

NO. 41941-6

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

STATE OF WASHINGTON, RESPONDENT

v.

KAREN VIELGUTH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda Lee

No. 09-1-03783-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence to prove that the defendant committed second degree burglary and second degree theft?

B. STATEMENT OF THE CASE.

1. Procedure

On August 18, 2009, the Pierce County Prosecutor's Office ("State") charged Karen M. Vielguth ("defendant") of the crime of burglary in the second degree and theft in the second degree. CP 1.

The case proceeded to jury trial before the Honorable Linda CJ Lee on February 9, 2011. 1 RP 1.¹ A 3.5 hearing was held to determine the admissibility of the defendant's statements. 1 RP. The court held that all statements made after and before the defendant was given her *Miranda* rights were admissible. 2 RP 115; 2 RP 119-120.

The jury found the defendant guilty as charged. 6 RP 475. Defendant's offender score is 9. 7 RP 485. On April 1, 2011, defendant was sentenced to standardized range sentencing of 54 months on burglary 2, and 29 months on theft 2, to be served concurrently. 7 RP 505.

Defendant filed a timely notice of appeal. CP 148.

¹ 1 RP is referring to Volume 1, 2 RP is referring to Volume 2, etc.

2. Facts

Ms. Halverson owns property on 28504 Meridian East, Graham, in Pierce County, Washington. 2 RP 124; 3 RP 185. The property has a house, a large outbuilding, a garage, and a log cabin. 2 RP 124; 3 RP 185. The gate to the property is secured with a chain that is wrapped around a post and locked with a padlock. 2 RP 127. An opening between the gate and the post is barricaded with barbed wire and secured to some trees. 2 RP 128.

On August 17, 2009, Mr. and Ms. Halverson went onto the property and noticed that the barbed wire had been cut and the chain had been pulled off. 2 RP 129; 3 RP 159. The padlock had been tampered with and reset to make it look like it was still locked. 2 RP 129; 3 RP 159. Mr. and Ms. Halverson had been on the property a few days before and the padlock and barbed wire had been secure. 2 RP 130; 3 RP 188.

Mr. and Ms. Halverson drove toward the property, assuming that whoever had done this was gone, and saw a parked white van. 2 RP 133; 3 RP 188. The van was backed in, next to the garage that was filled with the Halversons' property. 2 RP 131. The garage has five stalls for cars and a door for people ("man door"). 2 RP 132. The "man door" is secured by a dead bolt lock that requires a key to open it. 2 RP 132. Mr. Halverson backed his truck up, got out of the truck, bringing his gun, while Ms. Halverson called the police. 2 RP 133; 3 RP 189.

Mr. Halverson saw a woman pushing a bicycle toward the back of the van, as if she was going to load it into the van. 2 RP 133. The bicycle was typically leaned against the outside of the garage. 2 RP 134. Mr. Halverson described the woman as Caucasian with light brown hair. 2 RP 134. Ms. Halverson saw a man getting into the driver's side of the van. 3 RP 189.

After the woman saw Mr. Halverson, she leaned the bicycle against the back of the building and she spoke to the man. 2 RP 135. The man and woman then got into the van and sped past Mr. Halverson's truck. 2 RP 137; 3 RP 190. While the van was speeding off, Mr. Halverson put a bullet in the tire of the van. 2 RP 138; 3 RP 190. Ms. Halverson saw the first four letters of the van's license plate: B275. 3 RP 190; 3 RP 272.

Officer Coburn was the first officer that responded to the scene after the burglary had occurred. 3 RP 237. Officer Coburn and Mr. Halverson walked around inspecting the property. 3 RP 239. The "man door" had been broken into. 2 RP 139; 3 RP 191; 3 RP 255. There was also a pink leather glove that was lying on the floor by the gate, which was not Ms. Halverson's glove. 2 RP 148; 3 RP 241. The glove brand was Tuff Chix, a work glove for females. 3 RP 241.

Officer Coburn followed fresh tire marks left by the van where it was parked against the garage, followed the tire marks past Mr. Halverson's truck, out to Meridian and noticed they were heading southbound. 3 RP 245-246. Officer Coburn then broadcasted a description of a Caucasian female and Caucasian male, both in their thirties, driving southbound on Meridian in a white Astro-type van. 3 RP 245-246.

