

NO. 39115-5-II

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

IN RE THE PERSONAL RESTRAINT OF:
GEORGE ANTHONY WILSON

PETITIONER'S REPLY BRIEF

LILA J. SILVERSTEIN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
BY
SERIALIZED
LILA J. SILVERSTEIN
APPELLATE PROJECT
1511 3RD AVENUE
SUITE 701
SEATTLE, WA 98101
(206) 587-2711

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A. INTRODUCTION

In 1997, 37-year-old Cecil Davis brutally raped and murdered his neighbor Yoshiko Couch. Davis is on death row for the crime.

Petitioner George Wilson was a 17-year-old child at the time. He was at Cecil Davis's house on the night in question, and went with him to the Couch residence because he needed money and he thought they were just going to rob the Couches. He returned five minutes later, terrified. He said, "We went over there to rip the lady off, but Cecil just kicked in the door and started beating on her and rubbing all over."

Despite these facts, Mr. Wilson was charged with and convicted of felony murder predicated on rape, burglary and robbery. At least three major due process violations occurred at his trial: First, Mr. Wilson was charged as an accomplice, but the wrong instruction on accomplice liability was given. Second, the State failed to prove the rape predicate but told the jury it did not matter because if Mr. Wilson was an accomplice to any crime he was "responsible for the rest." Third, the State also told the jury that in order to acquit, it had to "fill in the blank" with a reason.

Mr. Wilson filed a timely pro se CrR 7.8(b) motion raising the instructional error. As explained in Mr. Wilson's supplemental opening brief, the other errors may be raised now pursuant to RCW 10.73.100.

Although the State filed a 38-page brief, it provides scant argument in response. It appears to acknowledge its failure to prove felony murder predicated on rape. Yet, contrary to the very case it cites, it argues this failure is not a problem of insufficient evidence and therefore cannot be raised now.

The State also acknowledges the accomplice liability instruction was incorrect, and that Mr. Wilson timely filed a CrR 7.8(b) motion raising this issue. Bizarrely, though, the State claims that because the trial court did not transfer the motion in a timely manner, it is now time-barred.

Finally, the State acknowledges that the prosecutor's closing argument in this case violated due process under this Court's decisions in Anderson, Venegas, and Johnson. But it insists that all of those cases were wrongly decided.

The State's arguments should be rejected. Mr. Wilson's PRP should be granted because these due process violations, individually and collectively, deprived him of a fair trial.

B. ARGUMENT

1. MR. WILSON'S PRP SHOULD BE GRANTED BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE HE COMMITTED FELONY MURDER PREDICATED ON RAPE.

As explained in Mr. Wilson's supplemental opening brief, a new trial should be granted because the State failed to prove Mr. Wilson committed felony murder predicated on rape. Supp. Br. at 7-13. Where a felony murder charge is based on more than one predicate felony, the State must prove the defendant committed each element of each predicate felony. Otherwise, the verdict must be set aside unless it is clear that no juror convicted based on the unproven alternative. State v. Maupin, 63 Wn. App. 887, 894, 822 P.2d 355 (1992).

a. The issue is properly before this Court. The State concedes that a claim of insufficient evidence is not subject to the one-year time bar. Resp. Br. at 20; RCW 10.73.100(4). It also appears to concede that it presented insufficient evidence to prove the rape predicate. Resp. Br. at 28. But it attempts to circumvent this defect by arguing that its failure was not "truly" a sufficiency problem but rather a unanimity problem. Resp. Br. at 21. So

reabeled, the argument goes, the claim cannot be raised now.

Resp. Br. at 21.

But as the State acknowledges, the very case it cites stands for the opposite proposition. In Randhawa, the defendant had argued that the State failed to prove each alternative means of the crime charged, but framed the issue as one of instructional error. State v. Randhawa, 133 Wn.2d 67, 72-73, 941 P.2d 61 (1997).

The Supreme Court corrected the defendant, stating, “we view Randhawa’s challenge as being to the sufficiency of the evidence to support his conviction.” Id. at 73. A sufficiency challenge is not subject to the time bar. RCW 10.73.100(4).

The State then claims Mr. Wilson cannot raise this argument because it is “successive,” given that he already raised a sufficiency argument in his direct appeal. Resp. Br. at 22, 24-26. The State misunderstands the rule. There is a prohibition on successive collateral attacks, but a collateral attack filed after a direct appeal is not impermissibly “successive.” RAP 16.4(d); RCW 10.73.140; In re the Personal Restraint of Haverty, 101 Wn.2d 498, 503, 681 P.2d 835 (1984).

