

NO. 71159-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TAMAS HIBSZKI,

Appellant.

30
APPELLANT'S BRIEF
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COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. To show the defendant committed second degree burglary, the State had to prove that he unlawfully entered a building with intent to commit a crime therein. "Building" has an expansive definition, and includes any structure used for the use or deposit of goods. The State presented evidence that Hibscki boarded a vessel, which had had its engine removed and was permanently anchored, and stole metal. The vessel was used for moorage of barges containing goods. It also was enclosed, large enough to enter, and could easily accommodate a number of human beings. Did the State present sufficient evidence that the vessel was a "building" under the statutory definition of the term?

2. To obtain appellate relief from instructional error not objected to at trial, the defendant must show manifest constitutional error. Jury instructions, read as a whole, must accurately inform the jury of the law, not be misleading, and permit the defendant to argue his theory of the case. The trial court accurately instructed the jury on the essential elements of each of the charged crimes, the State's burden to prove the charges beyond a reasonable doubt, and accomplice liability. Hibscki did not object to the

instructions. Has Hibszi failed to show manifest constitutional error in the jury instructions?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Tamas Hibszi by amended information with second degree burglary, second degree theft, and second degree malicious mischief. CP 15-16. The trial court denied Hibszi's pretrial motions to suppress evidence and to sever his case from his codefendant, Justin Stoltman.¹ RP 145-49, 167-73, 198-02;² CP 17-28. The jury found Hibszi guilty of second degree burglary and second degree theft and found him not guilty of malicious mischief. RP 634; CP 94, 97, 99, 100.

¹ Stoltman appealed his convictions on different grounds from Hibszi, alleging error in the trial court's CrR 3.5 and 3.6 ruling and denial of the motion to dismiss due to pre-charging delay. State v. Stoltman, No. 71094-0-I. His appeal is currently pending in the Court of Appeals.

² The verbatim report of proceedings consists of five volumes, consecutively paginated. This brief refers to the record by page number only.

2. SUBSTANTIVE FACTS.

At about 2:30 a.m. on July 27, 2010, Washington Department of Fish and Wildlife Sergeant Erik Olson stopped Hibszi's boat in the Duwamish River for boating safety violations. RP 217, 224, 226-28. Hibszi did not have the required navigational lights or registration on his boat. RP 234. Stoltman was in the small, seven-foot boat with Hibszi. RP 228, 230. They told Olson's partner that they were out for a "pleasure cruise." RP 231. Olson immediately saw that Hibszi had a very large metal valve in the middle of his boat. RP 228-29. The valve weighed approximately 35-40 pounds. RP 229.

The night before, Olson had stopped Hibszi and Stoltman in the same boat at approximately the same time. RP 217, 224. On that occasion, Hibszi had a large amount of unusual cabling and bags with bolt and wire cutters. RP 219-20. Hibszi said he had taken the cabling off of abandoned pilings in order to recycle it. RP 221. Olson called the Port of Seattle Police to confiscate the cabling, as he believed from Hibszi's description it had been taken from Port property. RP 221. Port of Seattle police came and seized the cabling. RP 222. Olson also noted that Hibszi's boat did not have the required lights or registration. RP 219, 224.

He released Hibszi and warned him about the boating safety violations. RP 224.

The following night, Olson decided to question Hibszi and Stoltman separately about the large metal valve, which appeared out-of-place. RP 229-30. Stoltman told Olson that he did not know where the valve came from and that it was on the boat when they launched. RP 230. Hibszi claimed that the valve had been given to him by a friend. RP 231. Both consented to Olson searching their bags. RP 231. Stoltman's bag contained seven red, metal valve handles. RP 233, 241. He said he was going to give them to a friend who collects them, but had no answer as to where he had obtained them. RP 233. Hibszi's bag contained various copper and brass fittings. RP 233. From Olson's experience, he believed that the items had been taken from a larger vessel. RP 235. Olson seized the bags and their contents. RP 234.

Olson then searched for a larger vessel from which the valve and fittings could have been stolen. RP 235. Several hundred yards up the Duwamish River he found a very large, freighter-type vessel that had the same paint color as some of the items he had seized. RP 235. The vessel was welded to pilings, permanently affixing it in place. RP 236. The hatches were open, which

appeared unusual. RP 235. Olson boarded the freighter and climbed down into the below-deck area. RP 236-37.

