

FILED

APR 19, 2012

**In the Office of the Clerk of Court
WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 29528-1-III

Respondent,

Division Three

v.

GARY ALAN SHAW,

UNPUBLISHED OPINION

Appellant.

Sweeney, J. — Gary Alan Shaw appeals his conviction for second degree burglary as either an accomplice or a principal. We hold that there was sufficient evidence to support the conviction and affirm.

FACTS

An alarm went off at the Benton County Rural Electric Association (REA) yard in Prosser, Washington, at 2:57 am and 40 seconds on August 11, 2010. Police responded by 3:00 am. The facility is located only two blocks from the Prosser Police Station. Several spools of copper wire had been moved from a storage location in the REA yard to a site where a hole had been cut in a fence that enclosed the yard. There were three large

spools, one of which had some wire off of it, and several smaller “hand coils.” Report of Proceedings (RP) at 28-29. The full wire spools are heavy, weighing about 300 pounds. They are difficult to lift but can be rolled by one person. It took an REA employee about 10 minutes to roll the wire spools back to where they were originally stored.

Prosser Police Officer Michael Buck responded to the alarm call. Detective Sergeant Edward Blackburn of the same department met him at the REA yard. They saw two males walking next to the fence. Sergeant Blackburn stopped Roger Engel near a loading dock, cuffed him, and put him in the back of a patrol car. They found a cable cutter in the bed of the truck that Mr. Engel had directed them to.

Benton County Deputy Sheriff Scott Monds also responded. He and Sergeant Blackburn found Gary Shaw hiding under the loading dock near where the officers had seen the two men walking. The dock is adjacent to an alleyway between the fenced Benton County REA yard and a video store; the loading dock is part of the adjacent video store. Sergeant Blackburn then conducted a “sweep” of the REA yard. He found a loose window screen and a foot print on what he described as a “heat exchanger.” RP at 58. He looked at the print, photographed it, and compared it to both Mr. Engel’s shoes and Mr. Shaw’s shoes. The pattern was similar to the pattern of Mr. Shaw’s shoe. He also saw, during his sweep, that copper wire was stacked near where the fence to the yard had

been cut open. Some of the wire had been stacked on a four wheel cart and moved from where it was stored in the yard to the opening cut in the fence.

Mr. Engel said that he and Mr. Shaw were looking to steal (siphon) gas. The REA yard is about a mile and a half from the Interstate. And there is gas available at the Interstate exit and “plenty of dark areas around that area at that time of day.” RP at 83.

The State charged Mr. Shaw with second degree burglary. He waived his right to a jury and the matter proceeded to a bench trial. The court heard from the investigating officers, the REA employee who came to the scene, and the security company who received and responded to the alarm. Mr. Shaw moved to dismiss for insufficient evidence at the close of the State’s case. The court denied those motions. Mr. Shaw called Mr. Engel. Mr. Engel testified that he alone was responsible for the burglary and that Mr. Shaw never went inside the fenced yard. The judge found Mr. Shaw guilty of second degree burglary both as an accomplice and a principal and entered appropriate findings of fact and conclusions of law.

DISCUSSION

Mr. Shaw assigns error to the court’s essential findings of fact. He contends that the evidence is insufficient to support the court’s findings that it would have been impossible for Mr. Engel to move the copper wire by himself or that the shoe print found

inside the REA yard was his. Mr. Shaw contends that any remaining findings of fact do not support the conclusion of law that he was present on the scene and ready to assist in this burglary.

We review this record to determine whether substantial evidence supports the court's essential findings of fact. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). We must view the evidence in a light most favorable to the State. *Id.* When so viewed, we then must decide whether any rational trier of fact could have found the essential elements of the crime of second degree burglary. *Id.* This standard is modest. We review the judge's decision to admit and consider physical evidence for abuse of discretion. *State v. Strandy*, 49 Wn. App. 537, 543, 745 P.2d 43 (1987).

Elements of the Crime

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. RCW 9A.52.030(1). And a building is now defined to include a fenced area: "'Building' . . . includes any . . . fenced area." RCW 9A.04.110(5).

Also, the court could convict Mr. Shaw as an accomplice despite the information here that charged him as a principal. *State v. Rodriguez*, 78 Wn. App. 769, 774, 898 P.2d

871 (1995). Mr. Shaw acted as an accomplice if he “(a) [w]ith knowledge that it will promote or facilitate the commission of the crime, he (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.” Former RCW 9A.08.020(3)(a) (1975). The State need only show general knowledge of a crime; specific knowledge of every element of the principal’s crime is not necessary. *State v. Sweet*, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999). And circumstantial evidence is as probative as direct evidence. *State v. Clay*, 144 Wn. App. 894, 898, 184 P.3d 674 (2008).

Findings and Conclusions

Here, the court found that:

- The alarm for the Benton REA went off at 2:57 am on the morning of August 11, 2010. Clerk’s Papers (CP) at 21 (Finding of Fact (FF) 1).
- Police arrived within 5 minutes and saw two people “walking towards 7th Street [next to the REA yard].” CP at 21 (FF 3).
- Police found Mr. Shaw hiding under the loading dock of a store next to the REA yard. CP at 21-22 (FF 5).
- Police found a shoe print on a heat pump underneath a window screen that was similar to the shoes worn by Mr. Shaw. CP at 22 (FF 6, 7).
- It took an REA employee 10 minutes working by himself to move the rolls of wire back. CP at 22 (FF 8).
- Mr. Engel testified that he and Mr. Shaw were looking for a place to siphon gas and that Mr. Shaw did not enter the REA yard. Mr. Engel is a convicted burglar. The court did not believe Mr. Engel’s testimony because he is a convicted burglar, there were other places closer to the Interstate where the two men could have siphoned gas, and it would have been impossible for Mr. Engel to move the copper wire by himself. CP at 22 (FF 10-14).

The evidence outlined above easily

supports these findings of fact, especially when viewed in a light most favorable to the State. *Green*, 94 Wn.2d at 221-22. Both men were traveling together. Two men were seen walking in the early morning hours near the REA yard. The fence had been cut. Police captured Mr. Engel and found Mr. Shaw in the immediate vicinity hiding under a loading dock. Police found a shoe print similar to Mr. Shaw's in the REA yard under the site where a screen had been removed.

The court concluded from these facts that:

- Mr. Shaw was present and ready to assist Mr. Engel. CP at 22 (Conclusion of Law (CL) 15).
- Mr. Shaw was inside the Benton REA yard on August 11, 2010. CP at 22 (CL 17).

The findings easily support those conclusions.

Shoe Print Evidence

The evidence at issue here was the shoe print found on the heat pump underneath a window in the REA yard. Mr. Shaw maintains the court found that he did not enter the fenced-in compound. Br. of Appellant at 9; RP at 112. And while the court did say that he did not enter the yard, the ultimate finding is just the opposite: "Circumstantial evidence indicates that the defendant was inside the Benton REA yard on August 11, 2010, including the shoe prints similar to the defendant's shoes, the impossibility of Mr. Engel moving the wire by himself in under 5 minutes, and the defendant being found on the scene." CP at 22 (CL 17). And it is

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those findings and conclusions that count, not the court's earlier musing on the record at the end of the trial. *State v. Mallory*, 69 Wn.2d 532, 533, 419 P.2d 324 (1966).

Mr. Shaw filed a statement of additional grounds which merely supplements appellate counsel's brief and needs no separate consideration. We then affirm the conviction for second degree burglary.

A majority of the panel has determined that 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.

Sweeney, J.

WE CONCUR:

Korsmo, C.J.

Brown, J.