66058-6 66058-6

NO. 66058-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ANTOINE DAVIS,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE LAURA MIDDAUGH

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**BRIEF OF RESPONDENT**

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 14 PM 4: 37

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## A. ISSUES PRESENTED

1. Davis and two co-defendants fired dozens of rounds into a car containing four people. The driver was killed, two passengers were struck by bullets, and a two-year-old boy in the back seat emerged from the vehicle physically uninjured. Davis was convicted of first-degree murder for causing the death of the driver, and three counts of attempted second-degree murder for the passengers. Davis contends that he cannot be held responsible--factually or legally--for the crimes committed against the passengers. Should this Court reject Davis' claim?

2. When an alternate juror needed to be seated during deliberations, the trial court followed the procedures as delineated in State v. Chirinos.[1] Should this Court agree that the trial court followed the proper procedures for seating an alternate juror?

## B. STATEMENT OF THE CASE

### 1. PROCEDURAL FACTS

Davis was charged in Count I with First-Degree Murder (victim: Mario Spearman), in Count II with Attempted First-Degree

[1] ___ Wn. App. ___, ___ P.3d ___, 2011 WL 1833462 (Wn. App. Div. 1, May 16, 2011).

Murder (victim: David Route), in Count III with Attempted First-Degree Murder (victim: Paige Sauer), and in Count IV with Attempted First-Degree Murder (victim: two-year-old N.S.).[2] CP 163-65. Each count carried a firearm sentence enhancement. Id.

A jury convicted Davis as charged on count I, and with lesser-included offenses of Attempted Second-Degree Murder on counts II, III and IV. CP 110, 113-14, 116-17, 119-20. The jury returned findings that Davis was armed with a firearm on each count. CP 111, 115, 118, 121. Davis received a standard range sentence on each count, with firearm enhancements, for a total sentence of 767 months. CP 148.

## 2. SUBSTANTIVE FACTS

Dominick Reed, Jontae Chatman, Nestor Ovidio-Mejia and the defendant, Antoine Davis, are all close friends. 17RP[3] 41-43, 50-51. On April 7, 2009, Ovidio-Mejia and Reed were driving down

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[2] Davis was charged along with three co-defendants, Dominick Reed (the driver of the getaway car), Jontae Chatman, and Nestor Ovidio-Mejia. None of the co-defendants are part of this appeal.

[3] The 25 volume verbatim report of proceedings is cited as follows: 1RP--2/26/10, 2RP--3/26/10, 3RP--4/30/10, 4RP--5/11/10, 5RP--6/4/10, 6RP--6/21/10, 7RP--6/22/10, 8RP--6/23/10, 9RP--6/24/10, 10RP--6/30/10, 11RP--7/1/10, 12RP--7/6/10, 13RP--7/7/10 (pps 1-200), 14RP--7/7/10 (pps 201-249), 15RP--7/8/10, 16RP--7/12/10, 17RP--7/13/10, 18RP--7/14/10, 19RP--7/15/10, 20RP--7/19/10, 21RP--7/20/10, 22RP--7/21/10, 23RP--7/22, 7/26 & 7/28/10, 24RP--8/3/10, and 25RP--9/24/10.

Rainier Avenue South looking to score a "swish" (marijuana rolled into a cigar) when they came upon a number of police cars at a crime scene. 17RP 44-46. Stopping at the scene, the two discovered that their close friend, Ronald "Ron Ron" Preston had been shot. 17RP 48. Word on the street was that Mario Spearman had ordered someone shoot Ron Ron. 17RP 48.

Shortly thereafter, Reed, Ovidio-Mejia, Chatman and Davis met at Chatman's residence and decided to seek revenge for their friend having been shot. 17RP 51, 53-54, 70. Davis retrieved his AK-47 assault rifle and put it in Reed's car. 17RP 57. In addition to the AK-47, Davis and Ovidio-Mejia were each armed with a handgun. 17RP 81, 85-86. The four men then got in Reed's car and headed for Pacific Highway in search of Spearman so that they could execute him. 17RP 70.

