

SEP 03 2013

COA No. 31408-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD PERALES,

Appellant.

BRIEF OF APPELLANT

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A person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows is being sought by law enforcement officials for the commission of a crime, he harbors or conceals such person. There must be an affirmative act or affirmative statement by the accused which sheds light on the nature of the affirmative act or statements relating to the harbor or concealment of the person sought. (Assignment of Error A).....1

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I. ASSIGNMENT OF ERROR

A. The State's evidence was insufficient to support the conviction for first degree rendering criminal assistance.

Issues Pertaining to Assignment of Error

1. Did the court err by failing to give the following proposed instruction by the defense?

A person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows is being sought by law enforcement officials for the commission of a crime, he harbors or conceals such person. There must be an affirmative act or affirmative statement by the accused which sheds light on the nature of the affirmative act or statements relating to the harbor or concealment of the person sought. (CP 63). (Assignment of Error A).

2. Was the evidence insufficient to support the first degree rendering criminal assistance conviction when the State failed to show an affirmative act or statement by Mr. Perales that he "harbored or concealed" the person being sought for the commission of first degree murder? (Assignment of Error A).

II. STATEMENT OF THE CASE

Mr. Perales was charged by information with one count of first degree rendering criminal assistance:

On, about, during or between March 31, 2012, and April 19, 2012, in the State of Washington,

with intent to prevent, hinder or delay the apprehension or prosecution of Marcus Anthony Torres, a person whom you knew committed a crime or juvenile offense or was being sought by law enforcement officials for the commission of the crime or juvenile offense of First Degree Murder, a Class A felony, you harbored or concealed that person. (CP 5).

The case proceeded to jury trial.

Rose Cruz-Torres, the mother of Marcus Torres, lived in a home at 121 Arrowsmith Road outside Sunnyside, Washington, with her boyfriend, Richard Perales. (12/4/12 RP 418). Christian Capener was the owner of the property at 121 Arrowsmith Road. (*Id.* at 419). He rented basement rooms to Ms. Torres and Mr. Perales, Marcus Torres, and Isaac Cruz, another son of Ms. Torres. (*Id.* at 423-24). Mr. Capener did not own the adjoining orchard, which was adjacent to the home. (*Id.* at 423).

In March 2012, Detective Sam Perrault was investigating a homicide involving Manuel Coria. (12/4/12 RP 417). He had five different suspects, including Marcus Torres and Isaac Cruz. (*Id.* at 418). The detective could not find Mr. Torres, but heard he was living in hotels around the Sunnyside area and knew that his mother and brother were living at 121 Arrowsmith Road. (*Id.*).

Detective Robert Engquist had contact with Mr. Perales on April 19, 2012, and on several occasions before that day as well. (12/4/12 RP 431-32). The detective told Mr. Perales he was looking for Marcus Torres in connection with a homicide and could himself be arrested for harboring and concealing Mr. Torres. (*Id.* at 433-34). Deputy William Boyer contacted Mr. Perales on April 17, 2012, and told him he was looking for Mr. Torres for first degree murder. (*Id.* at 487).

Marcus Torres was arrested without incident on April 19, 2012. (12/5/12 RP 488-89, 492). Deputy Boyer received information that day Marcus Torres had been seen at 121 Arrowsmith Road a couple of hours before. (*Id.* at 489). The deputy as well as other law enforcement officers went to the address intending to arrest Mr. Torres. (*Id.*). He was some 200-300 yards east of 121 Arrowsmith Road in an unmarked vehicle. Rose Cruz Torres and Mr. Perales were moving about the property. (*Id.* at 489-90). Some twenty minutes into the planning phase of the police operation, Deputy Robert Tucker advised he had been seen by Mr. Perales. (*Id.* at 490).

At that point, Deputy Boyer instructed all units in the area to move in and contain the property. Driving to a location north and

west of the residence, he observed Deputy Tucker taking Mr. Perales into custody. (*Id.* at 491). Mr. Torres was also eventually apprehended at the front of the south side of the house when instructed to do so by other officers telling him to give himself up on a loud speaker system. (*Id.* at 492).

Mr. Torres had apparently been hiding out in a hole covered by an apple bin in the orchard some 30-40 yards from the 121 Arrowsmith Road home. (12/4/12 RP 436). Officers inspecting the empty hole saw a sleeping bag, a bag from McDonald's, some unopened beers, a partial pack of cigarettes, and a newspaper from April 18. (*Id.* at 465).

Deputy Engquist said Mr. Perales told him he had been running errands on April 18, 2013. (12/4/12 RP 437). He left the house about 8 p.m. and came back around 10:30 p.m. (*Id.*). Mr. Perales returned with some hamburgers from Burger Ranch, a six-pack of 16-ounce Millers, and a six-pack of 16-ounce Busch Light beer. (*Id.*). When he walked into the house, he saw Marcus Torres there with his girlfriend. (*Id.*). Mr. Perales offered some beers and chatted with him upstairs. (*Id.* at 438).

The detective asked Mr. Perales how long he had been aware that Mr. Torres had been hiding in a hole in the orchard with

an apple bin covering it. (12/4/12 RP 438). He told Detective Engquist he was not aware of it. (*Id.*).

