NO. 31862-1-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

JAMES BRUCE HAMBLETON

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

# BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

A. COUNTERSTATEMENT OF ISSUES ..... 1

**1. IS THE TRIAL COURT'S FINDING THAT THE CELL PHONE WAS PURCHASED BY MS. HUEY BASED ON SUBSTANTIAL EVIDENCE?..... 1**

**2. DID THE TRIAL COURT PROPERLY CONCLUDE THAT MS. HUEY HAD AUTHORITY TO CONSENT TO THE SEARCH OF THE CELL PHONE? ..... 1**

**3. IN ANY EVENT, WAS THE SEARCH OF THE CELL PHONE AUTHORIZED BY A SEARCH WARRANT? ..... 1**

**4. WAS SUFFICIENT DIRECT AND CIRCUMSTANTIAL EVIDENCE PRESENTED TO SHOW DEFENDANT WAS A PARTICIPANT IN THE CRIMES CHARGED? ..... 1**

B. COUNTERSTATEMENT OF THE CASE..... 1

C. RESPONSE TO ARGUMENT ..... 4

**1. SUPPRESSION ISSUES..... 4**

**2. SUFFICIENCY OF THE EVIDENCE ..... 11**

D. CONCLUSION..... 18

## TABLE OF AUTHORITIES

### CASES

Baker v. State, 905 P.2d 479, 489 (Alaska Ct. App. 1995) ..... 12

State v. Carothers, 84 Wn.2d 256, 261-62, 525 P.2d 731 (1974) ..... 12, 13

State v. Hill, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994) ..... 5

State v. Hoffman, 116 Wn.2d 51, 104-05, 804 P.2d 577 (1991) ..... 12, 13

State v. Huff, 64 Wn. App. 641, 648-653, 826 P.2d 698 (1992) ..... 10

State v. Hughes, 106 Wn.2d 176, 203-04, 721 P.2d 902 (1986) ..... 11

State v. Leach, 113 Wn.2d 735, 739, 782 P.2d 1035 (1989) ..... 9

State v. Morse, 156 Wn.2d 1, 123 P.2d 382 (2005) ..... 9

State v. Rangel-Reyes, 119 Wn. App. 494, 499, 81 P.3d 157 (2003) ..... 11

State v. Siderts, 17 Wn. App. 56, 60-61, 561 P.2d 231 (1977) ..... 6

State v. Spring, 128 Wn. App. 398, 402-03, 115 P.3d 1052 (2005) ..... 10

## TABLE OF AUTHORITIES CONTINUED

State v. Toomey, 38 Wn. App. 831, 840, 690 P.2d 1175 (1984) ..... 12

### STATUTES

RCW 9A.08.020(1)&(3)(a) ..... 12

### OTHER AUTHORITIES

12 ROYCE A. FERGUSON, JR., WASH. PRAC.: CRIMINAL PRACTICE AND PROCEDURE § 2713 (3d ed. 2004) ..... 8

12 WASH. PRAC. § 2713 ..... 8

## A. COUNTERSTATEMENT OF ISSUES

1. **IS THE TRIAL COURT'S FINDING THAT THE CELL PHONE WAS PURCHASED BY MS. HUEY BASED ON SUBSTANTIAL EVIDENCE?**

2. **DID THE TRIAL COURT PROPERLY CONCLUDE THAT MS. HUEY HAD AUTHORITY TO CONSENT TO THE SEARCH OF THE CELL PHONE?**

3. **IN ANY EVENT, WAS THE SEARCH OF THE CELL PHONE AUTHORIZED BY A SEARCH WARRANT?**

4. **WAS SUFFICIENT DIRECT AND CIRCUMSTANTIAL EVIDENCE PRESENTED TO SHOW DEFENDANT WAS A PARTICIPANT IN THE CRIMES CHARGED?**

## B. COUNTERSTATEMENT OF THE CASE

James Brue Hambleton (hereinafter defendant) is appealing his Franklin County convictions for Theft of a Motor Vehicle and Burglary in the Second Degree. Defendant's Statement of the Case is substantially correct. However, the State would make the following additions, corrections and amplifications.

