IN THE COURT OF APPEALS OF IOWA

No. 2-572 / 11-1741
Filed October 3, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIKA NINO-ESTRADA,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Steven J. Andreasen, Judge.

Erika Nino-Estrada appeals her conviction of burglary in the first degree. **REVERSED.**

Priscilla E. Forsyth, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Patrick Jennings, County Attorney, and Mark Campbell, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

Erika Nino-Estrada appeals the judgment and sentence following a jury verdict finding her guilty of burglary in the first degree, in violation of Iowa Code section 713.1 and 713.3(1)(b) (2011). She contends the district court erred in denying her motion for judgment of acquittal and motion for new trial, as well as allowing the State to introduce gang-related evidence. Because we find the evidence of aiding and abetting presented during the State's case in chief was too weak to survive the defense motion for judgment of acquittal, we reverse the conviction.

I. Background facts and proceedings

The jury could have found the following facts from the prosecution's case: On June 7, 2011, Julia Guerra was visiting her grandmother in Sioux City when she saw two young men she knew as Erika Nino-Estrada's brothers emerge from an alley onto Summit Street. The brothers were accompanied by two young women and were carrying a baseball bat and rocks. The defendant was not with them. A third man, armed with a screwdriver or a knife, soon joined the group. Guerra recalled the older brother, Juan, asking the younger brother, Enrique, "Is this where it happened?" and Enrique replied: "Yes, it's the house."

Family members—including a mother, stepfather, two children, and a baby—were sitting on the front porch of that house at 1316 Summit Street. Guerra recalled that the Nino brothers' group stormed the porch as the family members tried to retreat inside their house. Some of the intruders threw rocks through the front door. One of the occupants was injured when a rock struck his wrist. The mother ran to her truck and yelled to the intruders: "We are calling the

cops." When they heard the police were called, "they all scattered and took off running."

Guerra noticed Erika Nino-Estrada "coming down the street on the sidewalk" at the same time the older brother was walking up the steps of 1316 Summit Street. The defendant, who had taken a different route from her house than Enrique, "was walking like she was at a fast pace, like she was trying to get to help her brothers." The defendant stopped on the sidewalk, near a retaining wall in front of the house next door to 1316 Summit Street. The wall was several feet to the left of the victims' front porch.

Guerra saw Nino-Estrada holding something in her hand. The witness described the defendant's action: "As the mother was in the truck, like I said, she was driving off to chase them away, Ericka turned around, lifted up her hand like she was going to throw it, and then she just shook her head and put her hand back down and didn't throw it." Nino-Estrada then turned and walked away from the scene.

Sioux City Police Officer Nathan West responded to the family's 911 calls and stopped Nino-Estrada as she walked away from the area of the disturbance. The officer described her as "very belligerent" and "very upset." When she refused to get into the back of his squad car, he arrested her. Officer West testified the residents of 1316 Summit Street identified Nino-Estrada as one of the people who were "present at the house." When Officer William Nice asked the defendant "what happened down the street"; she responded "she didn't have anything to do with that, she didn't know what [he] was talking about." After Officer Nice placed her in handcuffs and read her the Miranda rights, Nino-

Estrada told him "she had followed her brother down to that location. She knew there was going to be a fight, and she was down there to have her brother's back."

The jury heard the following information during the defense case: Nino-Estrada was at her home—which was three or four blocks from 1316 Summit Street—when she received a call from her younger brother, Enrique. He told her he had "gotten jumped." When Enrique showed up at their house he "was hurt and mad, real mad." Nino-Estrada was worried her brother would act in retaliation. Four or five minutes before Enrique left the house, Nino-Estrada decided she was going to follow him. Nino-Estrada lost sight of Enrique when he left the house, walking through the alley. When she set out after him, she took the sidewalk toward 1316 Summit Street. She testified: "I showed up when everybody was, like, running."

She recalled yelling to her little brother: "What are you doing? Get out of here. What's going on?" She also warned Enrique: "What are you doing? The police are coming." She didn't believe her warning made any difference: "But he wasn't listening to me. Nobody was."

On June 10, 2011, the State filed a trial information charging Erika Nino-Estrada with criminal gang participation, a class "D" felony, in violation of Iowa Code section 723A.2, and burglary in the first degree, a class "B" felony, in violation of Iowa Code sections 713.1 and 713.3(1)(b). On September 30, 2011, the State filed a trial brief addressing the concept of aiding and abetting, and indicating its intent to offer expert testimony regarding four other individuals' convictions of violent crimes related to the Westside Locos gang. On the aiding

and abetting issue, the State cited a turn-of-the-century case holding "the defendant's presence may alone, under some circumstances, bring him within the rule of the statute." *See State v. Dunn*, 89 N.W. 984, 987 (Iowa 1902).

