

No. 35739-9-II

STATE OF WASHINGTON  
COURT OF APPEALS  
BY: *DM*

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Edward A. Steward,**

Appellant.

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Clallam County Superior Court

Cause No. 06-1-00395-0

The Honorable Judge Kenneth Williams

**Appellant's Reply Brief**

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## ARGUMENT

### **I. THE COURT’S INSTRUCTIONS CONFLATED TWO DISTINCT MENTAL STATES, WHICH THE STATE WAS REQUIRED TO PROVE TO ESTABLISH MR. STEWARD’S GUILT.**

To convict Mr. Steward as an accomplice, the prosecution was required to show that he acted “with knowledge that [his actions would] promote or facilitate the commission of the crime.” Instruction No. 14, CP45. Instructions that relieve the state of proving the correct knowledge element for accomplice liability require reversal. *State v. Evans*, 154 Wn.2d 438 at 451-452, 114 P.3d 627 (2005); *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). Under Instruction No. 21, the jury was *required* to infer that Mr. Steward acted with knowledge if he performed any intentional act, even if he were actually ignorant of his codefendants intentions. CP 52<sup>1</sup>.

Respondent relies on bombastic writing, apparently to distract from the logical flaws in its argument. First, Respondent attempts to distinguish *Goble* by claiming it was “largely fact-driven,” because the defective knowledge instruction in that case “operated directly upon one

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<sup>1</sup> *See, e.g.*, Brief of Respondent, p. 6 (describing *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005) as “highly idiosyncratic”), p. 7 (describing Mr. Steward’s argument as “tortured”), p. 10 (accusing Mr. Steward of “a flight of fancy.”)

of the two elemental mental states...” Brief of Respondent, p. 7. Without citation to authority, Respondent burdens Mr. Steward with the task of linking the error to an “elemental mental state,” and claims that “[t]he defense cannot force all the links to that chain [connecting the accomplice instruction to an elemental mental state].” Brief of Respondent, p. 8. Where no authority is cited, this Court may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405 at 418, 36 P.3d 1065 (2001). Furthermore, *Goble* is not limited to “elemental mental states.” As the Supreme Court has made clear, the instructions must correctly explain the mental state required for conviction, whether that mental state is “elemental” or contained in an accomplice instruction. *Evans, supra; Roberts, supra; Cronin, supra*. Under Respondent’s logic, *Evans, Roberts, and Cronin* were wrongly decided, since all involved the mental state required for accomplice liability rather than “elemental mental states.”

Respondent also attempts to distinguish *Goble* by pointing out that the jury expressed confusion in that case. Brief of Respondent, p. 7. But the jury’s confusion in *Goble* had nothing to do with this Court’s analysis in that case. *See Goble, supra, at 204* (“We agree that the instruction is confusing and that the italicized portion of the instruction allowed the jury to presume *Goble* knew *Riordan's* status at the time of the incident if it

found Goble had intentionally assaulted Riordan. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew Riordan's status if it found the assault was intentional. Further, given the conflicting evidence, we cannot say that this error was harmless and reversal is required," *footnote omitted.*)

Next, Respondent suggests that Appellant's argument (that the jury was required to infer knowledge from any intentional act, even if Mr. Steward were<sup>2</sup> ignorant of his friends' intentions) is a "huge stretch." Brief of Respondent, p. 9, n. 2.<sup>3</sup> According to Respondent, the final sentence of Instruction No. 14 "clearly provided a minimum threshold by which the jury had to find at least that Steward knew of his co-defendants' intentions..." Brief of Respondent, p. 9, n.2. But the final sentence of Instruction No. 14 does not solve the problem: the jury was *required* (through the action of Instruction No. 21) to find that Mr. Steward had

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<sup>2</sup> Despite Respondent's use of [sic] in quoting from Appellant's Opening Brief, the use of the word "were" instead of "was" is required because the clause beginning with "if" is in the past form of the subjunctive (as opposed to the indicative) mood. *See, e.g., The American Heritage Book of English Usage* (1996) at Chapter 1, Section 61: "The past subjunctive is identical with the past tense except in the case of the verb *be*, which uses *were* for all persons: *If I were rich ...*, *If he were rich ...*, *If they were rich...*" Respondent's use of [sic] apparently indicates ignorance of or displeasure with the past tense of the subjunctive mood.

<sup>3</sup> Inexplicably, Respondent places this argument in a footnote.

knowledge of his codefendants' planned crimes if he performed any intentional act. The "knowledge" referred to in the final sentence of Instruction No. 14 could be inferred from any intentional act, under Instruction No. 21.

The problem caused by Instruction No. 21 applies equally to both the assault and the kidnapping charges, despite Respondent's claim that the argument is "even sillier" when applied to kidnapping. Brief of Respondent, p. 9. Respondent's assertion is based on the erroneous assumption that a *Goble* error must directly affect the elements of the crime. This assumption fails to take into account *Evans*, *Roberts*, and *Cronin*.

Respondent faults Mr. Steward for what it describes as a "telling" omission with respect to the kidnapping charge. In the scenario described at pp. 9-10 of the Respondent's Brief, Respondent attributes actual knowledge to Mr. Steward by presuming that he acted with intent to hold the victim for ransom or reward. Brief of Respondent, pp. 9-10. But Respondent's argument ignores the fact that accomplice liability is premised on another's culpability. That is, his guilt would be established by proof that he acted with knowledge that his actions would promote or facilitate his codefendants' intent to hold the victim for ransom or reward, even if he did not share that intent.

Under the instructions given, Mr. Steward would have been found guilty as an accomplice to Kidnapping in the First Degree even if he lacked actual knowledge. For example, Mr. Steward could have driven his friends to the scene-- an intentional act that furthered his friends' plan to kidnap and assault Schroeder-- without actually knowing that they intended to kidnap Mr. Schroeder and hold him for ransom or reward. Under Instruction No. 21, the jury was required to find that Mr. Steward's intentional act (driving the car) was done with knowledge that it would promote or facilitate the charged crime (Kidnapping in the First Degree). This is true even if Mr. Steward drove to the scene intending to rob Schroeder. Contrary to Respondent's assertion, the fact that the jury was not instructed on robbery is irrelevant. *See* Brief of Respondent, p. 10.

An error affecting the mental element for accomplice liability is subject to the stringent constitutional standard for harmless error: reversal is required unless the reviewing court concludes beyond a reasonable doubt that the verdict would have been the same absent the error. *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). Respondent contends that any error was harmless, pointing out (without citation to authority) that neither attorney made use of the error during closing argument and that the jury did not express confusion. Brief of Respondent, pp. 10-12.

Respondent is incorrect. Errors in jury instructions are not cured simply

because they are not explicitly exploited in closing argument. Nor are instructional errors harmless simply because the jury does not express confusion. *See, e.g., Brown, supra* (reversal required even where error was not exploited in closing, and despite jury's silence as to meaning of the erroneous accomplice instruction).

Finally, Respondent contends that the error was harmless because “[t]he evidence is sufficient to show the Defendant acted as a principal.” Brief of Respondent at p. 12, *citing Brown, supra*. This claim is made without any citation to the record. In fact, it was undisputed that Mr. Steward did not personally restrain or assault Schroeder. RP (11/7/06) 15-231; RP (11/8/06) 11-224. Accordingly, the finding of guilt rested entirely on the jury's decision that he acted as an accomplice. This decision was tainted by the error in Instruction No. 21, which allowed conviction as an accomplice even if Mr. Steward were ignorant of his codefendants' intended crimes.

The problem could have been resolved by omitting the final sentence of Instruction No. 21 and relying instead on the jury's common sense (that an intentional act necessarily implies knowledge *of that same act*). This was the route suggested by defense counsel in his proposed instructions. CP 70-91. Or the court could have modified Instruction No. 21 to clarify that conviction was permitted if Mr. Steward either intended

to promote or facilitate the commission of the crime, or acted with knowledge that his actions would promote or facilitate the commission of the crime. Indeed, Respondent suggests a workable (if awkward) formulation for the instruction at the conclusion of footnote 3.<sup>4</sup> Brief of Respondent, p. 9, n.3.

Because Instruction No. 21 relieved the state of its burden to prove the proper mental state for accomplice liability, Mr. Steward's convictions must be reversed. *Evans, supra*. The case must be remanded to Clallam County Superior Court for a new trial.

**II. DEFENSE COUNSEL SHOULD HAVE OBJECTED AND TAKEN EXCEPTION TO INSTRUCTION NO. 21.**

Mr. Steward stands on the argument made in his opening brief.

**III. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REVIEW DISCOVERY AND DISCUSS THE CASE WITH MR. STEWARD.**

Without citation to authority, Respondent asserts that defense counsel "was not ineffective" because a criminal defense attorney need not review police reports with her or his client. Brief of Respondent, p. 14.

