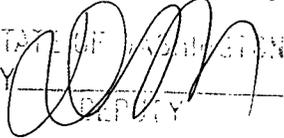


COURT OF APPEALS  
DIVISION II

11 MAY 27 PM 12:00

STATE OF WASHINGTON  
BY  DEPUTY

No. 41099-1-II (41164-4-II)

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

ADRIAN TUBIS BROUSSARD,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 09-1-04647-8  
The Honorable John McCarthy, Judge

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OPENING BRIEF OF APPELLANT ADRIAN T. BROUSSARD

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## **I. ASSIGNMENTS OF ERROR**

1. The State failed to present sufficient evidence to prove beyond a reasonable doubt that Adrian Broussard acted as an accomplice to the crime of attempted first degree robbery.
2. The State failed to present sufficient evidence to support Adrian Broussard's conviction for attempted first degree robbery.

## **II. ISSUE PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where the evidence at most establishes Adrian Broussard's presence, knowledge, and acquiescence in the crime of attempted first degree robbery, did the State fail to meet its burden of proving beyond a reasonable doubt that Adrian Broussard acted as an accomplice, and therefore fail to present sufficient evidence to support a conviction for attempted first degree robbery? (Assignment of Error 1 & 2)

## **III. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The State charged Adrian Tubis Broussard with one count of attempted first degree robbery (RCW 9A.56.190, .200). The State alleged that Broussard or an accomplice were armed with a firearm, and that the crime was committed in order to obtain, maintain or

advance his position in a gang. (CP 1-2) Over objection, the trial court joined Broussard's case with the case of co-defendant Christopher Simms, who was also charged with attempted first degree robbery arising from the same alleged incident. (CP 3-4, 5, 11-13, 47-50)

The jury found Broussard guilty of attempted first degree robbery, and answered the firearm special verdict form in the affirmative. (CP 89, 90; TRP 490-91)<sup>1</sup> The jury answered the gang-motivation special verdict form in the negative. (CP 91; RP 491) The trial court sentenced Broussard within his standard range to 81.75 months of confinement. (SRP 5-6; CP 103, 105-06) This appeal timely follows. (CP 114)

#### B. SUBSTANTIVE FACTS

Ashley Jones lives with her young daughter in a multi-story apartment in Tacoma's Hilltop neighborhood. (TRP 110, 11) Jones' cousin, Kendra Keith, lives next door with her husband, Kevin McField. (TRP 112-13, 296-97, 320-21) McField and Adrian Broussard are friends. (TRP 295)

Jones has known Broussard for over a decade, and they

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<sup>1</sup> The transcripts of trial, labeled volumes 1 thru 6, will be referred to as "TRP." The transcript of sentencing will be referred to as "SRP." The remaining transcripts of pretrial hearings will be referred to by the date of the proceeding.

dated briefly in 2003 or 2004. (TRP 114-15) The relationship did not end on good terms. (TRP 115) Broussard had a relative who lived in Jones' apartment complex so it was not unusual for Jones to see Broussard. (TRP 115-16, 117, 165, 166) Early in the summer of 2009, while Jones was at a neighbor's backyard barbecue, Broussard looked over the fence, asked for something to eat, and asked Jones if he could use her bathroom. (TRP 166-67) Jones declined both requests, and Broussard left. (TRP 166-67)

On the night of July 30, 2009, McField heard a knock on his door, and found Broussard outside the apartment. (TRP 295, 297, 315) Broussard indicated that he was looking for Jones. (TRP 297, 326) McField and Broussard walked to Jones' door and knocked. (TRP 297) According to Jones, she heard Broussard and McField calling to her through her upstairs window, so she went downstairs and opened the front door. (TRP 112, 118)

Broussard told Jones that he was hungry, so Jones invited Broussard inside and told him she would make him a sandwich. (TRP 119) Broussard walked into the apartment, and McField went back home. (TRP 119) Broussard sat on the couch in the living room while Jones prepared the sandwich. (TRP 120-21) Jones noticed that Broussard was receiving texts on his cellular phone.

