

68936-3

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NO. 68936-3-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

VICTOR ALFONSO CERVANTES,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

RESPONDENT’S BRIEF

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I. SUMMARY OF ARGUMENT

The appellant, Victor Cervantes, was convicted of Burglary in the First Degree, Robbery in the First Degree, and Theft of a Firearm.

Cervantes alleges the State presented insufficient evidence of being armed during the burglary, insufficient evidence of accomplice liability in the theft of a firearm, and that the jury instruction misstated the definition of proof beyond a reasonable doubt.

The State responds that there was sufficient evidence that Cervantes was “armed” when he was not charged with any firearm enhancements and when he, or his accomplice, was in actual possession of the gun that was taken away from the residence. The State further responds that there was sufficient evidence that Cervantes was an accomplice to the general crime of “theft” as well as to the specific crime of Theft of a Firearm. Finally, the jury instruction has been approved on multiple occasions and does not misstate the burden of proof.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was there sufficient evidence to convict Cervantes of Burglary in the First Degree when the firearm was in actual possession by Cervantes

or his accomplice and was removed from the house that was burglarized? (Assignment of Error 1.)

2. Was there sufficient evidence to convict Cervantes of Theft of a Firearm where Cervantes joined in the intent to commit theft generally and when there was evidence that Cervantes and his accomplices were specifically looking for a firearm? (Assignment of Error 2.)
3. Did the trial court err in instructing the jury pursuant to the WPIC that the Washington Supreme Court has instructed the trial courts to use? (Assignment of Error 3.)

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On May 16, 2012, Victor Cervantes was found guilty of Burglary in the First Degree, Robbery in the First Degree, and Theft of a Firearm. CP 109.

On June 13, 2012, Cervantes was sentenced to sixty-six months incarceration. CP 112.

On June 14, 2012, Cervantes timely filed a notice of appeal. CP 123-133.

2. Statement of Facts

Michelle and Brandon Richie lived at 19912 Dry Slough Road in rural Skagit County in July, 2011. 1RP 20-22.¹ In their bedroom nightstand drawer, for purposes of personal protection, was Brandon's loaded, fully functional handgun. 1RP 27, 28, 87.

On July 28, 2011, Michelle was driving home when she saw a glimpse of a person on her porch. She rounded a curve in the road and then no longer saw the person. 1RP 28. Michelle pulled into her driveway and noticed a blue car pulled in close to her house. 1RP 28, 30. As Michelle exited her vehicle, she saw Cervantes approaching her from the residence. 1RP 30, 52-55, 106. Michelle felt that something was wrong, so she pulled out her cell phone to call Brandon. 1RP 30. As she was in the processing of doing that, she asked Cervantes why he was there and why he was in her house. Cervantes answered that the house was unlocked. 1RP 31. Michelle knew that the door had not been unlocked. 1RP 57. Michelle told him that even if it was unlocked, that was no reason to be going through the house. As they were talking, Cervantes and Michelle kept walking toward each

¹ The State will refer to the verbatim report of proceedings (VRP) by using the volume number followed by "RP" and the page number. 1RP is volume I of the trial transcript (5/14, 5/15). 2RP is volume II of the trial transcript (5/16).

other. As Michelle was walking, she was passed the blue car. When Brandon answered the phone, Michelle started to read off the license number of the blue car to him. 1RP 32. Cervantes then swore at Michelle, called her names, and hit her on the right side of the head. 1RP 33, 88-89. Michelle was holding the phone to her right ear and, either after, or concurrent with, striking Michelle, Cervantes took her cell phone. 1RP 33, 58.

Cervantes entered the blue car and fled the scene. 1RP 34, 36. At the same time, Michelle saw two other men running from the direction of the back of the house. 1RP 34, 61. Further investigation revealed that the blue vehicle was owned by Cervantes's father, that Cervantes would drive the vehicle, and that Cervantes intended to buy this vehicle "some day". 1RP 80-85, 165.

Shortly after the flight of the three men, Michelle, Brandon, and law enforcement saw that entry had been made by forcing in the front door. 1RP 42-45, 93, 159. They looked through the house and saw that the handgun had been taken. 1RP 40, 45, 47, 88. They also saw that other places within the home had been ransacked. 1RP 45-47, 93-95, 150-151, 159-160. They noted that there were a number of items that would have been observed by the intruders, but that were not taken, including the TV, X-Box, Wii, laptop, and jewelry. 1RP 48.

None of the three men were apprehended on the day of the burglary. Cervantes was arrested on September 14, 2011, pursuant to an arrest warrant issued for these offenses. 1RP 170-171. The other two have never been identified. The cell phone and gun were never recovered.

IV. ARGUMENT

1. The guilty verdict on the Burglary in the First Degree charge is supported by sufficient evidence.

Cervantes was convicted of Burglary in the First Degree. He claims that the State failed to prove that, during the commission of the burglary, Cervantes, or his accomplice, was armed with a deadly weapon.

“For purposes of first degree burglary, defendants are armed with a deadly weapon if a firearm is easily accessible and readily available for use by the defendants for either offensive or defensive purposes.” State v. Hernandez, Nos. 41707–3–II, 41717–1–II, 41908–4–II, 43146–7 II, 2012 WL 6700391, 290 P.3d 1052, 1055 (Div. II, WA Court of Appeals, Dec 26, 2012); State v. Chiariello, 66 Wn. App. 241, 243, 831 P. 2d 1119 (1992); State v. Faille, 53 Wn. App. 111, 113, 766 P.2d 478 (1988); State v. Randle, 47 Wn. App. 232, 235, 734 P.2d 51 (1987), rev. denied, 110 Wn.2d 1008 (1988).

Where firearms are taken in a burglary, the State need not prove an intent or willingness to use those firearms in the furtherance of the burglary.

Hernandez, 290 P.3d at 1055; State v. Speece, 56 Wn. App. 412, 416, 783 P.2d 1108 (1989), aff'd, 115 Wn.2d 360, 798 P.2d 294 (1990) (“Thus, no analysis of a defendant's willingness or present ability to use a firearm, whether loaded or unloaded, is needed in determining whether the firearm is easily accessible and readily available for use.”). See generally Faille, 53 Wn. App. at 113; State v. Hall, 46 Wn. App. 689, 732 P.2d 524, rev. denied, 108 Wn.2d 1004 (1987). Rather, actual possession of the firearm, alone, is sufficient to prove the defendant’s being “armed” for purposes of a first degree burglary conviction. Hernandez, 290 P.3d at 1055; Faille, 53 Wn. App. at 114-115 (defendant was “armed” even though the firearms were unloaded).

Cervantes relies on State v. Brown, 162 Wn.2d 422, 432, 173 P.3d 245 (2007), to support his contention that the State must show that “the defendant or his accomplice handled the weapon ‘in a manner indicative of an intent or willingness to use it in furtherance of the crime.’” Br. App. at 6. Brown does not support Cervantes’s position. This language in Brown, that the weapon must be handled “in a manner indicative of an intent or willingness to use it in furtherance of the crime, ” comes from the court’s examination of whether sufficient nexus was shown among the defendant, the gun, and the crime. Brown, 162 Wn.2d at 430. The nexus requirement itself was articulated in a line of cases dealing with the deadly weapon

enhancement (as opposed to being “armed” for purposes of first degree burglary) starting with State v. Mills, 80 Wn. App. 231, 907 P.2d 316 (1995)² and extending through State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005)³. This nexus requirement is limited to those cases where the defendant was in constructive possession of the firearm:

But Willis, Schelin, and Valdobinos all involved constructive possession. In a constructive possession case, the nexus test ensures that a defendant will not face a sentencing enhancement due to the incidental presence of a firearm. . . . When a defendant actually possess a weapon during the commission of a crime, the protections of the nexus requirement become irrelevant.”

State v. Easterlin, 126 Wn. App. 170, 173, 107 P.3d 773 (2005) aff’d, 159 Wn.2d 203, 149 P.3d 366 (2006)⁴.

² The Mills court, in reviewing prior enhancement cases, noted that, “[i]n each of these cases, the reviewing court looked for a nexus between the defendant and the weapon. Here, the trial court looked only to the nexus between the drugs and the weapon, finding that Mills was using the gun to protect his drugs.” Mills, 80 Wn. App. at 236.

³ “The [Mills Court] refined the analysis, requiring that there be a nexus between the defendant, the crime, and the weapon.” Willis, 153 Wn.2d at 372.

⁴ While the Supreme Court, in affirming the Court of Appeals, may have left “wiggle” room for the possibility of a circumstance where actual possession would not preclude the advisability of a jury instruction regarding nexus, in this case, actual possession was sufficient to establish the defendant’s being “armed” for enhancement purposes. “For example, if a defendant is in possession of a ceremonial weapon, such as a Sikh’s kirpan that he is required to carry by religious commandment, or of a prop, or of a kitchen knife in a picnic basket, or is a farmer who carries a .22 caliber rifle in a gun rack, or has some object that merely could be used as a weapon, it may be appropriate to allow him to argue to the trier of fact that he is not ‘armed’ as meant by Washington law and to allow the trier of fact to make that determination.” State v. Easterlin, 159 Wn.2d 203, 209 n. 3, 149 P.3d 366, 369 (2006).

The Brown court held that the lack of evidence that Brown or his accomplice “handled the rifle on the bed at any time during the crime in a manner indicative of an intent or willingness to use it in furtherance of the crime” constituted a lack of proof of nexus between the weapon and the crime. Brown, 162 Wn.2d at 432.

Although the Brown court was addressing both whether the defendant was armed for purposes of the enhancement as well as for purposes of the burglary conviction, all the Court’s analysis rested solely on enhancement cases. See Brown, 162 Wn.2d at 431, citing State v. Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005); State v. Schelin, 147 Wn.2d 562, 567, 570, 55 P.3d 632 (2002); State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005); State v. Easterlin, 159 Wn.2d 203, 208–09, 149 P.3d 366 (2006); State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993); State v. Willis, 153 Wn.2d ³⁶⁶ 373, ~~103 P.3d 1213 (2005)~~. The Brown court did not purport to overrule prior case law regarding being “armed” for purposes of first degree burglary. Indeed, the court appeared to maintain a distinction between the analysis of being armed for burglary versus being armed for the enhancement. At footnote 4, in addressing the dissent’s argument that the majority of courts hold that a defendant is armed if he acquires a firearm as loot, the majority states, “These cases are also not on point. None involves a defendant who is both charged with a

deadly weapon sentence enhancement as well as first degree burglary.

This means that none of those decisions involved the application of a nexus requirement between the gun and the crime.”⁵

Thus, post-Brown, it still the case that in determining whether a defendant is “armed” for purposes of the first degree burglary statute, the sole question is whether the firearm is readily available and accessible for use. The State need not further prove that the defendant handled the firearm indicative of intent or willingness to use it in furtherance of the crime. The nexus requirement, and therefore the requirement that the State prove the willingness to use the firearm in furtherance of the crime, is limited to constructive possession in enhancement cases.

Here, the facts are very similar to those in Hernandez. Cervantes was one of three burglars involved in burglarizing a residence. Cervantes, or one of his accomplices, stole a loaded, operable, firearm from the home and then left with it⁶. As in Hernandez, “[t]his case involves a deadly weapon *per se*, a firearm, and a first degree burglary conviction, without firearm enhancements.” Additionally, there was evidence in this case that Cervantes

⁵ It should also be noted that, in that same footnote, the majority appears to opine that had the firearm actually been removed from the home, then the nexus requirement may have been met: “For the reasons noted above, Faille and Hall are not determinative here because in those cases weapons were removed from the homes.”

⁶ Although Michelle did not see the gun on the person of Cervantes, that does not mean that he did not have it concealed under his clothing.

and his accomplices were, in fact, looking for firearms because they specifically did not take other items of value that were in the home. This case is not similar to Brown where the best that one could say was that there was a fleeting contact with the firearm that was ultimately not removed from the home. Finally, Cervantes was not charged with a firearm enhancement as Brown was.