Below deck, Olson and his partner found the engine room. RP 238, 241. The engine room had stems, which matched the red valve handles that Olson had seized. RP 241. Olson also found an area where the copper and brass fittings appeared to have been removed. RP 242. The remaining metal in the area was very shiny, indicating it had recently been cut. RP 242.

Olson dusted for fingerprints. RP 243. He was able to lift one palm print. RP 243. The palm print was later searched through the database and returned to David Roberts. RP 243.

Island Tug & Barge owned the vessel. RP 359. The company had removed the propulsion system from the vessel and used it for barge storage. RP 360. The vessel was permanently anchored in the Duwamish River by affixing it to "spuds." RP 360. "Spuds" are large pipes drilled down into the riverbed, which hold a vessel in a locked position. RP 361. This vessel was affixed with two "spuds" on the left or port side and one on the starboard or right side. RP 361.

Various barges moored to the vessel. RP 363. Using the vessel for barge moorage saved Island Tug & Barge on moorage

fees. RP 362. The barges carried various goods, such as sand, gravel, or compacted cars. RP 363.

The valve, valve handles, and metal fittings that Olson seized had been stolen from this vessel. RP 364-65. As a consequence, the vessel was damaged. RP 366, 386-87. Island Tug & Barge employees did not normally enter the vessel. RP 385. Rather, they stepped on the vessel in order to moor barges. RP 385. The company did not allow anyone to enter the vessel without a "shipyard comp."³ RP 385, 394-95.

David Roberts testified that he had stolen metal with Hibszi from the vessel on several occasions, including the night that they stole the large valve. RP 451-55. Roberts received immunity in exchange for his testimony. RP 449. He explained that he had had a drug habit and had engaged in "scrapping" to support his drug habit. "Scrapping" is when a person enters businesses, trucks, or other areas in order to steal copper, brass, or other metal and then sell it for money. RP 448.

³ A "shipyard comp" is when a marine chemist ensures that there is sufficient air in the confined spaces of a vessel for people to safely enter. RP 394-95. There was a danger of explosive gases or other chemicals on the vessel. RP 395.

Roberts explained that he knew Hibszi and that it had been Hibszi's idea to board the vessel and steal metal. RP 453. They had entered the vessel at night and boarded it by climbing over on ropes or using a ladder. RP 453. Hibszi and Roberts had worked together to remove the large brass valve, as it was heavy and difficult to remove. RP 455. Roberts testified that Hibszi, Stoltman, and he had each left the vessel with a duffle bag of "scrapped" metal. RP 455.

The trial court instructed the jury on the essential elements of second degree burglary, second degree theft, and second degree malicious mischief. CP 56, 70, 79. At defense counsel's request, the trial court also instructed the jury on the lesser-included crimes for each charge. CP 58-63, 72-75, 81-83. The trial court provided the standard reasonable doubt instruction. CP 43. The trial court instructed the jury on accomplice liability in a separate instruction from the to-convict instructions, and provided the cautionary instruction on accomplice testimony because Roberts testified as an accomplice against Hibszi and Stoltman. CP 48, 49.

C. ARGUMENT

1. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT THE VESSEL THAT HIBSZKI BURGLARIZED MET THE STATUTORY DEFINITION OF A BUILDING.

Hibszki asserts that the vessel he burglarized did not qualify as a “building” under the statute, and, therefore, there was not sufficient evidence to convict Hibszki of second degree burglary. This argument should be rejected because the immobile vessel qualified as a “building” under the ordinary meaning of the term and the statute.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court draws all reasonable inferences in favor of the State and interprets them “most strongly against the defendant.” Id.

In order to convict Hibszki of second degree burglary, the State had to prove beyond a reasonable doubt that he, *inter alia*,

unlawfully entered a building, other than a vehicle or a dwelling.

RCW 9A.52.030. RCW 9A.04.110 further defines "building":

"Building," in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods. . . .

RCW 9A.04.110(5).

Statutory construction is a question of law that is reviewed *de novo*. State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003).

First, the reviewing court first looks to the language of the statute.

State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009).

The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.

Id.

