

36039-0-II
NO. 36039-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRIAN WAHSISE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank Cuthbertson, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Appellant Brian Wahsise was deprived of his due process right to require the state to prove all the elements of first degree robbery beyond a reasonable doubt.

Issue Pertaining to Supplemental Assignment of Error

Whether there is a reasonable likelihood jurors misapplied the ambiguous accomplice liability instruction to convict Wahsise without proof beyond a reasonable doubt that he acted knowing he was facilitating a first degree robbery as opposed to some other crime, such as theft?

B. SUPPLEMENTAL ARGUMENT

THE STATE WAS RELIEVED OF ITS BURDEN TO PROVE ALL ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT.

Clearly established Supreme Court case law provides that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). As a consequence, a jury instruction is constitutionally defective if it “ha[s] the effect of relieving the State of the burden of proof enunciated in Winship.” Sandstrom v. Montana, 422 U.S.

510, 521, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). Clearly established Supreme Court case law specifies the standard for reviewing an ambiguous instruction: “[W]e inquire ‘whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (citation omitted).

The jury was instructed it could convict Wahsise if it found he was an accomplice to first degree robbery. CP 18-20, 26. To convict, the jury had to find the following elements:

(1) That on or about the 8th day of March, 2006 the defendant, or an accomplice, unlawfully took personal property, not belonging to the defendant, or an accomplice, from the person or in the presence of another;

(2) That the defendant, or an accomplice, intended to commit theft of the property;

(3) That the taking was against the person’s will by the defendant’s, or an accomplice’s, use or threatened use of immediate force, violence or fear of injury to that person;

(4) That the force or fear was used by the defendant, or an accomplice, to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant, or an accomplice, displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

CP 26.

The court defined accomplice liability as follows:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

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 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 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 18 (emphasis added).

Recently, the Ninth Circuit held this accomplice liability instruction is ambiguous because the underlined portion "a crime" could refer to the crime charged or some other uncharged offense. Sarausad v. Porter, 479 F.3d 671 (9th Cir. 2007), vacated in part on denial of rehearing en banc, 503 F.3d 822 (9th Cir. 2007), certiorari granted, Waddington v. Sarausad, 2008 WL 695629, 76 USLW 3324 (U.S. Mar 17, 2008) (NO. 07-772). Sarausad was convicted of murder for his alleged participation in a drive-by shooting. He

was driving the car from which his passenger (Ronquillo) fired the fatal shot. The sole issue at trial was whether he could be convicted of murder if he did not know that Ronquillo intended to commit murder. Sarausad, 479 F.3d at 689-90.

Like Wahsise's jury, Sarausad's was instructed as follows:

[Number 45:] You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when is an accomplice of such other person in the commission of the crime.

[Number 46, in part:] 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.

Sarausad, at 690 (emphasis in original).

The court found problematic the term "a crime" as used at the beginning of instruction 46.

The critical issue is the definition of the term "a crime," as that term is used at the beginning of Instruction 46. That term could mean "the crime" actually committed by the principal (whatever it turned out to be), or it could mean "the crime" the accomplice had knowledge the principal intended to commit. It would be easy to add a sentence to the instructions stating

which of the two possible definitions is correct, but the instructions contain no such sentence.

Id.

Although Sarausad's instructions closely tracked the language of Washington's accomplice liability statute, the court noted the statute itself was ambiguous, as evidenced by the courts' disparate interpretations over the years.¹

The Washington courts have had serious difficulty parsing the Washington accomplice liability statute's knowledge requirement, at times holding that it permits an "in for a dime, in for a dollar" theory, and at times holding the opposite. The jury instructions in Sarausad's case, which essentially tracked the statutory language, were no less confusing than the statute itself. We therefore conclude that the jury instructions were, at the very least, ambiguous on the question of whether Sarausad could be convicted of murder and attempted murder on a theory of accomplice liability without proof beyond a reasonable doubt that Sarausad knew that Ronquillo intended to commit murder.

Sarausad, at 692.

For a number of reasons, the court found there was a reasonable likelihood that the jury applied the instruction in a way that relieved the state of its burden to prove beyond a reasonable

¹ For instance, on Sarausad's direct appeal, the court held "in for a dime, in for a dollar" was an accurate statement of Washington accomplice liability. Sarausad, 479 F.3d at 687. This view was later repudiated in State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2001).

doubt every element of accomplice liability for murder under Washington law. First, the evidence supporting the conclusion that Sarausad knew that Ronquillo intended to commit murder was “somewhat thin.” Sarausad, at 692. Second, the prosecutor argued the “in for a dime, in for a dollar” theory of accomplice liability. Id. Third, jury inquiries revealed the jury was confused about what the state was required to prove for accomplice liability. Id., at 693. Finally, the court noted that in denying Sarausad’s personal restraint petition, the Washington Court of Appeals misstated the record. Id. The Ninth Circuit accordingly affirmed the district court’s grant of Sarausad’s federal habeas petition. Id., at 694.

This Court should follow the Ninth Circuit and hold that the accomplice instructions given in Wahsise’s care are ambiguous. As in Sarausad, the jury here was never informed that a person can be guilty of “a crime” as an accomplice only if that person knows that “a crime” is “the crime” the principal intends to commit. Following the Ninth Circuit’s reasoning, this Court should also reverse Wahsise’s robbery conviction because there is a reasonable likelihood the jury applied the instruction in a way that relieved the state its burden to prove beyond a reasonable doubt

every element of accomplice liability for first degree robbery under Washington law.

As in Sarausad, the evidence supporting the conclusion that Wahsise knew of George's intent to commit first degree robbery was thin. Although Huyn testified George pointed a gun at her, she testified that she could only see the barrel, since it was small and tucked into George's sleeve. RP 143. Huyn also testified that someone standing behind George would not have been able to see the gun. RP 159. In light of Huyn's testimony, it is entirely plausible that neither of the two individuals taking the television – allegedly Wahsise and Maas – knew of or ever saw the small gun tucked into George's sleeve. Moreover, the video showed that the television set thieves entered before George and went straight to the television set. It is therefore plausible that neither knew George intended to follow them inside and hold up Huyn. Their intent may have been to commit theft not robbery. And significantly, jurors were instructed on the definition of theft. CP 22. There is therefore a reasonable likelihood jurors applied the accomplice instructions in a way that relieved the state from having to prove Wahsise acted knowing he was facilitating a first degree robbery. This Court should reverse his conviction.

C. CONCLUSION

For the reasons stated herein and in Wahsise's opening appellate brief, this Court should reverse both of his convictions.

Dated this 20th day of March, 2008.

Respectfully submitted

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A handwritten signature in cursive script, reading "Dana M. Lind", is written over a horizontal line.

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