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<sup>4</sup> Footnote 3 is confusing. The first sentence (characterizing Mr. Steward's argument as "strained and nonsensical") is clear; however, what follows this opening sentence-- presumably to support the "strained and nonsensical" characterization-- is almost pure gibberish. The final sentence suggests that the accomplice instruction "would correctly read..." Respondent's conclusion appears to support Mr. Steward's position, a result that is no doubt unintended.

This Court may presume no authority exists for this claim. *Oregon Mut. Ins. Co. v. Barton, supra.*

Any legal strategy “must be based on reasoned decision-making: ‘[S]trategic choices made after thorough investigation of law and facts... are virtually unchallengeable... In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.’” *In re Hubert*, 138 Wn. App. 924 at \_\_\_, 158 P.3d 1282 (2007), quoting *Strickland v. Washington*, 466 U.S. 68, 104 S.Ct. 2052 ) at 690-691, 80 L.Ed.2d 674 (1984). Under this standard, it is impossible to provide effective representation without reviewing police reports with the accused in order to learn whether the accused agrees or disagrees with the information contained in the reports. Counsel’s failure to do so amounts to a failure to investigate, and requires reversal. *Hubert, supra.*

Without citation to the record, Respondent also claims that “[t]he record shows that Mr. Sund did discuss the discovery...” Brief of Respondent, p. 14. A thorough review of the transcript and the clerk’s papers reveals no basis for this claim. RP (8/21/06), (8/25/06), (9/14/06), (9/15/06), (9/22/06), (10/13/06), (11/6/06), (11/7/06), (11/8/06), (11/9/06), (12/15/06). Respondent also “respectfully suggests” that no inquiry was made into Mr. Steward’s testimony that counsel had not reviewed

discovery with him because “it was simply one more incredible claim in a series of many.” Brief of Respondent, p. 14. Respondent also suggests that Mr. Steward’s other statements undermine his credibility. Brief of Respondent, p. 15.

But the trial court made no finding on this point, and this Court should not be asked to make a credibility determination. *State v. Maupin*, 128 Wn.2d 918 at 930, 913 P.2d 808 (1996). Instead, this Court should accept Mr. Steward’s uncontradicted testimony as fact and determine its effect on the proceedings. *See Maupin*, at 930 (“We must take [the] testimony here as true, and evaluate its likely effect on the outcome of the trial.”)

Accordingly, Mr. Steward’s conviction must be reversed and the case remanded to the Superior Court. At that time, Mr. Steward should be given the opportunity to consider the original plea offer extended to him. Upon remand, the accused must be given the opportunity to accept the plea offer previously made. *Hoffman v. Arave*, 455 F.3d 926, at 942-943 (9th Cir. 2006); *Nunes v. Mueller*, 350 F.3d 1045 at 1057 (9th Cir. 2003); *United States v. Blaylock*, 20 F.3d 1458 at 1469 (9th Cir. 1994). In the alternative, the case should be remanded (as Respondent suggests) for a hearing on the adequacy of defense counsel’s communication regarding the plea offer and his preparation for trial. Brief of Respondent, pp. 15-16.

**IV. THE INFORMATION AND INSTRUCTIONS WERE DEFICIENT AS TO COUNT II.**

In light of this Court's decisions in *State v. Blatt*, 139 Wn. App. 555, 160 P.3d 1106 (2007) and *State v. Keend*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_, 2007 Wash. App. LEXIS 2660 (2007), Mr. Steward rests on the arguments made in his opening brief.

**V. RCW 9A.36.021 (1)(C) VIOLATES THE SEPARATION OF POWERS.**

The Supreme Court has accepted review of *State v. Chavez*, 134 Wn. App. 657, 142 P.3d 1110 (2006), *review granted at* 160 Wn.2d 1021 (2007). The Supreme Court's decision in *Chavez* will control this case. Accordingly, Mr. Steward rests on the arguments made in his Opening Brief.

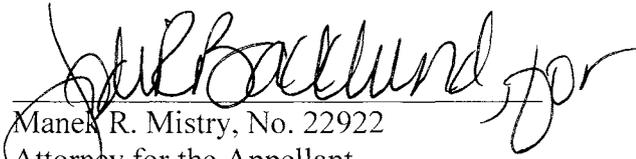
**CONCLUSION**

For the foregoing reasons, Mr. Steward's convictions must be reversed and the case dismissed with prejudice. If the case is not dismissed with prejudice, Count II must be dismissed without prejudice because of a deficiency in the Information, and the case must be remanded to the Superior Court for a new trial.

Respectfully submitted on October 2, 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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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on October 2, 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 October 2, 2007.

  
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BY \_\_\_\_\_  
STATE OF WASHINGTON  
07 OCT 2007  
CLALLAM COUNTY