

FILED

SEP 10 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 29097-2-III

STATE OF WASHINGTON, Respondent,

v.

DAVID WAYNE HARRELL, JR., Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

At David Harrell's trial for residential burglary, the trial court permitted the State to present out-of-court statements between Harrell's mother, Sheila Miller, and her husband (Harrell's stepfather) Kevin Miller, under ER 801(d)(v), statements of co-conspirators. Because the State did not present sufficient evidence to show that David Harrell was a party to their conspiracy, the statements should not have been admitted. Further, because the admission of the statements was not harmless, the conviction should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in finding that David Harrell participated in the conspiracy between Sheila and Kevin Miller.

ASSIGNMENT OF ERROR 2: The trial court erred in admitting the statements when they were not in furtherance of a conspiracy with Harrell.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State presented sufficient evidence in the record to establish by a preponderance that Harrell participated in a conspiracy.

2. Whether the ER 801(d) exception applies to statements that do not further a conspiracy with the defendant, but relate to a different conspiracy.
3. Whether the statements were in furtherance of a conspiracy when they were made after the objective of the conspiracy was accomplished.

III. STATEMENT OF THE CASE

David Harrell's mother, Sheila Miller, worked as a caregiver for Mary Miller in Mary's¹ home. I Report of Proceedings (RP) 70-71. Sheila was married to Mary's son, Kevin. I RP 68. She lived in Mary's house from October to December 2008. I RP 70

Mary died on February 1, 2009. I RP 71. At the time, Kevin was incarcerated in Airway Heights Correctional Center. I RP 70. Mary's great-niece, Kelly Korpinen, and her friend Karen Kagele, were appointed co-personal representatives of her estate. I RP 67, 72, 205.

Kevin remembered reading Mary's will, in which he received a substantial portion of the estate. I RP 167. However, there was another will in which he received nothing. I RP 171. Sheila and Kevin discussed

¹ Because there are multiple parties that share the last name "Miller," those individuals will be referred to by their first names. No disrespect is intended.

the possibility of Sheila going out to Mary's house to look for the wills. I RP 171-72, 174. During a phone call between Sheila and Kevin on the afternoon of February 17, 2009, Sheila told Kevin she would "try to get right out to break into the house." I RP 175-76. She described the window through which she would enter and stated, "I'll never get in trouble." I RP 177.

When Sheila and Kevin talked the next day, Sheila told Kevin that David had gone out to Mary's house with her and they looked through Mary's papers. I RP 181-82. They took a file and some documents and left. I RP 182-83. Sheila and Kevin were upset about how Mary's estate was handled, and Sheila encouraged Kevin to protest it. I RP 183.

Korpinen and Kagele discovered that Mary's house had been entered when they returned a few weeks later. I RP 86-87. While they were at the house, they received several phone calls where the caller did not speak when they answered. I RP 88. Eventually they dialed "*69" and learned that the number was from Geiger Correctional Center. I RP 88. Korpinen and Kagele believed that Kevin was incarcerated at Geiger. I RP 212. The next time the phone rang, Kagele answered, "What do you want, Kevin?" I RP 88, 212. The caller hung up and did not call again. I RP 212.

Kagele and Korpinen decided to call the police. I RP 88, 212. They reported a folder missing from the kitchen and indicated that nobody had permission to be in the home besides them. I RP 85, 89, 213. In the course of investigating the report, Deputy Jeff Lane subpoenaed Kevin's phone conversations from Airway Heights Correctional Center, which were recorded. I RP 112, 140. The phone conversations referenced the items taken from Mary's house. I RP 114.

Lane then obtained a search warrant for Sheila's house and served it on April 6, 2009. I RP 115-16. The officers found the file that was missing from Mary's house in the course of the search. I RP 118. Upon being questioned, Harrell told Lane that he had gone out to the house with two friends and Sheila. He had entered though the back window before when Mary could not answer the door, and it opened easily. According to Lane, Harrell said that they were going to look for the Will. I RP 120. However, by the time Harrell allegedly made this statement, more than a month had elapsed from the date of the entry.

