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STATE OF WASHINGTON
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NO. 95551-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JENNIFER CATHRYN DREEWES,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. ISSUES

1. Does the law of the case doctrine alter this Court's longstanding rule on accomplice liability so that when an unnecessary element is included in a to convict instruction the State takes on the burden of proving the unnecessary element as to all participants in the crime, regardless of whether they acted as a principal or an accomplice?

2. Should certain pages of the State's response brief and the defendant's reply brief filed in the Court of Appeals be sealed?

II. STATEMENT OF THE CASE

The facts of the case have been adequately outlined by the Court of Appeals in State v. Dreewes, 2 Wn. App. 297, 409 P.3d 1170 (2018), the Brief of Respondent in the Court of Appeals, and the State's petition for review. The State relies on that authority and documents for the arguments presented.

III. ARGUMENT

A. THE LAW OF THE CASE DOCTRINE DOES NOT ALTER THE STATE'S BURDEN OF PROOF FOR ACCOMPLICE LIABILITY.

This Court recently reaffirmed that Washington adheres to the law of the case doctrine. State v. Johnson, 188 Wn.2d 742, 399 P.3d 507 (2017). Under that doctrine a "to convict" jury

instruction becomes the law of the case where the parties have not objected to it. In that circumstance, the State takes on the burden of proving even unnecessary elements included in that instruction. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

Here the Court instructed the jury that in order to convict the defendant of second degree assault it must find beyond a reasonable doubt "(1) That on or about the 23rd day of January, 2014, the defendant assaulted Marty-Brewer Slater with a deadly weapon; and (2) That this act occurred in the State of Washington." 1 CP 27. Assault was defined in instruction 16. 1 CP 28. The jury was also instructed that "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." 1 CP 29.

Second degree assault requires proof that the defendant assaulted another, although not necessarily a specific person. RCW 9A.36.021. The parties did not object to the "to convict" instruction including the named victim. 9/24 RP 523-27. Therefore the State took on the burden of proving that Marty-Brewer Slater

was assaulted with a deadly weapon by one of the participants in the crime. The Court of Appeals found that there was overwhelming evidence that the defendant was an accomplice to second degree assault with a deadly weapon of another. Dreewes, 2 Wn. App. at 324. However it went further, finding that the State also took on the burden of proving that the defendant, acting as an accomplice, knew that Marty-Brewer Slater would be assaulted. Because there was no evidence that the defendant knew Ms. Brewer-Slater would be assaulted, it found the evidence insufficient to support the charge. Id.

When the defendant is charged with a crime based on a theory of accomplice liability, the knowledge requirement is proved by evidence the defendant had general knowledge of his co-participant's substantive crime. It is unnecessary to prove the defendant had specific knowledge of the elements of the co-participant's crime to convict one as an accomplice. State v. Rice, 102 Wn.2d 120, 125, 683 P.2d 199 (1984). The phrase "the crime," therefore, refers the defendant's knowledge that she is promoting or facilitating the specific crime committed by the co-participant. State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000).

"The crime" does not relate to proof of facts that determines the degree of crime charged. To prove premeditated first degree murder predicated on an accomplice theory of liability, the evidence must establish that the defendant had general knowledge that she was aiding in the commission of the crime of murder. State v. Cronin, 142 Wn.2d 568, 581-82, 14 P.3 752 (2000). To prove an assault in the first or second degree the evidence need only show that the defendant generally knew that she was facilitating an assault, even if it were only a simple misdemeanor level assault. The State need not prove that the defendant knew the principal was going to use deadly force or that the principal was armed. Sarausad v. State, 109 Wn. App. 824, 836, 39 P.3d 308 (2001). Thus, because an accomplice need not have specific knowledge of every element of the principal's crime, an accomplice is guilty of an assault to the same degree as the principal even when the accomplice is not present at the time a principal commits an assault. State v. Sweet, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999).

