

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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

NO. 290972 -III

STATE OF WASHINGTON
Respondent,

vs.

DAVID WAYNE HARRELL
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 09-1-00048-4

BRIEF OF RESPONDENT

JOHN G. PRENTISS, WSBA
#28218
Chief Deputy Prosecuting Attorney
for Adams County

Adams County Superior Court
210 West Broadway
Ritzville, WA 99169
509-659-3219

Attorney for Respondent

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Karl B. Tegland, Washington Practice Series, Evidence Law and Practice, Sec. 801.61 (5th ed. 2007) 13

RULES

ER 801 (d)(2)(v) 5, 9, 13

I. STATEMENT OF THE CASE

Appellant's summary of the evidence is self-servingly selective and appears directed more toward re-litigating the case than to stating facts relevant to issues on appeal. The relevant evidence is as follows:

Mary Miller was an elderly woman, who lived alone in a farmhouse in a secluded rural area of northwest Adams County. I RP 68-70, 109-10. Kevin Miller was her adopted son, and Sheila Harrell was Kevin's wife. I RP 68. The Appellant, David Harrell, is Sheila's son by another marriage. I RP 68, II RP 242.

On February 1, 2009, Mary Miller died. I RP 71. Two days earlier, realizing that Mary's death was imminent, the two personal representatives for Ms. Miller's estate, Kelly Korpinen and Karen Kagele, visited Miller's residence and changed the locks on her house. I RP 73. On February 1st, Korpinen and Kagele returned to the house and removed Ms. Miller's funeral directions and her most recent Will. I RP 73, 83.

Between February 1 and March 7, 2009, Ms. Korpinen and Ms. Kagele were the only persons who had permission to enter the residence or to remove anything from it. I RP 74-75, 85, 213. When they were not visiting the residence on estate business,

Korpinen and Kagele kept the doors of the house locked, and a locked padlock was placed on the front gate no later than February 17th. I RP 73, 106-07.

During this period (November 25, 2008 to May 4, 2009), Kevin Miller, Mary Miller's adopted son, was incarcerated at Airway Heights Correctional Center. I RP 142.

Kevin was afraid that under the terms of his mother's most recent Will -- her 2006 Will -- he was going to be partially disinherited. I RP 165-75, 183, 187-99. He believed that an earlier 1997 version of the Will, more generous toward him, was located somewhere within Ms. Miller's residence. I RP 165-72.¹ He wanted to retrieve the 1997 Will from the residence in order to contest the more recent Will or use the information therein to his advantage. I RP 165-171, 183, 195-99.

The problem was he was locked in prison, unable to act on his own. I RP 142.

On February 17, 2009, Kevin made two phone calls to his wife Sheila from prison. I RP 163-81. The first call began at 7:33 PM and lasted about 20 minutes. I RP 163. The second call began

¹ Kevin's fears were warranted. For a description of what Kevin would inherit under Mary Miller's 1997 Will versus her 2006 Will, see Kelly Korpinen's testimony. I RP 83-85.

at 7:55 PM and also lasted about 20 minutes. I RP 163-64. During their conversations, captured on the Airway Heights Correction Center's recording system, Sheila and Kevin agreed that Sheila would break into Mary Miller's residence and retrieve Miller's 1997 Will for Kevin, and also retrieve Miller's 2006 Will if it was still at the residence. I RP 175-77. During their second call, Sheila told Kevin that she would gain entry by "going' through that fuckin' window" to the back bedroom. I RP 177.

Thirteen hours later, on February 18th at 9:12 AM, Kevin phoned Sheila again. I RP 164. Sheila reported to Kevin that (1) during the night, she and the Appellant had gone to the Miller residence and broken in, (2) the Appellant had helped her look through Miller's stuff, and (3) they found and removed the 1997 Will. RP I 181-83, 185. Much of the rest of Sheila and Kevin's conversation was devoted to strategizing how to proceed now that the Will was in Sheila's possession. RP 183-99. The Appellant warned Sheila not to reveal that they had the Will "because that will fuckin' ickschnay us from anything." I RP 198-99.

