

No. 39075-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

TOMMY L. CROW, JR.,

Appellant.

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

The Honorable Wm. Thomas McPhee, Judge
Cause No. 08-1-00585-6

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court correctly admitted, pursuant to ER 404(b), evidence of Crow's involvement in the assault of Scott Cover, which occurred three weeks before the murders at issue in this case, for the purpose of proving the motive for Crow to commit the murders.

2. Whether defense counsel was ineffective because he failed to move to exclude evidence regarding the assault of Scott Cover.

3. Whether the limiting instruction which the court gave regarding the evidence of the assault of Scott Cover was adequate and whether it constituted a comment on the evidence.

4. Whether Crow received ineffective assistance of counsel because his trial attorney failed to object to the limiting instruction.

5. Whether the accomplice liability instruction relieved the State of its burden of proof.

B. STATEMENT OF THE CASE.

The State accepts Crow's statement of the substantive and procedural facts of the case. Any additional facts the State contends are important will be included in its argument.

C. ARGUMENT.

1. The trial court correctly admitted evidence of Crow's participation in the assault of Scott Cover, pursuant to ER 404(b), because it not only proved the motive for the murders of the two victims, but provided essential background under the res gestae exception to the rule.

On the second day of trial, after jury selection but before any evidence was presented, the court held a hearing on the State's motion, pursuant to Evidence Rule (ER) 404(b), to admit evidence that Crow had been involved in a severe beating of Scott Cover on March 7, 2008. [RP 47-72] The State made an offer of proof; the court found by a preponderance of the evidence that the uncharged act had occurred [RP 69] and that Crow was implicated in it. [RP 70] The court further found that the evidence was material and relevant to prove motive, and that the probative value outweighed the prejudicial effect. [RP 71-72] Finally, the court found that any unfair prejudice could be cured by a limiting instruction. [RP 72]

The admission of evidence of bad acts not charged in the current prosecution is governed by ER 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before a court admits evidence of other bad acts under ER 404(b), it "must (1) find that a preponderance of the evidence shows that the misconduct occurred; (2) identify the purpose for which the evidence is being introduced; (3) determine that the

evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect.” State v. Baker, 89 Wn. App. 726, 732, 950 P.2d 486 (1997) (citing to State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995)). The court’s finding of a preponderance of the evidence will be upheld if it is supported by substantial evidence. Id. “When any reasonable view of disputed facts supports the trial court’s finding, it will not be disturbed on appeal.” Id. Relevancy determinations are reviewed for abuse of discretion. Id., at 734. Uncharged acts must have substantial probative value; the court’s weighing of probative value versus prejudicial effect must appear on the record, and that is also reviewed for abuse of discretion. Id., at 736.

The trial court can make its determination of admissibility based on an offer of proof; an evidentiary hearing is not required. State v. Kilgore, 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002).

The trial court in Crow’s case clearly followed the procedural requirements to admit ER 404(b) evidence, and Crow does not claim that it didn’t. What he does argue is that the court erred in deciding the substantive issues—whether his involvement in the assault of Cover was proved by a preponderance of the evidence, whether that evidence was relevant, and whether it was more

probative than prejudicial. In making his argument, Crow simply ignores large portions of the evidence.

a. Proof that Crow was involved in the assault of Cover.

The trial court's ruling that the State proved Crow's involvement in the assault on Cover will be upheld if is supported by substantial evidence. "Substantial evidence is defined as evidence of a kind and quantity that will persuade an unprejudiced, thinking mind of the existence of the fact to which the evidence is directed." State v. Tharp, 27 Wn. App. 198, 203, 616 P.2d 693 (1980). The State made an offer of proof that was supported by the evidence presented at trial. A summary follows.

Justin Van Horn, a homeless man who camped in the same area as all the other people, excluding police officers, who are relevant to this case, witnessed a dispute between Crow and Scott Cover on an evening in early March of 2008. [RP 330] Cover had come to the defense of Bryan Eke, whom Crow was harassing, and had escorted Crow out of the camp. [RP 334-336] The following day Van Horn heard that Cover was in the hospital. [RP 340] With some other people, including Karen Schaeffer, he visited Cover in the emergency room. [RP 341] Cover asked Karen to convey a

message to Crow, Eke, and Durga, and that message was that Cover had not ratted them out. [RP 341, 361, 442]

Later that same day, Crow and Eke came to Van Horn's camp. Crow told Van Horn he had broken Cover's legs, and what happened to Cover would happen to Van Horn. [RP 344-45, 375]

Cover testified that on an evening in early March, 2008, he had awakened to find Crow and Eke standing over him; Cover found himself begging them to stop hitting him. [RP 398] Eke handed a baseball bat to Crow, who hit Cover on the back and legs. [RP 398] Cover crawled to his tent, and the next morning was found by a work release crew, which called for help. [RP 409-10] Cover refused to tell the police (until after the murders) who beat him. [RP 240-45, 411] He was in the hospital for six or seven days, and in a nursing home for another three months. [RP 412]

Terrance Stroman, another homeless man, discussed Cover's assault with David Miller, also homeless and one of the murder victims. Miller told Stroman he had broken up the fight, but despite Stroman's urging, Miller resisted telling authorities that he knew who the assailants were. He realized he was in danger. [RP460-63]

On March 18, 2008, Olympia police officer Bryan Henry arrested Miller on outstanding warrants. [RP 619] While he was in Henry's custody, Miller told the officer the street names of the two people he saw assault Cover, and the officer recognized them as Durga and Eke. [RP 624] Officer Henry had been to Durga's and Eke's camp at an earlier date and had seen a baseball bat there. On March 27, at about 4:30 p.m., Henry saw Durga in the area and followed him into the woods to his camp. He told Durga that there were rumors he was involved with Cover's assault and that a baseball bat had been used. He asked for, and received, the bat from Durga. [RP 625-32]

Also on March 27, at a time he estimated to be between 3:00 and 4:00 p.m., Jeffrey Simmons, also homeless, was with a woman named Vickie Turner in a wooded area behind a taco truck that parked on Harrison Avenue. He was confronted by Crow, Eke, and Durga. Crow was angry and asked Simmons if he'd told the police where the three of them lived. [RP 705-07] While the three were all upset, Crow was the most agitated. [RP 717] At approximately 5:00 p.m., in the same vicinity behind the taco truck, Mark Urbach, another homeless man, met and stopped to chat with Miller, a man called Sam I Am, and a third unidentified man. While they were

talking, Crow and two other men approached them. Crow accused Miller of calling the police, and although Miller denied it, one of the other men with Crow drew a line in the dirt with his shoe and said, "You've crossed the line." Another of the men said, "I'm gonna fuck you up." Urbach was frightened and left. [RP 819-33]

Bryan Eke said that when Durga told him and Crow that the police had taken the bat, Crow was upset, Durga was concerned, and the three of them went around asking who turned in Durga for beating Cover. [Vol. 6 RP 1125-26]¹ Crow was angry and did most of the talking. [Vol. 6 RP 1127] At approximately 10:30 to 11:00 p.m. on March 27, 2008, the three of them—Crow, Durga, and Eke—discussed how to resolve the situation. Crow was angry and upset, sure that Miller was the snitch, and said that the best way to get rid of a body is to burn it. [Vol. 6 RP 1135-37, 1141] Between midnight and 1:00 a.m. on March 28, the three of them made the ten-minute walk to Miller's camp. Crow was the first to enter the camp, asking repeatedly, "Why did you turn us in, I thought we were family." [Vol. 6 RP 1147-53] Crow then struck Miller in the face and Durga choked him. [Vol. 6 RP 1155] Eke testified that

¹ Page numbers 1048 through 1195 are repeated in Volumes 6 and 7 of the VRP. The material is different; only the page numbers have been repeated. A reference to the record contained on those pages also identifies the volume.

Peterson was killed because he interfered with the murder of Miller.

[Vol. 6 RP 1170-77]

Durga also testified at trial. He said that he and Crow had been close friends since 2005 and referred to each other as brothers. [Vol. 7 RP 1110-11] He also said that within an hour after Officer Henry took the baseball bat, he got together with Crow and Eke. They were all angry and went around questioning people to find out who had snitched about the assault on Cover. [Vol. 7 RP 1122-23] They confronted Miller at about 6:30 p.m. on March 27. [Vol. 7 RP 1128, 1131] Back at their camp, Crow expressed surprise that Miller had snitched on them. [Vol. 7 RP 1134] When the three of them went to Miller's camp, Crow was at the end of the line, but he cut in front of the others and asked Miller, "Why'd you snitch?" [Vol. 7 RP 1139] The assault on Miller and the murders of Miller and Peterson followed.

Justin Van Horn testified that at approximately 8:00 a.m. on March 28, 2008, Sam I Am and another man ran into his camp, waking him and screaming, "They're dead, they're dead, they're still burning!" Van Horn went with the men to Miller's camp site, where he saw the two burning bodies. [RP 346-48] Terrance Stroman was with him; Stroman called 911. [RP 465-68]

The only rational conclusion from this evidence is that Crow was furious that someone had told the police that Eke and Durga were responsible for the assault on Cover. He was determined to punish that person, and he wasted no time in conducting an investigation that included threats aimed at the snitch. In less than twelve hours from the time Crow concluded that Miller was that person, Miller was dead.

The State disagrees with Crow's assertion that this evidence does not establish his involvement with Cover's assault by a preponderance of the evidence. The only piece of evidence that questions that involvement was the fact that Miller told the police that Eke and Durga had assaulted Cover. However, according to Durga's testimony, Crow had left the scene of the beating before Miller came out of his tent, and at the time Miller emerged from the tent, Eke and Durga were the only ones there with Cover. [Vol. 7 RP 1114-17] Even assuming, however, for the sake of the argument, that Crow did not actually participate in the beating of Cover, it was clear he knew about it and took on the role of avenger for his "brother," Christopher Durga, and therefore that beating is still relevant and probative to prove motive. The three men were constantly together and acting in concert for the period of time after

the base ball bat was recovered by Officer Henry. The court's finding that the State had proved Crow's involvement in the beating by a preponderance of the evidence was correct.

b. The evidence is relevant to prove motive.

Although the motive for a killing is not an element of the crime of second degree murder, "[e]vidence of a defendant's motive is relevant in a homicide prosecution." State v. Stenson, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997). The State is entitled to prove the motive, which shows the context in which the murder was committed. See State v. Yarbrough, 151 Wn. App. 66, 83, 210 P.3d 1029 (2009). Motive is defined as:

Cause or reason that moves the will . . . An inducement, or that which leads or tempts the mind to indulge in a criminal act . . . the moving power which impels to action for a definite result . . . that which incites or stimulates a person to do an act.

State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995) (citing to State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)). "Evidence of prior threats is also admissible to show motive or malice." Id., at 260.

Contrary to Crow's assertion, it is not true that the only relevancy of this evidence was to show Crow's propensity to commit similar acts. He argues that the State wanted to prove that

since Crow was involved in the first assault, he must be involved in the second. [Appellant's Brief at 10-11] However, the evidence was necessary to prove why Crow chose these particular victims. Had Crow not been obsessed with locating and punishing the snitch, but rather killed Miller and Peterson for some other reason, the assault on Cover perhaps would not have been relevant. The State was not attempting to prove that Crow simply went around beating people. It needed to prove that Crow beat, and killed, these particular people. Evidence is relevant and necessary if it is "of consequence to the action and makes the existence of the identified fact more probable." Powell, 126 Wn.2d at 259.

ER 404(b) specifically allows evidence of prior bad acts to prove motive. The court did not err in admitting the evidence about the beating of Scott Cover.

c. The evidence establishes res gestae.

Although the court did not specifically find that the res gestae exception to the ER 404(b) prohibition against propensity evidence applied in this case, and it is not necessary to decide this issue, the State points out that the same evidence that proved motive was relevant to explain the circumstances surrounding the killings of two men.

The res gestae, or “same transaction”, exception applies where evidence of other crimes or bad acts is admissible to “complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *affirmed*, 96 Wn.2d 591, 637 P.2d 961 (1981). The jury is entitled to know the whole story. Id., at 205. Res gestae evidence, which must be relevant, proved by a preponderance of the evidence, and not unduly prejudicial, is admissible under ER 404(b) even if it is not relevant for one of the listed purposes, such as plan or motive. State v. Lane, 125 W.2d 825, 834, 889 P.2d 929 (1995).

Here, of course, the evidence was admissible to show motive. Further, even though the trial court was not asked to consider the res gestae exception, and did not address it, a reviewing court can sustain a conviction on any correct ground even if it was not considered by the trial court. State v. Fritz, 21 Wn. App. 354, 364, 585 P.2d 173 (1978). While the murders occurred almost three weeks after the beating of Scott Cover, they occurred within twelve hours of Crow’s discovery that someone had informed on his “brother.” The evidence was necessary for the jury to understand the context of the crimes charged.

d. The evidence was more probative than prejudicial.

As noted above, an appellate court reviews a trial court's rulings regarding the probative value versus prejudicial effect of the evidence for abuse of discretion. A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that "no reasonable person would take," and arrives at a decision "outside the range of acceptable choices." Id.

In Crow's case, the trial court found that the probative value of the proffered evidence was much higher than the prejudicial effect. [RP 72] The record supports that ruling; there was no abuse of discretion.

It would appear that Crow defines "prejudice" as some unfavorable result the defendant suffers from evidence or

argument. It is defined in Black's Law Dictionary as "[a] forejudgment; bias, preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of its justice." Black's Law Dictionary, 5th ed., 1979. The Washington Supreme Court has noted the Federal Advisory Committee definition of unfair prejudice as "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Cameron, 100 Wn.2d 520, 529, 674 P.2d 650 (1983). In Auburn v. Hedlund, 165 Wn.2d 645, 201 P.3d 315 (2009), the court said, "Evidence causes unfair prejudice when it is "more likely to arouse an emotional response than a rational decision by the jury."" Auburn, 165 Wn.2d at 654, citing to State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). "One Washington commentator has argued that unfair prejudice should be seen not as a matter of emotion, but of erroneous inferences that undermine the goal of the rules to promote accurate fact finding and fairness." Auburn, 165 Wn.2d at 655.

Virtually all evidence the State offers at trial will be unfavorable to the defendant. The State is trying to prove that the defendant committed a crime. The evidence of which Crow complains, however, cannot be considered to be unfairly

prejudicial. It was specifically aimed at explaining in a rational manner why Crow killed these two men. It did not, as Crow argues, suggest that he assaults anyone with whom he disagreed. [Appellant's Brief at 11] Rather, it established that he would punish anyone who informed the police of his assault on Cover; Crow went to great lengths to find out who that was, rather than beating or killing everyone whom he suspected.

The State does not dispute that the evidence of Crow's assault on Cover materially affected the outcome of the trial. It was offered for that purpose. But that result was not unfair. It was appropriate because it accurately and completely put the circumstances of the murders before the jury. The purpose of a trial is supposed to be to find the truth. Md. Casualty Co. v. Philbrick & Nicholson, 147 Wash. 277, 291, 266 P. 142 (1928).

2. Crow did not receive ineffective assistance of counsel.

Crow has accurately set forth the law relating to ineffective assistance of counsel claims, and it will not be repeated here. He argues that his trial counsel should have moved to exclude all of the evidence concerning the assault on Scott Cover. In fact, counsel did object to its admissibility at the ER 404(b) hearing. [RP 60-63] Crow has cited to no authority, nor has the State found any,

that requires a defense attorney to make continuing objections in front of the jury when the court has clearly ruled against him. The State does not argue that the objection was not properly preserved for appeal or that there was invited error.

Because the court's rulings regarding the evidence of the beating of Scott Cover were correct, even if counsel did have an obligation to move to exclude the evidence, there is no chance that such a motion would have succeeded. The outcome of the trial would have been no different. Crow has not established either a sub-standard performance by his attorney or any prejudice resulting from it.

3. The limiting instruction given regarding the evidence of the assault of Scott Cover was adequate and was not a comment on the evidence.

Crow argues on appeal that the limiting instruction given by the court, which his trial counsel thought was "appropriate," [RP 272] was not only inadequate to limit the use to which the jury could put the ER 404(b) evidence, but was a comment on the evidence. The State disagrees as to both arguments.

Crow did not object at trial to this instruction. [RP 326-27, 357] Even though he did not object, an appellate court will "consider a claimed error in an instruction if giving such an

instruction invades a fundamental right of the accused.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

When evidence is admitted for one purpose but not others, the court must give a limiting instruction. ER 105, State v. Gallagher, 112 Wn. App. 601, 611, 51 P.3d 100 (2002). A trial court has wide discretion to fashion that limiting instruction. Id.

The instruction which was read to the jury, but not included in the written instructions, is as follows:

I have allowed evidence and will allow evidence regarding the 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]

a. Comment on the evidence.

Crow has correctly stated the law regarding judicial comments on the evidence. However, there is simply no way this instruction can be construed as such a comment. “A statement by the court constitutes a comment on the evidence if the court’s attitude towards the merits of the case or the court’s evaluation relative to the disputed issue is inferable from the statement.” Lane,

125 Wn.2d at 838. Except for the possible inference that the judge thought the evidence of Cover's assault was relevant to the issue of Crow's motive, it is impossible to discern any opinion of the court from this instruction. Everybody already knew the judge thought that or he would not have admitted the evidence. That is no more a comment on the evidence than is Instruction No. 8, [CP 72] which told the jury to be wary of an accomplice's testimony. It merely told the jury how to consider the evidence it was about to hear. It did not tell the jury what the judge thought about it.

Crow has cited to State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997), to support his argument that this instruction was a comment on the evidence. In Becker, however, the jury was being asked to decide if a drug delivery had occurred within 1000 feet of a school. There was a dispute about whether the Youth Employment Education Program, which was located within that perimeter, was a school as defined by the statute. In the special verdict form, the term "Youth Employment Education Program School" was used, and the Supreme Court found that the trial court had commented on the evidence, essentially telling the jury that it was a school and removing that decision from them. Crow also cites to State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006). In that case,

Jackman had been convicted of communication with a minor for immoral purposes and sexual exploitation of a minor. The age of the victim was a question of fact for the jury, but in the “to-convict” jury instruction, the victim’s date of birth was included. Here again the Supreme Court held that the court had told the jury the victim was a minor, thus removing that element of the offense from its consideration.

The instruction at issue in this case is vastly different from those kinds of comments. Nothing has been decided for the jury. It was merely told to what purpose it could put the evidence that it heard.

b. The instruction limited the jury to consideration of motive, not propensity.

Crow claims that limiting the jury’s use of the evidence to the issue of motive didn’t really limit anything, since the court did not specify the acts for which Crow would have a motive. The State’s response is: what does it matter? The only acts before the jury were the deaths of Miller and Peterson and the fire which burned the bodies. All three of those crimes followed directly from the assault of Scott Cover. Miller was killed because he snitched, Peterson was killed because he had the misfortune to be present

when Miller was killed because he snitched, and the fire was set in an attempt to dispose of the bodies of the victims who had been killed because Miller snitched. Of course the jury could have used the ER 404(b) evidence to connect Crow to all three counts. What the jury could not do, under this instruction, is consider it for purposes other than determining if Crow had a motive to commit the three crimes. It could not, contrary to Crow's assertion, consider it for the proposition that he was a violent and vindictive man who killed people because it was in his character to do so. "This evidence *may* be considered by you *only on the issue of defendant's motive*. You may not consider it for any other purpose." [RP 327, emphasis added)

Crow argues on page 18 of his brief that the jury could have reasoned that the person involved in the assault of Cover was likely to have committed the crimes for which Crow was on trial. His interpretation is a strained reading of the instruction. The plain language of the instruction tells the jury it may, not must, consider the evidence and only as it applies to Crow's motive. "You may not consider it for any other purpose" quite clearly excludes its use as propensity evidence.

c. The limiting instruction cannot reasonably be compared to a directed verdict.

Crow maintains that the limiting instruction told the jury that he was associated with Cover, and therefore amounted to a directed verdict. Once again, he reads into the instruction something that is not there. The instruction says that the evidence of the assault on Cover has been admitted, and it was admitted solely for the jury to consider as it related to Crow's motive. The word "may" is permissive, not mandatory, and nothing in the language suggests that the jury must find that Crow was connected with the assault on Cover.

A trial court must necessarily find a balance between the obligation to give an adequate limiting instruction and the obligation to refrain from commenting on the evidence. Despite Crow's strained interpretation of the instruction, the court successfully did so in this case.

4. Defense counsel was not ineffective for failing to object to the court's limiting instruction.

The State is again not claiming that there was invited error, and as noted above, even without an objection below a fundamental constitutional error may be raised on appeal. Crow is claiming this is such an error. The State disagrees.

For all of the reasons argued above, the instruction was correct. Crow maintains there is no strategic or tactical reason that counsel would have failed to object, but the State can suggest one: trial counsel recognized that it was satisfactory. Unless Crow is suggesting that defense attorneys always object to everything, whether it is objectionable or not, in order to preserve an appeal, his argument makes little sense. That tactic would certainly slow down the trial process and annoy everyone in the courtroom, but in the end it would not make a difference to the outcome of a trial. Crow has not cited to any serious reason that his counsel should be ineffective for not having done so.

5. Crow misstates the requirements of the accomplice liability statute. The accomplice liability instruction did not relieve the State of its burden of proof.

Crow argues that Instruction No. 11, the accomplice liability instruction, improperly states the law of accomplice liability, and that the law requires an overt act on the part of the accomplice. That is incorrect.

Instruction No. 11 reads:

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.

A person is an accomplice in the commission of a crime, if, with knowledge that it will promote or facilitate the commission of the crime, he either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

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]

Crow did not except to this instruction at trial [RP 1254] and does not claim ineffective assistance of counsel for failure to do so. Because he is claiming a fundamental constitutional violation, however, the State assumes this court will review his claim.

A challenged jury instruction is reviewed de novo. The instructions are read as a whole and the challenged portion is considered in the context of all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In a criminal trial, the jury must be instructed that the State has the burden of proving

each essential element of the crime beyond a reasonable doubt. Id., at 656. That was done in this case. [Instruction No. 10, CP 73]

Crow asserts that accomplice liability requires an overt act, and that the jury was therefore improperly instructed. He cites to State v. Matthews, 28 Wn. App. 198, 203, 624 P.2d 720 (1981), for this conclusion. In Matthews, however, the court was citing to State v. Baylor, 17 Wn. App. 616, 565 P.2d 99 (1977), for the proposition that when co-defendants are charged with a crime, the State need not “establish which defendant was the principal and which was the abettor so long as each defendant was shown to have participated in the crime and committed at least one overt act.” Matthews, 28 Wn. App. at 203. In Baylor, the court held that the overt act requirement applies under former RCW 9.01.030 as it existed in 1974, but which had been superseded by RCW 9A.08.020 for offenses committed after July 1, 1976. Baylor, 17 Wn. App. at 618. The current statute, RCW 9A.08.020, does not require an overt act.

Crow also cites to State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974), to support his contention that an accomplice must commit an overt act. Renneberg was decided in 1974 and thus was also applying an accomplice statute that has been superseded. In any event, the holding of Renneberg was simply this—“that

physical presence and assent alone are not sufficient to constitute aiding and abetting.” Id., at 740. Jury Instruction No. 11 told the jury that. Crow is incorrect that a person could be found to be an accomplice merely by giving silent assent or approval. Under the instruction, the accomplice must at a minimum, encourage or agree to aid the principal. Simple unexpressed approval would not meet this requirement, and thus State v. Peasley, 80 Wash. 99, 141 P.316 (1914), a venerable 95-year-old case, is not violated.

D. CONCLUSION.

The evidence regarding the assault of Scott Cover was properly admitted, the limiting instruction and accomplice liability instruction were correct, and trial counsel was not ineffective. The State respectfully asks this court to affirm the convictions.

Respectfully submitted this 5th day of January, 2010



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

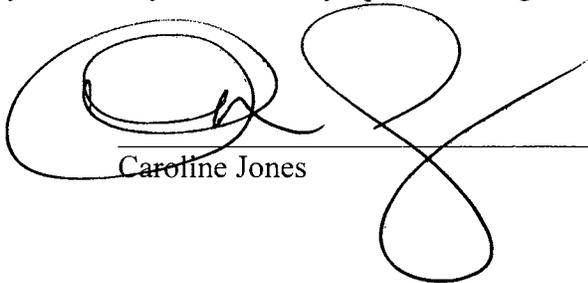
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ATTORNEY AT LAW
PO BOX 510
HANSVILLE WA 98340-0510

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STATE OF WASHINGTON
BY DR
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COUNTY OF PULASKI
CLERK

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

Dated this 5 day of January, 2010, at Olympia, Washington.



Caroline Jones