

No. 66058-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTOINE DAVIS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE ATTEMPTED MURDER CONVICTIONS MUST BE REVERSED BECAUSE AN ACCOMPLICE IS NOT "IN FOR A DIME, IN FOR A DOLLAR."

Jontae Chatman fired at least 20 shots into Mario Spearman's car, killing him. Mr. Chatman specifically tried not to kill any passengers, and was successful, although the frontseat passenger was injured.

Appellant Antoine Davis, along with two others, was with Mr. Chatman that day and encouraged the killing of Mario Spearman. Although Mr. Davis had a gun, he did not fire any shots at Mr. Spearman's car. No evidence was presented that Mr. Davis knew there were any passengers in Mr. Spearman's car.

On appeal, Mr. Davis does not challenge his conviction as an accomplice for count 1, the first-degree murder of Mario Spearman. But Mr. Davis was not an accomplice to the attempted murders of the passengers, and those convictions cannot stand. To be liable as an accomplice, a person must knowingly facilitate the crime charged. Mr. Davis did not even know there were passengers in the car, let alone encourage their attempted murder. The convictions on counts 2, 3, and 4 must be reversed.

a. Jontae Chatman, the person who killed Mario Spearman by firing at least 20 bullets at his car, was the principal in this case.

At trial, the State's theory of the case was that Jontae Chatman acted as principal and the other three defendants, including appellant Antoine Davis, served as his accomplices. 7/26/10 RP 35-39. The prosecutor in closing argument said:

Here's the real[ly] important instruction. It's instruction number 10 in your packet, and it's the accomplice liability instruction. And this one applies mainly to Nestor Ovidio Mejia and Antoine Davis. And you have to pay special attention to this instruction because this instruction tells you that a person is guilty of a crime if it's committed by another for which the person is legally accountable.

7/26/10 RP 35. Later, the prosecutor continued, "as we all know now, Jontae Chatman was by far the principal in this brutal shooting on April 7th." 7/26/10 RP 39. The prosecutor went on to discuss Jontae Chatman's actions and culpability for the next 17 pages. 7/26/10 RP 39-57.

She then shifted her focus to Mr. Ovidio, stating, "when looking at the guilt of Nestor Ovidio Mejia we have to look at what is he charged with, what are the elements, but most importantly the accomplice liability instruction." 7/26/10 RP 57. After repeating the accomplice instruction, the prosecutor said, "I would ask you that is

probably the most important instruction you have for both Nestor Ovidio Mejia and for Antoine Davis in this case because, if you find they are accomplices and if you find that Jontae Chatman committed these crimes, then they, too, are guilty of these crimes.” 7/26/10 RP 58.

On appeal, the State reverses course and argues that Mr. Davis could have been convicted as a principal. The record belies this claim.

Jontae Chatman shot at Mr. Spearman at least 20 times with an AK-47. 7/6/10 RP 124; 7/7/10 RP 236; 7/13/10 RP 73, 76; 7/19/10 RP 156. Mr. Davis had a gun, but it did not fire; the detective and the firearm expert testified that all 20 shell casings found at the scene were from the AK-47 that Mr. Chatman fired. 7/6/10 RP 233-36; 7/8/10 RP 13; 7/12/10 RP 66; 7/19/10 RP 156; 7/21/10 RP 24. Although Mr. Davis was present and ready to assist, Mr. Spearman would be alive today absent the actions of Jontae Chatman. Thus, Antoine Davis could not have been convicted as principal.¹

¹ The State cites witness Cynthia Bowman’s testimony for the proposition that “at least two of the defendants fired their weapons.” Resp. Br. at 4. The State neglects to mention that Ms. Bowman testified that the other shooter apart from Jontae Chatman was Hispanic and that she had no doubt about that. 7/6/10 RP 146, 149; 7/7/10 RP 3, 23. The Hispanic co-defendant was Nestor Ovidio

