

NO. 44085-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WILLAIM HARSH

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Brooke Taylor, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

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STATUTES, RULES AND OTHERS

A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that Mr. Harsh committed theft of firearms.
2. The state failed to prove beyond a reasonable doubt that Mr. Harsh committed the specific burglaries charged.

Issues Presented on Appeal

1. With no evidence to link Mr. Harsh to the specific burglaries charged, can the state prove beyond a reasonable doubt the essential elements of each burglary charge?
2. With no evidence to link Mr. Harsh to the theft of a firearm, can the state prove beyond a reasonable doubt the essential elements of each burglary charge?

B. STATEMENT OF THE CASE

William Harsh was charged by amended information with 7 counts of residential burglary and 1 count of theft of a firearm. CP 67. Mr. Harsh was convicted of six counts of burglary and one count of theft of a firearm. CP 14. The trial court dismissed one count of burglary for insufficient evidence following a half time motion. RP 317. This timely appeal follows. CP 10.

The state presented evidence of six burglaries from each of six different homeowners. RP 86-175. Mr. Bishop of 152 Lost Mountain Rd testified that his home was burgled in May 2008. RP 98-99. He testified that

someone took an old .45 pistol and a prescription bottle with a few pills. RP 101; Ex 16.

Burl King testified that his home at 4091 Blue Mountain Rod was burgled in May 2008. RP 113-114. The burglar took a TV, a laptop, a computer, a gun and some jewelry. RP 114-120. Megan Waldron's home at 43 E. Street was burgled in May 2008. The burglar took a DVD player, video games, DVD's, wallets and a sound system. RP 139. Dale Freelund a neighbor of Mr. King's saw the top of a dark colored sedan that he did not recognize parked in Mr. King's driveway on May 20, 2008. RP 156.

Marylyn McNamara's home located on 1993 Atterberry Road was also burgled on May 20, 2008. RP 1388. She was missing a computer, a large jar of pennies, a briefcase and jewelry. RP 129. Walter Stapish of 2181 Lost Mount Road was burgled in May 2008. During that time, he looked out his front door onto a heavily wooded area and noticed something glittering in the distance. When he approached, he discovered a pillow case on the ground near a pill bottle, a glass jar and jewelry. RP 160-162; EX 28. Mr. Bishop's name was on the pill bottle. RP 181. Joseph Suave of 385 Humble Hill Road also suffered a burglary on May 21008. RP 166-167. He lost a computer and a printer. RP 167.

The state played a tape recorded interview of Mr. Harsh admitting to committing burglaries in 2008. RP 224, 247. The police were investigating a string of burglaries from December 2007 to May 2008. RP 235. Mr. Harsh told the police that he was on drugs when he committed burglaries. RP 352-353. While he knew that he committed 6-7 burglaries, he could not remember which houses he had burgled and could only state that he was involved in the burglary on Blue Mountain Road. RP 340-344. Mr. Harsh remembered taking fishing rods and a guitar, but those items were not reported as stolen from the homes burgled in this case. RP 345.

Mr. Harsh never took guns from a home and Mr. Demmon with whom Mr. Harsh committed several burglaries, agreed not to take guns when Mr. Demmon and Mr. Harsh broke into a home together. RP 345, 347. Mr. Harsh did not take guns because he was afraid that stealing guns would make matters worse for himself. RP 346. Mr. Harsh knew that when Mr. Demmon committed his many burglaries on his own, he took guns. RP 347, 354-55.

Half Time Motion

After Mr. Harsh moved to dismiss the charges at the end of the state's case, the trial court made the following ruling and agreed to dismiss

one of the seven burglary charges but not the theft of a firearm charge. RP

314-317. In relevant part, the court's ruling is as follows:

in accomplices the crime
the burglary or the theft which is necessary to fill
out the burglary charge, or the theft of a firearm
specifically since that is a separate category from
felony than just a regular theft? And it seems to
me that what it refers to is, uh, with the intent or
knowledge that what he's doing will facilitate the
commission of thefts within the King residence, not
will facilitate the theft of any specific item,
whether that be a TV, a laptop, jewelry or a
firearm. And I think it is important in this
analysis that Mr. Harsh was aware that Mr. Demmon
had a propensity to steal firearms, even though Mr.
Harsh contended in his statement, and I have no
reason to disbelieve his contention, that he was
categorically against the theft of firearms, uh, the theft of
firearms did occur. And he indicated that
he had caught Joey Demmon stealing firearms and knew
that that was a possibility any time they entered a
house, particularly with regard to a handgun which
could be readily concealed.
So, I am going to deny the motion to 6 of the
7 burglaries and deny the motion to dismiss as to
count 8. I think with that construction of the
accomplice liability law, that there is facts from
which a reasonable jurors could find that Mr. Harsh
is guilty as charged of the theft of the firearm as
an accomplice to Mr. Demmon.

RP 316-317

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THEFT OF A FIREARM.

The standard of review for challenges to the sufficiency of the evidence to support a criminal conviction is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Luther*, 157 Wn.2d 63, 77, 134 P.3d 205 (2006); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *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. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254 (1980).

The elements of theft of a firearm RCW 9A.56.300 are as follows:

(1) A person is guilty of theft of a firearm if he or she commits a theft of any firearm.

(2) This section applies regardless of the value of the firearm taken in the theft.

(3) Each firearm taken in the theft under this section is a separate offense.

(4) The definition of “theft” and the defense allowed against the prosecution for theft under RCW 9A.56.020 shall apply to the crime of theft of a firearm.

