

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

2014 FEB 28 PM 4:40

No. 70428-1-1

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

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STATE OF WASHINGTON,

Respondent,

v.

J.H.,

Appellant.

---

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

---

APPELLANT'S REPLY BRIEF

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**A. The evidence was insufficient to prove J.H. guilty of attempted residential burglary.**

**1. One's mere knowledge or physical presence at a crime scene does not constitute a crime.**

The State argues that it is immaterial which of the three men in Wright's backyard tried to open Wright's backdoor and that merely standing in a backyard while someone else "fiddles" with a lock is sufficient evidence to find a person guilty of attempted residential burglary:

[I]t is logical and reasonable to conclude that one of the three men standing in Wright's fenced backyard fiddled with the lock in an attempt to enter the residence. And because the same criminal liability attaches to him as well as the other two men attempting to enter the residence, it is immaterial which of the three actually tried to open the door.

Br. of Resp't at 14. It may be reasonable to infer that one of the three men in Wright's backyard tried to enter the home. It does not follow that J.H. was this person or that he was complicit. "Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime." In re Welfare of Wilson, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979) (quoting State v. J-R Distributors, Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)). J.H. might have been simply standing in close proximity. While J.H. might

have been in the backyard without permission, this fact does not establish that he intended to burglarize the residence.

In Wilson, the Court reversed a reckless endangerment conviction that was based on the juvenile defendant's mere presence at the scene of the crime. In re Welfare of Wilson, 91 Wn.2d at 492. There, a group of youths had been pulling a rope taut across a road as the juvenile defendant stood by. Id. at 489-90. He was found guilty as an accomplice. Id. at 490. Our Supreme Court reversed, holding that "something more than presence alone plus knowledge of ongoing activity must be shown" to find a person guilty. Id. at 492.

For similar reasons, this Court reversed a robbery disposition based on accomplice liability in State v. Robinson, 73 Wn. App. 851, 872 P.2d 43 (1994). There, without any warning, a passenger in the juvenile defendant's car got out at an intersection, robbed a 14-year-old girl of her purse, and got back into the car. Id. at 852. Because the robbery was completed by the time the robber re-entered the car and the defendant was merely present at the scene of the crime, there was insufficient evidence to find that he was an accomplice to the robbery. Id. at 857. That the defendant left the scene of the crime with the robber did not change the analysis. See id.

Wilson and Robinson show that merely being present in a person's backyard while another person "fiddles" with a lock on a door is insufficient to prove that person guilty of attempted residential burglary. Evidence of complicity is required.

The State contends that J.H.'s complicity is established because J.H. was identified as knocking on the door of a different house, later discovered to be vandalized, while in the company of two other men. Br. of Resp't at 16. While a witness, Jim Beard, identified J.H. as the person who knocked on the door, Beard did not testify that J.H. was in the company of two other men. Beard only testified that he saw two other people walking down the street. RP 13 ("I seen this fellow right here facing the front door, and at the same time I seen two other fellows walking down the street . . ."). Beard did not testify that these two other men were at the door with J.H. or that they appeared to be associated with him. Further, Beard did not identify the other two men detained by police along with J.H. as being the same two men he saw walking down the street. RP 8-27. In sum, the evidence the State points to fails to prove that J.H. was complicit in an attempted residential burglary of Wright's home.

**2. The evidence did not show "consciousness of guilt" for the crime of attempted residential burglary.**

The State argues there was evidence of "consciousness of guilt,"

and that this evidence tended to prove that J.H. was guilty of attempted residential burglary. Br. of Resp't at 13-15. Specifically, the State points to evidence of "flight" and "false statements" by J.H. This evidence, however, does not show consciousness of guilt. Even assuming this evidence showed consciousness of guilt, it did not show consciousness of guilt for attempted residential burglary.

**a. Departing quickly after being sternly told to leave does not show "flight" or consciousness of guilt.**

The State argues that J.H.'s "flight" from Wright's backyard is evidence tending to prove that he is guilty of attempted residential burglary. Br. of Resp't at 13. To be probative of guilt, the evidence of flight must create a reasonable and substantive inference that the departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). "The circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful." Id. at 98 (citing State v. Bruton, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965)). Evidence of flight "tends to be only marginally probative as to the ultimate issue of guilt or innocence." Freeburg, 105 Wn. App. at 498. The probative value of evidence of flight as circumstantial evidence of guilt depends upon the

degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. Id. This Court “will not accept ‘pyramiding vague inference upon vague inference to supplant the absence of basic facts or circumstances from which the essential inference of an actual flight must be drawn.’” State v. McDaniel, 155 Wn. App. 829, 854, 230 P.3d 245 (2010) (quoting Bruton, 66 Wn.2d at 113) (brackets omitted).

“The rationale which justifies the admission of evidence of ‘flight’ is that, when unexplained, it is a circumstance which indicates a reaction to a consciousness of guilt.” State v. Jefferson, 11 Wn. App. 566, 570, 524 P.2d 248 (1974) (emphasis added). Here, the homeowner yelled, “Get the fuck out of here,” at the men in his backyard. CP 46 (FF 12). The men complied and left. Thus, their departure is explained. It is speculative to infer consciousness of guilt from this departure. See Bruton, 66 Wn.2d at 113 (jury was left to speculate whether accused shoplifter left out of a sense of guilt or merely left a “disagreeable scene”). Here, the men were simply following the homeowner’s instruction. Their

departure did not show a consciousness of guilt or an attempt to evade arrest.

Assuming the “flight” showed consciousness of some type of guilt, the State did not prove it showed consciousness of guilt for attempted residential burglary, the crime charged. See Freeburg, 105 Wn. App. at 500 (presence of the gun on defendant did not, by itself, indicate a consciousness of the serious offense he faced); McDaniel, 155 Wn. App. at 855 (evidence that defendant did not cooperate with police did not show consciousness of guilt for charged crimes of attempted first degree murder and other offenses because defendant was wanted on several warrants). The reason for the departure could stem from a consciousness of guilt for being in the backyard without permission.

Under the circumstances, the “flight” from the backyard did not support an inference that J.H. was guilty of attempted residential burglary.

**b. To show consciousness of guilt based on the giving of false statements to police, the State must prove the statements were knowingly made falsely.**

The State argues that J.H.’s “untruthful” statements to police about his whereabouts that day tends to show that he committed attempted residential burglary. Br. of Resp’t at 14-15. Other than citing the rule that credibility determinations are for the trier-of-fact, the State cites no authority to support its argument on this point. Argument without

supporting legal citation need not be considered. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3. Accordingly, this Court need not consider the State's argument on this point.

Regardless, J.H.'s statements to the police did not show consciousness of guilt. Knowingly providing false information to police, such as a false name, may show consciousness of guilt. State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001); State v. Allen, 57 Wn. App. 134, 143, 787 P.2d 566 (1990). While the police and the court obviously did not accept J.H.'s account of his whereabouts that Halloween, this did not prove that J.H. gave a false account. In fact, the court rebuffed the prosecutor during closing argument when he accused J.H. of lying. RP 110. Even assuming that J.H. knowingly made false statements, this only showed consciousness of guilt for entering Wright's backyard, not attempted residential burglary. See Freeburg, 105 Wn. App. at 500; McDaniel, 155 Wn. App. at 855. The Court should reject the State's argument that J.H.'s statements tended to prove that he committed attempted residential burglary.

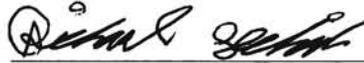
## **B. CONCLUSION**

J.H. was merely identified as being present in Wright's backyard. The evidence did not prove that J.H. himself tried to enter Wright's home

or that he was complicit in an attempted entry. The departure from the backyard and J.H.'s statements to police did not show consciousness of guilt for attempted residential burglary. Because there was insufficient evidence to establish beyond a reasonable doubt that J.H. committed attempted residential burglary, this Court should reverse with instruction that the charge be dismissed with prejudice.

DATED this 28th day of February, 2014.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70428-1-I
v.	)	
	)	
J. H.,	)	
	)	
Juvenile Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **REPLY 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] MAFE RAJUL, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] J. H. 24513 27 <sup>TH</sup> AVE S APT 2 DES MOINES, WA 98198	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2014.

X \_\_\_\_\_ 

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