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A. ASSIGNMENTS OF ERROR

01. The trial court erred in admitting evidence of Crow's alleged involvement in a prior assault of a person who was not one of the current victims for the purpose of proof of Crow's motive.
02. The trial court erred in permitting Crow to be represented by counsel who provided ineffective assistance by failing to properly move to exclude evidence of Crow's alleged involvement in the prior assault of Scott Cover.
03. The trial court erred in giving a purported limiting instruction that failed to eliminate the possibility that the jury would consider the evidence for improper propensity purposes.
04. The trial court erred in giving a purported limiting instruction that improperly commented on the evidence in violation of Washington Constitution article IV, section 16.
05. The trial court erred in allowing Crow to be represented by counsel who provided ineffective assistance by agreeing that the court's purported limiting instruction contained the appropriate language.
06. The trial court erred in giving Instruction No. 11, the accomplice liability instruction, where it relieved the State from its burden of proving Crow committed an overt act.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court committed reversible error in admitting evidence of Crow's alleged involvement in a prior assault of a person who

was not one of the current victims for the purpose of proof of Crow's motive?
[Assignment of Error No. 1].

02. Whether the trial court erred in permitting Crow to be represented by counsel who provided ineffective assistance by failing to properly move to exclude evidence of Crow's alleged involvement in the prior assault of Scott Cover? [Assignment of Error No. 2].
03. Whether a purported limiting instruction that informs the jury that it may consider evidence of a prior assault on the issue of the defendant's motive but fails to eliminate the possibility that the jury will consider the evidence for improper propensity purposes is inadequate and constitutes a comment on the evidence? [Assignment of Error Nos. 3 and 4].
04. Whether Crow was prejudiced as a result of his counsel's agreeing that the court's purported limiting instruction contained the appropriate language? [Assignment of Error No. 5].
06. Whether the trial court erred in giving Instruction No. 11, the accomplice liability instruction, where it relieved the State from its burden of proving Crow committed an overt act? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Tommy Lee Crow Jr. (Crow) was charged by

second amended information filed in Thurston County Superior Court on March 9, 2009, with two counts of murder in the second degree, counts I and II, and arson in the second degree, count III, contrary to RCWs 9A.08.020, 9A.32.501(1)(a) or (b), 9.94A.535(3)(a) and (w), and 9A.48.030. [CP 40-41].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 12]. Trial to a jury commenced on March 9, the Honorable Wm. Thomas McPhee presiding. The parties stipulated that the two deceased bodies located on March 28, 2008, were David N. Miller and Norman L. Peterson, the victims in counts I and II. [CP 38-39; RP 275-77].¹

Neither exceptions nor objections were taken to the jury instructions. [RP 1254-55]. The jury returned verdicts of guilty as charged [CP 60, 63-64], in addition to special verdicts that the victim in count I was killed while acting as a good Samaritan [CP 61] and that Crow's conduct during the commission of count II manifested deliberate cruelty to the victim. [CP 62].

Crow was given an exceptional sentence of 660 months and timely

¹ All references to the Report of Proceedings are to the transcript entitled VOLUMES 1-8.

notice of this appeal followed. [CP 89-100].

02. Substantive Facts

On March 7, 2008, Scott Cover was severely assaulted with a baseball bat. [RP 240, 243-44, 341, 442-43]. Initially, he would not disclose the identity of his assailants [RP 244-45], and asked that a message be delivered to Crow, Bryan Eke and Christopher Durga that “he did not rat them out to the police.” [RP 361]. The evening after the assault [RP 367], Crow told Justin Van Horn “that he was responsible, that they had put (Cover) in the hospital(,) specifically told me about breaking his legs and that I was next....” [RP 345]. Crow talked in term of they, saying “himself, Bryan, and Chris.” [RP 375-76].

David Miller, the victim in count I, contradicted Van Horn, claiming that he had witnessed the assault of Cover by Durga and Eke. [RP 624, 661, 1066]. Miller was aware of the danger in reporting this to the police.

He was concerned. He wanted us - - the police department to catch these guys for doing what they were doing. He was extremely concerned for his safety and the safety of others out there.

[RP 623-24].

Nevertheless, Miller told the police what he knew, naming Durga and Eke as Cover's assailants, only to be murdered shortly after Crow and Eke and Durga became aware of this. [RP 623-25, 661].

