

NO. 70517-2-1

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

STATE OF WASHINGTON

Respondent

v.

SVEIN A. VIK,

Appellant

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 APR 24 PM 1:28

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. Was evidence sufficient to convict the defendant of criminal trespass on an accomplice theory of liability?

II. STATEMENT OF THE CASE

On December 25, 2011 the defendant, Svein Vik, Vladamir Klepanchuk, and Damien Irwin went to the Tulalip Youth Center in the defendant's van. The defendant got out of the van with Irwin and spoke with him for a few minutes. The defendant and Klepanchuk drove off for a short while, leaving Irwin at the Youth Center because Irwin wanted to "pick up some stuff". The defendant was aware that Irwin was involved in committing burglaries and selling for profit the items that Irwin stole in the burglaries. The defendant picked up Irwin after he left the building. The defendant and Irwin then got into an argument because the defendant did not want to return to the Youth Center the next day. 2 RP 54, 60-65, 68, 72.

The Youth Center was under construction in December 2011 as it was being converted from a former administration building. On December 25, 2011 the building was closed and surrounded by a fence. No one was working on the project that day. No one had permission to be on the job site except for people who were

employed to work on the project. No one was permitted to cut the locks on the site or take equipment from the site. 1 RP 42-48.

On December 26, 2011 Christopher Wallace picked up Irwin from the defendant's home. Wallace and Irwin arrived at the Youth Center at around 4:18 a.m. They picked up items including some electrical wire that had been cut and a job box containing tools and new surveillance cameras from that location and removed them to Paul Gehret's home. 2 RP 48-49, 66-67.

Detective Williams from the Tulalip Tribal Police Department was assigned to investigate the burglary of the Youth Center. Detective Williams went to the Youth Center construction site. He was taken through the site by construction workers who pointed out the places where things had been stolen. It took them about 45 minutes to tour the site. Detective Williams observed electrical wires and padlocks that had been cut. Detective Williams was aware through his experience investigating burglaries that sometimes individuals would stage a location that was intended to be burglarized. The person would initially go inside to select items that the person planned to take. That person would place them in a location that was easy to get to so that when he returned he could more quickly remove those items. Detective Williams noticed that

the items that had been stolen were not easy to locate; they were taken from a number of locations throughout the construction site. 2 RP 48-53, 66-67.

Detective Williams also reviewed surveillance video from the Youth Center site as well as the Quil Ceda Creek casino. From that video he was able to identify the defendant and Irwin. Detective Williams contacted the defendant at his home on December 27. The defendant initially told the detective that he was home on December 25. When confronted with evidence he had been at the casino with Irwin the defendant admitted that he had been there, and that he had taken Irwin to the Youth Center. He also admitted that he knew that Irwin was involved in burglaries and that Irwin wanted to go to the Youth Center to take things. The defendant offered that he would get back the items stolen from the Youth Center if the detective would agree not to arrest him and take him to jail. 2 RP 45-47, 54-55, 58-64.

The defendant gave Detective Williams permission to search his van. Inside the van the detective located a pair of bolt cutters and industrial wire cutters. 2 RP 56, 71-72.

The defendant was charged with one count of second degree burglary. 1 CP 55. The jury returned a guilty verdict on the lesser included offense of first degree criminal trespass.

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO PROVE THE DEFENDANT WAS AN ACCOMPLICE TO THE CRIME OF CRIMINAL TRESPASS FIRST DEGREE.

The defendant challenges the sufficiency of the evidence to prove that he was an accomplice to the crime of criminal trespass first degree. Evidence is sufficient to support the charge if after viewing the evidence in the light most favorable to the State any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence are drawn in favor of the State and most strongly against the defendant. State v. Garbaccio, 151 Wn. App. 716, 742, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027 (2010). When evaluating the sufficiency of the evidence a reviewing court will treat circumstantial evidence as probative as direct evidence. Id. When a defendant challenges the sufficiency of the evidence he admits the truth of the State's evidence and all reasonable inferences that could be drawn from that evidence. State v.

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court gives deference to the trier of fact who resolves conflicting testimony, evaluates the credibility of the witnesses, and weighs the persuasiveness of the evidence. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157, review denied, 130 Wn.2d 1008 (1996).

In order to prove the defendant was guilty of criminal trespass in the first degree the State was required to prove that either the defendant or an accomplice knowingly entered or remained in a building, and that the defendant or an accomplice knew the entry or remaining was unlawful. 1 CP 30, RCW 9A.52.070. A person enters or remains unlawfully when he is not then licensed, invited, or otherwise privileged to enter or remain on a premise. 1 CP 31, RCW 9A.52.010(5). A person knows or acts knowingly with respect to a fact or circumstance when he is aware of that fact or circumstance. 1 CP 34, RCW 9A.08.010(1)(b).

A person is guilty as an accomplice to the charged crime if acting with knowledge that it would promote or facilitate the commission of that crime he aided or agreed to aid such other person in planning or committing that crime. RCW 9A.08.020(3). "An accomplice need not 'have specific knowledge of every

element of the crime nor share the same mental state as the principal.” State v. Whitaker, 133 Wn. App. 199, 230, 135 P.3d 923 (2006), review denied, 159 Wn.2d 1017, cert. denied, 552 U.S. 948 (2007), quoting, State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). Rather he need only have general knowledge of the specific crime committed. State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000).

