

No. 95551-4

NO. 74055-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JENNIFER CATHRYN DREEWES,

Appellant.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## **I. SUPPLEMENTAL ISSUE**

Under the law of the case doctrine does the State have to prove the defendant knew a particular person named in the “to convict” instruction was assaulted when the defendant is charged as an accomplice to second degree assault?

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

The Court has requested supplemental briefing on the issue of whether the evidence was sufficient to convict the defendant of second degree assault as an accomplice in light of State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) and State v. Johnson, \_\_ P.3d \_\_ (2017).

## **III. ARGUMENT**

### **A. THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANT OF SECOND DEGREE ASSAULT AS AN ACCOMPLICE.**

Washington has adopted the law of the case doctrine under which jury instructions not objected to become the law of the case. Hickman, 135 Wn.2d at 101-102. Under this doctrine the State bears the burden to prove unnecessary elements that are included in a “to convict” instruction without objection. Id. at 105. The Court recently reaffirmed this position in Johnson \_\_ P.3d at 5-8.

A person is guilty as an accomplice to a crime if with knowledge that it will promote or facilitate the commission of the crime she solicits, encourages, or requests such other person to commit it or aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020(3)(a). To be an accomplice a person must have acted with knowledge that she was promoting or facilitating the crime for which she was charged. State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). An accomplice need not have knowledge of every element of the crime charged, as long as she has general knowledge of that specific crime. State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 717 (2000). Thus, an accomplice may be guilty of first degree robbery even though he did not know the principal was armed with a deadly weapon, as long as he had knowledge that he was assisting in committing a robbery. State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984). "As to the substantive crime, the law has long recognized that an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." Id. at 658. In the context of a second degree assault charge this Court applied the rule stating that a person charged as an accomplice must know generally that he was facilitating an assault of some

kind, and need not have known that the principle was going to use deadly force or that the principle was armed. Sarausad v. State, 109 Wn. App. 824, 39 P.3d 308 (2001).

Whether the law of the case doctrine determined the elements to be proved when the State proceeded under an accomplice theory of liability was addressed in State v. Teal, 152 Wn.2d 333, 96 P.3d 974 (2004). There the defendant relied on Hickman to argue that there was insufficient evidence to prove he committed first degree robbery as an accomplice, because the “to convict” instruction referred to the “defendant” and not the “defendant or an accomplice.” The Court rejected the argument because Hickman did not address the issue of accomplice liability, and accomplice liability is not an element of the crime. Id. at 337-339.

Like Hickman, the Court did not address accomplice liability in Johnson. Neither case overruled Davis, holding that an accomplice need not have knowledge of every element of the offense as long as he has general knowledge of the charged crime. The Court continues to adhere to that rule. Roberts, 142 Wn.2d at 513, In re Domingo, 155 Wn.2d 356,368, 119 P.3d 816 (2005).

Davis demonstrates that the law of the case doctrine applies only to the sufficiency of the evidence to prove the crime charged, and not to the sufficiency of the evidence to establish accomplice liability. In Davis the defendant was charged as an accomplice to first degree robbery. The “to convict” instruction necessarily included the element that the defendant was armed with a deadly weapon. Davis, 101 Wn.2d at 655; WPIC 37.02; former RCW 9A.56.200<sup>1</sup>. Nevertheless under Davis the evidence was sufficient to support the charge if the defendant knew his principal was committing a robbery, and the evidence showed the principal was armed with a deadly weapon. Davis, 101 Wn.2d at 659.

Here there was sufficient evidence to prove the defendant’s principal committed a second degree assault against Marty Brewer-Slater, 1 CP 27. The male participant pointed a gun at Ms. Brewer-Slater and tried to shoot her. 9/21/15 RP 132, 156. There was also sufficient evidence the defendant knew she was facilitating an assault on someone. The defendant recruited the co-participants to commit an assault, warned that there were numerous people at the house, and advised to go armed. 9/22/15 RP 299, 304, 313-314;

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<sup>1</sup> RCW 9.94A.200 was amended by Laws of Washington 2002 Ch. 85, §1 to include robbery within a financial institution.

Ex. 52 pages 3793, 3795, 3808-3810. A reasonable inference from this evidence is that the defendant knew someone would be assaulted with a firearm.

If the law of the case doctrine required an accomplice to know the names of each actual victim when a crime was committed, then no conviction would ever be sustained where an accomplice arranged to have a co-participant commit an assault not knowing who exactly would be present at a particular location. Under that theory a person causing another to place a bomb on a public conveyance could escape conviction for assaulting or murdering those passengers injured or killed in the ensuing explosion simply because he did not know the names of those persons who happened to be on the conveyance at the time of the explosion. This is contrary to the legislative intent behind the accomplice liability statute which is to impose liability for the general crime the accomplice has knowledge of. Roberts, 142 Wn.2d at 512, State v. Rice, 102 Wn.2d 120, 125, 683 P.2d 199 (1984).

The Court adhered to the law of the case doctrine because it encouraged trial counsel to review all jury instructions to ensure their propriety before they are given to the jury and allows a trial

court to timely correct potential errors. Hickman, 135 Wn.2d at 105, Johnson, \_\_ P.3d at 8. Since an accomplice need only know generally that she is facilitating an assault, finding the evidence was sufficient to support the second degree assault charge here, even if there was no evidence that defendant did not know the specific person assaulted, does not run afoul of that doctrine.

#### IV. CONCLUSION

For the foregoing reasons, and the reasons previously argued the State asks the court to affirm the defendant's conviction for second degree assault and first degree burglary.

Respectfully submitted on August 9, 2017.

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THE STATE OF WASHINGTON,

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The undersigned certifies that on the 9<sup>th</sup> day of August, 2017, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

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I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Washington Appellate Project; [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org); [maria@washapp.org](mailto:maria@washapp.org)

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 9<sup>th</sup> day of August, 2017, at the Snohomish County Office.



Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office

**SNOHOMISH COUNTY PROSECUTOR'S OFFICE**

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