70148-7

70148-7

No. 70148-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD RICHARD BROWN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. STATEMENT OF FACTS IN REPLY

The State asserts, "The evidence showed that the kidnappers intended to threaten the victims' lives, as retaliation for one of the victim's involvement in a crime against one of the kidnappers." SRB at 1. This assertion is not supported by the record. To the contrary, the evidence consistently showed that Mr. Brown's unwavering intent was merely to recover the property that had been stolen from him by Mr. Mattox and Mr. Brinkley.

The witnesses consistently testified that Mr. Brown's intent in going to the Munsons' residence was to recover his property, not to harm the Munsons. Mr. Munson said that when the group arrived at his home, they told him "that they weren't there for me but they wanted me to get ahold of Jeff and Ethan and have them come there." 1/10/13RP 109. He said, "the main thing is what they're concentrating on is getting ahold of Jeff and Ethan." 1/10/13RP 123. Mr. Munson repeatedly phoned Mr. Brinkley and Mr. Mattox throughout the night. 1/10/13RP 116-17, 120, 123, 128. When he was able to reach them, they indicated that they would come to the house. 1/10/13RP 120, 128. Although the group continued to wait for them, Mr. Brinkley and Mr. Mattox never arrived. 1/10/13RP 128.

Ms. Munson similarly testified that she was consistently told the group was not there to harm her or her husband. Instead, they simply wanted Mr. Brinkley and Mr. Mattox to come to the house. 1/14/13RP 374, 377, 455.

There was no evidence presented that Mr. Brown or any of the others in the group intended to physically harm the Munsons. Mr. Fordham even testified that the gun he was carrying was unloaded, as his "understanding was that no one was supposed to get hurt." 1/16/13RP 798.

It is true that Mr. Easley testified he was angry about being robbed and assaulted earlier in the day by Mr. Mattox and Mr. Brinkley, and wanted "revenge." 1/14/13RP 502. But his desire for revenge was directed at Mr. Mattox and Mr. Brinkley, not the Munsons. Moreover, Mr. Brown did not share Mr. Easley's motive for revenge. To the contrary, Mr. Easley testified that Mr. Brown "was there for business," that is, merely to recover his stolen property and not to seek revenge. 1/14/13RP 502.

Mr. Munson allowed the group to enter his home. When their cars drove up, he turned on the lights, opened the back door, and yelled, "hey, Dirty, if you're out there, go ahead and come on in. You know,

just come on in, you know, I don't want no trouble." 1/10/13RP 100, 105; 1/11/13RP 210-11; 1/14/13RP 447. Mr. Munson had been informed ahead of time that the group was coming to his home in order to recover the property taken during the robbery of Mr. Easley. 1/14/13RP 489, 501-02; 1/15/13RP 543-44.

Moreover, the Munsons were not physically restrained. Although Mr. Munson was directed to sit on the couch, he never asked to get up or go anywhere. 1/11/13RP 226. When Ms. Munson arrived home, she was treated "[v]ery nice." 1/11/13RP 228. Mr. and Ms. Easley went out to greet her, "walked her in gently," and had her sit on the love seat. 1/10/13RP 119-20. Mr. Brown explained to her "that they were not there for us, they needed to get ahold of Ethan and Jeff." 1/10/13RP 120. She was allowed to get up and do the things she asked to do, such as use the bathroom, or call for the dog. 1/11/13RP 228; 1/14/13RP 310-11. Mr. Brown never touched her or threatened her. 1/11/13RP 229. She never saw Mr. Brown with a gun. 1/14/13RP 308, 377.

Additional facts are set forth in the relevant argument sections below.

B. ARGUMENT IN REPLY

1. The error in instructing the jury on uncharged alternatives for the crime of kidnapping was not harmless beyond a reasonable doubt

The State concedes that a constitutional error occurred when the jury was instructed on alternative means of committing kidnapping that were not charged in the information. SRB at 9. The State argues the error was harmless because there was "overwhelming evidence of a proper alternative." SRB 10. The State urges a harmless error test that is not the proper test to apply when this kind of error occurs. Under the proper test, the error was not harmless.

