

FILED

JUN 19, 2012
Court of Appeals
Division III
State of Washington

No. 30675-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA MICHAEL DOHERTY,

Appellant.

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

The Honorable Salvatore F. Cozza

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Instruction 10 relieved the State of its burden of proving every element of the offense beyond a reasonable doubt.

2. The State failed to prove Mr. Doherty acted as an accomplice to Mr. Doyle's trafficking in stolen property.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State has the burden of proving the elements of the offense beyond a reasonable doubt. A jury instruction which relieves the State of its burden of proof violates due process.

The accomplice instruction given by the trial court allowed the jury to infer Mr. Doherty's guilt of the trafficking count based solely on its finding of his guilt of the theft count. Was Mr. Doherty's right to due process violated requiring reversal of his conviction for trafficking?

2. Due process requires the State to prove each element of the charged offense beyond a reasonable doubt. Where the State charges a defendant with being an accomplice, it bears the burden of proving the defendant had knowledge of the specific crime the principal intended to commit. Mr. Doherty was never observed in the store where Mr. Doyle sought to sell stolen

DVDs nor did the State offer any other proof of Mr. Doherty's alleged involvement in trafficking in the DVDs. Must this Court reverse Mr. Doherty's first degree trafficking conviction for a failure of proof?

C. STATEMENT OF THE CASE

On September 24, 2011, Joshua Doherty was observed by Target store security placing eight DVDs in a plastic cooler and taking them out of the store without paying. RP 102-06.¹ He was seen entering a car which drove away. RP 106. The cooler and the DVS were valued at approximately \$237. RP 126.

Shortly thereafter, Target security manager David Tasca contacted Tamea Mendez, the customer service manager of Hastings, a nearby store in Spokane Valley that buys used DVDs. RP 110, 137-38. Mr. Tasca described the titles of the DVDs taken and Ms. Mendez confirmed that a person was attempting to sell the DVDs at Hastings. RP 110-11.

Mr. Tasca went to Hastings and saw the car he identified as being involved in the theft of the DVDs parked in a parking

¹ The verbatim report of proceedings consists of three volumes of transcripts. The trial transcripts listed as "Volume I" and Volume II" will be referred to collectively as "RP." The sentencing transcript will be referred to by date - "2/23/2012RP."

stall in the lot in front of the store. RP 112, 163. He saw Mr. Doherty seated in the driver's seat. RP 113. Mr. Tasca went inside the store and identified the DVDs as those stolen from Target. RP 115. He called 911. RP 117.

Once the police arrived, the man attempting to sell the DVDs, later identified as co-defendant Steven Doyle, fled. RP 118, 141-44. Mr. Doyle was arrested a short distance away and returned to Hastings. RP 169. Mr. Doherty was detained as well and the car was impounded. RP 151-53. A subsequent search of the car pursuant to a search warrant revealed two pair of wirecutters, eight security devices, which Tasca testified were attached to the DVDs, cellophane wrapping, and the plastic cooler. RP 153-61.

Mr. Doherty and Mr. Doyle were charged with first degree trafficking in stolen property and third degree theft.² CP 4. Following a jury trial, Mr. Doherty was found guilty as charged. CP 32-33; RP 277.

² Mr. Doyle apparently committed suicide prior to trial, thus Mr. Doherty was the only person tried. 2/23/2012RP 9.

D. ARGUMENT

1. INSTRUCTION 10 DEFINING AN ACCOMPLICE RELIEVED THE STATE OF ITS BURDEN OF PROVING EVERY ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT

a. The State bears the burden of proving each element of the offense beyond a reasonable doubt. The State bears the burden of proving every element of the charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). Jury instructions that relieve the State of its burden to prove every element of an offense violate due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). This Court reviews challenged instructions *de novo*, in the context of the instructions as a whole. *State v. Frasquillo*, 161 Wn.App. 907, 918, 255 P.3d 813 (2011).

b. The State was required to prove Mr. Doherty had knowledge of “the crime” Mr. Doyle intended to commit, not merely “a crime.” Under RCW 9A.08.020(3), a person is an accomplice if he knowingly aids or agrees to aid another in committing “the crime.”³ “It is a misstatement of the law to instruct a jury that a person is an accomplice if he or she acts with knowledge that his or her actions will promote *any* crime.” *State v. Brown*, 147 Wn.2d 330, 338, 58 P.3d 889 (2002). “[F]or accomplice liability to attach, a defendant must not merely aid

³ RCW 9A.080.020 states in relevant part:

(1) 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.

