

70427-3

70427-3

NO. 70427-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAHAD HILL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA A. MACK

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling. A person who is present at the scene and ready to assist by his presence is aiding in the commission of the crime; criminal liability attaches to the principal and his accomplice. Hill matched the description of a man who knocked on Phan's front door and walked away; shortly thereafter Hill was seen a block away with Ahmed, whose fingerprints were identified on a window screen that was the entry point for a residential burglary; both men were seen walking fast by a private driveway of a nursery with mostly dirt roads a block away; and while making furtive movements, both men were juggling Phan's stolen items from a yellow backpack. Is there substantial evidence in the record to support Hill's conviction for residential burglary?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State charged Jahad V.D. Hill by amended information with one count of residential burglary and one count of third degree

possession of stolen property.¹ CP 5-6. Fact Finding took place before the Honorable Barbara Mack, where she found Hill guilty of residential burglary, and not guilty of third degree possession of stolen property. CP 7; 1RP 166-67.² The court sentenced Hill on four separate cases for the following offenses: two counts of residential burglary; one count of attempted residential burglary; and criminal trespass in the first degree.³ The trial court imposed a standard range of 52-65 weeks on each residential burglary, to run consecutively, and no further sanctions on the remaining charges. CP 8-12; 2RP 56-59. On June 24, 2013, the court entered Findings of Fact and Conclusions of Law pursuant to CrR 6.1(d). CP 15-20.

2. SUBSTANTIVE FACTS

Thu Phan and Daniel Mendes are neighbors. They live across from each other on the SW 126th block in Burien, Washington. 1RP 21-23, 34. North of their homes, at the corner of

¹ Hill mistakenly states that he was charged as a principal. App. Br. at 13. The State alleged that Hill, together with others, did enter and remain unlawfully in the residence of Thu Phan with intent to commit a crime therein. CP 5-6. The State did not characterize Hill as either a principal or an accomplice.

² The Verbatim Report of the Fact Finding and Disposition Proceedings consists of volumes referred to in this brief as: 1RP (March 18 & 19, 2013); and 2RP (May 29, 2013).

³ Hill has appealed all four convictions (70428-1-I, 70429-0-I, and 70426-5-I).

SW 124th Street and 4th Avenue SW, there is a large nursery, Bel-R Greenhouse. 1RP 27. Between the nursery and Phan's residence, there are other houses and fences, but there are no other roads. Ex. 12. The nursery encompasses almost two square blocks. 1RP 89; Ex. 12. The nursery consists of six greenhouses and two fields. 1RP 65. On a typical day, there is little foot traffic at the nursery because it is not open to the general public. 1RP 65. Instead, the wholesale nursery delivers the products to their customers. 1RP 65. The nursery has a private paved driveway, which allows the employees to park their cars, but past the driveway most of the terrain is dirt. 1RP 67, 78. Kimberly McCann, a customer representative, has an office with two big windows, one that faces SW 124th Street and one that faces the driveway. 1RP 68; Ex. 12. There is a house located by the nursery's property, which William Barker rents. 1RP 48. Barker's house faces SW 124th Street. 1RP 48. Barker has a Chihuahua that barks every time people come by his house. 1RP 50.

On September 24, 2012, Phan left her house at about 9:30 a.m. for a doctor's appointment. 1RP 37, 42. While she was gone, she received a call from the police. 1RP 37. Phan returned to the house and found two officers at the residence. 1RP 38.

Phan's back door had been kicked in, a window screen had been damaged, her bedroom had been searched, and several items had been stolen. 1RP 37-38, 42, 112-13.

At about the same time when Phan left her house, 9:30 a.m., Mendes was on his front lawn talking with his next-door neighbor. 1RP 21-23. Mendes saw a slender African American male, about six feet tall, with short hair, wearing dark pants, knocking on Phan's door and walking away. 1RP 21-22, 25-26.

