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Court of Appeals
Division I
State of Washington

COA No. 71449-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN HUBBARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Ken Schubert

REPLY BRIEF

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TABLE OF CONTENTS

A. REPLY ARGUMENT 1

 1. MR. HENDERSON’S TESTIMONY WAS NOT SWORN 1

 a. An oath is required. 1

 b. In any event, the Respondent’s description of the record is not accurate. 1

 2. CONTRARY TO THE STATE’S ARGUMENTS, DETECTIVE HUGHEY’S CELL PHONE TOWER TESTIMONY WAS OPINION TESTIMONY THAT WAS ONLY THE PROPER PROVINCE OF AN EXPERT 3

 a. Detective Hughey’s cell phone testimony centrally included opinions regarding the ability to discern location from the tower data. 3

 b. Case law deems this expert opinion testimony. 7

 c. Reversible error. 10

 4. CONTRARY TO THE STATE’S ARGUMENTS, ATTEMPTED MURDER AND ASSAULT FIRST DEGREE AS CHARGED AND PROVED IN THIS CASE ARE THE SAME IN LAW, AND THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE LESSER OFFENSE. 12

 a. The lesser offenses was the same in law. 12

 b. Reversal is required. 16

 4. THE ACCOMPLICE LIABILITY INSTRUCTION WAS NOT PROPERLY GIVEN TO THE JURY 17

 a. Accomplice liability. 17

b. <u>The prosecutor placed before the jury that Mr. Hubbard would be guilty as an accomplice if he was the passenger of the Lexus sedan.</u>	19
B. CONCLUSION	20

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Amezola, 49 Wn. App. 78, 741 P.2d 1024 (1987) 20

State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997) 14,15,16

State v. Harris, 121 Wn.2d 317, 849 P.2d 1216 (1993). 15

State v. Henderson, ___ Wn.2d ___, (Slip Op. Feb 26, 2015). . . 13

State v. LaRue, 74 Wn. App. 757, 875 P.2d 701 (1994) 20

State v. Luna, 71 Wn. App. 755, 862 P.2d 620 (1993) 20

In re the Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) 12,13,14

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 14 17

UNITED STATES DISTRICT COURT CASES

United States v. Evans, 892 F. Supp. 2d 949 (N.D. Ill. 2012) 7

United States v. Machado-Erazo, 950 F.Supp. 2d 49 (Dist. Colo. 2013) 7

United States v. Jones, 918 F.Supp. 2d 49 (Dist. Colo. 2013) . . . 7

UNITED STATES COURT OF APPEALS CASES

United States v. Feliciano, 300 Fed. Appx. 795 (11th Cir. 2008) . . 7

United States v. Harrell, 751 F.3d 1235 (11th Cir. 2014) 7

United States v. Yeley–Davis, 632 F.3d 673 (10th Cir. 2011) 4

UNITED STATES SUPREME COURT CASES

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.
306 (1932) 14

A. REPLY ARGUMENT

1. MR. HENDERSON'S TESTIMONY WAS NOT SWORN.

a. **An oath is required.** Respondent contends that the minutes contradict the affirmative statement in the record that Mr. Henderson was not sworn before his trial testimony before the jury. See BOR, at pp. 13-14 (citing minutes, CP 455); AOB, at p. 14 (citing 14RP 1777). However, it is not tenable that the minutes can constitute the definitive statement of the record in the case. The record of trial is the verbatim report of proceedings. The verbatim report of proceedings affirmatively indicates that lead witness James Henderson was not sworn to tell the truth in the tribunal prior to his testimony.¹

Further, none of the indices that attest to a witness continuing testimony after previously being sworn are present, such as a notation that the witness had previously been sworn.

b. **In any event, the Respondent's description of the record is not accurate.** Respondent urges that during a brief time

¹ The verbatim report of proceedings of October 22, 2013 states, prior to Henderson's direct examination by the State: "(The witness was not sworn in on the record)". 14RP 1717. As noted in the opening brief, the other trial witnesses were properly sworn and the court reporters' practice in this case was to indicate in the transcript when the witness was sworn. See AOB at pp. 14-19 (noting in particular 6RP 673; 15RP 1885).

in which the jury was absent from the courtroom, Mr. Henderson surely must have been sworn to tell the truth during an unreported recess during the proceedings before his trial testimony, in which Mr. Henderson identified the voice of a witness in Exhibit 57, a recording. BOR, at p. 14 n. 6. But the record, including the Digital Record W941,² reflects that the court, after handling other cases, went on the record in the Hubbard matter at 9:14:43 a.m., with the proceedings commencing with a discussion of co-conspirator hearsay. 14RP 1705; CP 455; see DR W941 at time point 9:14:43.