At the intersection of 188th Avenue South and Pacific Highway, Ovidio-Mejia spotted Spearman's Cadillac, calling out to the others, "there's that nigger's car right there." 12RP 64-65; 17RP 68. When the light turned red, Reed stopped a few cars behind Spearman as Chatman, Ovidio-Mejia and Davis--each armed with a gun--jumped out. 17RP 70, 73. Chatman took Davis'

AK-47. 17RP 74. Ovidio-Mejia and Davis were armed with handguns. 17RP 85.

In the shooting spree that followed, Spearman's car was riddled with bullets, with evidence that over 30 shots were fired, that multiple guns were fired, and that at least two of the defendants fired their weapons. 12RP 142, 146, 150, 154; 13RP 3, 43; 14RP 229; 18RP 47, 58. Mario Spearman was in the driver's seat of the Cadillac, David Route was in the front passenger seat, Paige Sauer was in the left-rear passenger seat, and N.S. was in the right-rear passenger seat. 21RP 8-9, 15. As the four defendants fled the scene, the Cadillac rolled forward into a post as blood dripped from the driver's side door onto the ground. 12RP 108; 17RP 78.

Spearman was executed, having been struck multiple times. 21RP 56-57, 63-65. Route was also struck multiple times, with gunshot wounds to his left hand, left leg and right leg. 12RP 71; 17RP 24-25; 22RP 54. Route underwent five operations but survived. 22RP 54. When the shooting started, Paige dove on top of N.S. and miraculously N.S. was not hit and Paige suffered only a grazing bullet wound to her arm. 21RP 16, 22, 26-27.

Additional facts are included below.

## C. ARGUMENT

### 1. DAVIS IS FACTUALLY AND LEGALLY RESPONSIBLE FOR THE ACTS ENCOMPASSING COUNTS II, III AND IV.

Davis asserts that he cannot be held factually or legally responsible for the attempted murders of David Route (count II), Paige Sauer (count III), and N.S. (count IV). Davis is mistaken. Davis' argument is based on a claim that there was insufficient evidence for any reasonable jury to have found him guilty. His argument, however, is based on an inaccurate recitation of the facts and an incorrect statement of the law.

#### a. The Legal Standard For A Sufficiency Of The Evidence Claim.

Evidence is sufficient to support a conviction if viewed in the light most favorable to the State, the evidence permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review "does

not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992).

In short, to prevail here, Davis must prove that no rational jury could have found him guilty of attempted murder in the second degree as charged in counts II, III and IV--even when the evidence is viewed in the light most favorable to the State.

**b. What The State Had To Prove At Trial.**

A person commits the crime of murder in the second degree "when with intent to cause the death of another person but without premeditation, he causes the death of such person ***or of a third person***." RCW 9A.32.050; CP 204; WPIC 27.01. A person commits the crime of attempted murder in the second degree "when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime." RCW

9A.28.020; CP 208; WPIC 100.01. A "substantial step" is defined as "conduct that strongly indicates a criminal purpose and that is more than mere preparation." State v. Gatalski, 40 Wn. App. 601, 613, 699 P.2d 804, rev. denied, 104 Wn.2d 1019 (1985), impliedly overruled on other grounds, State v. Harris, 121 Wn.2d 317, 849 P.2d 1216 (1993); CP 188; WPIC 100.05. As instructed here, the jury was permitted to find Davis guilty if he acted as a principal in the crimes or as an accomplice in the crimes.[4] CP 179, 215-17.

**c. Davis' Argument Relies On An Inaccurate Recitation Of The Facts.**

The State relies on the facts as discussed in section B-2 above, the Statement of the Case. However, the State discusses the following defense factual allegations that pertain to the issue raised because the assertions are not supported by the evidence.

[4] In pertinent part, the jury was instructed that "... [a] person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime. The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice..." CP 179; WPIC 10.51; RCW 9A.08.020.

