No. 84714-2

MADSEN, C.J. (concurring/dissenting)—I agree with the majority that Kenneth Budik's conviction for first degree rendering criminal assistance must be reversed because there is insufficient evidence to support the conviction. However, the majority's conclusion that RCW 9A.76.050 requires an affirmative act or statement and that a false disavowal of knowledge cannot support a conviction under the statute is contrary to long-standing law. Accordingly, I concur in part and dissent in part.

Analysis

Mr. Budik was charged with first degree rendering criminal assistance under RCW 9A.76.050(4). That provision requires proof that a person "[p]revents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension" of a person who has committed a murder or is sought as the perpetrator of that crime. RCW 9A.76.050(4), .070(1). The State's theory at trial was that Budik's false statements constituted deception. I agree.

When the first officer arrived at the scene he spoke with Budik, who was lying on the ground. Budik told the officer that he had been shot. Asked who shot him, Budik replied that he did not know. The officer thought Budik was evasive and hostile.

A second officer also spoke with Budik. He also thought Budik was evasive when he stated that he did not know what had happened. Police found a spent shell casing in the cab of the truck, which they interpreted as evidence that the shooter fired inside the truck in full view of Budik. An eyewitness told officers that Titus Davis was standing next to Adama Walton's truck when the shooting occurred, killing Walton.

Later, Detective Kip Hollenbeck interviewed Budik in the hospital. He explained to Budik that the evidence showed that the shooting had occurred very close to where he was sitting. Hollenbeck asked Budik to identify the shooter. Budik said he did not see anything and did not know why he and Walton had been shot. Budik told Hollenbeck that the shooting started after he bent down to pick up his beer. But that story was inconsistent with Budik's left shoulder wound. Budik eventually refused to continue the interview. A couple of days after the shooting, Budik called Rae Walton, the murder victim's mother, and told her that Juwuan Nave was the shooter. Under these facts I believe there was sufficient evidence that Budik's false statements constituted deception.

However, the State was also required to establish that the deception prevented or obstructed anyone from performing an act that might aid in the discovery or apprehension of a person who committed or was being sought for committing a crime. RCW 9A.76.050(4). Here, I agree with the majority that the State's evidence fails. At trial the

only evidence offered by the State was Detective Hollenbeck's agreement with the prosecutor's statement that the investigation would "have been able to take a different turn" had Budik reported that Nave was the shooter, as he asserted to Rae Walton. 2 Verbatim Report of Proceedings at 184.

Testimony revealed that Detective Hollenbeck was already aware of rumors that Nave was the shooter before he talked to Rae Walton, who merely reinforced that rumor. Three independent witnesses "eventually" came forward, persuading Hollenbeck that Davis was the shooter and that Nave was the fall guy. The trial testimony gives no clear indication of how quickly Davis was identified as the shooter. Hollenbeck also testified that he learned from another witness that Budik had been instructed to pin the blame on Nave, which created a reasonable inference that Budik called Rae Walton for that purpose. Even when viewed in the light most favorable to the State, I agree with the majority that the evidence on this element of rendering criminal assistance was insufficient and this justifies reversal.

Although I agree that Budik's conviction must be reversed, I disagree with the majority's interpretation of RCW 9A.76.050 that a false statement does not satisfy the statute.

In my view, RCW 9A.76.050 does not preclude a conviction where the defendant affirmatively provides false information to investigating authorities with the knowledge and intent required by the statute. Contrary to the majority's apparent belief, a false disavowal of knowledge about an offense can affirmatively assist the perpetrator of a

crime. Imagine an individual who sees a murder committed by his close friend. When asked by the police, who know that the individual saw the murder, to protect his friend the individual falsely states that he does not know who committed the offense. He thereby deflects focus from the murderer, as intended, and so provides an opportunity and time for the murderer-friend to escape. By any reasonable construction of our statute, that individual just as surely renders criminal assistance as an individual who trips the pursuing officer to allow the murderer to escape.

This is, in fact, how many courts and commenters have concluded the offense can be committed. "[A]n affirmative falsehood to the public investigator when made with the intent to shield the perpetrator of the crime, may form the aid or concealment" that constitutes being an accessory after the fact.[1] *People v. Duty*, 269 Cal. App. 2d 97, 104, 74 Cal. Rptr. 606 (1969). Similarly, the court in *State v. Potter*, 221 N.C. 153, 19 S.E.2d 257 (1942), recognized that general rules must yield depending upon the circumstances. The court observed that while ordinarily failing to give information when knowing that a crime has been committed, or lying about one's knowledge regarding the commission of an offense, will not render the individual an accessory after the fact,

> "[w]here . . . concealment of knowledge of the fact a crime has been committed, or the giving of false testimony as to the facts is made for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the fact of the advantage to the accused, the person rendering such aid is an accessory after the fact."

*Id*. at 259 (quoting 14 Am. Jur. *Criminal Law* § 103, at 837).

[1] The offense is often called being an accessory after the fact, as it was known under the common law. Under RCW 9A.76.050 the offense is rendering criminal assistance.

As a leading commenter notes, the offense has typically required more than mere failure to report a felony, but among the acts that qualify an individual as an accomplice after the fact (one rendering criminal assistance) are "giving false testimony at an official inquiry into the crime, and giving false information to the police in order to divert suspicion away from the felon." 2 Wayne R. LaFave, Substantive Criminal Law § 13.6(a), at 402 (2d ed. 2003) (updated 2011) (footnote omitted). Thus, in *Duty*, 269 Cal. App. 2d at 101-04, the defendant's conviction was upheld where, with specific intent that an arson suspect avoid prosecution and to provide her an alibi, he falsely stated that she was with him and not in the vicinity of the crime.

The majority fails to adequately consider RCW 9A.76.050's purpose and intent, which is proscribing and punishing acts and statements that are accomplished with the intent to prevent, hinder, or delay apprehension of the offender. An affirmatively made, false disavowal of knowledge when questioned by investigating authorities is not the same as passive refusal to speak or false statements motivated by self-interest, neither of which is proscribed. An affirmative, false disavowal of knowledge, depending upon the individual's intent, can constitute rendering criminal assistance, and this is what the court should hold.

In reaching its contrary conclusion, the majority states that the five other means of committing rendering criminal assistance require some affirmative act or statement. This is incorrect because under RCW 9A.76.050(1) concealment of the offender can occur as a result of a defendant's false denial of knowledge about where the offender is or has gone.

If the defendant knows that the offender is hiding in nearby shrubbery, but with intent to keep that location hidden he tells the police that he does not know where the offender went, the defendant has affirmatively concealed the offender. Under the majority's interpretation, this concealment through a false statement of lack of knowledge will not support a conviction. The court should hold, instead, that a false statement of knowledge can support a conviction under the statute where the other requirements of the statute are met.

A conviction under RCW 9A.76.050(4) may be predicated on words alone, including a false disavowal of knowledge, provided those words are intended to and result in impeding discovery or apprehension of a person who has committed or being sought for committing a crime.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: