No. 31529-1

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

FRANK E. BRUGNONE, Appellant

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

THE HONORABLE RUTH REUKAUF

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
Attorney for Frank Brugnone
PO Box 829
Graham, WA
509.939.3038

TABLE OF CONTENTS

I. Assignments of Error..... 1

II. Statement of Facts..... 3

III. Argument..... 13

A. The Evidence Was Insufficient To Sustain a Conviction for Murder In The 2nd Degree. 13

IV. Conclusion .....

TABLE OF AUTHORITIES

Washington Cases
In re Welfare of Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979).....21
Pers. Restraint Petition of Sarausad 109 Wn.App. 824, 39 P.3d 308 (2001).....14
State v. Alvarez, 105 Wn.App. 215, 19 P.3d 485 (2001).....14
State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983).....20
State v. Boyd, 21 Wn.App. 465, 586 P.2d 878 (1978).....22
State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....21
State v. Matthews, 28 Wn.App. 198, 624 P.2d 720 (1981).....21
State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974).....20
State v. Setterstrom, 163 Wn.2d 621,183 P.3d 1075 (2008).....14
State v. Teal, 117 Wn. App. 831, 73 P.3d 402 (2003).....21

U.S. Supreme Court Cases
In re Winship, 397 U.S. 358, 90 S.Ct. 1968, 25 L.Ed.2d 368 (1970).....21

Constitutional Provisions
U.S. Const. Amend. XIV.....21
Wash. Const. Art. 1§3.....21

Statutes
RCW 9A.08.020 (3).....21
RCW 9A.32.050(1).....14

I. Assignment of Error

A. The trial court erred in making FF 70: ”Ms. Appleton stated that she heard the person driving the vehicle ask:” Did you do it?” CP 153.

B. The trial court erred in making FF 75: “Megan Nunley testified that she has some memory of the Defendant Frank Brugnone asking her for an alibi for the date of August 28, 1997.” CP 153.

C. The trial court erred in making FF 92: “The Defendant’s statement is clearly self-serving.” CP 155.

D. The trial court erred in making FF 93: “The Defendant’s statement is inconsistent with the evidence presented at trial.” CP 155.

E. The trial court erred in making FF 94: ”The evidence establishes that the Defendant was not an innocent bystander, as he has claimed.” CP 155.

F. The trial court erred in making Conclusion of Law (CL) 1: “Based upon the totality of the evidence, both direct and circumstantial evidence, the Court finds that the Defendant, Frank Brugnone, is guilty of the crime of murder in the

second degree as a principal or as an accomplice." CP 155.

G. The trial court erred in making CL2: "On August 28, 1997, Defendant Frank Brugnone, as a principal or as an accomplice to another, caused the death of Carolyn Faye Clift, a human being, and that she died as a result of the Defendant's acts, as a principal or as an accomplice." CP 155.

H. The trial court erred in making CL3: "The Court further finds, that the Defendant, or an accomplice was armed with a deadly weapon, a knife, with a blade between four and six inches that had the capacity to inflict death." CP 156.

I. The evidence was insufficient to sustain a conviction for second-degree murder as either a principal or an accomplice.

Issues Related To Assignments of Error

A. Did the State fail to prove Mr. Brugnone acted as a principal or an accomplice to murder when it proved only his physical presence at the time of the crime?

II. Statement of Facts

Procedural Background

On July 18, 2011, Frank Brugnone was charged by information with one count of second-degree murder, acting as a principal or an accomplice in the 1997 murder of Carolyn Clift. CP 4. Codefendant Michael Gorski was similarly charged. The causes were joined for trial. In pretrial hearings, the defendants made separate motions to sever, which were denied. (8/10/12 RP 56-81; 10/29/12 RP 99-127). Mr. Brugnone's case was tried to the court and Mr. Gorski's case was tried to a jury. CP 100; (1/17/13 RP 165).

Factual Background

On August 28, 1997, between 5:00 and 6:00 pm, Carolyn Clift went to the local liquor store and purchased a bottle of whiskey. (1/30/13 RP 688;690). She told the clerk a friend was coming over for dinner. (1/30/13 RP 689). As she left the store, Michael Gorski entered and made a purchase. Ms. Clift and Mr. Gorski did not acknowledge one another in the store, but after they left, the clerk saw Ms. Clift talking to Mr. Gorski near his car. (1/30/13 RP 701). That evening, between 6:45 pm and 7:30 pm,

Ms. Clift rented two movies from a video store. (2/4/13 RP1102-1106).

A witness recalled seeing Ms. Clift at the Wagon Wheel bar dancing by herself, after 9:00 pm that same evening. (2/1/13 RP 887-88). She left alone, before midnight. (2/1/13 RP 896). He also saw Mr. Brugnone that evening, but not with Ms. Clift. (2/1/13 RP 893). He did not remember seeing Mr. Gorski. (2/1/13 RP 894).

Megan Nunley, a former girlfriend of Mr. Gorski, reported she saw Mr. Gorski on the afternoon of August 28, 1997, at the Wagon Wheel. (2/1/13 RP 928). She invited him to her home. She left the bar sometime between 7:00 and 7:15 pm. (2/1/13 RP 939-40). Mr. Gorski arrived at her home between 8:00 and 8:30 pm. He told her he was late because he had given a woman a ride home from the liquor store. (2/1/13 RP 940-41; 944). He stayed until 10:00 or 10:30 pm. (2/1/13 RP 942).

At 11:19 pm, a Selah Square Apartment resident called police to say she heard a scream and thought it was her neighbor, Carolyn Clift. Ms. Clift was known to local police officers; they had previously received calls about her and considered her “a little mentally challenged.” (1/29/13 RP 440;448). Responding officers arrived at 11:22 pm and entered the apartment. (1/29/13 RP 450).

They found Ms. Clift naked, lying in a pool of blood. (1/29/13 RP 453;482; 489-90;498).

An autopsy revealed that she had four stab wounds thru three wound entrances; one at the lower region of the left ribcage, another on the lower left chest, and one between the shoulder blades that had two wound paths from the same entrance. (1/30/13 RP 590;594). The wound to the back was unusual, requiring "a tremendous amount of force" to cut through the vertebrae. The pathologist stated the knife was likely pounded into the back to get the wound that deep. He opined that the hammer found in the apartment kitchen was of appropriate size, weight and mass to cause such a deep wound. (1/30/13 RP 593). He was unable to reference the sequence of the three wounds; and while he surmised that the wound that cut through the vertebrae may have occurred latest in time, he agreed that Ms. Clift could have been on the floor when the abdomen/chest wounds were inflicted. (1/30/13 RP 609-610; 675). He also described defensive cut wounds on the left hand and minor bruising on her face, neck, and elbow. (1/30/13 RP 606-07).

Officers interviewed neighbors in the apartment complex.

Neighbor Carolee Appleton said she did not see anyone going in or out of the apartment on the night of the homicide. (2/1/13 RP 973). On September 10, 1998, a year later, Ms. Appleton told an officer that a month prior to the homicide she had seen two "kids" arrive in a blue pickup truck. (2/1/13 RP 981-82). At that time, Mr. Brugnone, aged 44, owned and drove an older blue pick up truck. (2/4/13 RP 1161; 2/6/13 RP 1313; SE 129 p. 47). Only one of them, the passenger, went into Ms. Clift's apartment. (2/1/13 RP 982). She again reported she did not see a vehicle or the "kids" the night of the murder. (2/1/13 RP 985).

On September 17, 1998, she gave a third statement. (2/1/13 RP 987). She again reported that she did not see anyone on the night of the homicide, and again, that she had seen a person three weeks prior to the murder; a man driving a blue pick up truck dropped his friend off at the apartment. (2/1/13 RP 987-88). She described the individual who entered the apartment as late 20s to 30 years old, with a butch type haircut. (2/1/13 RP 990;1035). When he was leaving, she heard him say to the driver of the truck, "C'mon let's get out of here." (2/7/13 RP 1562). She believed she heard the same male voice on the night of the homicide. (2/1/13 RP 992).

Fifteen years later, at trial, she denied some of the content of her earlier statements and noted that she did not remember things very well. (2/1/13 RP 992;997;1012;). She testified that on the afternoon of the homicide, between 5:30 and 6:30 pm, she sat with Ms. Clift and another tenant at a picnic table. (2/1/13 RP 951). A man approached the table and said, "I've come with dessert. I'm not taking her to dinner." (2/1/13 RP 952-53). He carried a bag wrapped around a bottle, and followed Ms. Clift into her apartment. (2/1/13 RP 953). Ms. Appelton said someone driving a blue truck had dropped off the man. (2/1/13 RP 954).

Later that night, she thought she heard a man knock lightly on Ms. Clift's door between 1:30 and 2:30 am; he did not enter the apartment. (2/1/13 RP 963; 997). She heard him say, "It's taking too long. C'mon. Hurry." (2/1/13 RP 962). "The kid" then ran back to his truck and another man came running out of the apartment with a towel shielding his face. (2/1/13 RP 998). She testified that although she gave a statement earlier to officers that she may have heard him say "Did you do it?" at trial she said:

> "Yes, but I'm not sure that I really heard that then. That's it. I just don't know. He was yelling at the other guy, 'get that started. We've got to get out of here.' He said, 'what did you do?' Something

like that, in that order." (2/1/13 RP 1013).

Eighty five year old apartment resident Virginia Jones reported that neighbor Lila Powell called her at 11:15 pm saying she heard screams. Ms. Jones went to Ms. Clift's apartment and called out for her. When she did not get an answer, she went to Ms. Powell's apartment. (1/31/13 RP 867). She saw a man run by the door, with his head down, and something shielding his face. He was wearing an unbuttoned shirt, blue jeans, and was between 5'10" and 6' tall. (1/31/13 RP 849). He ran into Ms. Clift's apartment, turned around, and went back out. (1/31/13 RP 861-62). Then she heard the motor of a car start. She saw a car, not a truck. She speculated there was another person in the car, but never saw anyone. (1/31/13 RP 863-64;876).

Investigating officers collected a variety of items from inside Ms. Clift's apartment: Marlboro cigarette butts that were located inside, near the front door, and a pair of eyeglasses from the living room. (1/29/13 RP 567). Officers did not recover a knife.

Officers contacted Mr. Gorski on September 2, 1997, and on September 4, 1997, he gave a taped interview. He also gave an untaped interview on September 17, 1997. (1/31/13 RP 725-726). Mr. Gorski told police he had been at Ms. Nunley's home until

10:30 or 11:00 pm that evening and then went home. At the time, he lived with Mr. Brugnone and Mr. Brugnone's wife. (1/31/13 RP 730).

On April 10, 1998, officers again met with Mr. Gorski and obtained blood and hair samples from him. (1/31/13 RP 732). DNA testing results on the cigarettes and eyeglasses, as well as scrapings from Ms. Clift's fingernails, were later found to be consistent with the DNA profile of Michael Gorski. (2/4/13 RP 1190-91; 1196; 1201-02). Mr. Brugnone was excluded as a contributor. (2/4/13 RP 1196; 1203;1205). The hammer found in the dish rack was also tested but contained only trace amounts of DNA, which were not matched to anyone. (2/4/13 RP 1193).

In an initial interview with officers, Ms. Nunley did not mention that she had seen or talked to Mr. Brugnone in the days following the homicide, or that he ever asked her to provide him with an alibi. (2/1/13 RP 945-46). She later told police that she had a vague recollection of Mr. Brugnone asking her for an alibi. However, at trial she testified that she didn't know what date it might have happened, didn't know the details, and didn't remember anything about an alibi. (2/1/13 RP 945).

February 22, 2007 and again in 2011, Cecil Toney, gave information to police regarding the unsolved homicide. (1/31/13 RP 783; 2/6/13 RP 1405). He knew Ms. Clift from the restaurants, bars, and lounges in Selah. (1/31/13 RP 775). Ms. Nunley was Mr. Toney's ex-wife. (2/1/13 RP 927).

In a transcribed interview, Mr. Toney reported that sometime between midnight and 12:30 am he drove a friend, whose last name he did not remember, to the apartment the night before the homicide. (1/31/13 RP 837). He made a U-turn near the parking lot and for a 'split second' saw two figures ducking between cars. (1/31/13 RP 787; 809; 843). He identified the men as Michael Gorski and Frank Brugnone. (1/31/13 RP 782).

At trial, he changed the timeline account several times between his original midnight to 12:30 am frame and an 11 pm to midnight time. (1/31/13 RP 800). He testified that rather than the night *before* the murder, he saw them the night *of* the murder. (1/31/13 RP 800). Additionally, the original information of a "split second" view as he made his U-turn, was instead a 30 second to two minute U-turn. (1/31/13 RP 804;808;812-13).

On July 13, 2011, officers placed Mr. Brugnone under arrest. (2/6/13 RP 1491-92). Mr. Brugnone initially told officers he had no

recollection of being at Ms. Clift's apartment in August 1997. (State Exh. 129 p. 4,14;25;35). Mr. Brugnone pieced together the evening's events over the course of approximately seven hours. ((2/6/13 RP 1506-07; State Exh. 129 p. 57-58).

He remembered he had been to Ms. Clift's apartment in July 1997, for a one-night stand with her. (State Exh. 129 p. 33). He believed that Mr. Gorski had had at least two sexual encounters with Ms. Clift. (State Exh. 129 p. 50).

On the evening of the August 28,1997, he and Mr. Gorski had been drinking at the Wagon Wheel. Mr. Gorski and Ms. Clift danced. (2/1/13 RP 887-88). Ms. Clift left the tavern. Mr. Gorski asked him to take him to her home. (State Exh. 129 p. 68). When they arrived at the apartment, Ms. Clift greeted them with hugs. (State Exh. 129 p. 68). They entered the apartment and Mr. Brugnone moved aside while Ms. Clift and Mr. Gorski whispered and kissed. (State Exh. 129 p. 68). Mr. Gorski removed Ms. Clift's robe. (State Exh. 129 p.68)

In less than 15-20 minutes, Mr. Gorski pushed or shoved Ms. Clift into Mr. Brugnone. (State Exh. 129 p. 68). Mr. Brugnone pushed her back and away from him. (State Exh. 129 p. 68; 79). He saw Mr. Gorski push, hit, or stab Ms. Clift in her back; he wasn't

sure if he saw him use a rod or a knife, describing it as “a big, big long thing, long knife but I couldn’t tell exactly what it looked like or what the handle looked like or anything, it was just a big long thing.” (State Exh. 129 p.68-70;87). As Ms. Clift went to her knees, Mr. Brugnone tried to catch her, but she fell to the floor. (State Exh. 129 p. 70;82). He got down on the floor to see if she was injured and saw blood. (State Exh. 129 p. 82-83).

> “I come over and ask her you alright, she’s kinda, well now she’s kinda screaming and groaning and I went asks are you alright. She says I don’t know I think so. I said well, Mike will take care of you. I said I’m leaving.” (State Exh. 129 (82).

He told police that she grabbed him by his shoulder as he stood up. (State Exh. 129 p. 72). Frightened, Mr. Brugnone told Mr. Gorski he was leaving, saying, “I said I’m outta here Mike you did this, you, I’m outta here.” (State Exh. 129 p.71; 72; 74). He reported he “didn’t know what he [Gorski] had done. I didn’t know if he killed her or what you know at that time. I know he’d hurt her.” (State Exh. 129 p. 74).

Mr. Brugnone did not see Mr. Gorski stab her a second time, however, as he was leaving, he thought he saw Mr. Gorski move

toward her and do something to her side. (State Exh.129 p.70;72;83;98). He never saw a hammer. (State Exh.129 p. 94).

He left, sat in his car, and waited for Mr. Gorski . (State Exh. 129 p. 73-74). Mr. Gorski came out to the car, told Mr. Brugnone not to leave, and went back into the apartment. (State Exh.129 p. 75). Mr. Brugnone waited another four or five minutes, and then drove the two of them home. (State Exh.129 p. 76).

Mr. Gorski testified he was not with Mr. Brugnone on the day of the homicide. (2/7/13 RP 1635). He saw Ms. Clift at the liquor store, gave her a ride home, and at her invitation, went inside her apartment. (2/7/13 RP 1592;1603;1654). They drank gin and smoked cigarettes. (2/7/13 RP 1603). As they sat on the sofa, they kissed and hugged. (2/7/13 RP 1608). He left her apartment between 7:30 and 7:40 pm and went to Ms. Nunley's home until 10 or 10:30 pm and then drove home. (2/7/13 RP 1592; 1609; 1614; 1656). He forgot his eyeglasses and cigarettes at Ms. Clift's apartment. (2/7/13 RP 1610).

Mr. Brugnone was found guilty of murder in the second degree with a special finding of armed with a deadly weapon. CP 126;155. He makes this timely appeal. CP 166.

III. Argument

The Evidence Was Insufficient To Sustain The Conviction For Murder In the Second Degree As Either An Accomplice Or A Principal.

Appellate review of a sufficiency of the evidence claim arising from a bench trial focuses on whether substantial evidence supports the court's factual findings, and whether the findings support the conclusions of law. *State v. Alvarez,* 105 Wn.App. 215, 220, 19 P.3d 485 (2001). A trial court's legal conclusions are reviewed *de novo. State v. Setterstrom,* 163 Wn.2d 621, 625, 183 P.3d 1075 (2008).

Mr. Brugnone was charged with murder in the second degree, "acting as a principal or an accomplice to another participant in the crime." To sustain a conviction for murder in the second degree, the State was required to prove beyond a reasonable doubt the defendant, without premeditation intended to cause the death of another person and caused the death of such person. RCW 9A.32.050(1). A defendant charged as an accomplice to second-degree murder must know that he was facilitating a homicide. *Pers. Restraint Petition of Sarausad* 109 Wn.App. 824, 836, 39 P.3d 308 (2001).

The State's evidence here cannot sustain a conviction as either a principal or an accomplice. There was no direct physical evidence establishing that Mr. Brugnone was a participant in the crime. Rather, the court's oral and written findings of fact citing numerous witness statements as the basis for a finding of guilt are not supported by substantial evidence.

1. Finding of Fact 70 : "Ms. Appleton stated that she heard the person driving the vehicle ask:" Did you do it?"

At trial, Ms. Appleton retracted the officer's summary of her earlier statement:

> Q. But in reporting the case you told him {police officer} that you heard one of the men say, 'did you do it?'
> A. That's what I think I did.
> Q. I get it that he got that part right?
> A. Yes, but I'm not sure that I really heard that then.
> Q. Okay.
> A. That's it. I just don't know. He was yelling at the other guy, get that started. We've got to get out of here. He said, 'What did you do?' Something like that, in that order. (2/1/13 RP 1012-13).

In making its oral findings, the court stated:

> "I think the other point – actually, you can thank your attorney on this one, Mr. Brugnone. Because what Ms. Appleton actually testified to on direct examination was that she heard the person driving this vehicle say to the individual who ran out, did you do it? Now, Mr. Banda went back on cross-examination and actually got her to waffle a little bit on that and said, well, could it have been 'what did you do?' I'm

> not entirely convinced that the first statement wasn't the most accurate." (2/15/13 RP 1983).

The record does not support the court's finding. The record discloses the witness questioned her own statement. Ms. Appleton's trial statement is especially important because it raised serious doubts about Mr. Brugnone's involvement as either a principal or an accomplice. There is a vast and significant difference between "Did you do it?" and "What did you do?" Because Ms. Appleton could not testify as to what she actually heard, the court's factual finding was in error and does not support the conclusion of law.

> 2. Finding of Fact 75: "Megan Nunley testified that she has some memory of the Defendant Frank Brugnone asking her for an alibi for the date of August 28, 1997."

Megan Nunley was interviewed by police on September 29, 1997, a month after the homicide. She did not tell police at that time that anyone had asked her for an alibi. (2/1/13 RP 939; 946). In her testimony she stated:

> Q. In the days after you'd learned that she had been killed, did you have any conversation with Frank Brugnone?
> A. Not that I remember.
> Q. All right. Did Frank Brugnone ask you to do anything after that period of time?
> A. Oh, yeah. I vaguely remember him asking for an alibi.

Q. He asked you for an alibi?
A. Yes.
Q. And what did you say?
A. No.

(2/1/13 RP 926).

Q. Okay. Now, you also, ma'am testified something about you vaguely remembered about an alibi, correct?
A. Correct.
Q. But you don't know the details of any alibi correct?
A. I don't.
Q. And you don't know what date it happened, correct?
A. No.
Q. You don't know what was talked about. You don't remember anything regarding the alibi, correct?
A. Yes, that's correct.

(2/1/13 RP 943).

Ms. Nunley's testimony was equivocal: there was a faint memory of a request, but she testified she didn't talk with Mr. Brugnone within days of the homicide, she couldn't remember any details, didn't know when it might have happened, and couldn't remember anything about it. The court's finding that Ms. Nunley vaguely remembered something about an alibi does not support its conclusion of law.

3. Finding of Fact 92: "The Defendant's statement is clearly self-serving" and Finding of Fact 93: "The Defendant's statement is inconsistent with the evidence presented at trial" are not supported by substantial evidence and do not support the conclusions of law.

Mr. Brugnone's lengthy interview was admitted as a statement against interest. ER 801(d)(2). The account he offered to police was consistent with witness testimony.

At trial, the forensic pathologist testified that the wounds on Ms. Clift's chest and side may have been inflicted when "a person may or may not be conscious and moving…I have no indication to tell me….I don't know that she's standing or lying down at the time it occurs…" (1/30/13 RP 599; 603). Further, although the second wounding in the back would have resulted in immediate loss of use of the legs, there would "still be use and strength in the arms, neck, and head." (1/30/13 RP 603). He testified that Ms. Clift would have been able to speak, scream, or make sounds after each of the injuries was inflicted. (1/30/13 RP 645). The blood on the rug near Ms. Clift's body indicated that her body had been in one position on the floor and then moved toward her left a few inches. (1/30/13 RP 655). He agreed that Ms. Clift could have been on the floor as the abdomen/chest wounds were inflicted. (1/30/13 RP 675).

Mr. Brugnone told police that Mr. Gorski pushed or shoved Ms. Clift into him. He pushed her back and away. He saw Mr. Gorski make a stabbing motion toward Ms. Clift's back and she fell to the floor. She was conscious, able to talk, and used her arms to

reach out and grab his shoulders as he knelt down. Mr. Brugnone he left the apartment after the first stab. The forensic evidence did not rule out that the frontal wounds may have occurred after the first back wound. The evidence was consistent with Mr. Brugnone's account of events.

Testimony from the witnesses at the apartment building was also consistent with Mr. Brugnone's statements. Not a single witness ever saw Mr. Brugnone in or entering the apartment. Witnesses did, however, place him in a vehicle while Mr. Gorski remained in the apartment.

Mr. Brugnone's statements were consistent with witness testimony. The court's findings are not supported by substantial evidence, and do not support the conclusions of law.

4. Finding of Fact 94: "The defendant was not an innocent bystander, as he has claimed."

Mr. Brugnone's statement was that he drove to the apartment and was present when Mr. Gorski first injured Ms. Clift. Mr. Brugnone told officers that when Mr. Gorski pushed Ms. Clift into him that he pushed her away from himself and back toward Mr. Gorski. (Finding of Fact 91). His statement and the court's finding

of fact 91 do not support the finding that Mr. Brugnone's action was more than that of an innocent bystander.

Although in its oral opinion, the court emphasized that the two defendants had been life long friends and were roommates at the time of the homicide, the State presented no evidence of how Mr. Brugnone aided, abetted, participated in, intended the crime, or engaged in an overt act to facilitate the crime. (2/15/13 RP 1978-79). Under Washington law, knowledge, presence or even assent to a crime alone is insufficient to establish complicity. *State v. Renneberg,* 83 Wn.2d 735, 740, 522 P.2d 835 (1974). The court's finding is not supported by substantial evidence and does not support the conclusions of law.

5. Because The Court's Findings of Fact Are Not Supported By Substantial Evidence, The Evidence Is Insufficient To Sustain A Conviction For Second-Degree Murder As A Principal Or Accomplice.

Sufficiency of the evidence is a question of constitutional magnitude and may be raised for the first time on appeal. *State v. Baeza,* 100 Wn.2d 487, 488, 670 P.2d 646 (1983). Due process rights, guaranteed under the state and federal constitution, require the State to prove every element of a crime beyond a reasonable

doubt. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1968, 25 L.Ed.2d 368 (1970); U.S. Const. Amend. XIV; Wash. Const. Art. 1§3. Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Insufficiency of the evidence to prove all elements of a crime beyond a reasonable doubt requires the conviction to be reversed and dismissed. *State v. Teal,* 117 Wn. App. 831, 837, 73 P.3d 402 (2003).

Washington law holds that accomplice liability requires an overt act; "one does not "aid"…unless, in some way, he associates himself with the undertaking, participates in it as something he desires to bring about, and seeks by his action to make it succeed." *In re Welfare of Wilson,* 91 Wn.2d 487,491, 588 P.2d 1161 (1979); *State v. Matthews,* 28 Wn.App. 198, 203, 624 P.2d 720 (1981). RCW 9A.08.020 (3). Mere physical presence combined with assent, or presence combined with knowledge, is insufficient to constitute aiding and abetting. *Wilson,* at 491.

Substantial evidence is that character of evidence which would convince an unprejudiced, thinking mind of the truth of the

fact to which the evidence is directed. *State v. Boyd,* 21 Wn.App. 465, 586 P.2d 878 (1978). Here, the findings of fact are not supported by substantial evidence. There was no evidence from which any rational trier of fact could conclude that Mr. Brugnone took any action or had any intent to, or did cause the death of Ms. Clift. Because there is no evidence to conclude Mr. Brugnone participated in the homicide, the special verdict of use of a deadly weapon should also be reversed and dismissed.

Credibility must be decided by the finder of fact; however the evidence of this case, even under the test announced in *Green,* demands reversal of the conviction. This conclusion is based on facts supported by the record, which differ from the findings made by the trial court.

IV. Conclusion

Based on the foregoing facts and authorities, Mr. Brugnone respectfully requests this Court to reverse his convictions and dismiss with prejudice all charges.

Dated this 3rd day of October 2013.

Respectfully submitted,
s/Marie J. Trombley WSBA 41410
Attorney for Frank Brugnone
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Frank Brugnone, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that on October 3, 2013 that a true and correct copy of the Brief of Appellant was emailed per agreement between the parties to :

Email: trefrylaw@wegowireless.com
David Brian Trefry, Special Prosecutor Yakima County

Email: gaschlaw@msn.com
Susan Gasch, attorney for Michael Gorski

And by first class, postage prepaid, USPS mail to:

Frank E. Brugnone, 11J-00530
Yakima County DOC
111 N. Front St.
Yakima, WA 98901

s/Marie J. Trombley WSBA 41410
Attorney for Frank Brugnone
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comcast.net