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April 29, 2016
Court of Appeals
Division I
State of Washington

NO. 73296-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GILJON LEE-SEAN JOHNSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN H. CHUN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. At trial, the jury considered evidence that Giljon Johnson agreed to help his friends burglarize a specific house, that he took a bus to that house intending to commit a residential burglary, and that he and his friends each put on a pair of purple latex gloves when they arrived at the house. Seattle Police detectives found a trail of property, stolen from inside the house, leading in the same direction that Johnson fled from police. Was there sufficient evidence for the jury to find beyond a reasonable doubt that Johnson was guilty of residential burglary, either as a principal or as an accomplice?

2. If the State is the substantially prevailing party on appeal, should the Court award appellate costs pursuant to RAP 14.2 when there is insufficient evidence in the record that Johnson will be unable to pay legal financial obligations in the future?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Giljon Johnson with one count of residential burglary, one count of assault in the third degree, and one count of resisting arrest in King County Superior Court. CP 10-11. The case proceeded to jury trial before the Honorable Judge John Chun. 02/25/15

RP 1-2. The jury found Johnson guilty of residential burglary and resisting arrest and not guilty of assault in the third degree. 03/13/15 RP 3-4. The trial court sentenced Johnson to 15 months in prison for the residential burglary conviction, based on a standard sentencing range of 13 to 17 months. CP 86-91. This appeal timely followed. CP 97.

2. SUBSTANTIVE FACTS.

On July 19, 2014, around 1:00 a.m., Eric Hull was falling asleep in the bedroom of his south Seattle home when he heard a loud, scraping sound outside. 03/03/15 RP 28. He looked out his window and saw flashlights in his neighbors' backyard at 4016 39th Avenue South. 03/03/15 RP 28. He saw "at least" two people and heard voices, but he could not see how many people were in the backyard. 03/03/15 RP 28-29. His neighbors, Kathryn Francis and Marc Cuthebert, were out of the country at the time. 03/10/2015 RP 11. Hull called 911. 03/03/15 RP 32. While he was on the phone with 911, he saw flashlights in multiple rooms inside the home, including the basement. 03/03/15 RP 34.

Several police officers responded within five minutes of Hull's 911 call. 03/03/15 RP 34. These officers included Terry Persun, Andrew Wilkes, Anthony Belgarde, and Benjamin Kelly. 03/03/15 RP 187; 03/04/15 RP 63, 85. The officers surrounded the house at 4016 39th

Avenue South, with some officers in the front yard and some officers in the back yard. 03/03/15 RP 34-35. Officer Kelly set up a containment position on Cascadia Avenue South, the street directly to the east, behind the backyard of the burglarized residence. 03/09/2015 RP 65-66.

Officer Persun approached Francis and Cuthebert's home from the front yard. 03/03/15 RP 191. Through a living room window, he saw a man walking inside the house, carrying a flat screen television. 03/03/15 RP 191. The man was wearing gloves. 03/03/15 RP 191. Officer Persun could not see the man's face clearly. 03/03/15 RP 193.

While Officer Persun was standing in the front yard of 4016 39th Avenue South, he heard a loud, crashing noise coming from the back of the house. 03/03/15 RP 193. "[I]t sounded almost like ten people crashing through the back door, and coming out into the backyard." 03/03/15 RP 193. He heard footsteps, which sounded like "several" people running from the backyard, around the north side of the house toward the front. 03/03/15 RP 194. When Officer Persun announced that he was a police officer, the footsteps turned around and ran back into the backyard. 03/03/15 RP 195. Officer Persun followed the suspects into the backyard. 03/03/15 RP 196. In the northeast corner of the backyard, he quickly found and arrested a man named Queshawn Maxwell. 03/04/15 RP 8-9.

Officers found a pair of purple latex gloves in the area where Maxwell was arrested. 03/03/15 RP 155; Ex. 9-P.

Meanwhile, Officer Wilkes and Officer Belgarde approached the burglarized house at the same time as Officer Persun. 03/04/15 RP 64, 87. Officer Wilkes saw two people walking inside the house with flashlights. 03/04/15 RP 65. Officer Belgarde saw more than two flashlights inside the house. 03/04/15 RP 88.

As Officer Wilkes walked to the front, south side of the house, he saw a young man climbing out of the house through a window. 03/04/15 RP 69. Officer Wilkes immediately arrested the man, later identified as Lamundo Williams. 03/04/15 RP 69, 73-75. Williams was wearing purple latex gloves. 03/04/15 RP 76-78.

While officers were arresting Maxwell and Williams, Johnson fled to the southeast corner of the backyard—in the opposite direction from Maxwell. 03/04/15 RP 94-96. Johnson hid in the bushes, behind a fence, until Officer Kelly found him. 03/09/2015 RP 84-85. When Officer Kelly told him to come out from the bushes, Johnson climbed onto the roof of a garage. 03/09/2015 RP 87-89.

