79354-9

FILED
NOV 15 2006
CLERK OF SUPREME COURT
STATE OF WASHINGTON

No. 79354-9

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON
(Court of Appeals Div. III No. 23569-6-III_

STATE OF WASHINGTON,

Petitioner,

v.

ANDRE PAUL BECKLIN,

Respondent.

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BY C. J. HERMITT

~~BRIEF OF RESPONDENT~~ Answer TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Appellant in this matter is ANDRE PAUL BECKLIN. He resides at 27 Bacon Creek Drive, Republic, Washington 99166. This Appeal is being filed on his behalf by his counsel of record the Law Office of Castelda & Castelda, Inc., P.S.

II. ISSUES PRESENTED FOR REVIEW.

1. Whether the failure to give an accomplice instruction, denied the Respondent a fair trial.

2. Whether the failure to give WPIC 10.51 was a harmless error.

III. STATEMENT OF THE CASE

This Appeal arises out of a Jury Trial conducted in Ferry County Superior Court on November 2 and 3, 2004 before the Honorable Judge Rebecca Baker. See Report of Proceedings (hereinafter referred to as RP), vol. 1, pg. 50. The Defendant was initially charged by Information filed April 6, 2004 in Ferry County Superior Court with One (1) Count of Stalking for alleged actions which occurred on or about March 26, 2004. See Clerk's Papers (hereinafter referred to as CP), pgs. 1-2. This was signed by Michael Sandonna, Deputy Prosecuting Attorney. See Id.

The State filed an Omnibus Application in the matter on May 28,

2004. It made no mention of any intent to Amend the Original Information from the one (1) original count of Stalking. CP, pgs. 11-14. Nor did the Court's Omnibus Order make any mention of any intent on that of the State to Amend from the Original Count. See CP, pgs. 21-25.

October 20, 2004 the State filed a Motion and Affidavit to Amend Information along with a Note for Motion to Amend. It was set to be heard on November 2, 2004 the first day of trial. See CP, pgs. 32-33 and pg. 34. The Motion and Affidavit along with the Note for Motion failed to contain any Proposed Amended Information. In fact there was no provision to the Defendant as to what the Amended Information would be. Just a general Motion to Amend. See Id.

The original Information remained in effect and was never Amended by Order of the Court. As such the Defendant and counsel operated off this Original Information in preparation for trial. See RP, vol. 1, pgs. 3-6. The Original Information charged one count of Stalking for one instance on March 26, 2004. That is all. See Id. On the date of trial, rather the very morning trial is to begin, the State moved over objection of the Defendant, to create a Second Amended Information which was never before seen by the Defendant or Defense, including new language of

"several times" and a entirely new date of March 13, 2004. See RP, vol. 1, pgs. 3-6 and CP pgs. 59-60. This was the Second Amended Information. Id. Defendant and Defense counsel had agreed previously to allow an Amendment to include language which would clarify the charge. That was acceptable to the Defendant and Defense. RP, vol. 1, pgs. 1-3. This first Amended Information still adhered to the same date as the original Information, and the same single count. See CP, pgs. 3-4. There was nothing new to it. It had in fact been discussed between counsel for the State and the Defendant. RP, vol. 1, pgs. 3-6.

The Amended Information contained no change from the original charge, date of offense or number of counts. It was essentially the same, containing only some clarification as to RCW 10.99.020. See CP, pgs. 1-2 and 3-4. It was not until the day of trial this Second Amended Information even surfaced with the new date of March 13, 2004, and the language of "several times" as it related to March 26, 2004. See CP, pgs. 3-4. Defendant and Defense objected to this Second Amended Information as prejudicial, surprise, lack of notice and not in compliance with the Superior Court Criminal Rules (hereinafter referred to as CrR) as it relates to Amendments. See RP, vol. 1, pgs. 3-6 and vol. 1, pgs. 9.

The Court granted the Motion to Amend and allowed the State to file the Second Amended information over objection of the Defendant and Defense Counsel. RP, vol. 1, pgs. 11. However, the State then moved for a third time during the course of trial to amend the Information yet once again. In fact this was the Third Amended Information. RP, vol. 3, pgs 242-245. See also CP, 121-122.