After the recess, which began at 9:28:01, the recorded proceedings indicate that at 9:35:18, the court went back on the record and the prosecutor indicated Mr. Henderson had been played a portion of Exhibit 57 to identify the speakers. Thereafter, the jury entered the courtroom. Upon motion by the prosecutor the court admonished the spectators prior to the taking of evidence, and then questioning of Mr. Henderson commenced with the State's request that he state and spell his name, followed by his direct examination testimony. 14RP 1716-17.

Respondent contends that the presumably rote minute

² The digital record has been supplied to counsel for the Respondent and will be supplementally designated as part of the record on appeal.

notation that the witness was sworn and examined means that James Henderson was sworn. However, the minutes reflect either inaccurate notation of minute events, or at best themselves fail to support the State's characterization. The record indicates that the brief recess had ended at 9:35:18 a.m., at which time point the court addressed the deputy prosecutor. 14RP 1716; DR W941 at time point 9:35:18. The jury subsequently entered the courtroom, prompting the court's order to the courtroom to all rise, at precisely 9:36:04 a.m. DR W941 at time point 9:36:04; 14RP 1716. There is no recorded indication of witness James Henderson being sworn. Based on the arguments in Mr. Hubbard's Appellant's Opening Brief, his convictions should be reversed. AOB, at pp. 14-19.

**2. CONTRARY TO THE STATE'S ARGUMENTS,
DETECTIVE HUGHEY'S CELL PHONE TOWER
TESTIMONY WAS OPINION TESTIMONY THAT WAS
ONLY THE PROPER PROVINCE OF AN EXPERT.**

a. **Detective Hughey's cell phone testimony centrally included opinions regarding the ability to discern location from the tower data.** Respondent argues that Mr. Hubbard has not shown that Detective Hughey's testimony included opinions that would properly only be offered by an expert. See BOR, at p. 25 (arguing that Hubbard has not identified any such conclusory or

speculative opinion). Respondent similarly argues that the case of United States v. Yeley–Davis, 632 F.3d 673, 684 (10th Cir. 2011), is inapplicable because in the present case, “Detective Hughey did not testify about how cell phone towers work.” BOR, at p. 27.

In Yeley-Davis, the circuit court held that an agent's testimony about how cell towers work constituted expert testimony. Yeley–Davis, 632 F.3d at 684. Although the specific testimony at issue was different than the present case, the detective’s testimony in this case is not as described by the State. Detective Hughey testified plainly that cell phone tower records, as a technical matter of what tower was “activated” by the cell phones, reliably showed the location of the individuals’ cell phones and therefore Mr. Hubbard and Mr. Henderson’s paths of travel that night. 20RP 2507-08. He stated that a particular cell tower will be “activated by the phone at the beginning of the call and at the end of the call,” and explained that this involves different cell towers because the people are driving. 20RP 2507-08.

It is true that the detective asserted that no “interpreting” was needed to reach the conclusions he had been reaching in his years of using these types of records, and stated that anyone can

“decipher” these records from the phone companies, but Hughey admitted that he had “talked with experts” about the process. 20RP 2510.³

Crucially, Detective Hughey was allowed to testify in a manner that communicated to the jury that his deciphering was reliant on the idea that “the cell towers the phone was connecting to” bore a relationship to the location of the phone(s) in question. 20RP 2513-14. He provided various specific locations of cell phone towers, such as “1001 South 112th Street,” and then asserted, for example, that

the first tower is the tower you connect to at the beginning of the call. The second tower is whatever tower you’re last connected to.

