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MARCH 5, 2015  
Court of Appeals  
Division III  
State of Washington

**NO. 32735-3-III**

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

**APPELLANT,**

**v.**

**MARCOS A. AVALOS BARRERA,**

**RESPONDENT.**

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**BRIEF OF APPELLANT**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	i
Table of Authorities.....	ii
I. ASSIGNMENT OF ERROR.....	1
Issue Pertaining to the Assignment of Error.....	1
II. STATEMENT OF THE CASE.....	1-5
III. ARGUMENT.....	5-12
A. Standard of Review.....	5-6
B. Relevant Law .....	6-7
C. Facts Supporting Accomplice Liability .....	7-8
D. Comparison with Other Accomplice Liability Cases .....	9-10
E. Summary of Liability .....	11-12
IV. CONCLUSION .....	12

TABLE OF AUTHORITIES

Page

STATE CASES

*State v. Alires*, 92 Wn. App. 931, 966 P.2d 935 (1998)..... 9

*State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136 (2009)..... 9-10

*State v. Conte*, 159 Wn.2d 797, 154 P.3d 194 (2007) ..... 5

*State v. Jackson*, 82 Wn. App. 594, 918 P.2d 945 (1996).....6

*State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986) ..... 5, 6

*State v. McChristian*, 158 Wn. App. 392, 241 P.3d 468 (2010)..... 7

*State v. Rangel-Reyes*, 119 Wn. App. 494, 81 P.3d 157 (2003)..... 7

*State v. Wilson*, 95 Wn.2d 828, 631 P.2d 362 (1981)..... 7

*State v. Womac*, 130 Wn. App. 450, 123 P.3d 528 (2005)..... 8

STATUTES AND OTHER AUTHORITIES

CrR 8.3(c)..... 5

ER 404(b) ..... 8

RCW 9A.08.020 ..... 6

WPIC 10.51 ..... 6-7

## **I. ASSIGNMENT OF ERROR**

The trial court erred in dismissing the Assault in the First Degree charges against Marcos Avalos Barrera.

### ***Issue Pertaining to the Assignment of Error***

Did the trial court err in concluding that it was mere speculation to conclude that Avalos Barrera encouraged and was present ready to assist in the assault when he conveyed threats to the victims a few hours before the assault, expressed threats towards the same victims to Police Officers a few hours before the assault, was caught on video as present during the assault, was seen yelling at the victims of the assault and briefly assisted one of the participants in the assault after he was injured?

## **II. STATEMENT OF THE CASE**

On June 23, 2013, at about 7:40 in the evening Marcos Avalos Barrera (aka "Froggy") was beat up by Alejandro Munoz in a fight near the Quail Run Apartments. CP 295-96. Officer Joe Westby responded and contacted Avalos Barrera, a member of the Marijuanos street gang. When Officer Westby asked Avalos Barrera what happened he responded "Don't worry about it, I'll take care of it, Street Justice." *Id.* As Avalos Barrera walked to Humberto Davalos' house he walked by the Munoz house and exchanged heated words with the family. *Id.* According to Alejandro (Alex) Munoz and the Munoz family Avalos Barrera threatened

them, telling them that they were going to die that night. CP 162, 287.

There had been a long running conflict between the Marijuanos and the Munoz family. CP 306.

Later Avalos Barrera went to the hospital for injuries sustained in the fight. While there Sgt. Snyder of the Quincy Police Department attempted to interview him to investigate the earlier fight. Avalos Barrera told Sgt. Snyder to not worry about it, he (Avalos Barrera) would take care of it, but not that evening. CP 314.

