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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 Chris Lanese, Judge
Cause No. 18-1-00220-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly gave an accomplice liability instruction where the defense theory was that the State could not prove that somebody else did not burglarize a residence, when the defendant was seen fleeing the yard at the residence and was found close by with the victim's property on his person.

2. If any error exists in the giving of an accomplice liability instruction, whether such error was harmless beyond a reasonable doubt where the evidence overwhelmingly demonstrated that Wilford was guilty as a principal.

B. STATEMENT OF THE CASE.

The appellant, James Wilford Jr., was charged in Thurston County Superior Court with burglary in the first-degree, two counts of theft of a firearm, unlawful possession of a firearm in the second-degree, theft in the second-degree, and bail jumping. CP 70-71. RCW 9A.52.020(1)(a); RCW 9A.56.300(1); RCW 9.41.040(2)(a); RCW 9A.56.040(1)(a); RCW 9A.56.020(1)(a); RCW 9A.76.170(3)(c), following events that occurred on the night of February 4, 2018. 2RP 80-83.¹

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.

Officer Bill Smith of the City of Olympia Police Department, responded to a burglary alarm at 1232 Frederick Street, Southwest, and noticed that the front door was open and a subject looking over the fence. 2RP 67, 74, 80-81. Officer Smith observed the subject on the inside of the fence looking over toward him. 2RP 81. The person crawled over the fence near the corner and into a field. 2RP 82. Officer Smith noted that the person was wearing a grey sweatshirt, dark pants, and had dark hair or a beanie. 2RP 83. Office Smith observed the person move toward the wood line. 2RP 83. As Officer Smith approached the house, he noticed items along the bushes. 2RP 85-86.

The description of the subject was dispatched to other officers who were arriving to the scene. 1RP 56; 2RP 84. Officers who were on the scene were told about the use of a K-9 unit and the direction of the K-9's track dictates the perimeter position of the officer. 1RP 57-58. As police continued their investigation, Officer Adam Allison filled an open spot in the perimeter that the police had set up. 1RP 59. As Officer Allison moved west of Frederick St. down Wheeler St., he noticed a male, later identified as Wilford, on foot who matched the description of the suspect that the police were working from the burglary at the residence. 1RP 60, 63.

Officer Allison made contact with Wilford by directing him to stop but Wilford kept walking, even after the officer pulled his vehicle in front of Wilford to get him to stop walking. 1RP 61. Wilford complied after a third command to stop and when Officer Allison exited his vehicle, he noted that Wilford was breathing heavily, and his clothes were wet and muddy. 1RP 62-64. The muddy and wet appearance was consistent with the area that the officers were conducting a K9 track in. 1RP 64.

As Wilford was patted down, the officers found many items, including a purse and a jewelry box which belonged to the victim Kalia Sweeney. 1RP 67-68, 127, 2RP 11-12. Officer Josh Marcusen responded to the victim's residence and noticed items on the ground outside of the home, including a television and some boxes, a pair of boots and a red plastic tote, which appeared out of place. 1RP 98, 116. The Officers cleared the residence and found nobody inside the home. 1RP 101. However, Officer Marcusen noticed several drawers had been pulled out and property was strung around the home. 1RP 102. Officer Marcusen contacted Ms. Sweeney, who was out of the area. 1RP 102-103. Officer Marcusen documented the disarray in the residence and relayed that information to Ms. Sweeney. 1RP 108-114.

Officer Marcusen learned from Sweeney that a firearm had been in the residence. 1RP 117. He located the firearm, a .22 revolver, in a firearm box that was inside of the plastic tote that was found outside. 1RP 117-118; 2RP 155. Officer Marcusen responded to Officer Allison's location and noted that Wilford "appeared almost damp, kind of like maybe he's been in the woods or laying down." 1RP 125. Officer Marcusen took a photo of the purse found on Wilford and sent it to Sweeney, causing him to believe that it belonged to Sweeney. 1RP 127-128. Officer Smith confirmed that Wilford appeared to be the man he saw run off into the woods when he arrived at the scene of the crime to assist with the arrest. 2RP 100, 126, 133. When Officer Allison transported Wilford to jail, Wilford said something like, "you guys caught me." 1RP 75.

Deputy Andrew Hansen of the Thurston County Sheriff's Office also responded as a perimeter unit for the K9 track. 2RP 137-139. When he arrived at the location where Officer Allison located Wilford, he also noticed that Wilford was wet, had mud and thorns from a bush covering his clothes, and was wearing a gray sweatshirt. 2RP 141. Deputy Hansen testified that Wilford's residence was not nearby, and he did not locate a vehicle

belonging to Wilford in the area. 2RP 143. Deputy Hansen collected and photographed property belonging to Sweeney that was found on Wilford, which included an Amazon tablet, several different items of jewelry, rings, a necklace, a hand purse, a wrist watch, and an earring. 2 RP 149-152. Deputy Hansen also documented the property that was located outside of Sweeney's residence, which included the firearm, ammunition, an Amazon Kindle, sunglasses, jewelry, and other items. 2 RP 156-158.

