

No. 35038-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Rex Lee Pope,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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BY: *Chm*

Clallam County Superior Court

Cause No. 05-1-00637-3

The Honorable Judge Craddock Verser

Appellant's Reply Brief

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ARGUMENT

I. MR. POPE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

In the Opening Brief, Appellant counsel misread the trial court record; accordingly, Appellant concedes these issues.

II. RESPONDENT'S ARGUMENT SUPPORTS REVERSAL OF THE CONVICTION.

Respondent argues that the accomplice instruction properly conveyed the requirement of an overt act, and did not permit conviction upon mere presence and silent approval of the crime. Brief of Respondent, pp. 9-10. This is incorrect.

Nothing in the instruction requires an overt act beyond mere presence and silent approval. Instruction No. 8 specifically defines "aid" (in relevant part) as "assistance... given by... presence." Instruction No. 8, CP 34. 'Presence and knowledge' is declared to be insufficient, but 'presence and silent approval' is not addressed. CP 34. Respondent's reliance on the requirement that the state prove "more than mere presence and knowledge" is misplaced. Brief of Respondent, p. 10. Even with this restriction, conviction could follow from mere presence and silent *approval* (as opposed to knowledge).

Respondent next argues that “presence can be an overt act.” Brief of Respondent, p. 10. According to Respondent, a person who is present and unwilling to assist but who approves of the crime “may properly be convicted if she or he knows his [sic] presence will promote or facilitate the crime.... [I]f you know that your presence at the scene, whether or not you are willing to assist, will promote [the crime], that presence is an overt act and you are an accomplice.” Brief of Respondent, p. 10-11.

Respondent’s interpretation points out the flaw in the instruction, and supports Mr. Pope’s argument. According to Respondent, a person who is present, knows about the crime being committed, and knows that her or his presence will encourage the crime, may be convicted. By allowing this interpretation, the instruction runs afoul of the U.S. Constitution. For example, a journalist who covers trespassing antiwar protesters may personally approve of the protesters’ cause and their (illegal) strategy. Such a journalist would likely know that media presence encourages the illegal activity. But arresting, charging, and convicting the journalist (which the state suggests is permissible) would violate the First Amendment.

Similarly, an audience that observes trespassing antiwar protesters might include people who silently approve, people who silently disapprove, and people who are silent and neutral about the protest. Under

the prosecutor's theory, a person who silently approves of the illegal activity with knowledge that her or his presence encourages the illegal activity could be arrested, charged, and convicted. Those who silently disapprove, or who are silent and neutral could not be prosecuted, even if they know their presence encourages the activity.¹ As with the example of the journalist, this anomalous result would violate the First and Fourteenth Amendments, and raises the specter of prosecution for thought crimes.

Respondent suggests that the instruction “ ‘require[s] a specific criminal intent, not merely passive assent, and the state of being ready to assist or actually assisting by his presence.’ ” Brief of Respondent, p. 10,² quoting *State v. Renneberg*, 83 Wn.2d 735 at 739, 522 P.2d 835 (1974).

But the instruction in *Renneberg* differed significantly from the instruction here. First, in *Renneberg*, the jury was instructed that “to aid and abet

¹ Respondent's Brief is somewhat unclear on this latter point. It is possible that Respondent's theory of accomplice liability would also sweep up the disapproving and the neutral, since all that is required is that “you know that your presence at the scene” promotes the crime. Brief of Respondent, pp. 10-11.

² “Specific intent” involves “an intention in addition to the intention to do the physical act.” *State v. Allen*, 101 Wn.2d 355 at 359, CITE (1984). In *Renneberg*, the instruction required proof that an accomplice intended the physical act (being present) and also intended to commit the crime charged. *Renneberg*, at 739. Although Respondent uses the phrase “specific intent” (intent to commit the crime), Respondent apparently believes “specific intent” is established by mere knowledge: “[A] person will always have to have a specific criminal intent; i.e., if you know that your presence... will promote or facilitate [the crime].” Respondent's conflation of “specific intent” with mere knowledge is one more indication that Instruction No. 8 was seriously flawed.

may consist of *words spoken, or acts done, for the purpose of assisting in the commission of a crime or of counseling, encouraging, commanding or inducing its commission.*” *Renneberg*, at 739, *emphasis added*. Second, the instruction in *Renneberg* expressly required that “the aider or abettor *should share the criminal intent of the person or party who committed the offense.*” *Renneberg*, at 739, *emphasis added*.

By contrast, Instruction No. 8 does not require proof of specific intent. Instead, as Respondent correctly argues, it permits conviction whenever a person is present, silently approves of the criminal activity, and knows that their presence will promote or facilitate the crime, even if they don’t intend their presence to have that effect. In fact, conviction is also proper under the instruction whenever a person is present, knows of the criminal activity, and knows that her or his presence will encourage the crime, whether approving or disapproving of the result.³ In other words, under the instruction as given in this case, a person can be convicted as an accomplice even if they don’t share the principal’s intent.⁴

³ In such cases, the admonition that mere presence and knowledge of the criminal activity is insufficient is overcome by the additional knowledge that presence will facilitate or encourage the crime.

⁴ Ironically, under the right circumstances, this would include victims and other people opposed to the commission of the crime. For example, a police officer who approaches a threatening person could be convicted as an accomplice of Assault in the Third Degree: if the officer knows of the intended crime, approaches the aggressor, and knows that

This leads to absurd results, and cannot be what the legislature meant when it allowed conviction as an accomplice for one who “aids or agrees to aid” another person in the crime. RCW 9A.08.020.

In fact, the state must prove that the crime was committed and that the defendant *participated* in it. *State v. Teal*, 152 Wn.2d 333 at 339, 96 P.3d 974 (2004), *emphasis added*. Furthermore, “[I]t is the *intent to facilitate* another in the commission of a crime by providing assistance through his presence or his act that makes the accomplice criminally liable.” *State v. Galisia*, 63 Wn. App. 833 at 840, 822 P.2d 303 (1992), *emphasis added*. Here, the instruction permitted the jury to convict Mr. Pope without evidence that he participated in the crime. It also permitted conviction even if he lacked the intent to facilitate the commission of the crime. Instead, the instruction required only presence, knowledge of the crime, and knowledge that his presence would facilitate the crime. Instruction No. 8. CP 34. Because of this, the conviction must be reversed.

by being present, s/he is facilitating the assault (since it could not occur in her or his absence), s/he could be found guilty as an accomplice under the instruction.

Finally, Respondent argues that any error “would not have materially affected the trial.” Brief of Respondent, p. 11. But this is not the proper test for harmless error.

An error of this sort is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002). A reviewing court must “thoroughly examine the record” and reverse the conviction unless it concludes beyond a reasonable doubt that the jury verdict would have been the same absent the error. *Brown*, at 341.

Respondent has not attempted to meet this standard; nor can it do so. Mr. Pope asserted that he was not involved in the burglary, and claimed that he had no knowledge of it. RP (4/19/06) 15-65. The jury may have believed he was not involved, but concluded that he had knowledge of Knudson’s activity.⁵ Under these circumstances, it cannot be said that the error was harmless beyond a reasonable doubt. Accordingly, the conviction must be reversed, and the case remanded for a

⁵ Respondent suggests that the jury would either “believe Mr. Knudson or believe Pope.” Brief of Respondent, p. 11. This is incorrect: the jury could have had a reasonable doubt as to some parts of Mr. Knudson’s testimony. The jury could also have believed part but not all of Mr. Pope’s testimony. Respondent’s flat assertion that the case should be evaluated in an either/or fashion ignores the presumption of innocence and the burden of proof.

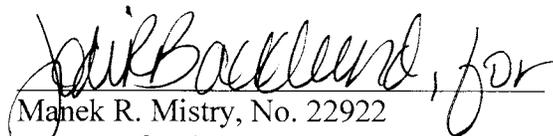
new trial. *Brown, supra.*

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on February 20, 2007.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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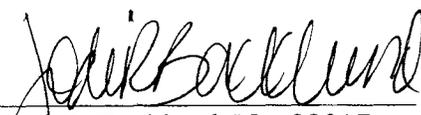
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 20, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 20, 2007.



Jodi R. Backlund, No. 22917
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STATE OF WASHINGTON
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