

No. 70214-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SANG T. NGUYEN,

Appellant.

FILED
SUPERIOR COURT
KING COUNTY
WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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Rule

RAP 2.5 6

A. ASSIGNMENT OF ERROR

Sang T. Nguyen was deprived of his Sixth and Fourteenth Amendment right to a jury finding of every fact necessary for a conviction beyond a reasonable doubt when the jury was not instructed that the State bore the burden of proving accomplice liability beyond a reasonable doubt.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Sixth Amendment and Fourteenth Amendment afford a criminal defendant the right to a jury finding of every fact necessary for a conviction beyond a reasonable doubt. The State bears the burden of proving accomplice liability beyond a reasonable doubt. Where the jury was not instructed on the State's burden for accomplice liability, were Mr. Nguyen's constitutional rights violated?

C. STATEMENT OF THE CASE

Seattle police officers used a confidential informant to arrange a purchase of cocaine from Sang T. Nguyen and his girlfriend, Kimberle Alojasin. The informant placed several calls to a cellular telephone that was answered by Mr. Nguyen and they agreed to meet at the informant's house. RP 261-62, 264, 268. Undercover officers waited near the informant's house and arrested Mr. Nguyen and Ms. Alojasin when they arrived at the scheduled time. RP 273, 307-08. A search of Mr. Nguyen

recovered two cell phones, one of which was determined to be the telephone called by the informant. RP 312-14. Mr. Nguyen stated that the telephone belonged to Ms. Alojasin. RP 327. Ms. Alojasin turned over two plastic bags of cocaine that she had secreted in her bra. RP 374, 376. Mr. Nguyen told police officers that Ms. Alojasin was holding the drugs for him. RP 414-15; Ex. 9.

Mr. Nguyen was charged with unlawful possession with intent to deliver cocaine. CP 50-51.¹ At trial, Ms. Alojasin² testified that she took one call from the informant but asked Mr. Nguyen to take the subsequent calls due to a language barrier and because she was driving her car. RP 448-49, 451, 455. She insisted that the drugs were hers only and did not belong to Mr. Nguyen, the deal with the informant was entirely “my drug deal,” and Mr. Nguyen did not have any part or interest in the transaction RP 453, 475.

Mr. Nguyen moved to dismiss the charge due to lack of evidence that he had “dominion and control” over the cocaine. RP 420-21. The State responded, “This is certainly an accomplice liability case.” RP 421. The motion to dismiss was denied. RP 425.

¹ He was also charged with attempted bail jumping, to which he pleaded guilty. CP 50-51, 52-63; RP 518-527.

² Ms. Alojasin pleaded guilty to unlawful possession with intent to deliver cocaine prior to Mr. Nguyen’s trial.

The jury was given the pattern instruction on reasonable doubt. CP 28. The jury was also given the pattern instruction defining accomplice liability, even though the “to convict” instruction did not refer to “the defendant or an accomplice.” CP 38. But no instruction informed the jury that the State was required to prove accomplice liability beyond a reasonable doubt.

Mr. Nguyen was convicted as charged. CP 21.

D. ARGUMENT

Mr. Nguyen was deprived of his Sixth and Fourteenth Amendment right to a jury finding of each fact necessary for a conviction determination beyond a reasonable doubt.

1. Jury instructions must clearly set forth the State’s burden of proof.

Instructions that reduce the State’s burden of proof violate the Due Process Clause of the Fourteenth Amendment. *State v. Bennett*, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007). When read as a whole, instructions must clearly inform the jury of the allocation of the burden of proof. *State v. Coe*, 101 Wn.2d 772, 787, 684 P.2d 668 (1984). “[T]he test is whether the jury is informed of the State’s burden in an understandable way.” *State v. Teal*, 117 Wn. App. 831, 839, 73 P.3d 402 (2003), *aff’d*, 152 Wn.2d 333, 96 P.3d 974 (2004) (citing *State v. Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988)).

In addition, the Sixth Amendment guarantees a criminal defendant the right to a trial by jury. *State v. Siers*, 174 Wn.2d 269, 273, 274 P.3d 358 (2012). This right includes the right to a jury determination of every fact necessary for a conviction. *In re Pers. Restraint of Beito*, 167 Wn.2d 497, 504-05, 220 P.3d 489 (2009).

The State must prove accomplice liability beyond a reasonable doubt. *State v. Cronin*, 142 Wn.2d 568, 579-82, 14 P.3d 752 (2000); *Teal*, 117 Wn. App. at 839. Therefore, the jury must be clearly instructed that the State bears the burden of proving accomplice liability beyond a reasonable doubt.

2. The jury was not instructed that the State bore the burden of proving accomplice liability beyond a reasonable doubt.

The jury was instructed, in relevant part, on the State's burden of proof:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

CP 28 (Instruction No. 3).

The jury was provided a “to convict” instruction that did not make any reference to accomplice liability:

To convict the defendant of the crime of possession with intent to deliver a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) that on or about April 11, 2012, the defendant possessed a controlled substance;
- (2) That the defendant possessed the substance with the intent to deliver a controlled substance; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return of verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 33 (Instruction No. 8).

The jury was provided an instruction that defined accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

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.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his

or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 38 (Instruction No. 13).

The “reasonable doubt” instruction and the “to convict” instruction clearly set forth the State’s burden as to the elements of the offense. In stark contrast, however, the accomplice liability instruction was completely silent as to the State’s burden of proof. And because accomplice liability was not incorporated into the “to convict” instruction, it was untethered from the State’s burden of proof as set forth in that instruction. Accordingly, the instructions improperly relieved the State of its burden as to accomplice liability and violated Mr. Nguyen’s right to a jury finding of every fact necessary for a conviction beyond a reasonable doubt.

3. The instructional error requires reversal.

Instructional error that relieves the State of its burden of proof is an issue of constitutional magnitude that may be raised for the first time on appeal. *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011); RAP 2.5(a). A challenge to jury instructions is reviewed *de novo*. *State v. Yates*, 161 Wn.2d 714, 749, 168 P.3d 359 (2007).

Instructions that relieve the State of its burden of proof are a structural error that is not subject to a harmless error analysis. “[W]here the instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury’s findings.” *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (emphasis in original); accord *State v. Smith*, 174 Wn. App. 359, 368, 298 P.3d 785 (2013) (defective reasonable doubt instruction is structural error, is presumed prejudicial, and is not subject to harmless error analysis). Here, because the instructions relieved the State of its burden of proving accomplice liability beyond a reasonable doubt, reversal is automatically required.

Even under a harmless error analysis, reversal is required. A constitutional error is presumed prejudicial unless the State can show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Instructional error on accomplice liability is not harmless beyond a reasonable doubt, unless uncontroverted evidence established the defendant acted as a principal. *State v. Williams-Walker*, 167 Wn.2d 889, 917-18, 225 P.3d 913 (2010); *State v. Brown*, 147 Wn.2d 330, 341-42, 58 P.3d 889 (2002). The State cannot meet that burden here. The State expressly relied on accomplice liability to demonstrate dominion and control and, in closing argument, the State argued that the

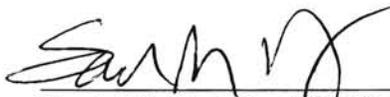
evidence supported a conviction of Mr. Nguyen as either a principal or as an accomplice to Ms. Alojasin. RP 421, 500-01. In light of the evidence that Mr. Nguyen never possessed the cocaine, and the State's reliance on accomplice liability to support a guilty verdict, the State cannot establish that failure to instruct the jury of its burden of proof regarding accomplice liability was harmless beyond a reasonable doubt.

E. CONCLUSION

The failure to instruct the jury on the State's burden of proof for accomplice liability violated Mr. Nguyen's constitutional right to trial by jury and to proof of every fact necessary for a conviction beyond a reasonable doubt. For the foregoing reasons, Mr. Nguyen respectfully requests this Court reverse his conviction for unlawful possession with intent to distribute cocaine.

DATED this 18th day of November 2013.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 70214-9-I
)	
SANG NGUYEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **OPENING 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF NOVEMBER, 2013.

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