On February 17th -- the day before the burglary -- Korpinen and Kagele spent the day at Ms. Miller's residence finishing their inventory and photographing Ms. Miller's possessions. I RP 80-81,

209. Then they locked up, left, and did not return to the residence until March 7th. I RP 86, 210. When they re-entered the residence of March 7th, they discovered that the window to the back bedroom had been tampered with, the plastic screen removed, and a stick that had previously been in the window was now lying on the floor. I RP 86-88, 210-11. They also discovered that a folder containing various items, including cancelled checks Mary had written to Kevin, was missing. I RP 89-92, 213.

On April 6, 2009, sheriff's deputies searched Sheila Harrell's residence and found Ms. Miller's 1997 Will in a locker drawer next to Sheila's bed. I RP 134-35. They also found other items taken from Ms. Miller's residence the night of February 17th. I RP 116-19. The Appellant arrived during the search and angrily demanded to know why the deputies were there. I RP 132-33. When told that the deputies were looking for stolen property, the Appellant blurted, "What? The stuff from the lady's dead house?" I RP 133. When asked what lady he was referring to, he said "her," indicating Sheila, "her mother-in-law," but said it was "bullshit" and Sheila had nothing to do with it. I RP 133-34.

During an interview with Deputy Lane later that day, the Appellant stated that (1) he had gone to Ms. Miller's residence with

two female acquaintances and Sheila to look for the Will and (2) when they arrived, he personally entered the residence by climbing through the back bedroom window. I RP 120, 127.

In a separate interview, Sheila Harrell admitted (1) going to the Miller residence with the Appellant, (2) gaining entry through back bedroom window, and (3) taking all the items from the house. However, Sheila claimed only she, not her son, physically entered the house. I RP 128.

Sheila Harrell and the Appellant both had contact with the Korpinen and Kagele following the February 17th incident, but neither of them mentioned to Korpinen or Kagele that they had broken into the Miller residence through the back window after dark or that they had taken items from inside. I RP 99-100.

During motions in limine, the prosecutor advised the court that she wished to introduce into evidence the recorded phone conversations between Kevin Miller and Sheila Harrell on February 17th and 18th. I RP 48-50. She stated that the legal basis for admission was ER 801 (d)(2)(v) (statements by a coconspirator of a party during the course and in furtherance of the conspiracy). I RP 49. The prosecutor then summarized the relevant law and listed

evidence of conspiracy independent of the statements themselves.

I RP 52-57

The court indicated it was withholding its final ruling on admission until later. I RP 58.

At trial, prior to admitting the challenged conversations, the court again gave both parties an opportunity to argue. The prosecutor argued in part:

PROSECUTOR

[T]o show conspiracy the State does not need to show that there's any formal agreements. All we need to show, by a preponderance of the evidence, is that there's a concert of action where all of the parties are working together understanding -- understanding with a single design for the accomplishment of a common purpose....

[O]nce we show that there is a conspiracy, all we need show is just a slight connection by the defendant is enough to support the admission of these statements...

The evidence that the State has is 1) we know that there's evidence of the burglary out at Mary Miller's house. We know that there's items missing; the window has been tampered with. More importantly, we have the defendant's own admission that he went out to that house, that he arranged the ride for his mother, that he went there for the purpose of taking the Will. He lied about his mother's involvement to law enforcement; we also know that he had -- that he knew --

THE COURT

Well, somebody lied. Either -- either he lied or his mother lied....

PROSECUTOR

...We have evidence of conflicting statements, you're right, so we know somebody lied. He told the police – he did lie to the police; he told the police his mother had nothing to do with it when she did by her own admission. We know that the defendant was familiar with Mary Miller's house; he had been through that window before. He knew that she was dead, that she wasn't there. We have evidence that there was a gate on a lock [sic], new locks on the door – and that the window actually had to be broken into.

