

NO. 70517-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

SVEIN VIK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Millie M. Judge, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Svein Arve Vik was convicted of criminal trespass in the first degree via accomplice liability. But, at most, the State's evidence showed only that Vik had knowledge of and assent to the crime and that he was near where the crime occurred. The State failed to provide sufficient evidence that Vik aided in any aspect of the crime. Because the State's evidence was insufficient for any rational jury to conclude that Vik was an accomplice, this court must reverse Vik's conviction.

B. ASSIGNMENT OF ERROR

The State presented insufficient evidence that Vik qualified as an accomplice to the crime of criminal trespass in the first degree.

Issues Pertaining to Assignment of Error

1. Where the State's evidence only shows that a defendant was present at the scene and may have known about or assented to a crime, is the State's evidence insufficient to support a conviction based on accomplice liability?

2. Where the State fails to provide evidence that a defendant aided in or agreed to aid in the commission of a crime, is the State's evidence insufficient to support a conviction based on accomplice liability?

3. Where the State supports its theory of accomplice liability through inferences that amount to mere surmise and speculation, is the State's evidence insufficient to support a conviction based on accomplice liability?

C. STATEMENT OF THE CASE

1. Factual background

On the morning of December 25, 2011, Vik, Vik's tenant (Damian Irwin), and a man who was staying at Vik's house (Vladimir Klapenchuk), drove to the Tulalip Casino in Vik's van. 2RP¹ 62, 89-90, 100. After Irwin and Vik spent a brief time in the casino, Irwin asked Klapenchuk to drive him to the nearby Youth Center, which was under construction. 2RP 32, 43-44, 64, 72, 79, 90. When they arrived, Irwin exited the vehicle and gained access to the Youth Center. 2RP 63, 65, 91. Vik and Klapenchuk remained in the vehicle. 2RP 63-64, 91.

After waiting several minutes, Vik and Klapenchuk became frustrated and impatient. 2RP 91. They began honking the van's horn. 2RP 92. Vik exited the vehicle to get Irwin so that they could all leave the vicinity. 2RP 92. Vik saw Irwin behind the fenced area of the Youth Center. 2RP 93. When Irwin would not come, Klapenchuk started the van's engine and he and Vik drove off. 2RP 93. Vik and Klapenchuk, unfamiliar

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – January 18, 2013; 2RP – April 22, 23, and 24, 2013; 3RP – June 17, 2013.

with the road on which they were driving, eventually turned around and headed back to the Youth Center. 2RP 93.

Klapenchuk again honked to try to get Irwin's attention. 2RP 93. Vik again exited the vehicle to look for Irwin. 2RP 93. Vik again saw Irwin inside a fenced area and told Irwin that he and Klapenchuk were leaving. 2RP 94. Irwin relayed to Vik that he had found materials that he wanted to take from the Youth Center site. 2RP 94. An argument ensued between Vik and Irwin. 2RP 65, 68, 80. Without taking anything, Irwin got back into the van and the three men drove to Vik's residence. 2RP 94-95.

In the early morning hours of December 26, 2011, security video captured a blue pickup entering the Youth Center parking lot and leaving 45 minutes later with multiple items in its bed. 2RP 36, 38.

A few days later, Vik awoke to multiple police officers at his house. 2RP 89, 95. Police had captured the van's license plates on surveillance video from December 25, 2011, leading them to Vik. 2RP 31-33, 54. Vik admitted to being in the van when Irwin trespassed on the Youth Center site that day, but denied any involvement in or knowledge of Irwin's criminal activities. 2RP 73, 102-03. Officers arrested Vik. 2RP 68, 73.

Irwin later admitted that he and another associate, Christopher Wallace, had taken the property from the Youth Center on December 26, 2011. 2RP 66-67. Wallace did not know Vik, but had picked Irwin up from

Vik's residence on December 25, 2011. 2RP 67. Irwin also led officers to the residence of Paul Gehret, where officers recovered items stolen from the Youth Center. 2RP 67. Gehret did not know Vik either. 2RP 67.

2. Pretrial proceedings and trial

The State charged Vik with one count of second degree burglary. CP 55, 71. Vik pleaded not guilty. 2RP 3.

Defense counsel brought a Knapstad² motion asserting that the State had not provided a prima facie showing that Vik acted as an accomplice to the burglary. 1RP 2; CP 63-68. Defense counsel argued that Vik did not promote, facilitate, or aid Irwin in planning or committing the crime. 1RP 5. The court denied the Knapstad motion. 1RP 6.

At trial, the testimony wrought out facts conforming to the recitation above. Prior to trial, the parties agreed that the hearsay statements of Vik, Irwin, and Klapenchuk would be admitted through the testimony of the State's witnesses, primarily through Detective James Williams of the Tulalip Tribal Police Department. 2RP 5-6. Vik also testified at trial, comprising the entirety of the defense's case-in-chief. 2RP 88-104.