When the State specifies a particular alternative means of committing the crime in the charging document, the defendant's notice is limited to that particular means. In re Pers. Restraint of Brockie, 178 Wn.2d 532, 538, 309 P.3d 498 (2013). If the jury is later instructed on a different alternative, the error that occurs is a violation of the defendant's constitutional right to notice of the charges. State v. Laramie, 141 Wn. App. 332, 343, 169 P.3d 859 (2007). The violation of the right to notice is not cured simply because the State presents sufficient evidence to support one of the alternatives that was actually charged.

Washington courts have long held that an error in offering an uncharged alternative means as a basis for conviction is presumed prejudicial and requires reversal *if it is possible the jury convicted the jury under the uncharged alternative*. See State v. Severns, 13 Wn.2d 542, 549, 125 P.2d 659 (1942); Laramie, 141 Wn. App. at 343; State v. Bray, 52 Wn. App. 30, 34-36, 756 P.2d 1332 (1988). Recently, in Brockie, the Washington Supreme Court reaffirmed these principles set forth in "the Severns line of cases." Brockie, 178 Wn.2d at 537.

In determining whether an error in instructing the jury on an uncharged method of coming the crime is harmless, courts look at whether "in subsequent instructions the crime charged was clearly and specifically defined to the jury." Bray, 52 Wn. App. at 34; Severns, 13 Wn.2d at 549. Courts also look at whether the prosecutor referred to the uncharged alternative during closing argument. Bray, 52 Wn. App. at 34; Severns, 13 Wn.2d at 549.

Here, neither of these standards is met and the error was plainly prejudicial. In the "to convict" instructions, the jury was instructed it could convict Mr. Brown of kidnapping under two uncharged alternative means: by abducting the alleged victim with intent (1) "to hold the person for ransom or reward" or (2) "to hold the person as a

shield or hostage." CP 121,127. No other jury instruction correctly defined the crime for the jury or expressly informed the jury it could not convict Mr. Brown under the uncharged alternatives.

Second, the prosecutor urged the jury to convict Mr. Brown under the uncharged alternatives during closing argument. 1/18/13RP 984.

Because it is not only possible but likely that the jury convicted Mr. Brown of first degree kidnapping based on a finding that he held a person for ransom or reward, or held a person as a shield or hostage, the error is prejudicial and requires reversal. Severns, 13 Wn.2d at 549; Laramie, 141 Wn. App. at 343; Bray, 52 Wn. App. at 34-36.

The case that the State relies upon to argue that the error is harmless does not apply to this kind of error. See SRB at 10 (citing State v. Jones, 22 Wn. App. 506, 512, 591 P.2d 816 (1979)).

In Jones, the jury was instructed on three alternative means of committing welfare fraud and was not required to specify which means formed the basis for its verdict. Jones, 22 Wn. App. at 509. The issue was whether the defendants' constitutional right to jury unanimity was violated because there was no evidence presented to prove one of the alternative means. Id. at 509-10. The court concluded that, although it

was error to instruct the jury on the alternative means that was not supported by the evidence, the error was harmless because there was ample evidence to support a finding of guilt on the other two means. Id. at 512. Thus, no reasonable juror could have been misled by the references to the means for which there was insufficient evidence. Id.

Here, unlike in Jones, the constitutional right to a unanimous jury verdict is not at issue. Instead, Mr. Brown's constitutional right to notice was violated. Thus, the question is not whether the State presented sufficient evidence to prove the charged alternative. Instead, the error requires reversal if *it is possible that the jury convicted Mr. Brown under one of the uncharged alternatives*. Severns, 13 Wn.2d at 549; Laramie, 141 Wn. App. at 343; Bray, 52 Wn. App. at 34-36. Because it is not only possible but likely that the jury convicted Mr. Brown under an uncharged alternative, the kidnapping convictions must be reversed.

2. The assaults merged into the robbery and kidnapping convictions, resulting in a double jeopardy violation

The State concedes that any assaults committed during the course of the incident merged with the robbery and kidnapping convictions because the assaults were relied upon to elevate the degree

of those charges. SRB at 30. But the State contends that the second degree assault convictions were separate and distinct from the robberies and kidnappings because they were based on Mr. Fordham's act of pointing his gun at the Munsons and threatening to kill them as he was leaving the house. SRB at 31. The State argues the robberies and kidnappings were already completed by that time, and Mr. Fordham's act of pointing his gun at the Munsons inflicted an injury on them that was separate and distinct from the assaults committed during the robberies and kidnappings. SRB at 31-32.

Contrary to the State's argument, Mr. Brown cannot be held separately liable for Mr. Fordham's action of pointing his gun at the Munsons as he was leaving the house. Mr. Fordham's action of pointing his gun at the Munsons must be viewed either as part of a continuous, ongoing assault that occurred throughout the evening, or it must be viewed as a separate and distinct crime. If it was part of a continuing, ongoing assault, then it merged into the robberies and the kidnappings. If it was a separate and distinct crime, then Mr. Brown cannot be held liable for it unless he was guilty as an accomplice. But the State did not prove beyond a reasonable doubt that Mr. Brown *knew* Mr. Fordham pointed his gun at the Munsons. Therefore, he cannot be

held liable for the assault as an accomplice. Under either scenario, the second degree assault convictions must be vacated.

The Washington Supreme Court has determined that assault is a "course of conduct crime." State v. Villanueva-Gonzalez, 180 Wn.2d 975, 984, 329 P.3d 78 (2014). This means that a person cannot be convicted separately for each assaultive act committed during a single, continuous assaultive episode. Although there is no bright-line rule for determining when multiple assaultive acts constitute one course of conduct, courts look at: the length of time over which the assaultive acts took place, whether the assaultive acts took place in the same location, the defendant's intent or motivation for the different assaultive acts, whether the acts were uninterrupted or there were any intervening acts or events, and whether there was an opportunity for the defendant to reconsider his or her actions. Id. at 985. No one factor is dispositive and the ultimate determination depends on the totality of the circumstances. Id. In Villanueva-Gonzalez, the defendant's two acts of hitting the victim in the nose with his head, and grabbing her by the neck, were part of a single course of conduct because they took place in the same location, over a short time period, with no intervening events

or evidence to suggest the defendant had a different intention or motivation for the actions. Id. at 985-86.

Here, the evidence suggests that Mr. Fordham's action of pointing his gun at the Munsons while he was leaving the house was simply part of the single, continuous series of assaultive acts that occurred throughout the evening.[1] The witnesses testified that although many of the participants came to the house carrying guns and remained armed throughout the incident, only Mr. Fordham pointed his gun at the Munsons. 1/10/13RP 103, 105-06; 1/14/13RP 307, 318. Mr. Fordham pointed his gun at the Munsons several times, while yelling at them and acting threatening. 1/14/13RP 318, 456; 1/15/13RP 637-38; 1/16/13RP 765-66. He continued to do this throughout the evening. Id. He committed his final assaultive act when he pointed his gun at the Munsons and threatened them while leaving the house. 1/10/13RP 139; 1/14/13RP 331.

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[1] The jury was instructed on the following definition of "assault":

> An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 139.

Mr. Fordham's final act of pointing his gun at the Munsons while he was leaving the house was merely part of a single, continuous course of assaultive conduct. Although the entire incident occurred over several hours, Mr. Fordham's repeated, continuing acts of pointing his gun at the Munsons occurred at the same location, were uninterrupted by any significant intervening event, and were committed with the same intent or motivation—to scare the Munsons. Thus, they were part of a single assault. Villanueva-Gonzalez, 180 Wn.2d at 984-86. They therefore merged into the robbery and kidnapping convictions.

If this Court concludes, on the other hand, that Mr. Fordham's final act of pointing his gun at the Munsons while leaving the house was indeed a separate crime, then Mr. Brown cannot be criminally liable for it unless the State proved he was guilty as an accomplice. To prove Mr. Brown guilty as an accomplice for Mr. Fordham's offense, the State was required to prove beyond a reasonable doubt that Mr. Brown "solicit[ed], command[ed], encourage[d], or request[ed]" Mr. Fordham to commit the crime, or "aid[ed] or agree[d] to aid" Mr. Fordham in "planning or committing the crime." CP 120; RCW 9A.08.020(3)(a). Additionally, the State was required to prove Mr.

Brown acted with knowledge that his actions would "promote or facilitate the commission of the crime." Id.