Although it is not clear from the brief, the State may be arguing that even if Mr. Davis could not have been convicted as a principal on count 1, he could be convicted as a principal on the other counts. But all counts were part of a single event: the shooting of Mario Spearman's car. Just as Jontae Chatman is the one whose bullets killed Mario Spearman, Jontae Chatman is the one whose bullets hit and injured the frontseat passenger, and whose bullet may have grazed the arm of a backseat passenger. 7/6/10 RP 233-36; 7/8/10 RP 13; 7/12/10 RP 66; 7/19/10 RP 156; 7/21/10 RP 24. Thus, he was the principal on the attempted murder counts just as he was the principal on the murder count. There can be no question that Antoine Davis was convicted as an accomplice, and could not have been convicted as principal.

b. Although Mr. Davis was properly convicted as accomplice to Mario Spearman's murder, he may not be held liable for attempted murder of the passengers because he did not even know they existed, let alone knowingly facilitate the crimes against them.

Although Mr. Davis concedes he was properly convicted as an accomplice to count 1, he was not an accomplice to the attempted murder of the passengers and those convictions must be reversed.

Mejia, not Mr. Davis. Even if Mr. Ovidio could have been convicted as a principal – an issue appellant does not concede – Mr. Davis certainly could not have been.

Even Jontae Chatman, the principal, did not attempt to murder the passengers. As the State pointed out in closing argument, Mr. Chatman said he tried not to shoot into the passenger side, and the State's trajectory analysis showed all shots were aimed at the driver. 7/26/10 RP 42, 46. Mr. Davis relies on his opening brief for the argument that Mr. Chatman did not commit attempted murder; Mr. Chatman did not appeal and the Court need not address the issue. The law of accomplice liability resolves the question as to Mr. Davis: Because he did not even know about the passengers, let alone encourage their murder, he cannot be liable for Mr. Chatman's crimes against them.

The State would have this Court return to the pre-Roberts/Cronin state of the law under which an accomplice is "in for a dime, in for a dollar." It ignores both the required mens rea for attempt crimes and the necessary mens rea for accomplice liability. First, the State claims "[t]he jury could find Davis guilty of attempted murder in the second degree if he took a substantial step towards the commission of the crime." Resp. Br. at 12. That is incorrect. To convict a defendant of an attempt crime, the State must prove not only that the defendant took a substantial step, but also that he had the intent to commit the specific crime. RCW 9A.28.020 (1).

Second, the State argues that because “there is no question that Davis was an accomplice to murder” for count one, “liability extends to all other unintended victims.” Resp. Br. at 21. The State misunderstands the law. An individual is liable as an accomplice only if he knowingly facilitated the crime committed by the principal; he is not liable for any crime the principal ends up committing without the accomplice’s knowledge or encouragement. RCW 9A.08.020; State v. Cronin, 142 Wn.2d 568, 578-79, 12 P.3d 752 (2000).

Although the accomplice statute was once interpreted the way the State urges the Court to construe it here, the Supreme Court clarified the law of accomplice liability in Cronin and State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000). Timothy Cronin was convicted of murder as Michael Roberts’ accomplice. Cronin, 142 Wn.2d at 581. Cronin had argued at trial that he was not guilty of murder because he did not know the principal was going to kill the victim. Id. at 576. But the jury was instructed that a person is liable as an accomplice if he knowingly facilitates “a crime,” and the State told the jury an accomplice is “in for a dime, in for a dollar.” Id. at 576-77. The Supreme Court reversed, explaining:

[T]he plain language of the complicity statute does not support the State's argument that accomplice liability attaches so long as the defendant knows that he or she is aiding in the commission of any crime. On the contrary, the statutory language requires that the putative 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. ... [T]he legislature intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has knowledge.

Id. at 578-79.

Not only is the State's argument on appeal contrary to Roberts and Cronin, but the State's argument to the jury was similarly flawed. The prosecutor said, "if you find [Mr. Davis and Mr. Ovidio] are accomplices and if you find that Jontae Chatman committed these crimes, then they, too, are guilty of these crimes." 7/26/10 RP 58. The prosecutor failed to inform the jury that they had to determine whether Mr. Davis was an accomplice separately for each crime. Although the misstatement was presumably inadvertent, the prosecutor essentially told the jury that once they found Mr. Davis acted as an accomplice to Mr. Chatman for count 1, he was "in for a dime, in for a dollar." Whatever additional crimes Mr. Chatman committed, Mr. Davis, too, was guilty. 7/26/10 RP 58. That is not the law. An accomplice must knowingly facilitate

each crime in order to be guilty of each crime the principal commits. Cronin, 142 Wn.2d at 578-79.

