



No. 295281

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

GARY ALAN SHAW, Appellant

APPEAL FROM THE SUPERIOR COURT
OF BENTON COUNTY
THE HONORABLE CARRIE L. RUNGE

OPENING BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
Attorney for Appellant
PO Box 28459
Spokane, WA 99228
509.939.3038



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I. ASSIGNMENTS OF ERROR

- A. The trial court erred in making Finding of Fact (FF) 14: “It would have been impossible for Mr. Engel to move all the copper wire by himself” because it was not supported by substantial evidence. (CP 22)
- B. The trial court erred in making Conclusion of Law (CL) 15: “The defendant was present and on the scene ready to assist Mr. Engel.” (CP 22).
- C. The trial court erred in making CL 17: “Circumstantial evidence indicates that the defendant was inside the Benton REA yard on August 11, 2010, including the shoe prints similar to the defendant’s shoes, the impossibility of Mr. Engel moving the wire by himself in under 5 minutes, and the defendant being found on the scene.” (CP 22).
- D. The trial court erred in making CL 18: “The defendant is guilty of the crime of Burglary in the Second Degree.” (CP 22).
- E. The State’s evidence was insufficient to sustain a conviction as an accomplice to Burglary in the Second Degree.

Issues Relating to Assignments of Error

- A. Was the evidence insufficient to sustain Mr. Shaw’s conviction as an accomplice to Mr. Engel’s second degree burglary?

II. STATEMENT OF FACTS

Mr. Shaw was charged with burglary in the second degree for events which occurred on August 10, 2010. (CP 1). After a bench trial, he was found guilty. (RP 96).

As Gary Shaw traveled with his friend, Roger Engel, to Walla Walla, Washington, they ran low on gas. They stopped in Prosser, WA, with the expectation they could siphon enough gas to fill the tank and continue on to Walla Walla. (RP 71). Mr. Engel, the driver, testified they both got out of the truck and went their separate ways to look for gas. (RP 72).

As Mr. Engel walked by the Benton Rural Electric Association (REA) yard, he noticed rolls of copper wire. (RP 73). He went back to his truck, got his wire cutters, cut a hole in the fence, and went inside the yard. (RP 73). He lifted a reel of copper wire onto a cart and rolled it to the area where he had cut the fence. He quickly unloaded it and placed a second reel on the cart and wheeled it back to the fence. (RP 74, 79). He headed back to his truck, "hoping Gary would show up, you know, and tell him about it, you know, get it." (RP 73).

The movement inside the yard triggered a silent alarm at Moon Security at 2:57 a.m. (RP 14). The security service immediately telephoned the premises but there was no answer. The next phone call

was to Mike Bradshaw, a manager at REA. Mr. Bradshaw instructed the service to call the police. The police were called at 3:00 a.m., three minutes after the initial alarm. (RP 14-16).

Officer Buck of the Prosser Police Department testified he was on the scene within a minute or so of the telephone call. (RP 35). Officer Blackburn arrived around 3:03 a.m. (RP 51). Mr. Engel testified as he came out of the fenced area he saw the police officers arrive. (RP 73). Officer Blackburn saw Mr. Shaw and Mr. Engel walking in an alley. (RP 51, 53). He took custody of Mr. Engel. (RP 54). About 15-30 minutes later, he and Sheriff Monds found Mr. Shaw under a loading dock and arrested him. (RP 47, 56). Officers obtained a search warrant for Mr. Engel's truck and discovered shears, clippers, a cable cutter, gas cans, and siphoning tubes. (RP 41-42).

Officer Blackburn did a sweep of the REA yard and noticed a loose screen on a window and a shoe print on a compressor right outside the window. (RP 58). He photographed the shoe print. He later testified, over defense objection, that the shoe print on the compressor was "similar" to Mr. Shaw's because it had "little square marks on the edge of the shoe." (RP 65).

On direct examination, manager Mike Bradshaw testified it took him approximately ten minutes, working alone, to hand-roll the two reels and some smaller coils back to the side of the warehouse. (RP 22).

