Cite as 2011 Ark. App. 486

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA10-1248

Opinion Delivered August 31, 2011

T.D. APPELLANT	APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. JV-2010-365]
V.	HONORABLE RHONDA K. WOOD, JUDGE
STATE OF ARKANSAS APPELLEE	MOTION TO WITHDRAW DENIED; REBRIEFING ORDERED

JOHN MAUZY PITTMAN, Judge

Appellant, a minor, was adjudicated delinquent based on a finding that he committed misdemeanor theft of property; consequently, he was fined and placed on probation. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(k), appellant's counsel has filed a motion to be relieved and a brief stating that there is no merit to the appeal. The motion is accompanied by an abstract and addendum of the proceedings below, including all objections and motions decided adversely to appellant, and a brief in which counsel explains why there is nothing in the record that would support an appeal. The clerk of this court attempted to serve both appellant and his guardian with a copy of his counsel's brief and notification of his right to file a pro se statement of points for reversal within thirty days, but both letters were returned as undeliverable.

From our review of the record and the brief presented to us, we cannot say that the appeal is wholly without merit. In reviewing the sufficiency of the evidence in a delinquency case, we apply the same standard of review as in criminal cases; that is, we view the evidence in the light most favorable to the State, considering only the proof that tends to support the finding of guilt. *C.H. v. State*, 51 Ark. App. 153, 912 S.W.2d 942 (1995). We will affirm if the adjudication is supported by substantial evidence, which is evidence that is of sufficient force and character to compel a conclusion one way or the other without resorting to speculation or conjecture. *Id.*

Here, there was evidence that a cell phone was stolen from a backpack while the owner was playing on the visiting team during a middle-school basketball game. The backpack was in an unsecured athletic locker room at Bob Courtway Middle School in Conway, Arkansas. The next day, the school principal reviewed the game-day surveillance video showing the door to the locker room. It showed that appellant and another young man approached the doorway, stood there for a few moments, and entered the locker room. They left the locker room soon thereafter and walked toward the camera. Based on the video, appellant and the other young man were summoned to the principal's office. The other young man admitted having the cell phone, which he surrendered to the principal. He did not implicate appellant.

There was no evidence that appellant took the cell phone. It is true that, when two people assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both; one cannot disclaim accomplice liability simply because he did

not personally take part in every act that made up the crime as a whole. *Henson v. State*, 94 Ark. App. 163, 227 S.W.3d 450 (2006). However, mere suspicion that a crime has taken place, or presence at the scene of a crime, is not enough to make a person an accomplice. *See Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982); *Roleson v. State*, 277 Ark. 148, 640 S.W.2d 113 (1982). Except in extraordinary cases, even presence at the scene of the crime combined with actual knowledge that a crime is being committed is insufficient to make a person an accomplice in the absence of any purpose to further the accomplishment of the offense. *See Cate v. State*, 270 Ark. 972, 606 S.W.2d 764 (1980).

Arkansas Code Annotated section 5-2-403 (Repl. 2006) provides:

> (a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person:
>
> (1) Solicits, advises, encourages, or coerces the other person to commit the offense;
>
> (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing the offense; or
>
> (3) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to prevent the commission of the offense.
>
> (b) When causing a particular result is an element of an offense, a person is an accomplice of another person in the commission of that offense if, acting with respect to that particular result with the kind of culpable mental state sufficient for the commission of the offense, the person:
>
> (1) Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the particular result;
>
> (2) Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the particular result; or

> (3) Having a legal duty to prevent the conduct causing the particular result, fails to make a proper effort to prevent the conduct causing the particular result.

Thus, in order for a person to become an accomplice by failing to take affirmative action to prevent the commission of an offense, that person must have the "legal duty to prevent" the commission of the offense or conduct as referenced in subsections (a)(3) and (b)(3). Such a duty has been held to arise where a custodial parent knows that her child is being abused but takes no action to stop the abuse from continuing. *See Boone v. State*, 282 Ark. 274, 668 S.W.2d 17 (1984); *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1979).

In finding that appellant had been an accomplice to the theft, the trial judge addressed appellant as follows:

> I'm going to find the charge against you true. So that you understand, you're liable for the conduct of another and what the law says—clearly [the other young man] took the phone, handed the phone over. You guys were together. It looked suspicious, like you keep looking out in the hallway to make sure nobody was coming. But what it says [is] if you aid or attempt to aid somebody else in the commission of a crime then you are responsible. But, also, you have a legal duty to prevent the crime, which is [Ark. Code Ann. section] 5-2-403[(a)](3). You have a legal duty to prevent it, and . . . to say "Don't take the phone" or afterwards come up and say "This is where the phone is." My belief from the evidence is that you aided him, as well.

On this record, considering the trial judge's ruling from the bench, we cannot say that there are no nonfrivolous issues to be argued on appeal. Consequently, appellant's attorney's motion to withdraw is denied, and counsel is directed to submit an adversarial brief.

Motion to withdraw denied; rebriefing ordered.

GLADWIN and BROWN, JJ., agree.