To prove the knowledge element of accomplice liability, the State bore the burden to prove Mr. Brown had knowledge that his actions would promote or facilitate "the commission of *the* particular crime at issue." State v. Bauer, 180 Wn.2d 929, 943, 329 P.3d 67 (2014) (internal quotation marks and citation omitted). The State had to prove Mr. Brown acted with knowledge of "the charged offense." State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000). In this case, the "charged offense" is Mr. Fordham's final, isolated action of pointing his gun at the Munsons as he was leaving the house. Thus, to prove Mr. Brown guilty as an accomplice, the State was required to prove he *knew* Mr. Fordham pointed his gun at the Munsons as a final action after the main incident was over, and that he acted in some way to promote or facilitate that offense.

The State did not prove accomplice liability because there is no evidence to show that Mr. Brown was aware of Mr. Fordham's final offense. It was uncontroverted that, after the shotgun blast that killed Mr. Buckmaster, all of the participants "bolt[ed]" from the house in a hurry. 1/10/13RP 139; 1/14/13RP 331; 1/16/13RP 771. Mr. Fordham

was the last person out of the house; the others had already run to their cars. 1/14/13RP 331; 1/16/13RP 771. Mr. Fordham was "straggling" behind. 1/10/13RP 139. Only as he was leaving the house, after the others had fled, did Mr. Fordham point his gun at the Munsons. 1/10/13RP 139; 1/14/13RP 331; 1/16/13RP 771.

There is no evidence that Mr. Brown observed Mr. Fordham point his gun at the Munsons. There is no evidence that he was aware Mr. Fordham was going to do so, or that he acted in any way to promote or facilitate Mr. Fordham's action. Even if Mr. Brown acted as an accomplice to any prior offense, the State did not prove he was a knowing accomplice to *this* offense. Therefore, he was not guilty of the crime.

The second degree assault convictions must be vacated because Mr. Fordham's final assaultive act was either part of the earlier ongoing assault and therefore merged with the robberies and kidnappings, or it was a separate offense for which Mr. Brown was not criminally liable.

3. The State did not prove beyond a reasonable doubt that Mr. Brown was an accomplice to robbery

The State contends that the evidence was sufficient to prove Mr. Brown guilty as an accomplice to robbery because he was aware that

other participants were taking some of the Munsons' belongings, and knew that his actions in "maintaining control of the victims and preventing them from interfering" aided in commission of the robberies. SRB at 18-19. The State contends Mr. Brown could have prevented the robberies if he had any genuine desire to do so. SRB at 20. But this evidence, even if taken at face value, was still not sufficient to prove Mr. Brown guilty as an accomplice to robbery. The State was required to prove not only that Mr. Brown knew of the robberies, and that his actions might facilitate them, but also that his *purpose* was to aid the commission of the robberies. See Roberts, 142 Wn.2d at 510-11. Because the evidence consistently showed that Mr. Brown's single-minded purpose was *not* to take property belonging to the Munsons, but to contact Mr. Brinkley and Mr. Mattox in order to recover his own stolen property, the evidence was insufficient to prove him guilty as an accomplice to robbery.

The State contends the mental state for accomplice liability is knowledge, not intent. SRB at 19. But this is not strictly true. The State must prove a mental state that goes beyond mere knowledge. "Washington case law has consistently stated that physical presence and assent alone are insufficient to constitute aiding and abetting." In

re Welfare of Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). "Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime." Id. at 491-92. Even though a person's presence at the scene may, in fact, encourage the principal actor to commit a crime, that does not in itself make the person a participant in the guilt. Id. "It is not the circumstance of 'encouragement' in itself that is determinative, rather it is encouragement *plus the intent of the bystander to encourage* that constitutes abetting." Id. (emphasis added).

In Roberts, the court stated, in order for accomplice liability to attach, the accomplice must "have the *purpose* to promote or facilitate" the principal's conduct and cannot be liable for conduct that does not fall within this purpose. Roberts, 142 Wn.2d at 510-11 (emphasis added). "Purpose" means "something that one sets before himself as an object to be attained: an end or aim to be kept in view in any plan, measure, exertion, or operation: DESIGN." Webster's Third New International Dictionary 1847 (1993). This definition is similar to the criminal code's definition of "intent." A person acts with "intent" if he "acts with the objective or *purpose* to accomplish a result which constitutes a crime.." RCW 9A.08.010(1)(a) (emphasis added).