The defendant was aware that Irwin was a burglar; a profession that by its nature involves going into places where he is not “licensed, invited, or otherwise privileged” to be in. RCW 9A.52.020, RCW 9A.52.025, RCW 9A.52.030 (defining burglary as entering or remaining unlawfully in particular defined places with intent to commit a crime against a person or property therein). On this particular occasion the defendant knew that Irwin “wanted to get some stuff” at the Youth Center. Given the date, a holiday, and that the Youth Center was under construction, closed, and surrounded by a fence, a rational juror could conclude that the defendant knew that in taking Irwin to the Youth Center he was at the very least assisting Irwin in entering that property unlawfully for the purpose of planning to steal property from that site. The defendant aided Irwin in criminally trespassing on that property by

providing him transportation to and from the Youth Center knowing that Irwin would trespass onto that property.

The defendant argues the evidence was insufficient because it only showed that he was present and had knowledge that Irwin was committing a crime. "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." State v. J-R Distributors, Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949 (1974). Thus, mere presence at the scene of a crime is not sufficient to prove accomplice liability. State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Instead the State must prove that the defendant was ready to assist the principal in the crime and that he shared the principal's criminal intent. State v. Troung, 168 Wn. App. 529, 540, 277 P.3d 74, review denied, 175 Wn.2d 1020 (2012).

In Luna a group of young men that included the defendant were committing vehicle prowls when one member of the group momentarily left, and returned with a stolen truck, and drove past the rest of the group. The defendant, who was driving a car carrying the rest of the group, followed the truck, stopping when the

truck stopped. Another member of the group got out of the car and took the wheel of the truck, driving it off and ultimately damaging it. Luna, 71 Wn. App. at 756. Because there was no evidence the defendant knew either member of his group was going to steal the truck or drive it away before those acts were committed, the evidence was insufficient to prove the defendant was an accomplice to taking a motor vehicle without owner's permission. Id. at 759-760.

In contrast the evidence was sufficient to convict the defendant as an accomplice to a burglary of a business in State v. Robinson, 35 Wn. App. 898, 671 P.2d 256 (1983). There the defendant was aware in advance that several members of his group planned a burglary of a store in order to steal beer. When they were unsuccessful, the defendant and two other members of the group went to the store to steal the beer. While the defendant did not go in, some evidence was introduced that the defendant acted as a lookout. Id. at 899. Although the defendant did not commit the burglary himself, his presence as a lookout was sufficient to prove he was an accomplice to that crime. Id. at 901.

Here the defendant was not merely present when Irwin criminally trespassed on the Youth Center property. Rather his

affirmative conduct was designed to aid Irwin in that crime. Unlike the defendant in Luna, evidence that the defendant knew that Irwin was a burglar and wanted to go to the Youth Center to get things was evidence that the defendant knew in advance what the plan was when they went to the Youth Center and agreed to assist in that plan.

The defendant testified that he permitted Irwin to come with them when they left for the casino. 2 RP 89-90. The three men travelled to the casino and then the Youth Center in the defendant's vehicle, a large box van. 2 RP 32. But for the defendant, Irwin would not have been in the vicinity of the Youth Center and would not have been able to unlawfully enter the premises at that time. The defendant then got out of the van with Irwin at the Youth Center. A short time later he and Klepanchuk left Irwin there for a time, and came back for him. 2 RP 63-64, Irwin said that the defendant knew what he intended to do, but later argued with Irwin about coming back for the items Irwin had selected. A rational trier of fact could infer from these facts that the defendant dropped Irwin off to commit a burglary. He conferred with Irwin about how long he would need to do that. The defendant left the area to avoid drawing attention to his van being parked at a closed construction site which

would arouse suspicion that the Youth Center was being burglarized. When they returned the defendant was upset with Irwin for only staging the site, not completing the burglary. These facts demonstrate that far from being a passive bystander, the defendant was an active participant in ensuring the success of at least a criminal trespass committed by Irwin.

The defendant's arguments to the contrary largely rely on his own testimony disavowing any participation in the crime. His arguments should be rejected on that basis because there was substantial evidence that conflicted with the defendant's testimony that proved he was an accomplice to the criminal trespass. The court does not disturb a jury's credibility determinations. Robinson, 35 Wn. App. at 901.

The defendant also argues the evidence is not sufficient because he was not driving the van when Irwin was dropped off and picked up from the Youth Center. The van belonged to the defendant and he had control over who got in the van and where it went. Particularly in light of evidence the defendant conferred with Irwin before dropping him off and picking him up from the Youth Center knowing Irwin wanted to get things from that site, evidence

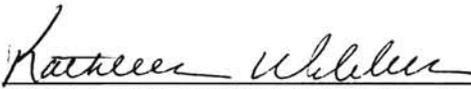
someone else drove the defendant's van does not transform him into one who was merely present at the scene of a crime.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the defendant's conviction for criminal trespass first degree.

Respectfully submitted on April 23, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent



**Snohomish County
Prosecuting Attorney
Mark K. Roe**

Criminal Division
Joan T. Cavagnaro, Chief Deputy
Mission Building, MS 504
3000 Rockefeller Ave.
Everett, WA 98201-4060
(425) 388-3333
Fax (425) 388-3572

April 23, 2014

Richard D. Johnson, Court Administrator/Clerk
The Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

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**Re: STATE v. SVEIN A. VIK
COURT OF APPEALS NO. 70517-2-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

KATHLEEN WEBBER, #16040
Deputy Prosecuting Attorney

cc: Nielsen, Broman & Koch
Appellant's attorney

23rd April

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

THE STATE OF WASHINGTON, Respondent, v. SVEIN A. VIK, Appellant.
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No. 70517-2-I
AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 23rd day of April, 2014, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 23rd day of April, 2014.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line. The signature is stylized and cursive.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit