IN THE COURT OF APPEALS OF IOWA

No. 8-689 / 08-0440
Filed October 1, 2008

IN THE INTEREST OF K.A.L.R.,
Minor Child,

K.A.L.R., Minor Child,
Appellant.

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis, District Associate Judge.

A minor appeals a district court order finding he committed the delinquent act of aiding and abetting attempted burglary in the third degree. **REVERSED.**

Lars Anderson of Holland & Anderson, L.L.P., Iowa City, for appellant minor child.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Janet Lyness, County Attorney, and Kristin Parks, Assistant County Attorney, for appellee State.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

VAITHESWARAN, J.

K.A.L.R. appeals a district court order finding he committed the delinquent act of aiding and abetting attempted burglary in the third degree. He claims the evidence was insufficient to support this finding. Our review is de novo. *In re S.C.S.*, 454 N.W.2d 810, 814 (Iowa 1990).

A delinquent act is defined as "[t]he violation of any state law or local ordinance which would constitute a public offense if committed by an adult." Iowa Code § 232.2(12)(a) (2007). The state law on attempted burglary provides that a person commits the crime where the person

> having the intent to commit a felony, assault or theft therein, who, having no right, license, or privilege to do so, attempts to enter an occupied structure, the occupied structure not being open to the public . . . .

Id. § 713.2. The state law on aiding and abetting provides:

> All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals. The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt.

Iowa Code § 703.1. Aiding and abetting requires proof that the accused "assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission." *State v. Lott*, 255 N.W.2d 105, 107 (Iowa 1977), *overruled on other grounds by State v. Allen*, 633 N.W.2d 752 (Iowa 2001).

The State asserted that K.A.L.R. aided and abetted the commission of a burglary by serving as a lookout while his fourteen-year-old companion broke into

an apartment. On appeal, K.A.L.R. contends the State relied on his mere presence at the scene, a fact that he maintains is legally insufficient to establish a violation. *See id.* (stating "neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting"); *cf. In re R.M.O.*, 433 N.W.2d 44, 46 (Iowa Ct. App. 1988) (finding previous presence at scene, presence at scene during burglary, ability to serve as lookout, failure to report burglary, and fact that objects were stolen amounted to insufficient evidence to corroborate accomplice testimony). We agree with K.A.L.R.

The record reveals the following facts. Amanda Tully and her boyfriend, Jeremy Payne, decided to make a trip from North Liberty to Des Moines. As Tully left her apartment and went to her car, she saw two boys, later identified as K.A.L.R. and S.S., standing outside the building. The boys watched as Tully and Payne drove off. Within five to ten minutes, Payne discovered that he had left his wallet in the apartment. Tully and Payne returned to the apartment. As they pulled up, they saw K.A.L.R. leave the corner of the building that provided a view of Tully's apartment window and her parking space. The couple entered the apartment and found an open bedroom blind, a slashed window screen, and snow resting on the inside of the windowsill. Police discovered the boys walking along a street near the apartment building. They later examined the shoes that the boys were wearing and compared them to the footprints around Tully's bedroom window. The shoes that created the prints in the snow immediately outside the window were identified as those worn by S.S., not K.A.L.R.

This evidence established that K.A.L.R. was acquainted with S.S., was present at the scene and may, indeed, have known that his companion was

burglarizing Tully's apartment. The evidence did not establish that K.A.L.R. participated in or encouraged the burglary. As noted, his footprints were not found in or around the apartment. Additionally, there is no evidence to establish that he attempted to alert S.S. to Tully and Payne's return. While K.A.L.R. had the opportunity to serve as a lookout, there is simply not enough evidence to establish that he did serve as a lookout. *See In re R.M.O.*, 433 N.W.2d at 46.

In reaching this conclusion, we have considered evidence that the day was cold and blustery, no one else was in the vicinity, and Tully did not recognize the boys as residents of the apartment. These are all facts that might lead one to suspect illicit conduct. However, suspicion is not enough to establish guilt in the criminal context. *See State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981) (stating evidence must do more than create "speculation, suspicion, or conjecture"). We believe it is similarly insufficient to establish a violation in this context.

The State had the burden to prove beyond a reasonable doubt that K.A.L.R. actively participated in or encouraged the criminal act. Iowa Code § 232.47(10). With this heavy burden in mind, we conclude the State did not prove that K.A.L.R. aided and abetted his companion's act of attempted burglary. Accordingly, we reverse the district court's finding that K.A.L.R. committed a delinquent act.

REVERSED.