Nino-Estrada responded by filing various motions in limine to preclude the admission of the gang-related evidence. After a hearing on the matter, the district court weighed the inherent prejudicial effect of such evidence against the State's need to prove the charge of criminal gang participation. The court ruled the testimony was admissible so long as the expert was qualified and used these convictions as a basis for his opinion under Iowa Rule of Evidence 5.703.

The jury trial commenced on October 4, 2011. After the State rested its case, the defense moved for judgment of acquittal on both offenses. On the burglary count, defense counsel argued: "[T]he State has failed to prove the element of prior knowledge or encouraging the activity that would have been required under the aiding and abetting theory for burglary first." The State resisted and referenced the argument in its trial brief.

The district court reserved ruling on the motion for judgment of acquittal at the close of the State's case and again when the defense renewed the motion after presenting its own evidence. *See* Iowa R. Crim. P. 2.19(8)(b) (allowing court to reserve decision on a motion for judgment of acquittal made at the close of all the evidence and submit the case to the jury). The jury found Nino-Estrada guilty of burglary in the first degree, but not guilty of criminal gang participation. The district court denied her posttrial motion for judgment of acquittal, motion for new trial, and motion in arrest of judgment.

The court sentenced Nino-Estrada to a term of incarceration not to exceed twenty-five years. She now appeals.

II. Sufficiency of the evidence

Nino-Estrada contends the district court erred in denying her motion for judgment of acquittal. "A motion for judgment of acquittal is a means of challenging the sufficiency of the evidence, and we review such claims for correction of errors at law." *State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). In determining whether the district court should have granted the motion for judgment of acquittal, it is not our job to resolve conflicts in the record, pass upon the credibility of witnesses, or weigh the evidence. *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006). Those functions rest with the jurors. *Id.* Instead, we decide if the evidence could persuade a rational jury that the defendant was guilty beyond a reasonable doubt. *Id.* We "view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record." *Serrato*, 787 N.W.2d at 465. But "[e]vidence that raises only a suspicion or generates only speculation is not substantial." *Hutchinson*, 721 N.W.2d at 780.

The State prosecuted Nino-Estrada under a theory of aiding and abetting. To convict Nino-Estrada of first-degree burglary, the State was required to prove the following elements:

> 1. On or about the 7th day of June, 2011, Erika Nino-Estada aided and abetted a person who:
>
> a. Broke into 1316 Summit Street in Sioux City, Iowa. . . . [or]
>
> b. Entered 1316 Summit Street in Sioux City, Iowa. . . .
>
> 2. 1316 Summit Street was an occupied structure. . . .

> 3. One or more people were present in 1316 Summit Street.
>
> 4. The person Ericka Nino-Estrada aided and abetted did not have permission or authority to break into or enter 1316 Summit Street.
>
> 5. 1316 Summit Street was not open to the public.
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> 6. Ericka Nino-Estrada knew that the person she aided and abetted had the specific intent to commit an assault. . . .
>
> 7. During the incident, the person Ericka Nino-Estrada aided and abetted either:
>
> a. Possessed a dangerous weapon, or
>
> b. Intentionally or recklessly inflicted bodily injury on another person.

In addition to the marshalling instruction, the court provided the jury with the following definition:

> "Aid and Abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Participation can be inferred from circumstantial evidence, including presence, companionship, and conduct before and after the offense is committed. However, mere nearness to or presence at the scene of the crime without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting." The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part she has in it, and does not depend upon the degree of another person's guilt.

At trial, Nino-Estrada did not contest the State's proof that a burglary occurred. Instead, her motion for judgment of acquittal challenged whether the State offered substantial evidence showing she knowingly advised or encouraged the principals' actions.

The district court reserved ruling on the motion for judgment of acquittal after the State's case and again at the close of all evidence. Following the jury's guilty verdict, the court denied Nino-Estrada's motion for judgment of acquittal:

> [B]ased upon the evidence submitted, the jury could have concluded that Ms. Nino-Estrada took actions in addition to being simply present at the scene of the incident; in particular, her statements to the officer that she was there to have her brother's back; evidence that she had, at one point in time, raised her hand, appearing to be preparing to throw something, although she did not throw anything . . . that action of raising her hand, the jury could conclude gave some support for her brother and the others involved that there was somebody there to assist them.

The district court also highlighted Nino-Estrada's testimony that "she alerted those involved with the actual assault that the police were on their way."

On appeal, Nino-Estrada emphasizes that any intent she may have had to help her brother commit the burglary never came to fruition because she arrived at the scene too late. She argues no witness testified she did anything to encourage the attack before or during its commission.

The State's appellate argument acknowledges that while Nino-Estrada followed her brother to the scene "prepared to actively assist and encourage in the assault and burglary," her involvement was "cut short." The State does not identify any conduct by Nino-Estrada that actually encouraged the burglary before or during its commission.