(2) A person is legally accountable for the conduct of another person when:

(c) He or she is an accomplice of such other person in the commission of *the* crime:

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of *the* crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it;

(Emphasis added).

in any crime, but must knowingly aid in the commission of the specific crime charged.” *Id.*

Here, the court orally instructed the jury in Instruction 10:

A person is guilty of a crime if it is committed by the conduct of another person for which he is 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 a 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 request 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 a 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.

RP 242-43 (emphasis added).⁴

⁴ Mr. Doherty proposed a correct version of the jury instruction for accomplice liability, which was not given. CP 7.

Thus, the instruction provided that one is an accomplice to trafficking in stolen property if he knows that his conduct will aid "a crime." RP 242-43. This instruction was erroneous.⁵

The Supreme Court declared this precise instruction to be an improper statement of the law of accomplice liability. *State v. Cronin*, 142 Wn.2d 568, 578-80, 14 P.3d 752 (2000). In *Cronin*, the trial court declined to give the defendant's proposed instruction and, instead, instructed the jury as follows:

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

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

Cronin, 142 Wn.2d at 576-77 (emphasis added). The Court held that it is error to use an accomplice liability instruction that

⁵ Failing to object to jury instructions at trial usually constitutes waiver of any error, precluding review for the first time on appeal. RAP 2.5(a). But since due process requires the State to prove every element of an offense beyond a reasonable doubt, and such errors affect a constitutional right, the error may be raised for the first time on appeal. RAP 2.5(a)(3); *Winship*, 397 U.S. at 364; *State v. Chino*, 117 Wn.App. 531, 538, 72 P.3d 256 (2003).

references “a crime” instead of “the crime,” because it suggests the jury can find the defendant guilty as an accomplice for a crime other than the specific crime charged. *Id. See also State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000) (“[K]nowledge by the accomplice that the principal intends to commit ‘a crime’ does not impose strict liability for any and all offenses that follow. Such an interpretation is contrary to the statute’s plain language, its legislative history, and supporting case law.”).

The Supreme Court further explained that this accomplice liability instruction was deficient because “it [did] not require that the defendant had knowledge he was facilitating *the* crime for which he was charged.” *Thomas*, 150 Wn.2d at 843 (emphasis in original).

The same infirm instruction used in *Cronin* and *Roberts* was used here in Mr. Doherty’s case. Instead of instructing the jury that Mr. Doherty was required to have knowledge of *the* crime, the court instructed the jury it need find only that Mr. Doherty had knowledge of “a crime.” Thus, under the prevailing

Supreme Court precedents, Instruction 10 was an erroneous statement of the law.

c. The court's error in instructing the jury in

Instruction 10 was not harmless and requires reversal. This Court reviews jury instruction errors under the constitutional harmless error standard. *State v. Berube*, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003). An erroneous instruction is harmless if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Brown*, 147 Wash.2d at 341. If "the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error— for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless." *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

In *Brown*, the defendant was charged with robbery and there was direct evidence that the defendant was the principal actor in that crime. But the defendant was also charged with rape and assault against the same victim, and there was no evidence that he was the principal actor in those crimes. The

jury was given the erroneous jury instruction permitting them to find the defendant culpable as an accomplice if he knew his conduct would facilitate "a crime." The *Brown* Court held that the erroneous instruction was not harmless because it allowed the jury to conclude that the defendant was an accomplice to the rape and the assault simply because he robbed the victim.

Brown, 147 Wn.2d at 341-42. This possible inference improperly lifted the State's burden to show that the defendant knew that his conduct would specifically aid the charged crimes of rape and assault.

Here, the erroneous instruction is similarly not harmless. There was ample evidence that Mr. Doherty was the principal in the commission of the theft. But, there was no evidence he was the principal in the trafficking count. Thus, as in *Brown*, Instruction 10 allowed the jury to conclude Mr. Doherty was an accomplice to the trafficking simply because he stole the discs.

Brown, 147 Wn.2d at 341-42.

This Court has noted that the two offenses contain different elements and that proof of one does not necessarily prove the other. To prove trafficking, the State must prove an

intent “to sell or dispose of another's property to a third party.” *State v. Walker*, 143 Wn.App. 880, 887, 181 P.3d 31 (2008). On the other hand, to prove theft, the State must prove an intent “to deprive the owner of its property.” *Id.* Thus, proof of one crime would not necessarily prove the second crime. *Id.* at 889.

