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STATE OF WASHINGTON
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NO. 37413-7-II
Clark County No. 05-1-01737-6

STATE OF WASHINGTON,

Respondent,

vs.

ADRIAN EDWARD REKDAHL

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

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C. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Appellant Adrian Rekdahl was charged in a third amended information with Count I: Felony Murder in the First Degree; Count II: Assault in the First Degree (against Gerald Newman); Count III: Assault in the First Degree (against Laura Harrington); Count IV: Burglary in the First Degree. CP 8-9. Each of the charges alleged that Mr. Rekdahl was armed with a firearm. CP 8-9.¹ The case proceeded to trial. Report of Proceedings. Mr. Rekdahl was found guilty of all four charges, with special verdicts finding he was armed with a firearm as to each count. CP 63-70. Mr. Rekdahl was given a standard range sentence as to each count, for a total sentence of 880 months' confinement. CP 76-77. This timely appeal followed. CP 86.

II. FACTUAL SUMMARY

On the evening of August 6, 2005 Gerald Newman was entertaining friends at his home in Vancouver, Washington. RP Vol. II, p.190-91. At approximately 11:30 p.m., all of the guests had left except Rob and Laura Harrington. RP Vol. II, p. 174-75. The Harrington's and Mr. Newman were having a conversation in the kitchen when three men with rifles burst through the front door. RP Vol. II, 176. Mr. Newman rushed toward the men and was shot in the hip. RP Vol. II, 178, 193. He

¹ Three co-defendants, Jason Balaski, Michael Odell, and Daniel Johnson were tried together in a separate trial and convicted of the charges in the Third Amended Information.

was then beaten severely in the entryway as the Harringtons ran out the back door. RP Vol. II, 178, 194. One of the intruders followed the Harringtons out the back door and fired several shots at Robert Harrington as he and Laura fled for their lives. RP Vol. II, p. 178-80. Robert Harrington was shot several times and died in the back yard. RP Vol. VIII, 983. As he was being shot Mr. Harrington yelled at Laura to run and she did. RP Vol. II, p. 179-80. As she hid in a shrub she could hear one of the gunmen looking for her by moving the leaves with his rifle. RP Vol. II, 180. She heard a voice say “come on, man, we gotta get the fuck out of here.” RP Vol. II, 181. She then heard footsteps, heard three cars doors shut and heard a car leave. RP Vol. II, 181.

III. TRIAL TESTIMONY

a. Michael Koenkamp

Michael Koenkamp works for Metro Watch. RP Vol. II, p. 213. On August 6, 2005 he was working as a patrol sergeant for Metro Watch in Vancouver. RP Vol. II, 214. He was driving eastbound on Evergreen Highway when he heard five to seven gunshots. RP Vol. II, 214-17. He was certain they came from the north side of the road. RP Vol. 217. Immediately after hearing the shots he saw a white Chevrolet Tahoe-type SUV parked on the side of the road facing the opposite direction. RP Vol. II, p. 217. The car had an Oregon license plate. RP Vol. II, p. 217. He

contacted his dispatcher to report the shots fired. RP Vol. II, p. 219. Mr. Koenkamp drove to the intersection of 164th and Evergreen Highway and waited for further instruction. RP Vol. II, p. 219-20. A few minutes later he saw the white Tahoe traveling toward him. RP Vol. II, p. 220. The Tahoe had an Oregon plate. RP Vol. II, 221. The Tahoe turned left and traveled northbound on 164th, and Mr. Koenkamp began to follow it. RP Vol. II, 222-23. Once he caught up to the Tahoe he was able to read the plate, and he relayed it to his dispatcher. RP Vol. II, p. 224. After relaying the license plate Mr. Koenkamp stopped trailing the Tahoe. RP Vol. II, p. 225.

b. Laura Harrington

On August 6, 2005 Laura and Rob Harrington were invited by Gerald Newman, a friend of theirs, to come to his house for a barbecue. RP Vol. II, p. 170. They initially decided not to go, opting to stay at home for an evening together. RP Vol. II, p. 171. Mr. Newman, however, insisted that they come over and they finally relented and arrived at Newman's house at around 9:30. RP Vol. II, p. 171-72. They visited for several hours, and were the only guests remaining at 11:30 p.m. RP Vol. II, 175. The three of them were talking in the kitchen when the door burst open and three men wearing camouflaged clothes came into the house. RP Vol. II, p. 176. They were carrying what Laura described as automatic

weapons. RP Vol. II., 176. Her husband pulled her up off the stool she was sitting on and pushed her toward the kitchen door that led out to the back yard. RP Vol. II, 177-78. She saw Mr. Newman go toward the front door and lunge toward the intruders. RP Vol. II, 178. As she and her husband were going out the back door she heard a gun shot but didn't see what happened to Mr. Newman. RP Vol. II, 178.

Laura tripped as they were going out the back door but they continued across the deck, navigating around patio furniture, hoses, and a hot tub. RP Vol. II, 178-79. Laura tripped again, but her husband never let go of her arms. RP Vol. II, 178-79. There were steps leading from the deck to the back yard and Laura fell down them as her husband continued to hold onto her arms. RP Vol. II, 179. They turned to look up and saw a man standing there looking at them with his gun pointed at them. RP Vol. II, 179. Mr. Harrington began pleading for his own life and that of his wife. RP Vol. II, 179. He told the gunman that they didn't live there and didn't know anything about what was going on, and that they wouldn't be able to recognize him. RP Vol. II, 179. He concluded by begging the gunman not to shoot them because they had children and grandchildren, including a new grandbaby. RP Vol. II, 179. The gunman didn't respond and just stared at them with his laser-lighted gun pointed at them. RP Vol. II, 179. After begging for their lives in futility, Mr. Harrington got his

wife back on her feet and yelled at her to “run, run, run” and as they got about halfway across the yard, Laura heard the first shot ring out and her husband released her arms. RP Vol. II, 179. As he did, he pushed Laura forward and she heard him say “oh God, oh my God.” RP Vol. II, 180. Laura reached the hedge and heard four or five more shots and she dropped to the ground. RP Vol. II, 180.

Desperate for help Laura crawled under the hedge but found, as she got to the other side, there was no place to go. RP Vol. II, 180. As she was hiding, she could hear the gunman on the other side of the shrubbery “like he had his weapon and was looking through the shrubs.” RP Vol. II, 180. She wondered if it was going to hurt when the gunman shot her. RP Vol. II, 180. After a few seconds, she heard a voice say “come on, man, we gotta get the fuck out of here,” followed by footsteps and the sound of three car doors shutting and a car leaving. RP Vol. II, 181. She then made her way to a neighbor’s house and got help. RP Vol. II, 181. Laura was not able to identify any of the assailants. RP Vol. II, 181.

c. Gerald Newman

On August 6, 2005 Mr. Newman lived at 15708 Southeast Evergreen Highway in Vancouver, Washington. RP Vol. II, 190. He came home that night after a family wedding at around six or seven in the

evening, and decided to have some people over for a gathering. RP Vol. II, 190. Among his guests were Laura and Rob Harrington. RP Vol. II, 191. Over the course of the evening, after he had returned home from the wedding, he drank about half a dozen hard alcoholic drinks. RP Vol. II, 198. He also consumed marijuana and cocaine at the gathering. RP Vol. II, 199. By 11:30 all of the guests had left but the Harringtons and they were all having a conversation in the kitchen. RP Vol. II, 192. Mr. Newman testified that the front door flew open and three guys wearing masks and holding weapons came in. RP Vol. II, 192. He described them as three different sized men; a small guy, a middle-sized guy, and a big guy. RP Vol. II, 193. Newman went toward the intruders and something to the effect of "get out of my house." RP Vol. II, 193. One or two of the intruders (he couldn't be specific) raised his gun and Mr. Newman got shot in the hip. RP Vol. II, 193. He was then beaten severely and only remembers trying to get to his bedroom to call 911. RP Vol. II, 194. He didn't see what happened with the Harringtons. RP Vol. II, 194.

