

FILED
February 1, 2016
Court of Appeals
Division I
State of Washington

No. 73296-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

GILJON LEE-SEAN JOHNSON,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT..... 6

1. **The State did not prove beyond a reasonable doubt that Mr. Johnson was guilty of residential burglary as either a principal or an accomplice** 6

2. **Any request that costs be imposed on Mr. Johnson for this appeal should be denied because the trial court determined he does not have the ability to pay legal financial obligations** 10

E. CONCLUSION 14

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. I, § 3 7

U.S. Const. amend. XIV 7

Washington Cases

In re Welfare of Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979) ..8, 9, 10

State v. Ferreira, 69 Wn. App. 465, 850 P.2d 541 (1993)..... 9

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 7, 10

State v. Landon, 69 Wn. App. 83, 848 P.2d 724 (1993) 8

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000)..... 10, 11

State v. Sinclair, No. 72102-0-I (Jan. 27, 2016) 10, 12, 13

United States Supreme Court Cases

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... 7

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 7

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)..... 7, 10

Statutes

RCW 10.73.160(1)..... 10, 11

RCW 9A.08.020(3)..... 8

RCW 9A.52.025(1)..... 6

Court Rules

RAP 14.2..... 11, 12

A. ASSIGNMENT OF ERROR

The State did not prove the elements of the crime beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. To prove the charged crime of residential burglary, the State was required to prove beyond a reasonable doubt either that (1) Giljon Johnson unlawfully entered a dwelling with the intent to commit a crime therein, or that (2) Mr. Johnson aided others in committing a burglary with the knowledge that his actions would promote or facilitate commission of the crime. Was the evidence insufficient to prove these elements, where the State did not prove either that Mr. Johnson entered the dwelling, or that he aided or facilitated commission of the crime?

2. The trial court determined Mr. Johnson did not have the present or future ability to pay legal financial obligations. This Court has discretion to disallow appellate costs even if the State is the substantially prevailing party. Should this Court exercise its discretion not to allow costs, in the event the State substantially prevails, where the trial court ruled Mr. Johnson lacks the ability to pay legal financial obligations?

C. STATEMENT OF THE CASE

On the evening of July 18, 2014, Giljon Johnson and his friends Lamonda Williams and Kieshan Maxwell played basketball and then went to a park to hang out. 3/10/15RP 48-49. At some point, Mr. Williams suggested the idea of burglarizing a house. 3/10/15RP 50, 94. Mr. Williams knew of a house in the Mount Baker neighborhood of Seattle, where he had seen a computer through a window. 3/10/15RP 51, 95-96. The three young men took a bus to that location. 3/10/15RP 50.

No one was home at the Mount Baker house, as the residents were out of the country. 3/10/15RP 12. Although they had asked a friend to housesit, the house-sitter also was out of town at the time. 3/10/15RP 29.

Mr. Williams had three pairs of purple gloves and gave a pair each to Mr. Maxwell and Mr. Johnson, who put them on as they walked toward the house. 3/10/95RP 95. Before entering the house, however, Mr. Johnson changed his mind and decided not to participate in the burglary. 3/10/95RP 51. He was concerned they had no vehicle in which to carry any items they might take from the house. 3/10/95RP 51, 96-97. Mr. Johnson waited for his friends in the backyard.

3/10/95RP 52. He did not leave the area because he did not want to leave his friends behind. 3/10/95RP 98.

Mr. Johnson never entered the house and had no further involvement in the burglary. 3/10/95RP 51, 96, 98, 131. He never took any property from inside the house and his friends never gave him any property to carry. 3/10/15RP 64, 101.

Consistent with Mr. Johnson's testimony, witnesses reported seeing only two people inside the house.¹ Eric Hull, a neighbor, saw two flashlights inside the house. 3/03/15RP 30, 34. Both Mr. Williams and Mr. Maxwell were each carrying a flashlight. 3/10/95RP 97. Mr. Johnson did not have a flashlight. 3/10/95RP 97. Mr. Hull called 911 and told the operator he thought there were two people inside the house. 3/03/15RP 41.

When police officers arrived, they also reported seeing no more than two people inside the house. Officer Terry Persun said he saw one person walking through the house carrying a flashlight. 3/03/15RP 191-92. Officer Andrew Wilkes saw "two figures inside moving about," each carrying a flashlight. 3/04/15RP 65-66. Officer Andrew Belgarde said he was "[n]ot 100 percent sure" how many people he saw

¹ It was undisputed that Mr. Williams and Mr. Maxwell entered the house, each carrying a flashlight.

inside carrying flashlights. 3/04/15RP 89. He thought there were “two, three” people but admitted he probably over-estimated the number of people inside because he “would rather over-estimate at the time than underestimate and be surprised by somebody else inside.” 3/04/15RP 88-89.

As he was waiting in the backyard, Mr. Johnson saw his two friends exit the house carrying property they had taken from inside. 3/10/95RP 52. Mr. Maxwell was carrying a computer screen and a keyboard and had a bag over his shoulder, and Mr. Williams had a backpack. 3/10/95RP 52, 99. The three young men then began walking toward the gate. When they heard a police officer announce his presence, they ran the other way. 3/10/95RP 53, 100.