Officer Filing assisted with the follow-up investigation regarding the burglary. 4 RP 301. The officer heard the broadcast, spotted the van, turned his patrol lights on, and the van accelerated as it approached an intersection at 304th and Mountain Highway. 4 RP 303. The van turned into a convenience store parking lot, pulled behind the convenience store, and a white male and white female got out of the van and began running south toward some woods. 4 RP 304.

Officer Filing caught up to the female and identified at the scene and in court as the defendant. 4 RP 305. Initially, defendant denied being in the van until Officer Filing told her that he saw her get out of the van. 4 RP 306. Defendant then admitted to being in the van and identified the driver of the van as "Rob." 4 RP 306. Defendant later identified "Rob" as James Robert Murphy during a photo lineup. 4 RP 311.

A search was conducted on the van with the license plate number B2754K. 4 RP 325. An iron bell, a black leather wallet belonging to Mr. Murphy, a mail order form with defendant's name and address, old sheet music, an iron cart with two wagon-type wheels, ski poles, glass skis, wooden skis, and an older model pressure washer were found inside the van. 4 RP 321. The Halversons were able to identify the iron bell, sheet music, iron cart with the wagon wheel, ski poles, and pressure washer as being items stolen from their property for Officer Filing. 4 RP 324. A receipt with the defendant's name was also found inside the van. 4 RP 324.

Officer Filing and Officer Hausner had a show up with defendant and the Halversons. 3 RP 281; 4 RP 310. The Halversons drove to 304th and Mountain Highway to identify whether the defendant was the burglar. 3 RP 281-282; 4 RP 310. The Halversons were unable to make a positive identification. 3 RP 281; 4 RP 310. Mr. and Ms. Halverson did not personally know James Robert Murphy or defendant. 3 RP 155-156; 3 RP 197. The Halversons also never gave Mr. Murphy or defendant permission to enter the Halversons' property, go into the garage, or take any items off of the property. 3 RP 156; 3 RP 197.

Officer Filing testified that defendant initially stated that she got into an argument with her husband and went to a friend's house, Ms. Nelson, before Mr. Murphy had arrived there. 4 RP 308. Defendant

needed a ride and Mr. Murphy offered to drive her. 3 RP 281; 4 RP 308. After the two left Ms. Nelson's house, they drove past Officer Filing on Mountain Highway. 3 RP 281; 4 RP 308. Defendant stated that she ran away from the police with Mr. Murphy because she did not know what was going on. 4 RP 309.

Officer Filing testified that defendant later confessed about arriving at Ms. Nelson's house with Mr. Murphy. 4 RP 317. Defendant also confessed to Officer Filing that she had gone with Mr. Murphy to the Halversons' property in the white astrovan. 4 RP 318. Defendant stated that Mr. Murphy had said that people had been out on the property before taking stuff. 4 RP 319. Defendant said that she closed the gate after the van entered the property. 4 RP 318. Defendant also admitted to being with Mr. Murphy when he entered the building, removed a really old wagon wheel, and placed it into the van. 4 RP 319.

Defendant directed Officer Filing to Ms. Nelson's residence. 4 RP 310. Officer Hausner went to Ms. Nelson's residence and spoke with Ms. Nelson and Charles Jones. 3 RP 284. Ms. Nelson testified that defendant had not been hanging out with her earlier that day. 3 RP 229. Mr. Jones and Ms. Nelson testified that Mr. Murphy and defendant arrived together at Mr. Jones' mother's residence in a white GMC safari van, 3 RP 217-218; 3 RP 228; 3 RP 230, and that Mr. Murphy and defendant left together. 3 RP 220; 3 RP 231.

Pictures were admitted, which showed the damage that had been done to the door, tire tracks the van left, and of the stolen property. 2 RP 141; 3 RP 195-196; Exhibit 3-14; Exhibits 19-20 and 24-28. Items that were stolen included: a steam cleaning machine, antique wheels, a couple pairs of skis, and a steel bell. 3 RP 156; 3 RP 192. It was estimated that the antique wheels were worth about \$50 to \$100, the plain skis were worth around \$25, the vintage cross country Norwegian skis were worth around \$100, the steam cleaner was worth around \$100, and the steel bell that was stolen was worth around \$5 or \$10. 3 RP 193-194. The estimations came from Ms. Halverson's 20 years of experience as an antiques dealer. 3 RP 212.