Because Cervantes was not charged with a firearm enhancement, and he or his accomplice was in actual possession of the firearm, and the firearm was removed from the home, the State was not required to prove an intent or willingness to use the firearm in furtherance of the crime.

2. The trial court did not err in denying Cervantes's motion to dismiss and there was sufficient evidence of Cervantes's accomplice liability to the Theft of a Firearm verdict.

Cervantes argues that the trial court erred in denying the defense motion to dismiss at the conclusion of the State's case in chief because the State failed to prove that Cervantes was an accomplice to the Theft of a Firearm. Cervantes further asserts, without briefing, that there was insufficient evidence to prove that Cervantes was an accomplice specifically to the firearm theft, knowing that a firearm would be stolen.

Preliminarily, Cervantes asserts that the State's theory of the case was that "Mr. Cervantes's companions stole the gun and escaped through the

back fence while Mr. Cervantes was robbing Ms. Richie of her cell phone in the front yard.” Br. App. at 9. This is not entirely accurate. The State’s argument to the jury was that (1) even if they couldn’t specifically decide which of the three burglars took the gun, then Cervantes was still guilty at least as an accomplice to theft, 2RP 18, 20, 22, and (2) there was sufficient evidence that the jury could find that Cervantes knew, specifically, that a gun would likely be stolen, 2RP 61-62.

The law of accomplice liability in Washington requires that the State prove that the accomplice to a crime knows he is facilitating the crime generally but need not know that the principal had the kind of culpability required for a particular degree of the crime. Sarausad v. State, 109 Wn.App. 824, 836, 39 P.3d 308 (2001)⁷. The defendant “need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal.” State v. Berbube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003) (citations omitted). So, for example, an accused who believes he is facilitating a simple, misdemeanor-level assault is nonetheless responsible for an assault in the first degree if the principal exceeds the scope of the misdemeanor assault and commits a first degree assault. The accused

⁷ In asserting that the trial court erred in denying the motion to dismiss, Cervantes inexplicably fails to address Sarausad, the only case substantively cited by the State in its briefing to the trial court and the case upon which the trial court relied in denying the motion to dismiss.

need not be aware that the principal is armed and may exceed the scope of the assault. Furthermore, an accused who knows generally that he is facilitating a homicide may be guilty as an accomplice to aggravated premeditated murder. Sarausad, 109 Wn. App. at 836.

The court in Sarausad observed that the Roberts⁸ court had explained that under Davis⁹ “an accomplice, having agreed to participate in a crime, runs the risk that the principal actor will exceed the scope of the pre-planned illegality”, in other words, “an accomplice need not have specific knowledge of every element of the crime committed by the principal, provided that he, the accomplice, has general knowledge of that specific crime.” Sarausad, 109 Wn. App. at 834-835 citing Roberts. The court went on to note that in Roberts “‘the crime’ for purposes of accomplice liability is murder, regardless of degree.” Sarausad, 109 Wn. App. at 835. In other words, because only general knowledge of “the crime” is required, a defendant cannot escape responsibility for an aggravated pre-meditated murder by claiming he only meant to aid in a second degree murder.

In Sarausad, the State presented evidence that Sarausad knowingly facilitated a drive-by shooting. The court held that this was a sufficient basis to find him guilty as an accomplice to the murder and attempted murder.

⁸ State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000).

⁹ State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984).

This was because the legislature intended to impose accomplice liability on those who knowingly facilitate “the particular conduct that forms the basis for the charge.” Sarausad, 109 Wn.App. at 837, quoting Roberts. Turning to the statutory definition of “knowledge”, the court found that an ordinary person would know that a drive-by shooting is likely to result in the death or injury of one or more people and a rational trier of fact could thereby infer that the knowing facilitation of a drive-by shooting thereby knowingly facilitates the murder, attempted murders and assaults that result from the drive-by shooting. Sarausad, 109 Wn.App. at 837-838.

Here, there was sufficient evidence that Cervantes acted as a principal or an accomplice in the burglary and that the intent of that burglary was to commit the crime of theft. An ordinary person would know that in committing a theft and burglary, if the burglar comes upon a firearm, the burglar would likely steal it. Thus, a rational trier of fact could find that the knowing facilitation of a burglary and theft thereby knowingly facilitates the theft of any firearm that is present.

Looked at another way, at least three men including the defendant were involved in the burglary of the residence of Richie. Being equally responsible for the burglary, they bore equal responsibility for the theft of any item therein. If the Hope Diamond had been stolen from within the residence by the one criminal who happened upon it, the other two could not

absolve themselves from responsibility by claiming, “but we only thought we’d get cash and electronics.”

Cervantes argues that Theft of a Firearm is not theft. Br. App. at 14. He is incorrect. Theft of a Firearm is defined as “theft” of any firearm. RCW 9A.56.300 (1). “The definition of ‘theft’ and the defense allowed against the prosecution for theft under RCW 9A.56.020 [apply to] the crime of theft of a firearm.” RCW 9A.56.300(4).

Because the evidence was sufficient to establish that Cervantes was at least an accomplice to the general crime of theft, the evidence was sufficient establish Cervantes’s complicity in the Theft of a Firearm charge.

Furthermore, the State argued¹⁰, and there is sufficient evidence that, Cervantes in fact shared in a specific intent to steal a firearm. Despite other valuable items being present and observable in the home, the firearm was the only thing taken from the home. Additionally, those places in the residence that were ransacked were exactly those places where one might expect a homeowner to keep firearms maintained for personal protection.

¹⁰ 2RP 62.

3. The trial court did not err in overruling Cervantes's objection to the reasonable doubt instruction.

Cervantes contends that the final “abiding belief” sentence of WPIC 4.01 was erroneously given by the court in light of State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012), in which the court found prosecutorial misconduct in closing argument where the prosecutor argued that the function of the jury was to search for the truth. Br. App. at 15, 17-18.

In Emery, the argument was improper because the statements mischaracterized the role of the jury. “The jury's job is not to determine the truth of what happened; a jury therefore does not ‘speak the truth’ or ‘declare the truth.’ Anderson, 153 Wn. App. at 429, 220 P.3d 1273^[11]. Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt. Winship, 397 U.S. at 364, 90 S.Ct. 1068^[12].” Emery, 174 Wn.2d at 760.

“Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” State v. Pirtle, 127 Wn.2d 628, 656,

¹¹ State v. Anderson, 153 Wn. App. 417, 200 P.2d 1273 (2009).

¹² In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

904 P.2d 245, 261 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996) (citations omitted).

WPIC 4.01, including the final “abiding belief” sentence, has been approved by several courts. Pirtle, supra; State v. Lane, 56 Wn. App. 286, 299, 786 P.2d 277 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988); State v. Price, 33 Wn. App. 472, 475-476, 655 P.2d 1191 (1982), rev. denied, 99 Wn.2d 1010 (1983). Indeed, the Supreme Court has specifically directed the trial courts to use this instruction. State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

Emery does nothing to change settled law with regard to the jury instruction on reasonable doubt. The reasonable doubt instruction has, and does, explicitly tell the jurors their conclusion has to be based on the evidence in the case and so “there is no reasonable likelihood that the jury would have understood [‘abiding belief’] to be disassociated from the evidence in the case.” Pirtle, 127 Wn.2d at 657. Indeed, in the abiding belief sentence itself, the abiding belief must be “after such consideration [of the evidence or lack of evidence].”

The “abiding belief” language does not instruct the jury that their role is to ascertain the truth. The instruction that the Supreme Court has instructed the trial courts to use does not misstate the prosecution’s burden of proof or confuse the jury’s role.

V. CONCLUSION

Sufficient evidence supports the convictions for first degree burglary and theft of a firearm, the trial court did not err in denying the motion to dismiss the theft of a firearm charge, and the “abiding belief” instruction does not misstate the prosecution’s burden or the jury’s role. Therefore, the convictions should be affirmed.

DATED this 19 day of February, 2013.

SKAGIT COUNTY PROSECUTING ATTORNEY

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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by: United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: LILA SILVERSTEIN addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 19th day of February, 2013.

Karen R. Wallace
KAREN R. WALLACE, DECLARANT