That morning, while Barker was on his couch in the living room, his dog barked. 1RP 48, 52. This prompted Barker to look out the window. 1RP 52. Barker saw two African American males, one short and one tall, acting in a "furtive and peculiar manner," walking along SW 124th Street. 1RP 52. The taller male was wearing all black, and the shorter male was holding a yellow bag. 1RP 52, 55. Less than five minutes later, Barker heard his dog bark again. 1RP 54. He looked out the window a second time and saw the same two males across the street in his neighbor's driveway walking toward Barker's house. 1RP 52-53. The males were walking along the fence that borders his neighbor's property toward SW 124th Street. 1RP 53. Barker was concerned because the males were still acting in a furtive manner, looking around, and

did not have the bag with them any longer. 1RP 53-54. Barker then called 911. 1RP 53.

Simultaneously, McCann, who was sitting at her desk facing the driveway, saw two black males walking fast – in a hurry – up the nursery’s driveway toward SW 124th Street (away from Phan’s residence) “juggling stuff in and out of a bag.” 1RP 68-70. Both males were walking very close together and trying to place items in the bag. 1RP 69, 79-80. Given that the nursery does not have people who show up unannounced, McCann continued to watch the males. 1RP 69. After the males reached the end of the driveway, McCann lost sight of them. 1RP 71. McCann then left the office and walked to SW 124th Street, where she saw the males running from behind a fenced house, and without the bag. 1RP 71.

In addition to Barker calling 911, Andrew Denny also called 911 that morning. 1RP 7. Denny was leaving his house located on SW 124th Street, when he saw a maroon Buick parked on the street with two males inside who were staring at him and did not look friendly. 1RP 8, 10. Denny also saw a younger male across the street as if he was leaving a house. 1RP 7-8. Denny found this suspicious, so he drove around the block. 1RP 8, 12. When he returned, he saw the car parked in a different place on the same

street and noticed that there was only one male in it. 1RP 8, 12-13. He also noticed that the younger male was now running from across the street toward the Buick. 1RP 13. Denny described the young male as a skinny guy with khaki pants and red high-top tennis shoes.⁴ 1RP 12, 15. There was no question in his mind that the skinny guy was associated with the Buick.⁵ 1RP 19. Denny went back to his house and called 911. 1RP 15.

At approximately 9:53 a.m., King County Deputies Glasgow, Galusha, Manzanares, and others, responded to the area as a result of several 911 calls reporting suspicious males casing the neighborhood. 1RP 86, 106, 115. As Deputy Glasgow was doing an area check, he overheard on the police radio that Sergeant Gates had contacted the Buick. 1RP 86. Deputy Glasgow went to the location and two or three citizens flagged him down and pointed toward SW 124th Street. 1RP 88. Deputy Glasgow and Deputy Manzanares drove their patrol cars in that general direction. 1RP 89. The citizens then pointed at two males who were walking

⁴ Hill assigns error to the court's findings of fact that the person Denny saw knocking on the door was African American. App. Br. 1. Denny did not testify as to the person's race.

⁵ Hill assigns error to the court's findings of fact that the car Denny saw was following a man. App. Br. 1. Denny did not specifically say the car followed the man, only that the car was associated with the man. 1RP 19.

briskly at the intersection of SW 124th Street and 4th Avenue SW. 1RP 89-90. The taller male was identified as Hill and the shorter male as Zakariah Ahmed. 1RP 90, 95. As Deputy Glasgow detained Ahmed, and Manzanares detained Hill, the citizens were yelling, "those" are the guys. 1RP 89-90, 95.

While the deputies had Hill and Ahmed detained, Barker and McCann came to the scene. 1RP 56, 73. McCann told the police that the yellow bag might be on the other side of the fence. 1RP 74. Deputy Galusha followed McCann's tip and information from one of the 911 callers who had stated that one of the suspects had thrown a bag over the fence. 1RP 108-09. Deputy Galusha located a yellow backpack in a backyard over the fence. 1RP 109. McCann recognized the bag as the same one that the males had been carrying. 1RP 74-75. Deputy Galusha looked inside the backpack and found documents identifying Phan. 1RP 110. Phan confirmed that the property recovered in the yellow backpack was hers and had been stolen during the burglary. 1RP 39-41, 44. Phan did not know Hill and had never seen him before in her life. 1RP 43.