20RP 2518. Once the detective used various technical keys and first LAT and first LID information provided by the phone companies, and made a spreadsheet of the calls the phone records purported to show were made by Hubbard’s and Henderson’s phones, the detective focused on calls made during the hours surrounding the

³ In preserving the error, Mr. Hubbard clearly argued that the cell phone tower testimony was properly a matter of expert testimony, rather than Detective Hughey’s lay testimony, and that there was no foundation for the detective’s testimony because he had admitted he lacked expertise in the area. 16RP 1997-98. Counsel made clear that his objection was that the question of the accuracy of cell phone tower “pings” – the assertion that the location of the particular cell tower that picks up a cell phone’s signal is accurately reflective of anything to do with the location of the cell phone – could only properly be the subject of expert testimony. 16RP 2000-01.

time the shooting had occurred at the Citrus Lounge. 20RP 2517-22. The detective was plainly offering an opinion, purporting to be based on science, that the location data he obtained was accurate.

Respondent argues that the detective did not testify that the assertions regarding location in his testimony, in his opinion, were specifically accurate. BOR, at pp. 18-19. It is true that the trial prosecutor did elicit from Detective Hughey his statement that the cell tower information does not give one “an exact address of a cell phone.” 20RP 2523. The prosecutor also had the detective agree that one cannot tell where within the reception range of that cell tower that cell phone is standing, and that the information stated “[j]ust” that the phone was within the reception range of that tower, i.e., “within the cellular footprint” of that tower. 20RP 2523.

But this testimony about range, cellular footprint, and the detective’s assertion to the jury that the cellular tower analysis was reflective of some geographical location of the phone, rendered Detective Hughey’s testimony without foundation, as he was not qualified as an expert in this area. The State certainly offered Detective Hughey’s testimony as being able to state that the cell tower locations that received individuals’ phone signals would give “a

general idea of the individual's location." 16RP 1996. The State also argued that Detective Hughey could testify that "you hit the closest tower within eyesight to your phone." 16RP at 2001. And in later defending the defense's re-raised objection to Detective Hughey's testimony regarding how he used the cell phone tower analysis when he interrogated Mr. Hubbard, the prosecutor contended that "the cell tower records, while they can't tell you where someone specifically is, they can tell you where someone likely was not." 23RP 2777.

b. Case law deems this expert opinion testimony. The better-reasoned cases illustrate why testimony of this sort is generally deemed to be a matter of expert opinion. Respondent minimizes the case of United States v. Harrell, 751 F.3d 1235, 1243, (11th Cir. 2014). BOR, at pp. 26-27. Harrell is very much an example of case law under which, as Mr. Hubbard argued, "cell tower testimony has generally been viewed as requiring a foundation in expert qualifications and as having to pass muster under the evidence rules for expert testimony." AOB, at p. 26. The case stands for the proposition that cell phone tower testimony is properly the subject of a witness *qualified* as an expert, which the circuit court

found the government had not established. On appeal, the government contended that the police detective had merely testified to matters any lay witness could testify to, which is the same representation the Respondent in this case holds to. Harrell, 751 F.3d at 1243-44 (“The government responds that the district court improperly labeled Detective Jacobs' testimony as expert opinion; as the government sees it, Detective Jacobs merely testified as a lay witness based on his experience as law enforcement officer.”).

The Respondent's cited case of United State v. Feliciano, 300 Fed. Appx. 795 (11th Cir. 2008), is not helpful to an argument that cell phone tower testimony was not opinion testimony requiring qualification as an expert. There, a detective was allowed to testify that his experience of the locations of cell phone towers allowed him to conclude than an alleged participant in the crime was “nowhere near” the arrest location. Feliciano, 300 Fed. Appx. at 801-802. The issue before the Court was whether the officer could testify to matters within his personal knowledge, and the Court specifically held that this particular testimony was not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Feliciano, at 801-02.