Indeed, our Supreme Court has held “the mere fact that an issue was raised on appeal does not automatically bar review in a

PRP.” In re the Personal Restraint of Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). Collateral attacks must not be “so limited as to prevent the consideration of serious and potentially valid claims.” In re the Personal Restraint of Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990). Rather, “collateral review must be available in those cases in which petitioner is actually prejudiced by the error.” Taylor, 105 Wn.2d at 688. See also Haverty, 101 Wn.2d at 502 (“interests in finality and economy are outweighed by constitutional error which actually prejudices the petitioner”); In re the Personal Restraint of Hews, 99 Wn.2d 80, 85, 660 P.2d 263 (1983) (failure to raise available issue in direct appeal does not bar raising issue in PRP).

Furthermore, in the direct appeal, this Court addressed only the sufficiency of the evidence as to the robbery predicate, not the rape predicate. App. D to Supp. Br. at 12-13. Because of a misunderstanding of accomplice liability, this Court did not reach the issue of whether there was sufficient evidence of the rape predicate. Id. at 13 (“That Davis did more than rob the Couches does not excuse Wilson’s liability. ... [A]n accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality”).

Because this issue has not been previously heard and determined, it is properly before the Court in this PRP. Taylor, 105 Wn.2d at 688.

The Supreme Court's decision in Swenson is instructive. In re the Personal Restraint of Swenson, 154 Wn.2d 438, 114 P.3d 627 (2005). There, as here, the defendant was convicted of felony murder as an accomplice. Id. at 443, 449. The defendant admitted that he planned to commit theft, but said he left the scene as soon as he saw his partner attack the victim, and only learned later that his partner killed the victim. Id. at 450. As in this case, an erroneous accomplice liability instruction was given, and, as in this case, the jury was instructed on the statutory defense. Id. at 450-51. The defendant in Swenson objected to the accomplice instruction and raised the issue on direct appeal. Also as in this case, the Supreme Court decided Roberts and Cronin shortly after the defendant's conviction was affirmed on direct appeal. Id. at 453.

The defendant then raised the issue in a PRP. As in this case, the State complained that the defendant could not raise an issue in a PRP that was already considered on direct review. Id. at 454. But the Supreme Court granted relief. It noted that the

defendant showed error as well as actual and substantial prejudice. Id. As in this case, the defendant was prejudiced not only by the erroneous instruction, but by the prosecutor's closing argument claiming the defendant was "in for a dime, in for a dollar." Id. at 452. The Supreme Court held the ends of justice would be served by addressing the claim, even though it had been addressed on direct appeal, because "[w]ithout the benefit of our forthcoming decisions in Roberts and Cronin, the Court of Appeals rejected his claim." Id. at 455.

The same is true here. This Court summarily rejected Mr. Wilson's sufficiency challenge on direct review because – through no fault of its own – it did not have the benefit of the Supreme Court's forthcoming decisions in Roberts and Cronin. App. D. to Supp. Br. at 13. Thus, the ends of justice would be served by addressing the claim now. Swenson, 154 Wn.2d at 455-56.

b. A new trial must be granted because the State failed to prove Mr. Wilson committed rape but one or more jurors may have convicted Mr. Wilson of this unproved alternative means. As explained in Mr. Wilson's opening brief, Maupin is on point because it addresses a felony murder conviction. Supp. Br. at 8-10. There, the defendant was convicted of first-degree felony murder where

the underlying felonies charged were kidnapping, rape, or attempted rape. Maupin, 63 Wn. App. at 888-89. This Court explained that felony murder is an alternative means crime, and that an argument raising a failure of proof on one alternative means is, indeed, a sufficiency-of-the-evidence claim. Id. at 892, 894.¹

This Court reversed the conviction because although the State had presented sufficient evidence of the kidnapping predicate, it failed to present sufficient evidence of rape. Id. This Court granted a new trial because even though no evidence was presented of sexual intercourse, this Court could not be sure the jury's verdict rested only on the kidnapping alternative and not on the rape alternative. Id. at 894.

Similarly here, as the State concedes, the State failed to prove Mr. Wilson was an accomplice to the rape and attempted rape predicate felonies. Supp. Br. at 10-11; Resp. Br. at 28. And because this Court cannot ascertain that no juror convicted Mr.

¹ This Court cited the seminal case of State v. Green, in which the Supreme Court reversed an aggravated murder conviction despite sufficient evidence of rape, because there was insufficient evidence of kidnapping. The Court explained, "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Wilson based on the unsupported alternative, a new trial is required. Supp. Br. at 11-13.

The State argues that the error was harmless, i.e. that no juror convicted Mr. Wilson based on the unsupported alternative, because it conceded in closing argument that the evidence did not show he knew about the rape. Resp. Br. at 28. But in the same closing argument, the prosecutor said that Mr. Wilson was guilty of all of the crimes if he knew about any of them:

A person with knowledge that will promote or facilitate the commission of a crime, not necessarily the same crime that Mr. Davis had in mind, but a crime... We're talking about a man who made a deliberate decision to go with him. He went to the scene with Davis and he told friends later on that he wanted something out of it. He wants money. Once he starts participating, it's like getting on a slippery slope and he's sliding down and he can't get off that slope, in for a penny, in for a pound. What crimes were committed by Wilson as an accomplice? Not all of the crimes, but some of the crimes, while in complicity and therefore making him responsible for the rest.

20 RP 2223-25 (emphasis added). In other words, the prosecutor urged the jurors to convict Mr. Wilson based on all of the predicate felonies, notwithstanding the insufficiency of the evidence for rape. And the erroneous accomplice liability instruction allowed them to do so. App. B to Supp. Br. (Instruction 15); see Roberts, 142 Wn.2d at 510-11.

Furthermore, the to-convict and definitional instructions provided to the jury included the rape predicate. App. B to Supp. Br. (Instructions 14, 18, 21); see Maupin, 63 Wn. App. at 893-94. The verdict form was a general form that did not show which of the underlying felonies the jury relied upon in reaching its verdict. App. C to Supp. Br.; see Maupin, 63 Wn. App. at 894. Additionally, the one witness other than Keith Burks who testified about Mr. Wilson's participation stated that Mr. Wilson gave him conflicting accounts of what happened, first stating that he went in the house with Davis and later stating he was never inside the house. 17 RP 1873.

Given the above, this Court cannot ascertain that all of the jurors based their verdicts only on the robbery and burglary predicates, and not on the unproven rape predicate. Accordingly, Mr. Wilson should be granted a new trial. Maupin, 63 Wn. App. at 894-95. This Court need not reach the alternative arguments below.

**2. THE ACCOMPLICE LIABILITY INSTRUCTION
IMPERMISSIBLY LOWERED THE STATE'S
BURDEN OF PROOF.**

As explained in Mr. Wilson's supplemental opening brief, the instruction on accomplice liability that was given in this case violated due process because it allowed the jury to convict if it

found Mr. Wilson facilitated “a” crime, instead of “the” crime in question. Supp. Br. at 16-17 (citing State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2001); State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000)). Furthermore, Mr. Wilson was deprived of the effective assistance of counsel when his attorney proposed the erroneous instruction. Supp. Br. at 18-20 (citing State v. Kylo, 166 Wn.2d 856, 215 P.3d 177 (2009); In re Domingo, 155 Wn.2d 356, 119 P.3d 816 (2005)).

The State concedes that the instruction given here was erroneous under Cronin. Resp. Br. at 12. The State also concedes that Mr. Wilson raised the instructional issue within the one-year time limit. Resp. Br. at 12.

The State sets up a straw man in discussing equitable tolling. Resp. Br. at 12-13. Mr. Wilson never argued that equitable tolling applied. There is no need to toll the time for filing the motion, because Mr. Wilson filed it within the one-year limit. Indeed it appears the State inadvertently copied and pasted this paragraph from a brief in another case; it is irrelevant here.

The State then argues that even though Mr. Wilson performed his required tasks in a timely manner, this Court should

hold he “abandoned” his motion. But it acknowledges it has no authority to support such a holding. Resp. Br. at 13.

The State claims that its response to a 2006 petition should have alerted Mr. Wilson that the court had taken no action on his 2001 motion. Resp. Br. at 14. But the State’s 2006 brief claimed only that the court had not asked the State to respond to Mr. Wilson’s 2001 motion, not that the court was not planning to rule on the motion. Resp. Br. at 13. In any event, the fact that the court had not yet decided Mr. Wilson’s motion did not provide notice to Mr. Wilson that he was required to take some additional step. Nor does the court’s inaction mean Mr. Wilson’s motion was not timely filed. It was. As explained in Mr. Wilson’s supplemental opening brief, not only does the State’s novel “abandonment” theory have no support in the law, but it contravenes sound policy because it would result in courts being flooded with inmate queries. Supp. Br. at 13-16. Because the State concedes Mr. Wilson raised this issue within the one-year time limit and also concedes that the instruction violated Roberts and Cronin, this Court should grant relief.²

² The State also argues that Mr. Wilson may not raise an ineffective assistance of counsel claim outside the one-year time limit. But the ineffective assistance of counsel claim is not freestanding; it is part and parcel of the instructional issue which Mr. Wilson timely raised. Appointed counsel is simply

The State incorrectly claims that trial counsel was not ineffective when proposing the erroneous instruction because “the instruction followed the WPIC at the time, and there was no other authority calling it into question.” Resp. Br. at 29. The State completely ignores Kyllo and Domingo. See Supp. Br. at 18-21.

In Kyllo, counsel and the court followed the relevant WPIC. Kyllo, 166 Wn.2d at 865. The Supreme Court nevertheless held that the lawyer’s performance was deficient because “there were several cases that should have indicated to counsel that the pattern instruction was flawed.” Id. at 866. There is no legitimate strategic or tactical reason for allowing an instruction that incorrectly states the law and lowers the State’s burden of proof. Id. at 869 (citing State v. Woods, 138 Wn. App. 191, 201-02, 156 P.3d 309 (2007); State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004)).

Similarly here, counsel and the court followed the relevant WPIC, but counsel’s performance was deficient because the WPIC was inconsistent with the accomplice liability statute. Domingo, 155 Wn.2d 356. The accomplice liability statute has been in place since 1975, and has always required proof that the defendant knew of the crime the principal would commit. Id. at 364-65 (citing RCW

presenting a more thorough argument on an issue which Mr. Wilson, pro se, properly preserved.

9A.08.020). The statute never allowed for strict liability for any and all crimes that followed. Id. Cases from 1984 on were consistent with Roberts and Cronin, and did not approve of the proposition that accomplice liability attaches for any and all crimes committed by the principal so long as the putative accomplice knowingly aided in any one of the crimes. Id. at 367-68 & n.7 (listing cases). Thus, had counsel researched the relevant statute and caselaw, he would not have proposed the incorrect accomplice liability instruction. Mr. Wilson's attorney's failure to research the relevant law and propose a proper instruction deprived Mr. Wilson of the effective assistance of counsel. Kyllo, 166 Wn.2d at 869. For this reason, too, the PRP should be granted.

3. THE PROSECUTOR'S CLOSING ARGUMENT
IMPERMISSIBLY SHIFTED THE BURDEN OF
PROOF FROM THE STATE TO MR. WILSON.

a. The prosecutor violated Mr. Wilson's right to due process by arguing that in order to acquit, the jury had to state a reason for doing so. As explained in Mr. Wilson's supplemental opening brief, the State violated his right to due process by shifting the burden of proof during closing argument. Supp. Br. at 21-24. The prosecution argued that in order to acquit Mr. Wilson, it had to "fill in the blank" with a reason. 20 RP 2291. Such argument constitutes

flagrant and ill-intentioned misconduct under this Court's decisions in State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010), review denied, 170 Wn.2d 1003, and State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010).

"The State agrees that the prosecutor's argument was erroneous in light of recent case law." Resp. Br. at 30. But the State wrongly claims the argument was not flagrant and ill-intentioned and could have been corrected by a limiting instruction. Resp. Br. at 30. The State refuses to accept this Court's holdings to the contrary in Venegas and Johnson. In Johnson, this Court explained that "such arguments are flagrant and ill-intentioned and incurable by a trial court's instruction in response to a defense objection." Johnson, 158 Wn. App. at 685 (citing Venegas, 155 Wn. App. at 523 n.16, 525).

The State argues that the prosecutor's argument could not have been flagrant and ill-intentioned because it pre-dated Anderson, Venegas, and Johnson. Resp. Br. at 33-34. But of course the same was true in both Venegas and Johnson. In those cases, this Court held the prosecutor's argument was flagrant and ill-intentioned misconduct notwithstanding the fact that the trials

occurred prior to Anderson. Johnson, 158 Wn. App. at 685;
Venegas, 155 Wn. App. at 523 n.16.

The State complains that “the court in Venegas completely failed to articulate what about the statement was not curable by a jury instruction, seeming instead to simply assume that such was the case.” Resp. Br. at 32. But this Court did articulate the problem:

Although the trial court's instructions regarding the presumption of innocence may have minimized the negative impact on the jury, and we assume the jury followed these instructions, a misstatement about the law and the presumption of innocence due a defendant, the “bedrock upon which [our] criminal justice system stands,” constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights. State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); Anderson, 153 Wn. App. at 432, 220 P.3d 1273.

Johnson, 158 Wn. App. at 685-86.

The State then resorts to arguing that all three of this court's recent pronouncements on the topic – Anderson, Venegas, and Johnson – were wrongly decided. Resp. Br. at 33. The prosecutor claims, “The ‘fill in the blank’ argument does not shift the State's burden on reasonable doubt, it merely argues to the jury that they should have an identifiable reasons for their doubt.” Resp. Br. at 33. This statement is an astonishing refusal to acknowledge the

assault on the presumption of innocence inflicted by the “fill in the blank” argument. Again, as this Court has already explained:

By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [the defendant] guilty unless it could come up with a reason not to. Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that [the defendant] was responsible for supplying such a reason to the jury in order to avoid conviction.

State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (emphasis in original). “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). This Court has properly enforced this elementary principle in prior cases, and should do so again here.

In sum, the State impliedly concedes that this Court would have to overrule both Venegas and Johnson in order to hold the argument in this case did not constitute flagrant and ill-intentioned misconduct incurable by an instruction. This Court should apply Venegas and Johnson, and grant Mr. Wilson’s PRP.

b. Mr. Wilson may raise this issue under RCW 10.73.100 (6). As explained in Mr. Wilson's supplemental opening brief, he may raise this issue now under RCW 10.73.100(6) because of the significant change in the law. Supp. Br. at 23. The State argues, "None of the cases relied upon by the defendant overturned prior material law in effect prior to the expiration of the one-year time limit. Accordingly, this argument does not fall under an exception to the one year time limit on collateral attack." Resp. Br. at 23-24. But the law in effect prior the expiration of the one-year time limit was that misconduct could not be considered flagrant and ill-intentioned absent a published decision addressing the prosecutor's precise statements. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996). That changed in 2010 with Venegas and Johnson. See Johnson, 158 Wn. App. at 685-86. The issue is properly before this Court, and the PRP should be granted.

4. MR. WILSON WAS PREJUDICED BY THE IMPROPER INSTRUCTION AND ARGUMENT ON ACCOMPLICE LIABILITY AND THE IMPROPER ARGUMENT ON THE BURDEN OF PROOF.

As explained above and in the supplemental opening brief, Mr. Wilson's right to due process was violated by the improper

accomplice liability instruction and the improper fill-in-the-blank argument, in addition to the failure of proof on the rape predicate. Mr. Wilson was prejudiced by the constitutional errors, because the result likely would have been different absent the errors. Supp. Br. at 24-27. The State recites only black-letter law as to prejudice analysis, and does not apply it to this case. Resp. Br. at 34-38. Mr. Wilson will therefore not repeat his arguments from the opening brief. Supp. Br. at 24-27. This Court should grant Mr. Wilson's PRP because multiple due process violations deprived him of a fair trial.

C. CONCLUSION

For the reasons set forth above and in his supplemental opening brief, Mr. Wilson respectfully requests that this Court grant his personal restraint petition and remand for a new trial.

DATED this 30th day of March, 2011.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Petitioner

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

IN RE THE PERSONAL RESTRAINT PETITION OF)

GEORGE WILSON,)

Petitioner.)

NO. 39115-5-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] STEPHEN TRINEN, DPA
PIERCE COUNTY PROSECUTOR'S OFFICE
930 TACOMA AVENUE S, ROOM 946
TACOMA, WA 98402-2171

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] GEORGE WILSON
ID #21881
WYOMING CORRECTIONS CENTER
PO BOX 400
RAWLING, WY 82301

(X) U.S. MAIL
() HAND DELIVERY
() _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF MARCH, 2011.

X _____



STATE OF WASHINGTON
COURT OF APPEALS - DIVISION TWO
NO. 39115-5-II
MARCH 31 2011
BY: [Signature]

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711