So is it part of a conspiracy? You bet. He knew the reason they were going out there was to get a Will by his own admission, Your Honor.

I RP 145-47

The defense then -- without any offer of proof of their own -- argued that there was no evidence Appellant profited from the conspiracy, knew why he was visiting the Miller property, or that he intended to take the Will. I RP 147-49. The prosecutor responded:

MS. JONES

He did admit that he was looking for the will; not personal belongings of his mom's but the Will. ² They go out there in the middle of the night or late at night... It as dark at night, they travel forty-five miles.... He gets upset when he sees the police at his home... Why lie to the police? Why lie to protect your mother? It's all in furtherance of the conspiracy, Your Honor.

I RP 149-50

² Deputy Lane testified on this very point earlier. See I RP 120.

The court then admitted the three recorded conversations into evidence, stating as follows:

THE COURT

[F]irst of all, it seems to me that there's sufficient evidence to show, as it – as the definition indicates in Sanchez-Guillen³, concert of action, all parties working together understandingly with the single design for the accomplishment of a common purpose.

What was the purpose? To go to Mary Miller's home and retrieve a Will. It's a house that was secured. It's a house that the defendant and his mother did not have permission to enter so the entry was unlawful. The purpose was to retrieve something from that house that didn't belong to them and that they didn't have permission. That is, by definition, a burglary.

So I think the State has shown sufficient nexus here – first of all, that there was – concert of action to accomplish a common purpose. And as the -- as the Sanchez-Guillen holds, once the State shows a conspiracy, which I believe we have here, even a slight connection by the defendant is enough to support admission. In this case I think we have more than a slight connection. It seems to me what we have here – in the defendant's mind he may not have realized that what was going on was a burglary; but he was aware of all of the facts that are sufficient for a person to either know or should know that a crime was being committed...

I RP 150-51

³ In the transcript the case name is spelled "Sanchez-Gan," but "Sanchez-Guillen" is the correct spelling.

II. RESPONSE TO ASSIGNMENTS OF ERROR

In State v. Sanchez-Guillen, 135 Wn. App. 636, 145 P.3d 406 (Div. 3 2006), cited by the trial court, Division 3 sets forth the law regarding admissibility of coconspirator statements as follows:

Statements made by a coconspirator in the course of and in furtherance of a conspiracy are not hearsay. ER 801(d)(2)(v); State v. St. Pierre, 111 Wn. 2d 105, 118-19, 759 P.2d 383 (1988). But the court must first conclude that a conspiracy took place and that the defendant was part of it. State v. Guloy, 104 Wn.2d 412, 420 705 P.2d 1182 (1985). The State must show this independently of the statements it seeks to admit. St Pierre, 111, Wn. 2d at 118, 759 P.2d 383....

The conspiracy... need not be a formal agreement. A “ ‘concert of action, all parties working together understandingly with a single design for the accomplishment of a common purpose.’” will suffice. State v. Barnes, 85 Wn. App. 638, 664, 932 P.2d 669 (1997) (internal quotation marks omitted) (quoting State v. Casarez-Gastelum, 48 Wn. App. 112, 116, 738 P.2d 303 (1987)).

Once the State shows a conspiracy, even a slight connection by the defendant is enough to support admission of the statement. State v. Brown, 45 Wn. App. 571, 579, 726 P.2d 60 (1986).

Sanchez-Guillen, 135 Wn. App. at 642-43

Division 3 also reiterated the rule that a trial court's interpretation of rules of evidence is a question of law that is reviewed de novo but its application of the rules to particular facts is

reviewed for abuse of discretion. Sanchez-Guillen, 135 Wn. App. at 642.

Appellant's assignments of error are addressed in order below:

- A. The trial court did not err when it found that the Appellant participated in the conspiracy between his mother and Kevin Miller because the Appellant's connection to the conspiracy was amply supported by the evidence, including Appellant's own statements.