The State cites the 1985 case of State v. Guloy for the contrary proposition, but that case is not on point. Resp. Br. at 20 (citing State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985)). Like Cronin, Guloy involved defendants who were convicted of murder as accomplices. Id. at 430-31. The defendants raised many issues on appeal; the majority opinion is 17 pages long, and only one page is devoted to the issue the State suggests is relevant here. The defendants argued the trial court erred in not instructing the jury that an accomplice to murder must act “intentionally.” Id. at 430. The Supreme Court disagreed, noting the statute requires only the lesser mens rea of “knowledge;” it does not require the State to prove the accomplice “had the intent that the victim would be killed.” Id. at 431 (citing RCW 9A.08.020).

Mr. Davis does not dispute that the accomplice liability statute speaks of “knowledge” rather than “intent.” But “knowledge by the accomplice that the principal intends to commit ‘a crime’ does not impose strict liability for any and all offenses that follow.” Roberts, 142 Wn.2d at 513. The knowledge that is required is knowledge that one is facilitating the crime charged, not some

other crime. RCW 9A.08.020; Cronin, 142 Wn.2d at 578-79. The crime charged in counts 2, 3, and 4 was the attempted murder of the passengers. Mr. Davis did not knowingly facilitate those crimes; there was no evidence he even knew the passengers existed, let alone that he knowingly aided in their attempted murder. Mr. Davis knowingly facilitated the crime of murder as charged in count one. He was properly held liable for that crime, but he may not be held "in for a dime, in for a dollar."²

A hypothetical scenario illustrates the problem with the State's argument. Imagine that Mr. Davis had given Mr. Chatman the AK-47, encouraged him to kill Mr. Spearman, and told him Mr. Spearman would likely be driving down a particular street at that moment. If Mr. Chatman had gone and done exactly what he did in this case but Mr. Davis stayed home, clearly Mr. Davis could be held liable only for the murder of Mr. Spearman, not the attempted murder of his passengers. The fact that Mr. Davis accompanied Mr. Chatman does not change the analysis, because Mr. Davis did not know there were passengers in the car and did not knowingly facilitate the crimes against them.

² To the extent Guloy could be read not to require knowledge of the crime charged, it has been overruled by Roberts and Cronin.

Stein is instructive. State v. Stein, 144 Wn.2d 236, 27 P.3d 184 (2001). There, the defendant was convicted of three counts of attempted murder after the jury had been instructed alternatively on accomplice liability and conspiracy. Id. at 241. The conspiracy instruction allowed the jury to hold the defendant liable for reasonably foreseeable acts committed by coconspirators. Id. at 243. The Supreme Court reversed, holding the convictions were contrary to Roberts and Cronin. Id. at 245-46.

[T]he instructions here, taken as a whole, enabled the jury to convict Stein of conspiratorial liability for attempted murder without finding the necessary element of knowledge that his coconspirators intended to murder the victim. Further, since liability under [federal law] requires no such knowledge, it is directly contrary to the holding of Roberts and Cronin and is therefore incompatible with Washington law.

Id. at 246 (emphasis added). Here, Mr. Davis's convictions for attempted murder cannot be sustained because the State failed to prove he knew Mr. Chatman intended to murder the victims. See id. Mere foreseeability is not sufficient. Id. at 248. This Court should reverse and remand for dismissal of the charges on counts 2, 3, and 4, and for resentencing.

2. THE TRIAL COURT SEATED AN ALTERNATE JUROR WITHOUT DETERMINING HER CONTINUED IMPARTIALITY, REQUIRING REVERSAL AND REMAND FOR A NEW TRIAL.

The trial court replaced a juror with an alternate after the jury had been deliberating for more than a day, but the court did not determine whether the alternate juror had remained impartial. This failure constitutes reversible error.

After Mr. Davis filed his opening brief, this Court concluded to the contrary in State v. Chirinos, 161 Wn. App. 844, 255 P.3d 809 (2011). This Court should reconsider that decision.

