

No. 29629-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

LUIS CISNEROS VALENCIA,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Vic L. VanderSchoor, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

There was insufficient evidence to sustain the conviction of attempted residential burglary as an accomplice.

Issue Pertaining to Assignment of Error

Is the attempted residential burglary conviction based on accomplice liability unsupported by substantial evidence in violation of Mr. Valencia’s right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

B. STATEMENT OF THE CASE

Luis Cisneros Valencia, the defendant, was charged with attempted residential burglary, alleging that on January 13, 2010 Mr. Valencia, acting as principal or accomplice, tried to pry a screen off of the window of a residence to gain unlawful entry. CP 1.

A jury trial was held on December 6 and 7, 2010. RP¹ 2–151. Homeowner Flora Goodale sold her house and enlisted help in moving some belongings to her new residence. RP 71–72, 86. For several weeks Diana Holt, a next door neighbor at the old house, had helped with the

¹ The jury trial proceedings are contained in one volume, by court reporter John McLaughlin, and will be referred to as “RP ____”. Reference, if any, to the separate volumes containing an evidentiary hearing and sentencing will include the date of the proceeding, e.g. “1/5/11 RP ____”.

moving. January 13, 2010 was the last day for hauling out most of the remaining items. RP 8.

Calvin Kernan, who was a friend of Goodale's nephew and had once lived at the house, helped move on January 13, 2010 and paid his friend Juan Garcia to lend a hand. They hauled two or three loads before ending the day sometime between 7:00 and 10:30 p.m., and Kernan dropped Juan off at his brother's house. RP 72–74, 86–88, 90–92, 99–100.

The few items remaining in the house at day's end included a wall-mounted TV, another TV, a table and chair set, and a big buffet. RP 8–9, 74.

That night about 11:00 p.m., Holt and her son Evan Kosterman were in his bedroom, from which they could clearly see Goodale's house. RP 10, 13, 26, 31. They saw a vehicle pull into Goodale's driveway with its headlights off. RP 10. Kosterman walked over to the front of Goodale's house and saw that the vehicle was a '92 or '93 Jeep Grand Cherokee, and got the license number. RP 23. His mother had meanwhile called Goodale at the new house, and determined that no one was supposed to be there. RP 10. Kosterman returned home, and they called 911 and gave them the car information. RP 11, 23. Kosterman went back

out because he didn't see anyone still in the front yard. RP 23. He saw a skinnier male kneeling near the back slider door with an illuminated light on his head, and a chunkier male standing upright. One of them seemed to be pushing at the door and the other had a broom stick as if to hit the door off the track. RP 24. Kosterman said something out loud, a brief scuffle took place and the males ran toward their car. RP 24–25.

Benton County Sherriff Deputies Tungesvik and Trevino arrived as the dark-colored Jeep spun out of the driveway with its light off. Within a block the Jeep hit ice and slid into a ditch. The driver, Mr. Valencia, and his passenger nephew were arrested. RP 32–34, 36, 62–64, 97. Mr. Valencia was injured in the scuffle and was taken to the hospital prior to booking. RP 60–61, 67–69.

Near the back slider door, police found a head lamp that was still illuminated, and a long-handled “screw-driver” or paint scraper. It looked like someone had attempted to pry open the door or screen door. RP 36, 54, 65, 123–24. The broom handle was lying in front of the patio door and was not in its normal place. RP 77.

Police saw a crow bar and/or pry bar in the Jeep and impounded the vehicle. They later executed a search warrant for the car and

additionally found pliers, channel locks, a second head lamp by the center console and a pair of gloves. RP 41–42, 51, 54–57.

Mr. Valencia told police his nephew Juan Garcia had asked him to drive somewhere to pick up some items because Juan had been there earlier in the day to help the owner move and some items were left there that the owner had given Juan permission to take later. RP 41.

Goodale had not given any of the items remaining at her house to the people who helped her move. RP 74.

Juan testified that at some point that night he decided to go back to Goodale's to steal some property. RP 100–01. In earlier interviews with the State and a defense investigator, Juan maintained he was returning to the house to retrieve some of his own property, that Goodale had given him one of the TVs, and said that he was not going there to steal or do anything illegal. RP 106.

Juan did not have a license or a car, and asked Mr. Valencia for a ride. RP 101. Juan did not tell Mr. Valencia what he wanted to do with the vehicle or that he needed a large vehicle so that he could go out and steal TV's. RP 119. Mr. Valencia's car was not working so he borrowed a car from Frankie, a family member. Frankie does painting and remodeling, and the Jeep contained work tools, e.g. paint scrapers. RP

101, 118–20. Mr. Valencia works in the construction trade and apparently has access to tools similar to those found at the scene. RP 115. Juan gathered the tools he wanted and put them in the back of the Jeep. RP 113, 119, 122.

Mr. Valencia followed Juan’s directions to the house. RP 102. Juan said Mr. Valencia stayed in the car while Juan went to the back of the house and tried to get the door off of the hinges. RP 102, 104. Just as Mr. Valencia came around to the back to see what Juan was doing, the neighbor’s son Kosterman came over and the scuffle ensued. RP 104–05, 110.

In closing, the State argued solely that Mr. Valencia was guilty of being an accomplice to his nephew, Juan Garcia:

... [W]hat is in dispute is the defendant aided or abetted Mr. Garcia in committing a substantial step toward the crime of Residential Burglary. ... The Court described to you the definition for accomplice. That is aiding or assisting or even being present at the scene ready to aid or assist somebody in their efforts to conduct criminal activity. There are a number of things that we have presented into evidence that establish Mr. Valencia was there to aid and assist his nephew and obviously the nephew admitted he was engaged in a substantial step to commit this crime.

