IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KENDRA F. LARSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12337 Trial Court No. 3PA-14-3821 CR MEMORANDUM OPINION No. 6610 — March 21, 2018

Appeal from the District Court, Third Judicial District, Palmer, William L. Estelle, Judge.

Appearances: Lars Johnson (opening brief), and Laurence Blakely (reply brief), Assistant Public Defenders, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Krista N. Anderson, Assistant District Attorney, Palmer, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge ALLARD.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Kendra F. Larson was convicted of theft in the fourth degree[1] based on evidence that she and her roommate shoplifted various items from Walmart. The State's theory at trial was that Larson was an active participant in the shoplifting and that she had personally picked out various items to steal.

The accomplice liability instruction that the jury received was based primarily on the pattern instruction, but it also included additional language from this Court's decision in *Andrew v. State*.[2] On appeal, Larson asserts that the court erred in including this additional language and the jury may have been misled by this additional language into convicting her based only on a finding that she was aware of her roommate's shoplifting and did nothing to prevent or report it.

For the reasons explained here, we conclude that the district court erred in including this additional language, which was quoted out of context and contained language that could potentially be misleading. But we also conclude that the error was harmless given the rest of the instructions the jury received, the evidence presented at trial, and the nature of the State's theory of prosecution.

Background facts and prior proceedings

In December 2014, Larson and her roommate, Athena Yannikos, went to Walmart in Wasilla. While the two women were shopping with a shopping cart, two Walmart Asset Protection employees became suspicious of the women and began monitoring their actions. The employees observed Larson grab a purse off a shelf, and they also observed both Yannikos and Larson taking items and putting them in the purse. Yannikos then put more items in their shopping cart. The employees observed the two

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[1] Former AS 11.46.150(a) (2014).

[2] *Andrew v. State*, 237 P.3d 1027 (Alaska App. 2010).

women proceed to the check-out, where Yannikos paid for the items in the cart, but she did not pay for the purse or the items in the purse.

The women were stopped outside the store and asked to return to the loss prevention office, where various stolen items valued at about $70 were recovered from them. The Wasilla police were contacted, and both women were arrested and charged with fourth-degree theft. Yannikos subsequently pleaded guilty to this charge. Larson pleaded not guilty and went to trial.

At trial, the State relied heavily on the testimony of the loss prevention officer who was available to testify. The loss prevention officer testified that he saw Larson grab the purse from the shelf, and he also saw both Larson and Yannikos take items and put them in the purse.

Larson testified in her own defense, denying any involvement in her roommate's shoplifting and further denying any awareness that her roommate was shoplifting. Larson testified that she went to Walmart only because Yannikos needed a ride, and that she spent most of the time in the store on her cell phone, arguing with her boyfriend. Larson acknowledged that she and Yannikos did not look alike.

Yannikos also testified in support of Larson's defense. Yannikos testified that she acted alone and that Larson was not involved in the shoplifting.

During closing argument, the prosecutor argued that the loss prevention officer's testimony was credible and that the evidence showed, beyond a reasonable doubt, that "Larson was participating[;] [s]he was selecting items, she was helping conceal items." The prosecutor emphasized that "it's the State's position that [Larson] was participating in this crime, that she knew what was going on, and that she was a part of it[.]"

The defense attorney argued that the loss prevention officer was mistaken and that the State had failed to prove beyond a reasonable doubt that Larson had

participated in the shoplifting or that she had done anything to aid or abet her roommate's crime.

The parties agreed that the jury should be instructed on accomplice liability using the pattern jury instruction. The district court also added an additional paragraph in the middle of the pattern instruction. The first part of the paragraph was included at the request of the defense attorney. The second part of the paragraph was included at the request of the prosecutor over the defense attorney's objection. Here is the paragraph that was added to the pattern accomplice instruction:

> Accomplice liability requires more than mere knowledge that another person is committing a crime and failure to prevent it. *However, knowledge that another person is committing a crime and failure to oppose it may be considered among all the facts and circumstances in evidence that aid in determining whether the defendant assented to, approved of, or encouraged the commission of the crime.* (Emphasis added.)

The italicized language was taken from this Court's decision in *Andrew v. State*.[3] The prosecutor argued that this language was a correct statement of the law and it should therefore be included in the pattern instruction. The defense attorney objected to the inclusion of this language, arguing that it was being quoted out of context and that it could be misunderstood by the jury as suggesting that mere knowledge of the crime *was* enough to establish a person's complicity in that crime. The district court overruled the defense attorney's objection and included this language in the jury instruction at the prosecutor's request.

Following deliberations, the jury convicted Larson of fourth-degree theft. This appeal now follows.

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[3] *Andrew v. State*, 237 P.3d 1027 (Alaska App. 2010).

Why we conclude that the modified accomplice liability instruction was potentially misleading but ultimately harmless in the context of this case

Under AS 11.16.100, "[a] person is guilty of an offense if it is committed by the person's own conduct or by the conduct of another for which the person is legally accountable under AS 11.16.110, or by both." Alaska Statute 11.16.110(2) provides, in relevant part, that a person is legally accountable for another person's actions if "with intent to promote or facilitate the commission of the offense, the person ... aids or abets the other in ... committing the offense." The jury was instructed that "[a]id or abet" means "to help, assist, or facilitate the commission of the crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission."[4]

In *Andrew v. State*, we addressed the more subtle ways that a person can "abet" another person in committing a crime.[5] We explained that the act of "abetting" "encompasses conduct such as counseling or encouraging the other person's criminal act by words or gestures[,]" and that it also encompasses less overt acts of incitement or encouragement such as a defendant "stand[ing] by for the purpose of giving aid to the perpetrator if necessary, provided the latter is aware of [the defendant's] purpose."[6]

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[4] *See* Alaska Criminal Pattern Jury Instruction 11.16.110(12) #2; *see also Thomas v. State*, 391 P.2d 18, 24-25 (Alaska 1964) (approving similar instruction prior to enactment of AS 11.16.100 & AS 11.16.110); *cf. Andrew*, 237 P.3d at 1037 (stating that AS 11.16.110 was intended "to substantially recapitulate Alaska's common law of accomplice liability as that law had been developed by the Alaska Supreme Court in various cases").

[5] *Andrew*, 237 P.3d at 1044.

[6] *Id.*

In support of this point of law, we referred to a Kansas Supreme Court case, *State v. Ly*.[7] Our discussion of *Ly* included the quoted language that the prosecutor later requested be included in the jury instruction in Larson's case. Here is our full discussion from *Andrew*:

> In *Ly*, the Kansas court explained that, even though "[t]he mere presence of the defendant at the time and place of the crime is insufficient for establishing the defendant's guilt [of] that crime", there may be "facts and circumstances surrounding the defendant's presence and the defendant's conduct [at the scene]" which support a reasonable inference "that the defendant's presence did in fact encourage someone else to commit the crime" — and that, if the defendant had the intent to promote or facilitate the crime, "guilt may be inferred".
>
> Thus, "[even if] the defendant's conduct does not [openly] demonstrate a design to encourage, incite, aid, abet, or assist in the crime, the factfinder may [nevertheless] consider the defendant's failure to oppose the commission of the crime, along with other circumstances, and conclude that the defendant assented to, approved of, or encouraged the commission of the crime" — thereby establishing the defendant's vicarious liability for the crime as an abettor.[8]

The prosecutor modified the last paragraph of this discussion and requested that the jury be instructed as follows:

> However, knowledge that another person is committing a crime and failure to oppose it may be considered among all the facts and circumstances in evidence that aid in determining whether the defendant assented to, approved of, or encouraged the commission of the crime.

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[7] *State v. Ly*, 85 P.3d 1200 (Kan. 2004).

[8] *Andrew*, 237 P.3d at 1045 (internal citations omitted).

As already explained, the district court agreed to this request over the defense attorney's objection.

We agree with Larson that the district court erred in modifying the pattern instruction to include this additional language. We come to this conclusion for a variety of reasons. First, this was not a case that involved the more subtle forms of "abetting" such as the ones at issue in *Andrew*. The State's theory of prosecution in the current case was that Larson directly participated in the theft — that she had aided Yannikos in stealing the purse and selecting the items to be put in the purse. Under these circumstances, there was no need for the jury to be instructed on the subtler meanings of "abet."

Moreover, even if the jury did need further instruction on the definition of "abet," this was an inappropriate and confusing way to provide such instruction. By separating the quote from the larger discussion in which it occurred, and then modifying it further, the prosecutor created a jury instruction that could be potentially misleading in certain circumstances.

The decontextualized quote from *Ly* uses "assent," "approve" and "encourage" as though they are all equally valid synonyms for "abet." But merely "approving" of someone else's crime does not make a person vicariously liable for that crime unless the person assists, facilitates, or encourages the commission of the crime with the requisite intent to do so. Likewise, a person can "assent to" the commission of a crime by another person in the sense of doing nothing to prevent, stop, or report it, without becoming vicariously liable for that person's criminal conduct. As we otherwise emphasized in *Andrew*, "mere acquiescence" in the commission of a crime by another

person is not enough to establish vicarious liability for the other person's criminal actions.[9]

We therefore agree with Larson that the district court erred when it added this decontextualized and potentially misleading language to the pattern accomplice liability instruction used in Larson's case. We also conclude, however, that the error was ultimately harmless. As already noted, the State's theory of prosecution was that Larson actively participated in the shoplifting by selecting the stolen purse and placing at least some of the other stolen items in the purse. Moreover, the prosecutor never argued, or even suggested, that Larson should be found guilty on any basis other than her direct participation and assistance in the crime.

Because the trial focused on whether Larson actively participated in the shoplifting, because the jury was otherwise properly instructed on the elements of complicity under AS 11.16.110(2), and because the jury was specifically instructed that mere knowledge and failure to report a crime is not sufficient to establish vicarious liability for another's criminal actions, we conclude that the inclusion of the potentially misleading language from *Ly* was harmless in the context of this case.

Conclusion

We AFFIRM the judgment of the district court.

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[9] *Andrew*, 237 P.3d at 1044.