Barker and McCann had no doubt in their minds that the two males detained by the police were the same two males they had

seen along the fence, making furtive movements and carrying the yellow bag. 1RP 57-59, 74-75.

Deputy Galusha went to Phan's residence and noticed that the door had been forced and the frame was cracked. 1RP 113. He also noticed that a window was open and the damaged window screen was on the ground. 1RP 113. Deputy Galusha processed the screen for prints and was able to lift several latent prints. 1RP 113. Anna Torres, a King County latent print examiner, individualized one of the prints to Ahmed. 1RP 121, 128.

C. ARGUMENT

1. SUFFICIENT EVIDENCE IN THE RECORD SUPPORTS HILL'S RESIDENTIAL BURGLARY CONVICTION.

Hill does not deny that the record contains circumstantial evidence. Rather, in acknowledging that the evidence in support of guilt was circumstantial, he argues the evidence was "too weak" to justify a guilty finding. Hill further argues that his conviction was the result of guilt by association, acknowledging that Ahmed burglarized Phan's residence because his fingerprints were recovered at the burglarized home and because he was carrying a bag with the stolen property. Because in determining the reliability

of evidence presented, circumstantial and direct evidence are given equal weight, and because criminal liability attaches to the principal and his accomplice, there is substantial evidence in the record establishing that Hill burglarized Phan's residence. Hill's argument should be rejected.

a. The Record Supports A Logical Probability That Hill, Together With Ahmed, Burglarized Phan's Residence.

It is not the role of the reviewing court to determine whether or not it believes the evidence at trial established guilt beyond a reasonable doubt; "[i]nstead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (italics added). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Thus, in reviewing a juvenile court adjudication, the appellate court must decide whether

substantial evidence supports the trial court's findings of fact and, in turn, whether the findings support the conclusions of law.

State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001).

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Ware, 111 Wn. App. 738, 741, 46 P.3d 280 (2002).

A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle. RCW 9A.52.025(1).

A person is an accomplice of another person in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests such other person to commit it, or aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020(3)(a)(i) and (ii). 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. 11 Wash. Prac., Pattern Jury Instr. Crim. § 10.51 (3d ed. 2008). The same criminal liability attaches to the principal and his accomplice because they share equal responsibility for the substantive offense. State v. Rodriguez, 78 Wn. App. 769, 772-73, 898 P.2d 871 (1995), review denied, 128 Wn.2d 1015 (1996).

Here, the trial court found that Hill, together with Ahmed, and possibly others, unlawfully entered and remained in Phan's house, with the intent to commit a crime against her person or property therein, as evidenced by the property that was stolen and identified by Phan.⁶ 1RP 166. The trial court noted, "This case is circumstantial," and correctly stated that the law does not distinguish between direct and circumstantial evidence. 1RP 159-60.

In determining the reliability of evidence presented, circumstantial and direct evidence are given equal weight. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). There was ample circumstantial evidence by which a rational fact-finder could find Hill guilty of the crime of residential burglary, either as a principal or as an accomplice, because as the trial court observed,

⁶ Hill mistakenly states he was convicted as a principal. App. Br. at 13.

“Sometimes circumstantial evidence adds up and becomes far more than mere coincidence.” 1RP 165. Here, several facts add up to more than just a coincidence: 1) it is highly probable that Hill was the person knocking on Phan’s front door, while Ahmed was making entry through the back of the house; 2) Hill was seen with Ahmed, whose fingerprints were recovered from the window screen, shortly after the burglary and only one block away from Phan’s residence; 3) the two men were walking by a private area where people would not naturally walk to reach the street; and 4) the two men were seen handling the yellow backpack with property that was stolen from Phan’s residence.

First, although Mendes was not asked if he could identify Hill in court as the person he witnessed knocking on Phan’s front door, Mendes provided a description of the person he saw. Mendes described the person as a slender young African American, six-foot tall male, with short hair and wearing dark pants. 1RP 21-22, 25-26. This physical description matched Hill; and the clothing description was the same description provided by Barker, who said the taller male was wearing all black. 1RP 55. Additionally, after Ahmed and Hill were apprehended, several citizens indicated to the police that “those” were the guys. 1RP 95. The trial court made a

finding that except for the discrepancy in Denny's description of the pants one of the males wore, the witnesses' testimony was consistent and credible. CP 19 (Fact Finding 41).