Here, the evidence consistently showed that Mr. Brown's purpose was *not* to facilitate a robbery of the Munsons, but to contact Mr. Brinkley and Mr. Mattox so that he could recover his own stolen property. As stated already, the Munsons were repeatedly and consistently told that the group was not there for them but just "wanted [Mr. Munson] to get ahold of Jeff and Ethan and have them come there." 1/10/13RP 109, 123; 1/14/13RP 306, 374, 377, 455. Mr. Brown expressly told Ms. Munson that "these people were not here for me or my husband" but were there because "[h]e just wanted his stuff back." 1/14/13RP 309.

Mr. Brown himself did not take anything from the Munsons and he repeatedly told the others not to take anything. 1/11/13RP 224-25, 228; 1/15/13RP 657-58. When Ms. Munson heard people rummaging through the belongings in her bedroom, Mr. Brown told them "not to take anything from the room." 1/14/13RP 314. He told them several times that "nothing was to be taken." 1/14/13RP 314. Mr. Brown said "hey, we're not here for that, you know, we're not here to be taking shit, we're here to just get our shit back and – he told them not – not to take anything." 1/11/13RP 225.

After the incident, Mr. Brown told Mr. Fordham to return the Munsons' belongings to them. 1/16/13RP 775, 778, 813. Mr. Brown even gave them some cash to help replace the personal property that had been taken by the others. 1/10/13RP 156; 1/15/13RP 545.

The evidence showed that most of the property taken from the Munsons was taken opportunistically and not because of some larger purpose or plan. Mr. Fordham testified that the property taken from the back rooms of the house included jewelry, an address book, and miscellaneous "stupid stuff." 1/16/13RP 776. Mr. Easley testified that people were rummaging through items in the back rooms "[f]or whatever reason" and because they were simply "[b]eing tweakers." 1/14/13RP 454. Mr. Brown had no purpose or intent to take any of the property in the back rooms or to aid in the theft of the property.

Mr. Munson did give Mr. Brown $700 in cash and a pistol. 1/14/13RP 460; 1/15/13RP 539. But those were items that had been taken from Mr. Easley earlier that day. 1/14/13RP 438. Mr. Munson said Mr. Brinkley and Mr. Mattox had given him the gun and the cash. 1/15/13RP 656. Mr. Brown immediately returned them to Mr. Easley. 1/15/13RP 539.

Mr. Munson said that two of the men took his wallet and his watch. 1/10/13RP 118. But he also said that he was told "they weren't there to rob us of anything . . . they were just there for . . . Ethan and Jeff, so if I could get ahold of them, get them there, this situation would be over." 1/10/13RP 118. Mr. Brown expressly told the men not to take Mr. Munson's wedding ring. 1/10/13RP 118-19. Even if Mr. Brown was present when the two men took Mr. Munson's wallet and watch, there is no evidence that he acted with the purpose of facilitating the taking of the property.

The State contends that the jury could have ignored the evidence showing that Mr. Brown did not act with the purpose to rob the Munsons. The State suggests the jury could have simply speculated that Mr. Brown's instructions to the others not to take anything was part of his "good cop" role, made without any intention that his instructions be carried out. SRB at 20. But the State may not rely upon speculation to prove an essential fact. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The weight of the evidence, and Mr. Brown's consistent statements and actions, showed that he did not act with the purpose of robbing the Munsons. To surmise that he in fact

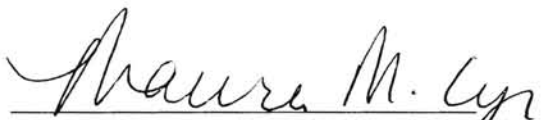
harbored a secret, contrary purpose, is simply speculation that does not satisfy the State's burden of proof.

In sum, the State did not prove beyond a reasonable doubt that Mr. Brown was guilty as an accomplice to the robberies.

C. CONCLUSION

For the reasons given above and in the opening brief, the robbery and kidnapping convictions must be reversed because the jury was instructed on alternative means of committing the crimes that were not alleged in the information; the assault convictions must be vacated because they merged into the robbery and kidnapping convictions; the State did not prove beyond a reasonable doubt that Mr. Brown was an accomplice to the robberies, requiring those convictions be reversed and the charges dismissed. In the alternative, the prosecutor's prejudicial misstatement of the law regarding accomplice liability in closing statement requires the robbery convictions be reversed.

Respectfully submitted this 7th day of November, 2014.



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

STATE OF WASHINGTON, Respondent, RONALD BROWN, Appellant.	)))))))))	NO. 70148-7-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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