NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

S.L.W.,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D18-3546
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Opinion filed January 17, 2020.

Appeal from the Circuit Court for Lee County; Geoffrey H. Gentile and Robert Branning, Judges.

Howard L. Dimmig, II, Public Defender, and Carly J. Robbins-Gilbert, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Peter Koclanes, Assistant Attorney General, Tampa, for Appellee.

SILBERMAN, Judge.

S.L.W., a juvenile, seeks review of an order adjudicating him delinquent and finding that he committed burglary of a dwelling, grand theft, and burglary with assault or battery. S.L.W. challenges the sufficiency of the evidence presented to

support the burglary of a dwelling and grand theft charges. Because the evidence established nothing more than S.L.W.'s mere presence near the scene of the burglary in the company of another person who was in possession of the stolen item, it was insufficient to establish that S.L.W. either committed or aided in the commission of these crimes.

The burglary of a dwelling and grand theft charges were based on the State's theory that S.L.W. entered a carport and stole a bicycle. The burglary with assault or battery charge was based on the theory that S.L.W. reached into the owner's truck during a scuffle that occurred when the owner subsequently confronted him. S.L.W. does not challenge the adjudication of delinquency for burglary with assault or battery, and we affirm that portion of the order on appeal without further comment.

This court reviews the denial of a motion for judgment of dismissal de novo. A.D.P. v. State, 223 So. 3d 428, 430 (Fla. 2d DCA 2017). In conducting this review, we construe the evidence in the light most favorable to the State. Id. Burglary is defined as "[e]ntering a dwelling,[1] a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter." § 810.02(1)(b)(1), Fla. Stat. (2017). "A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently . . .

[1]" 'Dwelling' means a building or conveyance of any kind, including any attached porch . . . which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof." § 810.011(2), Fla. Stat. (2017).

[d]eprive the other person of a right to the property or a benefit from the property." § 812.014(1)(a), Fla. Stat. (2017).

At the adjudicatory hearing, Kenneth Sheppard testified that he saw three juveniles walking down the street on the morning of the crime. One of the juveniles was straddling a bicycle. The bicycle looked like one belonging to Sheppard's daughter, who lived across the street about fifty feet from where the boys were walking. So Sheppard went to check her carport for it.

After Sheppard confirmed that the bike was missing, Sheppard's son-in-law, Jeffrey Romanoff, drove up in his truck. Romanoff had left for work about forty minutes earlier but returned home to retrieve his cell phone. Sheppard told Romanoff that he had just seen some juveniles walking down the street with his wife's bike. Romanoff caught up with the juveniles and confronted them. The juvenile on the bike, L.C., abandoned it and took off. Romanoff demanded that the two remaining juveniles, one of whom was S.L.W., provide their names and the name of the third boy. They refused. Romanoff put the bike in his truck, and the juveniles took off.

Romanoff drove to a nearby high school seeking information. On his way home, he again encountered the three juveniles. He got out of his truck and started taking photos of the boys with his cell phone. There was a scuffle, Romanoff fled to his truck, and the boys reached into the truck and tried to pull him out. Romanoff was able to fend off the boys and return home. The police located the juveniles shortly thereafter, and Romanoff and Sheppard confirmed their identify when the police took them to view the juveniles in a show-up. Post-Miranda, S.L.W. denied that he was present when the bike was stolen.

S.L.W. argues that the State's evidence was insufficient to establish that he entered the carport, as required for the burglary charge, or that he knowingly obtained or used the bike, as required for the theft charge. We agree. The facts, even when taken in the light most favorable to the State, only established S.L.W.'s presence near the scene of the crime in the company of another person who was in possession of the stolen bike.

Because the State presented no evidence that S.L.W. actually entered the carport, his conviction for burglary could only be based on a principals theory. A person is guilty as a principal if he was a participant in a common scheme to commit the crime. A.D. v. State, 106 So. 3d 67, 71 (Fla. 2d DCA 2013). "An aider and abettor 'must have a conscious intent that the crime be done and must do some act or say some word which was intended to and does incite, cause, encourage, assist or advise another person to actually commit the crime.' " Id. (quoting R.J.K. v. State, 928 So. 2d 499, 503 (Fla. 2d DCA 2006)). "Mere presence at the scene of the crime, knowledge of the crime, and even flight from the scene are insufficient to show that a defendant was an aider and abettor." Id.

The facts of this case are analogous to those in T.W. v. State, 98 So. 3d 238 (Fla. 4th DCA 2012). In T.W., a police officer was patrolling a neighborhood after midnight when he came upon two or three juveniles in and near an SUV. Id. at 240. One of the juveniles was inside the vehicle, and T.W. was standing next to the passenger door with a shocked look on his face. When the officer stopped, the juveniles took off. A police dog found T.W. in a nearby backyard and detained T.W. by

biting his leg. T.W. viciously punched and kicked the dog until the K9 officer intervened. Id. at 240-41.

The Fourth District found that the evidence was insufficient to establish that T.W. was a principal to burglary. Id. at 242. The court explained that the State failed to present any evidence that T.W. did anything to encourage or aid in commission of the burglary. While T.W.'s flight from the police was suspicious, it did not establish his participation in the burglary. Id.; see also K.B. v. State, 170 So. 3d 121, 123 (Fla. 2d DCA 2015); G.C. v. State, 407 So. 2d 639, 640 (Fla. 3d DCA 1981).

In this case, S.L.W. was seen walking down the street fifty feet away from the burgled carport almost forty minutes after Romanoff left his house. As in T.W., there was evidence that S.L.W.'s companion committed a burglary. However, there was no evidence that S.L.W. did anything to encourage or aid in the commission of the burglary or the theft of the bike. Indeed, there was no evidence that S.L.W. even knew that the bike was stolen. While S.L.W.'s subsequent actions in refusing to provide his name and battering his accuser were imprudent, these actions did not establish his participation in the burglary or the bike theft.

Therefore, the evidence was insufficient to establish a prima facie case of burglary of a dwelling or grand theft, and we reverse the adjudication of delinquency for those crimes. We affirm the adjudication of delinquency for burglary with an assault or battery but reverse the disposition and remand for a new disposition hearing. See T.W., 98 So. 3d at 243.

Affirmed in part, reversed in part, and remanded.

BADALAMENTI and SMITH, JJ., Concur.