

NO. 74055-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER DREEWES,

Appellant.

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

APPELLANT'S REPLY BRIEF

Marla L. Zink
Attorney for Appellant

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

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

 1. **Jennifer Dreewes did not know of the crimes committed and therefore could not be held accountable as an accomplice**..... 1

 2. **Michelle Thomas was unable to authenticate the business record containing Facebook data fields at Exhibit 52** 5

 3. **The State inaccurately characterizes the prosecutor’s closing argument in an attempt to avoid prosecutorial misconduct** 8

 4. **When a trial court imposes costs without making an individualized finding on the defendant’s ability to pay, this Court should strike the costs**..... 10

 5. **Because Ms. Dreewes lacks the ability to pay, no appellate costs should be imposed if the State substantially prevails** 12

B. CONCLUSION 14

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Allen, 182 Wn.2d 364, 341 P.3d 268 (2015) 2

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 11

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2001) 1

State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2001) 1, 3

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994) 10

State v. Stein, 144 Wn.2d 235, 27 P.3d 184 (2001)..... 2, 3, 4

Washington Court of Appeals Decisions

State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005)..... 10

State v. Fawler, No. 32271-8-III, 188 Wn. App. 1015 (2015) 5

State v. Grendahl, 110 Wn. App. 905, 43 P.3d 76 (2002)..... 2

State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016) 12

State v. Williams, 136 Wn. App. 486, 150 P.3d 111 (2007)..... 6

United States Supreme Court Decisions

Rosemond v. United States, __ U.S. __, 134 S. Ct. 1240,
188 L. Ed. 2d 248 (2014)..... 4

Decisions of Other Courts

Sublet v. Maryland, 113 A.3d 695, 715, 718 (Md. 2015)..... 7

Statutes

RCW 9A.08.020 1

Rules

ER 901 7

RAP 14.2.....	12
RAP 15.2.....	12
RAP 2.5.....	11

A. ARGUMENT IN REPLY

1. Jennifer Dreewes did not know of the crimes committed and therefore could not be held accountable as an accomplice.

The State's evidence was insufficient to show Jennifer Dreewes had actual knowledge of Michelle Thomas's burglary or assault on Marty Brewer-Slater. An accomplice can be held liable for the crimes of a principal only if the accomplice has actual knowledge of "the" crimes the principal committed. RCW 9A.08.020; *State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 713 (2001); *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2001). "[K]nowledge by the accomplice that the principal intends to commit 'a crime' does not impose strict liability for any and all offenses that follow." *Roberts*, 142 Wn.2d at 511; *accord id.* at 510-13. Rather, the statute "requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate the crime for which he or she is eventually charged." *Cronin*, 142 Wn.2d at 579 (emphasis added).

Ms. Dreewes cannot be convicted of burglary as an accomplice simply because she might have known Ms. Thomas would commit a different crime. Accomplice liability does not extend to acts or crimes that are merely foreseeable. *State v. Stein*, 144 Wn.2d 235, 246, 27

P.3d 184 (2001). “[T]he fact that a purported accomplice knows that the principal intends to commit ‘a crime’ does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal.” *Id.* at 579. Thus, a defendant cannot be convicted as an accomplice to a robbery if she has actual knowledge only of theft. *State v. Grendahl*, 110 Wn. App. 905, 911, 43 P.3d 76 (2002); *see State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

The State presented no evidence Ms. Dreewes actually knew Ms. Thomas would unlawfully enter into a building, a critical element of burglary. *See, e.g.*, CP 19 (to-convict instruction requires unlawful entering or remaining). In fact, Ms. Thomas told Ms. Dreewes that she had not entered the Brewer-Slater home when she first went there because no one answered the door and the doors and windows were locked. Exhibit 52, p.3813. Ms. Thomas reported she did not unlawfully enter the residence when no one let her in the first time. *Id.* Ms. Thomas provided no information that she would pursue the course of unlawful entry on return. *See id.*; Exhibit 52, pp. 3808-10. The evidence therefore does not show Ms. Dreewes knew that Ms. Thomas would unlawfully enter the residence.

The State makes the illogical claim that the jury could infer Ms. Dreewes expected Ms. Thomas would unlawfully, forcibly enter the residence because the two discussed “a manner that would not involve the police” and the number of people at the residence. Resp. Br. at 10. Neither of these facts is sufficient to show Ms. Thomas’s actual knowledge of burglary. The discussion of the lack of police involvement indicates, if anything, that Ms. Dreewes did not anticipate a forceful, or unlawful, entry.