Erin Cassiano testified for the defense that on the night of February 17, 2009, she was at Harrell's house when Sheila called and offered to give her gas money in exchange for driving her somewhere. II RP 222-24. When they arrived at the destination, Sheila told David to come with her

and he did. II RP 225. They were gone for about ten minutes and when they returned, Sheila had some papers. II RP 226.

Likewise, Chelsea Lopez testified that she and Cassiano were at Harrell's house when his mother called and asked for a ride. II RP 234. Lopez believed that they were going out to a house Sheila was living at to pick up some of her stuff. II RP 235, 239. When they arrived, Sheila asked Harrell to go with her and they both got out of the car. When they returned, Sheila was carrying some belongings. Harrell was not carrying anything. II RP 235.

Harrell testified that he first met Mary around December, when Sheila needed a ride to the house. II RP 244. When they arrived, Sheila did not have her key. They could see through the window that Mary was lying helpless on the floor. Harrell helped Sheila enter the house through a side window so they could help Mary get up. II RP 245.

On the night of February 17, 2009, Sheila called Harrell to ask for a ride out to Mary's house. Harrell's truck was broken down, but Cassiano agreed to let them use her car. II RP 247. When they arrived, Sheila tried the front door, then came back and asked for Harrell's help opening the window. II RP 248-49. Harrell did not know Sheila had

moved out or that Mary had died, and she told him they were there to pick up some of her belongings. II RP 249.

When they got inside, Sheila told Harrell to help her look for an envelope. II RP 250. Harrell pointed out an envelope in the kitchen, and Sheila grabbed it and said, "Let's go." II RP 250. Harrell did not know what was in the envelope. II RP 251. Harrell denied that he told Lane they had gone to Mary's house to get the will; he said they had gone out to get Sheila's belongings. II RP 254.

The State charged Harrell with one count of residential burglary. Clerk's Papers (CP) 31-32. At trial, the court allowed the State to play to the jury the recorded conversations between Sheila and Kevin as statements of co-conspirators under ER 801(d)(2)(v). I RP 150-51. The jury convicted Harrell, and he was sentenced to three months' confinement. CP 56, 59. Harrell now appeals. CP 69.

IV. ARGUMENT

The evidence overwhelmingly established that Sheila and Kevin conspired to break into Mary's house and retrieve Mary's will. But there was a paucity of evidence that Harrell knew about their conspiracy and knowingly participated in it. Moreover, the statements between Sheila and Kevin can hardly be said to have furthered a conspiracy with Harrell

because they were made after the fact, when the conspiracy was ended. Because the statements do not meet the standard for admissibility under ER 801(d), they should have been excluded.

Before admitting out-of-court statements under the exception for statements of a co-conspirator, “the trial court must first determine whether the State has shown, with substantial independent evidence, a prima facie case of conspiracy.” *State v. St. Pierre*, 111 Wn.2d 105, 119, 759 P.2d 383 (1988). A “conspiracy” for purposes of ER 801(d) is not technically defined, but is considered by its common sense, dictionary definition as an agreement between two or more persons to commit an unlawful act. *State v. Halley*, 77 Wn. App. 149, 154, 890 P.2d 511 (1995). Stated alternatively, it is sufficient to show that there was a concert of action in which the parties worked together understandingly with a single design for the accomplishment of a common purpose. *State v. Sanchez-Guillen*, 135 Wn. App. 636, 643, 145 P.3d 406 (2006).

The evidence of the conspiracy must be independent of the statements themselves. *State v. Guloy*, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985). Further, to be admissible, the statements must have been made during and in furtherance of the conspiracy. *St. Pierre*, 111 Wn.2d at 119. Statements made after the conspiracy has ended do not fall within

the exception. *Id.* A conspiracy ends when its objectives “have either failed or been achieved.” Advisory Committee’s Note to FRE 801(d)(2)(E) (citing *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949)); *United States v. Moss*, 9 F.3d 543, 549 (6th Cir.1993) (citing *Wong Sun v. United States*, 371 U.S. 471, 490, 83 S.Ct. 407, 418, 9 L.Ed.2d 441 (1963)); see also *Lutwak v. United States*, 344 U.S. 604, 616, 73 S.Ct. 481, 97 L.Ed. 593 (1953); *Grunewald v. United States*, 353 U.S. 391, 401-02, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957) (Jackson, concurring) (The crucial teaching of *Krulewitch* and *Lutwak* is that after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment); *cf. Dutton v. Evans*, 400 U.S. 74, 81, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (citing *Lutwak* and *Krulewitch*: “It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy, and not during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise.”).

