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COURT OF APPEALS  
DIVISION II  
09 FEB 25 PM 12:24  
STATE OF WASHINGTON  
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NO. 38008-1-II  
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,  
Respondent  
vs.  
DONALD W. WALLER,  
Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Chris Wickham, Judge  
Cause No. 07-1-02043-9

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in not taking the case from the jury for lack of sufficiency of the evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Whether the trial court erred in not taking the case from the jury for insufficient evidence to uphold Waller's criminal conviction for conspiracy to commit either robbery in the first degree or burglary in the first degree?

C. STATEMENT OF THE CASE

01. Procedural Facts

Donald W. Waller (Waller) was charged by second amended information filed in Thurston County Superior Court on March 6, 2008, with unlawful possession of a firearm in the first degree, count I, and conspiracy to commit either robbery in the first degree and/or burglary in the first degree, count II, contrary to RCWs 9A.41.040, 9A.28.040, 9A.56.200 and 9A.52.020. [CP 20-21].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 13, 18]. Trial to a jury commenced on June 18, the Honorable Chris Wickham presiding. Waller was tried with his codefendants David Reading and Dawn Cooper.

The jury found Waller not guilty of the firearm charge but guilty of the conspiracy allegation. [CP 78-80]. He was sentenced within his standard range and timely notice of this appeal followed. [CP 123-133].

02. Substantive Facts<sup>1</sup>

On November 27, 2007, at approximately 9:30 in the morning, three men were observed approaching a residence in Thurston County. [RP 42, 44-45, 72, 89].

I saw the African American walked (sic) up to the front door of the residence. One of the other men was standing at the garage of the residence, and the other man was standing at the bay window of the residence.

I saw the African American open the screen door of the residence and what appeared to me look as if he was trying to open the front door of the residence and pushing with his front shoulder.

[RP 75].

The person at the bay window appeared to be trying to open the window. [RP 76]. All of the men were wearing hooded sweatshirts and “had their hoods on.” [RP 76]. Waller was later identified as the black male. [RP 79, 84].

The three left in a Ford Explorer that was subsequently chased by the police before it stopped and the occupants jumped out and ran from the

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<sup>1</sup> All references to the Report of Proceedings are to the transcripts entitled JURY TRIAL held on June 18-26, 2008, and the facts are limited to the offense for which Waller was convicted.

vehicle. [RP 72, 95-100, 104-05]. The backseat passenger, Janus Afo, the driver, David Reading, and the front seat passenger, Waller, were all apprehended within an hour and 15 minutes. [RP 107-08, 126-28, 132, 139, 153]. Waller was seized wearing a mask that covered the lower part of his face. [RP 133, 154, 156]. A loaded 45-caliber handgun was retrieved from the vehicle near the passenger rear door. [RP 129-30, 135].

The investigation showed that Kristinna Whitt had contact with the three defendants and Janus Afo on the day of the incident, assisting them in getting the address of David Nathan Hoffman, whom they were attempting to reach about a debt that was owed. [RP 246, 283-294, 313-336]. No one had mentioned anything about a robbery or a burglary. [RP 345-48, 354-57, 361-62]. There was no plan. [RP 367]. There was no discussion of what was going to happen if they contacted Hoffman. [RP 369]. Afo did not even know the particulars of the debt, only that Cooper had introduced Hoffman to Waller and Reading and that the money was owed. [RP 360].

When interviewed by the police, Cooper never said she had an agreement with anyone to cause harm to Hoffman. [RP 394]. Similarly, Tara Miller, who spent the day of the incident with the defendants and Whitt, never heard any discussion regarding Hoffman or money owed to anyone. [RP 457-473].

Likewise, David Reading testified that no one had tried to force Hoffman's door open or to open any window, pointing out that Waller had even asked the neighbor if Hoffman was home that day, which was corroborated by the neighbor's testimony. [RP 48, 528]. Reading did admit being chased by the police, explaining that he had DOC warrants and "the cops were looking for me because I failed to report for probation." [RP 530]. He also acknowledged that Hoffman did owe him a car or \$1,500 "for a car he test drove and never came back in." [RP 531, 539]. Though he had not heard from Hoffman for a couple of months, Reading asserted that he "simply wanted to get ahold (sic) of him to find out why he hadn't contacted me to pay me my money." [RP 535].

Q. When you were looking for Mr. Hoffman, did you have any intent to rob Mr. Hoffman?

A. Not at all.

Q. Did you have any intent to burglarize his home?

A. No.

Q. Was there ever any discussions between you and the others to rob M. Hoffman?

A. No, there wasn't.

[RP 534-35].

D. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE  
ELICITED AT TRIAL TO UPHOLD  
WALLER'S CRIMINAL CONVICTION  
FOR CONSPIRACY TO COMMIT EITHER  
ROBBERY IN THE FIRST DEGREE OR  
BURGLARY IN THE FIRST DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

(1) A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause

the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RC 9.28.040.

One element the State is required to prove when seeking a conspiracy conviction is an actual agreement between at least two coconspirators: “(B)y requiring an agreement, the Legislature intended to retain the requirement of a genuine or bilateral agreement.” State v. Pacheco, 125 Wn.2d 150, 155, 882 P.2d 183 (1994).

As charged and instructed in this case, the State was required to prove that Waller agreed with one or more persons to engage in or cause the performance of conduct constituting either the crime of robbery in the first degree or burglary in the first degree, (2) the agreement was made with the intent that such conduct be performed, and (3) any one of the persons involved in the agreement took a substantial step in pursuance of the agreement. RCW 9A.28.040. [CP 20-21, 105].

The sum of the State’s evidence to prove that Waller was guilty of conspiracy consisted of proof that Hoffman owed Reading \$1,500, that efforts were made to obtain Hoffman’s address, that Waller and Reading and Afo went to the suspected address with items in the vehicle that could be of assistance in committing the offenses and that Waller appeared to

have pushed the front door of the residence with his shoulder while another appeared to try to open a particular bay window.

This evidence, however, does not constitute sufficient proof, for it fails to demonstrate the existence of an actual agreement between the participants to commit either of the alleged offenses. There was not one word offered of an agreement, nothing regarding what was going to happen at the residence or to Hoffman, for that matter. Of interest, Waller openly spoke with the neighbor before the three participants left the area, hardly the activity of one in agreement to commit serious offenses. To fill this void, in an act of true conflation, the State argued nothing but the above evidence to satisfy both the agreement and substantial step elements of the offense, thus voiding, in its mind, the requirement of independent proof of an agreement. Very simply, there was insufficient evidence that Waller agreed with anyone to commit the offenses at issue, with the result that his conviction must be reversed.

E. CONCLUSION

Based on the above, Waller respectfully requests this court to reverse and dismiss his conviction.