Moreover, an “advice to go armed” does not support actual knowledge of the crime of burglary or unlawful entry or remaining. *See* Resp. Br. at 11. The State had to show Ms. Dreewes actual knowledge of the crime of burglary, not knowledge of any crime involving a firearm. *See, e.g., Roberts*, 142 Wn.2d at 511.

Accordingly, Jennifer Dreewes cannot be held liable for complicity in burglary—even if it was foreseeable or she had knowledge of a different crime—because she did not have knowledge of that crime. *See Stein*, 144 Wn.2d at 246.

The State also did not prove Ms. Dreewes actually knew of the assault of Marty Brewer-Slater. CP 73. The State presented evidence that Ms. Dreewes and Ms. Thomas discussed assaulting the suspected

thief. *E.g.*, Exhibit 52, p.3792-93, 3795, 3809. But, the State did not prove that Ms. Dreewes had knowledge of an assault on a different person—the homeowner or any other person.

Advance knowledge is critical to accomplice liability because it enables the accused to make the relevant legal and moral choice for which she may be ultimately held accountable. *Rosemond v. United States*, ___ U.S. ___, 134 S. Ct. 1240, 1249, 188 L. Ed. 2d 248 (2014). But, when an accomplice knows nothing of the intended crime, she lacks the ability to withdraw from it. *Id.*

Ms. Dreewes could not withdraw from complicity in the assault of Marty Brewer-Slater because she did not know in advance that Ms. Thomas planned to assault the property owner. *See Rosemond*, 134 S. Ct. at 1249; *Stein*, 144 Wn.2d at 246; *accord* RP 299 (Dreewes told Thomas the plan could not change from what was discussed in advance).

To be clear, Ms. Thomas did not assault Marty Brewer-Slater in a mistaken belief that she was the suspected thief. Likewise, Ms. Thomas did not assault Marty Brewer-Slater in the course of assaulting the suspected thief. In fact, the suspected thief was neither on nor near the property when Marty Brewer-Slater was assaulted.

The assault of Marty Brewer-Slater was an independent act of assault that Ms. Thomas pursued on her own, without notice to Ms. Dreewes. Ms. Dreewes, accordingly, cannot be held liable for the crime of assault Marty Brewer-Slater.

The burglary and assault convictions should be reversed and the charges dismissed because the State lacked sufficient evidence to find Ms. Dreewes guilty as an accomplice.

2. Michelle Thomas was unable to authenticate the business record containing Facebook data fields at Exhibit 52.

The trial court abused its discretion in admitting a 25-page printout of data fields—“recipients,” “author,” “sent,” “deleted” and “body”—with the header “Facebook Business Record” through the lay witness Michelle Thomas.

The State argues “Ms. Thomas was able to identify the Facebook page as belonging to the defendant.” Resp. Br. at 15. But Exhibit 52 is not a “Facebook page,” it is an extraction of data fields from a company with which Ms. Thomas has no affiliation.¹ Ms.

¹ The issue here is distinct from the issue before Division Three in *State v. Fowler*, No. 32271-8-III, 188 Wn. App. 1015 (2015), which the State cites pursuant to GR 14.1(a). Resp. Br. at 13 & n.1. In *Fowler*, the issue on appeal was ineffective assistance of counsel for failing to object to the admission of a single screenshot of a Facebook

Thomas might have been able to read the names listed on Exhibit 52 and confirm that they were in fact listed on the document, but she could not verify the authenticity of 25 pages of data fields. *See* Exhibit 52.

As the State recognizes, information relied on by the trial court in finding evidence authentic, must be reliable. Resp. Br. at 15 (citing *State v. Williams*, 136 Wn. App. 486, 500, 150 P.3d 111 (2007)). The State's reliance on Ms. Thomas to authenticate Facebook business records, however, was unreliable. Ms. Thomas testified pursuant to a plea deal and in exchange for a reduced sentence. Moreover, as Ms. Thomas testified, she was intoxicated or under the influence of controlled substances when much of the purported conversations occurred. RP 331, 334-35. At trial, she could not recall the conversations well enough to verify the substantive accuracy of the exhibit or to testify to their content from her own memory. RP 309-12. Instead, she read directly from the exhibit to the jury. *Id.* Ms. Thomas also was not familiar with the format or some of the content of the exhibit. RP 311-12.

page that was in the format Facebook users regularly see, accompanied by the defendant's name and picture, and corroborated by a third-party tip. 188 Wn. App. 1015, *1, 3. Moreover, unlike Fawler, Ms. Dreeses cites to cases discussing the relevant standard for admissibility of Facebook records. *Compare id. with* Op. Br. at 20-22 & *supra*.