The court dismissed an alternative for the charge that Mr. Perales knew Mr. Torres committed a crime. (12/5/12 RP 498). The court also narrowed the time frame for the charge to April 18 and 19, 2012. (*Id.*). Mr. Perales was not allowed to argue in closing that he was required to do some affirmative act in order to be convicted. (*Id.* at 505). It had declined to give a defense proposed instruction which stated in relevant part:

. . . There must be an affirmative act or affirmative statement by the accused which sheds light on the nature of the affirmative act or statement relating to the harbor or concealment of the person sought. (CP 63).

Mr. Perales excepted to the failure to give this instruction. (12/5/12 RP 503).

The jury convicted him as charged. (CP 83, 95). This appeal follows.

III. ARGUMENT

A. The State's evidence was insufficient to support the conviction for first degree rendering criminal assistance because it failed to show an affirmative act or statement by Mr. Perales that he

an apple bin covering it. (12/4/12 RP 438). He told Detective Engquist he was not aware of it. (*Id.*)

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. . . There must be an affirmative act or affirmative statement by the accused which sheds light on the nature of the affirmative act or statement relating to the harbor or concealment of the person sought. (CP 63).

Mr. Perales excepted to the failure to give this instruction. (12/5/12 RP 503).

The jury convicted him as charged. (CP 83, 95). This appeal follows.

III. ARGUMENT

A. The State's evidence was insufficient to support the conviction for first degree rendering criminal assistance because it failed to show an affirmative act or statement by Mr. Perales that he

“harbored or concealed” Marcus Torres, who was being sought for the commission of first degree murder.

In a challenge to the sufficiency of the evidence supporting a conviction, the issue is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). To determine whether the State has produced sufficient evidence to prove each element of the offense, the court must begin by interpreting the underlying criminal statute, *i.e.*, RCW 9A.76.070. *State v. Budik*, 173 Wn.2d 727, 272 P.3d 816 (2012).

Mr. Perales was convicted of first degree rendering criminal assistance under RCW 9A.76.070. A person violates this statute when he renders criminal assistance to another person who has committed or is being sought for first degree murder. *Id.* The term “renders criminal assistance” is defined by RCW 9A.76.050, which provides that a person “renders criminal assistance” if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows is being sought by law enforcement officials for the commission of a crime, he (1) harbors or conceals such person; or (2) warns such person of impending discovery or

apprehension; or (3) provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or (4) prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or (5) conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person; or (6) provides such person with a weapon. The court's instruction 6 stated the pertinent parts of RCW 9A.76.050 and further provided "[h]arbor means to give shelter or refuge to somebody" and "[c]onceal means to place out of sight." (CP 73).

Although the *Budik* court was concerned only with the fourth action; *i.e.*, preventing or obstructing by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of a sought person; it nonetheless stated that "the five other means of rendering criminal assistance require some affirmative act or statement, be it harboring or concealing the person sought, RCW 9A.76.050(1); warning the person sought of pending discovery, RCW 9A.76.050(2); providing a person sought money, a disguise, transportation, or other means of awarding discovery, RCW 9A.76.050(3); concealing, altering, or

destroying physical evidence that would aid in discovery, RCW 9A.76.050(5); or providing the person sought with a weapon, RCW 9A.76.050(6).” 173 Wn.2d at 735-36. From this premise, the *Budik* court inferred the legislature similarly intended to require an affirmative act or statement in order to violate RCW 9A.76.050(4). *Id.* at 736.

After the defense moved to dismiss based on the State's failure of proof to show any affirmative act or statement by Mr. Perales, the court denied the motion because it opined that *Budik* applied only to the fourth prong of the rendering criminal assistance statute, not the “harbor or conceal” prong. (12/5/12 RP 499). But the court was incorrect as *Budik* clearly states that the court reached the result it did because the five other means required an affirmative act or statement and the inference was that the requirement also applied to the fourth prong. And “harbor or conceal” is one of those five other means. 173 Wn.2d at 735-36. Thus, the court also erred by failing to give the defense's proposed instruction requiring such an affirmative act or statement. *Id.*

The State produced no evidence of such an affirmative act or statement by Mr. Perales indicating an effort to harbor or conceal Marcus Torres. *Budik*, 173 Wn.2d at 737-38. The mere failure of

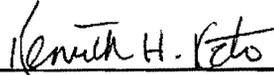
Mr. Perales to say anything to law enforcement is thus insufficient to support the conviction for first degree rendering criminal assistance beyond a reasonable doubt. *Id.* at 740; *Green*, 94 Wn.2d at 220-21. The conviction must be reversed and the charge dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Perales respectfully urges this Court to reverse his conviction of first degree rendering criminal assistance and dismiss the charge.

DATED this 3rd day of October, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on October 3, 2013, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Richard Perales, # 749004, Olympic Corrections Center, 11235 Hoh Mainline, Forks, WA 98331; and by email, as agreed by counsel, on David B. Trefry at TrefryLaw@WeGoWireless.com.