We find the district court erred in not granting Nino-Estrada's motion after the State's case in chief. *See* Iowa R. Crim. P. 2.19(8)(a) (stating the court "shall order the entry of judgment of acquittal" after the evidence on either side is closed "if the evidence is insufficient to sustain a conviction"). The evidence offered by the State's witnesses—even uncontested—was not substantial enough to generate a jury question on aiding and abetting.

Our courts have long held that a defendant's "mere presence" at the scene of the crime is insufficient to prove aiding and abetting. *See State v. Wolf*,

84 N.W. 536, 538 (Iowa 1900) ("It has never been held, so far as we are advised, that mere presence at the scene of crime constitutes aiding and abetting. Indeed, it is elementary that such is not the case. Nor is it sufficient, in addition thereto, that the person present mentally approves what is done."); *accord State v. Daves*, 144 N.W.2d 879, 881 (Iowa 1966).

In this case, the defendant was not even present during commission of the burglary. By the time Nino-Estrada reached the sidewalk outside the Summit Street house, her brothers' unauthorized entry into an occupied structure with the intent to commit an assault was already completed. One of the victims yelled that she was "calling the cops," and the perpetrators fled.

So what conduct did the defendant encourage before or at the time of its commission? The district court identified three acts: (1) Nino-Estrada's admission she went to the scene to have her brother's back; (2) her aborted throwing motion, and (3) her shouts to Enrique that the police were coming. We disagree that this evidence was sufficient to create a jury question.

First, Nino-Estrada's statement to the officer that she followed her brother to "have [his] back" was not relevant if she arrived too late to back him up. *Cf. United States v. Varelli*, 407 F.2d 735, 749 (7th Cir. 1969) (holding defendant's presence must aid, encourage, or incite the principal to commit the crime; defendant who entered scheme after theft was complete was too late to be aiding and abetting). Whether she mentally approved of Enrique's efforts to exact revenge for being jumped or aimed to prevent him from getting into trouble, her uncommunicated and unfulfilled purpose in following him did not constitute aiding and abetting.

Second, even viewed in the light most favorable to the State, Nino-Estrada's act of cocking back her arm as if to throw something, and then thinking the better of it, cannot be said to have lent countenance to the first-degree burglary. According to Guerra's testimony, Nino-Estrada's throwing motion came as the participants in the burglary were fleeing in response to the victims' calling the police. Her small gesture did not encourage the crime before or during its commission.

Third, the district court pointed to Nino-Estrada's testimony that she alerted Enrique to the approach of the police. Acting as a lookout has been recognized as a way to aid and abet the principals in a burglary. *See State v. Berger*, 96 N.W. 1094, 1095 (Iowa 1903). But the evidence does not support the conclusion that Nino-Estrada filled the role of a lookout. She testified she told her little brother: "What are you doing? The police are coming." But by the time she made these statements, Enrique and his confederates were already fleeing the house, knowing the victims had called the police. As Nino-Estrada further testified: "[H]e wasn't listening to me. Nobody was."

More critically, the evidence that Nino-Estrada tried to warn her brother came only from her testimony. The State did not present any similar evidence as part of its case in chief. When the defendant first moved for judgment of acquittal, that evidence was not before the district court. Some jurisdictions recognize a waiver rule that provides:

> [W]hen a motion for [a judgment of] acquittal at the close of the state's case is denied, a defendant may not secure appellate review of the trial court's ruling without [forgoing] the right to put on evidence in his or her own behalf. The defendant's sole remedy is to remain silent and, if convicted, to seek reversal of the conviction

> because of insufficiency of the state's evidence. If the defendant elects to introduce evidence, the appellate review encompasses the evidence in toto.

State v. Perkins, 856 A.2d 917, 923 (Conn. 2004) (alterations in original).

We find no Iowa precedent that would allow us to consider evidence presented in the defense case to supply missing elements necessary for the State to carry its burden of proof. *See id.* at 932 n.23 (collecting cases on so-called "waiver rule" and not including Iowa among either the thirty-one states following the waiver rule nor among the seven states rejecting it). Under rule 2.19(8)(a), the district court must grant a motion for judgment of acquittal at the close of the State's case in chief if the evidence is insufficient to sustain a conviction. If the district court does not grant the defense motion at the close of the State's case, the rule allows the defendant to "offer evidence without having waived the right to rely on such motion." *See* Iowa R. Crim. P. 2.19(8)(a). At least one state supreme court has rejected the waiver doctrine based on similar language in its rule of criminal procedure. *State v. Pennington*, 534 So. 2d 393, 395–96 (Fla. 1988). We do not believe Nino-Estrada waived her insufficiency argument by electing to testify on her own behalf.