3. Conviction and sentence

The jury found Vik guilty of the lesser included offense of criminal trespass in the first degree. CP 16; 2RP 129-31. The trial court sentenced

² State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

Vik to the maximum term of 364 days with 334 days suspended and 30 days imposed. CP 3; 3RP 4. The trial court also imposed 24 months of probation, the mandatory victim assessment, and \$250 in court costs. CP 4; 3RP 5. This timely appeal follows. CP 1-2.

D. ARGUMENT

THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE VIK LIABLE AS AN ACCOMPLICE TO FIRST DEGREE CRIMINAL TRESPASS

This court reviews claims of insufficiency of the evidence by asking whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing all evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” Id. at 16. Such inferences must “logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.” Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

Because the State merely proved that Vik was present at the scene on December 25, 2011 and because the State failed to demonstrate that Vik rendered any aid whatsoever, no rational trier of fact could have determined that Vik was an accomplice to first degree criminal trespass.

1. Criminal trespass in the first degree

“A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building.” RCW 9A.52.070(1). In this case, it was undisputed that Vik himself never entered or remained unlawfully in the Youth Center. 2RP 63-64, 65, 80, 91-92, 103. Thus, the State’s case depends entirely on whether Vik was complicit in Irwin’s conduct.

2. Accomplice liability

“A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.” RCW 9A.08.020(1). “A person is legally accountable for the conduct of another person when . . . [h]e or she is an accomplice of such other person in the commission of the crime.” RCW 9A.08.020(2)(c).

A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(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).

To convict a defendant by accomplice liability, “[t]he evidence must show that the accomplice aided in the planning or commission of the crime and that he [or she] had knowledge of the crime.” State v. Truong, 168 Wn. App. 529, 539-40, 277 P.3d 74, review denied, 175 Wn.2d 1020, 290 P.3d 994 (2012). “Mere presence of the defendant without aiding the principal—despite knowledge of the ongoing criminal activity—is not sufficient to establish accomplice liability.” Id. at 540 (citing State v. Parker, 60 Wn. App. 719, 724-25, 806 P.2d 1241 (1991)). “Rather, the State must prove that the defendant was ready to assist the principal in the crime and that he shared in the criminal intent of the principal ‘demonstrating a community of unlawful purpose at the time the act was committed.’” Truong, 168 Wn. App. at 540 (quoting State v. Castro, 32 Wn. App. 559, 564, 648 P.2d 485 (1992); see also State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981) (“This court has repeatedly stated that one’s presence at the commission of a crime, even coupled with a knowledge that one’s presence would aid in the commission of the crime, will not subject an accused to accomplice liability. To prove that one present is an aider, it must be established that one is ‘ready to assist’ in the commission of the crime.” (internal quotation marks omitted) (quoting In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979))).

3. The State's evidence failed to prove that Vik aided in the commission of Irwin's crime

Viewing it in the light most favorable to the State, the evidence in this case merely showed that Vik happened to be present at the Youth Center at the time of Irwin's trespass and knew that Irwin was committing a crime. Vik's presence and knowledge alone were insufficient to prove his liability as an accomplice, as the State failed to show that Vik did anything to assist Irwin. To the contrary, the evidence showed Vik hindered rather than aided Irwin's commission of the crime. Because Vik was not "ready to assist" at the scene, he was not an accomplice to the criminal trespass.

According to the testimony of Detective Williams, Vik stated at the time of his arrest that he knew that Irwin was "into" doing burglaries and selling stolen items for a profit. 2RP 63. Vik also stated that he did not take anything from or enter the Youth Center, and that he did not want to participate in any way in Irwin's crime. 2RP 63-64, 72-73. Rather, all Vik did was sit as a passenger in his van when Irwin trespassed in the Youth Center. This evidence merely established Vik's presence and knowledge of criminal activity, which was insufficient to subject Vik to accomplice liability.

Detective Williams testified that Irwin, who was already in police custody, stated, "Vik did know what [Irwin] was planning on doing"

2RP 68. Detective Williams also recounted Irwin's statement that Vik and he got into an argument because "Vik did not want to go back to pick up the items" from the Youth Center later. 2RP 68. Detective Williams indicated that Klepanchuk, the driver of the van, stated that Vik exited the van briefly to argue with Irwin. 2RP 64, 80. In contrast, Vik testified that Irwin asked Klepanchuk to take Irwin down to the Youth Center and that Vik did not know of Irwin's plans to enter the Youth Center at the time. 2RP 91, 102. Vik indicated that he did not know what Irwin was doing until he saw Irwin enter the Youth Center property. 2RP 92-93. Vik also stated that he and Irwin argued because Vik and Klepanchuk did not want to continue waiting in the parking lot and that Vik did not want any part of Irwin's activities. 2RP 92-94. Even when viewing this conflicting testimony in the light most favorable to the prosecution, at most it demonstrates that Vik assented to Irwin's plans to enter the Youth Center, which alone is insufficient to show that Vik acted as an accomplice.

Even assuming that Vik had knowledge and assent to Irwin's trespass, the State failed to demonstrate that Vik aided in the commission of the crime. In fact, the evidence showed that Vik's actions hindered the criminal trespass.

Vik testified that after Irwin jumped out of the van, Vik and Klepanchuk became frustrated by having to wait for Irwin and began

honking the horn. 2RP 91-92. After waiting for several minutes, Vik stated that he left the van and made contact with Irwin, telling Irwin that Vik and Klepanchuk did not want to continue waiting. 2RP 92. When Irwin did not return to the van, Klepanchuk started the van and drove away. 2RP 93. Vik indicated that he hoped that Irwin seeing the van drive away would prompt Irwin to cease his activities at the Youth Center. 2RP 93. After driving north from the Youth Center, Vik and Klepanchuk were unfamiliar with the road and turned around. 2RP 93. When they arrived back at the Youth Center parking lot, Klepanchuk again honked the horn. 2RP 93. Vik again exited the vehicle and called out Irwin's name. 2RP 93. After making contact with Irwin, Vik told Irwin, "We're leaving," prompting an argument. 2RP 94. Vik's testimony was not contradicted by the State's evidence at trial.

Vik's behavior at the scene did not reflect an accomplice aiding in the criminal trespass. The State presented no evidence that Vik rendered any form of assistance to Irwin. To the contrary, honking the horn and exiting the vehicle to call out Irwin's name at the crime scene, if anything, resulted in a hindrance to Irwin's stealthy commission of the crime. Because the evidence was insufficient that Vik provided any aid to Irwin, Vik was not "ready to assist" in the perpetration of the crime and was therefore not an accomplice. Rotunno, 95 Wn.2d at 933-34.

Nor was the fact that Vik owned the van that was present at the scene enough to show Vik's complicity. The testimony was undisputed that Vik was not driving the van; Vik was merely a passenger while Klepachuk drove. 2RP 72, 79, 91, 94-95. Vik's ownership of the van, by itself, was not an act showing Vik's readiness to assist in Irwin's crime. In other words, the fact that Vik owned the van did not facilitate or promote Irwin's criminal trespass.

The State argued below that allowing Irwin to ride in the van after the criminal trespass occurred showed Vik's complicity. 2RP 115-16. However, Irwin had already completed the criminal trespass when he returned to the van. See State v. Luna, 71 Wn. App. 755, 760, 862 P.2d 620 (1993) (rejecting accomplice liability where defendant could not have assisted in theft because it had already occurred). Again, Vik was not driving, and it is unclear how riding in the same van as Irwin demonstrated anything more than mere presence. A ride back to Vik's residence—where Irwin also lived, 2RP 100—did not aid Irwin's criminal trespass or facilitate or promote Irwin's future criminal activity, i.e., the burglary that occurred the following day. Vik testified that he made his disapproval of Irwin's activities known to Irwin. 2RP 94, 103. The fact that Vik did not leave

Irwin stranded without transportation was insufficient to demonstrate his complicity in Irwin's crime.³

The State's remaining circumstantial evidence is even more tenuous. The State elicited Detective Williams's testimony that officers found bolt and wire cutters when they searched Vik's van after arrest. 2RP 57. But the presence of bolt and wire cutters in his van does not support a reasonable inference that Vik was an accomplice. Indeed, Detective Williams acknowledged that he could not testify that these tools were even used at the Youth Center. 2RP 57-58. To infer accomplice liability because the bolt and wire cutters could have been used in the commission of a crime amounts to rank speculation and is therefore unreasonable. Vasquez, 178 Wn.2d at 16.

The State also made much of the fact that Vik allegedly told Detective Williams "he could get the stuff from the burglary back, if [Detective Williams] didn't take him to jail." 2RP 63, 116; cf. 2RP 104 (Vik testifying, "I never told [Detective Williams] I was going to get his stuff back. I don't know how I could tell him get [sic] the stuff back. I didn't even know [Irwin] took the stuff"). Vik's alleged statement to Detective

³ Allowing Irwin to ride in Vik's vehicle after the crime is akin to performing the cooking and cleaning that was insufficient to show complicity in State v. Amezola, 49 Wn. App. 78, 89, 741 P.2d 1024 (1987). Here, like in Amezola, the ride "might have made life easier for those committing the crime" but was not "sufficient to expose one to criminal liability." Id.

Williams, made as part of a desperate plea to avoid arrest, merely suggests that Vik could have contacted Irwin—the person who Vik believed committed the crime—to attempt to recover the stolen property. It does not demonstrate Vik was an accomplice in the criminal trespass. Moreover, none of the other participants in the Youth Center burglary, including the person who ended up with the stolen property, had any idea who Vik was. 2RP 82. That the other participants did not know Vik undermines the State’s assertion that Vik’s offer demonstrated he was an accomplice.

D. CONCLUSION

The State failed to put forth sufficient evidence that could convince a rational juror that Vik was an accomplice to Irwin’s criminal trespass in this case. When there is insufficient evidence to support criminal liability, the appropriate remedy is reversal of the conviction. Vasquez, 178 Wn.2d at 18. This court should accordingly reverse Vik’s conviction.

DATED this 27th day of February, 2014.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 70517-2-1
)	
SVEN VIK,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF FEBRUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF FEBRUARY, 2014.

x *Patrick Mayovsky*