

62069-0

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No. 62069-0-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

SIMRANDEEP SINGH KANG, Appellant.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court erred denying Kang's motion to sever Kang's trial from his co-defendant where the record reflects Kang waived this issue prior to trial because the state had agreed not to present incriminating statements made by Kang's co-defendant.
2. Whether Kang can establish he was denied constitutionally effective assistance of counsel where the record demonstrates his attorney previously represented one of the state's witnesses but nothing in the record evidences this alleged conflict adversely affected his attorney's performance.
3. Whether there is sufficient evidence in the record to support Kang's conviction for first degree robbery as an accomplice.

C. FACTS

1. Procedural Facts

Simrandeep Kang was convicted by jury of robbery in the first degree as an accomplice. CP 17-26. The jury also returned a special verdict concluding beyond a reasonable doubt that Kang was armed with a firearm, as an accomplice, during the commission of this crime. CP 27. Kang was given a standard range sentence of 108 months and timely filed a notice of appeal. 17-26, 4-14.

On appeal Kang asserts the trial court erred denying his motion to sever his trial from that of his co-defendant Craig Carlis, asserts his trial attorney was ineffective and, that there is insufficient evidence in the record to support his conviction as an accomplice to robbery in the first degree. Br. of App. at 1.

2. Substantive Facts

On May 19th, 2007 Simrandeep Kang and his companion Craig Carlis arranged to go to 18 year-old Robert Dowdle's apartment in Bellingham to purchase some marijuana. 4RP 7, 15-16.¹ Dowdle worked as a supervisor at Little Caesar Pizza but also sold marijuana on the side to supplement his income. 4RP 8, 28. When Carlis and Kang arrived, Dowdle was at his apartment with his roommate James Pursley and his friends Nicole, Lindsey and Carl. 4RP 16. Dowdle let Carlis whom he knew from previous contacts, and Kang in and the three went upstairs to Dowdle's bedroom. 4RP 27, 49. Dowdle's roommate and friends remained downstairs in the living room and kitchen areas of the apartment. 4RP 31. Dowdle testified his friends were all in a position to observe Carlis and Kang when they entered and left the apartment. 4RP 31.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP - July 21, 2008 (Voir Dire); 2RP - July 21, 2008 (Motions in Limine); 3RP - July 22nd 2008 (Sidebar); 4RP - July 22nd 2008- (Testimony); 5RP - July 23rd 2008; 6RP - July 24th 2008; 7RP - July 29th 2008

Upon entering Dowdle's bedroom Carlis and Kang indicated they wanted to get some marijuana and Carlis asked if it was "any good." 4RP 36. Dowdle replied it was and offered to sell all he had, 4-6 grams "take it or leave it." 4RP 36. Dowdle then went into his closet to retrieve the marijuana. 4RP 37. When Dowdle turned around Carlis pulled a semi-automatic handgun out of his waistband, put it in Dowdle's face and told him he "wasn't giving him shit." 4RP 37, 47, 52. Carlis then proceeded to ask for money as well as, all of Dowdle's drugs. 4RP 37. Dowdle gave Carlis the marijuana and Carlis in turn, handed the drugs back to Kang who then placed the drugs in his pocket. 4RP 38. Carlis appeared nervous to Dowdle and kept saying "you've got to have more than this, man, you've got to have more than this." 4RP 41. While Carlis pointed the firearm at Dowdle, Kang searched Dowdle's person, took over \$500 from Dowdle, checked his identification and took a cell phone from Dowdle's pants pocket. 4RP 39. Kang also quickly searched Dowdle's room. 4RP 44.

When Carlis looked at his identification he told Dowdle "I'm looking at your I.D. so now I know who you are." 4RP 42. Dowdle perceived Carlis statements as trying to intimidate him from reporting the robbery to the police. 4RP 42. Carlis and Kang then left Dowdle in his room and fled down the stairs and out of the apartment. 4RP 55.

Dowdle's roommate James Pursley remembered two men coming over and going up to Dowdle's room. 5RP 11. Pursley testified he took a second glance of the Carlis and Kang when they came downstairs to leave because one of them leaned over him and tapped his pocket where his cell phone was. 5RP 11, 12. After Carlis and Kang left, Dowdle immediately told Pursley and friends he'd been robbed. 4RP 55.