This Third Amended Information was done by the State during the course of finalizing the Jury Instructions. The State moved to Amend the Information a third time, what was deemed by Defense to be a Fourth effort to Amend the Information to conform to its version of the events. RP, vol. 3, pgs. 242-243. This Fourth amendment of the Information by the State changed the Information to state "on or about the 13th day of March, 2004, up to and including on or about the 26 day of March, 2004". RP, vol. 3, pgs. 243, lines 3-4. This was again very different from the Third Amendment which the Court had signed not forty-eight (48) hours previously on November 22, 2004. RP, vol. 1, pgs. 11 and CP, pgs 3-4. So there were in effect four (4) separate and distinct Amendments of the Information. The fourth and final Amendment being undertaken by the State at what appeared to be the direction and request of the Court

from the bench. See RP, vol. 2, pgs. 236.

During the course of deliberations the Jury came back to the Court with two (2) separate questions. The first question was raised on November 3, 2004 at 1830 hours. The Jury queried to the Court, "Is third party included in Stalking? Pursuant to our instructions of changes (sic) brought against the Defendant, can you stalk a party through a third person?" RP, vol. 3, pgs 340. The Court answered the question "Yes" over the objection of Defense counsel. RP, vol. 3, pgs. 340-342. It was the position of Defense counsel this was essentially handing the verdict to the State. RP, vol. 3 pgs. 341, lines 19. The Court refused to refer the jury back to a specific instruction such as the instructions dealing specifically with conviction, numbers 16 through 21. See RP vol. 3, pgs. 281 through 286 and CP, pgs. 91 to117.

This occurred once again during deliberations of the jury. On November 3, 2004 at 2000 hours the jury queried "Is there a stalking distance between the stalker and victim?" RP, vol. 3, pgs. 343. The Court over objection from Defense counsel responded to the question as follows; "No. Refer to Instruction Number 6 for the elements of the crime that need to be proven." RP, vol. 3, pgs. 344. Defense counsel objected to any

response outside of referring the jury to a specific instruction or series of instructions. RP, vol. 3, pgs. 343-344.

It is the position of the Defendant the Amendments as allowed and the Court's responses to the Jury's Questions were harmful and prejudicial errors warranting the overturning the conviction and remanding for further proceedings.

IV. LEGAL ARGUMENT

A. Did the failure to provide an Accomplice Instruction deny the Respondent a Fair Trial?

During the Course of Deliberations the Jury made two (2) separate inquiries of the Court. The first coming November 3, 2004 at 1830 hours. The question stated:

> "Is third party included in stalking? Pursuant to our instructions of changes (sic) brought against the Defendant, can you stalk a party through a third Person?" RP, vol. 3, pgs. 340, lines 7-9, CP, pgs. 123.

The second question came on November 3, 2004 at 2000 hours and stated:

> "Is there a stalking distance between the stalker and the victim?" RP, vol. 3, pgs. 343, lines 5-6. CP, pgs. 124.

To the First Inquiry the Court responded with a 'Yes" answer over

the objection of counsel for the Respondent at the time. See RP, vol. 3, pgs. 340-341.

To the Second Inquiry the Court responded, "No. Refer to Instruction Number 6 for the elements of the crime that need to be proven." RP, vol. 3. Pgs. 344. Once again, this was over the objection of counsel for the Respondent at the time. See RP, vol. 3, pgs. 343.

CrR 6.15 contains specific instructions to the Court as it relates to the responding of questions from a deliberating jury. It states in part:

> " ... Written questions from the jury, the court's responses and any objections thereto shall be made part of the record. The Court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is *least likely* to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instructions upon any point of law shall given in writing. (2) After deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate."
> CrR 6.15 (f)(1)(2) emphasis added.

In the case at bar the two (2) responses given by the Trial Court to the jury questions were prejudicial to the Defendant and did constitute an

impermissible comment on the evidence. The Trial Court is specifically forbidden from commenting on the evidence or appearing to comment on the evidence. CrR 6.15 (f)(1). See also Instruction Number 1 as read to the jury. RP, vol. 3, pgs. 275-278 and CP, pgs. 91-94. The sole purpose of our criminal justice system is to have a fair and impartial jury of your peers decide your guilt or innocence. This rests solely with the jury. The responses provided by the Trial Court essentially directed the verdict of the jury.

As the Court of Appeals correctly pointed out in its Decision, review of such questions are under a de novo standard of review. See Appendix A, pg. 5, and *State v. Barnes,* 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). In this case the Trial Court's Response to the query "is a third party included in stalking?' and "can you stalk a third party [through] a third person?" were of an affirmative nature. See CP 123. But this is not supported by the statute. The Statute at issue is clear an unambiguous. When such is the case it must be specifically enforced and the Court is not allowed to read any ambiguity into the statute. This is Black letter in the State of Washington and has been the standard for some time.