The State contended, and the trial court agreed, that the conspiracy in this case was to enter Mary's house to retrieve her Will. I RP 150. But the overwhelming independent evidence showed that Harrell did not know about the Will, and simply thought they were going to his mom's former residence to pick up some of her belongings. Harrell could not have worked in concert with Sheila and Kevin "understandingly with a single design for the accomplishment of a common purpose" if Sheila lied to him about the reason for entering Mary's house. *Sanchez-Guillen*, 135 Wn. App. at 643.

What the evidence fairly establishes is that, at Sheila's request, Harrell entered the house to retrieve *something*. Even if the trial court is correct that "in the defendant's mind he may not have realized what was going on was a burglary; but he was aware of all the facts that are sufficient to a person to either know or should know that a crime was being committed," that does not establish that Harrell knowingly assisted Sheila and Kevin in their plan to obtain Mary's Will. In other words, even if Harrell knew or should have known that in breaking into Mary's house, he was assisting Sheila in taking property that did not belong to her, this does not establish that Harrell was a party to the conspiracy between Sheila and Kevin.

ER 801(d)(2)(v) excludes from the hearsay rule statements made in furtherance of *the* conspiracy. Admittedly, the evidence may be sufficient to show that Harrell conspired with Sheila to unlawfully enter the house. But ER 801(d)(2)(v) logically limits the admissible statements to those that further the same conspiracy, not a separate conspiracy of a different conspirator.

Furthermore, the statements played by the State that implicated Harrell were not statements made in furtherance of the conspiracy – they were made after the house had been entered, the will retrieved, and the purpose accomplished. At that point, any conspiracy to break and enter and retrieve the Will was ended, and the statements should not have been admitted. *St. Pierre*, 111 Wn.2d at 119.

A trial court's admission of evidence in contravention of the rules of evidence is reviewed for harmless error. *State v. Whitaker*, 133 Wn. App. 199, 225, 135 P.3d 923 (2006). Here, the erroneous admission of the statements was not harmless. The statements comprised the vast majority of the State's direct evidence that Harrell intended to commit a crime in entering Mary's house – an essential element of a residential burglary charge. *See State v. Drum*, 168 Wn.2d 23, 27, 225 P.3d 237 (2010). Absent her statements, a jury could have easily concluded that the

circumstantial evidence was insufficient to overcome the testimony of Harrell, Cassiano, and Lopez, who all testified that they believed they were going to the house to retrieve Sheila's possessions. As such, there is more than a reasonable probability that the introduction of the phone conversations between Kevin and Sheila affected the outcome of the trial.

V. CONCLUSION

In the present case, while there was abundant evidence that Kevin conspired with Sheila to steal Mary's Will and Sheila conspired with Harrell to break into Mary's house, there was insufficient evidence of Harrell's involvement in the former conspiracy to permit hearsay statements between the former co-conspirators to be admissible against Harrell. Moreover, even if the State did establish that Harrell was part of the conspiracy with Sheila and Kevin, the statements introduced were not in furtherance of the conspiracy because they were made after the conspiracy had already ended. And the statements probably affected the outcome of the trial because they provided the only direct evidence that Harrell intended to commit a crime when he entered Mary's house, rather than simply help his mother retrieve her possessions.

Because the statements do not satisfy the hearsay exception set forth in ER 801(d)(2)(v), they should have been excluded. The judgment

should be reversed and the case remanded for a new trial without the conversations between Sheila and Kevin.

RESPECTFULLY SUBMITTED this 8th day of September,
2010.

A handwritten signature in black ink that reads "Andrea Burkhart". The signature is written in a cursive style with a horizontal line underneath it.

Andrea Burkhart, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the Brief of Appellant upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 8th day of September, 2010 in Walla Walla, Washington.


Andrea Burkhart