Mr. Engels, who earlier pleaded guilty to burglary in the second degree, testified Mr. Shaw never entered the REA yard, nor did he know about the copper wire. (RP 74, 79).

At the sentencing hearing, the court stated,

“Of course, I heard all of the evidence and I understand maybe your concerns, but from the Court’s perspective, while the evidence was clear that you did not enter into the fenced-in compound, from the Court’s perspective, the State established the case of Burglary in the Second Degree against you beyond a reasonable doubt, that you were an accomplice to this particular crime. And that was a finding that this Court made.” (RP 112).

On the same date, the court entered the findings of fact and conclusions of law. (CP 21-22). Mr. Shaw was sentenced to 68 months of incarceration. (CP 10,14). He makes this appeal. (CP 26).

III. ARGUMENT

The State Did Not Present Sufficient Evidence That Mr. Shaw Knowingly Aided The Burglary By Mr. Engel.

The State is required, as a matter of due process, to prove every element of a charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. 5, 14; Wash. Const. art.1 § 22. On review, the test is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the elements of the offense proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). In a challenge to the sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence. *State v. Theroff*, 2 Wn.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). Where the evidence is insufficient, the remedy is dismissal of the charge with prejudice. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

The accomplice liability statute, RCW 9A.08.020, provides:

(3) a person is an accomplice of another person in the commission of the crime if: (a) with knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020(3)(a)(i-ii).

To be held liable as an accomplice to the commission of a crime requires more than mere presence. Further, “to convict a defendant of accomplice liability, it must be shown, beyond a reasonable doubt that the defendant was knowingly “ready to assist” in the crime. *In re welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

1. The Court’s Findings Are Not Supported By Substantial Evidence.

Mr. Shaw disputes finding of fact 14: “It would have been impossible for Mr. Engel to move all the copper wire by himself.” (CP 22). Mike Bradshaw, manager of the REA yard, testified that working alone he moved the wire in about ten minutes when he *hand-rolled* it, rather than using the cart. (RP 22, 29). The timeline, offered through testimony, allowed Mr. Engel *at least* five minutes to use the *cart* to move the wire. As Mr. Engel made clear, he was attempting to steal the wire and moved quickly to accomplish it. In making its finding, the court inferred, contrary to Mr. Engel’s testimony, that he did not act alone, that is, Mr. Shaw not only entered the fenced area, but actively assisted Mr. Engel in moving the wire. However, in its oral ruling at the sentencing hearing, the court specifically stated the evidence was clear that Mr. Shaw *did not* enter the fenced-in compound. (RP 112).

Thus, like Mr. Bradshaw, either Mr. Engel moved all the wire by himself, or Mr. Shaw entered the fenced-in compound area and helped him move the wire. The court did not believe that Mr. Shaw entered the yard: Mr. Engels had to have moved the reels himself. Substantial evidence, is ‘evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise.’ *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) (citing *In re Welfare of Snyder*, 85 Wn.2d 182, 185-86, 532 P.2d 278 (1975)), cert. dismissed, 479 U.S. 1050 (1987). The trial court’s finding here is not supported by substantial evidence.

2. The Court’s Conclusions of Law Are Not Supported By The Findings Of Fact.

Mr. Shaw challenges the court’s Conclusion of Law 15:

“The defendant was present and on the scene ready to assist Mr. Engel”

and Conclusion of Law 17:

“Circumstantial evidence indicates that the defendant was inside the Benton REA yard on August 11, 2010, including the shoe prints similar to the defendant’s shoes, the impossibility of Mr. Engel moving the wire by himself in under 5 minutes, and the defendant being found on the scene.” (CP 22).

After a bench trial, the reviewing court determines whether substantial evidence supports the findings of fact and whether those

findings support the conclusions of law. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005) (citing *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 792, 98 P.3d 1264 (2004)).

Here, the findings by the court that Mr. Shaw was seen walking outside the REA yard in an alley (FF 3 CP 21), a lay opinion by a police officer that a shoe print found on a compressor was “similar to shoes” worn by Mr. Shaw (FF 7 CP 22), and that it was impossible for Mr. Engel to move the copper wire alone (CP 22) are woven together to conclude that Mr. Shaw was present and ready to assist Mr. Engel in his criminal activity. The facts and the findings do not support such a conclusion.

Officers saw Mr. Shaw and Mr. Engel *outside* of the REA yard after the *silent* alarm was triggered. (RP 14, 51,53). Clearly, neither Mr. Shaw nor Mr. Engel could even be aware there was an alarm. There was no obvious reason to leave the REA yard. The only explanation, offered by Mr. Engel, as to why he left the yard was that he headed back to his truck, “hoping Gary would show up, you know, and tell him about it, you know, get it.” (RP 73).

The testimony by the officer about the shoe print on the compressor looking similar to a shoe worn by Mr. Shaw implies that Mr. Shaw entered the REA yard. However, the court never made a finding that he entered

the yard- and specifically stated at sentencing, "...the evidence was clear that you *did not* enter into the fenced-in compound..." (RP 112).

Further, Mr. Shaw's presence outside the REA yard is not sufficient to find him guilty of accomplice liability. As the *Rotunno* court held, one's presence at the commission of a crime, even coupled with knowledge that one's presence *would* aid in the commission of the crime, will not subject an accused to accomplice liability. *State v. Rotunno*, 95 Wn. 2d 931, 933, 631 P.2d 951 (1981). (emphasis added).

This court held the State's evidence insufficient in *Luna* to prove accomplice liability. *State v. Luna*, 71 Wn. App. 755, 862 P.2d 620 (1993). There, a group of teens rode around in a car vehicle prowling, looking to steal from glove compartments. When the car stopped, one of the juveniles broke off from the group and stole a pick up truck. Mr. Luna got back in the car and drove, following the pick up. Eventually, they stopped and Mr. Luna got into the backseat of the car while someone else drove. Mr. Luna was charged with taking a motor vehicle without permission as an accomplice. This court held that

"While Mr. Luna knew, *after the fact*, that Mr. Lauriton took the truck without permission, there is no evidence that he knew of, or even suspected, Mr. Lauriton's intent before the theft occurred. Neither can it rationally be concluded under the evidence that Mr. Luna, by following the stolen truck...promoted or facilitated the theft, or aided Mr. Lauriton in stealing the truck. Mr. Luna did not, by driving away in the Camaro, seek

to make the theft succeed, since it had already occurred and he was unaware of Mr. Lauriton's plans after that point. *Id.* at 759-60. (emphasis added).

Similarly, here there is no evidence that Mr. Shaw had any knowledge of Mr. Engel's intentions before the fact. Further, there was no evidence presented that Mr. Shaw, by walking in the alley after the fact, promoted, facilitated or aided in the burglary.

In a case that involves only circumstantial evidence coupled with a series of inferences, the essential proof of guilt cannot be supplied by a pyramiding of those inferences. *State v. Weaver*, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962). Here, the State presented no evidence of Mr. Shaw's involvement other than his presence outside the REA yard. This is insufficient, as a matter of law, to sustain the conviction. The remedy is reversal of the conviction and dismissal with prejudice.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Shaw respectfully asks this court to reverse his conviction based on insufficiency of the evidence and dismiss all charges with prejudice.

Dated this 20th day of July, 2011.

Respectfully submitted,



Marie Trombley, WSBA 41410
PO Box 28459
Spokane, WA 99228

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on July 20, 2011, to Gary Alan Shaw, DOC 846049, Airway Heights Correction Center, PO Box 2049, Airway Heights, WA 99001; and by email per agreement between the parties to Andrew K. Miller, Benton County Prosecutors Office, at prosecuting@co.benton.wa.us.



Marie Trombley
PO Box 28459
Spokane, WA 99228