The areas of knowledge addressed by Detective Hughey – his testimony that cell phone tower records meant something in particular regarding Mr. Hubbard’s and Mr. Henderson’s locations on the night of the shooting – was properly the subject of expert testimony, and was inadmissible as lay testimony. Factors including signal strength, tower height, tower elevation, wattage of output, range of coverage, angle of coverage, the presence of obstructions, the amount of call traffic, and other variables affect cell tower connectivity and the tower that picks up a person’s cell phone signal may not be the tower nearest the person. See United States v. Evans, 892 F. Supp. 2d 949, 953-54 (N.D. Ill. 2012) (describing how expertise is needed to understand a cell phone’s ability to connect to a particular tower). This is consistent with recent learned statements regarding the accuracy of cell phone tower analysis. See http://educatedevidence.com/Viewpoint_J-F.pdf (noting that cell phone tower analysis suffers from such a degree of inaccuracy that postulated cell phone locations are not reliable).

Yet Detective Hughey’s testimony represented to the jury that the towers that picked up the signals of the cell phones in question bore a relationship to the location of those cell phones. His

occasional *caveats* that the towers did not provide the cell phones' "exact" locations with the accuracy of Global Positioning Coordinates does not insulate the testimony from being opinion. See BOR, at pp. 18-19 (citing 20RP 5253). Absent methodical, expert testimony regarding how cell phone towers operate, there can be nothing more than speculative lay opinion regarding the locating of a cell phone. See, e.g., United States v. Machado-Erazo, 950 F.Supp. 2d 49, 55-56 (Dist. Colo. 2013) (describing methodology); United States v. Jones, 918 F.Supp. 2d 1, 3 (Dist. Colo. 2013) (describing admissible cell tower sector evidence).

c. Reversible error. If this Court finds error in allowing Detective Hughey's testimony, it should reverse Kevin's convictions. The prosecutor relied on the accuracy of the cell tower location analysis in arguing to the jury that the cell tower testimony was able to discern and differentiate from Mr. Henderson's alleged path south and Mr. Henderson's alleged slightly – but important geographically different track. 24 RP 2903-06. The State therefore relied on its presentation, through Detective Hughey and therefore subsequently in closing argument, as knowledgeable testimony about the accuracy and reliability of the cell tower locating procedure.

The Respondent characterizes Detective Hughey's testimony, regarding his manner of interrogating Kevin Hubbard, as *not* being an assertion that Kevin was lying when he stated where and with whom he drove southbound after leaving the Citrus Club. See BOR, at p. 20. But this was the sole thrust of the testimony asserted at trial. In fact, the trial prosecutor commenced his examination of the detective, as regards his interrogation, by asking Hughey to describe "the setup" that he used for questioning Kevin. 23RP at 2760-61, 2771. The subsequent bulk of the detective's testimony on the matter related how he had prevailed in eliciting what he represented to the jury as lies from Mr. Hubbard, by trick. The detective testified that Kevin said he had left Seattle and driven to the hospital in Tacoma, where his child was being born, but then confronted him with his claims of cell phone tower records that Hughey told Kevin showed he had driven south with Henderson's phone, and thus presumably Henderson, in the sedan, which also allegedly confirmed Henderson's claims. 23RP 2764-67, 2770-71, 2783-84.

The entire thrust of the testimony, and this entire aspect of the case through to closing argument was the assertion that Mr. Hubbard was lying. See BOR, at p. 20. The argument was based

on the cell tower evidence. For these reasons, and for all the reasons argued in the Appellant's Opening Brief, the convictions should be reversed.

4. CONTRARY TO THE STATE'S ARGUMENTS, ATTEMPTED MURDER AND ASSAULT FIRST DEGREE AS CHARGED AND PROVED IN THIS CASE ARE THE SAME IN LAW, AND THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE LESSER OFFENSE.

a. The lesser offense was the same in law. The present case squarely placed before the trial court the question whether the legal prong of the lesser offense analysis, pursuant to the Double Jeopardy precedent of In re PRP of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), requires looking to how the offenses were charged and proved in the case. That issue should be assessed on appeal.⁴

Respondent argues that the assault in the first degree is not a legal lesser of attempted murder, because there are any number of ways in which the crime of attempted murder can be committed without committing first degree assault. BOR, at pp. 42-44.

⁴ Below, counsel argued that "when you consider the facts of this case" the crimes committed could, under the legal prong of the lesser included analysis, have been merely assaults with a firearm and an intent to cause great bodily harm. Additionally, under the factual prong and considering the evidence that Mr. Hubbard was punched but had no reaction or angry response to being a mere part of the melee in the Citrus Lounge, there was simply no motive to kill. 22RP 2705.

Certainly, one can commit attempted murder by, for example, purchasing poison and placing it in the food of a victim before that person sits down to dinner. But that has nothing to do with the facts of this case. Mr. Hubbard is entitled to argue to the jury that his crimes were merely a legal and factual subset of the offenses alleged against him. As the Supreme Court recently stated,

In criminal trials, juries are given the option of convicting defendants of lesser included offenses when warranted by the evidence. Giving juries this option is crucial to the integrity of our judicial system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free. In some cases, that will create a risk that the jury will convict the defendant despite having reasonable doubts.

State v. Henderson, ___ Wn.2d ___ (Slip Op. Feb. 26, 2015, at p. 1).

Relying on State v. Boswell, the State argues that there is no basis for arguing for assessment of the legal prong of the lesser offense analysis by looking to how the State charges and attempts to prove the greater crime.⁵

However, Orange provides precedent because that decision rejected the reasoning of the Court of Appeals below, “that, since

⁵ The trial court held that “[b]y my reading of the law . . . it’s not a lesser degree offense.” 22RP 2706. Without looking to the attempted murder crimes as charged in the case against Mr. Hubbard, as his counsel had urged, the court stated that as a matter of law there could never be an entitlement to first degree assault instructions in an attempted murder case. 22RP 2705-06.

murder could be attempted by all sorts of “substantial steps” other than assault (e.g., by lying in wait or constructing a bomb), attempted murder does not necessarily include assault.” Orange, 152 Wn.2d at 818.

Specifically, in a Double Jeopardy analysis, Orange held these two offenses are the same in law and fact when attempted murder is based on assaultive conduct. Orange, 152 Wn.2d at 820. That analysis mirrors the legal prong of the *lesser-included* analysis. Compare, Orange, 152 Wn.2d at 816-17 (citing Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) (“The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”); State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (the legal prong requires each element of the lesser offense must necessarily be proved to establish the greater offense as charged).

Both the Blockburger and lesser-included tests include a comparison of elements, and neither can be limited to the generic elements. Berlin stated:

Only when the lesser included offense analysis is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute, can both the requirements of constitutional notice and the ability to argue a theory of the case be met.

133 Wn.2d at 541. This led the Orange Court to conclude that “proof of attempted murder committed by assault will always establish an assault.” Orange, 152 Wn. 2d at 820. Thus the legal prong of the lesser included analysis is satisfied in Mr. Hubbard’s case. Harris is irreconcilable with Orange. It is logically impossible for two offenses to be the “same offense” yet at the same time not be an “included offense.” The opinion of the Court of Appeals on this score is contrary to Orange.

Harris’s analysis should be deemed rejected, because Harris (relied on by the Boswell Court) reasoned that because it was possible under the generic statutory language to commit attempted murder without necessarily committing an assault, an

assault could never be a lesser offense of attempted murder.

Harris, 121 Wn.2d at 321.

Four years later, in Berlin, the Court recognized that this analysis was incorrect. It is true that the Berlin case cautioned that the elements comparison for purposes of a lesser offense instruction should not look at alternative means of the statute that were not at issue, thus critiquing an analysis that looked to "the statute as a whole." Boswell, 340 P.3d at 978-79 (citing Berlin, 133 Wn.2d at 548). However, Berlin rejected a failure to look to the offenses as charged and proved, and the Orange case indicates that the same legal analysis requires looking to the base factual allegations to determine if one offense comprises another. The evolving case law stands for the proposition that it is no longer relevant whether one might hypothetically commit attempted murder without committing an assault. Instead, the legal prong requires a court determine only whether the assault is an included offense of attempted murder as charged and prosecuted in the case at hand. Berlin, 133 Wn.2d at 548.

b. Reversal is required. Due Process requires a trial court to instruct on a lesser included offense when requested by the

defendant, where (1) proof of the greater will also prove the lesser offense, and (2) in the light most favorable to the defendant, the evidence supports an inference that only the lesser offense was committed. The failure to instruct the jury on a lesser offense, where the evidence might allow the jury to convict the defendant of only the lesser offense, violates the Fourteenth Amendment right to Due Process. Beck v. Alabama, 447 U.S. 625, 636-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980); U.S. Const. amend. 14. Mr. Hubbard's attempted murder convictions should be reversed, as argued in the Opening Brief.

