STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
SECOND JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Suttles/Drljic,

Defendant.

Crim. Case No. 62-CR-10-1465 & 64

DEFENDANTS' COMMENTARY ON JURY INSTRUCTIONS 12/1/10 SESSION

CRIMJIG 3.08

Jury May Return for Information

This Court permits the jury to ask questions of the lawyers and the Court during your deliberations. Questions should be asked by _____.

CRIMJIG 4.02

Effect of Withdrawal

Even if the defendant aided, advised, hired, counseled, or conspired with another, or otherwise procured the commission of a crime by another person, the defendant is not liable for any crime, including the intended crime, if the defendant abandoned the purpose and made a reasonable effort to prevent the crime before the crime was committed.

CRIMJIG 4.03

If the defendant aided, advised, hired, counseled, or conspired with another, or otherwise procured the commission of a crime by another person,

and the crime was committed, the defendant is guilty of the crime. You are not to concern yourselves with what action, if any, was taken against the other person.

Burglary.

Defense has requested a "claim of right" charge. The "claim of right" does apply to burglary charges and this case, because they State here alleges the "crime" that was intended or attempted or committed, is stealing, which the Minnesota Court of Appeals has equated to "theft," and which includes a claim of right element. See:

- To prove a charge of theft by temporary taking, in violation of Minn. Stat. § 609.52, subd. 2(1), the State must establish, among other things, that a defendant intentionally and without claim of right, takes, uses, transfers, conceals, or retains possession of movable property of another without the other's consent. State v. Marshall, 541 N.W.2d 330, 1995 Minn. App. LEXIS 1541, 108:303 Fin. & C. 52 (Minn. Ct. App. 1995);
- The criminal code does not define the term "steals," but *Black's Law Dictionary* defines "steal" as "[t]o take (personal property) illegally with the intent to keep it unlawfully" or "[t]o take (something) by larceny, embezzlement, or false pretenses." *Black's Law Dictionary* 1548 (9th ed. 2009) (parentheticals in original). And Chapter 609 equates stealing with theft. *See* Minn. Stat. § 609.52, subd. 2(1) (2008) (defining theft as intentionally [*7] and without claim of right taking movable property of

another without the other's consent and with intent to deprive the other person permanently of possession of the property). Shaw v. State, 2009 Minn. App. Unpub. LEXIS 983 (Minn. Ct. App. 2009).

- "A trespasser is one who intentionally: occupies or enters the dwelling of another, without claim of right or consent of the owner * * *. Minn. Stat. § 609.605, subd. 1(6) (Supp. 1987). Consequently, where an intruder enters a dwelling, trespass is a lesser-included offense of second degree burglary." State v. Hicks, 1988 Minn. Ct. App. LEXIS 959 (Minn. Ct. App. 1988).
- The language of the St. Louis Park ordinance is identical to Minn. Stat. § 609.605(5)(1984), and cases interpreting that statute are controlling. *State v. Brechon*, 352 N.W.2d 745 (Minn. 1984) holds that in a **trespass** case brought under § 609.605(5), the State bears the burden of disproving that a defendant has a valid "**claim of right**" to be on the premises. If a defendant has a **claim of right**, he lacks criminal intent to **trespass**. *Id.* at 749-50. If the State's evidence shows a defendant has no **claim of right**, then the burden shifts to the defendant to show he has a property right such as an owner, tenant, lessee, licensee, or invitee. *Id.* at 750. State v. Scholberg, 395 N.W.2d 454 (Minn. Ct. App. 1986).
- *State v. Brechon*, 352 N.W.2d 745, 750 (Minn. 1984) (holding that a **claim of right** in a criminal trespass case is not a defense but a basic **element** of the State's case that the State must prove beyond a reasonable doubt).

- The elements of the crime of trespass are set forth in CRIMJIG 17.22. Although "claim of right" is an element of trespass, it is not defined within the trespassing instruction. Appellants requested that the court use the [*12] following language: "A claim of right is defined as a good faith claim by defendants that permission was given to them to be upon the premises by a statute, rule, regulation or other law." The district court rejected appellants' request and instead instructed the jury as follows: Third, the Defendant acted without claim of right. This means that the State must prove either, a, that the Defendant did not believe she had a legal right to remain on the property after the demand to leave was made or, b, if the Defendant did so believe that such belief was unreasonable. A claim of right can exist even though based on a mistaken understanding of the law as long so the claim of right is made in good faith and is reasonable. In the comment to CRIMJIG 17.22, it is recommended that the jury be instructed as follows: A bona fide claim of right exists only when the defendant is acting in good faith, as opposed to asserting a false claim. In order to find the defendant had a bona fide claim of right, you must find that the defendant believed he or she had a right to enter, and there were reasonable grounds for such belief. 10A Minnesota Practice, CRIMJIG 17.22 cmt. (2006). State v. Martin, 2010 Minn. App. Unpub. LEXIS 923 (Minn. Ct. App. 2010).
- Personal and subjective motivation is an important element of claim of right. State v. Higgins, 376 N.W.2d 747 (Minn. Ct. App. 1985).

CRIMJIG 16.01

Theft—Taking Property of Another—Defined

The statutes of Minnesota provide that whoever intentionally and without claim of right (takes) (uses) (transfers) (conceals) (retains) possession of movable property of another without the other's consent and with intent to permanently deprive the owner of possession of the property, is guilty of a crime.

There is no separate "charge" of aiding and abetting.

"It is well established that an abettor can simply be charged with the crime itself and still be convicted on the basis of aiding and abetting: A person is criminally liable for a crime committed by another [*6] if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime. Minn. Stat. § 609.05, subd. 1 (1992). Thus, the charge of the crime itself includes the elements of aiding and abetting. "There is no separate offense of 'aiding and abetting' * * * because it is not a substantive offense." State v. Kramer, 441 N.W.2d 502, 506 (Minn. App. 1989). See *generally State v. Lucas,* 372 N.W.2d 731, 740 (Minn. 1985) ("Even if the indictment had not used 'aiding and abetting' language, the jury would have been free to base the * * * conviction on a determination that defendant was liable as an aider or abettor.")." State v. Gino, 1995 Minn. App. LEXIS 826 (Minn. Ct. App. 1995).

Dated: December 2, 2008

ATTORNEYS FOR DEFENDANT

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2010 Minn. Ct. of Appeals

*2009 Minn. App. Unpub. LEXIS 983, **

Frederick Laderrell Shaw, petitioner, Appellant, vs. State of Minnesota, Respondent.

A08-2051

COURT OF APPEALS OF MINNESOTA

2009 Minn. App. Unpub. LEXIS 983

September 1, 2009, Filed

NOTICE: THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

SUBSEQUENT HISTORY: Review denied by Shaw v. State, 2009 Minn. LEXIS 831 (Minn., Nov. 17, 2009)

PRIOR HISTORY: [*1]
Hennepin County District Court File No. 27-CR-07-125071.

DISPOSITION: Affirmed.

CASE SUMMARY
PROCEDURAL POSTURE: Appellant challenged an order of the Hennepin County District Court (Minnesota) that denied his petition for postconviction relief, arguing that the district court erred in refusing to permit him to withdraw his guilty plea where his plea was unsupported by a sufficient factual basis.

OVERVIEW: Appellant was charged with burglary and theft of energy lines after taking copper piping with fittings and valves from a vacant building. After his arrest, appellant admitted taking the copper from another structure but denied taking it from the abandoned building. Subsequently, appellant pled guilty to third-degree burglary under Minn. Stat. § 609.582, subd. 3 (2006), based upon his admission that he entered a building other than the vacant building with which he was originally charged as having unlawfully entered. During the plea colloquy, appellant acknowledged entering a garage without the owner's permission and removing the copper piping. On review, the court held that, because taking property without the permission of the owner and with the intention of permanently depriving the owner of the property was equivalent to stealing the property, appellant's admission satisfied the stealing element of burglary. Because appellant's admission to taking property and his other admissions at the plea hearing established a sufficient factual basis to support a conclusion that appellant's conduct fell within the charge, appellant's plea was supported by an adequate factual basis.

OUTCOME: The district court's order denying postconviction relief was affirmed.

CORE TERMS: copper, guilty plea, burglary, factual basis, garage, theft, piping, permission, stealing, permanently, admit, steal, plea hearing, sufficient facts, postconviction, withdraw,

guilt, Black's Law Dictionary, record to support, plead guilty, misdemeanor, injustice, manifest, commit, felony, stolen, caretaker

LEXISNEXIS® HEADNOTES Hide

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > Findings of Fact

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN1 On review of postconviction decisions, appellate courts extend a broad review of both questions of law and fact. Legal issues are reviewed de novo. Factual findings will not be disturbed if sufficient evidence in the record sustains them. More Like This Headnote

Criminal Law & Procedure > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > Guilty Pleas > Knowing & Intelligent Requirement

Criminal Law & Procedure > Guilty Pleas > Voluntariness

HN2 A defendant may withdraw a guilty plea after sentencing if withdrawal is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists when a guilty plea was not accurate, voluntary, and intelligent. More Like This Headnote

Criminal Law & Procedure > Guilty Pleas > Factual Basis

HN3 A proper factual basis must be established for a guilty plea to be accurate. The district court is responsible for ensuring that a sufficient factual basis is established in the record. The purpose of requiring an accurate plea is to ensure the defendant does not plead guilty to a greater charge than he could be convicted of at trial. The factual basis must establish sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty. In a typical plea where the defendant admits his or her guilt, an adequate factual basis is usually established by questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > Burglary > Elements

HN4 Minn. Stat. § 609.582, subd. 3 (2006), provides in part that third-degree burglary occurs when a person enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building or enters a building without consent and steals or commits a felony or gross misdemeanor while in the

building. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Larceny & Theft > Elements

HN5 The taking of property without permission of the owner and with the intent to permanently deprive the owner of the property is equivalent to stealing property or theft of property. While the criminal code does not define the term "steals," Black's Law Dictionary defines "steal" as to take personal property illegally with the intent to keep it unlawfully or to take something by larceny, embezzlement, or false pretenses. Black's Law Dictionary 1548 (9th ed. 2009). Further, Minn. Stat. ch. 609 equates stealing with theft. Minn. Stat. § 609.52, subd. 2(1) (2008); Minn. Stat. § 609.525, subd. 2 (2008). More Like This Headnote

COUNSEL: For Appellant: Marie L. Wolf, Interim Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, MN.

For Respondent: Lori Swanson, Attorney General, St. Paul, MN; and Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, MN.

JUDGES: Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Schellhas, Judge.

OPINION BY: SCHELLHAS

OPINION

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges denial of his petition for postconviction relief in which he sought to withdraw his guilty plea based on an insufficient factual basis. Because the district court properly concluded that the facts admitted at the plea hearing satisfy the **elements** of **third-degree burglary**, we affirm.

FACTS

Respondent State of Minnesota charged appellant Frederick Shaw, a.k.a. Kwan Manasseh, with damage or theft of energy lines and third-degree burglary based on the events of November 21, 2007, when officers observed appellant carrying copper piping that had fittings and valves attached. According to the complaint, appellant told officers he found the piping in an alley a block away and guided **[*2]** officers to the area. Officers observed a building at 2321 Fremont Avenue that was boarded up and vacant, but had an open window. While officers were present, the caretaker of the building arrived. The caretaker identified the copper piping as that taken from the building and showed officers the space where it had been inside the building. After his arrest, appellant told officers that he had been given the piping by a couple that he did not know. Appellant denied entering the building at 2321 Fremont Avenue, but admitted taking copper from a residence and storing it in an unlocked garage.

On December 4, 2007, appellant pleaded guilty to third-degree burglary. At the beginning of the hearing, the prosecutor indicated that the plea was not based on removing copper piping from 2321 Fremont Avenue and that count one would be dismissed:
I don't know if the Court wants me to amend or add a charge. There is a third degree burglary charge already. [Appellant] is willing to admit that he entered a *different* building. I think we can just do it under Count 2 because it doesn't give the specific address.
(Emphasis added.) The district court responded, "Okay with me." Appellant's plea and an examination **[*3]** by counsel followed. Appellant offered the following factual basis for his plea:
DEFENSE COUNSEL: [Appellant], on November 21 of 2007 in the city of Minneapolis, County of Hennepin, you admit to the Court that you entered a garage in the area of 24th Avenue and Emerson?

APPELLANT: Yes, sir.

DEFENSE COUNSEL: And you admit to the Court that you did not have permission to enter that garage?

APPELLANT: No, I didn't.

DEFENSE COUNSEL: While you were in that garage you found some copper in the garage?

APPELLANT: Yes, sir.

DEFENSE COUNSEL: And you took it out of the garage, out of the residence - -

APPELLANT: I took it out - -

DEFENSE COUNSEL: - - with the intent to permanently take it, correct?

APPELLANT: Yes.

DEFENSE COUNSEL: And you didn't have permission of the owner - -

APPELLANT: No, sir.

DEFENSE COUNSEL: - - of that property to take that copper piping, correct?

APPELLANT: No, sir.
The district court asked appellant if there was anything he wanted to say and appellant answered, "No, your honor." The court accepted appellant's guilty plea.

On June 27, 2008, appellant filed a petition for postconviction relief and moved to withdraw his guilty plea on the basis that it was not supported by sufficient facts. **[*4]** The strict court denied the petition, rejecting appellant's argument that the record failed to show that appellant lacked a right to the copper. The court concluded that appellant's admissions satisfied the **elements** of **third-degree burglary** because appellant admitted that he "took" property without permission of the owner and that he committed theft within a building entered without consent. The court also rejected appellant's reliance on the complaint and a March 28, 2008 affidavit to demonstrate that appellant had a right to the

copper, noting that the court did not have the affidavit and that the factual basis for a plea "is determined solely by the facts admitted during the guilty plea." This appeal follows.

DECISION

HN1 "On review of postconviction decisions, [appellate courts] extend a broad review of both questions of law and fact." State v. Ferguson, 742 N.W.2d 651, 659 (Minn. 2007). Legal issues are reviewed de novo. *Id.* Factual findings will not be disturbed if sufficient evidence in the record sustains them. *Id.*

HN2 A defendant may withdraw a guilty plea after sentencing if withdrawal is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice **[*5]** exists when a guilty plea was not accurate, voluntary, and intelligent. Alanis v. State, 583 N.W.2d 573, 577 (Minn. 1998).

HN3 "A proper factual basis must be established for a guilty plea to be accurate." State v. Ecker, 524 N.W.2d 712, 716 (Minn. 1994). The district court is responsible for ensuring that a sufficient factual basis is established in the record. *Id.* The purpose of requiring an accurate plea is to ensure the defendant does not plead guilty to a greater charge than he could be convicted of at trial. *Id.* "The factual basis must establish sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." Munger v. State, 749 N.W.2d 335, 338 (Minn. 2008) (quotation omitted). "In a typical plea, where the defendant admits his or her guilt, an adequate factual basis is usually established by questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime." Ecker, 524 N.W.2d at 716.

Appellant argues that his guilty plea was not supported by adequate facts. HN4 Minnesota Statutes, section 609.582, subdivision 3 (2006), provides in part that third-degree **[*6]** burglary occurs when a person enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building, or enters a building without consent and steals or commits a felony or gross misdemeanor while in the building. Appellant argues that the record does not demonstrate that (1) he stole the copper or (2) he entered the garage for the purpose of stealing.

The district court concluded that the facts appellant admitted at the plea hearing established appellant's guilt of third-degree burglary. We agree. Appellant admitted he took copper without permission of the owner and with the intent to permanently take the copper. And HN5 such "taking" of property is equivalent to stealing property or theft of property. **The criminal code does not define the term "steals," but *Black's Law Dictionary* defines "steal" as "[t]o take (personal property) illegally with the intent to keep it unlawfully" or "[t]o take (something) by larceny, embezzlement, or false pretenses." *Black's Law Dictionary* 1548 (9th ed. 2009) (parentheticals in original). And Chapter 609 equates stealing with theft. *See* Minn. Stat. § 609.52, subd. 2(1) (2008) (defining theft as intentionally [*7] and without claim of right taking movable property of another without the other's consent and with intent to**

deprive the other person permanently of possession of the property); Minn. Stat. § 609.525, subd. 2 (2008) (for purposes of the crime of bringing stolen goods into the state, defining property as stolen if the act by which the owner was deprived of the property was a criminal offense that constitutes a theft as defined in chapter 609).

Because taking property without the permission of the owner and with the intention of keeping it permanently is equivalent to stealing property, appellant's admission satisfies the stealing element of burglary. And because appellant's admission to "taking" property and appellant's other admissions at the plea hearing establish "sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge," appellant's plea is supported by an adequate factual basis. *See* *Munger*, 749 N.W.2d at 338 (stating this standard for sufficiency of facts supporting a guilty plea). In addition, because the facts demonstrate guilt of a form of third-degree burglary that does not require proof of intent, the lack of facts regarding intent **[*8]** is immaterial.