Sweeney testified regarding the alarm system on her residence, indicating that the system gives "60 seconds to disarm," then attempts to contact the homeowner, and after that contacts law enforcement. 2RP 182-183. On the date of the incident, Sweeney had gone to a Super Bowl party. 2RP 185. Sweeney confirmed that her residence had not been in the disarray that law enforcement found when she left. 2RP 190-191. She indicated that the dog door was kicked in or pushed in somehow. 2RP 191. Sweeney testified that the .22 revolver had been in a container on the top shelf of her closet when she left. 2RP 199-200. She also confirmed that the TV was not in the front yard when she left. 2RP 201. Sweeney also confirmed that items found on Wilford were hers. 2RP 208-210. Sweeney confirmed that the .22 revolver is a

working firearm as was a separate .9 mm weapon that was in the residence. 2RP 211. Sweeney did not know Wilford and confirmed that he did not have permission to take or move her property or firearms. 2RP 212.

While the case was pending, Wilford was released with a scheduled arraignment hearing on February 20, 2018. 3RP 182-183. At the arraignment, the trial court set an omnibus hearing for April 12, 2018, a status hearing for May 9, 2018, and jury trial set to begin on May 14, 2018. 3RP 192. After Wilford failed to appear for the omnibus hearing on April 12, 2018, an additional charge of bail jumping was added. 3RP 194-195; CP 3-4.

When the trial court discussed jury instructions with the parties during trial, the prosecutor stated:

I anticipate the defense is gonna try to argue during this case that, well, no one saw Mr. Wilford in the house, so he can't be guilty of burglary. But accomplice liability allows the State to show if he's present and assisting in any way that he is equally guilty.

3RP 153-154. Defense counsel objected to the accomplice liability instruction, stating:

An overarching objection that the defense has to the State's proposed instructions are an objection to WPIC 10.50 which is the accomplice liability instruction, as well as an objection to references to or an accomplice found throughout the jury instructions.

It's the defense position that there has been zero evidence produced that Mr. Wilford acted as an accomplice to another person.

3RP 161. Defense counsel further argued:

No other persons have been charged. No other person has been identified. There has not been evidence of accomplice liability produced at this trial, and it's the defense position that it is essentially confusing to jurors to include the accomplice liability instruction and references.

3RP 161-162.

After the State rested, Wilford moved to dismiss counts 1 through 5, arguing that the State had failed to demonstrate more than a proximity to the firearm and a nexus between the weapon and the crime and that the State's case relied on speculation regarding whether or not Wilford touched the property. 3RP 215-216.

The State responded to the defense's motion to dismiss the charges by arguing that whether or not the appellant was the principal or whether he was an accomplice, the evidence that the State presented was sufficient to support the charges. 3RP 216-17. The defense raised an argument that an accomplice liability was not pertinent as the State had presented no evidence which would indicate the appellant acted as an accomplice. 3RP 218.

The trial court did not consider accomplice liability for the purposes of the motion to dismiss, but stated:

The court's task is to assess whether or not there is sufficient evidence in the record at this juncture to allow a reasonable jury to find the defendant guilty of the charges when considering the evidence in a light most favorable to the nonmoving party, which is the State.

3RP 219. The trial court ruled:

Based on the totality of the circumstances present in the record and the evidence admitted thus far in this trial, the court finds that it would not be speculation for the defendant to be found guilty in this case but, rather, a reasonable inference drawn from the admitted evidence; thus, the motion is denied.

3RP 219-20.

The defense raised another objection regarding the accomplice liability instruction by again arguing that the State had produced no evidence that the appellant acted as an accomplice to any other person. 3RP 222. The court ruled:

I do believe that the articulated basis that the State has given for why it wants the accomplice liability instructions present, specifically to rebut any sort of argument that someone else was involved, and to indicate that even if they were, that that would not prevent the jury from finding the defendant to be guilty, I find that is an appropriate basis for the inclusion of the accomplice liability instruction.

3RP 223.

The trial court gave the accomplice liability instruction and included references to accomplice liability in the to-convict instructions on the burglary in the first-degree charge, the theft of a firearm charge and the theft in the second-degree charge, as well as the special verdict form for being armed with a firearm. CP 139, 145, 155, 159, 163.

During closing argument, the prosecutor argued, “So I don’t have to prove particularly that Mr. Wilford committed the act. I could prove that he was an accomplice, meaning he was working with someone.” 3RP 249-250. While discussing the burglary charge, the prosecutor argued, “Even if you said, well, the person that went in there, they took the gun, if one person took the gun, the accomplice is just as guilty of taking the gun and being armed with it.” 3RP 252. The prosecutor later argued:

I don’t necessarily have to prove that Mr. Wilford entered the building. I could prove that he did it in concert with someone else acting as an accomplice. Well, in this case, I think the evidence shows that Mr. Wilford did enter the building, but I anticipate the defense will argue to you that, well, the State hasn’t shown any witness to say that Mr. Wilford was inside, and that’s true, but we’ll talk about what circumstantial evidence proves and what it means in a little bit. But, you know, even if you were to suppose that there was this second person there, you can still find that that second person – maybe they entered, and Mr. Wilford was acting as the lookout. I don’t think that’s what the evidence is.

3RP 253-254. When the prosecutor discussed the charge of unlawful possession of a firearm in the second-degree, he acknowledged that the State needed to prove “knowledge of the firearm in [Wilford’s] possession or control.” 3RP 256.

The prosecutor later argued that the circumstantial evidence supported a conclusion that Wilford had burglarized the residence, stating:

Mr. Wilford is seen in the backyard of the alleged victim’s residence, Ms. Sweeney. When the police come, he jumps the fence and takes off into the woods, and then a K9 track starts and they start trying to track him. A short time later Officer Allison finds him in close proximity to the house, and it looks like he’s got a lot of property in his front pocket of his sweatshirt.

3RP 264-265.

Defense counsel then argued that the State didn’t know its own theory and could not say that it was Mr. Wilford. 3RP 284. The defense argued that having possession of the property was not evidence of accomplice liability because there was no evidence of an accomplice. 3RP 285. Defense counsel argued,

What Mr. Wilford is guilty of is possession of stolen property. He was found in possession of these belongings, but here is what you don’t know. You don’t know how he got them. You don’t know how he obtained them. And there’s a reason why I’m telling

you he is guilty of possession of stolen property. He's not charged with that.

3RP 298.

In rebuttal, the prosecutor reiterated the definition of an accomplice and argued:

The defense says, the State hasn't proven to you that Mr. Wilford did this, this, and this. Well, what has been proven to you in this trial? Ms. Sweeney's house was burglarized. I don't think there's any argument that it wasn't, right? And that the property was either found outside the house or in the defendant's possession.

3RP 301. The prosecutor then discussed circumstantial evidence supporting that Wilford was in the house, stating, "what better circumstantial evidence do you want that he was in the house is that he has her property 15, 20 minutes later?" 3RP 302. The prosecutor further argued, "He committed the burglary. That's why he's got all the property on him." 3RP 303.

The prosecutor again discussed accomplice liability stating, "I submit to you that it's Mr. Wilford because Mr. Wilford committed the crime, but if the defense wants to say, okay, well, maybe there was this someone else, that person is called an accomplice, so Mr. Wilford can be an accomplice to someone else who took the firearm." 3RP 306-307.

The jury found Wilford guilty of burglary in the first-degree, unlawful possession of a firearm in the second-degree, theft of a firearm, theft in the second-degree, and bail jumping. 3RP 314. Wilford was found not guilty on one count of theft of a firearm. 3RP 314. The jury also found that either Wilford or an accomplice was armed with a firearm with regard to Count 1. The trial court exercised its discretion to merge the theft of a firearm and second-degree theft charges with the burglary in the first-degree charge. 4RP 342; CP 193, 194-205. Wilford was sentenced to a total term of confinement of 89 months. CP 198. This appeal follows.

C. ARGUMENT.

1. The evidence presented at trial was sufficient to support an accomplice liability instruction.

“Each side in a case may have instructions embodying its theory of the case if there is evidence to support that theory.” State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 126 L.Ed. 2d 331, 114 S.Ct. 382 (1993). A reviewing court considers a trial court’s decision about whether to give a jury instruction by looking at whether there was sufficient evidence to support an instruction viewing the evidence in a light most favorable to the requesting party. State v. Fernandez-Medina, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000).

Accomplice liability 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). An accomplice must associate himself with the principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed. State v. Jamieson, 4 Wn. App.2d 184, 204-205, 421 P.3d 463 (2018). A person is an accomplice in the commission of a crime if, with the knowledge that it will promote or facilitate the commission of the crime, he is present at the scene and is ready to assist by his presence. State v. Wilson, 95 Wn.2d 828, 631 P.2d 362 (1981).

Accomplice liability and principal liability are not alternative means of committing a crime. State v. Haack, 88 Wn. App. 423, 428, 958 P.2d 1001 (1997); citing, State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974). In this case, the prosecutor's theory was supported by the evidence. By participating in the burglary of Ms. Sweeney's residence, Wilford was guilty of the crime of burglary in the first-degree, whether he had a co-defendant or not. "The legislature has said that anyone who participates in the commission of a crime is guilty and should be charged as a principal, regardless of the degree or nature of his participation."

Carothers, 84 Wn.2d at 262. It was proper for the State to argue that, regardless of whether Wilford acted alone or in concert with another, the evidence demonstrated that he knowingly participated in the commission of the crime. Reviewing the evidence in a light most favorable to the State, the evidence supported the instructions and allowed the State to argue its theory of the case to rebut the defense theory. The circumstantial evidence supported the conclusion that Wilford was guilty as either principal or accomplice.

In State v. Munden, 81 Wn. App. 192, 913 P.2d 421 (1996), the defense theorized that another individual named Rice entered a market to commit the charged offense. The State responded that “even if Munden remained outside the market, he could be guilty as an accomplice because he was in possession” of the stolen property proving that he had assisted in removing the property. Id. at 196. Division I of this Court held that the evidence that Munden was inside the market entitled the jury to find both that he committed the burglary as a principal and that he simultaneously assisted, or stood ready to assist, the acts of burglary committed by his companions. Id. The Court noted, “we have not found the evidence insufficient to support the accomplice instruction.” Id. at 197.

In this case, as in Munden, the circumstantial evidence was sufficient for the accomplice liability instruction. Wilford was seen in the victim's yard during the crime. Property was being staged in the yard to be taken. In near proximity in both time and location to the crime, Wilford was found with items stolen from the residence on his person. The trial court did not err by instructing the jury that it could consider both principal and accomplice liability. The defense theory of the case necessarily pointed the finger at another person by arguing that Wilford merely possessed the stolen property. The circumstantial evidence supported theories of both principal and accomplice liability. It was proper for the jury to consider both.

2. If this Court finds that the instructions given by the trial court were erroneous, such error was harmless.

An erroneously given accomplice liability instruction is harmless if the Court concludes beyond a reasonable doubt that the verdict would have been the same absent the error. State v. Brown, 147 Wn.2d 236, 246, 27 P.3d 184 (2001); State v. Wren, 115 Wn. App. 922, 925 (2003). In this case, it is clear that the jury would have found Wilford guilty of the crime of burglary in the first degree even if the trial court had not instructed the jury regarding accomplice liability.

After a burglary alarm, which testimony indicated starts making calls 60 seconds after a pin is not properly entered, Wilford was seen by law enforcement in the victim's yard where her property had been placed outside. 2RP 80-81, 100, 126, 133, 182-183; 1RP 98, 116. After being seen, he ran into a wooded area, only to be found a short distance away, wet, muddy and out of breath, carrying several items which had been stolen from the residence on his person. 1RP 61-64, 67-68, 127, 2 RP 11-12, 83. After being arrested, he then stated something like, "you caught me." 1RP 75. There was no likelihood that the jury would not have found him guilty if the trial court had not provided an accomplice liability instruction. The evidence was overwhelming.

It should be noted that the only charge that remains which arguably may have been affected by the accomplice liability instruction was the burglary in the first-degree while armed with a firearm charge. Wilford's convictions for theft of a firearm and theft in the second-degree were merged into the burglary by the trial court, and the to-convict instruction for unlawful possession of a firearm in the second-degree did not include accomplice liability. CP 155, 193, 194-205. The overwhelming evidence and the fact that the jury found that Wilford knowingly possessed a firearm for

purposes of the unlawful possession charge demonstrated beyond a reasonable doubt that the jury would have found Wilford guilty of the burglary even if the trial court had not given the accomplice liability instruction.

D. CONCLUSION.

Sufficient evidence supported the trial court's accomplice liability instructions. The defense theory of the case necessarily involved another person entering the residence. The State was properly allowed to argue that the evidence demonstrated that Wilford was still guilty as an accomplice even if another person was present. Regardless, the evidence overwhelmingly supports the conclusion, beyond any doubt, that the jury would have found Wilford guilty regardless of whether or not the trial court gave an accomplice liability instruction. The State respectfully requests that this Court affirm Wilford's convictions and sentence.

Respectfully submitted this 24th day of June, 2020.



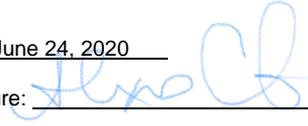
Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: June 24, 2020

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THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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