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Court of Appeals
Division II
State of Washington
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NO. 53912-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES WILFORD, JR.,

Appellant.

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

The Honorable Christopher Lanese, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ASSIGNMENT OF ERROR

The trial court erred in instructing the jury on accomplice liability over defense objection because there was no evidence in the record to support that theory.

Issue pertaining to assignment of error

Appellant was charged with burglary, theft of a firearm, theft, and unlawful possession of a firearm. When he was arrested he was in possession of property stolen from the residence that was burglarized, and the defense argued that while the State proved he was in possession of stolen property, it did not prove he committed the charged offenses. Over defense objection the court instructed the jury and permitted argument on accomplice liability. Where there was no evidence that appellant had knowledge of anyone else's plan to commit the charged offenses, or that he solicited, commanded, encouraged, requested or aided in the commission of the crimes, did the court err in instructing the jury on accomplice liability?

B. STATEMENT OF THE CASE

Appellant James Wilford, Jr., was charged in Thurston County Superior Court with first degree burglary, two counts of theft of a firearm, second degree unlawful possession of a firearm, second degree theft, and

bail jumping. CP 70-71; RCW 9A.52.020(1)(a); RCW 9A.56.300(1); RCW 9A.41.040(2)(a); RCW 9A.56.040(1)(a); RCW 9A.56.020(1)(a); RCW 9A.76.170(3)(c). The information included an accomplice allegation as to the burglary charge, and firearm allegations as to the burglary and theft charges. CP 70-71; RCW 9.94A.825; RCW 9.94A.533(3).

The State presented evidence at trial that on February 4, 2018, Olympia police officers responded to a burglar alarm at the home of Kaila Sweeney. 1RP¹ 47-48; 2RP 179. Officer Bill Smith was the first officer to arrive. 2RP 80. He saw a man in the yard, looking over a six foot tall privacy fence. 2RP 80-81. The man climbed over the fence into an adjacent field and ran off toward the woods. The only thing Smith noticed about the man was that he was wearing a gray sweatshirt and dark pants, and he had either dark hair or a beanie. 2RP 82-83. He did not see anything in the man's hands. 2RP 109. Smith broadcast a description of the person he saw to other officers. 2RP 83.

When Officer Josh Marcusen approached the house, he noticed a small collection of items on the ground, including a television, a pair of boots, a shopping bag, and a plastic tote. 2RP 32. They appeared out of place, and he suspected they were relevant to the investigation. 1RP 98. Among the items was a box containing a loaded revolver. 1RP 117-18. No

¹ The Verbatim Report of Proceedings is contained in four volumes, designated as follows: 1RP—6/25/19; 2RP—6/26/19; 3RP—7/1/19 and 7/2/19; 4RP—7/25/19.

attempt was made to lift fingerprints from the items found outside the house. 2RP 38. Sweeney testified at trial that all these items belonged to her and they were removed from her house without her permission. 2RP 200-07, 212.

Marcusen noticed that the front door to the house was open, and he went inside to clear it. 1RP 99. There was no one inside the house, but he saw that drawers were pulled open and items were strewn about. 1RP 101-02. A .9mm Ruger was located on the nightstand in the bedroom. 2RP 50. Marcusen contacted Sweeney, who indicated she had not left the house in that condition, although the Ruger was where she said it would be. 1RP 102, 106; 2RP 50.

Smith and another K-9 officer then attempted to track the suspect through the woods. 2RP 90. Eventually the dog lost the track before anyone was found. 2RP 90, 97.

Officer Adam Allison took a position east of the house as the track proceeded. 1RP 56. The only description he had of the suspect was a male in a gray sweatshirt. There was no description of race, height, weight, hair color, or any other identifying features. 1RP 79-80. As he was changing locations based on information from the K-9 track, he saw James Wilford, who was wearing a gray sweatshirt. 1RP 60, 63. Allison ordered Wilford to stop and then got out of his patrol car to contact him. 1RP 61-62.

Allison noticed that Wilford was breathing heavily and his clothes were wet and muddy. Believing that was consistent with information from the K-9 track, he told Wilford that he matched the description of a burglary suspect police were looking for. 1RP 63-64. Allison detained Wilford and placed him in handcuffs. 1RP 65. While patting Wilford down for weapons, Allison felt a bag and a tablet in the front pocket of Wilford's sweatshirt and a jewelry box in his pants pocket. 1RP 67.

Officer Marcusen arrived to assist Allison, and he took photographs of a leather purse that was visible in Wilford's pocket. 1RP 127. Marcusen texted the photo to Sweeney, who identified the purse as hers. 2RP 11-12. Wilford was arrested for burglary. 1RP 71. A further search of Wilford located an electronic tablet, several pieces of jewelry, a hand purse, and a watch. 2RP 150-51. When Smith arrived at the location, he identified Wilford as the person he had seen over the fence based on clothing and general appearance, although he did not recognize Wilford's face. 2RP 100, 126. As Allison transported Wilford to jail, Wilford said something like "you guys caught me." 1RP 75.

The defense moved to dismiss the charges at the close of the State's case, arguing that they relied on speculation, since there was no evidence Wilford ever touched any of the items found outside the house. 3RP 216. The State responded that someone removed the revolver from

the house and placed it outside, and whether it was Wilford or an accomplice, the evidence was sufficient to support the charges. 3RP 217. Defense counsel responded that there was no evidence of an accomplice and suggesting Wilford could be guilty on accomplice liability was speculation, not evidence. 3RP 218. Without addressing accomplice liability the court found sufficient evidence to support the charges and denied the motion to dismiss. 3RP 219-20.

Defense counsel then objected to the court's decision to give the accomplice liability instruction proposed by the State. 3RP 222. Counsel repeated that there was no evidence Wilford acted as an accomplice to any other person. 3RP 222. The instruction, as well as other references to an accomplice in the instructions, would confuse the jury and prejudice the defense. 3RP 161. The court noted that the State proposed the accomplice instruction so it could argue that even if someone else were involved, Wilford was still guilty. Finding that purpose appropriate, the court overruled the objection. 3RP 223.

The court instructed the jury on accomplice liability:

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. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:

- (1) solicits, commands, encourages or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

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.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 139 (Instruction. No. 8). The court also instructed the jury to convict Wilford of burglary, theft of a firearm, and second degree theft if it found he or an accomplice committed those offenses, and that if any accomplice was armed during these offenses it should find Wilford was armed in the special verdict. CP 145, 155, 159, 163.

During closing argument, the prosecutor told that jury that all the evidence showed that Wilford was the person in the house, but the defense had implied it could have been someone else. That’s why the court gave the accomplice instruction. Under that instruction the State doesn’t have to prove Wilford committed a particular act. If he was working with someone else, he is guilty as an accomplice. 3RP 249-50. As to the firearm special verdicts, the prosecutor argued that it could be an accomplice who was

armed. Someone took the revolver outside, so someone was armed during the burglary and theft. 3RP 261-62.

Defense counsel argued in closing that the State had proven Wilford was in possession of stolen property, but that did not make him an accomplice to the burglary. The State had to prove he had knowledge of the crime, and there was no evidence of that. 3RP 284. To say he was working with someone as an accomplice is to engage in speculation, which the jury is not allowed to do. 3RP 298. Wilford was guilty of possession of stolen property, because he was found with those items, but there was not proof beyond a reasonable doubt that he stole them. 3RP 298.

The jury found Wilford not guilty on one count of theft of a firearm. It returned guilty verdicts on the other charges and found Wilford was armed with a firearm during the burglary and theft. CP 166-73. The court merged the theft of a firearm and second degree theft convictions with the burglary conviction at sentencing. CP 193, 195. It imposed a standard range sentence of 89 months, which included a 60 month firearm enhancement. CP 197.

C. ARGUMENT

THE COURT'S INSTRUCTIONS REGARDING ACCOMPLICE LIABILITY WERE UNSUPPORTED BY THE RECORD AND PREJUDICIAL TO THE DEFENSE.

The instructions given by the court, and the closing argument by the prosecutor, invited the jury to consider a theory of accomplice liability for which there was no evidence in the record. "Each side in a case may have instructions embodying its theory of the case if there is evidence to support that theory; it is error to give an instruction which is not supported by the evidence." *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993); *see also State v. Munden*, 81 Wn. App. 192, 195, 913 P.2d 421 (1996). On appeal, the court looks at whether there was sufficient evidence to support an instruction viewing the evidence in the light most favorable to the requesting party. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

An accomplice theory requires proof that a person solicited, commanded, encouraged, or requested commission of the crime, or aided or agreed to aid commission of the crime. RCW 9A.08.020(3)(a). Mere presence at the scene of the crime is insufficient. *State v. Knight*, 176 Wn. App. 936, 949, 309 P.3d 776 (2013), *review denied*, 179 Wn.2d 1021 (2014). Instead, the State must show the accomplice had actual knowledge that the principal was engaged in the crime and actual knowledge that the

accomplice was furthering that crime. RCW 9A.08.020(3)(a); *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

The defense theory was that Wilford was in possession of the stolen property found on his person when he was arrested, but the State failed to prove how he came into possession of those items. 3RP 298. No one saw him in the residence, no one saw him remove any items from the house, and no fingerprints were taken in the house or on the items found in the yard to connect Wilford to the scene. 2RP 38, 112. The State was permitted to argue that he was guilty of burglary and theft as an accomplice even if someone else entered the home and removed the property. 3RP 249-50, 253-54. But the evidence was insufficient to support that argument.

The prosecutor wanted to use the accomplice liability instruction to suggest that Wilford was guilty whether he acted on his own or as an accomplice to someone else, even though it offered no proof that Wilford was working with anyone. Even considering the evidence and reasonable inferences in the light most favorable to the State, there was no evidence that Wilford had actual knowledge of another person's plan to commit the burglary, or that he solicited, commanded, encouraged, requested, or aided another person in planning or committing that crime. The State was permitted to argue that if it failed to prove beyond a reasonable doubt that

Wilford was inside the house, the jury should still find him guilty of burglary as an accomplice to whoever was, because the property in his possession came from the house. 3RP 249-50, 265. That bit of speculation is wholly unsupported by the evidence. There was no evidence that would support a reasonable and nonspeculative inference that Wilford was working with anyone else. An issue should not be submitted to jurors when the evidence supporting it is speculative and conjectural. *State v. Mriglot*, 88 Wn.2d 573, 578, 564 P.2d 784 (1977).

The court gave the accomplice liability instruction to allow the State to rebut an argument from the defense that someone else was responsible for the burglary and theft. 3RP 223. But the defense was entitled to argue that the State had not proven he took part in the burglary, only that he was in possession of stolen property. As the defense pointed out, no one identified Wilford as being in the house, there was only a vague description of the person seen running from the yard, he was not located in the dog track leading from the property, Wilford's location when he was arrested was inconsistent with the direction the person seen leaving the property was headed, and there was no fingerprint evidence placing him at the scene. 3RP 287, 289, 291, 296. The existence of a legitimate argument by the defense is not a reason to provide a jury instruction proposed by the State but unsupported by the record.

The accomplice liability instruction and the references to an accomplice in the to convict instructions and special verdict form were not necessary for State to rebut the defense theory. The State wanted it to use accomplice liability as a fallback position in case the jury did not find Wilford entered the house and removed the property. But there was no evidence he was working with anyone who committed the charged crimes, and the court erred in giving instructions which allowed the State's speculative argument.

Instructional error is presumed prejudicial unless it affirmatively appears to be harmless. *State v. Stein*, 144 Wn.2d 236, 246, 27 P.3d 184 (2001). An erroneous instruction is harmless only if the appellate court can conclude beyond a reasonable doubt that the verdict would have been the same absent the error. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

As noted above, given the lack of evidence connecting Wilford to the scene of the burglary, the defense had a compelling argument that the State had failed to prove anything other than possession of stolen property. The fact that the State felt the need to speculate that Wilford acted as an accomplice demonstrates there was reason to believe the jury would acquit absent that unsupported theory. This Court cannot conclude beyond a

reasonable doubt that the verdict would have been the same absent the improper instructions, and Wilford's convictions of burglary and unlawful possession of a firearm must be reversed.

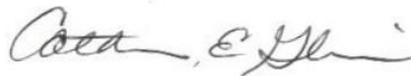
D. CONCLUSION

The court's instructional error prejudiced the defense, and Wilford's convictions of first degree burglary and unlawful possession of a firearm must be reversed.

DATED April 27, 2020.

Respectfully submitted,

GLINSKI LAW FIRM PLLC



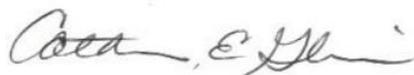
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in
State v. James Wilford, Jr., Cause No. 53912-8-II as follows:

James Wilford, Jr./DOC#417909
Clallam Bay Corrections Center
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Clallam Bay, WA 98326

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



Catherine E. Glinski
Done in Manchester, WA
April 27, 2020

GLINSKI LAW FIRM PLLC

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