

No. 35623-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Terry Robinson,

Appellant.

Lewis County Superior Court

Cause No. 06-1-00068-9

The Honorable Judges H. John Hall and Richard Brosey

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Mr. Robinson was twice put in jeopardy for the same offense, in violation of the state and federal constitutions..... 1

II. The trial court’s instructions allowed conviction as an accomplice without proof of an overt act..... 2

III. The trial court’s accomplice instruction was internally inconsistent. 4

IV. Admission of testimonial hearsay violated Mr. Robinson’s confrontation right..... 5

CONCLUSION 5

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000)..... 3

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000)..... 2

State v. Jones, 97 Wn.2d 159, 641 P.2d 708 (1982)..... 2

State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999)..... 3

State v. Warfield, 103 Wn. App. 152, 5 P.3d 1280 (2000) 3

OTHER AUTHORITIES

WPIC 16.02..... 3

WPIC 39.16..... 3

ARGUMENT

I. MR. ROBINSON WAS TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE, IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

The trial judge should not have granted a mistrial over Mr.

Robinson's objection, and the second trial violated Mr. Robinson's double jeopardy rights. This is so because: (1) the mistrial was brought on by the alleged misconduct of the court (acting through its representative, the bailiff),¹ (2) the trial judge did not hear from the bailiff or the juror(s) who allegedly committed the misconduct and so lacked a factual basis for declaring a mistrial, (3) the trial judge did not consider other alternatives to a mistrial, such as proceeding without an alternate juror or with fewer than 12 jurors (if Mr. Robinson consented), and (4) the trial judge did not make the necessary factual findings to support its decision to declare a mistrial and excuse the jury. RP (9/8/06) 68-72; RP (11/9/06) 17-18; RP (11/14/06) 2-18; CP 68-72.

Without analysis or citation to relevant authority, Respondent asserts that the trial judge had no choice but to grant a mistrial, based

¹ The word "court" here is used to refer to the court as an institution, including its employees and representatives. It is not intended to imply that the trial judge personally acted in bad faith or committed misconduct as an individual.

solely on the prosecutor's representations of what had transpired. Brief of Respondent, p. 3-4. The state does not address any of the four arguments raised in the opening brief and summarized in the paragraph above. *See* Appellant's Opening Brief, pp. 6-8.² Because of this, Mr. Robinson's convictions must be reversed and the case dismissed. *State v. Jones*, 97 Wn.2d 159, 641 P.2d 708 (1982).

II. THE TRIAL COURT'S INSTRUCTIONS ALLOWED CONVICTION AS AN ACCOMPLICE WITHOUT PROOF OF AN OVERT ACT.

The trial court's accomplice instruction misstated the law and allowed conviction in the absence of proof that Mr. Robinson was an accomplice. Respondent points out that WPIC 10.51 has not yet been determined unconstitutional;³ however this should not carry weight, since pattern instructions often endure for years before they are found to be incorrect. *See, e.g., State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000) (pattern instruction on accomplice liability erroneous); *State v. Studd*, 137

² Respondent does argue that the prosecutor's actions were not taken in bad faith. Brief of Respondent, p. 3. But this argument is misdirected: Mr. Robinson did not assert bad faith on the part of the *prosecutor*; instead, an employee of the court committed the misconduct requiring the mistrial—it is the court (as an institution) that caused the problem. Appellant's Opening Brief, pp. 6-7. The bailiff's attempt to help the prosecutor enabled the state to have a second crack at Mr. Robinson, with stronger evidence than it had at the first trial.

³ Brief of Respondent, p. 4-7.

Wn.2d 533, 973 P.2d 1049 (1999) (WPIC 16.02 “clearly erroneous,” *Studd*, at 545); *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000) (knowledge is an element of Unlawful Possession of a Firearm; standard instruction omitting that instruction erroneous); *State v. Warfield*, 103 Wn. App. 152, 5 P.3d 1280 (2000) (although not before the court, validity of WPIC 39.16 is doubtful).

Without analysis, Respondent claims that the instruction required proof of an overt act. Brief of Respondent, p. 5. Respondent apparently relies on the requirement that the state prove “more than mere presence and knowledge of the criminal activity of another...” Brief of Respondent, p. 5-6. But this language fails to exclude noncriminal activity from its reach: the instruction improperly allows conviction where the accused is present (with knowledge that such presence will assist the perpetrator) and silently approves of the criminal activity, but is not “ready to assist.” For example, a newspaper journalist who is personally opposed to the war in Iraq may be sent by an editor to cover antiwar protestors trespassing at the Port of Olympia. The protestors want coverage of their actions, and are encouraged by the reporter’s presence. The reporter knows this, and silently approves of their criminal activity, but gives no overt sign of her approval. Under the instruction, this journalist is guilty of trespass as an accomplice. First, she knows her presence “will promote or facilitate” the

trespass. Instruction No. 5, CP 35. Second, she “aids” the trespassers, given that “[t]he word ‘aid’ means all assistance whether given by words, acts, encouragement, support, or presence.” Instruction No. 5, CP 35. Third, she is “assist[ing] by her presence,” given that media attention is the protesters’ main object. Instruction No. 5, CP 35. Fourth, she is guilty of “more than mere presence and knowledge of the criminal activity,” since she personally approves of and silently supports their aims and methods. Instruction No. 5, CP 35. By the same token, a colleague from a rival newspaper who is opposed to the war would not be guilty. Under the same circumstances, such a colleague’s disapproval and lack of support for the protesters’ aims and methods would not amount to “more than mere presence and knowledge.” Instruction No. 5, CP 35.

For these reasons, the conviction must be reversed.

III. THE TRIAL COURT’S ACCOMPLICE INSTRUCTION WAS INTERNALLY INCONSISTENT.

Respondent has failed to address Mr. Robinson’s argument about Instruction No. 5’s internal inconsistency. Accordingly, Mr. Robinson stands on the argument set forth in the Opening Brief.

IV. ADMISSION OF TESTIMONIAL HEARSAY VIOLATED MR. ROBINSON'S CONFRONTATION RIGHT.

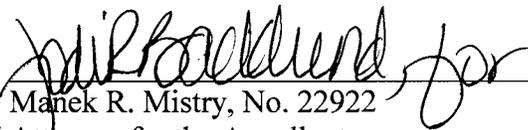
Respondent apparently acknowledges that the admission of the Steel transcript violated Mr. Robinson's constitutional rights if Mr. Steel was not "unavailable" at the second trial. Brief of Respondent, pp. 7-10. Accordingly, Mr. Robinson stands on the argument made in the Opening Brief.

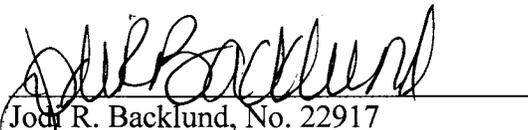
CONCLUSION

For the foregoing reasons, Mr. Robinson's convictions must be vacated and the charges dismissed with prejudice. In the alternative, the convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on February 2, 2008.

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CERTIFICATE OF MAILING

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

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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 2, 2008.

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 2, 2008.



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