Affirmed.

State of Minnesota, petitioner, Appellant, v. Jason Alan Ostrem, Respondent.

C0-94-56

SUPREME COURT OF MINNESOTA

535 N.W.2d 916; 1995 Minn. LEXIS 689

August 18, 1995, Filed

PRIOR HISTORY: [1]** Review of Court of Appeals.

DISPOSITION: Reversed.

CASE SUMMARY

PROCEDURAL POSTURE: The State sought review of a judgment of the Court of Appeals (Minnesota), which reversed a judgment of the trial court, which convicted defendant of aiding and abetting second-degree burglary and aiding and abetting theft in violation of Minn. Stat. § 609.582(2)(a) (1994), Minn. Stat. § 609.52(2)(1) (1994), and Minn. Stat. § 609.05 (1994).

OVERVIEW: Defendant was convicted of aiding and abetting second-degree burglary and aiding and abetting theft in violation of Minn. Stat. § 609.582(2)(a) (1994), Minn. Stat. § 609.52(2)(1) (1994), and Minn. Stat. § 609.05 (1994). The appellate court reversed the conviction and held that the evidence was insufficient to sustain the judgment. The State sought review. The court held that, in determining whether pretrial eyewitness identification evidence was to be suppressed, the trial court was to focus on whether the procedure was unnecessarily suggestive and whether, even if suggestive, it could have still been admissible if the totality of the circumstances showed that the witness' identification had adequate independent origin and was considered to be reliable despite the suggestive procedure. The court found that, although the procedure was suggestive, it was admissible because its independence reliance had been established by the State. The court held that the jury was allowed to convict defendant of aiding and abetting despite the absence of "aiding and abetting" language in the complaint. The court reversed the judgment of the appellate court.

OUTCOME: The court reversed a judgment of the appellate court, which reversed a judgment of the trial court, which convicted defendant of aiding and abetting second-degree burglary and aiding and abetting theft.

CORE TERMS: aiding and abetting, burglary, theft, farmhouse, deck, identification, suggestive, commit, shoe, circumstantial evidence, intentionally, abet, substantial rights, unnecessarily, prejudiced, guilt, photograph, wearing, station, drove, identification procedure, sufficient evidence, different offense, pretrial, totality, reliable, robbery, thwart, aids, photo identification

LEXISNEXIS® HEADNOTES Hide

Criminal Law & Procedure > Eyewitness Identification > Fair Identification Requirement

Criminal Law & Procedure > Eyewitness Identification > Showup Identifications

Criminal Law & Procedure > Pretrial Motions & Procedures > Suppression of Evidence

HN1 In determining whether pretrial eyewitness identification evidence must be suppressed, a two-part test is applied. The first inquiry focuses on whether the procedure was unnecessarily suggestive. Whether a pretrial identification procedure is unnecessarily suggestive turns on whether the defendant was unfairly singled out for identification. Single photo line-up identification procedures have been widely condemned as unnecessarily suggestive. However, under the second prong of the test, the identification evidence, even if suggestive, may be admissible if the totality of the circumstances establishes that the evidence was reliable. If the totality of the circumstances shows the witness' identification has adequate independent origin, it is considered to be reliable despite the suggestive procedure. The test is whether the suggestive procedures created a very substantial likelihood of irreparable misidentification. There are five factors to evaluate in considering the totality of the circumstances as articulated: 1. The opportunity of the witness to view the criminal at the time of the crime; 2. The witness' degree of attention; 3. The accuracy of the witness' prior description of the criminal; 4. The level of certainty demonstrated by the witness at the photo display; 5. The time between the crime and the confrontation. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > Trials > Judicial Discretion

HN2 The trial court has discretionary authority to determine whether to amend a complaint. The applicable rule of criminal procedure provides: The court may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. Minn. R. Crim. P. 17.05. The matter of allowing amendments to complaints under Minn. R. Crim. P. 17.05 is in the sound discretion of the trial judge. A two-step process is used to determine whether Minn. R. Crim. P. 17.05 properly authorized the trial court's actions. First, the appellate court looks to whether the aiding and abetting instruction constituted charging defendant with an "additional or different offense." Minn. R. Crim. P. 17.05. Aiding and abetting is not a separate substantive offense. A jury may convict the defendant of aiding and abetting despite the absence of "aiding and abetting" language in the complaint. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Accusatory Instruments > Complaints > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

HN3 Upon careful review of Minn. R. Crim. P. 17.05, in order to prejudice the substantial rights of the defendant, it must be shown that the amendment either added or charged a different offense. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Verdicts > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview

Evidence > Relevance > Circumstantial & Direct Evidence

HN4 The appellate court views the evidence in the light most favorable to the verdict when determining whether the jury acted with due regard for the presumption of innocence and for the need to overcome it by proof beyond a reasonable doubt. Furthermore, a conviction based on circumstantial evidence will be upheld and such evidence is entitled to as much weight as any other kind of evidence, so long as a detailed review of the record indicates that the reasonable inferences from such evidence are consistent only with the defendant's guilt and inconsistent with any rational hypothesis except that of guilt. Inconsistencies in the State's case or possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable. Thus, to succeed in a challenge to a verdict based on circumstantial evidence, a convicted person must point to evidence in the record that is consistent with a rational theory other than guilt. Furthermore, the jury is free to question a defendant's credibility, and has no obligation to believe a defendant's story. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > Scienter > General Intent

HN5 The aiding and abetting statute provides: A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime. Minn. Stat. § 609.05(1) (1994). To impose liability under the aiding and abetting statute, the State must show some knowing role in the commission of the crime by a defendant who takes no steps to thwart its completion. Mere presence at the scene of a crime does not alone prove that a person aided or abetted, because inaction, knowledge, or passive acquiescence does not rise to the level of criminal culpability. Active participation in the overt act which constitutes the substantive offense is not required, and a person's presence, companionship, and conduct before and after an offense are relevant circumstances from which a person's criminal intent may be inferred. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > Burglary > Elements

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > Burglary > Penalties

Criminal Law & Procedure > Sentencing > Fines

HN6 Minn. Stat. § 609.582(2) (1994) provides: Whoever enters a building without consent and with intent to commit a crime, commits burglary in the second degree and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $ 20,000 or both. Minn. Stat. § 609.52(2)(1) (1994) provides: Whoever does any of the following commits theft and may be sentenced as provided: (1) intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN7 A person's presence can be sufficient to impose liability if it somehow aids the commission of the crime. If the proof shows that a person is present at the commission of a crime without disapproving or opposing it, it is competent for the jury to consider this conduct in connection with other circumstances and thereby reach the conclusion that he assented to the commission of the crime, lent to it his approval, and was thereby aiding and abetting its commission. Certainly mere presence on the part of each would be enough if it is intended to and does aid the primary actors. Once a reasonable inference arises, however, from all the circumstances that defendant was a participant, defendant's guilt is sufficiently established. The inference is a fact question for jury determination. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN8 The State meets its burden by showing some knowing role in the commission of the crime by a defendant who takes no steps to thwart its completion. More Like This Headnote | *Shepardize:* Restrict By Headnote

HEADNOTES / SYLLABUS Hide

SYLLABUS

1. There is no denial of due process where, under the totality of the circumstances, a single-photo lineup did not give rise to a substantial likelihood of irreparable misidentification.

2. The trial court's sua sponte instruction on aiding and abetting, when aiding and abetting was not originally charged, does not deprive a criminal defendant of due process, nor does it create an impermissible appearance of partiality toward the prosecution.

3. There is sufficient evidence to sustain convictions where the record indicates that the

reasonable inferences from the circumstantial evidence are consistent only with defendant's guilt of aiding and abetting second-degree burglary and theft, and inconsistent with any other rational hypothesis.

COUNSEL: For Appellant: Hubert H. Humphrey, III, Attorney General, Cheryl W. Heilman, Assistant Attorney General, St. Paul, MN., and Kenneth Kohler, Nobles County Attorney, Worthington, MN.

For Respondent: Timothy R. Anderson, Frederic Bruno & Associates, Minneapolis, MN.

JUDGES: GARDEBRING, Justice.

OPINION BY: GARDEBRING

OPINION

[*917] Heard, considered and decided by the court en banc.