(TRP 121, 127) Broussard also received one call, and Jones heard Broussard tell the caller that he would call them back later. (TRP 126)

Jones also testified that she heard her daughter telling Broussard that "Uncle Martin" keeps some belongings in an upstairs bedroom. (TRP 124) According to Jones, Broussard then went to use the bathroom, but she never heard the sound of running water or of the toilet flushing. (TRP 124, 126, 128) When Broussard returned to the living room, he asked if they could watch a movie together. (TRP 128, 171) Jones told him no because she and her daughter needed to go to bed. (TRP 128)

Then Jones noticed a figure outside of her back kitchen door, so she went outside and saw McField. (TRP 122-23, 128) McField said he wanted to talk to Broussard. (TRP 123) Jones called to Broussard, who came to the kitchen and walked out the already-open kitchen door. (TRP 123, 129, 172)

A few minutes later, Jones decided to close the door, but at that moment a man walked through the door and into her kitchen. (TRP 129, 130) According to Jones, the man was a light-skinned African-American male with cornrows in his hair, who was holding a gun and wearing a bandana over the lower part of his face. (TRP

136-37) The man demanded: "Where's the money? Is the money upstairs?" (TRP 130) Jones backed up and pleaded with the man not to shoot her or her daughter. (TRP 131) Jones testified that the man looked around the apartment and looked at her, then ran out the back door. (TRP 135, 138)

Jones immediately went next door and screamed for McField and Keith to call the police. (TRP 138-39) According to Jones, when McField opened his door she saw Broussard inside, and believed that they had "set [her] up" to be robbed. (TRP 139, 140) When she accused them of participating, Broussard said he did not know anything about it, and left. (TRP 140)

When the police arrived a short time later, they noticed that a screen covering for a kitchen window appeared to have been forcefully removed. (TRP 82-83) But no usable prints were found on the screen, the window frame, or the kitchen door. (TRP 103, 105)

The following week, while Jones was shopping at a Hilltop Safeway store, she saw a man she recognized as Christopher Simms, and noticed that he was wearing the same clothing and had the same hairstyle as the man who tried to rob her. (TRP 144, 145, 147) She was sure that Simms was the perpetrator. (TRP 147)

Jones also noticed that Simms was with another man, Anthony Smith, who is Broussard's brother. (TRP 147) Smith testified for the prosecution in this case, as part of a plea agreement. (TRP 230) Smith is a member of the Hilltop Crips gang, as are Simms, Broussard, Jamal Henry, and Jones' brother Martin Newson-Jones. (TRP 124, 204, 205-06, 206-07)

According to Smith, Newson-Jones was engaged in selling crack in the Hilltop neighborhood, which displeased other members of the gang. (TRP 209-10) Newson-Jones was an unpopular member of the gang anyway so, according to Smith, he and Simms and Henry decided to steal the money Newson-Jones had made from his drug dealing activities. (TRP 207-08, 210-11) They thought the money had been stashed at his sister's apartment. (TRP 298, 210) Broussard was not part of the discussion or planning of the robbery. (TRP 246)

On July 30, Simms told Smith that he was ready to get the money, so they drove to a place near the apartment and parked the car. (TRP 212-13, 216) According to Smith, Simms then called Broussard and asked for a favor. (TRP 217) Smith heard Simms ask Broussard where he was, then say "good, good, good[,]" then ask Broussard to "just go over there." (TRP 217) Smith also said

that Simms told Broussard that he was going to “make a move” and asked Broussard to leave the back door open for him. (TRP 226, 267-68) Smith could only hear Simms’ side of the phone conversation, so he did not hear what Broussard said.<sup>2</sup> (TRP 249)

After the phone call, Simms pulled a blue bandana over his face, picked up his gun, got out of the car, and walked towards the apartment. (TRP 217-18, 219, 221) Smith testified that Simms did not return, so Smith got nervous and left. (TRP 222-23)

When Smith eventually saw Simms again, Simms told him that he did not get the money. (TRP 227) Simms recognized Ashley Jones, and saw that she had a young child, so he changed his mind and left. (TRP 227-28) Simms called three witnesses who all testified that he was at a relative’s home watching movies during the time of the robbery. (TRP 347-48, 360, 367, 368)

Smith saw Broussard shortly after the incident, and Broussard was angry. (TRP 224, 227) Broussard told Smith that he should not hang around with people like Simms, who “put you in certain situations.” (TRP 225) Smith also overheard Broussard telling Newson-Jones that he did not know Simms was planning to

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<sup>2</sup> The State did not present any phone records at trial to confirm that this call between Simms and Broussard actually occurred.

rob Jones. (TRP 264) Keith testified that Broussard seemed startled when Jones accused him of assisting in the attempted robbery. (TRP 328)

#### IV. ARGUMENT & AUTHORITIES

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

The State charged Broussard with attempted first degree robbery. (CP 1-2) A person commits first degree robbery when “he unlawfully takes personal property from the person of another or in his presence against his will” and is armed with or displays what appears to be a firearm. RCW 9A.56.190; RCW 9A.56.200(1)(a).