Without Nino-Estrada's testimony describing how she tried to warn her brother the police were coming, the State's evidence of her late arrival at the scene is clearly insufficient to prove aiding and abetting. Even if we could consider the defense case when deciding if the evidence was substantial, no rational trier of fact could find Nino-Estrada's conduct as a whole encouraged the burglary before or during its commission.

We reverse but do not remand because the defendant was entitled to a judgment of acquittal and therefore cannot be tried again on the burglary charge. *See State v. White*, 319 N.W.2d 213, 216 (Iowa 1982). Accordingly, it is unnecessary to address the admissibility of evidence concerning criminal gang activity.

REVERSED.

Bower, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

While I appreciate the majority's view that the evidence fell short of "sufficient to sustain the conviction," I must respectfully dissent. To reverse, we necessarily must conclude two things: (1) the jury did not adequately carry out its function and (2) the district court erred in denying the motion for judgment of acquittal and motion for new trial. The majority reaches this conclusion, despite being disadvantaged by not sitting in the courtroom as the district court judge and the jury were, but rather reviewing the transcript and exhibits to see how the evidence stacks up from a cold record.

In my view, the rational trier of fact, the jury, properly carried out its function of sorting out the evidence and placing credibility where it belonged when it found Nino-Estrada aided and abetted her brother(s) in the burglary that took place on June 7, 2011.

Nino-Estrada admittedly had a history of involvement with the Westside Locos, including knowledge of its propensity to assault rival gang members, especially in violent retaliatory acts. She knew her younger brother was "hurt and mad, real mad" after returning home from being "jumped." I find it significant that there was a mere twenty-one minutes in between Nino-Estrada's brother signing a statement releasing the Sioux City Police Department from any further investigatory responsibility over the initial assault committed on him and when the 911 call was placed for the retaliatory burglary. Officer William Nice Jr. testified, "[Nino-Estrada] told me that she had followed her brother down to that location. She knew there was going to be a fight, and she was down there to

have her brother's back." It was up to the jury to determine what Nino-Estrada meant by "having her brother's back." Then, eye-witness Julia Guerra testified,

> To me she was walking like she was at a fast pace, like she was trying to get to help her brothers. They are her brothers, so there was no doubt she wanted to have their back, so she is going to get over there and come to, like—not really come to the rescue but come help them whatever, if they needed help with anything.

This testimony came in with no objection.

Guerra further testified, "by the time [Nino-Estrada] actually got there, that's when they were getting ready to take off when the mom yelled, 'We called the cops. We are calling the cops.'" Guerra testified Nino-Estrada was standing on the sidewalk between 1316 Summit and the neighboring house. State's exhibit 8 is a photograph taken from the street, showing the two houses and the sidewalk. The houses are only a few feet apart, and the sidewalk where Nino-Estrada was standing abutted the stairs leading up to the front door of the 1316 Summit house. Had she thrown the object she held in her raised hand, the jury could have concluded that she was within easy striking distance of the target.

Officer Nice testified that immediately following the burglary Nino-Estrada told him that she knew there was going to be a fight and that she followed her brother to "have [his] back." However, she did not trail him. Her brother went down the alley and she took a different route—the front sidewalk—yet ended up at the same destination. The jury could have found her arrival from a different direction was consistent with the primary attackers' intent to ambush from multiple locations. She also yelled at her younger brother, warning him the police were coming, and then immediately following the incident, she denied any

participation in the attack to Officer Nice, claiming she was merely there to observe.

I acknowledge her mere presence at the scene of the burglary is not sufficient to support the conviction. *See State v*. *Lewis*, 514 N.W.2d 63, 66 (Iowa 1994) ("[N]either knowledge nor proximity to the scene is—standing alone—enough to prove aiding and abetting."). However, in this case, the jury must have found Nino-Estrada had more than mere knowledge and proximity—she was prepared to assist, "to have her brother's back." Moreover, she was armed, similarly to the principal attackers, with something to throw in her hand, and her arm was raised in a cocked position.

One of the tasks of the jury was to sort out all the testimony and decide whether Nino-Estrada was merely present at the scene, or by admitting she was there to "have her brother's back" and prepared to throw an object at the targeted area, whether she actually aided and abetted in the melee. "The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive. In fact, the very function of the jury is to sort out the evidence and place credibility where it belongs." *State v*. *Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) (citations omitted). The jury chose to believe the testimony of the unbiased eye witness and the trained officers, and we, as an appellate court, should not second-guess its determination of facts when they are reasonable. Under this record and the instructions given, a rational juror could have found that Nino-Estrada crossed the line from being a mere observer to someone assisting in the commission of the burglary by going to the scene prepared to aid her brother "either by active

participation" or "by knowingly advising or encouraging the act in some way before or when it [was] committed."

I therefore agree with the district court that the record contained sufficient evidence to sustain the burglary conviction, and the court correctly overruled Nino-Estrada's post trial motions.