The defendant called Mr. Murphy to testify for her case. 3 RP 381. Mr. Murphy testified that he had met defendant at Mr. Weymouth's home earlier in the day on August 17, 2009. 4 RP 383. Mr. Murphy stated that the gate was open to the Halversons' property, and that he and defendant initially entered the property to sleep over night. 4 RP 383. Mr. Murphy decided to steal the Halversons' property in the morning. 4 RP 384. Mr. Murphy testified that defendant warned him that someone was coming. 4 RP 391. Mr. Murphy also admitted to repairing his tire that was shot by Mr. Halverson. 4 RP 385.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF SECOND DEGREE BURGLARY AND SECOND DEGREE THEFT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. Thomas*, 166 Wn.2d 380, 390, 208 P.3d 1107 (2009). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Marohl*, 170 Wn.2d 691, 698, 246 P.3d 177 (2010). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff, supra*, at 593. Credibility determinations are for the trier of fact and not subject to review. *State v.*

Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

- a. State adduced sufficient evidence for the jury to find beyond a reasonable doubt burglary in the second degree.

To convict defendant of the crime of burglary in the second degree, the

State had to prove:

- (1) That on or about the 17th day of August, 2009, the defendant or an accomplice entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
- (3) That this act occurred in the State of Washington.

CP 84-116 Instruction No. 10; *see also* RCW 9A.52.030(1).

Defendant challenges the sufficiency of the State's evidence in the second element of burglary, defendant entered or remained on the property with the intent to commit a crime. Brief of Appellant 15. It is undisputed that the defendant entered the property unlawfully and the act occurred in the State of Washington. Brief of Appellant 15.

The State had more than sufficient evidence to prove beyond a reasonable doubt that the defendant entered the property unlawfully with the intent to commit a crime. A reasonable juror could infer that the defendant intended to commit a crime because defendant cut through the barbed wire to enter the Halversons' property, while wearing a pink leather work glove for the specific purpose of committing a crime. 2 RP 130; 3 RP 188; 2 RP 129. In addition, a reasonable inference is that the

defendant intended to commit a crime because the “man door” was kicked in to steal property from the garage. 2 RP 139; 3 RP 191; 3 RP 255.

Because the defendant was pushing the Halversons’ bicycle toward the back of the van, the jury could infer that she intended to load it into the van and steal it. 2 RP 134. The other items in the van that had been taken from the garage created a reasonable inference that defendant and her accomplice were intending to steal the Halversons’ property. 3 RP 156, 3 RP 192. Defendant’s criminal intent can also be inferred from the fact that she warned Mr. Murphy that someone was coming so that they could drive away and not be caught with the Halversons’ stolen property. 4 RP 391.

A reasonable juror could infer that defendant unlawfully entered the Halversons’ property when she cut through the barbed wire with her pink leather work glove for the sole purpose of committing a crime. Defendant’s intent to commit a crime can be inferred because she was caught attempting to load the bicycle into the van. Defendant’s intent to commit a crime can also be inferred because she warned Mr. Murphy that someone was coming so that they could get away when they were caught by Mr. and Ms. Halverson. Therefore, the jury had more than sufficient evidence to determine that the defendant intended to commit a crime when she unlawfully entered the Halversons’ property.

- b. State adduced sufficient evidence for the jury to find beyond a reasonable doubt theft in the second degree.

To convict defendant of crime of theft in the second degree, the State had to prove:

- (1) That on or about the 17th day of August, 2009, the defendant or an accomplice wrongfully obtained or exerted unauthorized control over property of another;
- (2) That the property exceeded \$250 in value;
- (3) That the defendant or accomplice intended to deprive the other person of the property; and
- (4) That this act occurred in the State of Washington.

CP 84-116 Instruction No. 20; *see also* RCW 9A.56.020(1)(a) and 9A.56.040(1)(a).

Defendant also challenges the sufficiency of the evidence of the first and third element of theft, defendant wrongfully obtained or exerted control over property of another with the intent to deprive the other person of the property. Brief of Appellant 15. It is undisputed that the property exceeded a \$250 value, and that the act occurred in the State of Washington. Brief of Appellant 15.

The State had more than sufficient evidence to prove beyond a reasonable doubt that defendant wrongfully obtained or exerted control over property of another with the intent to deprive the Halversons of their property. A reasonable juror could infer defendant wrongfully exerted control over the Halversons' property because the defendant was in the van with the following stolen property: a steam cleaning machine, antique

wheels, a couple pairs of skis, and a steel bell. 3 RP 156; 3 RP 192. In addition, a reasonable juror could infer that defendant had loaded the stolen items into the van because defendant was caught attempting to load the bicycle into the van until she saw Mr. Halverson. 2 RP 134. A reasonable juror could infer defendant wrongfully exerted control over the Halversons' property because Mr. and Ms. Halverson did not know defendant. 3 RP 155; 3 RP 197. Defendant did not have permission to come onto the Halversons' property, go into the garage, or take any items off the property. 3 RP 156; 3 RP 197. Furthermore, a reasonable juror could infer defendant was intending to deprive the Halversons of their property because defendant warned Mr. Murphy that someone was coming, and the two sped off with the property that had already been loaded into the van. 2 RP 135; 4 RP 391.

It could be inferred that defendant wrongfully exerted control over the Halversons' property because the van was full of the Halversons' stolen property. The defendant warned Mr. Murphy that someone was coming and the two of them sped away. The defendant did not have permission to enter the property, or to take any of the Halversons' belongings off of the property. Therefore, the jury had more than sufficient evidence to determine that defendant wrongfully exerted control of the Halversons' property with the intent to deprive the Halversons of their property.

- c. The defendant misconstrued the law regarding accomplice liability; the State is not required to prove principal and accomplice liability separately because accomplice liability is not an alternative means for committing an offense.

The jury was instructed:

A person is guilty of a crime if it is committed by the conduct of another for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of a crime.

A person is an accomplice in the commission if, with knowledge that it will promote or facilitate the commission of a crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 84-116 Instruction No. 8.

In Washington, an accomplice is a participant in a crime, but need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal. *State v. Sweet*, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999); *State v. Hoffman*, 116 Wn.2d 51,

104, 804 P.2d 577 (1991). The accomplice must have acted with knowledge that his or her conduct would promote or facilitate “the crime” for which he or she is eventually charged, and that knowledge of “‘a crime’ does not impose strict liability for any and all offenses that follow.” *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). Courts have upheld accomplice liability instructions where the evidence supports an inference that the defendant was either the principal or an accomplice, even if the prosecution primarily argued principal liability. *State v. Munden*, 81 Wn. App. 192, 913 P.2d 421 (1996) (when the evidence did not exclude the possibility that defendant acted both as principal and accomplice, the trial court did not err in instructing on accomplice liability); *see also State v. McDonald*, 138 Wn.2d 680, 689, 981 P.2d 443 (1999).

In *McDonald*, McDonald was charged with three counts of aggravated first degree murder. *Id.* at 682. The jury found McDonald guilty of two counts of the lesser included offense of second degree murder, and acquitted him on the third count. *Id.* at 683. McDonald appealed, arguing that the trial court erred in instructing the jury regarding both principal and accomplice liability in a single jury instruction. *Id.* at 683. The Court held that because there was substantial evidence of McDonald’s liability as an accomplice, the Court did not need to examine whether the evidence supported principal as well. *Id.* at 687. Principal and accomplice liability are not alternative means of committing a single

offense. *Id.* at 687.

The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victims, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. The elements of the crime remain the same.

Id. at 688.

The State had more than sufficient evidence to prove that the defendant acted as a principal to committing the crimes of burglary in the second degree and theft in the second degree, and is not required to prove accomplice liability as an alternative means of committing an offense. The court properly instructed on accomplice liability because there was ample evidence that defendant was acting in concert with another person in committing the crimes together. The defendant and Mr. Murphy unlawfully broke into the Halversons' property, stole items from the Halversons' property, and sped away together. Therefore, because the State proved that defendant acted as a principal, the State does not need to also prove that defendant acted as an accomplice.

D. CONCLUSION.

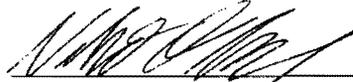
For the reasons argued above, the State respectfully requests that the Court affirm his convictions.

DATED: February 10, 2012.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the ~~appellant~~ and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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