to refuse to instruct the jury on an affirmative defense where a defendant has met this burden. Williams, 132 Wn.2d at 260 (citing State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983)).

“In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses’ credibility, which are exclusive functions of the jury.” State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000).

In this case, it is undisputed that Fisher did not commit the homicidal act and the State does not claim that Fisher in any way encouraged the commission of the homicidal act or that she was armed with a deadly weapon at any time. So the first two

requirements of this affirmative defense are clearly met.⁹

In her statement to investigators, Fisher explained that, while she overheard the men talking about robbing Masten, she told Steele to stay out of it. (CP 128, 135, 137, 155; RP14 1620, 1638, 1649) She was under the impression that Steele was not going to be involved in any robbery, and was only going along to show the other man or men where to meet Masten. (CP 137, 151-52; RP14 1637, 1638, 1642, 1643) When Steele left his cell phone at home, then subsequently called Fisher and asked her to make contact with Masten, she assumed that there would be no robbery and that Steele was simply trying to arrange the purchase of more drugs from Masten. (CP 150, 154; RP14 1642, 1645)

Interpreting the evidence most strongly in Fisher's favor, Fisher's statements show she did not believe, when she made the call to Masten, that the other men planned to rob him. Therefore, by obvious extension, Fisher had no reason to believe that either man would arm himself with a deadly weapon or that either man intended to engage in conduct likely to cause Masten's death.

Fisher met her burden of presenting evidence sufficient to

⁹ The prosecutor at trial agreed, stating that "yes, frankly, she does satisfy the first two elements here." (RP14 1700)

warrant the affirmative defense, and she should have been allowed to have the jury consider this defense. The trial court's refusal to include this instruction denied Fisher her constitutional right to present a defense, and to have the jury fully informed on the applicable law. Therefore, Fisher's first degree and second degree murder convictions should both be reversed.

V. CONCLUSION

The State failed to present evidence to prove beyond a reasonable doubt that Fisher acted with the intent and design to assist in the robbery of or assault against Masten. Therefore, both murder convictions should be reversed and dismissed with prejudice. Alternatively, the trial court's refusal to instruct the jury on Fisher's affirmative defense was error, and requires that her case be remanded for a new trial.

DATED: May 20, 2013



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CERTIFICATE OF MAILING

I certify that on 05/20/13, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Kisha L. Fisher DOC# 360378, Washington Corrections Center for Women, 9601 Bujacich Road NW, Gig Harbor, WA 98332-8300.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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