After a lengthy standoff, Johnson leaped from the roof of the garage and ran down a narrow side yard next to a home on Cascadia Avenue South. 03/09/2015 RP 90-103. Officer Kelly ran after him.

03/09/2015 RP 103. Johnson approached a fence at the end of the side yard and tried to leap over the fence, head first. 03/09/2015 RP 103-04. He did not make it over the fence and landed back in the side yard, with Officer Kelly standing right behind him. 03/09/2015 RP 104-05. Johnson turned around and hit Officer Kelly in the face while trying to run back through the narrow side yard. 03/09/2015 RP 107-08. Johnson could not escape past Officer Kelly and the two men wrestled for about a minute. 03/09/2015 108-11. During the struggle, Johnson grabbed Officer Kelly's gun. 03/09/2015 RP 111-12. Officer Kelly fired his gun and shot Johnson. 03/09/2015 RP 112-13. Johnson was treated for his injuries and arrested for residential burglary. 03/09/2015 RP 114-15.

Seattle Police detectives found a pair of purple latex gloves in the side yard of 4015 Cascadia Avenue South where Johnson struggled with Officer Kelly. 03/03/15 RP 51-52, 131-32. The detectives also found a large amount of stolen property in the backyard of the burglarized home, including a large computer screen, a guitar, and several backpacks.

03/03/15 RP 150-54; 03/04/15 RP 92; Exs. 9-F, 9-G, 9-M. There was a trail of stolen property leading through the backyard to a tool shed in the southeast corner—the same direction that Johnson fled. 03/03/15 RP 155-59; Exs. 9-B, 9-C, 9-N, 9-O. Kathryn Francis and Mark Cuthebert

identified the property in the backyard as property that had been stolen from inside their home. 03/10/2015 RP 16, 22-24, 38-43, Ex. 10.

Johnson testified at trial. 03/10/2015 RP 46. On the evening of the burglary, he said that he was smoking marijuana in a park with Maxwell and Williams when they decided to commit a burglary together. 03/10/2015 RP 49-50, 94-95. Specifically, Williams said, "Let's go hit a house," and Johnson said, "Yeah, okay, whatever, let's do it." 03/10/2015 RP 94-95, 97-98. The three men took a bus from Othello Park to the Mount Baker neighborhood of Seattle intending to burglarize a specific house (the house at 4016 39th Avenue South). 03/10/2015 RP 50-51. They arrived at Kathryn Francis and Marc Cuthebert's home around 1:30 a.m. 03/10/2015 RP 94, 96. As they walked toward the house, Johnson put a pair of purple latex gloves on his hands. 03/10/2015 RP 95-96.

Once they arrived at the house, after a lengthy bus ride, Johnson claimed that he suddenly realized that he and his friends did not have a car to carry all the stolen property. 03/10/2015 RP 51-52. He testified that he decided not to go inside the house; instead, he remained in the backyard, waiting for his friends to finish committing their crime. 03/10/2015 RP 51-52, 98. The State impeached Johnson with a prior statement in which

he admitted that he went inside the house with his friends and helped them commit the burglary. 03/10/2015 RP 126-28, 131-32.

C: ARGUMENT

1. **SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S VERDICT THAT JOHNSON COMMITTED THE CRIME OF RESIDENTIAL BURGLARY.**

Evidence is sufficient to support a jury verdict if, viewing the evidence and all reasonable inferences from the evidence in the light most favorable to the State, the court is satisfied that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The court does not weigh the persuasiveness of the evidence or evaluate the credibility of the witnesses. *State v. Killingsworth*, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012). Rather, the court presumes the jury believed the State's evidence, rejected conflicting evidence, and drew reasonable inferences from the evidence in favor of the State. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995).

A person is guilty of residential burglary if he or his accomplice enters a dwelling unlawfully, with intent to commit a crime against a person or property inside the dwelling. RCW 9A.52.025. The State proved beyond a reasonable doubt that Johnson committed the crime of residential

burglary, as either a principal or an accomplice.¹ The evidence showed that Johnson went inside Katherine Francis and Mark Cuthebert's house because he intended to steal their property from their home. The evidence also showed that Johnson acted as an accomplice to the criminal conduct of his two friends, Williams and Maxwell, who also unlawfully entered the home intending to steal property inside.