At approximately 10:00 in the morning on March 28, the police located two dead bodies still burning in a wooded area commonly used by transients for unauthorized campsites. [RP 143, 152, 155-56, 180-81, 221, 251, 479, 530]. The victims, later identified as David Miller and Norman Peterson, were severely burned. [RP 286, 289, 480-82, 963]. They had both died of asphyxia, probably by manual strangulation, and were deceased prior to being exposed to fire. [RP 980-83, 985-86, 989, 1013, 1015 1019-1022]. They had been staying at the campsite in a tent that was also burned. [189, 285].

On June 6, Cover picked Crow and Eke from two photomontages as the persons who had assaulted him [RP 382, 389-90, 392-93], saying he had been drinking that night at the campsite with the two and a number of other people. [RP 396].

I woke - - kind of woke up, whatever. I remembered that Bryan and Tom were, like standing over me, and I was begging for my life for them to quit hitting me. And Bryan handed the baseball bat to Tom, and then Tom hit me, and I felt - - on my legs and back.

[RP 398].

Eke, who admitted to giving prior inconsistent statements [RP 1114], claimed that he was not present when Cover was assaulted in early March, that he, Crow and Durga had gone to Miller's campsite around 1:00 in the morning on March 28 [RP 1147], where Durga choked Miller and Crow assaulted Peterson with a tree limb before choking him. [RP 1156-57, 1172-73]. Both Durga and Crow dragged their respective victim face down into a nearby campfire and stood on the back of his shoulders. [RP 1164, 1179-80]. Eke then lit the tent on fire because Crow "told me to start the fire." [RP 1054].

Durga declared that he and Eke had assaulted Cover in early March and that Miller was at the scene. [RP 1114-17]. He also admitted that he along with Crow and Eke had assaulted Miller later that month [RP 1142-46], right before Crow and Eke assaulted Peterson. [RP 1149, 1152-56]. Damage to Peterson's left leg was so severe it almost severed his foot from his leg. [160, 174, 495, 907]. There was a "footwear impression" on Peterson's back similar to a shoe belonging to Crow. [RP 496-98, 556]. According to Durga, he and Crow left the scene before Eke set the victims' tent on fire. [RP 1214-16].

When interviewed by the police on March 28, Crow denied any involvement in the deaths of Miller and Peterson, explaining that he was asleep at the time. [RP 1006]. Later, while in custody awaiting trial, he

allegedly told a fellow inmate that he had gone to Miller's campsite with Eke and Durga to beat up Miller because he had snitched on them, and while there knocked out Peterson and helped drag the bodies. [RP 1228-1231, 1237-1246].

Crow rested without presenting evidence. [RP 1254].

D. ARGUMENT

01. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO ADMIT EVIDENCE OF CROW'S ALLEGED INVOLVEMENT IN A PRIOR ASSAULT OF A PERSON WHO WAS NOT ONE OF THE CURRENT VICTIMS FOR THE PURPOSE OF PROOF OF CROW'S MOTIVE.

At the conclusion of a ER 404(b) hearing, and over objection, the trial court granted the State's motion to present evidence of Crow's alleged involvement in the prior assault of Scott Cover for the purpose of proof of Crow's motive. [RP 51-58, 60-63, 69-72]. The State argued that this evidence was necessary to show that Crow believed that Miller, the victim in count I, had snitched to the police about Crow's involvement in the prior assault of Cover and that this had served as motivation for the current crimes. [RP 50, 56-58].

(T)he one (current crimes) is not understandable without the other (prior assault). They went to the camp because they considered Mr. Miller a snitch who talked to the police about them. That's what caused them to go there. It's only by understanding

the nature of what had occurred previously that the jury can understand, well, what is this about a snitch?

[RP 58].

The admission of other crimes, wrongs or acts is governed by ER 404(b). Under the rule, the court is prohibited from admitting “(e)vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith.” This prohibition is designed to prevent the State from suggesting that a defendant is guilty because he is a criminal-type person who would be likely to commit the crime charged. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

ER 404(b) evidence may be admissible for a limited purpose, “such as proof of motive....” Before admitting ER 404(b) evidence, a trial court must:

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d at 642 (citing State v. Lough, 125 Wn.2d at 853). To avoid error, the trial court must conduct this analysis on the record. State v. Jackson, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). “In doubtful cases, the evidence should be excluded.” State v. Baker, 89 Wn.

App. 726, 732, 950 P.2d 486 (1997). A limiting instruction must also be given if the evidence is admitted. State v. Lough, 125 Wn.2d at 864.

