IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. R.A.Y.,[1] Appellant.	No. 41599-2-II UNPUBLISHED OPINION

Armstrong, J. — R.A.Y., a juvenile, appeals his adjudication of second degree burglary, arguing that the evidence was insufficient to support his conviction. The State charged R.A.Y. with stealing copper pipe from a construction storage area at Gray's Harbor Community Hospital early on the morning of October 18, 2010. R.A.Y. confessed that he was the getaway driver, but the State's evidence showed that someone else was the driver. Nonetheless, because other evidence was sufficient to prove that R.A.Y participated in the burglary, we affirm.

[1] Under RAP 3.4, this court changes the title of the case to the juvenile's initials.

FACTS

In the early morning of October 18, 2010, Aberdeen Police Officer Jeffrey Weiss was working as a security guard for the Gray's Harbor Community Hospital. At about 3:00 a.m., after making rounds, Officer Weiss noticed a suspicious vehicle parked near the construction storage area. The vehicle was not parked there when he passed by earlier, and it fit the description of a vehicle reportedly associated with an earlier theft at the hospital. Officer Weiss ran toward the vehicle as it started up and attempted unsuccessfully to stop it. The officer saw copper pipes attached to the right side of the vehicle and was able to see the driver of the vehicle as it passed him; R.A.Y. was not the driver of the vehicle. Officer Weiss did not notice anyone else in the vehicle. After the vehicle left, Officer Weiss ran to a hillside vantage point where he could see much of Aberdeen and tracked the vehicle as it fled. He relayed this information to other officers.

Officer Weiss reviewed surveillance video tapes that showed someone exiting the vehicle, walking to the corner, outside of the video tape's range, toward the storage area, and then walking into the emergency room. R.A.Y. was not the person on the video tape, and Officer Weiss did not see anyone else exit the vehicle. The person on the video tape walked into the emergency room. As he left, he raised his hand to his face as if talking on a walkie-talkie. The video tape showed other people in the parking lot, but they were not near the vehicle or fenced area, and were not identifiable.

Approximately 10 minutes after Officer Weiss reported the theft, Sergeant Keith Dale located a vehicle that fit Officer Weiss's description at 1700 Bay Street. Copper pipe was tied to

the right side of the vehicle using heavy gauge copper wire. Sergeant Dale and other officers secured the perimeter of the residence. When Officer Weiss arrived, he identified the suspect vehicle. The officers knocked on the door of the residence and announced their presence but no one answered for 15 or 20 minutes. During this time, an officer saw someone inside moving a curtain quickly and looking out the window. Another officer saw what appeared to be two males walk past a sliding glass door; one was wearing red or orange boxer shorts and no shirt.

The officers learned that R.A.Y.'s grandmother owned the vehicle. When contacted, she said that her daughter and son-in-law had the vehicle. An officer called R.A.Y.'s mother, who agreed to come to the door, but explained that it would take a few minutes because she was disabled and needed to use a wheelchair.

R.A.Y's mother did eventually come to the door. When the officers asked if they could speak to R.A.Y., he came to the door. An officer stated, "I guess you know [why] we are here." Report of Proceedings (RP) at 34. R.A.Y. responded, "I was driving. I did it. I was there." RP at 34. R.A.Y. also volunteered that he was the only person involved and he was not willing to say who else was involved. R.A.Y.'s mother also told the officers that R.A.Y. was the driver of the vehicle. The officers located R.A.Y.'s two younger siblings, along with his father in the house, all sleeping.[2] Officers eventually woke R.A.Y.'s father. He was wearing only black and red boxer shorts and acting as though he was under the influence of sleeping medication.

When interrogated the next morning, R.A.Y. said that he did not remember much from the previous evening. He explained that he was drinking that night and blacked out but remembered

[2] It is not clear from the record whether the man found at the house was R.A.Y.'s father or stepfather. R.A.Y. refers to him as his father.

that he was the getaway driver, and that the crime was not his idea. The officer questioning R.A.Y. testified that he did not appear intoxicated and did not smell of alcohol.

At trial, R.A.Y. testified that when the officers came to his home, he lied about driving the vehicle and he lied when interrogated the next morning. He claimed that he was home the night of the theft, never left the house, and was asleep when the police arrived. R.A.Y. explained that he lied to protect his father. He conceded that he knew his father used the vehicle to steal copper because there was copper in the house when he woke up, and his mother told him what she knew. R.A.Y. explained that he invented the drunk-and-blacking-out story because he did not know the details of the crime.