Credibility determinations are reserved for the trier of fact, and an appellate court "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Thus, the mere existence of inconsistent or differing evidence does not negate the sufficiency of the State's evidence. Id. Here, the trial court did not conclude that the male Denny saw was either Ahmed or Hill. 1RP 165. However, this fact alone does not negate Mendes' testimony or the inference that Hill was the person knocking on Phan's door. Denny's testimony related to his observations on the SW 124th block, while Mendes' observations related to the SW 126th block, where Phan's residence was located.

Furthermore, it is likely that the group consisted of more than Ahmed and Hill, which the trial court observed in its findings: "I find that on September 24, 2012, Mr. Hill together with Mr. Ahmed and others possibly, unlawfully entered or remained in Ms. Phan's house..." 1RP 166. Hill highlights Denny's inconsistent testimony

rather than provide an explanation for why Hill would be knocking on Phan's door. Phan did not know Hill, and Mendes testified that it was apparent the male was not a solicitor. 1RP 33, 43. Therefore, it is reasonable for a rational trier of fact to find that Hill was the person who knocked on the door to ensure nobody was home, so that Ahmed could force his way into the residence.

Second, Hill was seen and arrested with Ahmed, whose fingerprints matched the latent prints recovered at the burglarized home. They were apprehended shortly after the burglary, and in close proximity. The evidence established that entry was made through the back of the residence. 1RP 42, 112. The door frame was broken, and a damaged window screen was lying on the ground. 1RP 113. Deputy Galusha processed the window screen for latent prints and those prints were individualized to Ahmed. 1RP 113, 128. Barker and McCann saw Hill and Ahmed, together, approximately a block from Phan's residence. 1RP 52, 68-69; Ex. 12. Both believed Ahmed and Hill were acting suspiciously, which prompted a call to 911, and going outside to keep an eye on them. Barker specifically said the men were acting in a "furtive manner, looking around." 1RP 53. Hill's behavior is indicative that

he was actively involved in the burglary where his accomplice left fingerprint evidence behind.

Third, Ahmed and Hill took inconspicuous paths to get away. Neither Hill nor Ahmed had any business being in the private driveway of the Bel-R Greenhouse. They were not visiting the nursery or doing business with it. According to McCann, there is not a lot of foot traffic in the nursery. 1RP 65. Although McCann did not specifically say that people always make an appointment when they visit the nursery, she did say that it is rare for people to go to the nursery grounds.⁷ 1RP 65. McCann specified that most of their work is done on the phone and the internet because they deliver the products to their customers. 1RP 65. It was the lack of foot traffic in the area that caused McCann to keep an eye on Ahmed and Hill.

Furthermore in discussing the area where Hill and Ahmed were seen by two witnesses, the court considered Exhibit 12, which showed the ingress and egress from the nursery, mostly with unpaved roads. 1RP 166; CP 16. The trial court noted that this area was immediately north of Phan's house, with no roads, other

⁷ Hill assigned error to the trial court's finding that when people visit Bel-R Greenhouse, they always schedule an appointment. App. Br. 1.

than fences and additional homes. 1RP 166; CP 16 (Fact Finding 11). Thus, the only reasonable explanation as to why the two men were by a private property with no access to roads, just north of where the burglary had just happened, was because they were trying to escape apprehension.

Fourth, both men were handling the backpack that contained stolen property. Although Barker saw only the shorter male, Ahmed, carrying the bag, McCann witnessed the two men close together and “juggling stuff in and out of the bag.” 1RP 52, 68-69. Hill suggests that because the trial court did not find him guilty of possession of stolen property, then he was never in possession of Phan’s property. This misstates the court’s findings. The trial court in her ruling said,

Although the bag was in *their* possession, a possessory offense is a little bit different... I believe Mr. Barker testified that the shorter person who would be Ahmed was carrying the bag... Other than McCann’s testimony which indicated that they were both putting things in the bag, there is no testimony that I recall that Mr. Hill actually was in possession of that property, although he certainly was involved in the taking.