Defendant states at 9-10 that "[t]he State's theory was that Mr. Hambleton was an accomplice to the theft of a motor vehicle and second degree burglary charges." The State's

position could more precisely be described as conceding that there may have been other persons besides defendant involved in the criminal enterprise, but that under the principles of accomplice liability defendant was responsible for the actions of his co-participants as well as his own. As stated by the prosecutor in closing argument:

> So, it's not necessary, ladies and gentlemen, for you to determine exactly what role the defendant played in the commission of the crime. It's only necessary for you to find that he was, in fact, a participant in the crime in the sense it's defined for you in the court's instructions.

(RP 396). However, the State's theory's suggested that the role played by defendant was a major one:

> Mr. Lin (defense counsel) says, "Well, there's no evidence here that he aided in the commission of the crime." Think about the evidence you know. You know that the defendant knew where all the keys were as an employee. He worked there for two months. He knew there would only be one person anywhere on the premises at that hour of the night. His vehicle, for no explanation whatsoever, was parked behind the premises.
>
> That's when Mr. Fruitts (the only employee on the premises at that hour) reported that the company vehicle had been taken (and) Mr. McFarland (defendant's employer) came from his residence out to the place of business. At that point he could see that the company vehicle was gone and the defendant's vehicle, his green van, was parked behind the RJ Mac Co

premises in a place where no employee vehicle would be parked, even during working hours.

We know that he called the defendant. About 1:04 in the morning is when the phone call was made. It was certainly at that point the defendant knew that his vehicle was there at the premises. He knew that the company vehicle was gone, and he knew that Denver McFarland, his boss, was there at the premises, and you can imagine what kind of mood he would have been in at that point.

So, he knew he was in trouble, the defendant did. He knew he had some explaining to do. What does he do? Does he do what any reasonable person would do if he had a reasonable explanation? [G]o immediately to RJ Mac Co to explain to his boss what was going on? No. He was nowhere to be found.

He didn't show up until three o'clock in the morning when suddenly he comes walking down the roadway on Railroad Avenue out the middle of nowhere out by the railroad tracks out by King City, the other side of the freeway from the King City Truck Stop. Just walking out there at three o'clock in the morning and telling wild stories as to where he had been and how he managed to be walking out there at that hour with no transportation.

Ladies and gentlemen, I'd submit to you this evidence does show that he did aide in the commission of the crime. He had the knowledge. He had the opportunity. His vehicle was there with no explanation. He was walking out there at three o'clock in the morning even after he'd gotten the phone call from his boss, letting him know that the circumstances had been discovered.

> You take all of that together, clearly the only reasonable conclusion you can reach is that the defendant was a participant in these two crimes. We'd ask you to return verdicts finding his guilty of the crime of burglary in the second degree and theft of a motor vehicle.

(RP 426-28).

Other facts will be developed from the record as they relate to individual issues.

## C. RESPONSE TO ARGUMENT

### 1. SUPPRESSION ISSUES

The motion judge properly found based on uncontradicted evidence that Jodie Huey had purchased the cell phone that was found to contain pictures of generators. The motion judge further properly found that Ms. Huey validly consented to the search of the cell phone under the common authority rule. In any event, Detective Brad Gregory obtained a search warrant prior to the submitting the cell phone to forensic examination and discovering the photographs of generators.

Defendant first argues at 11 that "the portion of finding of fact 7 that states 'Ms. Huey had purchased the cell phone [used by defendant]' is not supported by any evidence whatsoever." Defendant further contends "Ms. Huey only

said that the phone was hers and she contracted for it. She did not say she had purchased the cell phone and, indeed, it was purchased by Mr. Hambleton and her sole connection to the phone was her name on the account."

Defendant has completely misread the record. At the suppression hearing, Detective Brad Gregory testified to the statements made by Ms. Huey at the time she consented to the search of the cell phone:

> I told Ms. Huey that I wanted to do a search warrant on the phone to obtain the information from inside the phone. She said she wanted to cooperate and gave me the phone. She said that the phone was hers. She gave it to Mr. Hambleton. She made the contract. She bought the phone. And I decided at that point that that would be legal for her to give me the phone. . . . Although I told her that I could go back to the police department, get a warrant and come back and look for the phone, she immediately told me I didn't have to do that. She would give me the phone.

(6/4/13 RP 75) (emphasis added). Moreover, Ms. Huey and defendant resided together and had a child in common. (6/4/13 RP 76).