ANALYSIS

I. Sufficiency of the Evidence

We test the sufficiency of the evidence by asking whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We construe the evidence together with all reasonable inferences from it in favor of the State. *Salinas*, 119 Wn.2d at 201. We also defer to the trier of fact to resolve issues of conflicting testimony, credibility of witnesses, and the persuasive force of the evidence. *State v. Raleigh*, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011). We consider circumstantial evidence and direct evidence to be equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The second degree burglary statute reads:

A person is guilty of burglary in the second degree if, with intent to commit a

> crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

Former RCW 9A.52.030(1) (1976). To convict under this statute the State must prove "(1) intent to commit a crime and (2) unlawful entry." *State v. Steinbach*, 101 Wn.2d 460, 462, 679 P.2d 369 (1984).

A defendant may be convicted as an accomplice 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).

Accomplice liability is not an alternate means of committing an offense, anyone who participates in the commission of a crime is guilty as a principal. *State v. McDonald*, 138 Wn.2d 680, 687-88, 981 P.2d 443 (1999). A conviction based only on evidence of accomplice liability when the defendant is not charged as an accomplice does not violate a defendant's constitutional right to be apprised of the nature and cause of the accusation against him. *See State v. Frazier*, 76 Wn.2d 373, 377, 456 P.2d 352 (1969) (jury instruction that aiding and abetting was sufficient to convict was not an unconstitutional variance from allegations in information even though the information only charged the defendant with burglary). Evidence that a defendant was an accomplice is sufficient to sustain a conviction even if that defendant was not charged as an accomplice. *State v. Carothers*, 84 Wn.2d 256, 260, 525 P.2d 731 (1974).

R.A.Y. does not contest that the State proved a burglary at the construction storage area at Gray's Harbor Community Hospital. Rather, he argues that the State failed to prove that he

participated as a principal or an accomplice in the burglary.

R.A.Y. argues that the State presented no direct evidence, aside from his confession, that he was at the scene or that he entered the fenced storage area. The State concedes that the trial court erred in finding that Officer Weiss saw two people in the vehicle that fled from the scene of the crime. Officer Weiss testified that he saw only the driver exit the vehicle and that R.A.Y. was not the driver. And R.A.Y. is correct that the presence of stolen copper at his residence alone is not sufficient to convict him of burglary. *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217 (1982) (defendant's possession of stolen bank cards was insufficient proof of second degree burglary).

The State did not rely solely on the presence of the stolen copper. Officer Weiss testified that the vehicle driver raised his hand to his mouth as if speaking on a walkie-talkie, supporting an inference that another person was participating in the burglary. Further, Officer Weiss testified that the driver of the vehicle was only off camera in the construction area for a few seconds, not enough time to enter the fenced area, take the copper, and attach it to the vehicle. The circumstances at the residence also support an inference that R.A.Y. participated in the burglary. The occupants delayed in answering the door and during the delay, an officer saw two males walk quickly past a window. R.A.Y and his father were the only two adult males in the house. R.A.Y. also confessed, responding to the officer's statement that "you know [why] we are here," with "I was driving[,] I did it[,] I was there." RP at 23, 33-34. R.A.Y.'s mother also told the officers at the door that R.A.Y. had driven the vehicle. And Officer Weiss's testimony that R.A.Y. was not the driver did not obligate the trial court to disregard entirely R.A.Y.'s confession simply because

he misrepresented his actual role in the burglary.

We conclude that there is sufficient evidence to support R.A.Y.'s conviction for burglary in the second degree.

II. Findings of Fact

R.A.Y. contends that the State failed to prove that he committed second degree burglary. He also challenges three findings of fact: (1) that Officer Weiss saw two people in the vehicle fleeing from the scene (finding 3); (2) that the copper pipe was "stolen by the driver and other passenger" (finding 5); and (3) that "officers arrived quickly" at the residence where the suspect's vehicle was located (finding 6). Br. of Appellant at 16-17; Clerk's Papers (CP) at 15.

We review a trial court's challenged factual findings for substantial supporting evidence. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise. *State v. Schlieker*, 115 Wn. App. 264, 269, 62 P.3d 520 (2003).

Substantial evidence does not support the trial court's finding that Officer Weiss saw two people in the suspect's vehicle. Officer Weiss testified that he saw only the driver of the vehicle because that was where he focused his attention. But that does not rule out that another person was in the vehicle. More importantly, it does not undermine the trial court's reasoning that it took two people to commit this burglary. Substantial evidence supports the trial court's finding 6, that "[o]fficers arrived quickly" at the residence where the suspect vehicle was found. Officers arrived at the residence about 10 minutes after Officer Weiss reported the vehicle leaving the scene of the crime.

In conclusion, we hold that the State presented sufficient evidence to prove that R.A.Y. participated in the burglary as either a principal or accomplice. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Penoyar, C.J.

Van Deren, J.