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Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 69785-0

Title of Case: State of Washington V. Jacob Patrick Brown

v.

State of Washington V. Marshall C. Harris

File Date: 09/19/2002

Oral Argument Date: 06/12/2001

SOURCE OF APPEAL

Appeal from Superior Court,

King County;

96-1-07232-6

Honorable Stephen G. Scott, Judge.

JUSTICES

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Concurring: Charles W. Johnson

Barbara A. Madsen

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Tom Chambers

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)

Respondent,) v.)

No. 69785-0

_____)

JACOB PATRICK BROWN,)

Petitioner.)

-----) STATE OF WASHINGTON,

_____)

Respondent,)

v.)

_____)

MARSHALL C. HARRIS,)

Petitioner.) Consolidated

_____) with

STATE OF WASHINGTON,)

Respondent,) No. 69787-6

v.)

_____)

LINNIELL PHIPPS, JR.,)

Petitioner.)

-----)

STATE OF WASHINGTON,)

Respondent,) En Banc

_____)

v.)

_____) Filed September 19, 2002

LINNIELL PHIPPS, JR.,)

Defendant,)

and)

)

LECHAUN DWAYN BAKER,)

and each of them,)

Petitioner.)

)

IRELAND, J. -- This case determines whether an erroneous accomplice liability jury instruction is subject to harmless error analysis, and if so, whether the instruction was harmless in these consolidated appeals. We hold that an erroneous jury instruction may be subject to harmless error analysis if the error does not relieve the State of its burden to prove each element of the crime charged. An erroneous instruction is harmless if, from the record in a given case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. The analysis must be completed as to each defendant and each count charged. The Court of Appeals' decision is affirmed in part and reversed in part.

FACTS

State v. Brown; State v. Harris

Jacob Brown's convictions were based on seven counts committed against Lewis Brown, Thomas Boyd, and Jelani and Jerel Tackett, in three separate incidents. Codefendant Marshall Harris was convicted as a result of his participation in the Lewis Brown incident.

Lewis Brown

Porsche Washington and Lewis Brown (Lewis) were involved in an intimate relationship. On September 30, 1996, Porsche called Lewis and arranged to meet him at a Seattle motel. Lewis arrived at about 2 a.m. the following morning, and he complied with Porsche's request that he take off his clothes. Then three men, who Lewis later identified as Jacob Brown (not related to Lewis), Marshall Harris, and Tesino Barber, suddenly came out of the bathroom. Brown was armed with a revolver.

Brown hit Lewis in the chest with his fist, and Barber struck him in the face with a gun that he took from Lewis's coat. Brown and Barber also took Lewis's watch, rings, cell phone, cash, and other personal belongings. Lewis testified that Washington hit him in the face and applied a substance to his anus before Barber forced a dildo into Lewis's anus and mouth and burned Lewis's arm with a hot iron.

Harris signed the motel registration card. Lewis testified that Harris blocked the door to the motel room during the incident and that Harris threatened to beat Lewis.

After Lewis got dressed, Barber took him from the motel room at gunpoint. Barber drove Lewis's car to the Rainier Valley, told the victim to get out, and then drove away. Lewis sought help at a convenience store. He was taken to a hospital and treated for lacerations and burns. When police found Lewis's car several days later, the stereo and speakers had been removed. Lewis was able to identify Brown, Harris, and Barber in police photo montages.

Thomas Boyd

In the early morning of October 6, 1996, police responded to reports of gunshots near a residence in Auburn. They discovered the body of Thomas Boyd lying just inside the front door of his home.

When Porsche Washington was arrested on another matter two weeks later, she made a statement to police about Boyd's shooting. As a result, an arrest warrant was issued for Jacob Brown. Brown gave conflicting accounts of Boyd's death, but both Washington and Brown admitted being at or near the residence when Boyd was shot.

In his third statement to police, Brown said that he and Washington had gone to Boyd's house to steal money from him. Brown described how he and Washington worked together. She would pose as a prostitute; he would feign hysteria and demand money for drugs. Victims usually paid Brown in order to get rid of him, but Boyd fought with Brown. Brown stated that while the men were struggling, Washington shot Boyd.

Jelani and Jerel Tackett

The final incident began in the late evening of October 14, 1996, when Porsche Washington and Ramona Rigney went for a ride with Jelani Tackett and his brother, Jerel. The women asked Jelani to drive them to an apartment and then to a nearby convenience store in Seattle. At the store, Ramona got out. Jacob Brown and Tesino Barber approached the car, and Washington introduced Brown as her brother. At Washington's request, Jelani agreed to take Brown and Washington to their mother's house.