Appellant concedes there was overwhelming evidence that Sheila Harrell and Kevin Miller conspired to break into Mary Miller's house and retrieve Mary's will. Brief of Appellant, p. 6. But he claims there was a "paucity of evidence" that Appellant knew about the conspiracy and knowingly participated in it. He claims the "overwhelming independent evidence" showed he thought they were going to his mom's residence "to pick up some of her belongings." Brief of Appellant, p.6.

Nonsense. By the Appellant's own admission to Deputy Lane he traveled to the Miller residence with his mother for the express purpose of retrieving the will – the very purpose of the conspiracy as envisioned by all three participants. I RP 120. Based this admission, alone, there was sufficient evidence to support the

trial court's finding that the participants acted in concert with a single design for the accomplishment of a common purpose.

In addition, the following circumstantial evidence corroborates Appellant's admission that his visit to Mary Miller's residence was for the criminal purpose of retrieving her Will (not to innocently collect his mom's belongings):

- After Mary Miller died on February 1, 2009, no one other than the two personal representatives of the estate had permission to enter her residence or remove items from it.
- The residence doors of the residence were kept locked and a locked padlock was on the front gate.
- Appellant and his mother traveled to the unoccupied residence late at night after dark.
- They entered through a back bedroom window and did not bother replacing the screen.
- During their next visit to the house, the personal representatives for Miller's estate discovered physical evidence of illegal entry via the bedroom window.
- Appellant and his mother both had contact with the personal representatives after their late night visit, but neither of them said a word to the representatives about entering the residence or removing items.
- While searching Sheila Harrell's residence, deputies found Mary Miller's 1997 Will locked in a drawer in her bedroom.

- When Appellant discovered deputies at Sheila's residence, he reacted angrily instantly without waiting to be informed of the purpose of their visit.
- When a deputy explained they were looking for stolen property, the Appellant blurted, "What? The stuff from the lady's dead house?"
- Appellant and his mother then told inconsistent stories about their visit to Miller's residence.

Again, once the State shows a conspiracy – a fact amply supported by the evidence and conceded by the Appellant – even a slight connection by the defendant is enough to support admission of the statement.

Based on the above, the trial court's finding that a conspiracy existed and that Appellant was part of it was amply supported by the evidence.

- B. The trial court did not abuse its discretion in admitting the three phone conversations between Kevin Miller and Sheila Harrell into evidence because (1) two of the conversations occurred on February 17th prior to the burglary and (2) the third conversation occurred less than 13 hours after the burglary; more importantly, the purpose of the third conversation was not to chat casually about past events but (a) to deliver a progress report to the principal conspirator who was not yet in possession of the Will or even aware the Will had been stolen and (b) to discuss strategy.

Appellant next argues -- without distinguishing between dates --that the statements made by Sheila Harrell and Kevin Miller

during their phone conversations were not made in furtherance of the conspiracy because, he claims, the conspiracy with Appellant had ended prior to the phone calls. Brief of Appellant, p. 6-7, 10-11. There is not even a colorable issue with regard to the two conversations between Sheila and Kevin on February 17th (I RP 165-81) because both conversations occurred prior to the burglary when the attempt to retrieve the Will was still in its planning stages. The “in furtherance” issue arises only with respect to the February 18th phone conversation (I RP 181-203) which occurred less than 13 hours after the Will had been physically removed from Mary Miller’s residence.⁴

Appellant correctly states that to be admitted under ER 801 (d)(2)(v) a statement by a coconspirator must have been made during the course of and in furtherance of the conspiracy. However, determining the point where a conspiracy ends has frequently proved troublesome, and decisions addressing this issue tend to be fact specific. See 5B Karl B. Tegland, Washington Practice Series, Evidence Law and Practice Sec. 801.61 (5th ed. 2007).

⁴ We know the burglary had to have occurred less than 13 hours before the final call, because Sheila and Kevin’s previous conversation prior to the burglary (while the burglary was still being planned) had occurred just 13 hours before, and Sheila reported that the burglary occurred during the night sometime between the second and third call.

Casual, retrospective statements about past events do not fall within the coconspirator exception. State v. Baruso, 72 Wn. App. 603, 614-15, 865 P.2d 512 (1993). However, the ‘in furtherance’ requirement has been broadly construed, and a statement about past events meant to facilitate the conspiracy or to inform a coconspirator about the status of the conspiracy is sufficient to satisfy the “in furtherance” requirement. State v. Israel, 113 Wn. App. 243, 280-1, 54 P.3d 1218 (2002) (citing Baruso, 72 Wn. App. at 625 and United States v. Herrero, 893 F.2d 1512 (7th Cir.1990)). See also, United States v. Nazemian, 948 F.2d 522, 529 (9th Cir. 1991); U.S. v. Fortes, 619 F.2d 108 (1st Cir. 1980) (statement made one day after an alleged robbery held to be within the rule); U.S. v. Davis, 766 F.2d 1452 (10th Cir. 1985) (statements of coconspirators during “payoff period” when they met to divide criminal proceeds properly admitted); State v. Rivenbark, 311 Md. 147, 533 A.2d 271, 276 (Md.1986) (“before the conspirators can be said to have successfully attained their main object, they must often take additional steps, e.g., fleeing, or disposing of the fruits and instrumentalities of crime. Such acts further the conspiracy by assisting the conspirators in realizing the benefits from the offense which they agreed to commit.”).

Turning to the present case, if the sole purpose of the conspiracy had been to physically remove the Will from Mary Miller's residence, Appellant would have a valid argument. The moment Appellant and Sheila Harrell had removed the Will from the residence, they could have torn it up or burned it on the lawn, and that would have been the end of conspiracy. But of course that would have accomplished nothing. The purpose of the conspiracy was to retrieve a will from the residence of Mary Miller for the benefit of Mary's adopted son, Kevin Miller, who was in prison, so that Miller could then use the will or the information therein to contest his mother's most recent will. Therefore, by any rational standard, the conspiracy cannot be said to have ended until the Will or, at a minimum, a summary of its contents was conveyed to Kevin Miller. At time of the February 18th call, this goal had not yet been accomplished. Until the phone call, Miller did not even know whether a burglary had been attempted. Therefore, the first portion of the phone conversation (I RP 181-83) was not a casual conversation about past events; it was a progress report from one conspirator to another hot on the heels of a burglary that had occurred just hours before, and its purpose was to inform one of the conspirators (Miller, the person for whose benefit the conspiracy

*was formed) of the status of the conspiracy. It was during this portion of the conversation that Sheila Harrell informed Miller of the Appellant's participation in the burglary.

As noted, much of the remainder the February 18th phone conversation between Sheila and Appellant was devoted to strategy (i.e. discussing how to proceed now that the will was in Sheila's possession and whether of not to tell others that they had the Will). Arguably, under Rivenbark and Davis, these statements were all properly admitted, but it is a moot question because by this point Sheila's damaging remarks implicating the Appellant in the burglary had already been made.

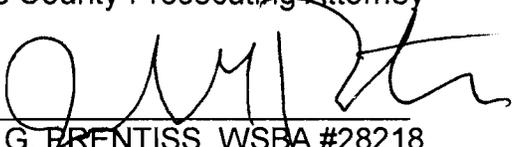
In short, Appellant's "in furtherance" argument is without merit.

CONCLUSION

None of Appellant's claims present serious and valid reasons for granting his relief. Therefore, the State respectfully requests that his appeal be denied.

DATED this 5th day of NOVEMBER, 2010.

RANDY J. FLYCKT
Adams County Prosecuting Attorney

By: 
JOHN G. PRENTISS, WSBA #28218
Chief Deputy Prosecuting Attorney