Dowdle testified he was very afraid for his and his friends' safety for the five minutes Carlis and Kang were in his bedroom robbing him at gun point. 4RP 52. Specifically, Dowdle feared Carlis and Kang would kill him. 4RP 119. Dowdle also testified that when he spoke to the 911 dispatcher he was afraid Carlis and Kang would return to his apartment if he reported the robbery to the police. 4RP 58.

After the police were called and started investigating, Dowdle's roommate Pursley and his friends started combing the neighborhood looking for the two robbers. 5RP 18. After finding the home of 'Rob' whom Pursley knew to be a mutual acquaintance of both Carlis and Dowdle, the police came over to investigate. 4RP 119. Pursley was called back to this residence twice by police to identify possible suspects. 5RP 19. Pursley confirmed he did not recognize the first two suspects the police identified. 5RP 19. Later on the same evening Pursley did however, identify two more suspects as the robbers. 5RP 21-22, 4RP 67.

Dowdle later also identified the same suspects, Carlis and Kang, as the robbers. *Id.* At trial, Dowdle testified he was certain the men in the courtroom identified as Carlis and Kang were the same men who robbed him at gun point. 4RP 124.

Prior to trial Kang moved to sever his case from his co-defendant Carlis. CP 61-63. The court however, never ruled on Kang's motion. RP 11 (July 21, 2008). Instead the parties agreed the state would not introduce at trial statements made by Carlis that implicated Kang. 2 RP 11-12. Nothing in the record evidences Kang renewed his motion to sever his trial.

D. ARGUMENT

- 1. Kang abandoned his motion to sever his trial after the State agreed not to elicit any statements made by co-defendant Carlis that implicated Kang. Kang therefore waived his right to assert this error on appeal.**

Kang asserts the trial court erred denying his motion to sever his case from that of his co-defendant Craig Carlis. Br. of App. at 11. Contrary to Kang's assertion, the trial court did not deny Kang's motion. The record reflects Kang abandoned his motion after the state agreed not to introduce statements at trial made by Carlis that could be construed as implicating Kang. 1RP 11-12. Under these circumstances, Kang waived his right to assert error pursuant to CrR 4.2 (a)(2).

CrR 4.3 provides that two or more defendants may be joined and their trials consolidated when the offenses charged are part of a common scheme or plan, or are so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others. CrR 4.3(a) requires such offenses be consolidated for trial unless the court orders a severance pursuant to rule 4.4. Offenses properly joined may be severed under CrR 4.3 if the court determines severance will promote a fair determination of the defendant's guilt or innocence of each offense. CrR 4.4(b).

A defendant's motion for severance on the ground that an out-of-court statement of a co-defendant referring to him is inadmissible against him shall be granted unless the prosecuting attorney elects not to offer such statements in its case in chief. CrR 4.3 (c)(1)(i)(ii). While Kang did move to sever his trial from Kang's, the record reveals he withdrew his request after the state elected not to present statements that incriminated Kang during the state's case in chief. 4RP 37. Nothing in the record evidences that despite this agreement, Kang still wanted a separate trial or that the trial court denied a motion to sever. Kang therefore waived the right to raise this issue for the first time on appeal. RAP 4.4(a)(2). Kang argues nonetheless that severance was warranted in this case pursuant to Bruton v. United States, 391 U.S. 123, 135-136, 88 S.Ct. 1620, 20 L.Ed.2d

476 (1968). In Bruton, the Supreme recognized that allowing the State to admit a codefendant's statements under ER 801(d)(2) may violate a defendant's sixth amendment right of confrontation if the statements also implicate the defendant. Bruton, 391 U.S. at 135-36. To protect a defendant's confrontation rights in a joined trial, the Court required the State to redact any references that facially incriminated the defendant. Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151, 1157, 140 L.Ed.2d 294 (1998). A redaction is constitutionally sufficient if it contains statements that implicate a defendant only when linked with other evidence. Id.

In this case the state agreed not to introduce any statements made by Carlis that implicated Kang. In so doing, the joinder of Kang and Carlis' trial did not violate Kang's sixth amendment right to confrontation or otherwise present a Bruton issue. The fact that Carlis showed the police where to find the weapon used in the robbery does not constitute a *statement* that implicates Kang. Furthermore, even if this evidence were considered 'testimonial' for Bruton purposes, this evidence only implicates Kang when it is linked to other evidence. Bruton is therefore inapplicable and Kang's sixth amendment rights were not violated.