At trial, Johnson admitted that he arrived at 4016 39th Avenue South with the specific intent to steal property from that home. He claimed, however, that he abruptly changed his mind about committing the burglary when his friends went inside the house. After considering the other evidence in the case and inconsistencies in Johnson's testimony, the jury did not believe that Johnson was merely present when the burglary occurred. Instead, the jury found him guilty of residential burglary. Johnson now asks this Court to substitute its judgment for that of the jury and accept his testimony as credible. The Court should reject Johnson's argument, defer to the jury's determination of credibility, and affirm Johnson's residential burglary conviction.

¹ It was not necessary for the jury to determine whether Johnson acted as a principal or as an accomplice to the residential burglary. *State v. Hoffman*, 116 Wn.2d 51, 104, 804 P.2d 577 (1991).

a. The Evidence, Including The Amount And Location Of The Recovered Stolen Property, Proved That Johnson Stole Property From Inside The Home.

Several of the State's witnesses, including Eric Hull, Officer Wilkes, and Officer Belgarde, testified that they saw and heard more than one man inside the house. Officer Belgarde, in particular, saw "more than two flashlights" inside the house. 03/04/15 RP 88. Eric Hull saw a flashlight in the basement at the same time that Officer Wilkes saw two men in the living room. Although none of the witnesses could recall a specific number of men or identify which men they saw, there was strong circumstantial evidence that Johnson was one of three men inside the house.

In particular, the stolen property in the backyard proved that Johnson stole property from inside the home. It is undisputed that there were only three people involved in the burglary: Williams, Maxwell, and Johnson. Williams was immediately arrested when he crawled out of a window on the south side of the house. 03/04/15 RP 69. He was not carrying any property. 03/04/15 RP 69-78. Because Williams was arrested immediately, before he could run into the backyard, all of the property found in the backyard had to have been carried by Maxwell, Johnson, or both. That property included a guitar, a large computer screen, several

backpacks, and a set of speakers. 03/03/15 RP 150-54; 03/04/15 RP 92; Exs. 9-F, 9-G, 9-M. The size and amount of stolen property in the backyard raised a reasonable inference that two men carried the stolen property out of the house. It was simply too much property for one man to carry out of the house on his own.

There was also a trail of stolen property leading from the back door of the house to the tool shed in the southeast corner of the backyard—the same direction that Johnson fled. This property included a pearl necklace, a black bag, and a set of speakers that had been stolen from inside the home. 03/03/15 RP 155-59; 03/10/2015 RP 22-24, 40-43; Exs. 9-B, 9-C, 9-N, 9-O, 10-C, 10-N, 10-O, 10-P. This property could not have been carried by Williams, who was arrested on the front, south side of the house, and it could not have been carried by Maxwell, who was arrested in the opposite (northeast) corner of the backyard. 03/04/15 RP 8-9, 69. The only reasonable inference from this evidence is that Johnson carried the stolen property out of the house, dropping it as he fled through the backyard. Taken together, the amount, size, and location of the recovered stolen property proved that Johnson unlawfully entered and stole property from inside Francis and Cuthebert's home.

b. The Evidence, Including Johnson's Own Testimony, Proved That Johnson Was An Accomplice To The Burglary.

Aside from ample evidence that Johnson was an active participant in the residential burglary, a reasonable jury could also have found Johnson guilty as an accomplice. It is undisputed that Johnson's friends, Maxwell and Williams, committed a burglary of Francis and Cuthebert's home. The jury was properly instructed that a person is legally accountable as an accomplice to a crime "if, with knowledge that it will promote or facilitate the commission of the crime, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime." CP 64; RCW 9A.08.020(1)-(3). The jury was also properly instructed that, although "mere presence and knowledge" is insufficient to establish that a person is an accomplice, a person aids in the commission of a crime by being "present at the scene and ready to assist by his or her presence." CP 64; WPIC 10.51.

In this case, there was proof beyond a reasonable doubt that Johnson acted with knowledge that he was promoting or facilitating the crime of residential burglary, and that he helped his friends plan and commit the burglary. During cross-examination, Johnson admitted that he and his friends discussed the burglary and that he specifically agreed to

commit the burglary with them. 03/10/2015 RP 49-50, 94-95, 97-98. He admitted that he rode a bus to a specific house around 1:30 a.m., still intending to commit the burglary. 03/10/2015 RP 50-51, 94, 96. He admitted that he put a pair of purple latex gloves on his hands once he arrived at the victims' house. 03/10/2015 RP 95-96, 98. He admitted walking into the backyard of that house with his friends. 03/10/2015 RP 51-52, 98. He admitted that he did not call police to report the burglary, and he did not try to stop his friends from committing the crime.² 03/10/2015 96-99. He admitted that he ran from police when they arrived. 03/10/2015 100-01.

These facts alone provided sufficient evidence for a reasonable jury to conclude that Johnson both encouraged and aided the commission of this burglary. At a bare minimum, the evidence proved beyond a reasonable doubt that Johnson was not only present at the scene, but that he was also ready to assist the burglary with his presence. The evidence further established that, before the three men even arrived at the house, Johnson agreed to aid in the commission of the burglary and never

² Because Johnson claimed that he simply stood by while his friends committed the residential burglary, his testimony was insufficient as a matter of law to establish that he terminated his complicity prior to the commission of the crime, either by giving timely warning to law enforcement authorities or by making a good faith effort to prevent the commission of the crime. See RCW 9A.08.020(5) (establishing that a person may terminate his liability as an accomplice if he gives "timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime").

affirmatively acted to terminate his complicity prior to the commission of the crime.

c. The Jury Properly Rejected Johnson's Testimony That He Did Not Commit The Burglary Because His Claim Was Not Credible.

Johnson testified that he intended to commit the burglary but abruptly changed his mind, waiting in the backyard while his friends went inside the house to commit the burglary without him. His testimony is the foundation of his argument on appeal and comprises most of the facts asserted in his appellate brief. Appellant's Opening Br. at 2-6. But Johnson's argument ignores the fact that the jury did not find Johnson's explanation credible. The jury is the sole judge of the credibility of the witnesses in the case, and the appellate court defers to the jury's credibility determinations and resolution of conflicting testimony. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

There were ample reasons for the jury to discredit Johnson's testimony that he was merely present at the scene and did not assist with the burglary. First, Johnson's testimony that he never went inside the house was inconsistent with a prior statement that he made to Seattle Police detectives. In that statement, Johnson admitted that he went inside the house with his friends and helped them commit the burglary.

03/10/2015 RP 126-28, 131-32. The State successfully impeached Johnson with that prior statement during cross-examination. 03/10/2015 RP 126-28, 131-32.

Second, Johnson's testimony was inconsistent with other evidence in the case. Specifically, Johnson claimed that he saw Williams walk out the back door of the house. 03/10/2015 RP 99-100. His testimony conflicted with Officer Wilkes' and Officer Belgarde's credible testimony that Williams was arrested while climbing out of a window. 03/04/15 RP 69, 91. Johnson also testified that he saw his friends exit the back door of the house carrying a computer screen, a keyboard, three bags, and a set of speakers. 03/10/15 RP 99. He was unable to account for the guitar that was also found in the backyard, stolen from the basement of the house. 03/10/15 RP 24, 39, 42, 99.

Third, Johnson's explanation was not credible on its face. It does not make sense that Johnson, after discussing the burglary with his friends, riding a bus to a specific house to commit the burglary, and putting on a pair of latex gloves, would suddenly realize that he and his friends did not have a car to carry all the stolen property. The jury properly weighed and rejected his testimony in the context of all the other evidence in the case.

2. THE COURT SHOULD AWARD COSTS TO THE STATE AS THE SUBSTANTIALLY PREVAILING PARTY ON APPEAL BECAUSE THERE IS INSUFFICIENT EVIDENCE THAT JOHNSON WILL BE UNABLE TO PAY COSTS IN THE FUTURE.

RAP 14.2 states that “[a] commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.” The State agrees that RCW 10.73.160(1) grants the appellate court discretion to determine whether appellate costs should be awarded.

The trial court did not make any specific findings regarding the appellant’s present and future ability to pay legal financial obligations. The court’s determination of indigency was based primarily on the fact that the defendant was incarcerated at the time of sentencing, CP 112-14. He has since been released from custody after serving his 17-month sentence. There is insufficient evidence in the record regarding the defendant’s financial situation to make a determination that he will be unable to pay costs at any time in the future.

D. CONCLUSION

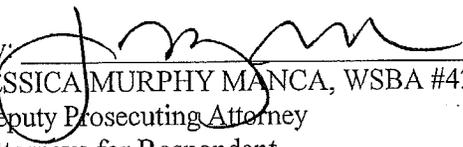
The evidence proved beyond a reasonable doubt that Johnson and his friends agreed to commit a residential burglary and that they all participated in the burglary together. When police interrupted the burglary,

Johnson fled from police, dropping a significant amount of stolen property along the way. He then resisted arrest in a manner that was dangerous to everyone involved. For the foregoing reasons, the Court should affirm Johnson's residential burglary conviction and award costs to the State as the substantially prevailing party on appeal.

DATED this 29th day of April, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

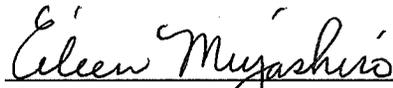
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Maureen Cyr, the attorney for the appellant, at Maureen@washapp.org, containing a copy of the Brief of Respondent, in State v. Giljon Lee-Sean Johnson, Cause No. 73296-0, 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.

Dated this 29th day of April, 2016.



Name:

Done in Seattle, Washington