The prosecutor’s argument is ample proof of the fact the error was not harmless. The prosecutor’s argument urged the jury to do exactly what the Court in *Brown* feared; ignore this difference between the two offenses and infer that conviction of theft necessarily proves trafficking:

If you look at the evidence that has been presented to you, you cannot traffic in stolen property without what? Stolen property. The defendant stole the property. He has already participated in the crime. *He has already aided in the crime.* He has obtained the product that is going to be trafficked. How he can then say, I am not involved in it, given the facts before this jury, I think is preposterous. If you look at what he did, he is the person that stole the DVDs that were going to be trafficked. There was nothing for Steven Doyle to sell at Hastings except what the defendant gave him by his actions. *That is why he is guilty.*

RP 267 (emphasis added).

Instruction 10 was erroneous and the error was not harmless. Mr. Doherty is entitled to reversal of his conviction for trafficking.

2. THE STATE FAILED TO PROVE MR DOHERTY HAD KNOWLEDGE OF THE CRIME MR. DOYLE INTENDED TO COMMIT

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Winship*, 397 U.S. at 364. The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn

therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. The State failed to prove Mr. Doherty had knowledge Mr. Doyle intended to sell the DVDs. Mr. Doherty submits that in light of the lack of evidence showing he assisted Mr. Doyle, his conviction for trafficking in stolen property must be reversed.

The first degree trafficking in stolen property statute, RCW 9A.82.050(2), provides in relevant part that a “person who knowingly . . . traffics in stolen property, is guilty of trafficking in stolen property in the first degree.” “Traffic” under RCW 9A.82.010(10) means “to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.” Additionally, “stolen property” is defined as “property that has been obtained by theft, robbery, or extortion.” RCW 9A.82.010(9).

Thus, to convict under the first degree trafficking in stolen property statute in this case, the State was required to

prove that Mr. Doherty “knowingly traffic[ked] in stolen property.” RCW 9A.82.050(2). To convict Mr. Doherty as Mr. Doyle’s accomplice in the commission of first degree trafficking in stolen property, the State was required to prove that Mr. Doherty “[w]ith knowledge that it will promote or facilitate the commission of the crime, ... solicit[ed], command[ed], encourage[d], or request [ed Doyle] to commit [the crime] ... or aid[ed] or agree[d] to aid [Doyle] in planning or committing [the crime.]” RCW 9A.08.020(3).

Under RCW 9A.08.020(3)(a), to be convicted as an accomplice, a defendant must have knowledge that his conduct will promote or facilitate the commission of the crime. General knowledge by an accomplice that a principal intends to commit “a crime” does not impose strict liability for any and all offenses that follow. *Roberts*, 142 Wn.2d at 513. “[F]or accomplice liability to attach, a defendant must not merely aid in any crime, but must knowingly aid in the commission of the specific crime charged.” *Brown*, 147 Wn.2d at 338.

Mere presence of the defendant without aiding the principal—despite knowledge of the ongoing criminal activity—

is not sufficient to establish accomplice liability. *State v. Parker*, 60 Wn.App. 719, 724-25, 806 P.2d 1241 (1991). Rather, the State must prove that the defendant was ready to assist the principal in *the* crime and that he shared in the criminal intent of the principal, thus “demonstrating a community of unlawful purpose at the time the act was committed.” *State v. Castro*, 32 Wn.App. 559, 564, 648 P.2d 485 (1982). Thus, the defendant must have associated himself with the criminal conduct, participated in the criminal conduct, and sought to make the crime successful by his actions. *State v. Robinson*, 73 Wn.App. 851, 855, 872 P.2d 43 (1994).

The State here proved Mr. Doherty’s presence and only his presence. Being the driver of a get-away car without more does not establish accomplice liability. *See Robinson*, 73 Wn.App. at 857 (State failed to prove driver of car in which passenger got out and forcibly took the victim’s purse before returning to the car was an accomplice). There was no evidence Mr. Doherty entered Hastings or did anything to encourage or assist Mr. Doyle. Thus, the State failed to prove that Mr. Doherty had knowledge of the specific crime Mr. Doyle intended

to commit with the DVDs: that he intended to sell them at Hastings.

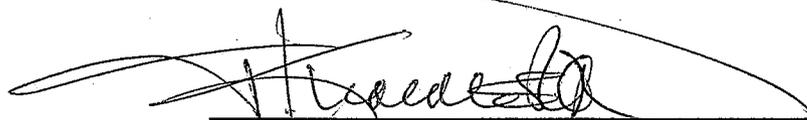
c. Mr. Doherty is entitled to reversal of his first degree trafficking in stolen property conviction with instructions to dismiss. Since there was insufficient evidence to support the conviction for first degree trafficking in stolen property, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

E. CONCLUSION

For the reasons stated, Mr. Doherty requests this Court reverse his conviction for first degree trafficking in stolen property with instructions to dismiss or remand for a new trial.

DATED this 18th day of June 2012.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 30675-5-III
)	
JOSHUA DOHERTY,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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