

65603-1

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NO. 65603-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STEVEN LOUIE HARDING,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUES

1. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. To prove residential burglary, the State must show that the defendant entered or remained unlawfully. The State presented evidence that Harding and a co-defendant were seen inside the threshold of the victims' damaged back door and were seen running away from the property. The State also presented evidence that Harding and the co-defendant were apprehended just a few minutes later, and that at that time the co-defendant had an item in his pocket that had been stolen in the burglary. Is this sufficient evidence to demonstrate that Harding either unlawfully entered the victims' home or acted as an accomplice to the co-defendant?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Steven Louie Harding and James Troy Byrge with Residential Burglary. CP 1. The jury convicted Harding

as charged. CP 15. The trial court sentenced Harding within the standard range, imposing 43 months. CP 216-20; RP 138.

2. SUBSTANTIVE FACTS

On the morning of Sunday, October 11, 2009, Ken Donaldson and his son, Joseph, were driving in a residential neighborhood in Tukwila. RP 9. Specifically, they were heading eastbound on 140th Street. RP 11, 24. Joseph Donaldson was driving the car, and Ken Donaldson was seated in the backseat, on the driver's side of the car. Id. Ken Donaldson happened to look out the window and was able to get a clear view of the back door area of a house. RP 11-12, 18. He noticed two men standing on the threshold of the home's back door. RP 11, 18. Ken Donaldson described the two as being "in the threshold." RP 20. When asked by defense if the two were inside the building, Ken Donaldson answered yes. Id. He also described the two men as being "just crammed in the doorway." RP 21. Joseph Donaldson also saw the two men at the house standing on the back porch, and he did not recognize either of the men as residing in that home. RP 24-25. While Joseph Donaldson doesn't know the names of the individuals who reside in that particular home, he is nonetheless familiar with the occupants. RP 25. According to

Joseph Donaldson, the two men were both facing the house, and it appeared as though they were both getting ready to enter. RP 34. Joseph Donaldson identified the address of the residence associated with this incident as 13879 38th Ave. S. RP 36.

As Joseph Donaldson passed the house, the two were briefly out of view. RP 34. He backed the car up and again got a view of the two men. RP 34. Then, as Ken and Joseph Donaldson watched, the two men took off running out of the yard and down an adjacent alley. RP 12, 27, 29. At that point, Ken Donaldson placed a call to 911. RP 12. Ken Donaldson kept an eye on the two men as they made their way down the alley. RP 14. He estimated he observed them during this period for two to three minutes. RP 15. When asked if they appeared to be together, Ken Donaldson replied that the two remained "side by side." Id. When Joseph Donaldson was asked if the two men appeared to be together, he responded in the affirmative, and noted that the two were "right next to each other." RP 32.

Ken Donaldson observed damage to the back door, specifically, that the screen door was "hanging." RP 12. He later elaborated that the screen door appeared to be "hanging off of the hinge." RP 20. Joseph Donaldson also noticed damage to the back

door area, describing the door as "hanging open" and noting that it did not appear to be intact. RP 27.

A couple of minutes after Ken and Joseph Donaldson lost sight of the two men, the two men appeared again, walking at the intersection of 37th Ave. South and South 140th Street. RP 15, 31. This intersection was approximately 100 feet from where Ken Donaldson had first seen the two. RP 17. Ken Donaldson was 100 percent certain that the two men he stopped and detained were the same two men that he had seen run away from the damaged back door of the house. RP 19. Joseph Donaldson was also 100 percent certain. RP 33. At that time, Ken Donaldson requested that both men stop and lie down on the pavement, and the two complied with that request. RP 16. The person Ken Donaldson detained was the defendant. Id. Both men were detained for approximately seven minutes until police officers arrived. RP 19.

Officer Ken Hernandez was one of the officers who responded. RP 69. In a search incident to arrest of the co-defendant, James Byrge, Officer Hernandez located a "small silver black pin" in Byrge's right front jacket pocket. RP 71-72. Officer Hernandez indicated that State's exhibit number four showed the item that was recovered from Byrge's pocket. RP 72.

Paul Fleury and Rex Aston reside in a home located at 13879 38th Ave. S in Tukwila. RP 42, 59. On the morning of October 11, 2009, Mr. Aston, who works during the evening, was home and asleep. RP 60. Around 10:30 a.m., Mr. Aston woke up to the sound of loud banging. Id. After maybe four or five of the loud banging sounds, he heard a loud crash and the sound of glass breaking. Id. At that point, Mr. Aston got up, opened his door, and, thinking that it could be his roommate, called out, "Paul?" Id. When he heard no response, Mr. Aston walked through the house to the kitchen area. RP 60-61. As he looked into the kitchen, he saw his back door "laying on the floor." RP 61. Mr. Aston then exited the home through the front door and used his cell phone to call 911. RP 62. When he exited the home, Mr. Aston contacted two of his neighbors. Id.