The court may look to the common law to define terms not defined by the statute. Id. The court may also look to a dictionary for the ordinary meaning of an undefined statutory term. State v. Johnson, 159 Wn. App. 766, 770, 247 P.3d 11 (2011). If a statute is subject to two or more reasonable interpretations, then the statute is ambiguous. Engel, 166 Wn.2d at 578. Interpretations

that produce absurd results should be avoided, as the legislature is presumed not to have intended an absurd result. Id.

“Building” has an expansive definition under the burglary statute. 13A Seth A. Fine & Douglas J. Ende, Washington Practice Criminal Law § 504, at 94 (2nd ed. 1988); accord State v. Tyson, 33 Wn. App. 859, 862-63, 658 P.2d 55 (1983) (““building” under the burglary in the second degree statute is broadly and uniquely defined. . .”). For example, the following qualify as “buildings” under the statute: a locomotive, Johnson, 159 Wn. App. at 770; a fully-enclosed “fenced area,” Engel, 166 Wn.2d at 580; a detached semi-trailer, Tyson, 33 Wn. App. at 863; and a separate storage unit in an apartment building, State v. Miller, 91 Wn. App. 869, 873, 960 P.2d 464 (1998).

An examination of Johnson is instructive. In Johnson, the defendant unlawfully entered a locomotive and stole copper. 159 Wn. App. at 769. He appealed his second degree burglary conviction, claiming that the locomotive did not meet the statutory definition of a “building.” Id. The Court of Appeals disagreed.

Id. at 772. Even if the locomotive was not a “railway car,”⁴ Johnson held that it was a “building” under the ordinary meaning of the term. Id. at 772. After examining prior cases, the court held that the ordinary meaning of the term “building” includes structures that are (1) enclosed, (2) large enough to enter, and (3) able to accommodate a human being. Id. Because the locomotive met these three factors, it was a “building” for purposes of the burglary statute. Id.

Similarly, the vessel that Hibszi burglarized qualified as a “building” under the ordinary meaning of the term. RCW 9A.04.110(5). As in Johnson, the vessel was fully enclosed, large enough to enter, and could accommodate a number of human beings. RP 235-37, 254, 287, 288, 312, 453-57.

The vessel was approximately 100 feet long and at least 50 feet tall. RP 312, 474. Witnesses estimated that it was far bigger than the courtroom in length and width. RP 312. To enter the vessel, Sergeant Olson had to climb to the top of his patrol boat and up onto the deck. RP 300. From the deck, the vessel could be

⁴ The statutory definition of “building” includes a “railway car.” RCW 9A.04.110(5). Johnson held that the locomotive was a “building” because it was a “railway car” and because it was within the ordinary meaning of the term. 195 Wn. App. at 772. Only the latter holding is relevant here.

entered through hatches to climb into the “bowels of the ship.” RP 237. The below-deck area had separate enclosed rooms, such as the engine room. RP 241. The valve and other stolen metal found in Hibszi's boat were taken from the engine room and other below deck areas. RP 247, 364-65, 367, 455.

While it was referred to as a vessel, it was immobile and a fixed structure. RP 360. Island Tug & Barge had removed its propulsion system and *permanently* anchored it with “spuds” in the Duwamish River. RP 360.

Under the ordinary meaning of the term “building,” as interpreted in Washington cases, the vessel was a “building.” It could be entered, it was enclosed, and it was certainly more than large enough to accommodate a human being. See Johnson, 159 Wn. App. at 772.

In addition, the vessel qualifies as a “building” under the statutory definition because it was employed for the use or deposit of goods. See RCW 9A.04.110(5). Island Tug & Barge used the vessel to moor other barges to it in the Seattle area. RP 361-62. The vessel often had at least one barge tied to it and the barges normally held goods, such as gravel. RP 237, 363. The barges themselves were goods, according to the ordinary understanding of

the term. “Goods” are defined as, “tangible or movable personal property other than money; esp., articles of trade or items of merchandise.” Black’s Law Dictionary (9th ed. 2009).

Hibszki asserts that the vessel cannot qualify as a “building” because the barges carrying goods were not always attached to it. Br. of App. at 10. This argument fails. The statute states very clearly that “a structure used for. . . the use, sale, or deposit of goods” is a “building.” RCW 9A.04.110. It does not say that the structure has to *currently* contain or be used for deposit of goods in order to qualify as a “building.” Id. The reviewing court must assume that the legislature meant exactly what it said. State v. Roggenkamp, 153 Wn.2d 614, 625, 106 P.3d 196 (2005).

Consider a grain silo; it remains a silo used for storing grain, regardless of whether it contains grain at a particular time. Here, the vessel remained one that was used for mooring barges, regardless whether a barge was attached at a particular time.

Hibszki next asserts that if the statute is ambiguous, then the legislature’s 1975 amendments to the statute show that the legislature did not intend for all boats or watercraft to automatically qualify as “buildings.” Br. of App. at 11. This argument should also be rejected. The statute is not ambiguous. Even if the court were

to find it ambiguous, then the legislative amendments must be examined in context.

The legislature amended the burglary statutes in 1975. Laws of 1975, 1st Ex. Sess., ch. 260; Wentz, 149 Wn.2d at 349. In doing so, the legislature removed “boat” and “watercraft” from the general statute defining a “building.” Compare Former RCW 9.01.010(18) (1909) with RCW 9A.04.110(5). The legislature then created the separate crime of vehicle prowl to encompass the crime of unlawful entry of a boat or vehicle. RCW 9A.52.100. These crimes had previously been included in the general burglary statute. Former RCW 9.19.020 (1909). The vehicle prowl statute provides that:

A person is guilty of vehicle prowl if he or she enters or remains unlawfully in a vessel *equipped for propulsion by mechanical means or by sail* which has a cabin equipped with permanently installed sleeping quarters or cooking facilities.

RCW 9A.52.095 (emphasis added).

Thus, the legislature intended to continue to criminalize burglary of vessels, but intended to do so under a different statutory scheme by creating a separate crime for vessels and vehicles.

Here, the vessel was not equipped for propulsion by mechanical means or by sail. Because it was permanently

anchored, its use was within the ordinary meaning and statutory definition of “building.” If the vessel was not a “building,” then Hibszi’s entry without permission under cover of night, to steal metal for “scrapping,” would not have been a crime. That would be an absurd result, and contrary to the legislature’s intent in criminalizing burglary.

In sum, Hibszi’s arguments should be rejected. Because the vessel was a “building,” there was sufficient evidence from which any rational trier of fact could have found Hibszi guilty. His conviction for second degree burglary should be affirmed.

2. THE TRIAL COURT’S INSTRUCTIONS TO THE JURY, READ AS A WHOLE, CORRECTLY STATED THE LAW ON ACCOMPLICE LIABILITY AND THE STATE’S BURDEN OF PROOF.

Hibszi argues that his convictions must be reversed because the jury instructions did not make clear the law of accomplice liability and the State’s burden to prove accomplice liability beyond a reasonable doubt. Hibszi is incorrect. Hibszi did not object or take exception to the accomplice liability or to-convict instructions. He fails to show any manifest constitutional error. The jury instructions, read as a whole, accurately stated the

law of accomplice liability and that the State bore the burden of proving each element of each crime beyond a reasonable doubt.

The appellate court reviews a challenge to jury instructions *de novo*. State v. Yates, 161 Wn.2d 714, 749, 168 P.3d 359 (2007). A defendant must generally make a “*timely and well-stated*” objection to a jury instruction given or refused by the trial court so that the trial court has the opportunity to correct any errors. State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) (emphasis in original); CrR 6.15(c). The appellate court may refuse to review any claim of error that was not raised in the trial court. RAP 2.5(a); State v. O’Hara, 169 Wn.2d 91, 97-98, 217 P.3d 756 (2009). This rule ensures efficient use of judicial resources and avoids needless appeals and retrials. O’Hara, 169 Wn.2d at 98.

As an exception to this rule, manifest constitutional errors may be challenged for the first time on appeal. Id. at 98. This exception is a narrow one. State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). It is not intended to afford defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below. Salas, 127 Wn.2d at 183.

In order to obtain appellate review of an unpreserved error, the defendant must demonstrate that (1) the error is manifest, and

(2) the error is truly of constitutional dimension. O'Hara, 167 Wn.2d at 98; RAP 2.5(a). The appellate court does not assume the alleged error is of constitutional magnitude.⁵ Id. Instead, the appellate court “look[s] to the asserted claim and assess[es] whether, if correct, it implicates a constitutional interest as compared to another form of trial error.” Id. If the appellate court determines that the error is of constitutional magnitude, then it must determine if the error was manifest. Id. at 99. An error is manifest only if the defendant shows actual prejudice. Id. This inquiry focuses on whether the error is so obvious on the record that it warrants appellate review.⁶ Id. The analysis does “preview the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

Hibszki did not object to any of the jury instructions below and cannot show that any alleged errors are manifest constitutional errors. RP 506, 518. He claims instructional error on two bases:

⁵ O'Hara cited the following examples of instructional errors that are not manifest constitutional errors: failure to instruct on a lesser included offense, and failure to define individual terms. 167 Wn.2d at 100-01 (internal citations omitted).

⁶ O'Hara listed the following as examples of manifest constitutional errors in jury instructions: directing a verdict, shifting the burden of proof to the defendant, failing to define the “beyond a reasonable doubt” standard, failing to require a unanimous verdict, and omitting an element of the crime charged. 167 Wn.2d at 100-01 (internal citations omitted).

(1) that the jury instructions did not make the applicable law of accomplice liability manifestly apparent, and (2) that the instructions did not make it clear that the State bore the burden to prove accomplice liability beyond a reasonable doubt. Hibszi claims these errors violated his due process rights under the Sixth and Fourteenth Amendments. His claims fail. The trial court correctly instructed the jury on the elements of each crime, the burden of proof, and accomplice liability. Any error in the instructions was not manifest constitutional error. As such, Hibszi is not entitled to review of these alleged errors. See O'Hara, 167 Wn.2d at 109.

Jury instructions, read as a whole, must correctly inform the jury of the law, not be misleading, and allow a defendant to present his theory of the case. O'Hara, 167 Wn.2d at 105. Constitutional due process is satisfied when the jury is instructed of each element of the crimes charged and that the State has the burden to prove each element beyond a reasonable doubt. Id.

Accomplice liability is not an element of the crime. State v. Teal, 152 Wn.2d 333, 338, 96 Wn.2d 333 (2004). Instead, it is a theory of liability. State v. Teal, 117 Wn. App. 831, 838, 73 P.3d 402 (2003). The State is not required to allege accomplice liability in the information. Id.; State v. Rodriguez, 78 Wn. App. 769,

773-74, 898 P.2d 871 (1995). However, the State must prove accomplice liability beyond a reasonable doubt. Teal, 117 Wn. App. at 839 (citing State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000)). Accomplice liability may be set out in an instruction separate from the to-convict or elements instruction. Teal, 152 Wn.2d at 338.

Teal is instructive and controls the result in this case. In Teal, the defendant was charged with first degree robbery with a firearm enhancement. 152 Wn.2d at 334-35. At trial, the State argued that Teal was guilty as an accomplice to the robbery. Teal, 117 Wn. App. at 840. Teal argued that he was aware only of the codefendant's plan of a drug deal, but had not knowingly participated in the robbery. Teal, 117 Wn. App. at 840. The to-convict instruction referred only to the defendant, and did not include accomplice liability. Id. at 835-36. Teal challenged the instructions, alleging that the State did not present sufficient evidence because the to-convict instruction did not reference accomplice liability. Id. at 837.

The Washington Supreme Court and Court of Appeals rejected Teal's argument, and held that accomplice liability does

not need to be included in the to-convict instruction.⁷ 152 Wn.2d at 339. The trial court's instructions to the jury included the following: the reasonable doubt instruction; the to-convict instruction, which included all of the essential elements of the crime; and the accomplice liability instruction, WPIC 10.51. 117 Wn. App. at 840. These instructions accurately instructed the jury on accomplice liability and the State's burden of proof. 152 Wn.2d at 340.

Here, the trial court's instructions to the jury accurately stated the law, informed the jury of the State's burden to prove the charges beyond a reasonable doubt, and included the essential elements of the crimes. CP 43, 48, 49, 56, 70. The instructions used were all based on the WPICs. Compare CP 43, 48, 49, 56, 70 with WPIC 4.01, 6.05, 10.51, 60.03, 70.06. These instructions are virtually the same as those held sufficient in Teal. 152 Wn.2d at 340; 117 Wn. App. at 839-40.

