

NO. 34529-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

B.J.S.

(D.O.B. 11/26/88)

Appellant.

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COURT OF APPEALS
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable James E. Warme

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO FIND B.J.S. GUILTY OF RESIDENTIAL BURGLARY AND THEFT IN THE SECOND DEGREE UNDER ACCOMPLICE LIABILITY.

The State argues that “[t]he judge found, based on the facts, there was sufficient circumstantial evidence that the crimes in fact occurred, and there was direct testimony about the Appellant’s involvement.” Brief of Respondent (BOR) at 7. However, the State fails to provide any facts in the record that support the trial court’s findings. The State merely argues that the court found that the testimony of co-defendant, Jason Norris, was inconsistent and it is within the discretion of the court to weigh credibility and determine the facts.¹ BOR at 6-8. Moreover, the State claims that Norris’s testimony was inconsistent by misstating his testimony, citing RP 65, 99. BOR at 7. The record, to the contrary, substantiates that Norris consistently stated that he and B.J.S. initially went to Bob Brekke’s house to party and he decided to take things after they got to the house:

Q. Is the only reason that you went up to Mr. Brekke’s home was to party and use his place?

A. At that point in time, yes.

¹ It should be noted that Respondent’s Statement of the Case contains argument in violation of RAP 10.3 (4), which requires a fair statement of the facts without argument. Respondent’s argument that a “large amount of Mr. Norris’s testimony was contradictory” should not be considered as fact. BOR at 2.

Q. Did it evolve into anything else?

A. Yes.

Q. And what did it evolve into?

A. Me paying Bob for his stuff. Taking stuff out of his house. It was an idea of somebody – a friend of mine and I idea had come up with earlier that day.

Q. Okay so if you came up with it earlier that day did you?

A. No it was kind of spur of the moment it went into effect, really.

7RP 65.

Q. Okay. So he knew the purpose of going up there that evening?

A. No the purpose when we first went up there was to party. It evolved later on when I was casing through the house.

7RP 99.

Norris also remained consistent in testifying that B.J.S. never helped him take the credit cards when he, James, and B.J.S. returned to Brekke's house the following morning:

Q. All right and then where did you three go?

A. Went back out there with the intention originally to get my car that was stuck.

Q. Okay. All right. And did you end up taking some more things from Mr. Brekke's house?

A. At that point credit cards.

....

Q. Did you see [B.J.S.] take anything at that time?

A. No, I didn't.

7RP 95 - 96.

Without providing facts or authority, the State asserts there was sufficient evidence to find B.J.S. guilty as an accomplice because it "presented evidence that the Appellant was involved beyond simply being present, he had a purpose in the commission of the crimes." BOR 7-8. The State's conclusory assertions fail under the Washington Supreme Court's definition of accomplice liability: "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 Distribs., Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949, 94 S. Ct. 3217, 41 L. Ed. 2d 1166 (1974). There was no evidence that B.J.S. aided or abetted Norris in the burglary and theft. See Brief of Appellant (BOA) at 11 - 14.

Furthermore, the court erroneously found that B.J.S. ran from the house, disregarding Timothy Entler's testimony that he did not see B.J.S. running away. 7RP 78 - 81. Contrary to the court's finding that there was no evidence of a party, Deputy Lisa Ulrich testified that she inspected

Brekke's home and found the house in disarray with alcohol bottles lying around. 7RP 45 - 48. The court could only depend on the testimony of Norris because it excluded Brekke's testimony.² 7RP 52, 58-60. Consequently, there was insufficient evidence, based on Norris's testimony, to find B.J.S. guilty as an accomplice for the burglary on November 17, 2005 and the theft of credit cards on November 18, 2005.

Unwittingly, the court expressed doubt as to the elements of the crimes:

I don't think there's any testimony as to value. I'm not sure when the thefts took place. Whether there was two or one. Theft of credit cards is a theft in the second degree. So I'm finding him guilty of one count of Residential Burglary and one count Theft in the Second Degree.

7RP 126.

Reversal is required because any rational trier of fact could not have found all the elements of the crimes beyond a reasonable doubt.³

State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003).

² Significantly, following defense counsel's motion to dismiss, the State conceded there was insufficient grounds for the residential burglary charges without Brekke's testimony. 7RP 85.

³ See Amended Information in relevant part:

COUNT I
RESIDENTIAL BURGLARY

The defendant, in the County of Cowlitz, State of Washington, on or about November 17, 2005, with intent to commit a crime against a person or property therein did enter or remain unlawfully in a dwelling other than a vehicle,

2. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT'S FINDINGS OF FACT ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND FAIL TO SUPPORT ITS CONCLUSIONS OF LAW.

The State argues that the court reasonably found that Norris was attempting to "take the fall" for B.J.S. because his testimony was inconsistent. BOR at 9 citing RP 125. The court summarized Norris's testimony:

His testimony is inconsistent. Every once in a while he would get candid and say I was going there to rip him off. That's what I was going to do, no I was going there to party and then he said later to rip him off. I wasn't going to do this in [B.J.S.'s] absence because this is [B.J.S.'s] territory and I wanted [B.J.S.] to know I wasn't going to go behind his back. Oops! I didn't mean to say that . . . What I meant was, once I got there I was gonna tell him.