The Davalos House sits kitty corner and one house down from the Munoz house. At about 11:00 PM that evening everything came to a head. The incident was recorded in part using two different systems. The Davalos house had a video security system that recorded the Marijuanos part of the fight. The Marijuanos included, among others, Rigoberto Vazquez, Luis Quintero, Humberto Davalos and Marcos Avalos Barrera.<sup>1</sup>

All descriptions of the video in this brief will use the time reference on the video (VT mm:ss), with 2200 (10:00 PM) as the hour. For a summary of the video, not tailored to the case regarding Avalos Barrera, *see* CP 78 – 84. Marcos Avalos Barrera is wearing a horizontally striped shirt in the video. In viewing the video the lower right screen is

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<sup>1</sup> The City of Quincy uses a system called Shot Spotter to acoustically detect and locate gun shots. By comparing the Shot spotter acoustics to the video the officers were able to determine the video time was off by about 30 minutes. CP 73.

the back of the Davalos House, the lower left is the left hand front yard facing out from the house, the upper left is the middle front yard and the upper right is the right hand front yard. The Munoz house is located to the left of the picture in the lower left picture. Alex Munoz is off to the left of the leftmost scene and is the one Vazquez is arguing with and threatening. CP 31-32.

- Rigoberto Vazquez (White Shirt) and Luis Quintero (Blue Shirt) can be seen yelling and gesturing towards someone off screen to the left. VT 27:45.
- Both Vazquez and Quintero go out into the street, gesturing aggressively. VT 28:02
- Humberto Davalos drops an object down his pant leg, later determined to be a gun. Marcos Avalos Barrera appears in the rear of the residence walking towards the front. VT 28:30.
- Davalos retreats behind a van, pulls out his pistol and aims it towards the Munoz side. VT 28:48
- Luis Quintero walks back to Davalos, Davalos hands Quintero a gun. VT 28:56.
- Avalos Barrera walks up towards Davalos, hesitates, than approaches. VT 29:17.

- Avalos Barrera stands behind Davalos and appears to yell something towards the Munoz side. VT 29:19.
- Avalos Barrera then withdraws towards the back, and other gang members come up and posture towards the Munozes. VT 29:30.
- First shots are fired. VT 29:38.
- Humberto Davalos is hit in the leg and goes down. He is helped to the ground by Quintero. VT 29:45
- Avalos Barrera returns to Davalos. VT 29:50.
- He bends down to and appears to try to help Davalos up while Vazquez fires towards the Munoz house. VT 29:56.
- Avalos Barrera then withdraws and leaves Quintero to help Davalos. Vazquez follows Avalos Barrera and reloads or clears his gun. VT 30:00.
- Vazquez fires several more shots. VT 30:04.
- Avalos Barrera comes into view in the back as Quintero and Vazquez drag away Davalos. VT 30:20.
- Avalos Barrera departs the camera views. VT 30:24.
- Vazquez moves through the back area. VT 30:50.
- Lights can be seen from responding police cars. VT 31:05

In addition to this incident there was an incident in July of 2011 where Vicki Tapia, Alex Munoz's aunt, got into a fight with Avalos Barrera. A few hours later her house was shot up in a drive by shooting. CP 364-370. This was resolved in a separate case.

Marcos Avalos Barrera was charged with two counts of first degree assault on an accomplice theory, and two counts of felony harassment. CP 5. The trial court dismissed the assault charges under CrR 8.3, concluding there was insufficient evidence to support accomplice liability. RP 23. The State appeals this dismissal.

### **III. ARGUMENT**

#### ***A. Standard of Review***

Appellate Courts review *Knapstad* rulings de novo. *State v. Conte*, 159 Wn.2d 797, 803, 154 P.3d 194 (2007). *Knapstad* created a pretrial process, akin to summary judgment motions in civil cases, that allows the trial court to dismiss a criminal case when the agreed upon facts show the prosecution's case is missing an element necessary to prove the charged offense. *State v. Knapstad*, 107 Wn.2d 346, 356-57, 729 P.2d 48 (1986). The procedure to be followed for *Knapstad* motions is delineated by CrR 8.3(c).

In a *Knapstad* motion, a defendant alleges by sworn affidavit that there are no material disputed facts and that the undisputed facts do not

establish a prima facie case of guilt. *Knapstad*, 107 Wn.2d at 356. When evaluating a *Knapstad* challenge to the sufficiency of the evidence, the trial court considers the evidence and reasonable inferences therefrom in the light most favorable to the State. *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996).

***B. Relevant Law***

The defendant alleged that there was insufficient evidence that conclude that Avalos Barrera was an accomplice to the charge of assault in the first degree committed by Rigoberto Vazquez and several others at the Davalos house. The argument centered around accomplice liability, not that there was insufficient evidence to conclude that Rigoberto Vazquez and others committed assault in the first degree. Thus the critical law in this case is the accomplice statute, RCW 9A.08.020, reflected in WPIC 10.51, which states in relevant part:

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 person 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 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.

It is not a requirement that the defendant be a cause in fact of the crime, only possess an intent to encourage. *State v. Wilson*, 95 Wn.2d 828, 631 P.2d 362 (1981). The State can use circumstantial evidence to prove accomplice liability. *State v. Rangel-Reyes*, 119 Wn. App. 494, 500, 81 P.3d 157 (2003). While knowledge of the crime is required, it is knowledge of the generic crime. Thus, knowledge of an assault is sufficient; the State is not required to prove the defendant had knowledge of the degree of assault the principal was going to commit.

[A]n accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor level assault, and need not have known that the principal was going to use deadly force or that the principal was armed.

*State v. McChristian*, 158 Wn. App. 392, 401, 241 P.3d 468 (2010).

### ***C. Facts Supporting Accomplice Liability***

Marcos Avalos Barrera lost a fight earlier in the day with Alex Munoz. When Officers tried to talk to Avalos Barrera he not once, but twice told them not to worry about it, he would take care of it using “street

justice.” When he was walking by the Munoz residence he was acting aggressively towards them and told the Munozes that they were going to die that night.

A few hours later Avalos Barrera is caught on camera when and where the shooting takes place. He can be seen, while the yelling and confrontation is going on, yelling at the Munoz side, although it is unknown what he was saying. He then leaves the video frame. After the shooting starts and Davalos is hit, Avalos Barrera comes back to the yard, checks on Davalos and attempts to help him up, and then retreats, all while the shooting is still going on.

While the above facts alone are sufficient, there are others. In 2011 Avalos Barrera got into a fight with another member of the Munoz family, Vicki Tapia. A few hours later her house was shot up. Now Avalos Barrera is asserting that it is mere coincidence or accident that the shootings happened to the Munoz family the day they get into fights with him without his involvement in the shootings. *See State v. Womac*, 130 Wn. App. 450, 456-58, 123 P.3d 528 (2005) (Evidence admissible under ER 404(b) to rebut claim of mistake or accident).

***D. Comparison with Other Accomplice Liability Cases***

1. *State v. Aires*, 92 Wn. App. 931, 966 P.2d 935 (1998)

Aires was burglarizing a building, and fled with a companion when the police showed up. The State's evidence consisted of the flight with a companion and some white paint on Aires' shirt that matched a windowsill at the building where the burglary took place. The court ruled that was sufficient.

In this case there was more evidence of assistance and encouragement, with Avalos Barrera yelling at the opposing side and assisting Davalos after he was shot.

2. *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136 (2009)

This was a homicide case where the Court of Appeals dismissed the case against the alleged accomplice Darius Vaielua. The court summarized the evidenced against Vaielua as follows:

The trial testimony showed that (1) Asaeli, Asi, and Williams witnessed Fola shoot at a car with Asian men in it at Thea Foss Park a week before Asaeli shot Fola but that Vaielua was not present at the time; (2) a week later, Vaielua was at Papaya's bar at the same time as Williams and Asaeli; (3) Vaielua spoke to Williams and Asaeli either at the bar or as they were all leaving the bar at closing time; (4) Asaeli did not ask Flores if she wanted to go to the waterfront until after speaking to the others as they were leaving the bar; (5) Vaielua did not normally go to the waterfront after the bars closed when he was with Ishmail; (6) after leaving the bar, talking to the others, and dropping Ishmail off, Vaielua drove the Explorer to Thea Foss Park

at the same time Asaeli, Van Camp, and Asi drove to the park; (7) the three cars arrived at approximately the same time; (8) when Vaielua arrived, he had four passengers with him, including Williams; (9) before the shooting, Vaielua and the others exited the Explorer and Vaielua spoke and motioned to the people in the Explorer for several minutes; (10) also before the shooting, some of those who arrived with Vaielua spoke to Asaeli; (11) immediately before the shooting, Vaielua approached James, whom he knew from prior peaceful encounters; and (12) after greeting James, Vaielua asked where “Blacc” was and then stood with James (with a car between them and Ramaley's car) until the shooting. *Importantly, the evidence did not show what was said during any conversations Vaielua may have had or overheard that evening nor was there any evidence that any of these conversations related in any way to a plan to shoot or assault Fola.*

There was also evidence that Vaielua may have shared an affiliation with his friends, that Vaielua and his friends may have displayed several gang colors when they arrived, and that someone shouted out “K” after the shooting. Although this is evidence that Vaielua and the others may have been acting in concert and may relate to motive, this evidence, even taken in the light most favorable to the State, does not demonstrate that Vaielua was aware that the group was planning to do more than locate Fola; it does not demonstrate that Vaielua was aware of a plan to assault or kill Fola.

*Asaeli*, 150 Wn. App. at 568-69; n 31. (emphasis added).

In this case the evidence shows that Avalos Barrera must have known about the pending firefight. He is on video engaging in the yelling, right behind Davalos, who has a gun out and trained on their opponents. In addition, Avalos Barrera had made threats earlier that evening to both officers and to the Munoz family that he was going to get

or kill the Munozes that night and inflict “street justice.” While it is true that we do not know exactly what is said when Avalos Barrera was yelling at the Munozes in the video, it is a reasonable inference based on the threats made earlier in the evening that the statement is aggressive.

In this case the State has the important evidence that was missing in *Asaeli*, evidence of knowledge of the assaults and statements made by Avalos Barrera that he would commit and/or support the assault made earlier in the evening. It is not “speculation” to conclude that Avalos Barrera did exactly what he said he would do. In addition Avalos Barrera is seen to come back as the fight is still ongoing to assist Davalos after he was shot in the leg. There is plenty of evidence to conclude that Avalos Barrera was both present and ready to assist and encouraged the assault.

***E. Summary of Liability***

Marcos Avalos Barrera was injured in a fight with Alex Munoz. He vowed to get even, telling officers who came to investigate that he would resolve the issue with “street justice.” As he walked by the Munoz house he threatened them with death that evening. Less than four hours after the fight he is present when an altercation erupts again. He puts himself into the altercation by yelling at the Munoz side. He retreats when the gunfire starts, and it is clear he does not have a gun, but returns to assist one of the combatants. A reasonable juror could, and would,

conclude that he is present ready to assist and encouraging the gun fight.

The Court should reverse the lower court and reinstate the charges.

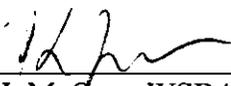
#### IV. CONCLUSION

It is not speculation to conclude that someone did exactly what they said they would. Avalos Barrera was present and ready to assist and encouraged the fight that included the exchange of gunfire. The trial court should be reversed and the case remanded for trial.

DATED: March 5, 2015

Respectfully submitted:

GARTH DANO,  
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\_\_\_\_\_  
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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Appellant,	)	No. 32735-3-III
	)	
v.	)	
	)	
MARCOS A. AVALOS BARRERA,	)	DECLARATION OF SERVICE
	)	
Respondent.	)	
_____	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

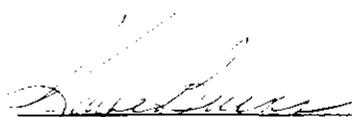
That on this day I served a copy of the Brief of Appellant in this matter on Susan Marie Gasch, Attorney for Respondent, by e-mail, receipt confirmed, pursuant to the parties' agreement:

Susan Marie Gasch  
gaschlaw@msn.com

That on this day I delivered to the Grant County Sheriff an envelope addressed to Appellant containing a copy of the Brief of Appellant for delivery to the Appellant in the Grant County Jail.

Marcos A. Avalos Barrera  
Grant County Jail  
35 C Street NW  
Ephrata WA 98823

Dated: March 5, 2015.

  
\_\_\_\_\_  
Kaye Burns