--Davis asserts that neither he nor Ovidio-Mejia fired their weapons. Def. br. at 4. This statement is not supported by the facts. Although no weapons were ever recovered, the evidence shows that all three defendants--Chatman, Davis and Ovidio-Mejia, were armed with firearms. 15RP 162; 17RP 76, 80; 19RP 55. All the shell casings that the detectives were able to recover from the scene were fired from an AK-47--a weapon that belonged to, and was provided by, Davis.[5] 15RP 13; 17RP 57; 20RP 155. The evidence shows that the AK-47 was likely fired by Chatman. 12RP 98, 101-02, 124-25; 17RP 76-77. However, this was not the only evidence admitted regarding the shooting. Other evidence demonstrates that at least one, if not both the other defendants, fired a weapon.

Davis and Ovidio-Mejia were both armed with handguns. 17RP 80, 85. An eyewitness testified that she saw not one, but two persons firing weapons--one was firing a handgun. 12RP 146-47;

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[5] Prior to police arrival, multiple vehicles and persons passed through the crime scene. 15RP 13-14. Shell casings were kicked and in some instances picked up by civilians. 13RP 43, 45-46. Security video showed that at least 105 vehicles drove through the crime scene before police were able to cordon off the area. 17RP 30. Testimony was admitted showing that casings from smaller caliber semiautomatic handguns (revolvers do not eject a shell casing when fired) could have been transported from the scene by being stuck in the tire treads of passing vehicles. 15RP 14-15. While 20 shell casings were recovered, there were over 30 impact cites in the Cadillac alone. 16RP 130; 18RP 47.

13RP 2-3, 5. Another witness testified that he saw a black male firing a long pistol. 13RP 80, 83.

Evidence of .22 caliber rounds and .380 caliber rounds were found in the car used by Davis in the shooting. 18RP 79. An AK-47 uses 7.62 caliber ammunition. 20RP 146. Additionally, there were at least three bullet holes in Spearman's Cadillac that were of a smaller diameter than the multitude of other bullet holes in the vehicle. 18RP 47, 57-58, 121. All of this evidence supports the conclusion that Davis, Ovidio-Mejia, or both of them, fired their handguns at the Cadillac.[6]

--Davis asserts that the backseat passenger, Paige Sauer, was not harmed, and that the front seat passenger, David Route, was simply struck by a stray bullet. Def. br. at 4. These statements are not supported by the facts. While Paige Sauer was not seriously hurt, she was struck by a bullet. A bullet grazed her arm leaving a burn mark. 12RP 74; 21RP 26-27. Route, on the other hand, was struck multiple times and suffered severe injuries. 12RP 71; 17RP 24-25; 22RP 54. While Route did not testify, the

[6] In a recorded jail phone call, Davis told Ron Ron that during the shooting his gun jammed. 22RP 23-24. Davis did not say whether his gun jammed after firing a round or rounds, or whether his gun jammed upon attempting to fire his first round.

parties entered into a stipulation that Route had been shot in both legs and his hand. 22RP 54. The parties further stipulated that Route had to undergo five surgical operations and extensive physical therapy due to his multiple gunshot wounds. 22RP 54.

--Davis asserts that Chatman aimed only at Spearman and that he actually tried to avoid hitting anyone else in the vehicle. Def. br. at 4. While Spearman made a self-serving statement to the police to this effect, his statement is not supported by the evidence.[7]

Spearman's Cadillac was riddled with bullet holes. 18RP 46-47. A trajectory could be determined only where a particular exterior bullet hole could be matched with a corresponding secondary interior bullet hole or interior damage. 18RP 55. There were numerous bullet holes in the trunk, rear window, rear quarter panel, rear passenger driver's side door, as well as the driver's side front door and windshield. 18RP 47-129; Exh 71; Exh 88. There was a bullet hole dead center of the trunk next to the Cadillac

[7] Chatman made other dubious claims in his statement--none supported by the evidence. Chatman claimed that he and the other defendants just happened upon Spearman while they were looking to score some weed, that the AK-47 was already in the car when Reed picked him up, and that Spearman yelled threats to him from his car before the shooting started. 19RP 106-07. No witness at the scene testified that any threats or statements of any kind came from Spearman's Cadillac or that anyone in the Cadillac even knew of the defendants' presence until Chatman started shooting.