7RP 125.

located at 1150 Spirit Lake Highway, Castle Rock; contrary to RCW 9A.52.025 and against the peace and dignity of the State of Washington.

....

COUNT IV
THEFT IN THE SECOND DEGREE

The defendant, in the County of Cowlitz, State of Washington, on or about November 18, 2005, did wrongfully obtained and/or exerted unauthorized control over Property belonging to another, to - wit: assorted credit cards and gas cards, an access device issued to Robert Brekke, with intent to deprive Robert Brekke of such property; contrary to RCW 9A.56.020(1)(a) and RCW 9A.56.040(1)(c) and against the peace and dignity of the State of Washington.

CP 15-16.

The record establishes that the court mischaracterized Norris's testimony because Norris never contradicted or corrected himself in that manner. Throughout his testimony, Norris maintained that B.J.S. never helped him in the burglary and theft. See BOA at 5-6.

The State also argues that testimony supports the court's findings that there was no evidence that Norris knew the security code so he brought B.J.S. along to enter the code and deal with any visitors that may show up while the burglary was in progress. BOR at 8 - 9 citing RP 72. The record reflects, however, that the court's finding is purely conjecture because Norris consistently testified that he and B.J.S. went to Brekke's house to party. Norris never stated that he brought B.J.S. with him to burglarize Brekke's house:

Q. Okay. Um . . . Did you enlist [B.J.S.'s] help with taking any of this stuff out of the house?

A. No. [B.J.S.] did not help me take anything outside of the house.

....

Q. Why did [B.J.S.] need to come with you then?

A. To make sure that I had the code right and stuff like that and the fact he needed more people - I'd only been around Bob for a few weeks at this point, you know. And Bob all the sudden offered me to live at his house, you know. Buying me stuff the way he buys it for [B.J.S.].

7RP 71 - 72.

Without any reference to the record, the State argues that based on the testimony, the court was “within its discretion to infer that Appellant was one of the parties running from the home.” BOR at 9 - 10. The court’s finding is based on speculation not inference because there was no testimony that B.J.S. fled from Brekke’s house. Although Timothy Entler testified that he saw two kids running, he emphatically stated that he did not see B.J.S.:

Q. Okay. You saw another kid running from the house?

A. I saw two people running from the house and one was – One was – One looked at me, but it wasn’t him.

Q. You didn’t see [B.J.S.] running from the house?

A. No.

7RP 81.

Reversal is required because even admitting the truth of the State’s evidence, the trial court’s findings are unsupported by substantial evidence and consequently fail to support its conclusions of law. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

3. REVERSAL IS REQUIRED BECAUSE B.J.S. WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

While conceding that defense counsel's performance was deficient for failing to properly advise B.J.S. of his eligibility for deferred disposition, the State inexplicably argues that "[b]ecause it is not likely from the record that the Appellant would have availed himself of the option because of his constant and consistent protestations of innocence, prejudice cannot be established." BOR at 11 - 12.

The State's hollow argument is disproved by the record. Defense counsel's admission to the court clearly indicates that B.J.S. relied on her advice and went to trial because he was assured that he would be eligible for deferred disposition if he did not prevail:

THE COURT: I don't think [deferred disposition] is available to him.

MS. BUSBY: Well my client may have an issue for appeal because I was unaware of that and I have advised them that if he went to trial that he could seek a deferred. So I'll just state that on the record.

7RP 131.

Undoubtedly, if counsel knew the law, to serve B.J.S.'s best interests, she would have moved for a deferred disposition rather than taking the case to trial. As a consequence of counsel's deficient performance, B.J.S. has a criminal record, when he would have had a

deferred disposition, with the potential for dismissal, if counsel had given him proper advice.

At sentencing, counsel regrettably explained the prejudicial effect of her failure to move for a timely deferred disposition:

We would like Your Honor to know that [B.J.S.] had hoped to and one reason they were very upset at the outcome of this case is that he had hoped to enter the military. Now he will have two felonies on his record and will not be able to do that. So I don't think they'll even take him when they are sealed. So that's highly unfortunate and that's quite a bit of punishment unless he can prevail on appeal so.

8RP 142.

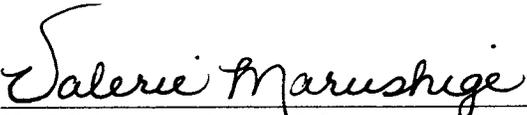
Defense counsel's performance was deficient and B.J.S. was prejudiced by her deficient performance because if counsel had given him proper advice, he would have a deferred disposition instead of two felony convictions. Reversal is required because B.J.S. was denied his constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

B. CONCLUSION

For the reasons stated here and in the opening brief, and as justice requires, this Court should reverse and dismiss B.J.S.'s convictions.

DATED this 22nd day of December, 2006.

Respectfully submitted,



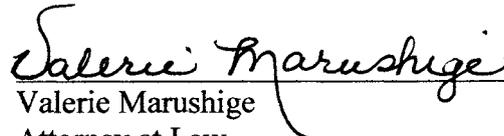
VALERIE MARUSHIGE
WSBA# 25851
Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Susan I. Baur, Cowlitz County Prosecutor's Office, 312 1st Avenue, Kelso, Washington 98626 and Brandon James Schlais, 1004 9th Avenue, Longview, Washington 98632.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of December, 2006 in Des Moines, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851

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