OPINION

[2] GARDEBRING**, Justice.

In December 1992, Jason Alan Ostrem was charged with second degree burglary and theft. In October 1993, Ostrem was convicted of aiding and abetting second-degree burglary and aiding and abetting theft. See Minn. Stat. § 609.582, subd. 2(a) (1994); Minn. Stat. § 609.52, subd. 2(1) (1994); Minn. Stat. § 609.05 (1994). The court of appeals reversed Ostrem's conviction on three grounds: 1) denial of due process resulting from a single-photo identification process; 2) impermissible appearance of partiality resulting from the trial court's instruction on aiding and abetting; and 3) insufficient evidence to sustain the convictions. State v. Ostrem, 520 N.W.2d 426 (Minn. App. 1994), pet. for rev. granted (Minn., Oct. 27, 1994). The state appeals and, in accordance with our reasoning below, we reverse.

The record reflects the following facts. Between 8:30 a.m. and 11 a.m. on November 22, 1992, Ardella and Ralph Schroeder's farmhouse, located off a lightly travelled **[*918]** gravel road in a rural area near Worthington, was burglarized. The Schroeders left their home at approximately 8:30 a.m. When they returned, between 11 a.m. and 11:30 a.m., the door was **[**3]** still locked, but they noticed that the bathroom blinds and a rug were out of place and a jar of change was open. Ardella Schroeder then noticed the safe door was ajar and $ 6,300 in cash, mainly in denominations of $ 50 and $ 100 bills, was missing.

The Schroeder's son Kevin and his family live approximately 1 1/2 miles up the road. On the morning of the burglary, Kevin Schroeder and his family drove past his parents' house at approximately 8:45 a.m. As he drove by, he noticed a 1972 or 1973 black Dodge Charger with mag-rimmed wheels parked on the side of the gravel road approximately 100 yards from his parents' house. The car was empty and showed no signs of trouble, but he noticed two men standing on the front deck of the house. Kevin Schroeder drove into the yard to ask if they needed any help. There was contradictory testimony concerning the location of the discussion between Kevin Schroeder and the two men. During the omnibus hearing, one of the investigating officers testified that "[Kevin Schroeder] talked to one of them, and the other one stood back on the deck of

the house * * * on the south side of the house * * *." However, at trial, Rodney Boomgaarden, who admitted **[**4]** being present at the scene, testified that Kevin Schroeder approached the two men on the deck. On direct examination, Kevin Schroeder testified that he approached the two men on the deck; however, during cross-examination he indicated he did not get out of the car, but rather the two men walked over to the side of his car.

One of the men, later identified as Boomgaarden, told Kevin Schroeder that the car had overheated and that they wanted to use the telephone. [1] Although Boomgaarden testified that he saw oil leaking from the car, neither Kevin Schroeder nor the investigating officers reported any evidence of an oil leak. Kevin Schroeder offered the men a ride into town, but they refused. Boomgaarden told Kevin Schroeder that his sister knew they were having trouble and he just wanted to call her to be sure she was on her way. Kevin Schroeder again offered them a ride, but they said they would "limp" the car into town. As he drove out of the yard, Kevin Schroeder saw the two men walk toward the black Charger, but did not actually see them get in the car.

FOOTNOTES

[1] At trial, Boomgaarden testified that the car "just quit" outside the Schroeders' residence because a rear seal in the engine had blown out and caused the oil to leak out. On direct examination, Boomgaarden stated that he saw oil that had leaked from the car.

[5]** At approximately 11:30 a.m., Kevin Schroeder received a telephone call from his mother who told him some money was missing from the safe. He told his mother about the two men on the deck. Ardella Schroeder called the sheriff to report the incident. Deputy Sheriff Kenneth Thompson went to the Schroeder farmhouse in response to the call.

Kevin Schroeder described to Deputy Thompson the men he had seen as both being white, in their twenties, weighing about 140 pounds and standing about 6 feet or a little taller. He also described one of the men, later positively identified as Boomgaarden, as having a mustache and wearing a black ski jacket, a cap, black dockers and white cotton gloves. Kevin Schroeder described the other man as having long hair, wearing glasses, a cap, a hooded sweatshirt, and high-top tennis shoes with multicolored shoe strings. Deputy Thompson inspected the farmhouse and found that a window screen in the back of the house had been slit and there were dirty smudges on the window pane where it had been pushed up. Deputy Thompson and Kevin Schroeder also saw what appeared to be two sets of footprints in the frost which led from the front deck toward the road near where **[**6]** the car was parked, and another set that led from the road toward the back of the house near the window that had been slit. Deputy Thompson recalled seeing a black Charger at Graham Tire in Worthington. Kevin Schroeder called a friend who worked there and was told Boomgaarden owned the car.

On November 23, 1992, Kevin Schroeder went into the police station to view a photographic line-up, and from the display of pictures, **[*919]** he identified

Boomgaarden as one of the men he met at his parents' home the morning of the crime. On November 24, 1993, police officers saw Boomgaarden at the wheel of a black Charger parked behind a store in Worthington. At the request of one of the officers, Boomgaarden emptied his pockets and allowed the officers to search his car, including the trunk. The officers found Boomgaarden in possession of a baggie containing $ 1,650 cash in $ 100 and $ 50 bills, as well as $ 189 in a new billfold. They also found several new purchases in the trunk, including new stereo speakers. Two passengers in the car were identified as Todd Weyker and Jennifer Evenson, Weyker's girlfriend. Weyker had $ 500 in $ 50 bills in his pockets. Weyker and Boomgaarden were placed in separate **[**7]** police cars. When one of the officers asked about the large sum of cash, Boomgaarden said $ 230 came from his last paycheck and $ 23 was from his savings account. Boomgaarden was unable to explain the rest of the money. [2] Boomgaarden also initially denied that his car had any mechanical problems within the past month and stated that he had not been at the Schroeders' residence. Eventually, Boomgaarden told the officer he had "forgotten" about his car breaking down and then admitted to being at the Schroeders' farmhouse with Weyker.

FOOTNOTES

2 At trial, Boomgaarden testified that the $ 1,650 in cash was money he was hiding from the Family Services agency to avoid paying child support.

Later in the day on November 24, 1993, Ostrem took Jennifer Evenson, who was a friend of his wife, to the police station to pick up Weyker's house keys. One of the records clerks notified Deputy Thompson that the man with Evenson closely resembled the description in the police report of the second man on the Schroeders' deck. Deputy Thompson **[**8]** told Ostrem that he fit the description of a person suspected of burglary and asked if he could take a photo of Ostrem's face and shoes. Ostrem was wearing high-top tennis shoes with multicolored fluorescent shoe laces. Ostrem consented to having his pictures taken. The photograph of Ostrem depicts a white man with long brown hair, wearing eyeglasses and a cap. The photograph of the shoes depicts high-top tennis shoes with multicolored shoe laces.

After Ostrem left the station, Deputy Thompson put the photos on his desk and called Kevin Schroeder to ask him to come into the station to look at a photographic line-up concerning the second suspect. Approximately 15 minutes later, Kevin Schroeder and his wife arrived at the police station and were met in the lobby by Deputy Thompson. As soon as the three of them entered Deputy Thompson's office, Kevin Schroeder and his wife saw the photo of Ostrem on the desk and said, "There's the second guy. There's the other guy that was on the deck." Deputy Thompson did not prompt or request Kevin Schroeder to look at the photo of Ostrem on the desk. In fact, Deputy Thompson testified that he had planned on presenting the photos differently, but Kevin **[**9]** Schroeder identified Ostrem's photograph on his desk before he had an opportunity to properly arrange the lineup. Ostrem, Weyker and Boomgaarden were charged with second-degree burglary and theft.

The defense's pretrial motions to dismiss and to suppress the photo identification evidence were denied. At the omnibus hearing, the court found the single photo identification procedure was unnecessarily suggestive but, based on Kevin Schroeder's

level of certainty, his opportunity to view Ostrem at the time of the crime and his accurate description to the police officer, the court did not suppress the photo identification.

