FILED
February 6, 2015
Court of Appeals
Division III
State of Washington

No. 31862-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JAMES B. HAMBLETON, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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1. The court erred by making this certain finding in finding of fact 7 on the hearing pursuant to CrR 3.6:

> (7) . . . Ms. Huey had purchased [the cell phone used by Mr. Hambleton] . . .

2. The court erred by denying the motion to suppress evidence obtained from James B. Hambleton's cell phone.

3. The State's evidence was insufficient to support the convictions for theft of a motor vehicle and second degree burglary.

Issues Pertaining to Assignments of Error

A. Did the court err by making this certain finding in finding of fact 7 on the hearing pursuant to CrR 3.6:

> (7) . . . Ms. Huey had purchased [the cell phone used by Mr. Hambleton] . . . ? (Assignment of Error 1).

B. Did the court err by denying the motion to suppress evidence from Mr. Hambleton's cell phone when he did not consent to the search that was conducted before a warrant was issued? (Assignment of Error 2)

C. Did the State's evidence prove beyond a reasonable doubt that Mr. Hambleton was guilty of the offenses based on

accomplice liability? (Assignment of Error 3).

II. STATEMENT OF THE CASE

Mr. Hambleton was charged by amended information with one count of theft of a motor vehicle and one count of second degree burglary. (CP 151). The State also gave notice it was seeking an exceptional sentence. (*Id*.).

The defense moved to suppress (1) statements made by Mr. Hambleton to police and (2) evidence obtained from his cell phone. On the CrR 3.6 motion, Pasco Police Sergeant Bradford Gregory testified he had contact with Jodie Huey, Mr. Hambleton's girlfriend, and had a discussion regarding a cell phone. (6/4/13 RP 73). He knew Mr. Hambleton had a cell phone on him due to some contacts with a Leslie Osborne. (*Id*. at 74). Sergeant Gregory had contacted Ms. Osborne, who had shown him a couple of messages on her phone to Mr. Hambleton's phone, which the sergeant wanted to obtain so he could get information off it to match with Ms. Osborne's. (*Id*.). Ms. Huey told him she had Mr. Hambleton's cell phone. (*Id*.). She had picked up the phone from property at the jail and had been searching through it "to find out what Mr. Hambleton may have been up to." (*Id*.). Ms. Huey said he had contact with

somebody named Leslie so she called her. (*Id*. at 74-75). When the sergeant asked for that number, Ms. Huey said no, but she would be willing to have Ms. Osborne contact him, which she did. (*Id*. at 75).

After he told Ms. Huey he wanted to do a search warrant on the phone to get information from it, she said she wanted to cooperate and gave it to Sergeant Gregory. (6/4/13 RP 75). Ms. Huey told him the phone was hers and she contracted for it. (*Id*.). At that point, the sergeant decided it was legal for her to give him the phone. (*Id*.). Ms. Huey was concerned Mr. Hambleton would be upset with her if she gave the sergeant the phone. (*Id*.). He said he could get a warrant and search, but she immediately said he did not have to do that and would give him the phone. (*Id*.). Mr. Hambleton was then in the Franklin County Jail. (*Id*.). Ms. Huey gave the cell phone to the sergeant on January 15, 2013. (*Id*. at 88).

Sergeant Gregory later applied for a search warrant that was issued on January 22, 2013. (6/4/13 RP 90). Before getting the warrant, he obtained at least two phone numbers from the cell phone, one being for Les Warner, a suspect, and there were text

messages from Ms. Osborne on the phone. (*Id*. at 74, 87-89). The sergeant acknowledged that Mr. Hambleton was probably the sole user of the cell phone. (*Id*. at 86).

Mr. Hambleton did not testify at the suppression hearing. (6/4/13 RP 115). Denying his motion to suppress evidence from the cell phone, the court entered these pertinent findings:

> . . . (7) During the course of investigation, Sgt. Gregory contacted defendant's girlfriend Jody Huey. Ms. Huey voluntarily turned over a cell phone to Sgt. Gregory and consented to it being searched. Ms. Huey and defendant lived together and have a child in common. Ms. Huey had at least an equal right with defendant to possess the cell phone. While defendant used the phone, Ms. Huey had purchased it and the contract was under her name. Under the common authority rule, Ms. Huey had authority to release the cell phone to Sgt. Gregory and consent to its search. While such consent by itself was sufficient, Sgt. Gregory took the additional step of obtaining a search warrant for the cell phone. The affidavit submitted in application for the warrant established probable cause and the warrant was proper in all respects. Any omissions from the affidavit were not material to the probable cause determination. (CP 229).

In its conclusion of law, the court stated: "(2) Defendant's motion to suppress evidence is denied." (*Id*.).

Viewed in a light most favorable to the State as it must be on

on appeal, the affidavit in support of probable cause summarizes the State's evidence:

> On 1/12/2013 at 1020 hrs, I was dispatched to a theft of a motor vehicle at 4911 N. Railroad Ave. I arrived and spoke with Denver McFarland, the co-owner of R.J. Mack. McFarland explained to me that his business shares a building with Pelican, Inc. a railcar refueling business. An employee of Pelican Thomas Fruitts, who works the graveyard shift, witnessed one of his work trucks drive off the lot at around 2300 hrs which is not normal. McFarland responded to his office to investigate. He noticed that the keys to the truck were stolen out of the office. The keys are kept in a special locker. Only he and four other employees know where these keys are located. McFarland explained that his company does not work after hours and his employees are not permitted in his office during off hours. McFarland walked outside to see if anything else was missing and noticed one of his employee's personal van was parked behind the office. It was a very cold night and all of the vehicles had frost on the windshields but the van did not. He called his employee James Bruce Hambleton the owner of the van. Hambleton told McFarland that he did not know why the truck was missing. He explained that he is going out on his live-in girlfriend and "hid " his van at work so she would not catch him. McFarland asked him to come back to the office so they could speak. McFarland also contacted several of the other employees and they did not have any knowledge of the truck's whereabouts. McFarland waited for over 2 hours and Hambleton did not show up. McFarland then called the police. McFarland explained that his work truck WA B06158W was

> a 2003 Chevrolet pickup with very expensive work tools and gas in the truck bed. We made attempts to contact Hambleton on his cell phone but could not reach him. We spoke with Hambleton's girlfriend Jodie Huey over the phone and she confirmed he was out with a friend named Les. She said it was not normal for him to be out so late and that he has used drugs in the past. I notified dispatch and entered the truck as stolen in the system. As we were driving away from the scene I observed a male walking on the side of the road. Railroad Ave is a very secluded location near the BNSF rail yard and the male was not wearing a coat. I stopped the man and he identified himself as James Hambleton. Hambleton explained that he was dropped off by his girlfriend "Leslie" at Oregon Ave and he was walking to pick up his personal vehicle that he left at work. Oregon Ave is about 3 miles away from R.J. Mack's office. I told Hambleton that we were investigating a vehicle theft at his work place. Hambleton said he knew about the theft because his boss informed him about it but he had nothing to do with it. Hambleton said he was on his way to a Casino in Hermiston but got into an argument with her because he left his wallet in his van. Hambleton would not give us Leslie's information to collaborate [sic] his story. Hambleton could not give me a good explanation why his girlfriend would not drop him off at his work's office. . . (CP 221-22).

All five of the employees of R.J. Mack knew where the keys were and had access to them. (6/27/13 RP 59;175-76). Four employees, Gary Watts, Dave Roberts, Kenny Cullison, and

Christian Linn established they were not at R.J. Mack the late evening of January 11 and early morning of January 12, 2013. (*Id*. at 53, 113; 6/28/13 RP 202, 213).

Mr. Fruitts saw the pickup being driven off between 11 and 11:35 p.m. on January 11, 2013. (6/27/13 RP 132-33). The vehicle was later recovered on January 14, 2013, at 5712 Larrabee Lane, Pasco, with everything intact and locked up. (*Id*. at 151-54).

In the early morning of January 12, 2013, Officer Kari Skinner was dispatched to R.J. Mack where she contacted Mr. McFarland. (6/27/13 RP 163). A green Ford van with no frost on it was parked at the business. (*Id*. at 163). It was 21° at the time and all the other vehicles had frost on them. (*Id*. at 164). She was provided with contact information on the van's owner, Mr. Hambleton, and called him on his cell phone. He did not answer so she left voice mail. (*Id*.). After another officer got his last known address to locate him or the pickup, Officer Skinner had a phone conversation with Ms. Huey. (*Id*. at 165). Wrapping up at R.J. Mack around 3 a.m., she and Officer Pruneda came upon Mr. Hambleton walking along the side of the road about ½ mile from R.J. Mack. (*Id*. at 166). After conversing with Mr. Hambleton who

gave changing stories, he was placed under arrest. (*Id*. at 173).

In the evening of January 11 and morning of January 12, 2013, Ms. Huey was at home, but Mr. Hambleton was not. (6/28/13 RP 231). She got a call from him at 10 p.m. when he said he would be home in a while. (*Id*. at 232). He did not come home, but a police officer showed up. (*Id*.). Ms. Huey then talked to another officer on the phone. (*Id*.). She learned he had been arrested and got a phone call from him to get his van. (*Id*. at 233). Ms. Huey got the van and found Mr. Hambleton's wallet inside. (*Id*. at 234-35). She went to the jail and picked up his property, including his cell phone. (*Id*. at 236). Mr. Hambleton bought the phone, but her name alone was on the Sprint account. (*Id*.). She turned his cell phone over to Detective Gregory. (*Id*. at 237).

Leslie Osborne, a friend of Mr. Hambleton's, got a visit from him the day before he was arrested. (6/28/13 248-49). They were maybe going to Hermiston to gamble, but did not go. (*Id*. at 249-50). She sent a text message to Mr. Hambleton as well. (*Id*. at 252-53).

Detective Gregory got Mr. Hambleton's cell phone from Ms. Huey. (6/28/13 RP 271). He obtained data and photos from the

phone. (*Id*.). The detective said that on January 12, 2013, about 8:30 a.m., some kids saw two men getting out of the stolen pickup and abandoning it. (*Id*. at 290). He acknowledged Mr. Hambleton was in jail at the time. (*Id*.).

Detective Justin Greenhalgh got information off Mr. Hambleton's cell phone received from Sergeant Gregory. (7/1/13 RP 314-15). Photos of generators on that cell phone were admitted as evidence because the court found them probative. (6/27/13 RP 92-93; 7/1/13 RP 323-24). In the State's offer of proof, Mr. McFarland said BNSF generators had been stolen from an R.J. Mack warehouse, but the photos were not a perfect match with those generators. (6/27/13 RP 83; 7/1/13 RP 330). He did not know who stole them and they were never found. (6/27/13 RP 81, 83). When the stolen pickup was retrieved, the warehouse keys were found in the bed of the truck. (*Id*. at 78). Mr. McFarland said his forklift was used to load a whole pallet of generators into the back of the truck. (*Id*. at 87).

There were no exceptions to the court's instructions to the jury. (7/1/13 RP 377-78). The State's theory was that Mr. Hambleton was an accomplice to the theft of a motor vehicle and

second degree burglary charges. (*Id*. at 390-409). The defense argued the State had failed to show accomplice liability. (*Id*. at 417).

The jury found Mr. Hambleton guilty of theft of a motor vehicle and second degree burglary. (7/2/13 RP 434-35; CP 81-82). Because of his 25 prior felony convictions and community custody status when the crimes were committed, the court found a standard range sentence on an offender score of 9+ would result in one of the crimes going unpunished and thus imposed an exceptional sentence. (CP 20, 225-26). This appeal follows.

III. ARGUMENT

A. The court erred by (1) making the certain finding in finding of fact 7 that Ms. Huey had purchased the cell phone and (2) denying the motion to suppress evidence obtained from Mr. Hambleton's cell phone when he did not consent to the search that was conducted before a warrant was issued.

On review of a CrR 3.6 motion to suppress, the court's inquiry is whether the findings were supported by substantial evidence and, if so, whether the findings support the conclusions of law. *State v. Schlieker*, 115 Wn. App. 264, 269, 62 P.3d 520

(2003). Mr. Hambleton contends the portion of finding of fact 7 that states "Ms. Huey had purchased the cell phone [used by him]" is not supported by any evidence whatsoever. Ms. Huey only said the phone was hers and she contracted for it. (6/4/13 RP 75). She did not say she had purchased the cell phone and, indeed, it was purchased by Mr. Hambleton and her sole connection to the phone was her name on the contract. (6/28/13 RP 236). That erroneous finding was a critical factor in the court's denial of the suppression motion and that finding does not then support the conclusion she had the authority to release the phone and consent to its search under the common authority rule.

There was no dispute that the cell phone searched by Sergeant Gregory before getting the warrant was used only by Mr. Hambleton. (6/4/13 RP 75, 86). The court nonetheless determined Ms. Huey could consent to the search of the cell phone because she had at least an equal right with Mr. Hambleton to possess the phone even though her only connection to it was her name on the contract. In this warrantless search, the common authority rule requires more.

Absent an exception to the warrant requirement, a

warrantless search is impermissible under Wash. Const. art. 1, § 7 and the Fourth Amendment. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The exceptions are jealously and narrowly drawn and the State has the burden of proving the presence of one. *Id*. at 717. Evidence seized during an illegal search is suppressed under the exclusionary rule. *Id*. at 716-17. Furthermore, evidence derived from the illegal search is subject to suppression under the fruit of the poisonous tree doctrine. *See State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963)).

