

No. 95551-4

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 SUPPLEMENTAL BRIEF

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Supplemental Argument Explaining How *State v. Johnson*, No. 93453-3 and *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998) Demonstrate the State’s Evidence was Insufficient to Prove Jennifer Dreewes Was an Accomplice to the Assault of Marty Brewer-Slater

Our Supreme Court recently reaffirmed that the “law of the case” doctrine requires the State to prove elements included without objection in the to-convict instructions, even if the State would not otherwise be required to prove the element, *i.e.* it is “unnecessary.” *State v. Johnson*, No. 93453-3, Slip Op. at 12 (Jul. 17, 2017); *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998) (venue became an element State had to prove beyond a reasonable doubt because it was included without objection in to-convict instruction).

The “law of the case” doctrine “benefits the system by encouraging trial counsel to review all jury instructions to ensure their propriety before the instructions are given to the jury.” *Hickman*, 135 Wn.2d at 105. It also promotes finality and efficiency in the judicial process and encourages general notions of fairness. *Johnson*, Slip Op. at 15-16.

Whether the State’s evidence was sufficient to prove Jennifer Dreewes was an accomplice to Michelle Thomas’s assault of Marty Brewer-Slater, accordingly, requires resort to the to-convict instruction used at trial. *See Johnson*, Slip Op. at 13 (citing, *e.g.*, *Hickman*, 135 Wn.2d at 102; *Tonkovich v. Dep’t of Labor & Indus.*, 31 Wn.2d 220,225,

195 P.2d 638 (1948) (“[T]he parties are bound by the law laid down by the court in its instructions where . . . the charge is approved by counsel for each party, no objections or exceptions thereto having been made at any stage. In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions.”). Here, the State assumed the burden of proving Jennifer Dreewes was an accomplice to the assault of Marty Brewer-Slater. CP 27 (to-convict instruction “(1) That on or about the 23rd day of January, 2014, the defendant assaulted Marty-Brewer Slater with a deadly weapon;”); *Hickman*, 135 Wn.2d at 102.

Accomplice liability requires proof that the accused person had actual knowledge of the crime charged. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). The legislature proscribes criminal liability, and it has limited accomplice liability to actual knowledge of the crime. *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2001) (quoting RCW 9A.08.020); *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2001). Accomplice liability is not strict liability. *Roberts*, 142 Wn.2d at 511. Accomplice liability cannot depend upon what the accused person “should have known”; it cannot depend upon constructive knowledge. *Allen*, 182 Wn.2d at 374. Furthermore, an individual is not liable as an accomplice for any foreseeable act. *State v. Stein*, 144 Wn.2d 235, 246, 27 P.3d 184 (2001).

Here, the crime charged was assault of Marty Brewer-Slater with a deadly weapon. CP 27 (“(1) That on or about the 23rd day of January, 2014, the defendant assaulted Marty-Brewer Slater with a deadly weapon;”). Therefore, the State was required to prove beyond a reasonable doubt that Ms. Dreewes aided or agreed to aid Ms. Thomas in planning or committing the crime of assault of Marty Brewer-Slater, with the knowledge that it would promote or facilitate the commission of that crime—assault of Marty Brewer-Slater. Regardless of whether an accomplice generally must have actual knowledge of the victim, the inclusion of Marty Brewer-Slater in the to-convict instruction placed the burden on the State to prove Jennifer Dreewes had actual knowledge of the assault on Marty Brewer-Slater. *See Johnson*, Slip Op. at 2-3, 20.

The State did not prove beyond a reasonable doubt that Ms. Dreewes had knowledge of an assault on Marty Brewer-Slater. Ms. Dreewes at most authorized an assault on the suspected thief of her property. *See* RP 299 (Dreewes told Thomas the plan could not change from what was discussed in advance). She told Ms. Thomas that Ms. Dreewes had heard 4 to 5 people could be present at the home and “don’t go there unless packing.” Exhibit 52, p.3810. Nothing in that statement indicates knowledge that Ms. Thomas would perpetrate an assault on Marty Brewer-Slater, a resident of the home Ms. Thomas went to who was

unknown to both Ms. Thomas and Ms. Dreewes. The State had to show Ms. Dreewes actual knowledge of the crime of assault on Marty Brewer-Slater, not knowledge of any crime involving a firearm or of any crime involving 4 to 5 people; that would be forbidden strict liability.¹ *See, e.g., Roberts*, 142 Wn.2d at 511-12.