First of all, the defendant assisted Mr. Garcia by borrowing a Jeep. ...

RP 140.

... There were a number of tools taken to the scene that were borrowed apparently from Mr. Valencia. ... The neighbors also testified that they had observed two individuals in the back near the sliding glass door and certainly by the testimony Mr. Valencia came to the back by the sliding glass door. His nephew at the least had already pried the sliding gas door open. ...

RP 141.

It is very clear, ladies and gentlemen, from the evidence that has been presented that Mr. Valencia knew or at a minimum should have known that by taking his nephew to this residence he is assisting his nephew in breaking into this home. ...

RP 142.

... The evidence is real clear that Mr. Valencia knew exactly what was going on and he assisted his nephew in an effort to gain access into this house. ...]T]he evidence is clear that Mr. Valencia was assisting his nephew and again I will be asking you to find him guilty as charged. ...

RP 150–51.

The jury found Mr. Valencia guilty of attempted residential burglary. CP 35. The court sentenced Mr. Valencia to a standard range sentence of 24.75 months based on an offender score of 6. CP 38, 41.

This appeal followed. CP 47.

C. ARGUMENT

The attempted residential burglary conviction based on accomplice liability is unsupported by substantial evidence and violates Mr. Valencia’s right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

a. Due process requires proof of all elements of attempted residential burglary beyond a reasonable doubt. As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of

the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. Baeza, 100 Wn.2d at 491, 670 P.2d 646. When an innocent explanation is as equally valid as one upon which the inference of guilty may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993).

b. The State did not prove Mr. Valencia knew that his nephew intended to commit a crime. To establish an attempted residential burglary, the State was required to prove that the nephew and/or Mr. Valencia had taken a substantial step toward two elements: (1) that he entered or remained unlawfully in a dwelling; and (2) that he intended to commit a crime against a person or property therein. RCW 9A.52.025(1); State v. Stinton, 121 Wn. App. 569, 573, 89 P.3d 717 (2004).

In addition, since Mr. Valencia was convicted as an accomplice, the State was required to prove that he had knowledge of the attempted burglary. A defendant is liable as an accomplice if, with knowledge that it will promote or facilitate 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 the planning or committing the crime. RCW 9A.08.020(3)(a). The defendant must act with knowledge that he is facilitating the specific crime charged, not simply “a crime.” State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000). An accomplice need not participate in the crime, have specific knowledge of every element of the crime, or share the same mental state as the principal. State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). Rather, an accomplice must merely act with the knowledge that he is aiding a particular crime. *See State v. Whitaker*, 133 Wn. App. 199, 230, 135 P.3d 923 (2006).

Here, the nephew testified that he intended to enter the house and steal some appliances. RP 100–01. But there is no evidence that Mr. Valencia knew of the nephew’s intent to burglarize the house. The nephew simply asked Mr. Valencia to drive somewhere to pick up some items, telling his uncle that he had been there earlier in the day to help the owner move and the owner gave him some item with permission to come back and take them later. RP 41. There was nothing suspicious about Mr. Valencia agreeing to provide a ride because Juan did not have a driver’s license or a car. RP 101. Mr. Valencia’s car was not working so he borrowed a car from a relative. RP 101, 118–20. Despite the state’s argument in closing that Mr. Valencia must have chosen a relative with a

large car (Jeep) for a reason, there was no evidence Juan had even told his uncle what items or size of items he intended to pick up. RP 119.

As for tools used at the scene, the Jeep contained some of the relative's work tools. RP 101, 118–20. While Mr. Valencia worked in the construction trade and apparently owned tools similar to those found at the scene, the evidence established only that it was Juan who gathered the tools he wanted and it was Juan who put them in the back of the Jeep. RP 113, 115, 119, 122. There is no evidence that Juan asked permission to take any tools and no evidence that Mr. Valencia knew Juan had take some tools and stashed them in the Jeep. As the nephew testified, the tools “might have been his, but I was the one that was putting them to use.” RP 115.

Mr. Valencia followed Juan's directions to the house. RP 102. Juan said Mr. Valencia stayed in the car while Juan went to the back of the house. RP 102, 104. Just as Mr. Valencia came around to the back to see what Juan was doing, the neighbor's son Kosterman came over. RP 104–05, 110. This scenario is consistent with Kosterman's own testimony that the second time he went around to his neighbor's back yard because he didn't see anyone still in the front yard. RP 23. There Kosterman saw two males, one kneeling with a light on his head and one standing, one pushing

at the door and one holding a broom stick. RP 24. This situation is equally consistent with the nephew's testimony that Kosterman arrived just as Mr. Valencia came around back to see what his nephew was up to. Mr. Valencia was likely very surprised and angered by Kosterman's not-so-neighborly attack and resulting injury, and of course he would want to leave the situation immediately. RP 24–25.

There was no direct evidence that Mr. Valencia knew what his nephew was apparently planning. The inferences that can be drawn from the circumstantial evidence are equally consistent with innocence, and do support by substantial evidence a reasonable conclusion that Mr. Valencia knew that his nephew intended to commit a burglary. Baeza, 100 Wn.2d at 491; Bautista-Avila, 6 F.3d at 1363. There was no showing that Mr. Valencia acted with the knowledge that he was in any way aiding the crime of burglary. *See* Whitaker, 133 Wn. App. at 230. The evidence is insufficient to establish accomplice liability and the conviction for attempted residential burglary must be reversed.

D. CONCLUSION

For the reasons stated, this Court should reverse the conviction for attempted residential burglary.

Respectfully submitted September 19, 2011.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 19, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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