

COA No. 30414-1-III

FILED

OCT 15 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

GREGORY F. EVERYBODYTALKSABOUT, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
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I. ASSIGNMENTS OF ERROR

A. The State's evidence was insufficient to support Gregory

F. Everybodytalksabout's convictions.

B. The court erred by holding the restitution hearing in Mr. Everybodytalksabout's absence even though he refused to waive his right to be present at the hearing.

Issues Pertaining to Assignments of Error

1. Was the evidence sufficient to support the convictions when the State failed to prove guilt beyond a reasonable doubt? (Assignment of Error A).

2. Did the court err by holding the restitution hearing in Mr. Everybodytalksabout's absence when he refused to waive his right to be present at the hearing? (Assignment of Error B).

II. STATEMENT OF THE CASE

Mr. Everybodytalksabout was charged by amended information with count 1 – residential burglary, count 2 – first degree theft, count 3 – first degree burglary, count 4 – first degree theft, count 5 – theft of a firearm, count 6 – unlawful possession of a firearm in the first degree, count 7 – second degree burglary, count 8 – first degree theft, count 9 – third degree malicious mischief, count 10 – second degree burglary, count 11 – second

degree theft, count 12 – third degree malicious mischief, count 13 – residential burglary, count 14 – second degree burglary, and count 15 – first degree theft. (CP 22-208). After numerous continuances that were granted over objection for good cause or without objection, the case proceeded to jury trial. The defense was that Mr. Everybodytalksabout had nothing to do with the burglaries or thefts. (10/18/11 RP 343).

Okanogan County Sheriff's Detective Deborah Behymer was a deputy in fall 2008 and investigated some burglaries in September 2008. (10/18/11 RP 344, 346). The Brewster Police Department was also investigating. (*Id.* at 347). Detective Behymer was involved with the burglaries at 422 N. Starr Road, 316 Old Highway 97, 309½ Old Highway 97, 26450 Highway 97, and Michael Wright's shop just off Highway 97. (*Id.* at 347-49).

She went to Mr. Wright's on September 20, 2008, where she located foot prints and a stolen Ford Explorer. (10/18/11 RP 349-51). From investigating the stolen vehicle, Johnny Woodward was identified as a possible suspect. Detective Behymer contacted him. (*Id.* at 352). This contact led police to get in touch with Tim Florence, Franco Sellers, and Mr. Everybodytalksabout. (*Id.*). They were all eventually arrested. (*Id.* at 353).

Okanogan County Sheriff's Detective Mike Warden investigated a burglary at 316 Old Highway 97 where Bill Lawson had a residence and a shop and was in the process of moving out. (10/18/11 RP 372-76). There were shoe and tire prints. (*Id.* at 376, 383). There was a broken window in the shop. (*Id.* at 389). By looking at tire prints, the detective determined the same vehicle at Mr. Wright's shop was at Mr. Lawson's as well. (*Id.* at 396).

Okanogan County Sheriff's Field Sergeant Eugene Davis was involved in investigating the burglaries. (10/18/11 RP 397-99). He processed the stolen vehicle. (*Id.* at 399). He was in contact with Mr. Woodward and Mr. Sellars, who admitted committing the burglaries. (*Id.* at 400, 401). Sergeant Davis and Mr. Sellars went to locations where he was involved in burglaries. (*Id.*). At 422 N. Star Road, he said Mr. Florence and Mr. Everybodytalksabout went in and took a gun and computer. (*Id.* at 401-02). Meat was also taken. (*Id.* at 404).

At Hospital Way in Brewster, Mr. Sellars said Mr. Florence and Mr. Everybodytalksabout went inside a blue single-wide trailer through an unlocked front door. (10/18/11 RP 402-03). They took two laptops. (*Id.* at 403). Sergeant Davis and Mr. Sellars went to a location outside the county where another burglary took place and

items were taken. (*Id.* at 405). Mr. Sellars also went with the sergeant to locations in the Brewster and Bridgeport area where they had gone to sell the stolen goods. (*Id.* at 405-11). He said Mr. Everybodytalksabout was the primary seller. (*Id.* at 407). Some items were recovered. (*Id.* at 411).

