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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

STATEMENT OF ADDITIONAL GROUNDS

COURT OF APPEALS #:36039-0-II

STATE OF WASHINGTON,

RESPONDENT,

VS.

BRIAN DEAN WAHSISE,

APPELLANT.

BRIAN DEAN WAHSISE

743175

WASHINGTON STATE PENITENTIARY

1313 NORTH 13 TH AVE.

WALLA WALLA, WA 99362

RAP 10.10 (a)

[1]

ARGUMENT

1. MR. WAHSISE WAS DENIED HIS RIGHT TO DUE PROCESS WHEN THE "TO CONVICT INSTRUCTION THAT INCLUDED THE ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE EVERY ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.

Due process requires that an instruction "purporting to list all of the elements of a crime must in fact do so." **State v. Smith**, 131 Wn.2d 258,262-63,930 P.2d 917 (1997)(citing **State v. Emmanuel**, 42 Wn.2d 799,819,259 P.2d 845 (19953)). A "to convict" instruction that fails to set forth every essential element of the charged crime is error of constitutional magnitude that may be raised for the first time on appeal. **State v. Aumick**,126 Wn.2d 422,429-30,894 P.2d 1325(1995);**State v. Scott**,110 Wn.2d 682,689-90,757 P.2d 492 (1988).

The error is not cured by reference to other jury instructions. **State v. Miller**,131 Wn.2d at 262-63. Moreover,the error is never harmless"because it affect[s] the right of [the defendant]to have the jury base its decision on an accurate statement of the law applied to the facts in the case." **Miller**,131 Wn.2d at 90-91;accord **Smith**,131 Wn.2d at 263-65;**State v. Pope**,100 Wn.App.624,630,999 P.2d 51,review denied, 141 Wn.2d 1018 (2000)(omission of element in "to convict"instruction is never harmless).

Under RCW 9.A56.200 (1)(A),a defendant commits the offense of Robbery in the first Degree each of the following elements of the crime must be proved beyond a reasonable doubt.(1) That the defendant unlawfully took personal property,not belonging to the defendant,from the person or in presence of another;(2)That the defendant;intended

to commit theft of the property;(3)That the taking was against the persons will by the defendant 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,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 immedaite flight therefrom the defendant,displayed what appeared to be a firearm or other deadly weapon;and(6)That any of these acts occurred in the State of Washington.

Under RCW 9A.08.020(3)(A) The defendant commits the offense of an Accomplice,When,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,encouragment,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.

In order to uphold a conviction under RCW 9A.08.020 (3)(A) Accomplice liability instruction No.9 must have advised the jury, that to find him or her guilty of **The Crime** committed by another person if it found Mr Wahsise had general knowledge that his actions would promote **"The Crime"**.

In this case the accomplice liability instruction allowed Mr Wahsise to be found guilty as an accomplice, if he had general knowledge his or their actions would promote (**"A Crime"**) See instruction No.9 It is Mr Wahsise position that under our states Complicity statute, RCW 9A.08.020, a person is not culpable as an accomplice unless that person possesses general knowledge of the **"specific crime"**, with which he is eventually charged.

The question before this court now, is whether a putative accomplice can be found guilty of the crime charged for merely acting with knowledge that his actions would promote or facilitate **"Any Crime"**.

The Supreme Court of Washington dealt with this precise issue in **State v. Roberts**, 142 Wn.2d 471, 14 P.3d 713 (2000). As was indicated there, the plain language of the complicity statute does not support the state's argument that accomplice liability attaches so long as the defendant knows that he is aiding in the commission of **"Any Crime"**. On the contrary, the statutory language requires that the putative accomplice must have acted with knowledge that his conduct would promote or facilitate **"The Crime"** for which he is eventually charged.