The exhibit is also unreliable because it is incomplete. The 25 pages at Exhibit 52 include page numbers in the header next to “Facebook Business Record.” The page numbers, however, are not consecutive. The pages jump from 3811 to 3813, skipping page 3812, and from 3814 to 3818, without including 3815, 3816 or 3817, and again skipping 3819 before reaching page 3820.

The exhibit and Ms. Thomas’s testimony do not provide sufficient proof that a reasonable juror could find the 25 pages of data fields contain an authentic record of Ms. Dreewes’s private conversations. *See, e.g., Sublet v. Maryland*, 113 A.3d 695, 715, 718 (Md. 2015); ER 901.

Notably, the State does not argue the admission of Exhibit 52 was harmless. *Compare* Op. Br. at 24-25 (improper admission of “Facebook business record” requires reversal because it was “the cornerstone of the State’s case”) *with* Resp. Br. at 11-16 (declining to argue error was harmless). The lack of response is not surprising because the State relies extensively on the Facebook communications to claim the evidence was sufficient in the first section of its response brief. Resp. Br. at 10-11.

The erroneous admission of 25 pages of unverified Facebook data fields in lieu of Ms. Thomas's actual recollection of conversations with Ms. Dreewes requires reversal and remand for a new trial.

3. The State inaccurately characterizes the prosecutor's closing argument in an attempt to avoid prosecutorial misconduct.

The State blatantly mischaracterizes its prosecutor's closing argument in the response brief. The prosecutor did not "elect" evidence when he argued to the jury that the evidence showed Ms. Dreewes was guilty of multiple acts of assault, though she was charged with only one. *See* Resp. Br. at 16-20. Rather, the prosecutor argued, "The State would have charged the crime of assault in the second degree for everybody in that house. We could have added three more counts of assault in the second degree." RP 549. If the prosecutor intended to elect an act, he simply should have argued that the jury was only to consider evidence relating to Marty Brewer-Slater when considering the assault count. The prosecutor did not "clarify" the evidence with these remarks, as the State alleges on appeal, he muddied the water.²

² The State seeks to rely on "multiple acts cases" to prove its point. Resp. Br. at 18. But the State charged Ms. Dreewes with a

The State's incredible argument on appeal is further belied by the to-convict instruction, which left no need for election or clarification. The jury instruction for the assault count named Marty Brewer-Slater. CP 27. The jury could not convict Ms. Dreewes of count two for the assault of anyone else. There was no need for prosecutorial election, and the plain text of the argument makes clear the prosecutor was inflaming the jury.

Prosecutorial misconduct inferring that Ms. Dreewes was guilty of uncharged crimes denied her a fair trial. The prosecutor relied on this inflammatory argument, appealing to the jury's passion and prejudice at the end of closing argument. The prosecutor first sought compassion for the State and contempt for Ms. Dreewes by asserting "recall that we just charged the crime of assault in the second degree for Marty Brewer." RP 546 (emphasis added). He then told the jury "The State would have charged the crime of assault in the second degree for everybody in that house. We could have added three more counts of assault in the second degree." RP 546. He continued by asking rhetorically, "were other people assaulted in the house . . . ? Yes." RP 546.

single count of assault. Because this was not a multiple acts case, the reliance on such case law and reasoning is inapposite.

The argument encouraged the jury to find Ms. Dreewes guilty on improper bases: that Ms. Dreewes should be held accountable through a verdict in this case for all potential offenses, not just those charged by the State; that the State acted mercifully by charging a single count of assault; and that Ms. Dreewes is more culpable than alleged. Specifically, the State argued that Ms. Dreewes was guilty of not just one assault but four, even though the State did not charge those counts and they were not before the jury.

The explicit suggestion by the prosecutor could not be cured through a jury instruction. *State v. Boehning*, 127 Wn. App. 511, 518, 522, 111 P.3d 899 (2005) (unobjected argument referring to dismissed counts and the evidence supporting them required remand for a new trial) (citing *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). The prosecutor's appeal to the jury's passion and prejudice through wholly irrelevant but inflammatory argument was a bell that could not be unrung. The matter should be remanded for a new trial.

4. When a trial court imposes costs without making an individualized finding on the defendant's ability to pay, this Court should strike the costs.