When he spoke to the police Mr. Newman described the intruders as three black men. RP Vol. II, 201. When questioned about that claim, he testified that he thought they were black because of things they said that "sounded like a black guy." RP Vol. II, 201. Mr. Newman also told the police, when he was interviewed in the hospital, that he went out to his

car and retrieved a weapon and returned to the house. RP Vol. II, 201. He testified he had some “heavy duty dreams” while in the hospital and that was the source of that particular story. RP Vol. II, 201.

d. Deputy Todd Young

Deputy Young of the Clark County Sheriff’s Department was working an overtime shift at the Clark County Fair on August 6, 2005. RP Vol. II, 305. As he was leaving the fair he heard a call come out over dispatch that a Chevy Tahoe was being sought in connection with a shooting in Vancouver. RP Vol. II, 305. The sought-after Tahoe bore the license number 097BLX from the state of Oregon. RP Vol. II, 307. He began to head toward his home in Hawkinson when, as he reached SR 503, he saw a white newer model Tahoe and turned to check the license number. RP Vol. II, 308. The license did not match the one being sought so he turned around and continued toward home. RP Vol. II, 308.

As he traveled north on Ward Road he noticed a white SUV coming toward him so he slowed down. RP Vol. II, 308. As he passed the SUV he saw that the Tahoe bore the Oregon license plate 097BLX. RP Vol. II, 308. He advised his dispatch he was following the wanted vehicle and turned around to follow it. RP Vol. II, 309. He did not immediately stop the Tahoe because he was planning to make a high risk stop and was waiting for back-up. RP Vol. II, 311. The Tahoe eventually

turned into a neighborhood and, after a few more turns, pulled over as though it had reached its destination. RP Vol. II, 311-12.

Young advised dispatch he was going to make contact and shortly thereafter all of the Tahoe's doors opened. RP Vol. II, 312. He turned on his emergency lights and starting giving orders to the subjects to lie down on the ground. RP Vol. II, 313. He had his weapon drawn. RP Vol. II, 313. Three of the subjects complied and got down on the ground while the fourth subject took off running. RP Vol. II, 313. The man who ran was sitting in the front passenger seat. RP Vol. II, 314. About 15 to 30 seconds after the front side passenger ran, back-up officers arrived. RP Vol. II, p. 315. Young took the three who complied with his commands into custody. RP Vol. II, 315. They were Jason Balaski, Daniel Johnson, and Michael Odell. RP Vol. II, 315. The man who ran was white with short, dark hair and was between five foot, six inches tall to five foot, eight inches tall. RP Vol. II, 315. He was wearing a white t-shirt and blue shorts. RP Vol. II, 315.

The deputies searched for the person who fled but were unable to locate him. RP Vol. II, 323. It was determined that he had gone over a fence, however no forensic investigation was done on the fence. RP Vol. II, 323-29.

c. Dirk Ziemer

On August 6, 2005 Mr. Rekdahl was living with Dirk Ziemer and his family in Portland. RP Vol. II, 350. He testified that Mr. Rekdahl worked for Mr. Odell, whom he (Ziemer) also knew. RP Vol. II, 351. He also testified that he knew Daniel Johnson, having met him through Mr. Rekdahl. RP Vol. II, 351. He did not, however, know Jason Balaski. RP Vol. II, p. 353. To help him out due to his poor credit, Mr. Ziemer got a cell phone for Mr. Rekdahl. RP Vol. II, 354. The number for the phone was (503) 348-8327. RP Vol. II, 357. The morning after Mr. Harrington was murdered Mr. Rekdahl called Mr. Ziemer from Vancouver asking for a ride home. RP Vol. II, 358-61. The call was a collect call, and wasn't made from Mr. Rekdahl's cell phone. RP Vol. II, 360. Ziemer picked up Mr. Rekdahl at an auto parts store on either Mill Plain or Fourth Plain Boulevard in Vancouver (he couldn't recall which). RP Vol. II, 361. Ziemer testified that Mr. Rekdahl asked him not to say anything about the ride, to say it "never happened." RP Vol. II, 362. Mr. Rekdahl explained his insistence that Mr. Ziemer not talk about the ride on the fact that it would break his probation to be across the river in Washington. RP Vol. II, 362. After stopping at a Burger King for food they went back to Mr. Ziemer's house. RP Vol. II, 363. A few hours later Mr. Ziemer and his wife left, leaving Mr. Rekdahl at the house. RP Vol. II, 363. When they returned home Mr. Rekdahl was gone. RP Vol. II, 363. When questioned

that evening by detectives, Mr. Ziemer initially lied and told them Mr. Rekdahl was at the house when he awoke that morning. RP Vol. II, 365. He subsequently changed his story and told them he had gone to pick Mr. Rekdahl up in Vancouver. RP Vol. II, 366.

f. Danny Stroup

Danny Stroup is the former boyfriend of Mr. Rekdahl's mother. RP Vol. V, 528. During his relationship with Mr. Rekdahl's mother Mr. Stroup lived with Mr. Rekdahl and his mother. RP Vol. V, 528. The relationship ended when Stroup went to prison bank robbery. RP Vol. V, 529. Mr. Stroup and Mr. Rekdahl continued to see each other occasionally after he got of prison. RP Vol. V, 530. A few weeks after Mr. Harrington was murdered, Rekdahl's mother got in touch with Stroup and asked him to help Mr. Rekdahl. RP Vol. V, 533-34. According to Stroup, she wanted him to drive Mr. Rekdahl up into the woods in Washington. RP Vol. V, 534. She promised him a few hundred dollars in return. RP Vol. V, 534. He agreed and drove Mr. Rekdahl up to the woods, dropping him off on an access road in the middle of the woods. RP Vol. V, 535. Stroup claimed that Mr. Rekdahl told him he had to get away for awhile. RP Vol. V, 536. A little over a month later Rekdahl's mother called Stroup again and asked him to go pick Mr. Rekdahl up. RP Vol. V, 537-38. She offered him money again; however he never got his

money the first time. RP Vol. V, 538. Stroup agreed and went back to the same access road and picked Mr. Rekdahl up. RP Vol. V, 539. He brought Mr. Rekdahl to his house to spend the night. RP Vol. V, 542. The next day, Rekdahl's mother came to pick him up. RP Vol. V, 543. The night after that, Stroup turned Mr. Rekdahl in. RP Vol. V, 544-47.

Stroup claimed that when he was driving Mr. Rekdahl up to the woods in Washington, they had a conversation about what happened in Gerald Newman's house. RP Vol. V, 547. Stroup claimed that Rekdahl told him that he and some friends went into a residence and that "it went wrong." RP Vol. V, 548. The specific exchange between Stroup and the prosecutor was this:

PA: Did he say how it went wrong?

Stroup: Well, he said he went in and, uh, one of the guys jumped on him or somethin' and there was a scuffle or somethin' like that.

PA: Then what did he say happened?

Stroup: Gunfire.

PA: Okay, did he say who he shot?

Stroup: No.

PA: Didn't say anything about who shot or how the shot occurred, anything like that?

Stroup: No.

PA: Okay. Did he say that he was actually one of the guys in the house?

Stroup: Yes.

PA: Alright. What else did he say about the homicide?

Stroup: Well, he said he was in the front room at the time.

PA: Okay. What else did he say?

Stroup: And the scuffle was in the front room.

PA: Okay.

Stroup: And then somethin' happened in the back somewhere.

PA: Did he give you any detail about that or was he vague?

Stroup: No, he didn't give me details, no.

PA: Okay. So basically he told you it went wrong?

Stroup: Yeah.

...

PA: Did he say why they did it, what was the plan?

Stroup: To do a robbery.

PA: Did he say anything about why they picked that person to rob?

Stroup: No.

RP Vol. V, 547-49. Stroup admitted that in exchange for helping the police he asked to have a warrant in California taken care of. RP Vol. V, 550. The warrant was for a parole violation that could have resulted in him getting sent back to prison. RP Vol. V, 550-51. Mr. Stroup initially

lied to the police and the attorneys in the case, repeatedly, about taking the defendant up to the woods in Washington. RP Vol. V, 554. One of those lies was told under oath. RP Vol. V, 554.

IV. JURY INSTRUCTION

The State's theory of the case was that Mr. Rekdahl was a principal or an accomplice to the crimes of burglary in the first degree and assault in the first degree as to both Laura Harrington and Gerald Newman. RP Vol. 9, 1167-73. The State further alleged that Mr. Rekdahl was guilty of felony murder in the first degree because a co-participant in the burglary of Gerald Newman shot and killed Robert Harrington. *Id.* As to accomplice liability, the jury was instructed, in instruction No. 10, as follows:

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.

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 or her 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.

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

CP 43.

As to the charge of felony murder in the first degree, the jury was instructed, in instruction No. 11, as follows:

A person commits the crime of murder in the first degree when he, or an accomplice, commits burglary in the first degree and in the course of or in furtherance of such crime, or in immediate flight from such crime, he or another participant, causes the death of a person other than one of the participants.

CP 44.

The "To Convict" instruction for felony murder in the first degree, found in instruction No. 12, stated:

To convict the defendant, Adrian Edward Rekdahl, of the crime of murder in the first degree, as charged in count one, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 6, 2005, Robert Harrington was killed;
- (2) That the defendant, Adrian Edward Rekdahl, or an accomplice, was committing burglary in the first degree;
- (3) That the defendant, Adrian Edward Rekdahl, or an accomplice, caused the death of Robert Harrington in the course of or in furtherance of such crime or immediate flight from such crime;
- (4) That Robert Harrington was not a participant in the crime; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 45.

D. ARGUMENT

I. THE CONVICTIONS AND SPECIAL VERDICTS IN COUNTS II AND III MUST BE REVERSED BECAUSE THE ACCOMPLICE LIABILITY INSTRUCTION WAS MISLEADING.

An individual is guilty as an accomplice if “[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.”

RCW 9A.08.020 (3) (a). An individual aids or agrees to aid if he is “ready to assist” in the commission of the crime. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981), citing *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Prior to *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (as amended) (2001), the law on accomplice liability as interpreted in Washington followed the principle of “in for a dime, in for a dollar.” In *Roberts*, the Washington Supreme Court repudiated this and held that in order to be convicted as an accomplice, the State must prove

that the actor who is alleged to be the accomplice must have knowledge of the specific crime the principal intends to commit, not merely “a crime” the principal intends to commit. *Roberts* at 735-36; *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000); *Sarausad v. Porter*, 479 F.3d 671, 688, 2007 U.S. App. LEXIS 5264 (2007). The instruction number 7 in *Roberts* read as follows:

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 he is an accomplice of such other person in the commission of *a crime*.

Roberts at 735. Since *Roberts*, the accomplice liability instruction has been changed to read as it read in the *Sarausad* case:

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 he is an accomplice of such other person in the commission of *the crime*.

Sarausad at 690.

The Ninth Circuit Court of Appeals, in *Sarausad*, addressed a habeas corpus petition in which the petitioner argued that the use of this jury instruction relieved the state of its burden of proof because this instruction continues to be defective. *Sarausad* at 683. The Ninth Circuit began its analysis by asking first, whether the jury instructions pertaining to accomplice liability were ambiguous. *Sarausad* at 689, citing *Estelle v.*

McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991). “If the instructions were ambiguous, we then ask ‘in the context of the instructions as a whole and the trial record’ whether there was a ‘reasonable likelihood that the jury has applied the instruction in a way that violates the Constitution.”

Sarausad at 689. Turning to whether the instruction was ambiguous, the Ninth Circuit observed that changing “a crime” in the last sentence of the instruction to “the crime,” while still failing to specify the specific crime and while keeping “a crime” in the first sentence, did nothing to cure this defective instruction. Referring to the instructions in *Roberts* and in *Sarausad*, the Court said:

The only difference between the two instructions is that the words “the crime” at the very end of Instruction 45 in *Sarausad*’s case are replaced by the words “a crime” at the end of the just-quoted portion of Instruction 7 in *Roberts*...But the simple change from “a crime” to “the crime” in Instruction 45 does not, in our view, make the jury instruction in *Sarausad*’s case unambiguous, for the basic problem identified above remains: There is no sentence in the instructions specifically instructing the jury 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.

Sarausad at 690-91. The Court went on to say “The fact that an instruction quotes from a statute does nothing to make either the statute, or the instruction, more understandable.” *Sarausad* at 691.

Having found the instruction ambiguous, the Court turned to whether there was a likelihood that the jury misapplied the instruction.

Sarausad must also establish that there is “a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. (Internal citations omitted). Under *Estelle*, we ask whether there is a “reasonable likelihood” that the jury applied the instruction in a way that relieved the State of its burden to prove beyond a reasonable doubt every element of the crime of accomplice liability for murder under Washington law. A defendant “need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction” in order to satisfy the “reasonable likelihood” standard.

Sarausad at 692. The Court then went on to analyze the facts of Sarausad’s case to conclude that there was a reasonable likelihood the jury had, in fact, misapplied the ambiguous jury instruction. *Sarausad* at 693-94. The Court went on to hold that the error was not harmless for the same reasons they concluded the second step of *Estelle* was satisfied, stating they were in grave doubt as to the harmlessness of the error. *Sarausad* at 694.

Turning to Mr. Rekdahl’s case, the instruction on accomplice liability, found in instruction number 10, suffers from the same infirmity as the instructions in *Roberts* and *Sarausad*: It is ambiguous. The State relied upon accomplice liability in each of the four charges. In the case of Count IV, burglary in the first degree, Mr. Rekdahl clearly acted as an accomplice to Balaski, Johnson, and Odell. Once the jury concluded Mr. Rekdahl acted as an accomplice to the burglary, he was an accomplice to the other participants as a matter of status. The jury instruction on

accomplice liability in Mr. Rekdahl's case was an umbrella instruction intended to cover each of the crimes for which he was charged. As such, it failed to specify the crime for which he was alleged to be acting as an accomplice.

This failure to specify the alleged crime, in the accomplice liability instruction, created the same ambiguity the Ninth Circuit took issue with in *Sarausad*. In both *Sarausad's* case and Mr. Rekdahl's case, the accomplice liability instruction failed to provide an "explicit statement that an accomplice must have knowledge of the actual crime the principal intends to commit." *Sarausad* at 690. Both sets of instructions merely called attention to "'a crime,' which could have meant either 'the crime' actually committed by the principal (whatever it turned out to be), or it could have meant 'the crime' the accomplice had knowledge the principal intended to commit." *Sarausad* at 690. The Court in *Sarausad* held that even though these instructions complied with *State v. Roberts*, the compliance was merely technical because it did nothing to clarify the inherent ambiguity in the language "the crime." *Sarausad* at 690.

Because of this ambiguity, there is a reasonable likelihood the jury misapplied the instruction to conclude that even if he had no knowledge that an accomplice intended to commit the crime of assault in the first degree against Gerald Newman or against Laura Harrington, he was

nevertheless an “accomplice” to the principal actors in those crimes by virtue of his status as an accomplice to the burglary. The State was thereby relieved of its burden of proving as to each count of assault in the first degree that Mr. Rekdahl had knowledge that one or more of his accomplices *in the burglary* intended to commit the crime of assault in the first degree by shooting and beating Mr. Newman and assault in the first degree by threatening Laura Harrington with a firearm. The danger of misapplication of this ambiguous jury instruction seems particularly high in cases such as Mr. Rekdahl’s, in which there are multiple charges and multiple actors. The ambiguity of this instruction could perhaps have been eliminated by using a separate accomplice liability instruction for each charge, specifying in each instruction “the crime” for which it is alleged the defendant had knowledge and acted as an accomplice to its commission.

The jury instruction on accomplice liability was defective here and relieved the State of its burden of proving each element of the crime 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.’” *Sarausad* at 683, citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970); *Jackson v.*

Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781 (1979). Further, the error was not harmless. Because this error is constitutional, the error is not harmless if the reviewing court is in “grave doubt as to the harmlessness of the error.” *Sarausad* at 694, citing *California v. Roy*, 519 U.S. 2, 5, 117 S.Ct. 337 (1996). Here, the actions which gave rise to the allegations of assault in the first degree against both Gerald Newman and Laura Harrington were the result of rogue actions undertaken by unexpected circumstances. In other words, the evidence did not establish that they were part of the original burglary plan to which Mr. Rekdahl was an accomplice. Assuming Mr. Rekdahl was not the person who fired the shot at Mr. Newman or beat Mr. Newman, and was not the person who threatened Laura Harrington with a firearm, the evidence was insufficient to prove that Mr. Rekdahl was an accomplice to those specific crimes, rather than simply the burglary in the first degree.

Mr. Rekdahl’s convictions and special verdicts under Counts I and II should be reversed and remanded for a new trial.

II. THE CONVICTION AND SPECIAL VERDICT IN COUNT I MUST BE REVERSED BECAUSE THE ACCOMPLICE LIABILITY INSTRUCTION WAS MISLEADING.

The conviction and special verdict in Count I for felony murder should also be reversed and remanded for a new trial. The

felony murder rule represents the one of the ways by which criminal liability for an act can be imputed to one who did not actually commit the act. *State v. Carter*, 154 Wn.2d 71, 77, 109 P.3d 823 (2005). Another mechanism is the accomplice liability statute (RCW 9A.08.020). *Id.* "...[T]he felony murder provision of the first degree murder statute requires that a 'participant' be one who actually commits the underlying felony or one who is an accomplice in the commission of such crime." *Carter* at 79; *State v. Dudrey*, 30 Wn.App. 447, 450-55, 635 P.2d 750 (1981). One cannot be deemed a co-participant in felony murder if he wasn't either the principal actor in the underlying felony or an accomplice to the underlying felony. *Carter* at 80. Here, the conviction in Count I was predicated upon the defective accomplice liability instruction complained of above. The jury, utilizing the ambiguous accomplice liability instruction, could have deemed Mr. Rekdahl an accomplice to any of the crimes committed by his accomplices (such as assault in the first degree), rather than a specific crime, but nevertheless found Mr. Rekdahl guilty of felony murder if it found that any of his accomplices was committing a burglary and during the course of that burglary, or in flight from the burglary, caused the death of Robert Harrington.

The "To Convict" instruction (instruction number 12) for murder in the first degree as charged in Count I stated:

To convict the defendant, Adrian Edward Rekdahl, of the crime of murder in the first degree, as charged in count one, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 6, 2005, Robert Harrington was killed;
- (2) That the defendant, Adrian Edward Rekdahl, or an accomplice, was committing burglary in the first degree;
- (3) That the defendant, Adrian Edward Rekdahl, or an accomplice, caused the death of Robert Harrington in the course of or in furtherance of such crime or immediate flight from such crime;
- (4) That Robert Harrington was not a participant in the crime; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 45. This instruction, in section (2)

As written, the jury could have concluded that Mr. Rekdahl was an accomplice to the crime of assault in the first degree of Gerald Newman, for example, and still found him guilty of felony murder if it found that any one of his accomplices committed a burglary in the first degree and

caused the death of Robert Harrington during the course of that burglary or in flight there from. The instruction, as written in section (2) and read together with Instruction 10, did not require Mr. Rekdahl to be either a principal or an accomplice to burglary, it merely required one with whom he acted as an accomplice to “a crime” to have committed a burglary and caused the death of Robert Harrington during the course of or flight from the burglary. This relieved the State of its burden of proving that Mr. Rekdahl was either a principal in the burglary or an accomplice specifically to the burglary and not some other crime before it could find him guilty of felony murder.

In *Carter*, the Supreme Court clarified that a defective accomplice liability instruction given in a felony murder case is not harmless error per se. *Carter* at 81. Rather, “[a]n erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Carter* at 81, citing *State v. Brown*, 147 Wn.2d 330, 338, 58 P.3d 889 (2002). Here, the interplay of these instructions can be confusing under the best of circumstances and particularly to lay people who sit on juries. Because there were multiple charges and multiple actors, as stated above, it cannot be said that this instructional error was harmless and Count I should be reversed and remanded for a new trial.

III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION AND SPECIAL VERDICT IN COUNT II.

As a part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, the State must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). A sufficiency claim admits the truth of the State's evidence. *State v. Luther*, 157 Wn.2d 63, 77, 134 P.3d 205, *cert. denied*, 127 S.Ct. 440 (2006). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). In considering sufficiency of the evidence, the Court will give equal weight to circumstantial and direct evidence. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The Court will not substitute its judgment for that of the jury on issues of fact. *State v. King*, 113 Wn.App. 243, 269, 54 P.3d 1218 (2002).