4. THE ACCOMPLICE LIABILITY INSTRUCTION WAS NOT PROPERLY GIVEN TO THE JURY.

a. **Accomplice liability.** The Respondent argues that Mr. Hubbard agreed at trial that he was the driver of the Lexus sedan in the security video footage, argues that the driver is the person in the footage who is in control of what the State argued appeared to be a firearm, and contends that the State's accomplice liability theory did not rest on the effort to argue that the passenger was also guilty, as an accomplice, if the jury did not believe that Mr. Hubbard was the driver of the car. Ultimately, therefore, the State argues that the accomplice liability theory can be supported by deeming Mr.

Hubbard the driver and can only be defeated by arguing that the videotape evidence is inaccurate. BOR, at pp. 38-39.

But the State's accomplice liability theory was a new argument for factual guilt that the State raised in closing argument, either because of, or subsequent to, weaknesses in the State's evidence. This theory is not supported by any evidence. First, Mr. Hubbard did not and does not state that he was the driver of the car seen in the video footage. Mr. Hubbard told Detective Hughey when he was interrogated that he borrowed the Lexus SUV of Ms. Hora⁶ to drive to Seattle that night, and around the time of the Citrus Club shooting, Mr. Hubbard was already on his way back to the greater Tacoma area and then the hospital where his child was being born. 23RP 2764-71; Exhibit 50 (transcript of interrogation). Mr. Hubbard did not ever and has not ever stated that he was the driver of the vehicle depicted in the video footage, his defense was and is denial of participation whatsoever.

b. The prosecutor placed before the jury that Mr. Hubbard would be guilty as an accomplice if he was the passenger of the

⁶ Respondent correctly notes that the white Lexus that Kevin Hubbard was driving on the night that a shooting occurred outside the Citrus Club was the sedan in question, not an SUV. See 16RP 2011; see BOR, at p. 11 n. 5. Mr. Hubbard described the vehicle as such in his interrogation by Detective Hughey. 23RP 2763.

Lexus sedan. However, the State placed before the jury a theory that the jury could rely on accomplice liability if it harbored concerns and doubts about the proof in the case that the defendant committed the shooting as depicted, it contended, in the video footage. In closing, the State first conceded that the video footage did not allow an identity of the two persons to be made, and relied on the claims of the cooperating witness, Henderson, to assert that the defendant was the driver. 24RP 2884, 2892. However, the State also offered an additional theory of guilt that “either the shooter was Mr. Henderson or the shooter was Mr. Hubbard.” 24RP 2914.

It is true that the prosecutor contended that if the driver of the car that pulled up in the parking lot and then exited was the defendant, that person would be guilty as an accomplice, because he appeared to retrieve something from inside the vehicle that the State argued was a rifle, and therefore he would have had to transfer the rifle to the shooter and then driven away with the shooter. 24RP 2915-16, 2922-23. But Mr. Hubbard never stated he was the driver of the car shown in the video footage. The State’s contention -- at the beginning of trial – was that Mr. Henderson was the shooter, and the person in the video who was not the shooter was Mr. Hubbard.

That individual – according to the State’s own case – did nothing but flee the scene. The State then sought to use accomplice liability as another basis for conviction at the end of the case.

Mr. Hubbard argues that this was inadequate to warrant an accomplice liability instruction. To be an accomplice, a person must give encouragement or aid and do so knowing that the same will promote or facilitate the principal's commission of the crime. State v. LaRue, 74 Wn. App. 757, 875 P.2d 701 (1994) (citing State v. Amezola, 49 Wn. App. 78, 89, 741 P.2d 1024 (1987)). The evidence did not warrant an accomplice instruction, and the instruction was improperly given. State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993) (mere presence is inadequate). Reversal is required.

B. CONCLUSION

This Court should reverse Mr Hubbard’s convictions.

Respectfully submitted this 7 day of April, 2015.

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

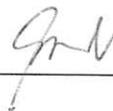
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71449-0-I
v.)	
)	
KEVIN HUBBARD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF APRIL, 2015, 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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