Findings of fact entered under CrR 3.6 following a suppression hearing are reviewed under the substantial evidence standard. State v. Hill, 123 Wn.2d 641, 644-47,

870 P.2d 313 (1994). Substantial evidence exists if the evidence in the record is sufficient to persuade a fair-minded rational person of the truth of the finding. Id. The appellate court does not independently evaluate the evidence regardless of whether constitutional issues are involved. Id. In the instant case, the uncontradicted suppression hearing testimony set forth above clearly provides substantial evidence for finding that Ms. Huey purchased the cell phone.

In contending that the cell phone was not purchased by Ms. Huey, defendant cites at page 11 of his brief to "6/28/13 RP 236". However, the testimony presented on June 28, 2013 was part of the jury trial. The suppression hearing pursuant to CrR 3.6 had occurred on June 4, 2013. Evidence that was not before the trial court at the time the decision was made cannot be considered to undermine the trial court's findings. State v. Siderts, 17 Wn. App. 56, 60-61, 561 P.2d 231 (1977). Since the motion judge was not privy to the later jury trial testimony, it has no relevance to whether the finding is supported by substantial evidence.

In any event, defendant is making a distinction without a difference. The testimony of Ms. Huey at the jury trial fully

supports the conclusion that she had common authority over the cell phone:

> Q. Okay. Tell us about that cell phone in terms of whose cell phone that is, if you know.
> A. James bought it, and it was on a Sprint account that was in my name alone, but we split the bill together. We splint all the household bills together.

(6/28/13 RP 236). Regardless of which person originally purchased the cell phone, it was on a Sprint account that was solely in the name of Ms. Huey and she and defendant split the bill. Ms. Huey had at least equal authority over the cell phone.

The trial court properly found that the search of the cell phone was conducted with consent:

> When the state seeks to justify a warrantless search on the basis of consent, it is not limited to proof that the consent was given by the defendant.
>
> A third party may validly consent to the search of another's property when the two parties possess common authority over the premises or property or when the non-consenting party has assumed the risk that the other will consent to the search. The authority of a third party to consent to a warrantless search generally depends upon the relationship to the property subjected to the search. The right of possession rather than the right of ownership ordinarily determines who may consent to a police search of a particular place.

> A spouse who has equal authority to the use and occupation of the premises has the authority to consent to the search of those premises. The fact that a certain item may be characterized as a personal effect does not compel the conclusion that no risk is assumed by leaving the object in the premises occupied by a spouse. The joint dominion and control of a husband and wife over the family home may extend to the non-consenting spouse's personal effects.

12 ROYCE A. FERGUSON, JR., WASH. PRAC.: CRIMINAL PRACTICE AND PROCEDURE § 2713 (3d ed. 2004) (footnotes and citations omitted).

Under the uncontradicted statements of Ms. Huey presented at the suppression hearing, Ms. Huey bought the cell phone, she made the contract for it, and it was her property. While she and defendant were not legally married, they resided together and had a child in common. The fact that the cell phone might be characterized as a "personal effect" is not controlling. The trial court was clearly correct in finding she had at least common authority over the cell phone and validly consented to it being searched.

As stated above in 12 WASH. PRAC. § 2713, a third party may validly consent to a search "when the two parties possess common authority over the . . . property or when

the nonsenting party has assumed the risk that the other will consent to the search." (Emphasis added). Defendant's reliance on State v. Morse, 156 Wn.2d 1, 123 P.2d 382 (2005) is misplaced as that case involved a mere houseguest giving consent. In fact, Morse recognizes that when a person shares authority with another, it may be inferred that the person has assumed the risk that the other person will consent to a search. "In essence, an individual sharing authority over an otherwise private enclave inherently has a lessened expectation that his affairs will remain only within his purview, as the other cohabitants may permit entry in their own right." Morse, 156 Wn.2d at 10 (quoting State v. Leach, 113 Wn.2d 735, 739, 782 P.2d 1035 (1989)). The fact that Ms. Huey was concerned that defendant may be angry with her shows only that defendant did not personally consent. It does mean he did not assume the risk that Ms. Huey would consent.

In an event, even if there was not consent, the search was still valid because Detective Gregory obtained a search warrant prior to the forensic examination of the cell phone. When police have probable cause to believe an item

contains evidence of a crime, they may seize the item and hold it for a reasonable period of time in order to maintain the status quo while they obtain a search warrant. State v. Huff, 64 Wn. App. 641, 648-653, 826 P.2d 698 (1992). That is exactly what occurred here.