When a statute is clear and unambiguous the court is required to

apply the statute as written. The Court cannot give its own meaning to the statute. *State v. Radan*, 143 Wn.2d 323, 330, 21 P.3d 255 (2001), *State v. Michielli*, 132 Wn.2d 229, 237, 937 P.2d 587 (1997). The plain meaning of the statute is to be followed. As such the decision of the Court of Appeals, in reading the statute without any ambiguity and following the plain meaning of the statute should be followed and Affirmed. The Court of Appeals did not find any ambiguity as none exists in this specific instance. The Trial Court clearly misapplied the law. The Petitioner is now attempting to have the Court re-write the law it would seem to support the conviction, something the Court of Appeals was disinclined to do and something this Court should not consider either.

Under RCW 9A.46.110(1)(a) a persons commits the crime of stalking when they intentionally and repeatedly harass or repeatedly follow another person. See RCW 9A.46.110(1)(a). The Petitioner goes to great lengths in its Motion for Reconsideration and in its Petition for Review to attempted to convince the Court there was never any intent to convict through the actions of a third party. See Motion for Reconsideration filed by Respondent and Petition for Review.

However, in reviewing the Motion for Reconsideration and

Petitioner for Review it becomes very evident the Petitioner's entire case was based upon the actions and undertakings of third parties. See Motion for Reconsideration filed by the Respondent, pgs. 1-7 as well as pertinent part in the Petition for Review filed herein. It was so evident even the Jury itself was obviously under the impression the Petitioner was attempting to convict through the actions of a third party. Otherwise, why the question that forms the basis for this Appeal? Logic would dictate the Jury was under the impression the Respondent was attempting to prove Guilt to the Charge of Stalking via Complicity Liability. They were certainly under that impression as they raised the question during deliberations.

If the Respondent was never charged as an accomplice as complained by the Petitioner at page 8 of the Motion for Reconsideration filed with the Court of Appeals, then why go to the effort to prove the conviction was valid via complicity liability? Even the Petitioner made it very clear in closing argument, the Respondent had somehow directed or controlled these people. The Respondent had somehow put these people under his power to do his bidding if you will. See RP., pgs. 292-295. The Petitioner is clearly of the mind the circumstantial evidence of the case creates a complicity liability situation in this case. See Id.

The Court of Appeals saw this all and found correctly. If the Petitioner had intended Complicity Liability or some theory associated therewith, it should have been properly plead. After all, the Trial Court was very lenient in allowing the Petitioner the opportunity and ability to Amend the Complaint numerous times from the morning trial began even into the middle of trial before resting the case if Chief. See RP, cited infra. With these lenient Amendments, it would stand to reason the Trial Court would have allowed the Petitioner to Amend to include a Complicity Theory. But no such request was made. The matter has to then proceed as charged. As Charged the Instruction given by the Trial Court were improper and created a harmful error.

Going to RP., pg. 300, lines 11-13. The Petitioner in Closing Argument alleges the Respondent was recruiting people out of the community to spy on the alleged victim. This is an overriding theme throughout Closing Argument. The Petitioner was stressing the Respondent was guilty as a result of the actions of others. As the Court of Appeals correctly found, RCW 9A.46.110 does not provide for third party performance of any of the actions necessary to support a conviction for Stalking. See Appendix A, pg. 6.

RCW 9A.46.110 defines "follows", "unlawful harassment", and "course of conduct". See RCW 9A.46.110 et al. But not once is the term "third party" defined. Nor does the statute create liability for the actions of a third party. It was just this which the Jury was inquiring about with its query.

The Court of Appeals correctly found the response provided by the Trail Court was incorrect. It was a mis-statement of the statute under which the Respondent was charged as well a mis-statement of the jury instructions provided.

RCW 9A.46.110 does not include a violation of a protective order as a definition of harassment. See RCW 9A.46.110. As such the conviction cannot stand as it is an improper application of the statute. The Petitioner cannot mold the statute into something the Legislature never intended. Specifically, the Petitioner cannot create ambiguity to support a conviction that is not supported by the very statute under which the Respondent is charged. That is in effect what the Petitioner is attempting to accomplish. As stated above the Court cannot read ambiguity where non-exists.

The charge was not for violation of the Protective Order. The

charge was for stalking under RCW 9A.46.110. As such the conviction must be for Stalking as defined by the clear and unambiguous language of the statute. Statutes cannot be modified ad hoc, or ex post facto to support what they were never intended to support in the first instance.

The Court of Appeals was correct in finding the Trail Court was amiss for its failure to provide the Jury with an Accomplice Instruction. Where there is an issue of complicity liability the Court should provide such an instruction. See *State v. Stein*, 94 Wn.App. 616, 628, 972 P.2d 505 (1999), *aff'd,* 114 Wn.2d 2336, 27 P.3d 184 (2001) and see *State v. Davenport*, 100 Wn.2d 757, 764-765, 675 P.2d 1213 (1984).

In the case at bar no such instruction was ever provided by the Trail Court, nor was on offered by the Petitioner in proposed instructions to the jury. However, the Trial Court did affirmatively answer the query as to the actions of a third party without the benefit of providing an instruction on this very issue. It remains the position of the Respondent this was a harmful and reversible error.

The Court of Appeals correctly found the Petitioner's position in Closing argument was, "Assistance. Aiding and abetting. That's what it is, that's what this case is about, is enlisting others to do your own dirty

work, and that's what Mr. Becklin did. RP, pg. 331, see also Appendix A, pg. 9. The Petitioner also was of the opinion an individual could stalk a third party through the actions of another. See RP, pg. 340, and Appendix A. pg. 9.

Just as in *State v. Davenport*, the Petitioner argued the parties were accomplices. And thus it did not matter whether the specific defendant or someone else was engaged in the criminal activity. See *Davenport*, Id. at 758. A party cannot argue beyond the scope of the instructions. *State v. Ransom*, 56 Wn.App. 712, 714, 785 P.2d 469 (1990).

The Petitioner can argue any legal theory contained within the Jury Instructions given. But the Petitioner cannot argue those beyond the scope of such Instructions. The Petitioner admits to doing just such. The Petitioner did in fact argue accomplice theory and did not instruct the Jury on such. Nor did the Court. Pursuant to *State v. Ransom,* such a theory should not have been answered and the query should have merely referred the Jury back to the Instructions actually provided.

The Petitioner in its Motion for Reconsideration and Petition For Review seems to be advancing yet another theory to support is short comings. However, on Appeal, even better stated on a Motion to

Reconsider or on a Petition for Review on an Appeal previously Granted, it is not appropriate to advance a new theory never previously argued before the Court. As such the arguments of the Petitioner as they relate to its Motion to Reconsider and Petition for Review seem to attempt to proffer a new theory to support the erroneous conviction. Such is not proper at this time. One should not argue no issues on Appeal. In only rare instances are such arguments even entertained by the Court and the facts and circumstances of the case at bar do not reach the level necessary to create such a rare instance or novel circumstance as to warrant new theories, especially when one considers the law is well established as to the Issues presented for Review.

Nor does it appear the Court of Appeals specifically found there is a per se or carte blanche prohibition on an individual being found guilty of stalking by complicity liability. Rather, it would appear the Decision of the Court of Appeals hinges upon the fact the Instructions as provided by the Trial Court were improper. There is nothing raised within the body of the Motion to Reconsider or the Petition for Review by the Petitioner challenging this finding. The law is well established in this area, one cannot argue a theory upon which the Jury is not properly instructed. In

the case at bar this is what occurred. The Court of Appeals properly found such and properly determined such was an error and reversed the conviction.

At no point does the Motion for Reconsideration or Petition for Review take issue with this specific fact. Rather, the Petitioner takes umbrage with the issue of whether or not stalking can be found by the actions of a third party. But this is not the issue before the Court on Appeal. The issues is the response provided by the Trial Court to the Jury's query. The response given was improper given the Instructions that were provided. The Petitioner cannot argue with this simple truth. If there was no accomplice liability as is now proffered by the Petitioner in its Motion for Reconsideration and Petition for Review, then the Petitioner should have shared in the Respondent's's Objection to the Trial Court's response to the Jury Query. As the Petitioner did not join in the objection we can draw but one simple conclusion from such, the Petitioner was intent on obtaining a conviction through complicity liability. A theory for which the Jury was provided no instructions as required under the Law.

V. CONCLUSION.

Based upon the foregoing, the Decision of the Court of Appeals

should stand. The Decision was proper under the Law and the Petitioner's Petition for Review should be denied.

DATED this 13TH day of November, 2006.

Castelda & Castelda, Inc., P.S.

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VII. APPENDIX.

FILED

JUN 27 2006

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23569-6-III**
Respondent,	)	
	)	**Division Three**
v.	)	
ANDRE PAUL BECKLIN,	)	
	)	**PUBLISHED OPINION**
Appellant.	)	

SCHULTHEIS, J. — The crime of stalking as defined by the legislature in RCW 9A.46.110(1) cannot be accomplished through a third party. The State argued an accomplice liability theory in closing argument but did not offer an accomplice instruction before deliberations. In response to an inquiry during jury deliberations, the trial court instructed the panel that stalking could be accomplished through a third party. Because the instruction was both too late and an incorrect statement of the law, we reverse the defendant's stalking conviction.

FACTS

Mary McGee Ash and Andre Paul Becklin had a child together in October 1997. After their relationship deteriorated, Ms. Ash married Aaron Ash. On December 29, 2003,

person?" Clerk's Papers (CP) at 123. The court responded, "Yes" over the objection of defense counsel. CP at 123. The second question was, "Is there a stalking distance between the stalker and the victim?" CP at 124. The court responded, "No, refer to Instruction No. 6 for the elements of the crime that need to be proven." CP at 124. The defense objected. The jury found Mr. Becklin guilty of felony stalking. *See* RCW 9A.46.110(5)(b). Mr. Becklin appeals.

DISCUSSION

a. Amendment of the Information

We review the trial court's grant of a motion to amend an information for abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 155, 892 P.2d 29 (1995). A trial court may allow the amendment of the information at any time before the verdict as long as the "substantial rights of the defendant are not prejudiced." CrR 2.1(d). Mr. Becklin has the burden of demonstrating prejudice under CrR 2.1(d). *State v. Hakimi*, 124 Wn. App. 15, 26-27, 98 P.3d 809 (2004) (citing *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982)), *review denied*, 154 Wn.2d 1004 (2005). Mr. Becklin argues he was prejudiced by the amendments to the information because the date of the charged conduct was altered, and he was not informed of the change in time to adequately prepare for trial.

The information was initially amended to include the statute. It read "*on or about March 26, 2004*, . . . [Mr. Becklin] repeatedly harassed or repeatedly followed another person." CP at 3 (emphasis added). On the first day of trial, the second amended

Finally, Mr. Becklin argues that the third amended information was improper as it was done sua sponte by the court. He relies on *State v. Kenney*, 23 Wn. App. 220, 595 P.2d 52 (1979). The record clearly demonstrates that it was the prosecutor's decision to amend the charge. Therefore, unlike the defendant in *Kenney*, the court did not sua sponte direct the amendment.

b. Jury Instructions

When a jury is in deliberations, the trial court has discretion to determine whether to give further instructions upon request. *State v. Brown*, 132 Wn.2d 529, 612, 940 P.2d 546 (1997); *see* CrR 6.15(f)(1). We review claimed errors of law in jury instructions under a de novo standard of review. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

Here, the jury first asked the court if a "third party [is] included in stalking?" and "can you stalk a party [through] a third person?" CP at 123. The court responded affirmatively.

Under the stalking statute, "A person commits the crime of stalking if . . . [h]e or she intentionally and repeatedly harasses or repeatedly follows another person."[1] RCW 9A.46.110(1)(a). The statute provides definitions for "follows" and "harasses." RCW

[1] The victim must also reasonably fear personal injury or injury to another or to their property. RCW 9A.46.110(1)(b). The perpetrator must either intend to frighten, intimidate, or harass the victim or know or reasonably should know that the victim feels afraid, intimidated, or harassed. RCW 9A.46.110(1)(c)(i), (ii).

RCW 10.14.020(2).

The State asserts that the instruction is a correct statement of the law. *See State v. Watkins*, 31 Wn. App. 485, 487, 643 P.2d 465 (1982) (affirming conviction when supplemental instruction was a correct statement of the law), *aff'd*, 99 Wn.2d 166, 660 P.2d 1117 (1983). The State relies on *State v. Parmelee*, 108 Wn. App. 702, 32 P.3d 1029 (2001). In *Parmelee*, Division One of this court held that two of the defendant's three protective order violation convictions merged with the felony stalking conviction. *Parmelee*, 108 Wn. App. at 711. There, the defendant told unwitting prison inmates that his former wife wished to receive sexually explicit mail from prisoners. *Id.* at 706-07. This is the course of conduct that resulted in the conviction, not the letter-writing by the third parties or the fact of the letters themselves, which are merely evidence of the defendant's course of conduct. *Parmelee* does not support the State's position.

A person can be held responsible for the conduct of another if "[a]cting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct." RCW 9A.08.020(2)(a). One can also be held responsible for the conduct of another if the statute defining the crime specifically provides for it. RCW 9A.08.020(2)(b); *e.g.*, *State v. J.M.*, 101 Wn. App. 716, 730, 6 P.3d 607 (2000) (holding that harassment under RCW 9A.46.020 requires proof of a direct or indirect threat, which could be accomplished through a third person; therefore, the State

Mr. Becklin contends that the State was required to charge him as an accomplice. He is mistaken. An information that charges an accused as a principal provides adequate notice of potential accomplice liability. *State v. Davenport*, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984). However, the court was required to give an accomplice instruction that provides the elements of accomplice liability. *State v. Stein*, 94 Wn. App. 616, 628, 972 P.2d 505 (1999), *aff'd*, 144 Wn.2d 236, 27 P.3d 184 (2001); *see Davenport*, 100 Wn.2d at 764-65. Here, it did not.

The State argued in closing, "Assistance. Aiding and abetting. That's what it is, that's what this case is about, is enlisting others to do your own dirty work, and that's what Mr. Becklin did." 3 Report of Proceedings (RP) at 331. Then, when the trial judge first asked the State for its comments with respect to the jury's inquiry, if one can stalk a party through a third person, the prosecutor stated:

> My view, of course, is that you can. It's aiding and abetting. It's a principal liability situation, and perhaps they should have had an instruction on that, that wasn't prepared by my office.

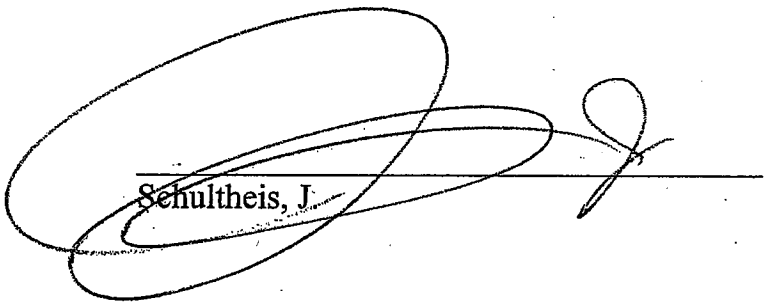
3 RP at 340.

Similar to this case, in *Davenport*, a second degree burglary case, the prosecutor argued in closing that it was immaterial whether the defendant or the driver of the car actually went into the house, because "'they are accomplices.'" *Davenport*, 100 Wn.2d at 759. But the State had not charged the defendant as an accomplice and had not requested an accomplice liability instruction. *Id.* at 758. During deliberations, the jury sent a note to

In light of our ruling, we do not reach the jury's second inquiry.

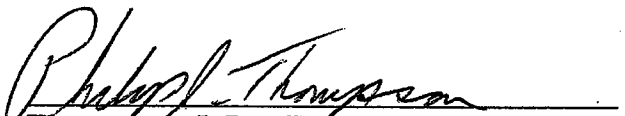
CONCLUSION

The court abused its discretion by instructing the jury when it did and it erred as a matter of law in the incomplete manner it instructed the jury on accomplice liability. We therefore reverse.



Schultheis, J.

I CONCUR:



Thompson, J. Pro Tem.

No. 23569-6-III

SWEENEY, C.J. (dissenting)—I respectfully dissent from part "b. Jury Instructions" of the majority opinion for the following reasons:

(1) The trial judge here had broad discretion to give additional jury instructions even after deliberations had begun. *State v. Ng*, 110 Wn.2d 32, 42-43, 750 P.2d 632 (1988); *State v. Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990). And a trial court may instruct the jury on accomplice liability even if the State failed to charge that theory in the information. *State v. Davenport*, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984). This is because a defendant who is charged as a principal is on notice of accomplice liability. *State v. Teal*, 117 Wn. App. 831, 838, 73 P.3d 402 (2003), *aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004).

(2) There was ample evidence of accomplice liability.

(3) And more significantly both the State and Andre Becklin argued accomplice liability to the jury. 3 Report of Proceedings at 294-96, 299, 314-15, 320, 322-23, 331.

(4) The court's response to the jury's inquiry was both limited and a correct statement of the law of accomplice liability, RCW 9A.08.020. Mr. Becklin's argument here on appeal is primarily that the court's further instruction amounted to a comment on