IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29553-2-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
DOROTEO VILLANO,	)	
	)	**OPINION PUBLISHED**
Appellant.	)	**IN PART**

Korsmo, J. — The juvenile court imposed a condition that Doroteo Villano not possess any "gang paraphernalia." We conclude that condition is unconstitutionally vague and strike it. The conviction for first degree arson is affirmed.

After convicting Mr. Villano of first degree arson, the juvenile court committed him to the Juvenile Rehabilitation Administration for a period of 103-129 weeks. The disposition order also imposed the following condition of post-release supervision:

> Gang conditions: subject to personal search upon reasonable suspicion of a probation violation; no contact with known gang members; no possession of gang paraphernalia; no possession of knives or other weapons.

Clerk's Papers (CP) at 9.

Mr. Villano timely appealed to this court, challenging the sufficiency of the evidence to support the conviction as well as the gang paraphernalia restriction. We address the evidentiary sufficiency challenge (and the facts underlying the charge) in the unpublished portion of this opinion.

Sentencing conditions must adequately inform the offender of what conduct they either require or proscribe; failure to provide sufficient clarity runs afoul of the due process protection against vagueness. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791, 239 P.2d 1059 (2010); *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008).

Both parties agree that the sentencing condition is unconstitutionally vague. So do we. In *Sanchez Valencia*, the court addressed a sentencing condition that prohibited possession of "any paraphernalia" used to ingest, process, or facilitate the sale of controlled substances. 169 Wn.2d at 785. The court unanimously concluded that the provision was vague because it failed to provide fair notice to the defendants and also failed to prevent arbitrary enforcement. *Id*. at 794-795.

The phrase "gang paraphernalia" used in a check-box paragraph on the standard disposition order here is even vaguer than the condition rejected in *Sanchez Valencia*, which at least referenced controlled substance usage. There is no similar limitation in

this case. There is no definition of what constitutes "gang paraphernalia." In the common experience of this court, popular clothing items or specific colored items are frequently described as gang attire. If the trial court intended to prohibit the wearing of bandanas or particular colored shoes, it needed to provide clear notice to Mr. Villano about what he could not possess. This provision does not do that. It is unconstitutionally vague. *Id*. at 795.

The parties both request that the condition be stricken. We remand to the juvenile court with directions to strike the gang paraphernalia restriction.

A majority of the panel having determined that only the forgoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

The remaining issue is whether the evidence supported the bench verdict.[1] We conclude that there was sufficient evidence to support the verdict.

Mr. Villano's challenge is targeted at the evidence identifying him as an actor in this crime. We review sufficiency challenges to see if there was evidence from which the trier-of-fact could find each element of the offense proven beyond a reasonable doubt.

[1] Appellant also challenged the failure to have the mandatory adjudicatory hearing findings entered in a timely manner. JuCR 7.11(d). The findings were ultimately entered at this court's direction. We were advised at oral argument that they were no longer at issue. We will not further address the topic.

Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). We must consider the evidence in a light most favorable to the prosecution. *Id.*

Mr. Villano and a companion, who was tried as an adult, were observed walking through a Pasco neighborhood late on a Saturday evening. One of the two men threw a molotov cocktail (a bottle containing gasoline and a lit fuse) at a house, striking the window. The two then ran to a parked car and drove away. One of occupants of the house trailed them in his own car until a Franklin County Sheriff's Deputy stopped the vehicle. Mr. Villano was the passenger in the car. Captain Russ Akers of the sheriff's office patted Mr. Villano down and testified that he smelled a faint odor of gasoline on the young man.

Captain Akers subsequently obtained Mr. Villano's clothing, placed it in paper bags, and subsequently transported the bags in the rear of his car. He reported that the bags emitted a "very strong odor of gasoline" while in the car. The clothing was transferred to special arson bags, which are designed to prevent the evaporation of volatile chemicals, on Monday morning.

No fingerprints were recovered from the gasoline bottle. Technicians from the crime laboratory did not find any ignitable liquids on Mr. Villano's clothing; the only

measurable quantity of gasoline discovered was a residue amount on the co-defendant's tennis shoes. The technician testified that gasoline could have evaporated from the clothing prior to the transfer to the arson bags.

Mr. Villano did not testify. His counsel argued that the co-defendant was the person who committed arson. The trial judge concluded that there was sufficient direct and circumstantial evidence to find Mr. Villano guilty beyond a reasonable doubt. The court's oral remarks particularly noted the gasoline smell on his clothing and the joint flight from the scene.

Other than the identity of the actor, the elements of first degree arson are not at issue in this appeal. No one identified which of the two men threw the bottle. The question, then, becomes whether there was sufficient evidence that they were working in concert. An accomplice is someone who aids another in the commission of the crime. RCW 9A.08.020(3)(a)(ii). The theory of accomplice liability need not be included in the charging document because it is the same as direct liability. *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974). A jury must be instructed on accomplice liability before it can return a verdict on that theory. *State v. Davenport*, 100 Wn.2d 757, 764-765, 675 P.2d 1213 (1984). However, we presume that judges know the law and will apply it appropriately. *In re Welfare of Harbert*, 85 Wn.2d 719, 729, 538 P.2d 1212

(1975).

As summed up in *Carothers*:

> The law is settled in this jurisdiction that a verdict may be sustained upon evidence that the defendant participated in the commission of the crime charged, as an aider or abettor, even though he was not expressly accused of aiding and abetting and even though he was the only person charged in the information. . . . [E]very person concerned in the commission of a felony, whether he directly commits the act constituting the offense or aids and abets in its commission, is a principal and shall be proceeded against and punished as such.

84 Wn.2d at 260-261 (citations omitted).

Did the evidence support the trial court's view that Mr. Villano was an active participant in this offense? Appellant cites authority noting that mere presence at the scene of a crime is insufficient to support criminal liability. However, this case presents more than mere presence. Whether or not Mr. Villano actually pitched the incendiary device, the evidence suggests he was a participant in its creation and delivery. His clothing smelled of gasoline, suggesting that he used the product that evening. He fled the scene in a waiting automobile. There would have been little reason to flee if he had not been involved in the arson. Also, there appears to have been no reason for him to be in the neighborhood except to commit the crime, and his immediate flight is therefore particularly telling. This was not the situation where two young men were out for a stroll

and one of them suddenly and unexpectedly committed a crime. Rather, the evidence permitted the trial judge to conclude that the two jointly drove to the neighborhood and got out of their car and walked up to the target house. One of them then threw the fire bomb and both fled back to their vehicle.

We believe the evidence allowed the trier-of-fact to conclude the men were joint participants in this crime. The evidence was thus sufficient to support the conviction.

The adjudication is affirmed. The case is remanded with directions to strike the gang paraphernalia prohibition.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Siddoway, J.