In addition to the cases discussed in appellant's prior briefing, *State v. Farnsworth* is instructive. 185 Wn.2d 768, 374 P.3d 1152 (2016). The evidence there showed Farnsworth and his partner specifically discussed committing a bank "robbery" and acknowledged the difference between theft and robbery, which involves a threatened use of force. *Id.* at 778. The State also proved Farnsworth knew that a bank teller would comply with any demand if they passed the teller a note containing a threat. *Id.* at 777. Farnsworth even wrote the demand note that was used in the robbery. *Id.* at 781. In fact, there was no deviation from the plan the two created except which one would play which role (entering the bank or driving the car). *Id.* at 780-81. Accordingly, there was sufficient evidence to convict Farnsworth as an accomplice to robbery because "the crime committed was a robbery and Farnsworth planned the crime exactly as it occurred." *Id.* at 780; *accord State v. Davis*, 39 Wn. App. 916, 920-

¹ The same argument applies to the burglary charged in count one; as set forth in the briefing and at oral argument, the State's evidence was insufficient to prove accomplice liability for that count as well.

21, 696 P.2d 627 (1985) (sufficient evidence of accomplice liability to robbery where witness testified the accused was aware of a plan to rob, the accused was present in the vehicle used in the robbery, and he tried to dispose of the proceeds after the robbery).

Unlike in *Farnsworth*, where the defendant had complete knowledge of the crime charged, the assault of Marty Brewer-Slater was an independent act of assault that Ms. Thomas pursued on her own, without notice to Ms. Dreewes. While Ms. Dreewes may have agreed to an assault on or “nabbing” of the suspected thief, Marty Brewer-Slater was not the suspected thief, was unknown to Ms. Dreewes and Ms. Dreewes’s conversations with Ms. Thomas never encompassed assault on, or any action against anyone other than the suspected thief. Ex. 52, p.3792-93, 3795, 3809. RP 299. The evidence was insufficient to sustain accomplice liability, as courts have held in several similar cases. *State v. Cordero*, 36 Wn.2d 846, 221 P.2d 472 (1950) (insufficient evidence the accused was an accomplice to negligent driving where he was a passenger in the vehicle at the time and knew the driver had been drinking because no evidence showed he knew the driver was driving in a reckless manner or was affected by the use of intoxicants an appreciable time before the accident happened); *State v. LaRue*, 74 Wn. App. 757, 762, 875 P.2d 701 (1994) (insufficient evidence the accused knew of the principal’s crime or desired

to facilitate it where evidence did not clearly point to knowledge of the crime); *State v. Luna*, 71 Wn. App. 755, 759-60, 862 P.2d 620 (1993) (insufficient evidence the accused accomplice knew before it happened that the principal would take a motor vehicle without permission although the accused transported the principal “to the point on the freeway where Mr. Brown committed the crime” because “there is no evidence, direct or circumstantial, to suggest that [the accused] knew that Mr. Brown was going to stop the stolen truck, or that Mr. Brown was going to take over driving it.”). Like in these cases and unlike in *Farnsworth*, Ms. Dreewes did not have actual knowledge of the substantive crime of assault of Marty Brewer-Slater. *See Roberts*, 142 Wn.2d at 512-13.

“[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.” *Cronin*, 142 Wn.2d at 579. The State did not prove Ms. Dreewes had actual knowledge of an assault on Marty Brewer-Slater. The assault conviction should be reversed and the charge dismissed because there was insufficient evidence Ms. Dreewes was an accomplice to that crime. *See Hickman*, 135 Wn.2d at 103 (retrial following reversal for insufficient evidence is ‘unequivocally prohibited’; dismissal required).

DATED this 9th day of August, 2017.

Respectfully submitted,

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STATE OF WASHINGTON,)	
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JENNIFER DREEWES,)	
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Appellant.)	

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF AUGUST, 2017, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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