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STATE OF WASHINGTON

BY 

NO. 34529-3-II  
Cowlitz Co. Cause NO. 05-8-00375-1

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

Respondent,

v.

**BRANDAN JAMES SCHLAIS,**

Appellant.

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**BRIEF OF RESPONDENT**

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## STATEMENT OF THE CASE

The Respondent agrees in large part with the statement of facts presented by the Appellant with the following additions.

The court heavily weighed its findings on the testimony of Jason Norris. RP 125. A large amount of Mr. Norris's testimony was contradictory. He testified that he and a friend had come up with the idea to burglarize Robert Brekke prior to going to the home with the Appellant. RP 65. He immediately clarified himself and stated that it was a spur of the moment decision. Id. He testified that he was not given the code to enter Mr. Brekke's home personally, despite his testimony that he was allowed to live there. RP 68.

During re-direct, Mr. Norris testified that he "talked [B.J.S.] basically allowing me to do it and not say anything or not give me up or nothing. You know, basically making it okay." RP 72. He further testified that the Appellant was needed to accompany him "to make sure that I had the code right and stuff like that..." Id.

During rebuttal testimony Mr. Norris established more details about the Appellant's involvement in the alleged criminal activity. He admitted again that the Appellant was brought along so that he could be sure they had the right access code and also because the Appellant was known to the victim's friends and it would not be out of place for him to be at the home when Mr. Brekke was absent. RP 99. He further testified he brought the Appellant along because "I wasn't going to go up there and screw this guy off that he had a friendship with, you know, unless I told him about it." Id. He clarified that "It wasn't the fact so much they were

friends, it was the fact that this is [B.J.S.'s] territory. This was his game, you know, and I wasn't going to screw that off for him." RP 100.

At this point in the testimony, Mr. Norris read portions of his written statement to the police into record. RP 100-102. Mr. Norris's written statement included discussion of the Appellant "wanting to do this" and it being "completely out of character." RP 101. He testified that he was referring to the purchasing of drugs and not the act of burglary. *Id.* Mr. Norris's written statement also discussed a comment by the Appellant during the second break-in at the home the following morning. RP 102. He read into the record "I heard glass breaking and [B.J.S.] say you should have used the bolt cutters, not punch it." *Id.* He testified that was referring to the entry into an outbuilding on the property and not the home itself. *Id.*

The courts findings heavily discussed the statements of Mr. Norris. The court questioned his testimony about intending to party at the home. RP 124. It was noted that, despite Mr. Norris's testimony about partying with some girls, none were specifically mentioned or identified. *Id.* The court stated that it was clear "Mr. Norris is taking the fall" based on the courts determination of Mr. Norris's credibility. RP 125. The court found that "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 to party and then he said later to rip him off. I wasn't going to do this in [B.J.S.'s] territory and I wanted [him] 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." *Id.*

The court found the Appellant guilty as an accomplice to residential burglary and theft in the second degree for his assistance in entering the property. RP 126. Defense counsel asked about the issue of

Mr. Norris's claim he knew the entry code, but the court noted that "this is a question of weighing the credibility..." Id. "The fact that Mr. Norris said he maybe had the code, he wasn't sure about that. His girlfriend says that when they went there he didn't enter the code." RP 127. The court further stated that "he did say that he took [B.J.S.] there for the purpose of making sure he'd get in." Id.

The court also addressed the issue of an inconsistency in the testimony as to the number of participants in the burglary. Defense counsel raised the issue during the courts ruling that the witnesses stated only two people were seen running from the property, but that Mr. Norris testified that there were three people there at the time. RP 127. The court refused to give weight to the issue based on the fact that there is no dispute by Mr. Norris or the Appellant himself that he was present at the house at the time it was burglarized and that he was not found there when the police arrived. RP 128. The court found, based on the evidence that "the point is, whoever was there ran and we know that the defendant was there and he ran. He didn't stay. He didn't stay." Id. In addition, the Appellant also testified he was present at the time of the crime. RP 113-119.

Ultimately the court ruled that, "this is the legal issue: is there sufficient evidence, direct or circumstantial to support the finding? That's the issue." RP 129. The court stated that, when a victim is unavailable, and a codefendant testifies that he took items, it meets the threshold to support a finding that the things were actually taken.

## ARGUMENT

**A. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO FIND THE APPELLANT GUILTY OF RESIDENTIAL BURGLARY AND THEFT IN THE SECOND DEGREE UNDER ACCOMPLICE LIABILITY.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is sufficient to permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Gentry*, 121 Wn.2d 570, 597 (1995); *State v. Luna*, 71 Wn.App. 755, 757 (1993); *Seattle v. Slack*, 113 Wn.2d 850, 859 (1989); *State v. Green*, 94 Wn.2d 216 (1980). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that can be reasonably drawn therefrom.” *State v. Sanchez*, 60 Wn.App. 687, 693 (1991) (quoting *State v. Porter*, 58 Wn.App. 57, 60 (1990)). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The reviewing court must give deference to the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-416, 824 P.2d 553 (1992). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71 (1990). Circumstantial evidence is accorded equal

weight with direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638 (1980).

In the present case, the court found the Appellant guilty of residential burglary and theft in the second degree, both as an accomplice. The elements of residential burglary require proving that, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025(1). The Appellant was charged with theft in the second degree under the stolen access device prong. RCW 9A.56.040(1)(c). A person is guilty as an accomplice to a crime if, with knowledge that their actions will promote or facilitate the commission of the crime, he aids or agrees to aid such other person in the planning or commission of the crime. RCW 9A.08.020(3)(a)(ii).

There is no disputing the evidence that the crimes occurred. The Appellant does not argue that there is insufficient evidence that Mr. Norris burglarized Mr. Brekke’s home, or that he stole an access device. The only issue presented is the argument that the State failed to prove that the Appellant was an accomplice.

In the present case, the court gave greatest weight to the inconsistent statements of the co-defendant, Mr. Norris. RP 124-29. Mr. Norris testified both that the Appellant had no prior knowledge of the plan

and that he told him the plan because he did not want to go behind his back in his territory. RP 65 and 99. The court gave greater weight to the statement that B.J.S. was made aware of the plan prior to arriving at the home. RP 125. Further the court looked heavily to the inconsistency over the statement about how entry was gained into Mr. Brekke's home. The court noted it was eluded to by several defense witnesses that Mr. Norris may have had the security alarm code, however the court gave greater weight to the statement that the Appellant was brought along to make sure the code was correct. RP 127.

Those statements, coupled with all of the inconsistencies, provided the trier of fact sufficient basis to question the credibility of the witness. It is within the sound discretion of the court to weigh credibility and determine accordingly the facts that support or refute a finding of guilty. In the present case, the court weighed the credibility of Mr. Norris, and found that he was attempting to deflect blame from the Appellant. The 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.

In the present case, more than enough evidence exists to give a reasonable trier of fact a basis to convict on residential burglary and theft in the second degree as an accomplice. The State presented evidence that

the Appellant was involved beyond simply being present, he had a purpose in the commission of the crimes and as such, the decision of the trial court should stand.

**B. THE TRIAL COURT DID NOT ERR IN ENTERING THE FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

Appellant argues that there are insufficient facts presented to support Findings of Fact 2, 3, 4, and 5. Those findings of fact state:

2. The co-defendant Jason Norris was taking the fall for the Respondent.
3. There was no evidence that Jason Norris knew the security access code to Robert Brekke's home.
4. The respondent was brought along to enter the security access code and to deal with any visitors that may show up at the home while the burglary was in progress.
5. The respondent fled the scene of the crime which is contrary to having permission to be on the property.

The argument of the Appellant fails both factually and legally.

By claiming insufficiency of evidence, the Appellant concedes the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Salinas*, 119 Wn.2d at 201. By admitting the truth of all of the State's evidence, the argument that its findings are unsupported by substantial evidence fails. See *State v. Madarash*, 116 Wn. App. 500, 509; 66 P.3d 682, 687 (Div. II, 2003) ("Here, Madarash's claim that substantial evidence does not support the trial courts findings of fact fails because in claiming insufficiency of the evidence, Madarash admits the truth of the

states evidence.”); see also *State v. Pineda*, 99 Wn. App 65, 78-9; 992 P.2d 525, 532-33 (Div. II, 2000).

A courts findings of fact will not be reversed on appeal if supported by substantial evidence. *Miles v. Miles*, 128 Wn. App 64, 69; 114 P.3d, 671, 674 (Div. II, 2005). “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding’s truth.” *Id.*, citing *State v. Solomon*, 114 Wn. App. 781, 789; 60 P.3d 1215 (2002). By looking at the facts presented above, the findings of fact were properly supported by the substantial evidence sufficient to persuade a fair-minded trier of fact.

With respect to finding two, the court properly relied in the inconsistency in Mr. Norris’s testimony as the basis for his attempt to protect the Appellant. The court noted that he was constantly correcting himself any time he let slip what the court believed to be the true events of the day in question. RP 125. This provided a reasonable basis for the courts finding, that Mr. Norris was attempting to “take the fall.”

The statements by Mr. Norris supported finding three and four; that he did not know the access code and that he took the Appellant along to ensure access to the victim’s home. RP 72. The court relied on that statement in making its ruling, in addition to other witness testimony that Mr. Norris *may* have known the code, but never testified he definitely had access. RP 127. This supports the finding that no evidence was presented that Mr. Norris affirmatively knew the access code, and that he took the Appellant along to ensure he knew the code to the victim’s home.

Finding number five addressed the Appellant fleeing the scene of the crime. The testimony and discussion of the court was that the Appellant was not found at the scene when police and witnesses arrived, and that he does not dispute that he was present at the scene during the

commission of the crime. Also testimony was presented that people were seen running from the scene when witnesses arrived. From those facts the court was within its discretion to infer that the Appellant was one of the parties running from the home.

There was sufficient evidence presented to establish the crimes of conviction. The findings presented by the court are supported from the same evidence. The findings of facts are sufficient and should not be disturbed on appeal.

**C. THE APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN ACCORDANCE WITH HIS CONSTITUTIONAL RIGHTS.**

**a. What Constitutes Ineffective Assistance Of Counsel?**

In order to make a claim of ineffective assistance of counsel, a defendant must meet the two pronged standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that the performance of the trial counsel was deficient. *Id.* at 687. This requires a showing that counsel “made errors so serious that counsel was not functioning as ‘counsel’ as required by the Sixth Amendment.” *Id.* Second, the defendant must prove that the deficient performance prejudiced the defense. *Id.* This requires the deficiency be serious to the degree of depriving the defendant of a fair trial. *Id.* “Unless a defendant makes both showings, it cannot be said that the conviction... resulted from

a breakdown in the adversarial process that renders the result unreliable.”

*Id.*

*State v. Thomas*, 109 Wn. 2d 222 (1987), held that, “regarding the first prong, scrutiny of counsel’s performance is highly deferential and courts will indulge in a strong presumption of reasonableness.” *Id.* 226. Regarding the second prong, the defendant has the burden to prove “that there is a reasonable probability that,” absent error by trial counsel, “the result of the proceedings would have been different.” *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (emphasis theirs), citing *Strickland* 466 U.S. 668 at 694. Under current case law, the Appellant in this case must show both that the trial counsel was deficient in his performance and that the error, if any, actually prejudiced her defense.

**b. Did Trial Counsel Act Deficiently?**

The state does not dispute that the failure to be adequately aware of the applicable laws evidences deficiency on the part of trial counsel.

**c. If The Court Finds Deficiency, Was The Defense Prejudiced Under Strickland?**

If deficiency is proven, the court must undertake the next step under *Strickland* and determine whether the defense was prejudiced as a result of the deficiency. 466 U.S. at 687. Evidence is not prejudicial “unless the result of the proceeding would have been different.” *Allen*, 127 Wn. App. at 951, citing *McFarland*, 127 Wn 2d. at 335.

Appellant fails to establish that the deficient performance prejudiced the defendant. Appellant states that “if counsel had properly advised him that he was eligible for a deferred disposition, he *could* have avoided the risk of a conviction at trial.” Brief of Appellant at 21

(emphasis added). This does not, however, establish that he would have avoided the risk at trial.

The defendant had the burden of proving that, absent error, the result of the proceeding would have been different. Because the Appellant actively participated in trial and was adamant that he was innocent of the charge, there is insufficient evidence presented that he would have availed himself of a differed disposition had he been properly instructed. The Appellant testified at trial, and maintained his innocence throughout the proceeding, as such there is no basis to reverse on ineffective assistance of counsel because prejudice is not sufficiently established.

### **CONCLUSION**

The trial court properly found that, based on the evidence presented, the Appellant was guilty of the crimes of residential burglary and theft in the second degree both as an accomplice. The testimony of Jason Norris was weighed by the court, and sufficient evidence exists from that testimony to establish accomplice liability.

Also, the trial court, by the same facts that establish sufficiency, properly filed findings of facts and conclusions of law. Again, the weight of the testimony and credibility is within the sound discretion of the finder of fact. As such, the findings were supported by the testimony of the witnesses after determining weight and credibility.

Lastly, though it is not disputed that the trial counsel was deficient for failing to properly apprise her client of the law regarding deferred disposition, the Appellant has failed to establish that there was some prejudice. Because 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.

For the above reasons, the relief sought by the Appellant should be denied.

Respectfully submitted this ~~13~~<sup>14</sup>th day of November, 2006.

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