Mr. Johnson hopped a fence and climbed on top of a garage roof. 3/10/95RP 53. Police Officer Benjamin Kelly saw Mr. Johnson on top of the roof and shone a bright light in his face. 3/10/95RP 60-61. Another officer told Mr. Johnson to come down. 3/10/95RP 57-58. Mr. Johnson jumped onto a fence, then jumped to the ground and ran. 3/10/195RP 66.

Officer Kelly chased Mr. Johnson. 3/10/95RP 68. Mr. Johnson tried to jump a fence but was unable to do so. 3/10/95RP 71. Mr.

Johnson testified that as he was trying to climb the fence, Officer Kelly grabbed his ankle and pulled him down. 3/10/95RP 71. Officer Kelly punched him in the head, pointed a gun at him, and shot him two times in the abdomen. 3/10/95RP 72-74, 78, 83-84. Mr. Johnson testified he never touched Officer Kelly. 3/10/95RP 75. Officer Kelly testified he wrestled with Mr. Johnson and was hit across the face, although he could not say what hit him. 3/09/15RP 107. Officer Kelly said he fired his gun because he felt it become trapped while he was wrestling with Mr. Johnson, although he could not say what was trapping the gun. 3/09/15RP 111. He shot Mr. Johnson because he was afraid of losing his gun. 3/09/15RP 112-13.

Mr. Johnson was taken to a hospital and treated for his gunshot wounds. 3/10/95 RP 91. He still has a bullet in his tail bone and continues to experience pain from his injuries. 3/10/95RP 91.

The police later found a white iPhone in a box on top of the roof of the garage which seemed to be new. 3/03/15RP 132; 3/10/95RP 113. The iPhone belonged to Mr. Johnson, who had bought it earlier that day. 3/10/95RP 113. The iPhone accidentally slipped out of his sweater pocket while he was on top of the roof. 3/10/95RP 113. The

iPhone found on top of the garage did not belong to either of the two people who lived in the house. 3/10/15RP 27, 44.

Mr. Johnson was charged with one count of residential burglary, one count of third degree assault, and one count of resisting arrest. CP 10-11. The jury found him guilty of residential burglary and resisting arrest but not guilty of third degree assault. CP 79-81.

D. ARGUMENT

- 1. The State did not prove beyond a reasonable doubt that Mr. Johnson was guilty of residential burglary as either a principal or an accomplice.**

To prove the charged crime of residential burglary, the State was required to prove Mr. Johnson, or a person to whom he was acting as an accomplice, unlawfully entered the Mount Baker house with the intent to commit a crime against a person or property therein. CP 64-65; RCW 9A.52.025(1). The State did not meet its burden of proof because the evidence does not show either that Mr. Johnson entered the house or that his actions aided or facilitated commission of the burglary. To the contrary, the evidence shows only that Mr. Johnson was present at the scene and was aware the burglary was occurring. This was insufficient to prove his guilt as either a principal or an accomplice.

Constitutional due process required the State to prove the elements of the crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. The question on appeal is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the 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); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The State did not prove beyond a reasonable doubt Mr. Johnson was guilty as a principal because it did not prove he actually entered the house. Mr. Johnson testified he never entered the house. 3/10/95RP 51, 96, 98, 131. Moreover, no witness ever saw Mr. Johnson inside the house. The witnesses said they saw no more than two flashlights, and two figures, inside the house. 3/03/15RP 30, 34, 41, 191-92; 3/04/15RP 65-66. Although Officer Belgarde said he might have seen “two, three” people inside the house, he also admitted he generally overestimates the number of suspects involved in a possible burglary

because he does not want to “be surprised by somebody else inside.”

3/04/15RP 88-89.

The State also did not prove beyond a reasonable doubt Mr. Johnson was guilty as an accomplice to the burglary. A person is guilty as an accomplice if “with knowledge that it will promote or facilitate the commission of the crime, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime.” CP 64; RCW 9A.08.020(3).

A person is not guilty as an accomplice unless he “associates himself with the venture and takes some action to help make it successful.” State v. Truong, 168 Wn. App. 529, 539, 277 P.3d 74 (2012). “One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed.” In re Welfare of Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

Mere presence at the scene of the crime is insufficient to establish accomplice liability. Id.; State v. Landon, 69 Wn. App. 83, 91, 848 P.2d 724 (1993). Nor is mere presence combined with assent sufficient, State v. Ferreira, 69 Wn. App. 465, 471, 850 P.2d 541

(1993), nor mere presence combined with knowledge. Truong, 168 Wn. App. at 79. As the Supreme Court explained in Wilson, “even though a bystander’s presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt.” Wilson, 91 Wn.2d at 491-92.

Here, the evidence shows only that Mr. Johnson was present at the scene and was aware of the ongoing burglary. It does not show his actions facilitated or aided in commission of the crime. Mr. Johnson testified he rode the bus with his friends to Mount Baker after Mr. Williams suggested the idea of burglarizing a house. 3/10/15RP 50-51, 94-96. But before entering the house, Mr. Johnson decided not to participate in the burglary and waited for his friends outside. 3/10/95RP 51. Although he put on a pair of gloves Mr. Williams gave him, he never entered the house or assisted his friends in removing any property from the house. 3/10/15RP 27, 44, 51, 64, 95-98, 101, 113, 131. There is no evidence that the police found any stolen property on Mr. Johnson at the time of his arrest, or that anyone saw him carrying stolen property.

Although Mr. Johnson's presence at the scene might have encouraged his friends to commit the burglary, that is not alone sufficient to convict him as an accomplice. Wilson, 91 Wn.2d at 491-92; Truong, 168 Wn. App. at 79. The State was required to prove he took some *affirmative action* to help make the burglary succeed. Truong, 168 Wn. App. at 539. The State failed to prove Mr. Johnson was guilty as an accomplice because it did not show he affirmatively acted in a way that aided or facilitated commission of the crime.

Because the State did not prove Mr. Johnson was guilty as either a principal or an accomplice, the conviction must be reversed and the charge dismissed. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221.

2. Any request that costs be imposed on Mr. Johnson for this appeal should be denied because the trial court determined he does not have the ability to pay legal financial obligations.

This Court has discretion not to allow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, __ Wn. App. __, No. 72102-0-I (Jan. 27, 2016). The defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. Sinclair, slip op. at 9. Here, the trial court found Mr. Johnson is

indigent and does not have the ability to pay legal financial obligations. CP 88; Sub #104. This Court should exercise its discretion and disallow appellate costs should the State substantially prevail.

The Rules of Appellate Procedure allow the State to request appellate costs if it substantially prevails. RAP 14.2. A “commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). In interpreting this rule, our Supreme Court held that it allows for the appellate court itself to decide whether costs should be allowed:

Once it is determined that the State is the substantially prevailing party, *RAP 14.2 affords the appellate court latitude in determining if costs should be allowed*; use of the word “will” in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but *that rule allows for the appellate court to direct otherwise in its decision.*

Nolan, 141 Wn.2d at 626 (emphases added).

Likewise, the controlling statute provides that the appellate court has discretion to disallow an award of appellate costs. RCW 10.73.160(1) states, “The court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added).

In Sinclair, this Court recently affirmed that the statute provides the appellate court with discretion to deny appellate costs, which the Court should exercise in appropriate cases. Sinclair, slip op. at 8. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing “cannot displace the court’s obligation to exercise discretion when properly requested to do so.” Id. Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant’s ability to pay, as remand to the trial court not only “delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties.” Slip op. at 9. Thus, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” Id. at 9-10. Under RAP 14.2, the Court may exercise its discretion in a decision terminating review. Slip op. at 8.

The Court should deny an award of appellate costs to the State in a criminal case if the defendant is indigent and lacks the ability to pay. Id. at 8-11. The imposition of costs against indigent defendants

raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. Slip op. at 11 (citing State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)). “It is entirely appropriate for an appellate court to be mindful of these concerns.” Sinclair, slip op. at 11.

In Sinclair, the trial court entered an order authorizing Sinclair to appeal in forma pauperis and to have appointment of counsel and preparation of the record at State expense, finding Sinclair was “unable by reason of poverty to pay for any of the expenses of appellate review,” and “the defendant cannot contribute anything toward the costs of appellate review.” Slip op. at 13. Given Sinclair’s poverty, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Slip op. at 14. Thus, the Court ordered that appellate costs not be awarded. Id.

Similarly here, Mr. Johnson is indigent and lacks an ability to pay. At sentencing, the trial court refused to impose discretionary legal financial obligations, finding “the defendant lacks the present and future ability to pay them.” CP 88. The court also entered an order authorizing Mr. Johnson to appeal in forma pauperis, finding he

“cannot contribute anything toward the costs of appellate review.” Sub #104. This finding is supported by the record. In his declaration, Mr. Johnson asserted he has no income and no assets, and no employment history. Sub #106 at 1-2. Although he is only 21 years old, he already has a lengthy felony criminal history, which will hinder any future attempts to obtain gainful employment. CP 91-92. Given these factors, it is unrealistic to think Mr. Johnson will be able to pay appellate costs.

This Court should exercise its discretion to reach a just and equitable result and direct that no appellate costs be allowed should the State substantially prevail.

E. CONCLUSION

The State did not prove the elements of the crime and the conviction should be reversed and the charge dismissed. In the alternative, should the State substantially prevail, this Court should deny an award of appellate costs.

Respectfully submitted this 29th day of January, 2016.

s/ Maureen M. Cyr

MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73296-0-I
v.)	
)	
GILJON JOHNSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
APPELLATE UNIT	(X)	AGREED E-SERVICE
KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] GILJON JOHNSON	()	U.S. MAIL
(NO CURRENT ADDRESS)	()	HAND DELIVERY
C/O COUNSEL FOR APPELLANT	(X)	RETAINED FOR
WASHINGTON APPELLATE PROJECT		MAILING ONCE
		ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JANUARY, 2016.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710