Mr. Fleury was not at home at the time of the burglary. RP 42. He hurried home, though, after seeing that he had missed a significant number of calls from Mr. Aston. RP 42-43. When Mr. Fleury arrived at home, he saw that the "kitchen door had been kicked in and pretty well destroyed." RP 43. He looked around the home and noticed that he was missing a couple of brooch pins that he wears in a hat. RP 44. Those pins were kept in a dish in the dining room, and the dish was in plain view in an open area.

RP 44-45. In order to get to the dining room from the back of the house, you must go through the kitchen. Id. Mr. Fleury received one of the pins back. RP 46. The pin that was returned to Mr. Fleury is depicted in State's exhibit number four, and features a silver dragon design mounted onto a black background. RP 45-46.

Both Mr. Fleury and Mr. Aston testified that neither the defendant nor James Byrge had permission to be inside their home. RP 47, 65.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS HARDING'S RESIDENTIAL BURGLARY CONVICTION.

a. There Is Sufficient Evidence To Show That Harding Entered The Victims' Home.

On appeal, Harding challenges his residential burglary conviction and argues that the State failed to prove beyond a reasonable doubt that he entered the victims' home or that he acted as an accomplice in the burglary. *App. Br.* at 4-5. Viewing the evidence in the light most favorable to the State, Harding's arguments fail. The State produced substantial evidence that Harding burglarized the victims' residence.

A person is guilty of residential burglary if he enters or remains unlawfully in a dwelling with the intent to commit a crime against a person or property therein. RCW 9A.52.025(1). At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. at 201. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but

only that there is substantial evidence in the record to support the conviction. Id. at 718.

Harding challenges the sufficiency of the State's evidence only on the element of unlawful entry. Essentially, Harding argues that the State produced insufficient evidence for the jury to find him guilty of entering the victims' residence. Significantly, though, "[u]nlawful entry, like any other element of a crime, may be proved by circumstantial evidence." State v. McDaniels, 39 Wn. App. 236, 240, 692 P.2d 894 (1984); State v. J.P., 130 Wn. App. 887, 893, 125 P.3d 215 (2005).

For example, in State v. Couch, 44 Wn. App. 26, 29-30, 720 P.2d 1387 (1986), the defendant claimed that the State produced insufficient evidence to prove that he or anyone else entered the burglarized tavern. The defendant argued that no one saw him inside the property or saw him leave, and that there was no evidence that anything was disturbed or taken from the tavern. Id. at 29. The court, however, upheld the defendant's burglary conviction based on circumstantial evidence that the victims saw the defendant's car parked across the street, heard someone moving around inside the tavern, and then saw the defendant climbing over the fence next to the tavern. Id. at 27-28. Viewing

the evidence in the light most favorable to the State, the court held that sufficient circumstantial evidence existed for a rational trier of fact to find that the defendant unlawfully entered the tavern. Id. at 30.

Here, like in Couch, there is substantial circumstantial evidence. Mr. Aston heard the sound of loud banging and then glass breaking in the back of his home. RP 60. Right around the same time, Ken and Joseph Donaldson observed the two defendants standing at Mr. Aston's back door. RP 11, 18, 24-25. The back door of Mr. Aston's home had substantial and visible damage. RP 43, 61. According to Mr. Fleury, the door appeared to have been kicked in and was destroyed. RP 43. Then, Ken and Joseph Donaldson watched as the two defendants fled away from the scene, running through the victims' yard and then down the adjacent alley. RP 12, 27-29.

However, there's also direct evidence here that Harding entered the victims' residence. Ken Donaldson described seeing the two defendants "in the threshold" of the residence. RP 20. When specifically asked if the two were inside the building, Ken Donaldson responded that they were. Id.

Harding's reliance on State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985) is misplaced. *App. Br.* at 4. Bergeron involves a conviction for attempted residential burglary for a juvenile respondent who gave a statement to police in which he admitted that he had broken and slid open the window, and had intended to go inside the home, but decided to leave without making any entry. Id. at 3. The juvenile respondent had been charged with attempted burglary, and his conviction was upheld. The fact of whether the respondent entered the residence was never at issue, and there was never an assertion that he did make an entry into the home. The Bergeron case also differs drastically from the facts in this case in one important regard. In Bergeron, there was no evidence that any entry had been completed. There wasn't anything moved inside the home, and there was not any property missing. Here, co-defendant Byrge had an item that had been stolen from inside the home on his person. RP 45-46, 71-72. This is a significant fact demonstrating that entry, by at least one of the defendants, was actually achieved and not merely contemplated.

Admitting the truth of the State's evidence and drawing all reasonable inferences in favor of the State, there is substantial

evidence from which a rational trier of fact could find that Harding broke into and entered the victims' home with the intent to commit a crime therein.

b. There Is Sufficient Evidence To Show That Harding Acted As An Accomplice.

Harding also argues that there is insufficient evidence to demonstrate that he acted as an accomplice to Byrge in the burglary. *App. Br.* at 7. Specifically, Harding asserts that there was no evidence to show that he assisted Byrge or otherwise participated in the crime. *Id.* Again, viewing the evidence in the light most favorable to the State, Harding's arguments fail. The State produced substantial evidence that Harding, if he did not enter the residence himself, certainly assisted Byrge in the commission of the crime.

In order for the State to show that a defendant acted as an accomplice, it must be demonstrated that that individual encouraged or aided another in the planning or commission of the crime, with knowledge that his or her actions would promote or facilitate the crime. RCW 9A.08.020(3)(a)(ii). "Aiding" in a crime includes "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... presence is aiding in the commission of the crime.” State v. Dove, 52 Wn. App. 81, 87, 757 P.2d 990 (1988).

In State v. Trout, a defendant's conviction as an accomplice was upheld when he went along with others to provide backup in case things got out of control. 125 Wn. App. 403, 105 P.3d 69 (2005). The court held that that was sufficient to establish that the defendant's presence promoted or facilitated the other defendants in the commission of a robbery. Id.

Harding cites In re Welfare of Wilson, and argues that his case is factually similar to Wilson. 91 Wn.2d 487, 588 P.2d 1161 (1979); *App. Br.* at 6-7. In Wilson, the court held that a juvenile's continued presence at the scene of a crime, without anything more, was insufficient to sustain a conviction as an accomplice. Id.

Here, though, unlike Wilson, there is much more than Harding's mere presence at the scene of the burglary. First, Harding was observed on the victims' property, standing inside the threshold to the back door to the residence. RP 20, 24-25. This was a location where the defendant had no permission to be and the circumstances of his presence there are suspicious. If, for

example, you have legitimate business at a home, then why not go to the front door? Furthermore, there was substantial and visible damage to the back door. RP 43, 61. Harding was right there and involved as the victims' door was literally kicked in. This is not a situation of someone innocently looking on as someone else committed a crime.

Furthermore, based on the timeline of the testimony from the Donaldsons and the sounds heard from Mr. Aston, there is a reasonable inference that that damage was made either by Harding, or when Harding was in close proximity to the door. Harding and Byrge both exited the property by running away RP 12, 27, 29. Significantly, the two were in close proximity to each other as they left the property, went down the alley, and also a few minutes later when they were detained by the Donaldsons. RP 15, 16, 32. And one of the two pins that had been stolen from the residence was recovered from Byrge. RP 45-46, 71-71.

Relying on all of the evidence taken together, the jury could make a number of reasonable inferences. A jury could infer that both Harding and Byrge entered the residence but were quickly

scared off when Mr. Aston called out and made his presence known. RP 60. In that circumstance, they would have had limited time to take items, but would have had time to grab two pins that were in a dish that was sitting out in the open. RP 44-45.

Following from this, it would also be a reasonable inference that when Ken Donaldson saw Harding and Byrge "crammed into the doorway," he was observing the two as they attempted to make a hurried escape from the victims' residence. RP 21.

Given these facts, a jury could have also reasonably inferred that Harding was there to act as a lookout for Byrge, and to alert Byrge of any potential problems, or that Harding was on hand to assist if the two encountered anyone.

Sufficient evidence exists in the record to support the jury's guilty finding, whether Harding was convicted as a principal or as an accomplice. The Court should affirm Harding's residential burglary conviction.

D. CONCLUSION

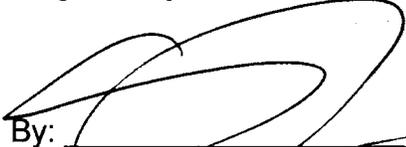
Viewing the evidence in the light most favorable to the State, there is sufficient evidence to support Harding's conviction for

residential burglary. Thus, the Court should affirm Harding's conviction.

DATED this 28 day of February, 2011.

Respectfully submitted,

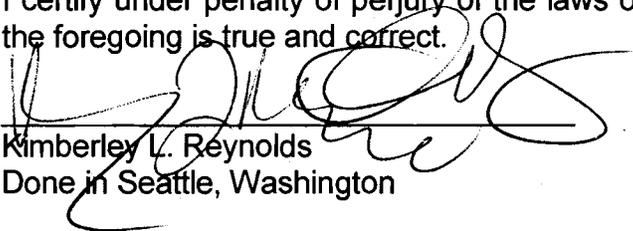
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen M. Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. STEVEN LOUIE HARDING, Cause No. 65603-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Kimberley L. Reynolds
Done in Seattle, Washington

2/28/11

Date

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