Even if Kang had not withdrawn his motion to sever, Kang cannot show that the consolidation of his trial with Kang's was so manifestly prejudicial as to outweigh the need for judicial economy. State v. Russel,

125 Wn.2d 24, 135, 882 P.2d 747 (1994). The failure to sever a consolidated trial is only reversible error upon a showing by the defendant that the court's decision was a manifest abuse of discretion. State v. Bythrow, 114 Wn.2d 713, 717-18, 790 P.2d 154 (1990). The evidence in this record demonstrates joinder of Carlis and Kang's trial was appropriate because the evidence presented was easy to compartmentalize and the evidence as to each co-defendant was overwhelming; both defendant's claimed they were misidentified-thus, there was no confusion that could have arisen from their separate but consistent defenses; the court properly instructed the jury to consider the evidence separately as to each co-defendant; and finally, the evidence presented would have been admissible in both trials had Kang and Carlis been tried separately. Therefore, there is nothing in the record to support Kang's contention that severance was required. *See*, State v. Kalalosky, 121 Wn.2d 525, 852 P.2d 1064 (1993).

2. Kang cannot demonstrate from this record that his trial attorney had a conflict of interest that adversely affected his representation.

Kang asserts his attorney was constitutionally ineffective because one of the state's witnesses disclosed during cross-examination that Kang's attorney previously represented him. Kang asserts it was reversible error for the trial court to fail to inquire into this potential conflict of interest. Br. of App. 14, See 4RP 37. Nothing in the record

evidences that Kang's attorney's alleged previous representation of James Pursley adversely affected his ability to effectively and rigorously cross-examine Pursley on behalf of Kang. The trial court's failure to inquire into the alleged previous representation where Kang did not otherwise object was not necessary under these circumstances and does not warrant reversal.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. amend. VI. This right encompasses the right to an attorney who is free from any conflict of interest in the case. State v. Dhawliwal, 150 Wn.2d 559, 79 P.3d 432 (2003).

Relying on State v. Richardson, 11 Wn.2d 669, 677, 675 P.2d 209 (1983), Kang asserts the court committed reversible error by failing to inquire of his attorney after the state's witness, James Pursley disclosed Kang's attorney previously represented him during cross examination. See, 4RP 37. Richardson was predicated on three United States Supreme Court cases; Holloway v. Arkansas, 435 U.S. 475, 483, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), Cuyler v. Sullivan, 446 U.S. 3335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) and Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). These cases suggested that when a trial

court knows or should know of a potential conflict of interest arising from the *simultaneous* representation of two or more defendants, it is reversible error for the trial court to fail to inquire about the potential conflict.

In Mickens v. Taylor, 535 U.S. 162 , 172, 122 S.Ct. 1237 (2002) however, the Supreme Court clarified that automatic reversal is not required when a trial court fails to inquire about a potential conflict of interest between the attorney and defendant/client. Instead, reversal is only warranted if the defendant can demonstrate his attorney had a conflict of interest that adversely affected his performance. Mickens at 174.

In State v. Dhawliwal, 150 Wn.2d 559, 79 P.3d 432 (2003), the Washington State Supreme Court adopted the Mickens analysis holding that reversal is not automatically mandated when a trial court knows of a potential conflict but fails to inquire into the possible conflict. The Dhawliwal court found insufficient evidence to justify remand or reversal where nothing in the record demonstrated the alleged conflict of interest arising from the trial attorney's concurrent representation of the defendant and trial witnesses or, of his previous representation of another state witness adversely affected the trial attorney's rigorous representation of the defendant.

Similarly here, Kang cannot demonstrate an actual conflict of interest warrants reversal because nothing in the record shows his trial

attorney was adversely affected by his alleged prior representation of the state's witness, James Pursley. To the contrary, Kang's attorney rigorously and effectively cross examined Pursley on both his credibility generally and the credibility of his identification of Kang as one of the men who robbed his roommate, Dowdle. Kang's claim should therefore be denied.

3. There is sufficient evidence in the record to support Kang's conviction for robbery in the first degree as an accomplice.