emblem, a bullet hole neck-high in the rear window directly in line with where a right-rear passenger would be sitting, a bullet hole head/neck-high in the rear window directly in line with where a left-rear passenger would be sitting, at least two holes in the driver's side left-rear door, and two bullet holes dead-center in the seat/head-rest area of the left-rear passenger seat. Id. If Paige Sauer had not pushed N.S. down and fallen on top of him, there can be little doubt that the two bullets that went through her seat would have struck her in the chest, neck or head. The evidence simply does not support Davis' claim that Chatman (or the others who may have fired) carefully tried to avoid hitting anyone other than Spearman.[8]

Further, Davis' claim that no one knew there were persons in the back seat is suspect. While the photos listed above show that the windows of the Cadillac were tinted, it does not appear that they were so darkened that a person could not see into the vehicle at all. Additionally, a civilian witness at the scene testified (consistent with

[8] In addition to Spearman's Cadillac, at least one other vehicle was struck multiple times during the shooting. The vehicle in front of Spearman's Cadillac had its rear window shattered, had multiple impact defects to the rear of the vehicle, and had a bullet strike the car's undercarriage just missing the gas tank. 12RP 97-98, 114, 120-21; 18RP 44-45, 62-65; Exh 2, slides K, L, N, O & P; Exh 71, slides A, E, F, H & I.

the photos) that at least one of the Cadillac's windows was open. 13RP 169-70.

### d. Sufficient Evidence Supports The Finding That Davis Acted As A Principal.

Davis' argument hinges in part of his premise that he could only be convicted as an accomplice. This premise is not accurate. The jury could find Davis guilty of attempted murder in the second degree if he took a substantial step towards the commission of the crime. This does not require a finding that he fire a shot--although viewed in the light most favorable to the State, a reasonable jury could conclude that he did. In addition, by his own admission, at a minimum Davis attempted to fire a shot--clearly a substantial step towards the commission of the crime. Firing into a vehicle with multiple persons inside is sufficient evidence of assault or attempted murder even if the shooter did not know the number of persons inside. See State v. Price, 103 Wn. App. 845, 852, 14 P.3d 841 (2000) (We hold that a reasonable jury could have found that the act of firing a single bullet into a vehicle occupied by two people sufficiently corroborated that Price took a substantial step toward commission of first degree murder for both victims),

rev. denied, 143 Wn.2d 1014 (2001); see also State v. Elmi, 166 Wn.2d 209, 218, 207 P.3d 439 (2009) (Where a defendant intends to shoot into and to hit someone occupying a house, a tavern, *or a car*, she or he certainly bears the risk of multiple convictions when several victims are present, regardless of whether the defendant knows of their presence).

Whether conduct is or is not a substantial step is a question of fact under the evidence. State v. Workman, 90 Wn.2d 443, 449-52, 584 P.2d 382 (1978). On appeal, a claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). In evaluating the sufficiency of the evidence, circumstantial evidence and direct evidence are equally probative. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Walton, 64 Wn. App. at 415-16. Because this Court cannot find that "no

rational trier of fact could have found" that Davis acted as a principal, his claim of insufficient evidence fails regardless of any of his other arguments regarding accomplice liability and transferred intent. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005) (We will reverse a conviction for insufficient evidence only where no rational trier of fact could have found that all of the elements of the crime were proved beyond a reasonable doubt).

**e. By Statute, Culpability For Murder Extends To Unintended Victims.**

Davis claims that even the primary shooter, Jontae Chatman, cannot properly be convicted on counts II, III and IV because, he asserts, Chatman's intent to murder Spearman cannot transfer to what he claims are unintended victims.[9] In other words, Davis claims that the common law doctrine of "transferred intent" does not apply. Thus, Davis cannot be convicted as an accomplice to a crime Chatman could not be properly convicted. In making this claim, Davis ignores indistinguishable Supreme Court case law. See Elmi, supra; State v. Wilson, 125 Wn.2d 212, 883 P.2d 320

[9] Consistent with Price, supra, a jury could certainly find that Chatman intended to kill anyone and everyone in the car.

(1994); see also Price, supra. ***By statute***, a person committing an assault or murder is legally responsible for all unintended victims.

In Wilson, the defendant fired multiple shots into a bar intending to shoot the bartender and a single particular patron. Missing his intended targets, Wilson shot two unintended victims. He was convicted of four counts of first-degree assault. The Supreme Court was asked to determine weather transferred intent applied to this situation. The Supreme Court ruled that it was not necessary to resort to the common law doctrine of transferred intent to support Wilson's convictions. Wilson, 125 Wn.2d at 216. Rather, the Court held, once the *mens rea* of the crime is established--the intent to inflict great bodily harm, which is usually proven by showing "the defendant intended to inflict great bodily harm on a specific person, the *mens rea* is transferred under RCW 9A.36.011, to any unintended victim." Wilson, at 218.

"Transferred intent," the Court said, "is only required when a criminal statute matches specific intent with a specific victim." Wilson, at 219. First-degree assault does not require intent to harm a specific victim. Rather, the statute requires an intent to inflict great bodily harm (RCW 9A.36.011(1)) and requires separately that the defendant "assaults ***another***" (RCW 9A.36.011(1)(c))

(emphasis added). Thus, under the plain language of the statute, the person assaulted need not be the person whom the defendant intended to inflict great bodily harm upon. The language and structure of the second-degree murder statute parallels the first-degree assault statute.

As pertinent here, the only difference between first-degree assault and second-degree murder is the level of harm intended by the perpetrator. Under the first-degree assault statute, RCW 9A.36.011, the defendant needs to have the intent to "inflict great bodily harm." RCW 9A.36.011(1). Under the second-degree murder statute, the defendant needs to have the "intent to cause the death of another person." RCW 9A.32.050. Under the first-degree assault statute, the person harmed can be the person the defendant intended to harm or "another" person. RCW 9A.36.011(1)(c); Wilson, supra. Under the second-degree murder statute, the person harmed can be the person the defendant intended to kill or "a third person." RCW 9A.32.050(1)(a). There is no distinguishing feature between the first-degree assault statute and the second-degree murder statute wherein the rationale of Wilson would not apply equally to unintended victims of murder. In short, the common law doctrine of transferred intent is not an issue

in this case because the statute itself dictates that one can be convicted for unintended victims of the crime.[10]

In Elmi, supra, the Supreme Court was asked to determine if this same conclusion results when the charge is an attempt crime, an "attempted battery." Elmi, 166 Wn.2d at 211. In conjunction therewith, the Court was asked to determine whether "intent to inflict great bodily harm transfers to an unintended victim *who is uninjured*." Elmi, at 211 (emphasis added). The Court did not limit the scope of the statute like Davis asks this Court to do.

Elmi fired multiple shots into the living room of his estranged wife's house. In the living room were Elmi's estranged wife and three small children--none of whom were physically injured. There is no indication Elmi knew the children were in the room. The Court ruled Elmi was properly convicted of the attempted murder of his ex-wife and four counts of first-degree assault (the attempted murder and one of the counts of assault--both with his ex-wife as the victim--merged).

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[10] If the language of the murder statute did not dictate this result, contrary to Davis' claim, the common law doctrine of transferred intent would be applicable and the same result reached. As far back as the 1890's, the doctrine of transferred intent was applied to the charge of murder. See State v. McGonigle, 14 Wash. 594, 45 P. 20 (1896) (intending to shoot his neighbor, McGonigle mistakenly shot and killed his own father--under the doctrine of transferred intent, he was properly found guilty of murder).

> Where a defendant intends to shoot into and to hit someone occupying a house, a tavern, *or a car*, she or he certainly bears the risk of multiple convictions when several victims are present, *regardless of whether the defendant knows of their presence*. And, because the intent is the same, criminal culpability should be the same where a number of persons are present but *physically unharmed*.

Elmi, 166 Wn.2d at 218 (emphasis added).

The holdings of Wilson and Elmi apply equally to attempted second-degree murder. This is exactly the conclusion the court reached in Price, supra. On two distinct occasions, Price fired shots into a vehicle containing two people--neither person was physically injured. For each incident, Price was convicted of two counts of attempted murder--one count for each victim. Price claimed that because he thought there was only one person in the vehicle he could not be convicted of two counts. He was wrong. The Court held that murder does not require specific intent for a specific victim, and thus Price was properly convicted of attempted murder for the passenger as well as the driver. Price, 103 Wn. App. at 852-53. There is no relevant distinction between an attempted battery--with or without a physically injured unintended victim--and attempted murder--with or without a physically injured unintended victim.

In arguing against this result, Davis cites to a number of out-of-state cases, specifically, People v. Bland,[11] State v. Hinton,[12] and Ford v. State.[13] Def. br. at 9-10. What Davis fails to mention is that the cases he relies are all taken from the dissenting opinion in Elmi. See Elmi 166 Wn.2d at 224-25 (Madsen dissenting). In other words, the Supreme Court has already rejected the arguments Davis makes here. Under the doctrine of *stare decisis*, a defendant must make a clear showing that an established rule is incorrect and harmful before it is abandoned. In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). Davis fails to meet that burden here. Under the case law and statute, Chatman was properly convicted as a principal for the attempted murder of each of the passengers in Spearman's car.

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[11] 48 P.3d 1107 (Cal. 2002).

[12] 630 A.2d 593 (Conn. 1993).

[13] 625 A.2d 984 (Md. 1993). It should be noted that Ford has subsequently been disapproved of in Henry v. State, 19 A.3d 944, 951-52 (Md. 2011) ("we hold that the doctrine of transferred intent is applicable to the killing of an unintended victim even if the intended victim was also killed, and we disapprove of the dictum to the contrary in Ford).

### f. Accomplice Liability Does Not Absolve Davis Of Criminal Liability.

Finally, Davis contends that he cannot be convicted as an accomplice because Route, Sauer and N.S. were unintended victims. Specifically, Davis contends that even if the principal could be convicted of attempted murder for the passengers, liability does not extend to an accomplice; that accomplice liability is victim specific. This assertion must be rejected. There is no support for this proposition under the statute or case law.

A person may be found guilty of a crime as either a principal or an accomplice. A person is an accomplice of another person in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he "aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a)(i-ii).

A principal and an accomplice need not share the same mental state. State v. Guloy, 104 Wn.2d 412, 431, 705 P.2d 1182 (1985). For example, to convict an accomplice of premeditated murder in the first degree, the State need not "show that the accomplice had the intent that the victim would be killed." Id. The State need only prove that the accomplice has a general

knowledge that he is aiding in the commission of the crime of murder. State v. Thomas, 166 Wn.2d 380, 388, 208 P.3d 1107 (2009) (citing State v. Cronin, 142 Wn.2d 568, 581-82, 14 P.3d 752 (2000)).

Davis ignores this principle and argues that accomplice liability to murder or attempted murder is victim specific. This is incorrect. As stated in the section above, under the murder statute, the principal is guilty for the murder of the intended victim or "another." Even if the State had to rely solely on accomplice liability--which it did not--there is no question that Davis was an accomplice to murder. Davis had, at a minimum, general knowledge that he was aiding in the commission of the crime of murder--a statute wherein liability extends to all other unintended victims.

**g. Davis' Argument Fails.**

As stated above, a rational jury could find Davis guilty as a principal or an accomplice to the attempted murder of Route, Sauer and N.S.. Davis' argument to the contrary is premised on incorrect factual assertions and incorrect legal premises. Thus, his claim must be rejected.

## 2. THE TRIAL COURT FOLLOWED PROPER PROCEDURES WHEN AN ALTERNATE JUROR WAS NEEDED FOR DELIBERATIONS.

Davis contends that in seating an alternate juror, a trial court is *required* to *voir dire* the alternate juror before seating the juror and that if this is not done, the conviction must be overturned. This assertion is contrary to the plain language of the governing rule, CrR 6.5, and contrary to existing case law. See State v. Chirinos, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 1833462 (Wn. App. Div. 1, May 16, 2011).

### a. An Alternate Juror Is Brought In For Deliberations.

On July 26, 2009, after the parties finished their closing arguments, the judge gave the jury concluding instructions and then released the two alternate jurors. 23RP 165-67.