The trial court's decision to admit evidence under ER 404(b) will be overturned for an abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Lack of adherence to the requirements of an evidentiary rule can be considered an abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Evidence of Crow's alleged involvement in the prior assault of Cover was never established by a preponderance of the evidence. While Van Horn did testify that Crow had admitted to his involvement in the prior assault [RP 345], this was directly contradicted by Miller, one of the victim's in the current charges, who claimed that he had witnessed the prior assault and that Crow was not involved. [624, 661, 1066].

Similarly, though Cover, after he "kind of woke up," indicated that Crow and Eke were responsible [RP 398], Durga, consistent with Miller, admitted that he and Eke had committed the prior assault. [RP 1114-17]. This is not a preponderance of the evidence, either way, and results in a doubtful conclusion, with the result that the evidence should have been excluded. State v. Baker, 89 Wn. App. at 732.

Despite any claim to the contrary, especially motive, the evidence of the prior assault merely established propensity, with any claimed

probative value being outweighed by the danger of unfair prejudice under ER 403.

The only logical relevancy of the evidence was to show Crow's propensity to commit similar acts, which is itself reversible error under State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). In Pogue's trial for possession of cocaine, the court allowed the State to elicit Pogue's admission that he had possessed cocaine in the past on the issue of knowledge and to rebut his assertion that the police had planted the drugs. The conviction was reversed. The appellate court held:

The only logical relevance of (Pogue's) prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident.

Pogue, 104 Wn. App. at 985.

Here, no evidence was presented that Cover was assaulted because he was a snitch. So the can't-understand-one-without-the-other-argument put forth by the State, is not really on point. The only logical relevancy of the evidence was through a propensity argument; i.e., as argued by the prosecutor in closing, the assault of Cover was "the first step in what eventually leads to the death of David Miller and Norman Peterson." [RP 1292]. In other words, even though Crow allegedly assaulted Cover for a reason different than that leading to the murders of the current victims,

each event resulted in an assault, which varied only in degree. This is classic propensity: Since Crow was involved in the first assault, he must be involved in the second assault, given that, as argued by the State, the first incident led to the second incident.

The evidence should not have been allowed. And the error was not harmless. This court examines evidentiary, non-constitutional error to see if the error, within reasonable probability, materially affected the outcome of the trial. See State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). It is within reasonable probability that but for the admission of the evidence of the prior assault, the jury would have acquitted Crow of the current charges, for the admission of the evidence was clearly introduction of Crow's propensity and character, which ER 404(b) forbids.

The prejudice resulting from the introduction of the evidence denied Crow his right to a fair and impartial jury trial and outweighed the probative value, if any, of the evidence. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Oughton, 26 Wn. App. 74, 612 P.2d 812 (1980). And the evidence materially affected the outcome by confirming that since Crow would assault someone he disagreed with, no matter the reason, he was more likely to have committed the crimes charged. The error was of major significance and not harmless, and was

exacerbated by the purported limiting instruction the court read to the jury [RP 326-27], which instead of restricting the jury's consideration of the evidence, was tantamount to a comment on the evidence (see following argument). The admission of the evidence was not harmless. Crow is entitled to a new trial.

02. CROW WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO PROPERLY MOVE TO EXCLUDE EVIDENCE OF CROW'S ALLEGED INVOLVEMENT IN THE PRIOR ASSAULT OF SCOTT COVER.²

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v.

² While it is submitted that this issue was properly preserved for appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)).

Should this court find that trial counsel waived the error claimed and argued in the preceding section of this brief by failing to properly move to exclude evidence of Crow's alleged involvement in the prior assault for exactly the same reasons or waived the issue by not repeating his objection to the evidence throughout the trial or by somehow inviting the error, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to properly move to exclude the evidence in the same manner, and if counsel had done so, the motion

would have been granted under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to properly move to exclude the evidence in the same manner, the jury would not have convicted Crow of the charged offenses.

Counsel's performance was deficient because he failed to move to exclude the evidence of Crow's alleged involvement in the prior assault on the grounds argued herein, which was highly prejudicial to Crow, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions.

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03. A PURPORTED LIMITING INSTRUCTION THAT INFORMS THE JURY THAT IT MAY CONSIDER EVIDENCE OF A PRIOR ASSAULT ON THE ISSUE OF THE DEFENDANT'S MOTIVE BUT FAILS TO ELIMINATE THE POSSIBILITY THAT THE JURY WILL CONSIDER THE EVIDENCE FOR IMPROPER PROPENSITY PURPOSES IS INADEQUATE AND CONSTITUTES A COMMENT ON THE EVIDENCE.

03.1 Instruction

The trial court read the following instruction

to the jury:

I have allowed evidence and will allow evidence regarding an earlier assault upon Scott Cover to be admitted in this case for only a limited purpose. This evidence may be considered by you only on the issue of defendant's motive. You may not consider it for any other purpose. Any discussion of this evidence during your deliberations must be consistent with this limitation.

[RP 326-27].

This instruction is based loosely on WPIC 5.30, which reads:

Evidence has been introduced in this case on the subject of _____ for the limited purpose of _____. You must not consider the evidence [for any other purpose] [for the purpose of _____].

11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 5.30, at 132 (1994) (WPIC).

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03.2 Overview: Comment on the Evidence

The Washington Constitution explicitly prohibits judicial comments on the evidence. Const. article IV, section 16.³ The Washington Supreme Court has interpreted this section as forbidding a judge from “conveying to the jury his or her personal attitudes toward the merits of the case” or instructing a jury that “matters of fact have been established as a matter of law.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1231 (1997). A violation of the constitutional prohibition will arise not only where the judge’s opinion is expressly stated but also where it is merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

A judicial comment is presumed prejudicial. The presumption of prejudice may only be overcome if the record affirmatively shows no prejudice could have resulted. Levy, 156 Wn.2d at 725. The fundamental question in deciding whether a judge has impermissibly commented on the evidence is whether the alleged comment or omission “conveys the idea that the fact has been accepted by the court as true.” Levy, 156 Wn.2d at 726. And while a defendant on appeal is ordinarily limited to specific

³ Article IV, section 16 reads “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

objections raised before the trial court, he or she may, for the first time on appeal, argue that an instruction was an improper comment on the evidence. State v. Tili, 139 Wn.2d 107, 126 n.9, 985 P.2d 365 (1999) (citation omitted); RAP 2.5(a)(3). A judicial comment in a jury instruction is an error of constitutional magnitude that is properly raised for the first time on appeal. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006) (citing State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006)).

In Becker and Jackman, the court found improper comments warranted reversal where the comments concerned questions that were highly contested or the principal issues in the case. Jackman, 156 Wn.2d at 744 (judicial comment removed material fact from the jury's consideration); Becker, 132 Wn.2d at 65 (finding comment "tantamount to a directed verdict").

03.3 Argument

There are several things wrong with the court's instruction. First, it has nothing to do with limitation. The phrase that the "(e)vidence may be considered by (the jury) only on the issue of defendant's motive(,)" places little, if any, limitation on the jury's use of this information. Motive for what? Setting fire to the tent? The assault and death of Peterson? who apparently showed up out of the blue? The

jury could have used this evidence—this motive—to connect Crow to all three counts. Unlike WPIC 5.30, which limits a jury’s consideration of certain evidence to a specific subject, the jury here was unfettered in this regard.

The court’s instruction permitted the jury to structure its analysis as follows:

Does this evidence connect Crow to all of the charges? The person involved in the prior assault is likely to have committed the crimes charged. Thus it is likely that Crow is guilty of all charges because of his involvement in the prior assault.

Rather than limit the jury’s use of the evidence of the prior assault, the court’s instruction focused instead on the prior conduct and assumed that because Crow had acted similarly before, he committed the current charges. “Once a thief always a thief.” See State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766, reviewed denied, 106 Wn.2d 1003 (1986).

As previously argued, the court’s instruction was insufficient to ensure that the evidence of the prior assault was not improperly used to prove Crow’s propensity to commit the crimes charged. See State v. Pogue, 104 Wn. App. at 985. Without an adequate limiting instruction, it was error to admit the evidence of the prior assault, which requires reversal if within reasonable probability the evidence materially affected the outcome of the trial. State v. Everybodytalksabout, 145 Wn.2d 456,

468-69, 39 P.3d 294 (2002). Given that it cannot be asserted with sufficient confidence that the jury would have found Crow guilty even if it did not know of the evidence of the prior assault, this court must reverse Crow's convictions and remand for a new trial.

Also, this court should hold that the trial court's instruction was equivalent to a directed verdict, and violated the Washington Constitution's prohibition on judicial comments on the evidence.

The instruction not only permitted the jury to use the evidence of the prior assault, without discernable limitation, as motive for all of the instant offenses, but also to consider "the evidence regarding an earlier assault upon Scott Cover. . . .)" which assumes the condition precedent, that is, Crow's association or connection to this evidence, which is a factual determination the jury needed to make, not the court.

Given that the instruction removed the material fact of whether Crow was associated with this evidence, it constituted an unconstitutional comment on the evidence by the trial judge. This court must presume that the comment was prejudicial. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). In such a case, "[t]he burden rests on the State to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment." Id. (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part,

rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974). In applying the constitutional harmless error analysis to a case involving judicial comment, our Supreme Court has held:

[E]ven if the evidence commented upon is undisputed, or “overwhelming,” a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.

State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963).

It cannot be credibility asserted that the court’s improper comment in the instruction did not influence the jury. The State cannot sustain its burden of rebutting the presumption that the court’s comment was prejudicial, with the result that this court should reverse Crow’s convictions because of the unconstitutional comment on the evidence embedded in the court’s instruction.

04. CROW WAS PREJUDICED BY HIS COUNSEL’S AGREEMENT THAT THE COURT’S PURPORTED LIMITING INSTRUCTION CONTAINED THE APPROPRIATE LANGUAGE.

Assuming, arguendo, this court finds that counsel waived or invited the error claimed and argued in the preceding section of this brief by agreeing that the court’s purported limiting instruction

contained the “appropriate language [RP 272](,)” then both elements of ineffective assistance of counsel have been established.⁴

First, the record does not reveal any tactical or strategic reason why trial counsel would have agreed to this. For the reasons and under the law set forth in the preceding section of this brief, had counsel not done so, the trial court would have been unable to give the jury the instruction. Trial counsel’s failure to exercise due diligence in this context cannot be deemed a tactical decision and falls below an objective standard of reasonableness.

Second, the prejudice here is self-evident. Again, as set forth in the preceding section of this brief, the instruction failed to eliminate the possibility that the jury would consider the evidence of the prior assault for improper propensity purposes and constituted a comment on the evidence. Counsel’s performance was deficient and Crow was prejudiced, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions.

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⁴ For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

05. INSTRUCTION NO. 11, THE ACCOMPLICE LIABILITY INSTRUCTION, RELIEVED THE STATE OF ITS BURDEN TO PROVE CROW COMMITTED AN OVERT ACT.

Accomplice liability requires an overt act. State v. Matthews, 28 Wn. App. 198, 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime; instead, he must say or do something that carries the crime forward. State v. Peasley, 80 Wn. 99, 100, 141 P.2d 316 (1914). In Peasley, the court distinguished between silent assent and an overt:

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.

State v. Peasley, 80 Wn. At 100; State v. Everybodytalksabout, 145 Wn.2d 456, 472, 39 P.3d 294 (2002) (physical presence and assent alone are insufficient for conviction as an accomplice).

Similarly, in State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974), the Supreme Court approved the following language: “to aid and abet may consist of words spoken or acts done....” [Emphasis added]. Id. at 739. The court went on to note that an instruction is proper if it requires ““some form of overt act in the doing or saying of something that

either directly or indirectly contributes to the criminal offense.” Id. at 739-40 (quoting State v. Redden, 71 Wn.2d 147, 150, 426 P.2d 854 (1967)).

Here, in Instruction No. 11, the court instructed the jury on accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the 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 abets to aid another person in the 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 74].

This instruction was fatally flawed because it allowed convictions for the three offenses without proof of an overt act. The jury was

permitted to convict if Crow was present and assented to his co-defendants' crimes, even if he committed no overt act, contrary to the mandates of State v. Peasley, supra, and State v. Renneberg, supra.

The final two sentences of the next to last paragraph of Instruction No. 11 do not cure this problem. The penultimate sentence ("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.") does not exclude other situations, such as when a person is present and unwilling to assist but approves of the crime. Such a person, under this instruction, may still be convicted as an accomplice if he knows his presence will promote or facilitate the crime.

Similarly, the final sentence in the next to last paragraph fails to save the instruction as a whole. Although the sentence ("However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.") excludes presence coupled with mere knowledge, it does not exclude presence coupled with silent assent or silent approval, with the result that a person who is present and unwilling to assist, but who silently approves of the crime, could be convicted.

Since Instruction No. 11 allowed conviction as an accomplice in the absence of an overt act, Crow's three convictions must be reversed and

remanded for a new trial. State v. Peasley, supra; State v. Renneberg, supra.

E. CONCLUSION

Based on the above, Crow respectfully requests this court to reverse his convictions.

DATED this 8th day of October 2009.

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

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I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Carol La Verne Dep Pros Attorney 2000 Lakeridge Drive SW Olympia, WA 98502	Tommy Lee Crow #773446 Clallam Bay Corrections Center 1830 Eagle Crest Way Clallam Bay, WA 98326
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DATED this 9th day of October 2009.

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634