As noted by the State in its memorandum below, under the common authority rule, a third party may consent to a search of another's property when they possess common authority over it and that authority rests on the right of possession rather than the right of ownership. (CP 159 (citing 12 Wash. Prac. § 2713)).

So viewed, Ms. Huey had no right to possession of Mr. Hambleton's cell phone as he used it exclusively and had bought the phone. She did not even have the right of ownership as her only connection with the cell phone was her name on the contract – a service contract having nothing to do with who had the right to

possess the phone. Furthermore, Detective Gregory's reasonable belief that Ms. Huey had the authority to consent to the search of Mr. Hambleton's cell phone is irrelevant. *State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008). Art. 1, § 7 provides greater protection from state action than the Fourth Amendment. *Id*. at 637. The detective's belief, no matter how reasonably held, cannot be used to validate a warrantless search under the Washington Constitution. *Id*. at 639.

Ms. Huey could consent for Mr. Hambleton, the non-consenting party, only if she had such access to the cell phone that he assumed the risk she would invite others to share it. *Cf. State v. Morse*, 156 Wn.2d 1, 10-11, 123 P.3d 832 (2005). To the contrary, Ms. Huey was hesitant and concerned Mr. Hambleton would be upset if she gave his cell phone to Sergeant Gregory. (6/4/13 RP 75). In these circumstances, she did not have authority to consent to the search of Mr. Hambleton's cell phone under the common authority rule. The court erred by determining she did.

The illegally obtained evidence prompted the search warrant, which cannot be upheld because evidence obtained in violation of the privacy protections of the Fourth Amendment and

Wash. Const. art. 1, § 7 must be excluded. *State v. Afana*, 169 Wn.2d 169, 179-80, 233 P.3d 879 (2010). Washington's exclusionary rule is "nearly categorical." *Id*. at 180. But a recognized exception is the independent source rule under which a search warrant obtained with unlawfully seized evidence may still be valid if the remaining information, after excluding the improper, is genuinely independent of the illegal search. *State v. Ruem*, 179 Wn.2d 195, 209, 313 P.3d 1156 (2013). Here, Mr. Hambleton's cell phone was illegally searched and there is no remaining information that was independent of the original warrantless search.

The subsequent search warrant cannot save the illegal search of the cell phone under that doctrine. *See Ruem*, 179 Wn.2d at 210. Therefore, even if the court had upheld the search based on the after-acquired search warrant (which it did not), the evidence must still be suppressed as the warrant did not cure the initial illegal search of the cell phone since Mr. Hambleton had an expectation of privacy in its contents. *State v. Hinton*, 179 Wn.2d 862, 871, 319 P.3d 9 (2014). Its admission was not harmless error as the untainted evidence was not overwhelming. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

B. The State's evidence was insufficient to support the convictions based on accomplice liability.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it 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). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 25, 225 P.3d 237 (2010). Even when viewed in that light, the State failed to meet its burden of proving accomplice liability beyond a reasonable doubt.

Questions of credibility are determined by the trier of fact, but the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The jury necessarily had to resort to making up facts to bridge the gaps in the evidence purporting to show accomplice liability. This, it cannot do.

The State tried Mr. Hambleton on the theory that he was an accomplice to theft of a motor vehicle and second degree burglary. (7/1/13 RP 390-409). Jury instruction 9 defined accomplice liability:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the 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 the 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 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 is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not. (CP 96).

Accomplice liability requires an overt act. *See State v. Matthews*, 28 Wn. App. 198, 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime; rather, he must say or do something that carries the crime forward. *State v.*

Everybodytalksabout, 145 Wn.2d 456, 472, 39 P.3d 294 (2002).

For accomplice liability to attach, the defendant must have knowledge that his actions will "promote or facilitate" the commission of "the" particular crime at issue. *State v. Bauer*, 180 Wn.2d 929, 943, 329 P.3d 67 (2014). Here, the State produced no evidence that Mr. Hambleton knew his actions, which consisted only of his van being parked at R.J. Mack when the pickup was driven off, would promote or facilitate the commission of the particular crimes of theft of a motor vehicle and second degree burglary. *Id*. His convictions must be reversed and the charges dismissed for insufficiency of the evidence.

IV. CONCLUSION

Mr. Hambleton respectfully asks this court to reverse his convictions and dismiss the charges.

DATED this 6th day of February, 2015.

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237