> And with that we have now concluded the closing arguments, and what I'm going to do is I'm going to release our alternates. Now, when I say release the alternate, what that means is that you're going home today but you will remain on call, because there is always a chance that one of the remaining 12 jurors will be unable to finish the case through the deliberations. If someone gets sick in deliberations -- it happens, and if that's the case then we call in an alternate and you start deliberations all over again. Okay.
>
> .....

> And frustratingly in the extreme is that while you're on call you still can't discuss this case amongst yourselves or with anyone else. And as soon as you're released from that we'll let you know.

23RP 166-67.

At the end of the following day, July 27, the prosecutor discovered that one of the jurors had committed misconduct by inquiring of attorneys she worked with about the potential penalties the defendants faced. 23RP 173-76. When the prosecutor learned of the juror's misconduct, he immediately notified the court and opposing counsel. 23RP 177.

On the morning of July 28, 2010, the court instructed the jury to cease deliberations until directed by the court otherwise. 23RP 177. A hearing was then held with all attorneys present and all defendants present. 23RP 172. The court asked each defense attorney if he or she had had sufficient time to talk with their client about the jury misconduct issue. 23RP 172. All replied that they had. Id.

Inquiry of the offending juror was then conducted in open court whereupon the juror admitted that she had in fact engaged in

misconduct by seeking out information about punishment faced by the defendants. 23RP 178. The juror had not discussed this with any of the other jurors. 23RP 178. With no objection from any party, the offending juror was excused. 23RP 179.

The court then explained to the parties that the plan was to call in one of the two alternate jurors, and that when this juror arrived, the entire jury would be properly instructed and deliberations begun anew. 23RP 180-81. This is exactly what happened.

When the alternate juror appeared, the court told the parties that the jury would be read WPIC instruction 4.69.02, the Supreme Court approved instruction that informs the jury that they must disregard all previous deliberations and begin deliberations anew. 23RP 181; see WPIC 4.69.02. The court asked counsel for each defendant if he or she had anything to add or put on the record--each declined. 23RP 181-82. The court then twice instructed the jurors that they were required to disregard any prior deliberations and that they must begin deliberations anew. 23RP 182-83.

### b. The Trial Court Followed Proper Procedures.

In Chirinos, supra, this Court approved the very same procedures employed by the trial court here--procedures consistent with the plain language of CrR 6.5.

CrR 6.5 sets forth the procedures for substituting an alternate juror during deliberations. The rule requires that the jurors be instructed that they must "disregard all previous deliberations and begin deliberations anew," with the reconstituted jury. That was done in this case. The rule does not require any separate or additional *voir dire* of the alternate juror. Rather, the rule provides that at the court's discretion, the court "***may*** conduct brief *voir dire* before seating such alternate juror," to determine the juror's ability to remain impartial. No more is required than the proper exercise of the court's discretion. Chirinos, 2011 WL 1833462 at 3-4.

While reasonable minds might disagree with a trial court's decision, that is not the standard where the trial court's discretion is challenged. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal here, the defendant must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284

(1982). An abuse of discretion is shown only when a reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (citing Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)).

Here, when the trial court temporarily excused the alternate jurors, the court did what it was required to do, instruct the jurors to continue with the requirement that they not discuss the case with anyone. CrR 6.5. When it came time to seat the alternate juror, the court again did what it was required to do, notify all the parties, hold a hearing, give each party an opportunity to be heard and to direct the court on how to proceed if they felt the court was acting improperly, and to lodge any objections. See State v. Stanley, 120 Wn. App. 312, 318, 85 P.3d 395 (2004). Davis never lodged an objection and never requested that the court engage in any other procedure beyond what was done here. The record does not support, and Davis--at trial and on appeal--has pointed to nothing in the record suggesting the trial court abused its discretion or that the alternate juror was in some manner tainted or suspect in her continued ability to remain impartial. Under CrR 6.5 and Chirinos, Davis' argument fails.

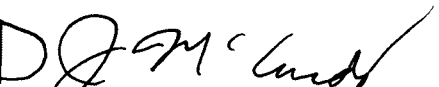
## D. CONCLUSION

For the reasons cited above, this Court should affirm Davis' convictions.

DATED this 14 day of July, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DAVIS, Cause No. 66058-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Done in Seattle, Washington

07-14-11

Date

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