At page 11 of his brief, defendant cites to "6/4/13 RP 75, 86" and seems to argue that the cell phone was searched prior to the search warrant being obtained. However, nothing on pages 75 or 86 of the transcript of the June 4, 2013 hearing supports that conclusion. The testimony was that the only items Detective Gregory got off the cell phone prior to the search warrant were two phone numbers requested by Ms. Huey in a phone call to him. (6/4/13 RP 87). Even if this was somehow illegal, an unlawful entry by police does not invalidate a subsequent search warrant so long as the unlawful entry did not prompt the decision to seek the warrant, and lawfully obtained evidence established probable cause. State v. Spring, 128 Wn. App. 398, 402-03, 115 P.3d 1052 (2005). Here, obtaining the two phone numbers at the request of Ms. Huey had no effect on the search warrant. The only evidence

admitted at trial that was obtained from the cell phone consisted of photographs of generators, not phone numbers. See 6/27/13 RP 92-93; 7/1/13 RP 330. There was no basis to suppress evidence.

**2. SUFFICIENCY OF THE EVIDENCE**

Defendant also argues there was insufficient evidence presented at trial to support his convictions. On a challenge to the sufficiency of the evidence, the appellate court must view the evidence in a light most favorable to the State and determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Rangel-Reyes, 119 Wn. App. 494, 499, 81 P.3d 157 (2003). The elements of the crime may be established by either direct or circumstantial evidence; the circumstantial evidence need not be inconsistent with every hypothesis suggesting innocence. Id. at 499 & n. 1. Appellate court cannot retry factual issues; it is function and the province of the jury to weigh the evidence, to determine the credibility of the witnesses, and decide the disputed questions of fact. State v. Hughes, 106 Wn.2d 176, 203-04, 721 P.2d 902 (1986).

Under the principles of accomplice liability, a person is guilty of a crime committed by another if with knowledge that it will promote or facilitate the commission of the crime, he or she solicits, commands, encourages, or requests such other person to commit it, or aides or agrees to aide such other person in planning or committing it. RCW 9A.08.020(1)&(3)(a). "There is no separate crime of being an accomplice; accomplice liability is principal liability." State v. Toomey, 38 Wn. App. 831, 840, 690 P.2d 1175 (1984). An accomplice liability instruction is essential whenever the evidence would support a conclusion that some of the acts constituting the crime were committed by a person other than the defendant on trial. Baker v. State, 905 P.2d 479, 489 (Alaska Ct. App. 1995). It is unnecessary for the jury to determine the precise role the defendant played in the criminal enterprise, as long as it is satisfied that the defendant was indeed a participant in the crime charged. State v. Carothers, 84 Wn.2d 256, 261-62, 525 P.2d 731 (1974); State v. Hoffman, 116 Wn.2d 51, 104-05, 804 P.2d 577 (1991). As explained in Carothers:

> The jury was not obliged to decide who held the gun or who committed the physical acts of taking possession of the property of the victims. If it was convinced that the alleged crimes were committed and that the petitioner participated in each of them, it was justified in returning a verdict of guilty on each count. It was, therefore, proper for the trial court to instruct upon the provisions of [the accomplice liability statute], in order that the jury could understand that it was not imperative that it determine the exact nature of the petitioner's participation in the crimes, if it was convinced that he did, indeed, participate.

Carothers, 84 Wn.2d at 261-62. See also Hoffman, 116 Wn.2d at 105 ("The jury in this case need not have decided whether it was Hoffman or McGinnis who actually shot and killed Officer Millard so long as both participated in the crime.")

While it is possible there were others involved, the evidence certainly supports the conclusion that defendant was a participant in the crimes. Among the facts supporting the jury's verdict (with citations to the trial transcript) are the following: Thomas Fruitts, who worked for a business on the same premises as R.J. Mack and was the only employee on duty at the time, saw the R.J. Mack company truck driven being driven off between 11:00 and 11:35 p.m. on January 11, 2013. (RP 132-33). Denver McFarland, owner of R.J.