The Supreme Court noted in **Roberts** that the legislative history of RCW 9A.08.020 supports a conclusion that the legislature "intended the culpability of an accomplice not extend beyond **The Crimes** of which the accomplice actually has "knowledge[.]" **Roberts**, 142 Wn.2d at 511:

Finally, the pertinent case law from the Supreme Court of Washington supports imposing criminal liability on an alleged accomplice only so long as that individual has general knowledge of "**The Crime**" for which he was eventually charged. *Id.* at 513 (citing **State v. Rice**, 102 Wn.2d 120, 125, 683 P.2d 199 (1984) and **State v. Davis**, 101 Wn.2d)).

This court should adhere to the decision in **Roberts** and conclude here, as was done in that case, that the fact that a purported accomplice knows that the principle intends to commit "**A Crime**" does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principle. See **Roberts**, 142 Wn.2d at 513. In that court's judgment, in order for one to be deemed an accomplice, that individual must have acted with knowledge that he was promoting or facilitating "**The Crime**" for which that individual was eventually charged. Because the jury instruction which was given in Mr. Wahsise's trial permitted the jury to find accomplice liability on an incorrect legal basis, it was legally deficient.

To better clarify how the state was relieved of proving every element of accomplice liability and that the instruction was given in a manner that was based in an incorrect legal basis, and was legally deficient, this court need not look any further than during closing arguments. The prosecutor [P] offered this explanation of accomplice liability:

Instruction number--I think this is No. 9 in your packet, this instruction is **Critical** in this case as it applies to the defendant, Brian Wahsise. You'll see the word "accomplice" repeats itself throughout a number of the instructions. It's repeated in 10, 11, 16, 17, and 33. What this tells you is if two or more people are involved in "**A Crime**", they're essentially equals. Hey, if Larry, curly, and Moe go decide to rob the bank and Larry is going to drive and curly is going to go in and demand the money and Moe is going to act as a lookout, in the eyes of the law, they're all the same. (RP at 487).

First, the prosecutors closing argument fails, because there is "**No**" testimony or evidence that Mr Wahsise planned or aided in any robbery. Secondly, the prosecutor stated during his closing argument: The next step is, or an accomplice. What puts Brian Wahsise in the days Inn lobby? there's no direct evidence. There's no person who said, "that's the guy who walked in and helped cart out the tv." (RP at 494).

In this case Mr Wahsise's Accomplice liability instruction was legally deficient the state was allowed to have Mr Wahsise found guilty if it found Mr Wahsise helped in "**A Crime**" or "**ANY CRIME**" when the jury should have been instructed for "**THE CRIME**" he was charged with. **IN THIS CASE AS IN ROBERTS**, Mr Wahsise's conviction should be reversed.

2. THE SUPREME COURT'S DECISION IN NEDER
DOES NOT OVERRULE WASHINGTON PRECEDENT.

Under **State v. Jackson**, and **State v. Pope**, an erroneous "to convict" instruction that effectively relieves the state of its burden to prove every element of the charged offense is not susceptible to harmless error analysis--reversal is required.

In **Neder v. United States**, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), however, the United States Supreme Court held that for federal constitutional purposes, an instructional error omitting an element of a criminal offense may be found harmless under the "harmless beyond a reasonable doubt" standard of **Chapman v. California**, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). **Neder**, 527 U.S. at 15.

For a number of reasons, the **Neder** decision can not and does not overrule **Jackson**, **Smith**, or **Pope**.

3. The Supreme Court Has Traditionally left harmless
Error Standards to the States When Not Violative
of Minimal Federal Constitutional Guarantees.

While the United States Supreme Court is the final arbiter on questions of federal constitutional law, traditionally the Court has left to the States the question of whether a particular federal constitutional violation was harmless in any given case.

For example, in **Sandstrom v. Montana**, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 29 (1979), the Court found a jury instruction

that may have shifted the burden of proof and/or been interpreted as a conclusive presumption unconstitutional under the Due Process clause. *Id.* at 524.

The State argued that any error was harmless under **Chapman v. California**. Sandstrom countered that an unconstitutional instruction on an element of the offense can never be harmless. The Supreme Court declined to address the matter, leaving it to the Montana courts to determine the applicable standard. **Sandstrom**, 442 U.S. at 526-27.

Similarly, in **Carella v. California**, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989), the Supreme Court found that an instruction improperly foreclosed the jury's consideration of an element of the offense. *Id.* at 265-66. The Court noted that although it had the authority to conduct harmless error analysis, that determination is usually left to the lower court; in that case the California courts. *Id.* at 266-67.

This is not to say that the Supreme Court has not mandated certain **minimal** standards of review. In **Chapman v. California**, the Court struck down a California standard compelling reversal only where the error "resulted in a miscarriage of justice." **Chapman**, 386 U.S. at 20. The **Chapman** Court held that in the face of constitutional error can be held harmless. And, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." **Chapman**, 386 U.S. at 24.

The **Chapman** Court reasoned:

Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the states, we cannot leave to the States the formulation of the authoritative laws, rules and remedies designed to protect people from infractions by the States of federally guaranteed rights.....

Chapman, 386 U.S. at 21: see also **Yates v. Evatt**, 500 U.S. 391, 406-07, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991) (Reversing state court's harmless error determination where standard applied fell short of minimum constitutional requirements).

The point is this: harmless error standards are not the sole domain of the United States Supreme Court. Most often, the question of harmless error is left to the state courts. When a state standard falls below minimum federal constitutional guarantees, however (as in **Chapman** and **Yates**), the Supreme Court intervenes. But there is nothing to prevent state courts from setting standards above those minimally required by the federal constitution.

Because the standard set forth in **Jackson, Smith** and **Pope** is not inconsistent with minimal federal constitutional guarantees, **Neder** does not overrule binding Washington precedent.

4. b. Despite The United States Supreme Court's Long-Time Application Of A Different Rule, Washington Has Shown Continued Adherence To Automatic Reversal For Errors Of This Type.

There is nothing new about **Neder**, a point made by the majority in that case. Since at least the mid 1980's, the United States Supreme Court has applied harmless error analysis to instructions that arguably relieved the prosecution of its burden to prove every element of the charge. See **Neder**, 527 U.S. at 9-10 (citing, among other cases, **Johnson v. United States**, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); **Yates v. Evatt**, 500 U.S. at 402-06; **Pope v. Illinois**, 481 U.S. 497, 502-04, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987)).

Despite this long line of United States Supreme Court precedent, Washington courts have chosen not to follow suit. The Washington Supreme courts decided **Smith** in 1997. It decided **Jackson** in 1999 and continues to adhere to its holding today, **Neder** notwithstanding. See **State v. Cronin**, 142 Wn.2d 568, 14 P.3d 752 (2000).

That the federal cases pre-dating **Neder** and **Neder** itself did not compel our Supreme Court to change Washington law is hardly surprising, as the rule of automatic reversal is the better rule. To understand why, one need look no further than this Court's sound analysis in **Jackson** and Justice Scalia's dissenting opinion in **Neder**. See **Jackson**, 87 Wn.App. at 812-16; **Neder**, 527 U.S. at 30-38 (Scalia, J dissenting).

CONCLUSION

The Accomplice Liability instruction relieved the state of its burden to prove every element of "**The Crime**".specific ally,the instruction allowed the jury to find Mr Wahsise guilty of an accomplice if it found he helped in "**A Crime**" the instruc tion failed to tell the jury that it must find the defendant guilty of "**The Crime**" In **State v.Cronin**,142 Wn.2d 568,14 P.3d 752 (2000).That Court stated that because the instruction failed to include the required legal basis to find **Cronin**, guilty was not harmless error.**Neder** is neither new nor prece dent setting.The error cannot be deemed harmless,Mr Wahsise jury instruction was defecient and not legally correct. Mr. Wahsise convictions should be reversed.

Dated this 14th day of Febuary,2008.



Brian Wahsise

Appellant