In this case the State was required to prove Marty Brewer-Slater was assaulted with a deadly weapon and that the defendant knew that she was promoting or facilitating an assault. The

evidence demonstrated that Ms. Brewer-Slater was assaulted by Don Parrish. Ms. Thomas and Mr. Parrish went to the victim's home at the defendant's direction. 9/22 RP 288, 297. The defendant directed them to find the woman the defendant believed stole the defendant's property. The plan was to kidnap and beat the woman. However, the defendant also warned Thomas and Parrish that there were multiple people in the home, and not to go there unless armed. 9/22 RP 298-310, 313-14. This evidence established that the defendant knew that Thomas and Parrish were going to assault someone in the victim's home. Certainly the defendant expected her co-participants to assault the suspected thief. But in advising them there were others in the home, and to go armed, the defendant also knew that there was a strong likelihood that her co-participants would also be assaulting other people with those firearms in order to facilitate kidnapping the suspected thief.

The Court of Appeals interpreted of the law of accomplice liability through the lens of the law of the case doctrine. In doing so it increased the State's burden of proof when the defendant is charged as an accomplice and an unnecessary element was included in the "to convict" instruction without objection. The Court of Appeals did not address whether the State was also required to

prove the defendant knew that Parrish used a deadly weapon, a necessary element of second degree assault. Under the law of accomplice liability as articulated in Rice, Roberts, and Cronin, and Sarausad, the State would not have to prove that the defendant knew that particular element.

Although the State was not required to prove the defendant knew she was promoting or facilitating an assault, the Court of Appeals nonetheless required the State to prove the defendant knew she was acting as an accomplice to an assault on a specific named person. It makes no sense to impose that obligation on the State when it is not required to prove the defendant, acting as an accomplice, had knowledge of any required element of the general crime. As long as the State proved some participant in the crime committed each of the necessary and unnecessary elements of the crime included in the "to convict" instruction, both the law of the case doctrine and the law related to accomplice liability are satisfied.

The defendant argues that the decision of the lower court was a correct, straight-forward application of the law of the case doctrine, citing State v. Johnson, 188 Wn.2d 742, 399 P.3d 507 (2017). Answer to petition for review at 9. She asserts that

because the law of the case doctrine applied to require the State to prove Marty Brewer-Slater was assaulted, that it also required the State prove the defendant had actual knowledge of the assault on Ms. Brewer-Slater. Neither Johnson nor Hickman control the outcome of this case however, because neither case involved accomplice liability.

This court relied in part on that distinction to reject an argument that accomplice liability must be included in the “to convict” instruction in order to find the defendant guilty as an accomplice. State v. Teal, 152 Wn.2d 333, 338, 96 P.3d 974 (2004). There the evidence showed the defendant had acted as an accomplice to his brother who had committed a robbery. The defendant argued that since he was only an accomplice, and the “to convict” instruction only included principal liability, the evidence was insufficient to convict him, relying on Hickman. Id. at 336-37. This Court rejected the argument because the defendant’s case and Hickman dealt with two different kinds of liability, principal and accomplice. It reasoned that since accomplice liability is not an element of the charge, the presence or absence of accomplice liability in the “to convict” instruction did not alter the State’s burden of proof. Id. at 339.

Teal shows that the evidence was sufficient to convict the defendant of second degree assault in this case, even in the absence of evidence that the defendant specifically knew that Ms. Brewer-Slater was assaulted. If Hickman is not controlling authority for determining the parameters of the State's burden of proof in a case involving proof of accomplice liability, where the "to convict" instruction includes all of the necessary elements, it does not change the State's burden of proof in an accomplice liability case where the "to convict" instruction includes an unnecessary element. Hickman only is relevant to the extent that it requires some participant in the crime assaulted Ms. Brewer-Slater and the defendant acted as an accomplice to that assault.

This conclusion is also supported by State v. Walker, 182 Wn.2d 463, 341 P.3d 976 (2015). There the defendant challenged the sufficiency of the definitional and "to convict" instructions in a premeditated murder case. He argued that the instructions permitted the jury to convict him of premeditated murder even if the jury believed the principal had only committed intentional murder without premeditation. This Court rejected the argument because in an accomplice liability case proof of the elements of the crime may be split between accomplice and principal. Thus a conviction may

be affirmed if there is sufficient evidence to prove beyond a reasonable doubt that one participant had the requisite mental state and one of the participants, but not necessarily the same participant, committed the criminal act. Id. at 482-83.

Since the essential elements of the crime may be split between participants, there is no reason why an unnecessary element included in the "to convict" instruction should not be permitted to be split among the participants as well, as long as there is sufficient evidence to prove that unnecessary element beyond a reasonable doubt. Neither Hickman nor Johnson suggested that the law of the case doctrine required proof as to unnecessary elements as to all participants of the crime. Rather, the evidence must prove beyond a reasonable doubt the unnecessary element, without reference to who is responsible for that element.

The defendant also challenges the State's argument that the decision in the Court of Appeals effectively increased the State's burden of proof, arguing that the purpose of the law of the case doctrine is to do precisely that. Answer to petition for review at 9-10. The argument ignores the distinction between principal and accomplice liability. "Accomplice liability represents a legislative

decision that one who participates in a crime is guilty as a principal, regardless of the degree of participation.” State v Hoffman, 116 Wn.2d 51, 104, 804 P.2d 577 (1991). Thus an accomplice may be guilty even though he does not share the same mental state as the principal. State v. Guloy, 104 Wn.2d 412, 431, 705 P.2d 1182 (1985).

Since the accomplice's degree of participation in the crime is not relevant, except to the extent that the evidence proves that the accomplice knowingly promoted or facilitated the general crime charged, the decision of the lower court in fact did increase the State's burden of proof in an accomplice liability case. It required evidence of a greater degree of participation in the crime by an accomplice when it required the State to prove that the defendant acted knowing about the unnecessary element included in the “to convict” instruction. There is nothing in the accomplice liability statute, RCW 9A.08.020(3)(a), which suggests a legislative intent to carve out an exception to the general rule for accomplice liability when an unnecessary element is included in the “to convict” instruction.

Finally the defendant has noted that the accomplice liability does not impose strict liability based on what the defendant “should

have known.” She notes that an accomplice is not liable for any foreseeable act, citing Roberts, 142 Wn.2d at 511, State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015), and State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001). Each of these cases dealt with an issue different from the one before the Court here. They do not alter the conclusion that as an accomplice the evidence was sufficient to convict the defendant of second degree assault even if she did not specifically know the named victim was assaulted.

In Roberts, the Court considered a jury instruction that created the potential that the jury may convict an accomplice for participation in some crime other than the charged crime. In that case the accomplice liability instruction permitted conviction if the accomplice acted with knowledge of “a crime” rather than “the crime” charged. This Court reiterated

an accomplice need not have knowledge of each element of the principal's crime in order to be convicted under RCW 9A.08.020. General knowledge of “the crime” is sufficient. Nevertheless, knowledge by the accomplice that the principal intends to commit “a crime” does not impose strict liability for any and all offenses that follow. Such an interpretation is contrary to the statute's plain language, its legislative history, and supporting case law.

Roberts, 142 Wn.2d at 513.

In Allen the Court addressed a claim of prosecutor error in misstating the law of accomplice liability by characterizing the knowledge requirement as "should have known." The Court recognized the subtle distinction between proving knowledge through circumstantial evidence and what the accomplice "should have known." While knowledge may be proved through circumstantial evidence, it is incorrect to say that the defendant should have known his principal was going to commit murder. Instead "the jury must find that Allen actually knew Clemmons was going to murder the four police officers." Allen, 182 Wn.2d at 374-75. (court's emphasis).

In Stein this Court addressed the federal doctrine of co-conspirator liability which attributes the overt act of one partner in crime to all the members of the conspiracy, as articulated in Pinkerton v. United States, 328 U.S. 640, 65 S.Ct. 1180, 90 L.Ed. 1489 (1946). The trial court gave two instructions based on Pinkerton. Each instruction imposed liability for a co-conspirator's acts if the defendant, having participated in the conspiracy, could reasonably foresee those acts would be done in furtherance of the conspiracy. Stein, 144 Wn.2d at 243. This Court rejected the Pinkerton doctrine, finding it was inconsistent with the law of

accomplice liability. It allowed the jury to convict the defendant for the principal's act of attempted murder, without finding the defendant actually knew the principal was going to attempt murder, as opposed to committing some other crime. Id. at 244-46.

None of these cases alter the conclusion that the law of the case doctrine did not change the State's burden of proof when it proceeded on a theory of accomplice liability against the defendant. The State was still required to prove that Ms. Brewer-Slater was assaulted. It also required the State to prove the defendant acted with knowledge that she was aiding in the assault. Unlike Roberts, Allen, or Stein, there is no danger that the defendant could be convicted of second degree assault based on evidence she knew Parrish and Thomas were committing some other crime. The requirements of both the law of the case doctrine and the accomplice liability statute are satisfied when the evidence showed that a second degree assault was committed on Marty Brewer-Slater and the defendant knew she was aiding and abetting a second degree assault.

Even if the State were required to prove the defendant knowingly aided in the second degree assault of Ms. Brewer-Slater, the accomplice liability instruction stating the defendant must have

acted knowing she was promoting or facilitating “the crime” is ambiguous. It may have meant the crime of assault or the crime of assault against the named victim. Where a jury instruction is ambiguous, the remedy in Washington is to remand for a new trial when the ambiguity prejudices the defendant. State v. Irons, 101 Wn. App. 544, 4 P.3d 174 (2007). Since under the law of the case doctrine it is the State and not the defendant who is prejudiced by the ambiguity, any ambiguity should not result in dismissal unless the evidence is insufficient as to all interpretations of the instruction. While the evidence may be insufficient if the jury were required to find the defendant knowingly aided in the second degree assault of Ms. Brewer-Slater, as the Court of Appeals acknowledged it was more than sufficient to prove the defendant knowingly aided in a second degree assault. Under that circumstance, if the court finds that the law of the case doctrine required the State to also prove that the defendant knew Ms. Brewer-Slater was the victim of the second degree assault, the remedy should be to remand for new trial.

B. PORTIONS OF THE PARTIES BRIEFS SHOULD NOT BE SEALED.

The defendant argued that she should not be assessed appellate costs. The State responded to that argument by asserting that she was not constitutionally indigent. It pointed out testimony from trial and the defendant's assertions in a declaration filed in her dissolution proceeding regarding assets and income. The State also designated documents from the dissolution file. The State argued that the defendant was not constitutionally indigent, and therefore if the State prevailed on appeal she should be assessed costs.

The defendant sealed a portion of her reply brief addressing the State's cost bill argument. She then filed a motion to seal the pages of the State's response brief and her reply brief referencing the assets and income of her marital community. The Court of Appeals struck the clerk's papers from the dissolution file but denied the motion to seal portions of the briefs. The defendant subsequently got an order from the Superior Court sealing declarations from the defendant and her husband filed in the dissolution case. The defendant then renewed her motion to seal in

the Court of Appeals criminal case. The motion was denied. The Court denied the defendant's motion for reconsideration.

The defendant sought discretionary review of the order denying reconsideration. The State was directed to file the affidavits from the dissolution action under seal by the Supreme Court commissioner. The motion for discretionary review was then granted by the Court

"Justice in all cases shall be administered openly" Washington Constitution Art. 1, §10. This provision applies to all documents considered by a judge in making a decision in a court proceeding. State v. DeLauro, 163 Wn. App. 290, 258 P.3d 696 (2011). When a party makes a motion to seal a court record the Court begins with the presumption of openness. Hundtofte v. Encarnacion, 181 Wn.2d 1, 7, 330 P.3d 168 (2014). The presumption is not absolute, and may be limited to protect other interests. Seattle Times v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 616 (1982). The framework for analyzing a motion to seal a court record is set out in GR 15 and Ishkawa, 97 Wn.2d at 37-39. The Court must consider both before granting a motion to seal or redact a court record. State v. Waldon, 148 Wn. App. 952, 202 P.3d 325 (2009).

Both GR 15 and Ishikawa require the court to first identify the interest or right that gives rise to the need to seal the record. GR 15(2); Ishikawa, 97 Wn.2d at 37. If the motion is made to further any right or interest besides the right to a fair trial, a “serious and imminent threat to some other important interest” must be shown. Ishikawa, 97 Wn.2d at 37. If the court does determine that sealing is appropriate it must be no broader in application or duration than necessary to serve its purpose. Id. at 39.

The defendant claims that she has a compelling interest in sealing because her personal financial information and personal financial circumstances are exposed in the State’s response brief and section 5 of her reply brief. She disputes the State’s representations in the reply brief. Further, GR 31(e) requires redaction of personal identifiers. She also argues that once the documents upon which the representations in the briefs had been sealed in the dissolution action, GR 15(g) mandates the records remain sealed in the unrelated criminal appeal.

Although no court order has granted a motion to seal the defendant’s reply brief, it remains under seal. The State cannot speak to any information contained in section 5 of the reply brief. The information contained in the State’s response brief was

included before RAP 14.2 was amended to allow the State to supplement the record with evidence of the defendant's ability to pay appellate costs after a decision entered. It was also filed before the documents in her dissolution file were sealed. It was a proper response to the defendant's claim she should not be assessed costs on appeal.

Although the circumstances have changed since the State filed its response brief, the defendant's proffered reasons for filing do not justify sealing pages 22-24 of the State's response brief. The information on page 22 is based on the trial testimony. That proceeding remains open to the public. Page 24 contains only argument. It does not include personal financial information, which if exposed to the public could threaten the defendant or her ex-husband's financial security. Page 23 includes general references to claims of income and assets. It does not include any personal identifying information that must be redacted pursuant to GR 31(e). Had the State included those identifiers, they should be redacted, because it could expose the defendant to the threat of identity theft. However, the information cited in the State's brief does not expose the defendant to that threat. Nor do those statements threaten the defendant's interest in financial security simply because she

disputes them in a reply brief she chose to file under seal. The Court of Appeals did not err when it denied her motion to seal, because the defendant has not demonstrated a threat to some important interest.

Nor does GR 15(g) require the Court to seal portions of the State's brief referring to assertions from affidavit in the dissolution file that have subsequently been sealed by the Superior Court. The rule contemplates continuity of sealing in a single action. The criminal case is a different action.

Even if the defendant met her initial burden of showing a substantial interest is threatened by the facts listed in the State's response brief, the public's interest in an open court record outweighs the defendant's interest. The information at issue relates to the defendant's ability to pay expenses incurred in this appeal. If she was indigent and unable to contribute to those costs then the State would pay them. RCW 10.101.020. The public has an interest in the expenditure of public funds. State v. Parvin, 184 Wn.2d 741, 770, 364 P.3d 94 (2015). In turn, the public has an interest in knowing whether the defendant does have the ability to contribute to those costs.

Finally, the defendant's request is overbroad. It encompasses portions of the brief that discusses information obtained from trial testimony. Specific reference to income and assets could be redacted. The defendant's request for sealing is for an unlimited period of time. A sealing order may only enter for a specific period of time. Ishikawa, 97 Wn.2d at 39.

Because the defendant has not shown a serious threat to an important interest, the Court of Appeals decision to deny her motion to seal portions of the parties' briefs should be affirmed.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to reverse the Court of Appeals decision finding insufficient evidence to convict the defendant on second degree assault and reinstate that charge. The State asks the Court to affirm the Court of Appeals decision denying the motion to seal portions of the briefs.

Respectfully submitted on July 31, 2018.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Petitioner,

No. 95551-4

JENNIFER C. DREEWES,

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FILING AND E-SERVICE

Respondent.

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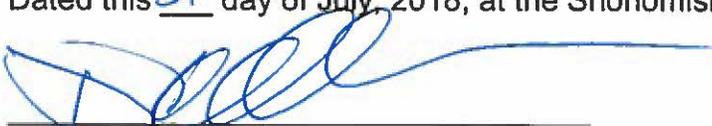
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SUPPLEMENTAL BRIEF OF PETITIONER

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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 31st day of July, 2018, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
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SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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