

FILED

AUG 03 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30675-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA M. DOHERTY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Instruction 10 relieved the State of its burden of proving every element of the offense beyond a reasonable doubt.
2. The State failed to prove Mr. Doherty acted as an accomplice to Mr. Doyle's [SIC] trafficking in stolen property.

II.

ISSUES PRESENTED

- A. CAN THE DEFENDANT RAISE THE ISSUE OF AN INCORRECT ACCOMPLICE INSTRUCTION WHEN THE DEFENDANT PROPOSED THE VERY INSTRUCTION GIVEN TO THE JURY?
- B. DID THE STATE PRESENT EVIDENCE THAT THE DEFENDANT ACTED AS AN ACCOMPLICE TO MR. DOYLE?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

- A. SINCE THE DEFENDANT SUBMITTED AN INSTRUCTION CONTAINING THE LANGUAGE HE NOW PROTESTS, THE DEFENDANT HAS CREATED AN “INVITED ERROR.”

The defendant appears not to have carefully read the instructions he submitted. CP 7 is a copy of the accomplice instruction submitted by the defendant. CP 7 is a word for word representation of the accomplice instruction given to the jury. CP 7. The State did not submit such an instruction.

The State submits that the defendant may not raise any issues regarding the allegedly defective accomplice instruction as the defendant caused the error by submitting the incorrect instruction to the trial court. The doctrine of invited error “prohibits a party from setting up an error at trial and then complaining of it on appeal.” *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (quoting *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled by *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995)). In *Henderson*, the defendant proposed, and the trial court gave, jury instructions that violated the defendant's due process rights. *Id.* at 868-69. The court refused to allow Mr. Henderson to raise this constitutional issue for the first time on appeal because the error was made by Mr. Henderson's invitation. *Id.* at 870.

The Washington State Supreme Court has held many times that the defendant cannot do what he did in this case. The defendant submitted an incorrect instruction, the trial court submitted the defective instruction to the jury and now the defendant wants to claim error on appeal. *State v. Schaler*, 169 Wn.2d 274, 292, 236 P.3d 858 (2010); *State v. Heddrick*, 166 Wn.2d 898, 909, 215 P.3d 201 (2009); *State v. Kyllo*, 166 Wn.2d 856, 861, 15 P.3d 177 (2009).

B. THERE WAS AMPLE EVIDENCE TO PROVE THE DEFENDANT'S ACCOMPLICE LIABILITY.

The defendant claims that the State did not provide the jury with sufficient evidence to support a conviction for trafficking. The law involved in such a claim is very well established.

"There is sufficient proof of an element of a crime to support a jury's verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt." *State v. Bright*, 129 Wn.2d 257, 266 n.30, 916 P.2d 922 (1996). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995).

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

When analyzing a sufficiency of the evidence claim, the court will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). The reviewing court will defer to the jury on the credibility of witnesses and the weight of the evidence. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999). Even if an appellate court is convinced that a verdict is incorrect, that court will not overturn the verdict of the jury. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964).

The defendant's claim that there was insufficient evidence to prove he was an accomplice to his partner's trafficking is an exercise in selective observations. The defendant admits he stole the DVDs. Within minutes, the accomplice, Mr. Doyle, was busy at a nearby store trying to sell the very same DVDs as the defendant had stolen.

The defense contends, using "blindness" logic, that there was no proof that the defendant gave the admittedly stolen DVDs to his partner to return for cash.

There were two wire cutters in the back of the car, a collection of snipped security wires and the defendant riding in the same car.

The defendant tried to enhance his defense by pointing out there was a “Harbor Freight” store near the Hastings store where the attempt was made to get cash for the DVDs. It is unclear what buying sandpaper at “Harbor Freight” had to do with trafficking in stolen DVDs.

In closing argument, the defense admitted that Mr. Doyle attempted to traffic the stolen DVDs. RP 258. The defense dismissed the fact that both Mr. Doyle and the defendant were friends and the defendant waited in the “get away” car while Mr. Doyle tried to traffic the stolen DVDs. The jury instructions tell the jury about accomplice liability, but that doesn’t satisfy the defense. The defense took the position that the State needed to present witnesses stating that the two men were working together. RP 259. This is an example of the “blindness” approach of the defendant. The defendant was sitting outside in a car containing two wirecutters and the wire security mechanisms from the DVDs that the defendant had stolen and put in the car. Yet, the defense wants more. Fortunately, the jury was allowed to evaluate the evidence and reach conclusions. That is what they did.

The defense claims that the security video shows someone working under the hood of the “get away” car. The State responds, “So?” Apparently, the car

was not reliable. That hardly negates Mr. Doyle's actions or the defendant's actions.

Clearly, the actions of the defendant and Mr. Doyle were designed to steal the DVDs and then attempt to get money for those DVDs from a different store. The jury was presented with all the evidence, not just the narrow evidence the defense would have preferred. There was ample evidence from which the trier of fact could conclude the defendant was guilty.

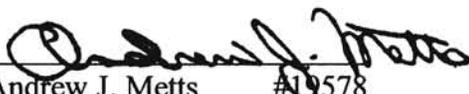
V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 2nd day of August, 2012.

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