Hibszki did not object or take exception to any of the jury instructions. RP 506, 518. His counsel specifically agreed that the accomplice liability instruction was the standard instruction and did not object to it. RP 506; CP 48. This instruction has been

⁷ The Court of Appeals reversed because the accomplice liability instruction stated "a crime" instead of "the crime," contrary to State v. Cronin, 142 Wn.2d at 580. 117 Wn. App. at 842. That portion of the decision was not appealed and not part of the Washington Supreme Court's decision in Teal. 152 Wn.2d at 337.

approved of as an accurate statement of the law. State v. O'Neal, 126 Wn. App. 395, 418-19, 109 P.3d 429 (2005), affirmed, 159 Wn.2d 500, 150 P.3d 1121 (2007).

The instructions allowed Hibszi to argue his theory of the case. Hibszi's counsel argued that the vessel was not a "building" and that Hibszi had been given the valve and metal by Roberts to sell for him. RP 567-70, 578-80. He argued Hibszi was not an accomplice because his only participation had been after Roberts committed the crimes. RP 578.

As a whole, the jury instructions correctly stated the law, included all of the essential elements of the crimes, and informed the jury of the State's burden of proof. They also allowed Hibszi to argue his theory of the case. The instructions were also all based on the pattern instructions, which have had the benefit of reasoned adoption. See State v. Bennett, 161 Wn.2d 303, 308, 165 P.3d 1241 (2007).

Hibszki contends that the jury instructions did not accurately state the law on accomplice liability and were confusing. However, the instructions here have previously been approved by this Court and the Washington Supreme Court. Id. at 317-18 (approving WPIC 4.01 as the instruction that should be given in every case); Teal, 152 Wn.2d at 339; Teal, 117 Wn. App. at 840; O'Neal, 126 Wn. App. 395 at 418-19 (approving WPIC 10.51, the accomplice liability instruction).

The basis of Hibszki's argument appears to be that the order of the instructions was confusing. This was not the case. The jury was instructed that the order of the instructions had no significance and that they were to be considered as a whole. CP 39-42, WPIC 1.02. Jurors are presumed to follow all instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

The jury's question does not show that the jury was confused about accomplice liability. Instead, the jury asked a question of the court about whether one may be convicted of second degree burglary if he did not enter the building, but acted only as an accomplice. CP 131 (Stoltman). The trial court provided the correct and general answer to refer back to the instructions. CP 132 (Stoltman). The jury then returned verdicts of guilty for

Hibszki on second degree burglary and theft, but not guilty on second degree malicious mischief. CP 94, 97, 99-98. The jury was clearly able to understand the instructions, as a whole, given they resolved any questions and returned thoughtful verdicts.

Hibszki next alleges error in that the first and last paragraphs of the accomplice liability instruction were included. This was appropriate because accomplice liability was one of the theories of Hibszki's guilt, which all parties argued. RP 577-80, 608-10, 616-21; see WPIC 10.51. It was proper to include WPIC 6.05, the cautionary instruction for a testifying accomplice. State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984) ("It is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced."), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988); State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989); and State v. McKinsey, 116 Wn.2d 911, 810 P.2d 907 (1991).

Moreover, there was also no error in including the language in the accomplice liability instruction of when one may be legally accountable for another. Roberts was legally accountable for the conduct of another despite the fact that he received immunity from prosecution. The statute clearly states this is the law. RCW 9A.08.020(6); see also State v. Peterson, 54 Wn. App. 75, 81, 772 P.2d 513 (1989) (Defendant found guilty as an accomplice to crime, even though the principal, an informant, could not be prosecuted).

Hibszki's second claimed error is that the instructions did not make clear the State's burden to prove accomplice liability beyond a reasonable doubt. Br. of App. at 17. This claim also fails. The trial court instructed the jury on the State's burden to prove each element of the crime beyond a reasonable doubt. CP 43, 56, 70. The jury was instructed to read the instructions as a whole. CP 42. The instructions made the State's burden of proof clear to the jury, as in Teal. 117 Wn. App. at 840.

Because Hibszki has failed to show error or manifest constitutional error, his claims should be rejected. Hibszki's convictions should be affirmed.

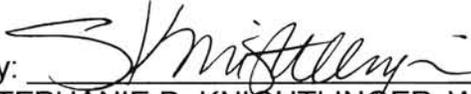
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks
this Court to affirm Hibszi's convictions.

DATED this 12th day of September, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sarah M. Hrobsky, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the NOTICE OF APPEARANCE, in STATE V. TAMAS HIBSZKI, Cause No. 71159-8 - I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 12th day of September, 2014

W Brame
Name
Done in Seattle, Washington