

65725-9

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NO. 65725-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER FENDICH,

Appellant.

---

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

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REPLY BRIEF OF APPELLANT

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JAN TRASEN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

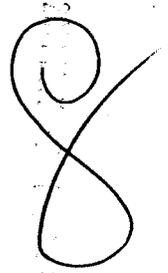


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A. ARGUMENT

1. WHERE THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON THE TESTIMONY OF AN ACCOMPLICE, REVERSAL IS REQUIRED.

- a. Cunningham met the definition of an accomplice.

The law requires that an accomplice act with knowledge that he will facilitate the crime. State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000); State v. Cronin 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000). As the State seems to concede, the accomplice need only have general knowledge of the crime; he need not know the specific degree of the crime he is facilitating. Resp. Brief at 8.

Here, the record indicates that Cunningham handed a loaded gun to Mr. Fendich so that he could fire it into the river, as Cunningham, himself, had just done. Clearly Cunningham functioned as Mr. Fendich's accomplice in possessing and using the firearm, and the jury should have been instructed to treat his testimony with the careful examination appropriate under such circumstances. Regardless of whether Cunningham had specific knowledge of Mr. Fendich's criminal history, Cunningham allegedly brought a loaded firearm to Mr. Fendich and, according to his own testimony, gave it to him. RP 451-53. Even if Cunningham knew nothing about Mr. Fendich's ineligibility to possess a firearm,

Cunningham admitted his accomplice liability on the stand; thus it was error for the trial court to deny the defense request for the accomplice instructions. Roberts, 142 Wn.2d at 512; Cronin 142 Wn.2d at 578-79; WPIC 10.51.

b. There was insufficient corroboration of the accomplice testimony. In State v. Harris, the Supreme Court held that “it is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced.” 102 Wn.2d 148, 155, 685 P.2d 584 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988). In fact, it is “always reversible error” when a court fails to give this instruction, “unless the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence.” State v. Harris, 102 Wn.2d at 155 (emphasis added).

The State argues that there was sufficient independent corroboration of the accomplice testimony, and therefore any error in the court’s refusal to give the accomplice instruction was harmless. Resp. Brief at 9-13.

This argument, however, is not supported by the record, which indicates that eyewitnesses could not corroborate

Cunningham's account of events. Even the one witness who did, William Newman, was impeached with the transcript of his own 911 call, in which he had reported that only one man had a gun, and he was the black man (Cunningham). RP 608-09.<sup>5</sup> Witness Rebecca Cabrales described the incident involving Cunningham's gun, but failed to identify Mr. Fendich in court. RP 668. John Cook testified for the State and saw Cunningham take several shots into the river, but never saw Mr. Fendich touch the gun. RP 631-40.

Due to the woeful lack of corroboration here, it was essential that the jury be instructed that Cunningham's testimony should be scrutinized and be acted upon with great caution. WPIC 6.05; Harris, 102 Wn.2d at 155. The failure to give the accomplice instruction deprived Mr. Fendich of his opportunity to argue his theory of the case – here, to fully attack the credibility of his accomplice – and was thus error requiring reversal.

c. Because the error was not harmless beyond a reasonable doubt, reversal is required. When a jury instruction is deficient in a manner that relieves the State of its burden to prove each essential element of a charged crime, a reviewing court must reverse the conviction, unless the State can show that the

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<sup>5</sup> The record reflects that Mr. Fendich is white and Mr. Cunningham is

instructional error was harmless beyond a reasonable doubt. State v. Williams, 158 Wn.2d 904, 917, 148 P.3d 993 (2006) (citing Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). The State cannot show beyond a reasonable doubt that the error did not contribute to the verdict obtained. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder, 527 U.S. at 15).

2. WHERE PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED, REVERSAL IS REQUIRED.

a. The prosecutor misstated the law, lowering the burden of proof during closing argument. When the deputy prosecutor misstated the terms of Mr. Fendich's ineligibility to possess a firearm during argument, she undermined the actual language of the notice of ineligibility, replacing it with language stating a lower burden – "can't be near them ... cannot be near firearms." RP 835. Nowhere in the notices of ineligibility, which resulted as collateral consequences of Mr. Fendich's adjudications as a juvenile offender, was there included a prohibition against being "near" or "around" firearms.

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black. RP 376.

The State seems to concede that the deputy prosecutor was using “overly broad” language to refer to constructive possession during her closing argument. Resp. Brief at 16. The State’s effort to whitewash the deputy prosecutor’s misconduct by referring to the remarks as “shorthand” do not change the fact that the State’s argument misstated the law and lowered the burden of proof, creating reversible error. Resp. Brief at 14, 16.

The prosecutor’s dramatic lowering of the State’s burden of proof must be soundly rejected as a clear violation of Mr. Fendich’s right to a fair trial and due process of law. State v. Warren, 165 W.2d 17, 28, 195 P.3d 940 (2008) (curative instruction insufficient to cure error where prosecutor gave “remarkable misstatement of the law” during closing argument); State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930) (a prosecutor is a quasi-judicial officer, whose duty it is to assure a defendant a fair and impartial trial, “in the character of fair play”).

b. The deputy prosecutor’s misconduct was flagrant, as defense counsel had objected to this precise argument before trial. Noting that the prosecutor was characterizing the firearm ineligibility orders in an overbroad manner, defense counsel argued in limine:

It doesn't say... you can't be around it, you can't be anywhere near it. That's not what it says. And in fact that's not what the law is requiring this ... but I do want the jury to be informed based on the actual language of the notification not sort of an expansion or an elaboration, I guess.

RP 171-72 (emphasis added).

The fact that the deputy prosecutor, regardless, misstated the law and attempted to lower burden of proof during closing argument, indicates that the State's misconduct was flagrant and ill-intentioned.

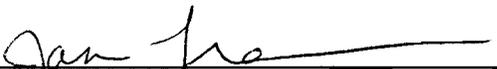
Accordingly, because Mr. Fendich's conviction resulted from prejudicial prosecutorial misconduct, it must be reversed. See also State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996) (finding manifest constitutional error and reversing conviction, despite failure of defense counsel to object at trial, where prosecutor misstated nature of reasonable doubt and shifted burden of proof to defense in closing argument).

B. CONCLUSION

For the foregoing reasons, Mr. Fendich respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 9<sup>th</sup> day of May, 2011.

Respectfully submitted,

  
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JAN TRASEN (WSBA 41177)  
Washington Appellate Project (91052)  
Attorneys for Appellant

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	)	
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, JOSEPH ALVARADO, STATE THAT ON THE 9TH DAY OF MAY, 2011, 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:

[X] JEFFREY C DERNBACH		
KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

**SIGNED** IN SEATTLE, WASHINGTON THIS 9TH DAY OF MAY, 2011.

x \_\_\_\_\_ *JA*

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710