As set forth in Ms. Dreewes's opening brief, if the convictions are affirmed, the Court should remand to strike the legal financial

obligations imposed without an individualized inquiry into the ability to pay. Op. Br. at 28-35. The issue is ripe for review because the trial court neglected its duty to make an individualized finding that, despite her indigency and lengthy incarceration, Ms. Dreewes had the ability to pay the imposed costs. See Resp. Br. at 21 (arguing issue not ripe for review until State seeks enforcement). Moreover, the constitutional implications of adopting the State's view were addressed in Ms. Dreewes's opening brief. Compare Op. Br. at 32-35 (discussing constitutional concerns with imposing costs without individualized ability to pay finding) with Resp. Br. at 22 (arguing constitutional issue not present). Furthermore, like our Supreme Court in *State v. Blazina*, this Court should review this important matter under its RAP 2.5 authority. 182 Wn.2d 827, 830, 834-35, 344 P.3d 680 (2015) (exercising RAP 2.5 discretion to reach merits of statutory obligation to make an individualized inquiry into ability to pay; "National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case."). The matter is appropriate for review in this Court at this time.

5. Because Ms. Dreewes lacks the ability to pay, no appellate costs should be imposed if the State substantially prevails.

Ms. Dreewes filed her opening brief before the amendments to RAP 14.2 were adopted. RAP 14.2 (amended effective Jan. 31, 2017).³ Accordingly, Ms. Dreewes asked this Court not to impose appellate costs if the State substantially prevails in this review. Op. Br. at 35-36 (citing *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016)).

Ms. Dreewes is entitled to a continuing presumption of indigency under RAP 15.2(f). The rule requires her to notify the Court of “any significant improvement [of her] financial condition” during review. RAP 15.2(f). Ms. Dreewes has been incarcerated since the determination of indigency. CP 1-3, 61 (sentenced to 90 months incarceration). There has been no improvement in her financial condition.

The State misrepresents documents from Ms. Dreewes’s divorce proceedings to claim improvement in her financial position. Resp. Br. at 23-24. The State claims the financial declarations from those proceedings show Ms. Dreewes has the ability to pay appellate costs.

³ The amendments authorize commissioners and clerks to deny cost bills unless the continuing presumption of indigency pursuant to RAP 15.2(f) has been overcome by evidence showing significant improvement in financial circumstances. RAP 14.2.

The financial declarations submitted by Ms. Dreewes and her estranged husband in their dissolution proceedings show both sides indicate their debts are more substantial than their assets. *See* Fin'l Decl. of Patrick Dreewes at 1 (total monthly expenses and debt payments vastly outweigh net monthly income), 4 (showing no liquid assets), 6 (showing debts owed); Decl. of J. Dreewes at 3 (attesting with supporting documentation that \$16,033.80 is owed on vehicle rather than \$20,396.00), 4 (asserting amounts owed are slightly less than husband claims).

The dispute is simply over how much the indebted property is worth or how much debt is owed on their accounts. *See* Decl. of J. Dreewes at 4-6 (asking court to order sale of property to cover portion of debts). In other words, the outstanding question is what percentage of their debt can be covered by the limited assets they have and for what portion of their debt is each party responsible. Neither party claims they have enough money or property to cover their debts; their debts outweigh their assets. The question is only as to degree.⁴

⁴ Generally, contested financial declarations would be a poor vehicle to overcome the presumption of continuing indigency. However, here the dispute is simply over how large the communal debt is and who owns what share of that debt. Thus, indigency is clear regardless of the precise apportionment of debt.

Contrary to the State's assertion, therefore, the fact that Ms. Dreewes may have an ownership interest in some property is not sufficient to overcome the presumption of indigency. Because, by any measure, the debts owed outweigh her share of the assets, Ms. Dreewes is not solvent. She was, is, and will remain indigent for the foreseeable future.

The supplemental documents submitted by the State do not stand for what it claims. The Court should deny an award of appellate costs, if the State substantially prevails.

B. CONCLUSION

Because the State failed to prove Jennifer Dreewes knew the principals would commit burglary and would assault Marty Brewer-Slater, the convictions should be reversed and the charges dismissed with prejudice. Alternatively, a new trial should be ordered because the lower court admitted unauthenticated Facebook messages and the prosecutor committed misconduct by telling the jury additional charges could have been filed.

If the convictions are affirmed, the Court should remand with instructions to strike the \$600 in LFOs.

DATED this 15th day of February, 2017.

Respectfully submitted,

s/ Marla L. Zink
Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant