

No. 49811-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY SAMNANG HEM,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-02513-1
The Honorable Edmund Murphy, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it found Anthony Hem guilty of second degree felony murder because the State did not meet its burden of proving that the person who died during the course of the felony was not a participant.
2. The State failed to meet its constitutional burden of proving all of the essential elements of the crime of second degree felony murder.
3. The State failed to prove beyond a reasonable doubt that, while committing or attempting to commit a felony, Anthony Hem caused the death of a person who was not a participant in that felony.
4. The evidence presented at trial does not support the trial court's written finding at CP 87 that "[t]he defendant was the driver and made all decisions regarding how to drive[.]"
5. The prosecutor improperly shifted the burden of proof to the defense during its closing argument to the trial court.
6. The trial court improperly shifted the burden of proof to the defense when it found at CP 87 that "[c]redible evidence does not support that Ms. Richie was an accomplice to the attempting to elude a police vehicle count[.]"

7. The trial court improperly shifted the burden of proof to the defense, and relieved the State of its constitutional burden of proof, when it convicted Anthony Hem of second degree felony murder because he did not disprove an essential element of the crime.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State fail to meet its constitutional burden of proving that the decedent was not a participant in the crime of attempting to elude, where the State presented no evidence to establish that the decedent did not participate in the crime, and where the evidence instead showed that the decedent knowingly and voluntarily placed herself in the truck as it was being stolen, that the decedent stayed in the truck with the other participants for almost an hour and a half after it was stolen, and that the decedent did not remove herself from the truck even after the participants first attempted to flee the police? (Assignments of Error 1, 2, 3 & 4)
2. Where nonparticipation by the decedent is an essential element of the crime of second degree felony murder, can the trier of fact convict a defendant if it merely finds insufficient proof of participation by the decedent?

(Assignments of Error 1, 2, 3 & 4)

3. Was the burden of proof improperly shifted to the defense, and was the State relieved of its constitutional burden of proof, when the court convicted Anthony Hem of second degree felony murder because he did not present sufficient facts to establish that the decedent was a participant in the attempt to elude, instead of requiring the prosecutor to establish the essential fact that the decedent was *not* a participant in the crime of attempting to elude?

(Assignments of Error 5, 6, & 7)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Anthony Samnang Hem by Amended Information with one count of first degree robbery (RCW 9A.56.190, .200), one count of second degree felony murder (RCW 9A.32.050), one count of vehicular homicide (RCW 46.61.520), one count of vehicular assault (RCW 46.61.522), one count of second degree assault (RCW 9A.36.021), and one count of attempting to elude a pursuing police vehicle (RCW 46.61.024). (CP 26-30) The State alleged that the underlying felony for the second degree murder charge was attempting to elude, and alleged that the victim

for both second degree murder and vehicular homicide was his passenger Marisa Richie. (CP 26-29)

Hem entered guilty pleas to vehicular homicide, vehicular assault, second degree assault, and attempting to elude. (CP 31-41; RP 91-108) Hem waived his right to a jury trial on the remaining counts. (CP 42; RP 86-89) Following a bench trial, the court found Hem guilty of first degree robbery and second degree felony murder. (CP 82-89; RP 421-27)

At sentencing, the court merged the attempting to elude count with the second degree felony murder count. (RP 430; CP 79-81) But the trial court disagreed with Hem's argument that the second degree felony murder and vehicular homicide counts merged or were the same criminal conduct. (CP 74-78; RP 432-33) The trial court imposed a standard range sentence totaling 360 months of confinement, and imposed only mandatory legal financial obligations. (CP 95, 97; RP 442) Hem now appeals. (CP 114)

B. SUBSTANTIVE FACTS

On May 9, 2015, Crystal Thomas and her friend Pierre Jennings spent the day driving around in Thomas' blue Monte Carlo. (CP 84; RP 136, 138) Around 11:00 that night, they picked up Marisa Richie and Anthony Hem. (RP 138; CP 84) Thomas

drove the group to her brother-in-law's apartment complex in Lakewood. (RP 141, 142; CP 85) Thomas parked her car in what she thought was an available stall, and went inside the apartment to take a shower. (RP 148; CP 85)

A short time later, Terry Sumey arrived in his GMC pickup truck. (RP 197; CP 84) He saw the blue Monte Carlo parked in his assigned spot. (RP 197, 199) He stopped, got out of his truck, and approached the Monte Carlo. (RP 201; CP 84)

Sumey noticed two men sitting in the front seats and a woman sitting in the back seat. (RP 202, 236; CP 84) He asked the man in the driver's seat to move the car, but the man said he did not have a key. (RP 201) After a short discussion, the driver exited the car and punched Sumey in the face. (RP 206-07, 234; CP 84) The other man then got out of the car, and the two men kicked Sumey repeatedly as he lay on the ground. (RP 208, 236-37; CP 84) The two men and the woman then jumped into Sumey's truck and fled. (RP 183, 339-40; CP 84)

Sumey went to a neighbor's house and called the police. (RP 209) The call was placed at 11:46 PM. (RP 125) Responding officers found a severely beaten Sumey, and noticed that the blue Monte Carlo was still parked in his stall. (RP 173) Thomas was

also there, and she confirmed that Hem, Jennings and Richie had stayed in the Monte Carlo when she went inside the apartment. (RP 149, 150) Officers broadcast the description and license plate of Sumey's stolen truck. (RP 184)

Shortly after midnight, Officer Jeffrey Robillard spotted the truck idling in the parking lot of a nearby apartment complex. (RP 323, 325) He turned his patrol vehicle around and pulled up behind the truck. (RP 324-25) The truck then pulled into an open stall as if it were going to park, but instead it drove rapidly over the curb and through some bushes, and sped away. (RP 325) Officer Robillard was not able to identify the occupants, but could see that there were three people in the truck. (RP 326)

Tacoma Police officers Zach Spangler and Dean Waubanasum were advised that the suspects were connected with a residence in East Tacoma, so they decided to go to that area to look for the truck. (RP 264) As they approached that residence shortly after 1:00 AM, they saw a similar truck backed up against a fence that separates the parking area from the yard. (RP 263, 265-66) They confirmed that the description and license plate matched Sumey's stolen truck. (RP 265)

But suddenly, the truck drove towards the officers' vehicle at

a high rate of speed. (RP 266) The officers were afraid the truck would hit their vehicle, so they quickly accelerated to get out of the way. (RP 266) The officers were able to see that the driver was a male, and that there was one male and one female passenger. (RP 266-67)

The officers pursued the truck, which drove through several signed intersections without stopping and reached speeds of at least 60 miles per hour in what was a 25 mile per hour zone. (RP 270-71, 297) The officers briefly lost sight of the truck as it went over a hill, but when the officers crested the hill they found that the truck had flipped over and struck a telephone pole. (RP 270, 297)

The officers rushed to assist, and found Jennings hanging out of the passenger side window and Hem trapped in the driver's seat. (RP 274, 277, 298-99, 300) Richie, who was in the middle seat, did not survive the crash. (RP 277, 280, 300)

According to Jennings, Richie participated in the assault and drove the truck away from the robbery. (RP 341-42, 348) Hem and Jennings both testified that Richie picked Hem up in the truck after the robbery. (RP 342, 348, 377-78) Hem and Jennings both testified that Hem was driving at the time of the collision.

Hem and Jennings testified that Richie told Hem to "go"

when the patrol vehicle pulled up in front of the house. (RP 341, 363, 365, 369, 378) Officers also found a pipe and a baggie of what appeared to be methamphetamine in Richie's pocket, and Richie had methamphetamine in her system at the time of her death. (RP 373, 385)

IV. ARGUMENT & AUTHORITIES

- A. THE STATE DID NOT MEET ITS CONSTITUTIONAL BURDEN OF PROVING THAT RICHIE WAS NOT A PARTICIPANT IN THE FELONY CRIME OF ATTEMPT TO ELUDE.

“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)). Where there are findings of fact entered following a bench trial, review is limited to whether substantial evidence supports the challenged findings, and whether the findings support the trial court's conclusions of law. State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). The reviewing court evaluates the facts by deciding whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. See State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192,

201, 829 P.2d 1068 (1992)).

The State charged Hem with one count of second degree felony murder pursuant to RCW 9A.32.050. (CP 28-20) That statute provides:

(1) A person is guilty of murder in the second degree when:

...

(b) He or she commits or attempts to commit any felony ... and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, *causes the death of a person other than one of the participants*[.]

(Emphasis added.) The State alleged that, in the course of committing the felony of attempting to elude, Hem caused Richie's death.¹ (CP 28-29)

Nonparticipation by the decedent "is clearly an element of the crime of second degree felony murder." State v. Langford, 67 Wn. App. 572, 579, 837 P.2d 1037 (1992) (citing RCW 9A.32.050(1)(b)); see also WPIC 27.04 (the pattern to-convict instruction for second degree felony murder, listing that the decedent was not a participant in the underlying crime as one of the

¹ To prove attempting to elude a pursuing police vehicle, the State must prove that the defendant was the "driver of a motor vehicle who willfully fail[ed] or refuse[d] to immediately bring [his] vehicle to a stop and who [drove his] vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop." RCW 46.61.024(1).

elements the State must prove beyond a reasonable doubt). Accordingly, the State had the burden of proving, beyond a reasonable doubt, that Richie was *not* a participant in the crime of attempting to elude.

A “participant” is either a principal (i.e., one who actually participates directly in the commission of the crime) or an accomplice (i.e., one who meets the statutory definition of accomplice). State v. Carter, 154 Wn.2d 71, 79, 109 P.3d 823 (2005). Under RCW 9A.08.020(3)(i)-(ii), an accomplice is one who, “[w]ith knowledge that it will promote or facilitate the commission of the crime ... encourages ... or aids” another person in committing a crime. Our legislature has provided that anyone who participates in the commission of a crime is guilty of the crime and may be charged as a principal, regardless of the degree or nature of her participation; whether the participant “holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way,” she is a participant. State v. Davis, 101 Wn.2d 654, 658, 682 P.2d 883 (1984) (quoting State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974)). And “an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality.”

Davis, 101 Wn.2d at 658.

In this case, the State failed to prove that Richie was not a participant in the attempt to elude. Hem and Jennings testified that Richie told Hem to “go” when they were spotted by the officers. (RP 363, 378) The trial court found that this testimony was not credible. (RP 426; CP 87) But the state did not present any other testimony or evidence to show what occurred inside the cab of the truck. Therefore, there is no evidence in the record to support the trial court’s factual finding that Hem “made all decisions regarding how to drive.” (CP 87) And this finding does not support the trial court’s legal conclusion that Richie was not a participant in the attempt to elude. (CP 87, 89)

The remaining evidence that was presented at trial certainly does not indicate that Richie was not a participant. Richie was in the back seat of Thomas’ car when the assault on Sumey began. (RP 202, 207, 236) But rather than staying there, Richie got out of the car and into a truck she had to know was in the process of being stolen. She was in the truck during the first attempt to flee, when the truck accelerated over a curb and through some bushes. (RP 326) But she still did not remove herself from the ongoing criminal activities, and instead was inside the truck when it was

spotted at the East Tacoma residence. (RP 266-67) Richie was also under the influence of methamphetamine and in possession of a controlled substance, and so had her own motive to flee the police. (RP 373, 385)

From this evidence, no reasonable trier of fact could have found beyond a reasonable doubt that Richie was not a participant in the attempt to elude. The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Accordingly, Hem's conviction for second degree felony murder must be reversed and dismissed.

B. THE PROSECUTOR AND THE JUDGE IMPROPERLY SHIFTED THE BURDEN OF PROOF TO HEM BY REQUIRING EVIDENCE THAT RICHIE WAS A PARTICIPANT IN THE FELONY CRIME OF ATTEMPT TO ELUDE.

The State bears the burden of proving every element of its case beyond a reasonable doubt, and it may not shift any part of that burden to the defendant. Winship, 397 U.S. at 361; State v. Fleming, 83 Wn. App. 209, 215, 912 P.2d 1076 (1996); Mullaney v.

Wilbur, 421 U.S. 684, 701-02, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). As a result, the defendant has no burden to present any evidence at all. See Fleming, 83 Wn. App. at 215.

In a bench trial, the reviewing court presumes that a trial judge will disregard inadmissible matters when making findings, and will apply the law correctly. See State v. Adams, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978); State v. Read, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002).

However, that presumption can be overcome with evidence that the trial judge misapplied the law. For example, in State v. Cantu, 156 Wn.2d 819, 826-27, 132 P.3d 725 (2006), the juvenile defendant was convicted of residential burglary after a bench trial. The Supreme Court first noted that a trier of fact may employ a permissive inference of intent to commit that crime whenever the evidence shows a person enters or remains unlawfully in a building. Cantu, 156 Wn.2d at 832 (citing RCW 9A.52.040; State v. Grimes, 92 Wn. App. 973, 980 n. 2, 966 P.2d 394 (1998)). But the Court reversed Cantu's conviction because the judge employed a *mandatory* presumption of intent and improperly shifted the burden to disprove intent to the defense:

Due process requires the State to bear the “burden of

persuasion beyond a reasonable doubt of every essential element of a crime.” A fair reading of the record leads us to conclude that the trial judge relieved the State of this burden by creating a mandatory presumption of criminal intent which Cantu was required to rebut. We therefore reverse the Court of Appeals, vacate the conviction without prejudice, and remand for further proceedings[.]

Cantu, 156 Wn.2d at 829 (citations omitted).

As noted above, the State must prove that the decedent is *not* a participant in the underlying felony in order to convict a defendant of the crime of second degree felony murder.² But the prosecutor and the judge shifted the burden away from the State and placed the burden on Hem to prove that Richie was a participant. When the prosecutor made his closing argument to the judge, he stated:

The accomplice in this case, Ms. Richie, *this is the defense position because they are saying she's a participant* based on the evidence, must associate herself with the venture and participate in it as something she wishes to bring about, and by an action do something to make it succeed. ... Elude, *there has to be some action on the part of Ms. Richie that the Court finds in evidence that shows she did something, an action, in order to help this joint action, this crime.* Her presence at the commission of the crime, even with knowledge of the crime, does not subject her to criminal liability, unless she shares the criminal intent of Mr. Hem, and she demonstrates a community of unlawful purpose.

² RCW 9A.32.050(1)(b); WPIC 27.04; Langford, 67 Wn. App. at 579.

(RP 389, emphasis added) According to the prosecutor, because Hem's "position" was that Richie was a participant in the attempt to elude, the judge had to find evidence to support this position. But in fact, the State bore the burden of establishing that Richie was *not* a participant.

Then, in its oral ruling, the judge adopts the prosecutor's reasoning and states:

Because it is clear that the defendant was driving during the elude that ended in Ms. Richie's death, the Court must look at whether or not Ms. Richie was an accomplice to the elude.

...

The credible evidence does not support a finding that Ms. Richie was an accomplice to the Attempting to Elude charge, therefore the Court finds the defendant guilty of the crime of Murder in the Second Degree.

(RP 425-27, emphasis added) The trial court believed it must find evidence of participation by Richie in order to acquit, when in fact the court was required to find evidence of nonparticipation by Richie before it could convict.

The court misunderstood the elements of the crime and the required proof, and convicted Hem using the incorrect standard. The trial court thereby relieved the state of its burden of proving an essential element of the crime of second degree murder, and

improperly shifted the burden to Hem to disprove his guilt. This error requires that Hem's second degree murder conviction be reversed and that his case be remanded for a new trial. Cantu, 156 Wn.2d at 829

V. CONCLUSION

It is irrelevant whether there was sufficient proof to find beyond a reasonable doubt that Richie was a participant, because the State had the burden of proving that she was not a participant. The State failed to meet that burden. The trial court also failed in its responsibility to hold the State to its constitutional burden of proof. For these reasons, Hem's second degree felony murder conviction must be reversed.

DATED: March 31, 2017



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CERTIFICATE OF MAILING

I certify that on 03/31/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Anthony S. Hem, DOC# 342355, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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