Mack, was notified that the truck was missing around 11:30 p.m. to midnight. (RP 60). He went to his place of business and saw the personal vehicle of defendant, who was one of his employees, "hid" behind the building. (RP 61). This was not a normal place for an employee's vehicle to be parked even during working hours. (RP 61). Defendant had no permission to be in the building after hours and no permission to take the company truck that night. (RP 62). He contacted defendant by telephone; defendant claimed he was hiding his vehicle from his girlfriend and would return to the premises as soon as possible. (RP 63-64). Mr. McFarland remained for three or four hours and defendant did not return during that time. (RP 64). The company truck was recovered abandoned in a west Pasco neighborhood on Monday, January 14, 2013; it had seen parked there since Saturday morning, January 12, 2013. (RP 218-20). There were no signs of forced entry into the vehicle and there had been no tampering with the ignition, indicating that the keys had been used to enter and start the vehicle. (RP 154).

The keys to the company truck were kept hidden on the premises of the R.J. Mack Company. (RP 59). The

employees were the only ones who knew where the keys were kept. (RP 59). All of the employees except defendant testified and established their whereabouts on the night the truck was taken and their lack of involvement in the theft of the vehicle. (RP 53, 113, 202, 213).

The following Monday, Mr. McFarland noticed that the warehouse key was missing from the office. (RP 78). At that point, he took an extra set of keys and inspected the warehouse. (RP 78). He then discovered that six new generators were missing from the warehouse. (RP 78). The warehouse key was later found in the back of the company truck after it was recovered. (RP 78, 80). The generators were never recovered. (RP 81). The generators had been on a pallet and parts of a pallet were found on the forklift, suggesting the forklift had been used to load the generators onto a vehicle (likely the company truck). (RP 87). Photographs of generators similar to those stolen from the warehouse were found on defendant's cell phone. (RP 92-93, 314-15, 323-24).

Officers responding the night of the incident noticed no frost on defendant's vehicle, suggesting it had been parked

there a short period of time. (RP 164). As police were leaving the scene at about 3:00 a.m., they saw a male later identified as defendant walking in a desolate area. (RP 166). He was about a half mile from R.J. Mack and three miles from Oregon Avenue. (RP 167). Defendant gave conflicting accounts of his reason for being at that location. (RP 170-71).

Defendant later stated to Detective Gregory that he had arrived at R.J. Mack at about 11:00 p.m. (RP 265) (which was around the time Mr. Furitts saw the company vehicle being driven away) (RP 132-33). Defendant said the vehicle was there was he arrived. (RP 263). The truck had not yet been recovered at the time defendant spoke to Detective Gregory, and defendant stated he might know someone who could tell the detective where the truck was located. (RP 270).

In summary, defendant had knowledge of the location of the keys to the company truck. The employees were the only ones who knew where the keys were kept, and defendant was the only employee whose whereabouts were not accounted for on the night of the theft. Defendant

admitted arriving at R.J. Mack at about the time the company truck was seen being driven away, and that the truck was there when he arrived. Defendant's personal vehicle was hidden behind the building and had only been there a short time, as it was not frosted over on the cold January night. Defendant received a phone call from his employer, which alerted him that the theft had been discovered; he undoubtedly realized that it looked suspicious that his personal vehicle was parked behind the building, but he did not immediately return to the premises to explain the circumstances to his employer. Three hours later, defendant was spotted by police walking in a remote area about a half mile from R.J. Mack. He gave conflicting explanations of his reason for being there. The next Monday it was discovered that generators were missing from the warehouse. The key to the warehouse was discovered in the back of the company truck when it was recovered. Defendant had photographs of generators on his cell phone (certainly unusual photographs for a person to carry on his or her cell phone). Defendant admitted he might know someone who could assist in recovering the truck. Given all, this is a

compelling case that defendant was a participant in the crime. The jury's verdict was clearly supported by sufficient evidence.

## D. CONCLUSION

On the basis of the arguments set forth above, it is respectfully requested that the conviction of James Bruce Hambleton in Franklin County Superior Court Cause No. 13-1-50015-8 be affirmed.

Dated this 20th day of May, 2015.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By: Frank W. Jenny
Frank W. Jenny
WSBA #11591
Deputy Prosecuting Attorney

## AFFIDAVIT OF MAILING

STATE OF WASHINGTON )
) SS.
County of Franklin )

COMES NOW Abigail Iracehta being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 20th day of May, 2015, a copy of the foregoing was delivered to James Bruce Hambleton #725847, Appellant, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay WA 98326 by depositing in the mail of the United States of America a properly stamped and addressed envelope and to Kenneth Kato, opposing counsel, khkato@comcast.net by email per agreement of the parties pursuant to GR30(b)(4).

Signed and sworn to before me this 20th day of May, 2015.

Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2018