The State alleged that Broussard acted as an accomplice to Simms' attempt to rob Jones. (CP 69, 78; TRP 409, 415-15) An accomplice bears the same criminal responsibility as a principal. State v. Silva-Baltazar, 125 Wn.2d 472, 480, 886 P.2d 138 (1994). A person is an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests another person to commit the crime, or he aids or agrees to aid another person in planning or committing the crime. RCW 9A.08.020(3)(a)(i), (ii).

It is well established that "one's presence at the commission of a crime, even coupled with a knowledge that one's presence would aid in the commission of the crime, will not subject an accused to accomplice liability." State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). Thus, more than mere presence and knowledge of the criminal activity is required. State v. Alsup, 75 Wn. App. 128, 132 n. 4, 876 P.2d 935 (1994); State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993).

Instead, "[t]o prove that one present is an aider, it must be established that one is 'ready to assist' in the commission of the crime." Rotunno, 95 Wn.2d at 933 (quoting In re Welfare of Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979)). There must be some

evidence showing that the defendant associated with the venture and participated in a way that shows he desired it to succeed. See State v. Carlisle, 73 Wn. App. 678, 680, 871 P.2d 174 (1994).

For example, in Wilson, a group of youths, including Wilson, tied a rope around a tree, strung the rope across a road, and pulled the rope taut as cars approached. 91 Wn.2d at 489. The juvenile court convicted Wilson of reckless endangerment as an accomplice, reasoning that “the actual touching and pulling the rope was not necessary for [Wilson] to really contribute to what was happening.” 91 Wn.2d at 490. The juvenile court based the conviction solely on Wilson's “participation in going to the scene, being with his friend, standing and being involved in the whole atmosphere of what was going on.” 91 Wn.2d at 490.

Our Supreme Court reversed, noting that “[p]resence at the scene of an ongoing crime may be sufficient if a person is ‘ready to assist[,]’” but found that there was nothing in the record indicative of Wilson's readiness to assist. Wilson, 91 Wn.2d at 491. The Court concluded that “Wilson's presence, knowledge . . . and personal acquaintance with active participants is [not] sufficient to support a finding of abetting.” 91 Wn.2d at 490.

Similarly here, there is insufficient evidence in the record

indicating Broussard's agreement and readiness to assist Simms. If the State's evidence is believed, there is no proof that Broussard did anything more than listen to Simms plan and stand by while he implemented it. No one heard Broussard agree to assist Simms. (TRP 126, 246, 249) Broussard sat in Jones' apartment, ate a sandwich, went to the bathroom, asked to watch a movie, and then left when McField asked him to come outside. (TRP 119, 124, 126, 128, 129, 172) Broussard walked out the back door, which was already open. (TRP 172) Jones did not ask Broussard to close the back door as he left, and she did not close it herself either. (TRP 174-75)

As in Wilson, the State presented nothing more than evidence of Broussard's "presence, knowledge . . . and personal acquaintance with active participants[.]" 91 Wn.2d at 490. This is insufficient to prove, beyond a reasonable doubt, that Broussard associated with the venture and participated in a way that showed he desired it to succeed. It is therefore insufficient to prove that he acted as an accomplice to the attempted robbery.

## **V. CONCLUSION**

There is no evidence that Broussard actually agreed or intended to assist Simms. Broussard was not present in the

apartment during the crime. Broussard did nothing that actually assisted Simms. The State therefore failed to prove that Broussard acted as an accomplice to Simms. Broussard's attempted first degree robbery conviction should be reversed.

DATED: May 26, 2011

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**CERTIFICATE OF MAILING**

I certify that on 05/26/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Adrian T. Broussard #342698, Larch Corrections Center, 15314 N.E. Dole Valley Road, Yacolt, Washington 98675-9531.

*Stephanie Cunningham*

STEPHANIE C. CUNNINGHAM, WSBA #26436

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