(italics added). It is reasonable to conclude that if two men are handling property that had just been stolen from a burglary, both men were acting in concert.

Hill relies on State v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982), to support his insufficiency of the evidence argument. Mace was convicted of second degree burglary. The conviction relied only on evidence that he “may have possessed” the bank cards that were stolen during the burglary. Id. at 843. The court reasoned that proof of possession of recently stolen property, unless accompanied by other evidence of guilt, is not prima facie evidence of burglary. Id. However, the court affirmed the well settled principle that proof of such possession, if accompanied by “indicatory evidence on collateral matters,” will support a burglary conviction. Id. (quoting State v. Garske, 74 Wn.2d 901, 903, 447 P.2d 167 (1968)).

Here, the evidence was more than just possession of the yellow backpack with the stolen property. The evidence included an eyewitness seeing someone matching Hill’s description knocking on Phan’s door; Hill being identified, and arrested, with the accomplice who left fingerprint evidence at the scene; witnesses observing Hill and Ahmed acting peculiar in an area where they should not have been; and Hill handling items in and out the backpack that contained Phan’s stolen property – all shortly after, and in close proximity to, the burglary. None of these facts

alone proves beyond a reasonable doubt that Hill committed the crime of residential burglary. However, when looking at the totality of the circumstances and adding all of these facts together, the only reasonable conclusion a trier of fact could reach is that Hill was an active participant in the burglary of Phan's residence.

Hill further argues that mere presence is not enough to support his conviction for residential burglary. He analogizes this case to others where the only evidence was presence or proximity to the crime. Hill is correct that mere presence is not enough. "Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime." State v. Robinson, 73 Wn. App. 851, 855, 872 P.2d 43 (1994); In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). However, this case is not analogous to any of the cases Hill cites. In addition to proximity to the burglary and his association with the man who left fingerprints at the crime scene, the evidence also established that, at the very least, Hill knocked on Phan's front door and handled the bag with the stolen property.

In sum, Hill was acting in concert with Ahmed, and is guilty of residential burglary as a principal or as an accomplice. Hill's conviction should be affirmed.

b. The Court Should Not Remand For Entry Of Judgment Of A Lesser Offense.

Hill suggests that the State may ask this Court to remand for entry of the lesser offense of criminal trespass in the first degree. Because the trial court made a specific finding that all of the elements of the charged offense were met and substantial evidence supports that finding, this Court should affirm and not remand for entry of the lesser offense.

When an appellate court finds the evidence insufficient to support a conviction for a charged offense, it may remand the case and direct the trial court to enter judgment on a lesser included offense or lesser degree of the offense charged when the lesser offense was necessarily proven at trial. State v. Garcia, 146 Wn. App. 821, 830-31, 193 P.3d 181 (2008), review denied, 166 Wn.2d 1009 (2009) (reversing conviction for third degree assault and remanding for entry of the lesser fourth degree assault); State v. CoBeli, 56 Wn. App. 921, 925-26, 788 P.2d 1081 (1989)

(reversing conviction for possession with intent to deliver and remanding for entry of guilt on the lesser included offense of possession where the evidence of possession was undisputed).

The trial court judge, as the trier of fact, is not constrained by jury instructions and may consider the charged offense as well as any lesser included offense. State v. Peterson, 133 Wn.2d 885, 892-93, 948 P.2d 381 (1997). Thus, if the trial court in this case would have believed that Hill was guilty only of criminal trespass, it would have made such a finding. The trial court made a specific finding that Hill, together with others, committed the crime of residential burglary by unlawfully entering or remaining in Phan's house with the "intent to commit a crime against a person or property therein." RP 166. The "intent to commit a crime therein" is a necessary element of residential burglary but not of criminal trespass in the first degree.⁸ For this reason, the State asks that this Court simply affirm Hill's conviction for residential burglary.

⁸ A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1).

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Hill's conviction for residential burglary.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Richard W. Lechich, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. JAHAD HILL, Cause No. 70427-3 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 3 day of April, 2014



Bora Ly
Done in Seattle, Washington