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 3, 21, and 22 of the Washington Constitution guarantee a defendant the right to an impartial jury. Wainwright v. Witt, 469 U.S. 412, 429-30, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961); State v. Davis, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). Moreover, Article I, section 21 of the Washington Constitution “provides greater protection for jury trials than the federal constitution.” State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.2d 913, 918 (2010).

To ensure that the right to a unanimous and impartial jury is adequately protected, when a juror is discharged during deliberations and replaced with an alternate, the court “shall” instruct the reconstituted jury to disregard all previous deliberations and begin deliberations anew and “shall” ensure any alternate jurors remain protected from outside influence if recalled to participate in deliberations. CrR 6.5; State v. Johnson, 90 Wn. App. 54, 72-73, 950 P.2d 981 (1998). CrR 6.5 directs, in pertinent part:

Alternate jurors who do not replace a regular juror may be discharged or temporarily excused after the jury retires to consider its verdict. When jurors are temporarily excused but not discharged, the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that juror’s ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations.

Based on the court rule and the constitutional requirement of a fair and impartial jury, several Court of Appeals decisions dictate that the process of recalling an alternate juror “clearly contemplates” a hearing such as a “brief voir dire” of the recalled alternate to verify her impartiality. State v. Stanley, 120 Wn. App. 312, 315, 85 P.3d 395 (2004); State v. Ashcraft, 71 Wn. App. 444, 462-63, 859 P.2d 60 (1993). At the least, there must be “a formal

proceeding” instituted by the judge “to insure that an alternate juror who has been temporarily excused and recalled has remained protected from ‘influence, interference or publicity, which might affect that juror’s ability to remain impartial.’” Johnson, 90 Wn. App. at 73-73 (quoting CrR 6.5); Ashcraft, 71 Wn. App. at 462.

Affirmative steps to establish continued juror impartiality are easily accomplished. The court need only ask the replacement juror whether she had discussed the case with anyone while absent from the courtroom, whether she had formed any opinions about the case, and whether she had received any additional information about the case from any outside source.

In an Illinois case, before substituting an alternate juror, the court questioned the alternate, who stated she had not discussed the facts of this case with anyone, and she had not formed an opinion about the case. People v. Roberts. 824 N.E.2d 250, 255 (Ill. 2005). But the court did not question the recalled alternate about whether she received additional information about the case, and the court later discovered that it was likely that this alternate had learned prejudicial information from the juror she was replacing. Id. at 261. The Roberts Court ruled that the court had not sufficiently ensured the alternate was free from bias. Id.

A Maryland case similarly reviewed the mid-deliberation substitution of a juror, requiring an on-the-record inquiry into the alternate juror's continued impartiality and fitness to serve:

Assurance that the alternate juror remains qualified to serve is a prerequisite to a substitution and, unless waived by the defendant, must be established on the record. Even courts that have allowed a mid-deliberation substitution on a non-prejudice basis have required that much. In short, on this record, we would be left to speculate whether the criteria we believe minimally necessary have been satisfied, and we are unwilling to engage in such speculation.

Hayes v. State, 735 A.2d 1109, 1121 (Md. Ct. Apps. 1999).

A Kentucky Court further explained that assuming an alternate could be substituted for a deliberating juror under its governing rules, the court must affirmatively inquire into the juror's ability to serve:

[T]he trial court erred by simply permitting that juror to join the other eleven jurors without undertaking any colloquy with the returning alternate to ensure that he had not discussed the case with anyone or otherwise encountered any circumstance after leaving the courtroom that might have affected his ability to serve as an impartial juror.

Crossland v. Com., 291 S.W.3d 223, 229 (Ken. 2009).

In light of the above authority, this Court should depart from Chirinos and reverse and remand for a new trial.

B. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Davis asks this Court to reverse his convictions on counts 2, 3, and 4, and remand for dismissal of those charges with prejudice. A new trial should be granted on count 1.

DATED this 25th day of August, 2011.

Respectfully submitted,


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ANTOINE DAVIS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF AUGUST, 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF AUGUST, 2011.

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