Next, Kang asserts there is insufficient evidence in the record to support his conviction. Br. of App. at 21. Specifically, Kang avers there is nothing in the record to indicate Kang assisted Carlis with the robbery and that the state failed to present evidence of Kang's intent. Br. of App. at 22. The record belies Kang's contention.

In reviewing a challenge to the sufficiency of the evidence, the issue is "whether, after examining 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. Joy, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993). In applying this test, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Id. at 339.

Circumstantial evidence and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Appellate courts defer to the trier of fact and will affirm where there is evidence to support finding the essential elements of the crime beyond a reasonable doubt. State v. Walton, 64 Wn.App. 410, 425, 824 p.2d 533 (1992). The trier of fact is in the best position to evaluate conflicting evidence, witness credibility, and the weight assigned to the evidence. Id. at 415-16. Due process requires the State to prove every essential element of a crime beyond a reasonable doubt. State v. Cantu, 156 Wn.2d 819, 132 P.3d 725 (2006).

To prove Kang is guilty of robbery in the first degree as an accomplice, the state had to prove beyond a reasonable doubt he, acting as an accomplice, unlawfully took personal property from another person or in his presence, against the persons will by the use or threatened use of immediate force, violence or fear of injury to that person or his property and that during the commission of the robbery was armed with a firearm or deadly weapon. RCW 9A.56.190, RCW 9A.56.200.

Pursuant to RCW 9A.08.020(3)(a)(iii), a person is guilty of being an accomplice to a crime if he aids or agrees to aid the principle in

planning or committing the crime.² State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). The individual must also have knowledge that his actions would promote or facilitate the crime at issue. RCW 9A.08.020(3). An accomplice need only have general knowledge of the crime and does not need to have specific knowledge of every element of the crime committed by the principle. State v Roberts, 142 Wn.2d 471, 511-12, 14 P.3d 713 (2000).

Mere physical presence at the crime scene is also not enough to convict someone as an accomplice. State v. Roberts, 80 Wn.App. 342, 355, 908 P.2d 892 (1996). The state must be able to establish that the defendant was ready and willing to assist in the crime itself. State v. Luna, 71 Wn.App. 755, 759, 862 P.2d 620 (1993). Thus, the question in this case is whether there is sufficient evidence in the record to demonstrate Kang aided or agreed to aid Carlis in the commission of the robbery of Dowdle.

Dowdle's testimony clearly places Kang in his room with Carlis aiding and participating in the robbery. While Kang did not pull the

² RCW 9A.08.020(3) states: 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 (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.

weapon on Dowdle, he did assist Carlis by taking the marijuana and money taken from Dowdle by threat of force and actively searched Dowdle's bedroom while Carlis held Dowdle at gun point. Under these circumstances there is sufficient evidence based on Dowdle's testimony alone for the jury to reasonably conclude Kang was guilty of robbery in the first degree as an accomplice and that he was armed as an accomplice with a firearm at the time of the robbery.

Kang complains nonetheless, that there is insufficient evidence to demonstrate he acted as an accomplice or intended to rob Dowdle. A person acts with intent when he acts with objective or purpose to accomplish a result constituting a crime. State v. Ferreira, 69 Wn. App. 465, 850 P.2d 541 (1993). A trier of fact may infer intent from circumstantial evidence. State v. Simpson, 22 Wn. App. 572, 575, 590 P.2d 1276 (1979). Criminal intent may be inferred if a defendant's conduct plainly indicates the required intent as a matter of logical probability. State v. Stearns, 61 Wn. App. 224, 228, 810 P.2d 41 (1991).

The jury reasonably concluded Kang intended to rob Dowdle because the testimony demonstrated Kang accompanied Carlis to Dowdle's apartment and actively participated in taking Dowdle's property and searching Dowdle's room while Carlis held him at gun point. The fact that there may be contradictory testimony in the record that the jury

rejected does not diminish the jury conclusion or undermine the substantial evidence in the record that the jury found credible, to support the verdict.

E. CONCLUSION

The State respectfully requests this Court affirm Kang's conviction for robbery in the first degree and the special firearm enhancement verdict.

Respectfully submitted this 18 day of August, 2009.



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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Nicholas W. Marchi, addressed as follows:

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