(5) As used in this section, “firearm” means any firearm as defined in RCW 9.41.010.

(6) Theft of a firearm is a class B felony.

RCW 9A.08.020. Liability for conduct of another—Complicity provides in relevant part:

(1) 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.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct; or

(b) He or she is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He or she is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) **With knowledge** that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it; or

(b) His or her conduct is expressly declared by law to establish his or her complicity.

(emphasis added).

The culpability of an accomplice as defined in the statute does not extend beyond the crimes of which the accomplice has knowledge. *State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 713 (2000). The fact that a purported accomplice knows that the principal intends to commit “a crime” does not mean that accomplice liability attaches “for any and all offenses ultimately committed by the principal.” *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). To be an accomplice, a person must have knowledge that he or she was promoting or facilitating the crime charged. *State v. Wilson*, 169 Wn.App. 379, 390, 279 P.3d 990 (2012), citing, *Cronin*, 142 Wn.2d at 579.

Here there was no evidence that Mr. Harsh stole firearms or that he knew that Mr. Demmon was stealing firearms during their joint burglaries. Rather the evidence indicated that Mr. Demmon stole firearms on his own or at least without Mr. Harsh's knowledge. RP 345, 354-55. The prosecutor in fact argued that she did not have to prove that Mr. Harsh knew about the guns, but rather that it was sufficient if he knew about a burglary involving theft of any item. RP 303-304

My recollection, and I know that often recollection betrays us, is that the instruction reads something to the effect that, um, one must perform the acts with the knowledge or intent to promote or facilitate the commission of the crime as counsel says. **It is an unanswered question in this state whether the crime means the very specific crime or whether it means the general category of crime, i.e., theft or theft of a firearm.** There is language in the opinion that goes both ways. Um, certainly the courts have said, um, some of the decisions tend to make it the specific crime. But even in those opinions generally there is some language that suggests under a different set of circumstances it might be a different situation. **I would note that while frequently our law is absurd, I don't think it's so absurd that the Court would interpret our Supreme Court would say that the crime does not mean simply the category of theft. And certainly that's absolutely what Mr. Harsh was out there doing as an accomplice knowledge that he was and intending to facilitate and promote and participate in thefts.** Now, I want to jump back to one of the other words in that. **Even if our statute is or our court**

-- Supreme Court were to interpret it in what I believe to be an absurd fashion, that it have to be not just a -- the crime of theft -- facilitation of the crime of theft, but the crime of theft of a firearm. I will note that there is evidence, uh, in this case which shows that the Defendant was aware that his accomplice, Mr. Demmon -- and he's at least an accomplice as to the burglaries, that he was interested in firearms and that he was catching him putting things, taking things and not splitting them. And yes he may have registered his objection, but he certainly had knowledge that Mr. Demmon when given the opportunity might very well pocket a firearm.

(Emphasis added) RP 303-304.

The prosecutor either did not understand the law or chose to assert her belief over the Supreme Court's and this Court's unequivocal decisions mandating that for accomplice liability to apply, the defendant must have knowledge of and assist in some matter with the commission of the specific crime charged, i.e. theft of a firearm. *Cronin*, 142 Wn.2d at 579; *Wilson*, 169 Wn.App. at 390. By the prosecutor's own summation of the facts, Mr. Harsh did not know that Mr. Demmon was stealing guns and he did not participate in the theft of guns. Under state and federal law, the state failed to prove beyond a reasonable doubt that Mr. Harsh committed theft of a firearm. *Winship*, 397 U.S. 358; *Luther*, 157 Wn.2d at 77; *Green*, 94 Wn.2d at 221. For

this reason, the theft of firearm charges must be reversed and remanded for dismissal with prejudice.

2 THE STATE FAILED TO PROVE APPELLANT
COMMITTED THE BURGLARIES CHARGED
RATHER THAN THAT HE COMMITTED
SEVERAL BURGLARIES IN GENERAL.

Mr. Harsh admitted to committing several burglaries but could not remember which ones he committed because he was too high on inhaled oxycodone. RP 335. 353. The state presented evidence of the commission many burglaries; far more than were charged. RP 86-330. The state relied on Mr. Harsh's general admission to committing several burglaries to prove that he committed the specific burglaries charged rather than actually presenting evidence that Mr. Harsh committed the charged burglaries. The police did not present any fingerprint evidence linking Mr. Harsh to the burglaries charged, Mr. Harsh was never found to be in possession of the items stolen and there was no evidence linking the items found in the woods to any burglary committed by Mr. Harsh other than the burglary against Mr. King's Blue Mountain Road home set forth in count VII RP 340-341; CP 67.

The evidence, when taken in the light most favorable to the state, does not satisfy the burden of proof beyond a reasonable doubt as to all of the

charges. For this reason the convictions fail to satisfy due process and must be reversed and remanded for dismissal with prejudice. *Winship*, 397 U.S. 358; *Luther*, 157 Wn.2d at 77; *Salinas*, 119 Wn.2d at 201, 829; *Green*, 94 Wn.2d at 221.

D. CONCLUSION

Mr. Harsh respectfully requests this Court reverse his conviction for insufficient evidence and remand for dismissal with prejudice.

DATED this 27th day of April 2013.

Respectfully submitted,

A handwritten signature in black ink that reads "Lise Ellner" followed by a long, sweeping horizontal flourish.

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Clallam County prosecutor's office lschrawyer@co.clallam.wa.us and William Harsh William Harsh DOC 8406890 Washington State Penitentiary 1313 North 13th Ave. EW223 Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed, on April __, 2013. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

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