Sergeant Davis talked to Mr. Everybodytalksabout. (10/18/11 RP 417). He was looking for a red Pontiac Grand Am stolen from 1116 Old Highway 97. The detective found it at Mr. Everybodytalksabout's residence. (*Id.* at 418). His niece and boyfriend had bought it from Tim Florence for \$500. (*Id.* at 422). The Ford had been dropped off by Mr. Florence for scrap. (*Id.* at 419). Sergeant Davis arrested Mr. Everybodytalksabout.

Deputy Tate Everett investigated a burglary at 27450 Highway 97. (10/18/11 RP 423-24). The residence of Kim and Marty Evans had been broken into and items taken. (*Id.* at 424).

Ms. Evans was not living at the home when the burglary occurred as they were in the process of moving. (1/19/11 RP 435). Entry to the house was gained through a broken window and bolt cutters used to get into the shed. (*Id.* at 436-37). Items were stolen with a replacement value of \$3573.83 and cash value of \$2523.94. (*Id.* at 438-41).

William Lawson was also in the process of moving from 316 Old Highway 97. (10/19/11 RP 443-44). The door and window of the shop were broken. (*Id.* at 444). Meat and tools were taken with a total value of \$3700. (*Id.* at 449-450). Nothing was returned. (*Id.* at 451).

Philip Swezey lived at 422 N. Star Road. (10/19/11 RP 453). In early September 2008, he reported a break-in. (*Id.*). Items with an approximate value of \$3000 were taken, including a Ruger .22 rifle. (*Id.* at 454-56). Nothing was returned. (*Id.* at 456).

Wayne Lehrman of Brewster had a recycling business. (10/19/11 RP 446-57). The door had been pried open and his tools taken. (*Id.* at 458). The tools were valued at \$1334.89 and the door was replaced for \$125. (*Id.* at 459).

Akifumi Moriyoshi said items were taken from Japanese trainees living in a trailer furnished by Gebbers Farms. (10/19/11 RP 462-64). It was located at 12 Hospital Way in Brewster. (*Id.* at 466-67). Two laptops were taken with a combined value of some \$5500. (*Id.* at 464-65).

Detective Behymer indicated the foot prints found at Mr. Lawson's to match Mr. Everybodytalksabout's shoes. (10/19/11 RP

472, 475). Prints had been found at different crime scenes. (*Id.* at 474).

Mr. Woodward pleaded guilty in November 2008 to burglaries with Mr. Florence and was in custody in Walla Walla. (10/19/11 RP 478-80). He said he committed no burglaries with Mr. Everybodytalksabout. (*Id.* at 494).

Mr. Florence pleaded guilty in December 2008 and was in jail. (10/19/11 RP 498-99). He said Mr. Everybodytalksabout was involved in the burglaries. (*Id.* at 502, 505-07).

Lawrence Sellars pleaded guilty in June 2009 and received a DOSA sentence. (10/19/11 RP 553-55). Mr. Everybodytalksabout directed them where to go and who to sell the stolen items to afterwards. (*Id.* at 557).

No exceptions or objections were taken to the court's instructions to the jury. (10/20/11 RP 594). The jury returned guilty verdicts to all 15 counts as charged. (CP 39-41). The court proceeded to sentencing the same day as the verdict. (10/20/11 RP 645). It imposed a sentence of 191 months confinement. (CP 5-17). When asked if the amount of restitution was agreed, Mr. Everybodytalksabout advised the court he did not stipulate to the

amount and did not waive his right to be present at the restitution hearing. (10/20/11 RP 650-51).

A restitution hearing was held on June 11, 2012. Although Mr. Everybodytalksabout did not waive his right to be at the hearing and the court was apprised of that fact, the court nonetheless set a restitution amount. (6/11/12 RP 3-6). This appeal follows.

III. ARGUMENT

A. The evidence was insufficient to support the convictions.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Credibility determinations are for the trier of fact and not subject to review. *State v. Stevenson*, 128 Wn. App. 179, 114 P.3d 699 (2005). The defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006).

Although an information that charges an accused as a principal adequately apprises him of his potential liability as an accomplice, *State v. Rodriguez*, 78 Wn. App. 769, 773-74, 898 P.2d 871 (1995), the accused's mere presence at the scene of a

crime, even if coupled with assent to it, is insufficient to prove complicity. The State must prove the defendant was ready to assist in the crime. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Here, viewed in a light most favorable to the State, the evidence showed only that Mr. Everybodytalksabout was present at the burglary scenes. His mere presence and assent do not prove he was an accomplice. *Id.* Accordingly, the State's evidence did not prove beyond a reasonable doubt that Mr. Williams was guilty of any of the 15 offenses as an accomplice. *Luna, supra.*

Furthermore, he was charged in count 6 with unlawful possession of a firearm in the first degree as a principal. (CP 203). Philip Swezey testified a Ruger .22 rifle was taken from his house. (10/19/11 RP 455). Mr. Florence, who pleaded guilty, said a gun was taken in one of the burglaries. (*Id.* at 511). Mr. Sellars, who also pleaded guilty, indicated Mr. Everybodytalksabout had sold the .22 to a Mexican worker on a tractor for \$50. The gun was not recovered. (*Id.* at 456). Even though credibility is a question for the jury to decide, the existence of facts cannot be based on guess, speculation, or conjecture by a fact finder. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Mr. Sellars and the others who pleaded guilty were going to take Mr. Everybodytalksabout

down with them. They did. Their untrustworthy testimony was not evidence, but rather fodder for guess, speculation, and conjecture by the jury. In these circumstances, Mr. Everybodytalksabout did not stand a chance and was improperly penalized for exercising his constitutional right to trial. *State v. Frampton*, 95 Wn.2d 469, 473, 627 P.2d 922 (1981); *State v. Montgomery*, 105 Wn. App. 442, 446, 17 P.3d 1237 (2001). All 15 convictions must be reversed.

B. The court erred by holding the restitution hearing in Mr. Everybodytalksabout's absence when he did not waive his right to be present at the hearing.

At sentencing, Mr. Everybodytalksabout neither stipulated to the amount of restitution nor waived his right to be present at any restitution hearing. (10/20/11 RP 650-51). Yet, the court held that hearing on June 11, 2012, where it was advised by the State that Mr. Everybodytalksabout had not waived his right to be present. (6/11/12 RP 3). The court proceeded to set a restitution amount anyway:

In these circumstances, because of the transcript, because the witnesses have testified in the Defendant's presence, been subject to cross examination, because no restitution is being sought that wasn't testified to and documented at trial, because the jury found the Defendant guilty beyond a reasonable doubt of the offenses involved, the

Court determines that the jury trial satisfied the requirements for restitution hearing and I'm signing the order of restitution. (6/11/12 RP 5).

RCW 9.94A.753(1) provides in relevant part:

When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause.

Here, the court held the restitution hearing beyond the 180 days mandated by statute. There is nothing in the record showing the court continued the hearing to June 11, 2012, for good cause. The restitution order is invalid. See *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996). Indeed, the court was fully aware Mr. Everybodytalksabout had neither waived his right to be present at the hearing nor stipulated to the amount of restitution. It nonetheless held the hearing and set restitution. This, the court cannot do in his absence. *State v. Burmaster*, 96 Wn. App. 36, 979 P.2d 442 (1999). The restitution order must be reversed and vacated. *Id.*

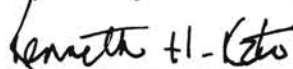
IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Everybodytalksabout respectfully urges this Court to reverse his

convictions and dismiss the charges or remand for new trial and to reverse and vacate the restitution order.

DATED this 15th day of October, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on October 15, 2012, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Gregory F. Everybodytalksabout, # 721944, Airway Heights C. C., PO Box 2049, Airway Heights, WA 99001; and Karl F. Sloan, Okanogan County Prosecuting Attorney, PO Box 1130, Okanogan, WA 98840.

