

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 29097-2-III

Respondent,

)

)

) **Division Three**

v.

)

)

DAVID WAYNE HARRELL, JR.,

) **UNPUBLISHED OPINION**

)

Appellant.

)

)

Kulik, C.J. — David Wayne Harrell, Jr., appeals his conviction for residential burglary, contending that the court improperly admitted evidence of coconspirator statements under ER 801(d)(2)(v) even though he was not a coconspirator. Alternatively, he argues that the court should not have admitted the statements under ER 801(d)(2)(v) because the conspiracy had already ended. Neither argument is persuasive. To admit Mr. Harrell’s statements only a slight connection to the conspiracy is required. The testimony and admissions by Mr. Harrell and his mother support the conspiracy and its continuation. Accordingly, we affirm the conviction.

FACTS

David Harrell's mother, Sheila Miller, lived with and worked as a caregiver for Mary Miller in Mary's¹ home. Sheila was married to Mary's son, Kevin Miller. Mary died on February 1, 2009. At that time, Kevin was incarcerated at Airway Heights Correctional Center. Mary drafted two wills—a 1997 will left Kevin a substantial portion of the estate. Mary's 2006 will partially disinherited him. Mary's great-niece, Kelly Korpinen, and her friend, Karen Kagele, were appointed copersonal representatives of Mary's estate.

On February 17, 2009, Sheila and Kevin had two telephone conversations about the possibility of obtaining the wills from Mary's house in order to contest the validity of the 2006 will. These conversations were captured on the Airway Heights Correctional Center's recording system. Sheila and Kevin agreed that Sheila would break in and retrieve the wills. Sheila told Kevin that she would break into the house as soon as possible. And Sheila told Kevin that she would gain entry by going through the window to the back bedroom.

Sheila asked Erin Cassiano and Chelsea Lopez for a ride to Mary's house to pick

¹ For the sake of clarity, this opinion will refer to the parties by their first names. No disrespect to the parties is intended.

up some papers. David Harrell accompanied them. When they arrived, Sheila asked Mr. Harrell to go with her, and they both got out of the car. After entering Mary's house through the side window, Sheila asked Mr. Harrell to help find an envelope. After Mr. Harrell pointed to one in the kitchen, Sheila grabbed it and said, "'Let's go.'" Report of Proceedings (RP) at 250. Mr. Harrell stated that he did not know what was in the envelope.

When they returned, Sheila was carrying some papers. Mr. Harrell claims that he did not know Sheila had moved out of Mary's house or that Mary had died. He asserted that Sheila told him that they were there to pick up some of her belongings.

On February 18, Kevin telephoned Sheila again. Sheila stated that (1) during the night she and Mr. Harrell had gone to Mary's house and broken in, (2) Mr. Harrell had helped her look through Mary's things, and (3) they found and removed the 1997 will. The remainder of the conversation discussed strategizing about how to proceed with the 1997 will.

When Ms. Korpinen and Ms. Kagele returned to Mary's house, they discovered that Mary's house had been entered. They called the police and reported a folder missing from the kitchen. They were the only persons who had permission to be in the house. Deputy Jeff Lane then subpoenaed Kevin's recorded telephone conversations, referencing

the items taken from Mary's house.

Deputy Lane obtained a search warrant for Sheila's house. The officers found the missing files in the house, along with other items from Mary's house. When Mr. Harrell arrived and was told that the officers were looking for stolen property, Mr. Harrell blurted, "What? The stuff from the lady's dead [sic] house?" RP at 133. He stated that Sheila had nothing to do with the stolen property.

Later, Mr. Harrell told Deputy Lane that he had gone to the house with Sheila and two friends. Mr. Harrell admitted that he entered the house through the back window. Deputy Lane stated that Mr. Harrell said they were going to look for the will. This statement was made more than one month after the date of entry into the house. Mr. Harrell denied that he told Deputy Lane that they had gone to Mary's house to get the will; he said they had gone to get Sheila's belongings. In a separate interview, Sheila admitted going to the house with Mr. Harrell, gaining entry to the back bedroom, and taking items from the house. She claimed that Mr. Harrell did not physically enter the house.

The State charged Mr. Harrell with one count of residential burglary. The court admitted recorded conversations between Sheila and Kevin as statements of coconspirators under ER 801(d)(2)(v). The court found that there was a conspiracy and

that there was more than a slight connection to Mr. Harrell. The jury then found Mr. Harrell guilty of residential burglary. Mr. Harrell appeals.

ANALYSIS

We review the trial court's interpretation of the rules of evidence de novo and the application to the facts of the case for an abuse of discretion. *State v. Sanchez-Guillen*, 135 Wn. App. 636, 642, 145 P.3d 406 (2006). To prove a conspiracy, it is not necessary to show a formal agreement; a conspiracy may be proven by the acts, declarations, and conduct of the conspirators. *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669 (1997) (quoting *State v. McGonigle*, 144 Wash. 252, 260, 258 P. 16 (1927)). Further, circumstantial evidence is enough to prove a conspiracy. *Id.*

Before admitting coconspirator statements, the trial court must first find "with substantial independent evidence, a prima facie case of conspiracy." *State v. St. Pierre*, 111 Wn.2d 105, 118, 759 P.2d 383 (1988). It is sufficient to show that there was a concert of action in which the parties worked together understandingly with a single design for the accomplishment of a common purpose. *Sanchez-Guillen*, 135 Wn. App. at 643 (quoting *Barnes*, 85 Wn. App. at 664). The evidence of the conspiracy must be independent of the statements themselves. *State v. Guloy*, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985).

Mr. Harrell claims that there is no evidence that he knew about the conspiracy or knowingly participated in it. But he admitted to Deputy Lane that he went to Mary's house to take the will. He claims that Sheila lied to him about the reason for entering the house and, therefore, it was her conspiracy with Kevin only. Considering all the evidence together, Mr. Harrell knew that the goal of the trip to Mary's house was to break in and take the will. To admit Mr. Harrell's statement, only a slight connection to the conspiracy is required. Mr. Harrell's statements to Deputy Lane and Sheila's statements to Kevin support the trial court's finding of a conspiracy. The court did not abuse its discretion.

Mr. Harrell next contends that the court erred by admitting the statements made by Sheila to Kevin about the status of the conspiracy. Mr. Harrell is correct that statements made merely to conceal a completed conspiracy are not admissible. *See Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949); *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970). Here, Sheila telephoned Kevin within 13 hours of the burglary and was not attempting to conceal the conspiracy. Rather, the purpose of the telephone call was to inform Kevin about the progress of the burglary. She described Mr. Harrell's involvement in the burglary and what items they took from the house. Kevin's main objective was to use the will for his personal gain. He could not

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do so until he knew the will was in Sheila's possession. Therefore, at the time of the February 18 telephone call, the conspiracy was ongoing. And Sheila informed Kevin of Mr. Harrell's involvement in furtherance of the conspiracy. Thus, the trial court did not abuse its discretion by admitting the coconspirator statements between Sheila and Kevin.

We affirm the conviction for residential burglary.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Korsmo, J.