Here, we don't know who did what in that house. We know from the evidence that one person followed the Harringtons out into the back yard. We don't know how many assailants, or which one, murdered Rob Harrington. We know that one person shot Gerald Newman in the leg when he unexpectedly advanced on the intruders, but we don't know how many men (one or two) participated in his severe beating because he couldn't say. To sustain the conviction for assault in the first degree against Gerald Newman, the State had to prove either that Mr. Rekdahl was the person who shot Mr. Newman and/or that he severely beat Mr. Newman, or that he was an accomplice to those actions. However, as the prosecutor argued in his closing argument, what happened in that house was the result of a plan (for burglary) gone wrong. The actions taken against Gerald Newman and Rob Harrington were not planned and, particularly in the case of Rob Harrington, were the result of rogue actions by panicked intruders. Without proving that Mr. Rekdahl was either the principal in the assault against Mr. Newman, or that he had knowledge that an accomplice was going to commit an assault in the first degree against Gerald Newman *and* he solicited, commanded, encouraged, or requested his accomplice to commit the crime or aided or agreed to aid his accomplice in planning or committing the crime, the conviction in Count II cannot be sustained.

Accomplice liability for Counts II and III does not work in the same way as the felony murder rule, despite the prosecutor having conflated the two principles somewhat in his closing argument. Mr. Rekdahl cannot be held accountable for assault in the first degree against Gerald Newman merely by being an accomplice to burglary in the first degree while one of his accomplices commits the assault in the first degree. That principle applies to felony murder, not general accomplice liability for non-homicide crimes.

The evidence is insufficient to sustain the conviction in Count II and the conviction for that count should be reversed and dismissed.

IV. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION AND SPECIAL VERDICT IN COUNT III.

The relevant case law on sufficiency of the evidence is stated in Part III above and is incorporated herein. The facts of this case do not support the conviction for assault in the first degree against Laura Harrington for the same reason they do not support the conviction in Count II against Gerald Newman. The murder of Rob Harrington and assault against Laura Harrington were not planned, as the prosecutor correctly stated in his closing argument. The plan was for a burglary and it went wrong due, as the prosecutor put it, to poor “intelligence.” These assailants did not expect to find the Harringtons at the house. There was

no time to form a plan as to how to deal with the situation and the assailant

who followed the Harringtons to the back yard acted in a rogue fashion in executing Mr. Harrington and shooting at Laura Harrington.

The State was required to prove either that Mr. Rekdahl was the back yard shooter, or that he had knowledge in advance that the back yard shooter intended to assault Laura Harrington. In addition to having prior knowledge that the back yard shooter intended to shoot at Laura Harrington, the State also had to prove that Mr. Rekdahl solicited, commanded, encouraged, or requested his accomplice to commit the crime or aided or agreed to aid his accomplice in planning or committing the crime. Again, it is not “in for a dime, in for a buck” under the law of the State of Washington, nor is it enough to have proven that Mr. Rekdahl was merely an accomplice to the burglary. Being an accomplice to the burglary simply does not make Mr. Rekdahl legally responsible for the assault against Laura Harrington the way it could have (assuming the jury was properly instructed) made him legally responsible for the death of Robert Harrington. Proof of accomplice liability requires more, and the State did not meet its burden.

The conviction in Count III should be reversed and dismissed.

E. CONCLUSION

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The convictions and special verdicts in Counts II and III must be reversed and dismissed. Alternatively, they should be reversed and remanded for a new trial. The conviction in Count I should be reversed and remanded for a new trial.

RESPECTFULLY SUBMITTED this 16th day of December, 2008.


ANNE CRUSER, WSBA #27944
Attorney for Mr. Rekdahl

APPENDIX

1.

RCW 9A.08.020 Liability for conduct of another - Complicity.

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he:

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

(4) A person who is legally incapable of committing a particular crime himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He is a victim of that crime; or

(b) He terminates his complicity prior to the commission of the crime,
and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

2.

RCW 9A.32.030 Murder in the first degree.

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or

(b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or

(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants: Except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was

armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a class A felony.

3.

RCW 9A.36.011 Assault in the first degree.

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony.

4.

RCW 9A.52.020 Burglary in the first degree.

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

(2) Burglary in the first degree is a class A felony.

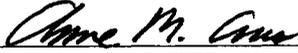
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and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MR. REKDAHL)
- (3) AFFIDAVIT OF MAILING

Dated this 16th day of December, 2008


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: Dec 16th, 2008, Kalama, WA

Signature: Anne M. Cruser