At trial, the state's theory was that when Kevin Schroeder drove up to the farmhouse, Ostrem and Boomgaarden were on the deck while Weyker was already in the house or at the back of the house where the window screen had been slit. In support of its theory, the state introduced evidence that the three men were friends. Boomgaarden testified that he and Weyker were at the Schroeders' farmhouse on the morning of the burglary, that he owned the black Charger, that they had stopped at the farmhouse because of car trouble, that Ostrem was not with them, and that they did **[**10]** not commit the burglary and theft. The state also introduced **[*920]** a note from Boomgaarden to Weyker that was intercepted by a jailer while both were in custody in jail, prior to Ostrem's arrest. [3] Boomgaarden also testified that he had a police record of prior offenses, which includes conspiracy to commit burglary in 1988, five third-degree burglary counts in 1989, and a felony escape from custody in 1989. The state's case was also supported by testimony from Kevin Schroeder, who made a positive in-court identification of both Ostrem and Boomgaarden. When asked to look at a photograph of Weyker to determine if he could have been the second man on the deck, Kevin Schroeder stated that he had no doubt in his mind that Ostrem was the man he saw, and not Weyker. Deputy Thompson also testified about the description Kevin Schroeder gave him of the two men on the day of the burglary and Kevin Schroeder's positive photo identification of both Boomgaarden and Ostrem.

FOOTNOTES

[3] The note in part stated:

You didn't tell the cops that we were in that f--kin' place did you? That's just what they told me * * *. They told me that they had the serial numbers to our money. That's a f--kin' lie and a half. I kept hounding their ass about getting those numbers and matching them up but they kept feeding me a bunch of lines * * * That's cool that Jenny didn't say anything. They couldn't get anything out of my ass I just more or less told them to kiss my ass. I did tell them that we were at the place to use a phone because my car overheated, and that I was going to call one of my sisters but that was it--Hey Homey write back as soon as possible and let me know what you said, so our stories don't get f--ked up. * * * PS I told you we shouldn't have pulled in that f--kin place * * *.

[11]** Ostrem testified that he was not with Boomgaarden and Weyker on the day of the burglary, but was home with his wife all weekend. Ostrem testified that he knew who Boomgaarden was and had been friends with Weyker for a couple of years. Weyker's

girlfriend was the best friend of Ostrem's wife and the four of them socialized occasionally. He also confirmed that he owned the glasses and shoes that he was wearing when the police took the photographs. To corroborate his alibi defense, Ostrem offered testimony from his sister. She testified that she called Ostrem at approximately 10:30 a.m. at home on the day of the burglary and he answered the telephone. Ostrem's wife was expected to testify as an alibi witness, but she did not.

At the close of evidence, the trial court held a hearing in chambers to discuss jury instructions. The trial court told the attorneys that it had concluded, as a matter of law, that the state had not presented sufficient evidence to submit the burglary and theft charges in the complaint, but that the court intended to submit the charges under an aiding and abetting theory. The trial court recognized that Ostrem had not been charged with aiding and abetting, but **[**12]** it determined such an instruction did not prejudice him because he was sufficiently put on notice by the burglary and theft charges. Furthermore, the trial court concluded:

In the Court's opinion there is no witness that either side, or that the state failed to call that the Defendant might have called to change the evidence available. In other words, I do not believe it's prejudicial to the Defendant to submit the aiding and abetting charges to the jury in light of his theory of the case and in the absence of any persuasive argument that to do so would be prejudicial.

Ostrem's counsel objected to the court's decision to give the aiding and abetting instruction, indicating that such an instruction put the defense at a strategic disadvantage. However, the trial court concluded:

It doesn't change the State's theory of the case. The State doesn't know whether one or two or three people entered the house. * * * Circumstantially the State has presented evidence that this was a burglary. Circumstantially the State has presented evidence that the Defendant was present at the time. * * * I don't know what other evidence anybody could have presented knowing three days ago **[**13]** that the matter would be submitted to the jury under 609.05, aiding and abetting the theft and the burglary. * * * There were no more people around. It's the same crime that is being discussed.

The trial court instructed the jury that Ostrem could be found guilty if he aided and abetted the commission of a burglary or **[*921]** theft. The court also gave a jury instruction on the elements of second-degree burglary and theft. [4] After deliberating for almost three hours, the jury returned guilty verdicts of aiding and abetting second-degree burglary and aiding and abetting theft.

FOOTNOTES

4 The trial court gave the following jury instructions concerning circumstantial evidence, aiding and abetting, second-degree burglary, and theft:

A fact is proved by circumstantial evidence when its existence can be reasonably inferred from the other facts proved in the case. Before a person can be found guilty on circumstantial evidence alone you must find that the circumstantial evidence, taken as a whole, is consistent with guilt and inconsistent with any other rational conclusion.

* * * *

Now, a Defendant is guilty of a crime committed by another person when the Defendant has intentionally **[**14]** aided the other person in committing it, or has intentionally advised, hired, counseled, conspired with or otherwise procured the person to commit it. A Defendant intentionally aids and abets another in committing a crime where the Defendant played some knowing role in the commission of the crime and takes no steps to thwart its commission. Active participation in the overt act constituting the crime is not necessary for a Defendant to be guilty of a crime committed by another. The intent to aid and abet another in committing a crime may be inferred from circumstantial evidence, including Defendant's presence, companionship and conduct before, during and after the commission of the crime. Defendant is guilty of a crime however only if the other person commits a crime. Defendant is not liable criminally for aiding, advising, hiring, counseling, conspiring or otherwise procuring the commission of a crime unless some crime, including an attempt is actually committed.

* * * *

Burglary in the second degree. The statutes of Minnesota provide: That whoever with intent to commit a crime therein enters a building without the consent of the person in lawful possession is guilty of **[**15]** **burglary** in the second degree if the building is a dwelling.

* * * *

Now, with respect to the crime of theft. The statutes of Minnesota provide that whoever intentionally takes, and without claim of right takes possession of movable property of another without the others consent, and with intent to permanently deprive the owner of possession of the property is guilty of theft.

The first issue we address is whether the pretrial identification procedure was impermissibly suggestive in violation of Ostrem's due process rights. HN1 In determining whether pretrial eyewitness identification evidence must be suppressed, a two-part test is applied. Simmons v. United States, 390 U.S. 377, 381, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968); State v. Marhoun, 323 N.W.2d 729 (Minn. 1982). The first inquiry focuses on whether the procedure was unnecessarily suggestive. Marhoun 323 N.W.2d at 733. Whether a pretrial identification procedure is unnecessarily suggestive turns on whether the defendant was unfairly singled out for identification. Simmons, 390 U.S. at 383. Single photo line-up identification procedures have been widely condemned as unnecessarily suggestive. Id **[**16]** .; Manson v. Brathwaite, 432 U.S. 98, 104, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977). However, under the second prong of the test, the identification evidence, even if suggestive, may be admissible if the totality of the circumstances establishes that the evidence was reliable. Manson, 432 U.S. at 116; State v. Bellcourt, 312 Minn. 263, 251 N.W.2d 631, 633 (Minn. 1977). If the totality of the circumstances shows the witness' identification has adequate independent origin, it is considered to be reliable despite the suggestive procedure. Manson, 432 U.S. at 116; Bellcourt, 251 N.W.2d at 633. The test is whether the suggestive procedures created a very substantial likelihood of irreparable misidentification. Id. In Bellcourt we adopted the five factors articulated by the United States Supreme Court to evaluate in considering the totality of the circumstances as articulated:

1. The opportunity of the witness to view the criminal at the time of the crime;

2. The witness' degree of attention;

3. The accuracy of the witness' prior description of the criminal;

4. The level of certainty demonstrated by the witness at the photo display;

5. **[**17]** The time between the crime and the confrontation.

Bellcourt, 251 N.W.2d at 633 (citing Neil v. Biggers, 409 U.S. 188, 199, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972)).

We may presume that in the present case the procedure was unnecessarily suggestive, as did the trial court. However, we conclude **[*922]** that the identification is nonetheless admissible because application of the Bellcourt factors supports a conclusion that the evidence is reliable: Kevin Schroeder had an opportunity to see Ostrem during daylight hours from relatively close range at the farmhouse; his attention was focused on the two men on the farmhouse deck and he carried on a conversation with one of the men; his description of Ostrem given to Deputy Thompson was detailed and accurate; his identification of Ostrem from the photo was instantaneous and unprovoked, and his identification of Ostrem's photo was only 48 hours after the crime. As a result, the out-of-court photo identification of Ostrem was properly admitted because it was reliable evidence under the totality of the circumstances test.

Next, we address whether the trial court committed reversible error by submitting the case to the jury under **[**18]** an aiding and abetting theory even though the complaint charging Ostrem with second-degree burglary and theft did not cite the aiding and abetting statute. [5] Ostrem contends that the trial court did not have the authority to sua sponte "amend" the complaint after trial had begun, and alternatively that even if the court had such authority, in this case it caused Ostrem substantial prejudice and deprived him of due process. [6] We find Ostrem's arguments unpersuasive.

FOOTNOTES

5 We note that, although the trial court and the parties refer to the statute as "aiding and abetting," in fact the word "abet" was not used as a part of Minn. Stat. § 609.05 when it was adopted in 1963, but instead "advises" was used. According to the Advisory Committee comments, "abet' * * * adds nothing to what is already provided," presumably because the dictionary defines "abet" as nearly synonymous with "aid." See Black's Law Dictionary 17 (4th ed. 1968). We have previously held that "aiding and advising" is more descriptive and is the correct phrase for the offense covered by the statute. Matter of Welfare of M.D.S., 345 N.W.2d 723, 733 n.5 (Minn. 1984). Nonetheless, subsequent cases refer to the statute as "aiding and abetting." See, e.g., State v. Lucas, 372 N.W.2d 731, 740 (Minn. 1985); State v. Ortlepp, 363 N.W.2d 39, 45 (Minn. 1985); State v. Campbell, 367 N.W.2d 454, 460 (Minn. 1985); State v. McKenzie, 532 N.W.2d 210, 222 (Minn. 1995); State v. Pierson, 530 N.W.2d 784, 788 (Minn. 1995). **[**19]**

6 We do not conclude that adding an aiding and abetting instruction constitutes an amendment to the complaint. However, for purposes of responding to Ostrem's argument, we will treat the trial court's action as such an amendment.

Case law and the Minnesota Rules of Criminal Procedure clearly provide HN2 the trial court with discretionary authority to determine whether to amend a complaint. The applicable rule of criminal procedure provides:

The court may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Minn. R. Crim. P. 17.05. Additionally, we have held that "The matter of allowing amendments to complaints under Minn. R. Crim. P. 17.05 is in the sound discretion of the trial judge." Gerdes v. State, 319 N.W.2d 710, 712 (Minn. 1982).

A two-step process is used to determine whether Minn. R. Crim. P. 17.05 properly authorized the trial court's actions in this case. First, we look to whether the aiding and abetting instruction constituted **[**20]** charging Ostrem with an "additional or different offense." Minn. R. Crim. P. 17.05. It is undisputed that aiding and abetting is not a separate substantive offense. See State v. Britt, 279 Minn. 260, 263-65, 156 N.W.2d 261, 263-64 (1968); State v. Alexander, 290 Minn. 5 at 9, 185 N.W.2d 887, 890 (1971); State v. Ortlepp, 363 N.W.2d 39, 45 (Minn. 1985). Furthermore, we have previously held that a jury may convict the defendant of aiding and abetting despite the absence of "aiding and abetting" language in the complaint. State v. Lucas, 372 N.W.2d 731, 740 (Minn. 1985). In

State v. DeFoe, 280 N.W.2d 38, 40 (Minn. 1979), a case of striking similarity, we affirmed the conviction of a defendant for aggravated robbery based on an aiding and abetting theory even though Minn. Stat. § 609.05 was not specifically mentioned in the complaint. Similarly, in the present case, because aiding and abetting is not a separate or additional charge to the second-degree burglary and theft charges, the instruction did not violate the first element of Minn. R. Civ. P. 17.05.

[*923] Ostrem's argument also fails the second prong of the test because his "substantial rights" were not prejudiced **[**21]** by the trial court's instructions. Ostrem argues that his due process rights were violated because the aiding and abetting instructions deprived him of an opportunity to prepare an effective defense, and the court of appeals concluded that the instruction gave the appearance of favoritism toward the prosecution. Ostrem, 520 N.W.2d at 429. We do not agree. [z] In Gerdes we stated the applicable standard:

HN3 Upon careful review of Rule 17.05, we find that in order to prejudice the substantial rights of the defendant, it must be shown that the amendment either added or charged a different offense.

Gerdes, 319 N.W.2d at 712. As noted above, aiding and abetting does not constitute a separate or different charge; thus under Gerdes, Ostrem's substantial rights were not prejudiced. Furthermore, in DeFoe we held:

Here, while the [aiding and abetting] statute was not cited in the complaint, the complaint made it clear that defendant was being charged with aggravated robbery, and the reports and statements attached to the complaint made it clear what the state basically contended had happened. There is therefore no possibility that defendant was confused **[**22]** as to the nature of the charges.

DeFoe, 280 N.W.2d at 40. Finally, it is particularly difficult to find any prejudice in this case, where Ostrem's entire defense rested on the alibi theory that he was at home with his wife. [8] Thus, the trial court's instruction does not violate the second element of Minn. R. Crim. P. 17.05. In sum, an additional or different offense was not charged and the substantial rights of Ostrem were not prejudiced. Therefore, the trial court did not abuse its discretion in giving the aiding and abetting instruction.

FOOTNOTES

z It is unclear how the instruction could be said to give "the appearance of favoritism toward the prosecution" when the trial court did not actually dismiss the charges of burglary and theft, nor were the jurors informed about the elements of burglary and theft until the close of evidence, when the trial court put the original charges in the context of aiding and abetting. In this context, it is unlikely that the jurors would have perceived any favoritism to the prosecution upon hearing the court's instructions.

8 The record indicates that during a chambers discussion concerning the jury instructions, Ostrem's counsel was unable to articulate how Ostrem would be prejudiced by the trial court's decision to submit the case to the jury under an aiding and abetting theory.

[23]** Finally, we must determine whether there is sufficient evidence in the record to sustain Ostrem's convictions of aiding and abetting second-degree burglary and aiding and abetting theft. HN4 We view the evidence in the light most favorable to the verdict when determining whether the jury acted with due regard for the presumption of innocence and for the need to overcome it by proof beyond a reasonable doubt. State v. Steinbuch, 514 N.W.2d 793, 799 (Minn. 1994). Furthermore, a conviction based on circumstantial evidence will be upheld and such evidence is entitled to as much weight as any other kind of evidence, so long as a detailed review of the record indicates that the reasonable inferences from such evidence are consistent only with the defendant's guilt and inconsistent with any rational hypothesis except that of guilt. Id.; State v. Scharmer, 501 N.W.2d 620, 622 (Minn. 1993). Inconsistencies in the state's case or possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable. State v. Anderson, 379 N.W.2d 70, 78 (Minn. 1985). Thus, to succeed in a challenge to a verdict based on **[**24]** circumstantial evidence, a convicted person must point to evidence in the record that is consistent with a rational theory other than guilt. Steinbuch, 514 N.W.2d at 798-99; State v. Race, 383 N.W.2d 656, 662 (Minn. 1986). Furthermore, the jury is free to question a defendant's credibility, and has no obligation to believe a defendant's story. Steinbuch, 514 N.W.2d at 800; see also State v. Bliss, 457 N.W.2d 385, 390 (Minn. 1990).

In the present case, Ostrem was convicted of aiding and abetting second-degree burglary and aiding and abetting theft. [2] **[*924]** The court of appeals concluded that the state's evidence at most showed mere presence and inaction, and was legally insufficient to establish that defendant intentionally participated in the crimes. Ostrem, 520 N.W.2d at 431. HN5 The relevant portion of the aiding and abetting statute provides:

> A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.

Minn. Stat. § 609.05, subd. 1 (1994). To impose liability under the aiding and abetting statute, the state must show "some **[**25]** knowing role in the commission of the crime by a defendant who takes no steps to thwart its completion." State v. Merrill, 428 N.W.2d 361, 367 (Minn. 1988) (citing State v. Jones, 347 N.W.2d 796, 801 (Minn. 1984)). Mere presence at the scene of a crime does not alone prove that a person aided or abetted, because inaction, knowledge, or passive acquiescence does not rise to the level of criminal culpability. Russell, 503 N.W.2d at 114. Nevertheless, active participation in the overt act which constitutes the substantive offense is not required, and a person's presence, companionship, and conduct before and after an offense are relevant circumstances from which a person's criminal intent may be inferred. Russell, 503 N.W.2d at 114 (citing State v. Ulvinen, 313 N.W.2d 425, 428 (Minn. 1981)); Matter of Welfare of M.D.S., 345 N.W.2d 723, 733 (Minn. 1984). Thus, we must determine if the evidence was sufficient to support both elements: 1) Ostrem's presence at the farmhouse; and 2) Ostrem's "knowing role" in the burglary and theft.

FOOTNOTES

[2] HN6 Minn. Stat. § 609.582, subd. 2 (1994) provides:

> Whoever enters a building without consent and with intent to commit a crime, * * * commits burglary in the second degree and may be sentenced to imprisonment for

not more than ten years or to payment of a fine of not more than $ 20,000 or both * * *.

Minn. Stat. § 609.52, subd. 2(1) (1994) provides:

Whoever does any of the following commits theft and may be sentenced as provided * * *.

(1) intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property * * *.

[26]** Although the record contains evidence of two different factual scenarios, after a detailed review of the record, we are convinced that there was sufficient evidence to establish Ostrem's presence at the farmhouse. At trial, Ostrem argued that he was at home with his wife when the crime was committed and introduced the following evidence to support his theory: 1) Boomgaarden's testimony, which consistently maintained that Ostrem was not with him and Weyker at the farmhouse; 2) Ostrem's testimony that he was not at the farmhouse; and 3) Ostrem's sister's testimony that she spoke with Ostrem on the telephone at approximately 10:30 on the morning of the crime. By contrast, the state's theory that Ostrem was present at the farmhouse was supported by the following evidence: 1) Kevin Schroeder's accurate description of the two men he saw on the deck; 2) Kevin Schroeder's positive out-of-court photo identification of both Ostrem and Boomgaarden; 3) Kevin Schroeder's testimony at trial, including a positive in-court identification of Ostrem; 4) Deputy Thompson's testimony of the investigation and arrest of Ostrem; 5) testimony from Boomgaarden and Ostrem concerning their relationship with **[**27]** each other and with Weyker; and 6) impeachment of Boomgaarden's testimony. After determining the weight and credibility of all the evidence, the jury disbelieved Ostrem's alibi defense and concluded he was present at the farmhouse. Viewing all the evidence in the light most favorable to the state, it appears a reasonable jury could conclude Ostrem was at the farmhouse during the crime.

Next we must determine whether the state presented sufficient evidence to allow the jury to reasonably infer not only that Ostrem was not merely present at the farmhouse, but also that he played some knowing role in the crime. [10] We have previously held **[*925]** that HNZ a person's presence can be sufficient to impose liability if it somehow aids the commission of the crime. State v. Parker, 282 Minn. 343, 355-56, 164 N.W.2d 633, 641 (1969); State v. Garretson, 293 N.W.2d 44, 45 (Minn. 1980). Our analysis in Parker of the circumstances in which "presence" constitutes "aiding and abetting " is particularly instructive:

In the instant case defendant was present during the criminal activity. He did nothing to prevent the offenses committed or the brutal beating which the victim endured. He must **[**28]** have known of the robbery and made no effort to stop it, and we think, under the circumstances, his presence and acts helped to make all the crimes possible.

If the proof shows that a person is present at the commission of a crime without disapproving or opposing it, it is competent for the jury to consider this conduct in connection with other circumstances and thereby reach the conclusion that he assented to

the commission of the crime, lent to it his approval, and was thereby aiding and abetting its commission. Certainly mere presence on the part of each would be enough if it is intended to and does aid the primary actors.

* * * *

'Once a reasonable inference arises, however, from all the circumstances that defendant was a participant[,] * * * defendant's guilt is sufficiently established. This inference is a fact question for jury determination * * *.'

Parker, 282 Minn. at 355-56, 164 N.W.2d at 641 (quoting State v. Bellecourt, 277 Minn. 163, 152 N.W.2d 61 (1967)). Similarly, in State v. Merrill, 428 N.W.2d at 367, the appellant argued that, although he participated in the burglary and aggravated robbery and was present when the victim was killed, **[**29]** the evidence was insufficient under Minn. Stat. § 609.05 to establish his intentional participation in the murder. We rejected this argument and distinguished between the type of "presence" in Merrill and the type of "presence" in State v. Ulvinen, 313 N.W.2d 425 (Minn. 1981): [11]
Appellant contends, however, that more than his mere presence at the scene is necessary to establish the level of activity required of one who aids and abets in the commission of a crime. For this premise, he relies primarily on Ulvinen, where the court construed section 609.05, subdivision 1 as requiring 'conduct that encourages another to act.' * * * Significantly, in Ulvinen, all of the defendant's actions were taken *after* the crime had been completed. * * * Appellant was clearly more than an innocent bystander who assisted [the principal] only after the killing was completed. * * * His involvement in the circumstances here is much greater and more extensive than was the defendant's in Ulvinen.
Merrill, 428 N.W.2d at 367-68 (citations omitted). We concluded in Merrill that HN8 the state meets its burden by showing some knowing role in the commission of the **[**30]** crime by a defendant who takes no steps to thwart its completion. Id. at 367; see also Russell, 503 N.W.2d at 114.

FOOTNOTES

[10] We note that if Ostrem could point to evidence in the record that is consistent with a rational explanation for his presence other than participation in the crime, then there would be insufficient circumstantial evidence to sustain the convictions. See Steinbuch, 514 N.W.2d at 799. However, because Ostrem relied exclusively on an alibi defense, there is no evidence in the record supporting any rational alternative to the state's theory for Ostrem's presence at the farmhouse.

[11] Ulvinen, the defendant was asleep downstairs when her son killed his wife. 313 N.W.2d at 426. After the killing, her son woke her and asked her to keep his children out of the bathroom while he dismembered his wife's body. Id. The defendant later helped clean up the blood and lied to investigators to protect her son. Id. Earlier, her son had told the

defendant that he intended to kill his wife and she had done nothing to prevent the killing. Id. at 427. Although defendant's acts were found to be "morally reprehensible," her conviction for murder was reversed because something more than mere inaction is required to impose accomplice liability under the statute. Id. at 428.

[31]** In the present case, the state introduced substantial evidence placing Ostrem at the farmhouse during the commission of the crime and establishing his long term association with Boomgaarden and Weyker, who also were charged with second-degree burglary and theft. There is convincing evidence indicating not only that Ostrem was at the farmhouse while the crime was being committed, but also that he did nothing to "thwart its completion" and in fact, when confronted by Kevin Schroeder at the farmhouse, Ostrem passively condoned Boomgaarden's **[*926]** efforts to cover up the crime. Overall, looking at all the evidence and reasonable inferences in a light most favorable to the state, and considering our holdings in Parker and Merrill, it appears a reasonable jury could infer that Ostrem's presence constituted aiding and abetting.

We reverse the court of appeals' decision on all three grounds and reinstate Ostrem's convictions for aiding and abetting second-degree burglary and theft.

State of Minnesota, Respondent, v. Edward Lewis Hicks, Appellant

No. C2-88-499

Court of Appeals of Minnesota

1988 Minn. App. LEXIS 959

September 30, 1988, Decided
October 11, 1988, Filed

NOTICE: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed his conviction in the trial court (Minnesota) of third degree burglary.

OVERVIEW: Defendant was apprehended by police while hiding in a garage in the area where several break-ins had occurred. They took defendant to the home of the victim, who had reported a burglary one hour before. The victim identified defendant as the man who had broken into his home. Defendant argued that police improperly had him in handcuffs and forced him to sit up in the police car so that the victim could see him and make the identification. The court held that the police methods were necessary because defendant had resisted arrest, requiring the handcuffs, and refused to sit up in the car. The court held that that the identification, which occurred one hour after the incident in which the victim was able to get a good view of defendant. in affirming the conviction the court held that there was sufficient evidence to demonstrate defendant's intent to commit a crime, stealing, in the victim's home because the victim reported that defendant was moving items around, as if to look for something.

OUTCOME: The court affirmed the conviction.

CORE TERMS: intruder, identification, degree burglary, apartment, suggestive, lesser-included, trespass, lesser offense, commit a crime, misidentification, confrontation, break-in, in-court, dwelling, robbery, arrest, jury instruction, photographic identifications, unnecessarily, timeliness, prejudiced, acquitted, captured, reliable, sitting, showup, minutes, lying, break-ins, kitchen

LEXISNEXIS® HEADNOTES Hide

Criminal Law & Procedure > Eyewitness Identification > Fair Identification Requirement

HN1 Even if a confrontation procedure for identification of a suspect is deemed to be deemed suggestive, the central question for the reviewing court is whether under the 'totality of the circumstances' the identification was reliable. Factors, in addition to

timeliness, to be considered when evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, and the level of certainty demonstrated by the witness at the confrontation. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > Property Crimes

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses

Criminal Law & Procedure > Jury Instructions > Requests to Charge

HN2 A lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former. In determining whether an offense is a lesser-included offense, the court looks at the elements of the offense, not the facts of the particular case. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > Property Crimes

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > Burglary > Elements

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > Criminal Trespass > Elements

HN3 **The offense of second degree burglary is committed if an intruder enters a dwelling without consent and with the intent to commit a crime. Minn. Stat. § 609.582, subd. 2 (1986). A trespasser is one who intentionally occupies or enters the dwelling of another, without claim of right or consent of the owner. Minn. Stat. § 609.605, subd. 1(6) (Supp. 1987). Consequently, where an intruder enters a dwelling, trespass is a lesser-included offense of second degree burglary.** More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > General Overview

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses

HN4 Having determined a lesser offense exists the decision to submit it to the jury lies within the sound discretion of the trial court. Where the evidence warrants such an instruction, the trial court must grant a request for the submission of a lesser-included offense only if the evidence rationally would permit the jury to acquit the defendant of the charged offense and find him guilty of the lesser offense. More Like This Headnote

COUNSEL: C. Paul Jones, State Public Defender, Mark F. Anderson, Asst. State Public Defender, University of Minnesota, Minneapolis, MN, for Appellant

Hubert H. Humphrey, III, Attorney General, St. Paul, MN, and Tom Foley, Ramsey County Attorney, Steven C. DeCoster, Assistant County Attorney, St. Paul, MN, for Respondent

JUDGES: Considered and decided by Doris Ohlsen Huspeni, Presiding Judge, Norton, Judge and Hachey, Judge, * without oral argument.

* Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. 6, § 2.

OPINION BY: HUSPENI

OPINION

UNPUBLISHED OPINION

DORIS OHLSEN HUSPENI, Judge

DECISION

On September 28, 1987, several attempted break-ins in the Merriam Park neighborhood of St. Paul were reported to the police. Appellant, Edward Hicks, was arrested after being apprehended while hiding under a pile of rugs inside a garage in the area. A police officer drove appellant to the home of Kevin Landberg who had reported a break-in at his Ashland Avenue apartment approximately half an hour before appellant's arrest. Landberg was asked **[*2]** if he could identify appellant, who was lying down in the rear seat of the squad car, as the man who entered his apartment. The police opened the car door and forced appellant into a sitting position so that Landberg could observe appellant more closely. Landberg immediately identified appellant as the intruder he had observed less than an hour earlier standing in the kitchen of his apartment.

Appellant was charged with second degree burglary in violation of Minn. Stat. §§ 609.581 and 609.582, subd. 2(a) 1986. At trial on January 6, 1988, the jury heard testimony from Landberg and two other witnesses who made photographic identifications of appellant as the man who had attempted to break into their homes during the morning of September 28. All three witnesses made positive in-court identifications of appellant. At the close of evidence, the trial court gave the jury an instruction on second degree burglary and *sua sponte* gave an instruction on third degree burglary. In response, appellant requested an instruction on trespass, which instruction was denied. The jury subsequently acquitted appellant of second degree burglary and found him guilty of third degree burglary.

Appellant's **[*3]** first challenge to the conviction is that the one-person on-the-scene showup at Landberg's apartment was impermissibly suggestive and that in consequence Landberg's affirmative identification was unreliable. The Minnesota Supreme Court has on

several occasions upheld the trial court's refusal to suppress eye-witness identification testimony following a one-person showup conducted shortly after the crime. *See, e.g.*, *State v. Gutberlet*, 346 N.W.2d 639, 642 (Minn. 1984) (defendant caught and identified within "moments" of armed robbery). See also *State v. Lloyd*, 310 N.W.2d 463, 464 (Minn. 1981) (defendant identified "within minutes" after robbery); *State v. Hardy*, 303 N.W.2d 57, 58 (Minn. 1981) (defendant captured and identified within "moments" of rape and robbery); *Jackson v. State*, 269 N.W.2d 23 (Minn. 1978) (defendant captured "within minutes" after the crime and "immediately returned" to the scene of the crime). We conclude that the identification in this case, which occurred within one hour of the attempted break-in, was conducted within a short enough time after the crime to be reliable with regard to timeliness.

Even though the time interval between the break-in **[*4]** and identification was short, we must further ensure the identification procedure was otherwise free from "suggestiveness" which could have given rise to "very substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 198 (1972). Suggestive confrontations are disapproved because they increase the likelihood of misidentification. *Id.* Appellant contends the identification was suggestive because he was handcuffed at the time and was forced into the sitting position by police to give Landberg a better view. The record reveals, however, that appellant resisted arrest with some violence and that he refused to leave the lying position so that Landberg could see him. Landberg was entitled to a view of appellant sufficient to exclude him as the person who entered the apartment. We conclude that the procedure employed to ensure that view was not unnecessarily suggestive.

HN1 Even if the confrontation procedure was to be deemed suggestive, the central question for the reviewing court is "whether under the 'totality of the circumstances' the identification was reliable." Id. at 199; *State v. Gutberlet*, 346 N.W.2d at 642. The *Biggers* Court set forth factors, **[*5]** in addition to timeliness, to be considered when evaluating the likelihood of misidentification:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation * * *
>
> 409 U.S. at 199.

In this case, our review of the record indicates that Landberg came into eye-to-eye contact with the intruder for several seconds as the man stood within a few feet of Landberg in his kitchen. This episode occurred in the middle of the day when lighting was good. It is true that Landberg was awakened by the noise of the intruder, but there is no indication Landberg was in any way sluggish from sleep when he investigated the intrusion into his home. The description of the intruder which Landberg gave to police was consistent with his in-court testimony.

In addition, appellant was affirmatively identified by two other victims living in the same vicinity as Landberg, who made complaints of an intruder answering Hicks' description within three hours before appellant's arrest. Apart from complaining of an officer's **[*6]** verbal approval of affirmative photographic identification the day after the attempted break-ins, appellant does not contend the identifications by these persons were unnecessarily suggestive. At trial these two victims gave descriptions of the intruder which matched those given by them to the police at the date of the incident. Both made affirmative in-court identifications of appellant even though his hair style was different at the date of trial. We conclude that, after considering all the relevant circumstances, there was no indication that appellant was misidentified.

Appellant next argues that the trial court erred in denying his request for a jury instruction on the lesser-included offense of trespass. HN2 "A lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former." State v. Roden, 384 N.W.2d 456, 457 (Minn. 1986). In determining whether an offense is a lesser-included offense, the court looks at the elements of the offense, not the facts of the particular case. Id. Under the 1986 **burglary** statute, HN3 the offense of second degree **burglary** is committed if an intruder enters a dwelling without consent **[*7]** and with the intent to commit a crime. Minn. Stat. § 609.582, subd. 2 (1986). **A trespasser is one who intentionally:**

occupies or enters the dwelling of another, without claim of right or consent of the owner * * *.

Minn. Stat. § 609.605, subd. 1(6) (Supp. 1987). Consequently, where an intruder enters a dwelling, trespass is a lesser-included offense of second degree burglary. HN4 Having determined a lesser offense exists, however, the decision to submit it to the jury lies within the sound discretion of the trial court. Bellcourt v. State, 390 N.W.2d 269, 273 (Minn. 1986). Where the evidence warrants such an instruction, the trial court must "grant a request for the submission of a lesser-included offense only if the evidence rationally would permit the jury to acquit the defendant of the charged offense and find him guilty of the lesser offense." *State v. Roden,* 348 N.W.2d at 458.

Appellant contends there is no evidence that the intruder entered Landberg's apartment with intent to commit a crime. It is not clear from the record by what means the intruder entered the apartment. There is evidence, however, that he entered through a rear window, forcing it open using **[*8]** an instrument such as a crowbar. In addition, Landberg heard the intruder moving items around as "if he was looking for something." We conclude that together these facts are evidence of an intent to steal, and that the trial court did not abuse its discretion in denying the request for a jury instruction on trespass. There was no "rational basis for submitting the lesser offense, the evidence being such that the only real issue for the jury was whether defendant was guilty as charged or not guilty at all." Id.

Even if we assume for the sake of argument that the trial court erred in denying appellant's requested instruction, the failure to give an appropriate instruction on lesser-included offenses is a ground for reversal only if a defendant is prejudiced thereby. Bellcourt, 390

N.W.2d at 273. In the circumstances, if the jury had determined there was insufficient evidence of the intent to commit a crime, it would have acquitted on the third degree burglary charge. Consequently, appellant was not prejudiced by any failure to give an instruction on trespass.

Affirmed.

September 30, 1988