Washington, Brown, and Barber rode in Jelani's car, and Brown directed

Jelani to pull to the curb in a residential area. Barber got into the front seat beside Jelani; Washington and Brown conferred behind the parked car.

Brown suddenly appeared at the driver's side window and pointed a gun at Jelani's head. At the same time, Barber demanded his money and jewelry. While Jelani wrestled with Barber, Jerel got out of the car. Brown then grabbed Jerel, put the gun to Jerel's head, and ordered Jelani to get out of the car. Washington and Barber fled.

Brown threatened Jerel and Jelani and told them to walk away. When Jelani pursued Brown and demanded the return of his car keys, Brown ran and fired several shots.

The cases against Brown and Harris were consolidated for trial. On July 31, 1997, a jury found Brown guilty of first degree murder, two counts of first degree robbery, first degree rape, and three counts of first degree assault, with a firearm enhancement rendered on each count. Harris was convicted, in the same court, of first degree robbery, first degree rape, and first degree assault, with a firearm enhancement for each count.

State v. Phipps and Baker

Charges against Linnell Phipps and Lechaun Baker stemmed from a series of events that occurred in the early morning of March 11, 1997.

Curtis Rodgers was visiting two men who lived in a Federal Way motel room. While Rodgers and another man were in the bathroom discussing a drug deal, two men came in through the front door of the room. One of them wore a mask and held a pistol.

The gunman told the occupants of the motel room to lie down on the floor and ordered both men out of the bathroom. The man who accompanied the gunman demanded the keys to a truck that belonged to Alice Manchester, a woman present in the room. The two men left with Rodgers at gunpoint and drove away in the truck.

After going a short distance, the gunman removed his mask and got out of the truck with Rodgers. The other man remained in the driver's seat. The gunman shot Rodgers twice in the abdomen, and the victim fell to the ground. When the driver urged the gunman to hurry up, the gunman fired a shot that grazed the victim's scalp. The two men then left.

Rodgers survived after emergency medical treatment and surgery. He was able to identify the gunman as Linnell Phipps and the driver who accompanied him as Phipps' half-brother, Lechaun Baker. Others who had been present in the motel room also identified Phipps and Baker.

On March 23, 1997, Phipps and Baker were stopped and arrested in Phipps' car. When police searched the car, they found the gun used to shoot Rodgers.

On July 14, 1997, a jury found Phipps and Baker guilty of attempted murder in the first degree, first degree robbery, first degree kidnapping, and first degree burglary, with a firearm sentence enhancement for each count.

PROCEDURAL HISTORY

Brown and Harris appealed their convictions and sentences on numerous procedural and evidentiary grounds. The Court of Appeals affirmed the trial court decision in part, reversed in part, and remanded for further

proceedings. The court held that there was insufficient evidence to convict Brown of first degree assault against Jerel Tackett. Accordingly, that conviction was reversed and dismissed. The court also reversed and remanded for new trial Brown's felony murder conviction because there was insufficient evidence to support one of the alternative predicate crimes. Because the State failed to elect the predicate crime or request a unanimity instruction, the defendant's right to a unanimous jury verdict was violated. In addition, the firearms enhancements against Brown and Harris were reversed and remanded to the trial court for resentencing. *State v. Brown*, 100 Wn. App. 104, 106, 995 P.2d 1278 (2000). The State has not cross-appealed any of the decisions of the Court of Appeals.

Phipps and Baker also appealed their convictions and sentences on several grounds. The Court of Appeals affirmed the judgments of conviction and remanded their cases for resentencing. *State v. Phipps*, Nos. 41367-8-I, 42892-6-I, slip op. at 10 (Wash. Ct. App. Apr. 10, 2000).

On appeal, Brown, Harris, and Baker contested the accomplice liability jury instruction given at their trials. The Court of Appeals held "that the trial court's accomplice liability instruction, if erroneous, was harmless error" as to Brown and Harris. *Brown*, 100 Wn. App. at 106. With regard to Baker's contention that the instruction given was erroneous, the Court of Appeals stated that "{b}ecause the language of the accomplice liability instruction here did not present an issue at trial, any alleged error was harmless." *Phipps*, slip op. at 4.

Brown, Harris, Phipps, and Baker each filed a petition for review in this

Court. Review of Phipps' petition was denied, and consideration of the remaining petitions was deferred pending final determination in *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000) and *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000).

The petitions of Brown, Harris, and Baker were then granted review and consolidated.

ISSUE

Review is limited to the sole issue of "whether an erroneous accomplice liability instruction is subject to harmless error analysis, and if so, whether the instruction was harmless in these cases." Order at 2, *State v. Brown, Harris, and Baker*, No. 69785-0 (Wash. Sup. Ct. Apr. 10, 2001).

ANALYSIS

In the cases before us, the trial court presented WPIC 10.51 to instruct the juries on accomplice liability. The pattern instruction states:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a 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 a 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.

Clerk's Papers (CP) at 106 (Brown), 144 (Harris), 86 (Baker); 11 Washington Pattern Jury Instructions: Criminal 10.51, at 157 (2d ed. 1994)(WPIC).

In contrast, the accomplice liability statute provides in relevant part:

(3) A person is an accomplice of another person in the commission of the crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it{.}

RCW 9A.08.020(3)(a).

The trial court instructed the juries that an accomplice must have knowledge that his or her actions will promote or facilitate the commission of "a" crime rather than conforming to the statutory language of "the" crime. Brown, Harris, and Baker (Defendants) contend that by using the term "a crime" instead of "the crime," the court instructed the juries that the Defendants were guilty as accomplices if they knew their actions would promote or facilitate the commission of any crime, and not only the crime charged. It is a misstatement of the law to instruct a jury that a person is an accomplice if he or she acts with knowledge that his or her actions will promote any crime. The Roberts and Cronin courts have held that for accomplice liability to attach, a defendant must not merely aid in any crime, but must knowingly aid in the commission of the specific crime charged. Roberts, 142 Wn.2d at 509-13; Cronin, 142 Wn.2d at 578-80. It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt.¹ Defendants argue that the erroneous accomplice liability instruction permitted the State to obtain guilty verdicts against them without proving every element of the charged offenses beyond a reasonable doubt. They contend that this error is not subject to harmless error analysis, but instead automatically requires reversal of their convictions. We disagree.

Under Roberts and Cronin, the accomplice liability instruction given in the instant cases was held to be erroneous. In addition, the Roberts and Cronin courts found the defective instruction was not harmless as to the defendants' aggravated first degree murder convictions because it relieved the State of proving every element of the crime charged. An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.²

However, not every omission or misstatement in a jury instruction relieves the State of its burden. In that instance, recent decisions of this court have incorporated harmless error analyses. For example, in its discussion of the same accomplice liability instruction that is at issue in the cases before us, the Cronin court observed "that the State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld." Cronin, 142 Wn.2d at 580. It then noted, "that a conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden." Id. The court went on to determine "whether the instructional error in these cases can be labeled harmless." Id. (emphasis added). The Cronin court answered its question by concluding as follows: "{W}e hold that the trial court's jury instruction regarding accomplice liability in both State v. Bui, 142 Wn.2d 568, 14 P.3d 752 (2000) and State v. Cronin was legally deficient. We also hold that the instructional error was not harmless in either case." Id. at 586.

In State v. Stein, the jury was instructed under the alternative theories of conspiracy and accomplice liability. 144 Wn.2d 236, 241, 27

P.3d 184 (2001). In its determination that the trial court's conspiracy instructions were erroneous, the Stein court also undertook a harmless error analysis: "Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless." *Id.* at 246 (emphasis added).

The United States Supreme Court has held that an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis:

Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). We find no compelling reason why this Court should not follow the United States Supreme Court's holding in *Neder*.

As evidenced by *Roberts* and *Cronin*, even in cases where there are multiple crimes charged and multiple defendants as to some charges, the use of an erroneous instruction may be harmless.

Another instruction in the cases before us admonished the juries as follows:

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant or each crime charged against that defendant separately. Your verdict on any count as to any defendant should not

control your verdict on any other count or as to any other defendant.

CP at 104 (Brown), 142 (Harris), 66 (Baker).

In order to conduct its analysis, the Neder court set forth the following test for determining whether a constitutional error is harmless: "{W}hether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Neder, 527 U.S. at 15 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. Neder, 527 U.S. at 18.

Therefore, we must thoroughly examine the record before us as to each defendant. In order to hold the error harmless, we must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Id. at 19.

Jacob Brown

The Court of Appeals' rulings reversed and remanded Brown's murder conviction for a new trial and reversed and dismissed his conviction for first degree assault against Jerel Tackett. The State did not cross-appeal. Therefore, we must complete harmless error analyses only concerning the remaining charges, including first degree robbery, first degree assault, and first degree rape against Lewis Brown, and first degree robbery and first degree assault against Jelani Tackett.

In the robbery of Lewis Brown, the record shows that Jacob Brown

struck the victim, took his personal property, and held him at gunpoint.

Because Brown acted as a principal in the robbery, the difference between "a crime" and "the crime" in the accomplice instruction is harmless beyond a reasonable doubt. However, as to the charges of rape and assault against the same victim, there is no evidence of direct participation by Brown as a principal. Under the accomplice instruction given, the jury might have concluded that because Brown robbed the victim, he was guilty as an accomplice to the rape and assault. The instruction was not harmless, and Brown must have a new trial, with a proper accomplice instruction, as to the rape and assault of Lewis Brown.

In the robbery and assault of Jelani Tackett, it is clear from the record that Brown was a principal as to both charges. In these instances, the erroneous accomplice instruction is again harmless beyond a reasonable doubt.

In sum, we affirm the Court of Appeals' reversal and remand for a new trial on the murder charge. We reverse and remand for a new trial on the additional charges of Lewis Brown's rape and assault. We affirm the reversal and dismissal of the assault charge as to Jerel Tackett. We affirm Brown's convictions for the robbery of Lewis Brown and for the robbery and assault of Jelani Tackett. We affirm the remand to the trial court of Brown's firearms enhancements for resentencing in light of *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 254, 955 P.2d 798 (1998).

Marshall Harris

All the charges against Marshall Harris - first degree robbery, first

degree rape, and first degree assault - were based on accomplice liability in the Lewis Brown incident. Evidence was presented at trial that Harris rented the motel room for Porsche Washington, hid in the bathroom with Brown and Barber, and burst into the room after the victim had undressed. There was testimony that Harris verbally threatened the victim and may have discouraged him from escaping during the robbery and sexual assault by standing in front of the door.

The record indicates that Harris did not touch Lewis Brown or actively participate in the robbery, assault, or rape. He was, at most, an accomplice to the crimes charged. Based on the erroneous instruction given, the jury could have convicted Harris for all of the crimes if it concluded that he was an accomplice to any of the crimes. The instruction was not harmless, and Harris must have a new trial as to all counts.

In sum, we reverse and remand for a new trial on the robbery, rape, and assault charges with a proper accomplice instruction.

Lechaun Baker

Baker was charged with four crimes. In three of them - robbery, kidnapping, and burglary - the evidence establishes that Baker acted as a principal. Baker unlawfully entered the motel room with Phipps with the intent to commit a crime. Baker was the principal actor in the robbery because he took the keys to the truck from Manchester. Baker was as active as his codefendant in ordering Rodgers out of the room and into the vehicle, which Baker drove. Under these facts, any error in the accomplice instruction as to robbery, kidnapping, and burglary is harmless beyond a

reasonable doubt.

With respect to the attempted murder charge, Baker did not pull the trigger, even though he fully participated in the events leading up to the shooting. A jury could conclude that Baker's assistance in delivering the victim to the scene of the shooting, coupled with what the prosecution characterized as his shouted encouragement, was sufficient to show his shared general intent to justify his liability as an accomplice in the crime of attempted murder. But under the erroneous instruction, a jury could also believe that Baker was guilty of attempted murder because he was guilty as a principal in the robbery, kidnapping, and burglary. It cannot be said that the erroneous jury instruction was harmless. Therefore, Baker must have a new trial on the attempted murder charge with a proper accomplice instruction.

In sum, Baker's convictions for robbery, kidnapping, and burglary are affirmed. We reverse and remand for a new trial on the attempted murder charge. We affirm the remand to the trial court of Baker's firearms enhancements for resentencing in light of *In re Post Sentencing Review of Charles*.

CONCLUSION

Under recent Washington case law, as well as *Neder v. United States*, an erroneous jury instruction that omits or misstates an element of a charged crime is subject to harmless error analysis to determine whether the error has not relieved the State of its burden to prove each element of

the case. To determine whether an erroneous instruction is harmless in a given case, an analysis must be completed as to each defendant and each count charged. From the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

The accomplice liability instruction at issue in the cases before us is not harmless as to some of the charges against the defendants.

Therefore, we reverse and remand for a new trial on the charges that Defendant Brown raped and assaulted Lewis Brown. We reverse and remand for a new trial on the robbery, rape, and assault charges against Defendant Harris. We also reverse and remand for a new trial on Defendant Baker's attempted murder charge. As to the remaining charges, the Court of Appeals is affirmed.

¹The Legislature has codified the State's burden as follows: "Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt." RCW 9A.04.100(1).

²State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997) ("Failure to instruct on an element of an offense is automatic reversible error."); State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995) ("The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. . . . It is reversible error to instruct the jury in a manner that would relieve the State of this burden.").

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