IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
JEMAELL DIAMOND RILEY,
aka Jemaell Diamondomi Riley,
Defendant-Appellant.

Multnomah County Circuit Court
140431549; A160143

Jerry B. Hodson, Judge.

Argued and submitted May 11, 2017.

Andrew D. Robinson, Deputy Public Defender, argued the cause for appellant. With him on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Jacob Brown, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before DeVore, Presiding Judge, and James, Judge, and Haselton, Senior Judge.*

JAMES, J.

Judgment of conviction on Counts 21 through 26 reversed; remanded for resentencing; otherwise affirmed.

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* James, J., *vice* Duncan, J. pro tempore.

JAMES, J.

Defendant appeals a judgment convicting him on 17 counts of a variety of offenses for a crime spree that spanned several days. For purposes of our opinion, only three episodes in that spree are relevant for discussion. Each episode is discussed in detail below, but in summary, the first involves an attempted kidnapping and robbery on April 2, 2014, (the Johnson episode). There, the state alleged that the defendant and his accomplices conspired to kidnap Johnson, a jewelry store employee, with the intention of forcing Johnson to open safes in various store locations using his employee keys. The second involves an attempted robbery of a T-Mobile store on April 15, 2014, (the T-Mobile episode). There, the state alleged that defendant and his accomplices conspired to perform a "strong arm" robbery on a T-Mobile store as the employees were closing the store for the evening. The third involves the burglary of a uniform supply store on April 15, 2014, (the Blumenthal's episode). There, officers observed suspects burglarizing the Blumenthal's store and a chase ensued, which resulted in the apprehension of defendant and two accomplices.

On appeal, defendant raises 15 assignments of error including challenges to the trial court's denial of his motion for judgment of acquittal, in which he argued that defendant's connection to the crimes alleged in Counts 21 and 26 (the T-Mobile episode) and Counts 22 through 25 (the Johnson episode) was solely through the testimony of his accomplices, without the extrinsic evidence connecting him to the crime as required by ORS 136.440(1). We agree, and accordingly reverse Counts 21 through 26.[1]

Because defendant was apprehended following the Blumenthal's episode, we relate the details of that incident first. In the early morning hours of April 15, 2014, Portland

[1] In light of our disposition on the motion for judgment of acquittal on Counts 21 through 26, the entirety of this case must be remanded for resentencing. See ORS 138.222(5); *State v. Skaggs*, 275 Or App 557, 559-62, 364 P3d 355 (2015), *rev den*, 359 Or 667 (2016).

Defendant also raises a number of sentencing errors, plus a plain error challenge to the trial court's failure to merge Count 10 with Count 13, and Count 16 with either Count 18 or 19. The state properly concedes the merger error, which the trial court can address on remand.

Police Officer Livingston learned that an alarm had gone off at a Blumenthal's Uniform Store on Barbur Boulevard. Upon checking the business he observed that the back door had been damaged in a possible attempt to gain entry. He also noticed that close by was a white Suburban. Ultimately, he left the scene.

Later that morning, around 2:00 a.m., Livingston was driving around that same area when he again saw the white Suburban in the vicinity of Blumenthal's. He became suspicious and called in other officers, who staged themselves in areas where the suspects could no longer see them, but they could conduct surveillance. Within 20 minutes the Suburban drove into the back alleyway behind the Blumenthal's.

One of the officers walked past the alleyway and saw a person wheeling a container from Blumenthal's to the Suburban. Shortly thereafter, the vehicle drove away. Another officer checked the back door and found that it was no longer secured, and saw evidence of a burglary.

Sergeant Holbrook fell in behind the Suburban and activated his overhead lights, but the suspects did not stop. A chase ensued involving the Suburban and three or four patrol cars. During that chase the suspect vehicle crashed into a pole, and the driver, Ropp, fled on foot.

Inside the Suburban, officers found Young and defendant, as well as numerous firearms, explosives, Molotov cocktails, zip ties, gloves, and binoculars.

Very quickly upon interrogation Young offered to assist the police and testify at trial regarding the events of that night, as well as various crimes he claimed that Ropp, himself, and defendant had been involved in over the preceding months, including the Johnson and T-Mobile episodes. Ultimately, both Young and Ropp negotiated cooperation agreements and testified for the state.

With respect to the Johnson episode, the accomplices testified that Ropp first formed the idea of kidnapping Johnson, an employee at a chain of jewelry stores. Their

plan was to kidnap Johnson and force him to open the safes at multiple store locations.

They testified that the three men followed Johnson on several occasions to learn his habits. They then broke into vehicles at an animal shelter in Washington County, hoping to find ketamine—an injectable sedative that could be used to facilitate the kidnapping—and stole syringes, zip ties, uniforms, and other equipment. They removed the middle row of seats from an Astro van and affixed the zip ties where they could be used to secure Johnson. Then, on April 2, 2014, they parked in the parking garage where Johnson kept his vehicle, and waited for him.

According to the accomplice testimony, Ropp rode the elevator with Johnson but, when a family with small children got on the elevator, he decided to abort the kidnapping attempt. However, by then, Young and defendant had already detonated several smoke bombs on the floor where Johnson kept his vehicle. When the elevator reached that floor, Johnson saw the smoke and ran off.

With respect to the T-Mobile episode, Ropp and Young testified that defendant had previously worked at the T-Mobile store and knew the closing procedures. They planned to enter the store at closing with weapons and take money from the safe. To that end, they had made thermite, a substance that, through chemical reaction, creates very high temperatures over a small surface area.

They testified that on the evening of April 15, 2014, they drove to the T-Mobile store in a Suburban SUV. Ropp and Young waited outside the store while defendant stayed in the vehicle as a lookout. All three were armed, and in contact via walkie-talkie. However, as the store employees began to leave a bicyclist rode up to an adjacent store. Not wanting witnesses, the three abandoned their plans and drove away.

At trial, defendant moved for a judgment of acquittal on Counts 21 through 26—the Johnson and T-Mobile episodes—arguing that the accomplice testimony was insufficiently corroborated by extrinsic evidence connecting the

defendant to the alleged crime.[2] The trial court denied the motion, and ultimately convicted defendant on those counts following a bench trial. On appeal, defendant renews his arguments that Counts 21 through 26 lacked the required extrinsic corroboration.

ORS 136.440(1) provides:

> "A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence that tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances of the commission."

That statute has remained unchanged in all material respects since its original enactment. *See* General Laws of Oregon, Crim Code, ch XXII, title II, § 217, p 478 (1845-1864). The rule reflects the long-standing policy that the testimony of one implicated in the crime is inherently untrustworthy. As the Supreme Court has noted, "accomplice testimony comes from a corrupt and polluted source, and any other rule would expose to the peril of unjust conviction innocent men whom the accomplice might find it to his interest to implicate in his crime." *State v. Reynolds*, 160 Or 445, 469, 86 P2d 413 (1939). The rule reflects concerns "about the veracity of a witness who, by his or her own admission, has committed a crime, and because of concern that an accomplice might be induced to testify falsely against the person with whom he or she committed the crime by promises of leniency or immunity." *State v. Oatney*, 335 Or 276, 283, 66 P3d 475 (2003).

The requirement is not onerous. Even "slight or circumstantial" evidence will suffice if it tends to connect the defendant with the crime. *State v. Ortiz-Rodriguez*, 229 Or App 373, 380, 211 P3d 373 (2009); *see also State v. Long*

[2] In relation to the Johnson and T-Mobile episodes, defendant was charged with two counts of conspiracy to commit first-degree robbery, ORS 164.415; ORS 161.450(2)(a) (Count 21 and 22); two counts of attempted first-degree robbery, ORS 164.415; ORS 161.405(2)(b) (Counts 23 and 26); one count of conspiracy to commit first-degree kidnapping, ORS 163.235; ORS 161.450(2)(a) (Count 24); one count of attempted first-degree kidnapping, ORS 163.235; ORS 161.405(2)(b) (Count 25).

et al., 113 Or 309, 312, 231 P 963 (1925). Nor does the corroborative evidence need to independently corroborate each material fact required to sustain a conviction. *State v. Boone*, 213 Or App 242, 248, 160 P3d 994, *adh'd to as modified on recons*, 215 Or App 428, 169 P3d 1274 (2007).

Rather, the corroborating evidence must "fairly and legitimately tend[] to connect the defendant with the commission of the crime, so that it can in truth be said that his conviction is not based entirely upon evidence of the accomplice[s]." *State v. Norton*, 157 Or App 606, 609-10, 972 P2d 1198 (1998) (quoting *State v. Brake*, 99 Or 310, 314, 195 P 583 (1921)). To fairly connect the defendant with the crime, the corroborative evidence must be independent of any of the testimony of the accomplices. Evidence that obtains its logical value in connecting the defendant to the crime, only when viewed through the lens of the accomplice's accusations, is insufficient.

That longstanding principle has been reiterated numerous times. In *Brake*, 99 Or at 313-14, the court held:

> "The language of the statute is 'other evidence,' and hence the corroborative evidence must be independent of the testimony of the accomplice. The corroborating evidence must connect, or tend to connect, the defendant with the commission of the crime charged; and, furthermore, the tendency of the corroborative evidence to connect the defendant must be independent of any testimony of the accomplice."

The court reaffirmed that analysis in *Reynolds*, noting, "[t]estimony which tends to make the connection only when supplemented by certain testimony of the accomplice does not satisfy the law." *Reynolds*, 160 Or at 458 (emphasis omitted).

That reasoning has continued into more modern Oregon jurisprudence. In *State v. Caldwell*, 241 Or 355, 360, 405 P2d 847 (1965), the court held that if the corroboration "must be supplemented by testimony by the accomplices in order to connect the defendant with the crime it is insufficient." *Id.*; *see also State v. Marling*, 19 Or App 811, 816, 529 P2d 957 (1974); *State ex rel Juv. Dept. v. B. M. L.*, 242 Or App 414, 419, 256 P3d 132 (2011).

Additionally, and critically, the accomplice testimony must connect the defendant with *the* offense alleged, not merely *an* offense generally. *State v. Ortiz-Rodriguez*, 229 Or App 373, 381, 211 P3d 373, 377-78 (2009); *State v. Foster*, 221 Or App 108, 113, 188 P3d 440 (2008). It is insufficient to look at the evidence and know that something foul is afoot. Rather, when viewed independently, not through the lens of accomplice testimony, the extrinsic evidence must do more than raise an aura of criminality; it must tend to connect the defendant with *the crime alleged*.

Finally, inherent in accomplice corroboration is the corollary common law concept of *corpus delicti* corroboration.[3] There must be some evidence, independent of the accomplice's testimony, showing that a crime *did in fact occur*. In *State v. Scott*, 28 Or 331, 42 P 1 (1895), the Oregon Supreme Court made this clear, quoting with authority Roscoe:

> "'What appears to be required,' says Roscoe, in his work on Criminal Evidence (volume 1, *p. 133), 'is that there should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only *that a crime has been committed*, but that the prisoner is implicated in it.'"

Id. at 337 (emphasis added); *see also Reynolds*, 160 Or at 458 (reiterating same).

Scott recounted a series of cases, noting that each contained some indication that the crime had occurred independent of the accomplice testimony. The court referenced *State v. Odell*, 8 Or 31, (1879), and *State v. Townsend*, 19 Or 213, 23 P 968 (1890), each involving accomplice accusations of theft (a sack of flour and a cow, respectively). The court noted that in *Odell* there was evidence of a missing sack of flour. Similarly, the owner of the cow in *Townsend* testified that the animal was stolen from his pasture on the night in question. The court distinguished those cases from the facts before it in *Scott*, which involved allegations of adultery.

[3] ORS 136.425(2), is the codification of the common law *corpus delicti* rule in the related context of confessions. *State v. Manzella*, 306 Or 303, 305 n 1, 759 P2d 1078 (1988).

> "But [in *Townsend*] the crime was susceptible of proof by the person who lost the animal, while in the case at bar the only evidence of the commission of the crime is the testimony of the accomplice herself. ***
>
> "Tested by this rule, we are unable to discover any evidence, aside from [the accomplice's testimony], which, taken by itself, leads to the inference that a crime even has been committed."

Scott, 28 Or at 337.

We turn now to applying those principles, beginning with the Johnson episode, wherein the accomplices testified to a planned, but aborted, kidnapping of Johnson for the purpose of using him to open jewelry store safes. The state argues that testimony was corroborated by evidence of defendant's association with Ropp and Young, in particular the fact that defendant was apprehended with Ropp and Young during the Blumenthal's burglary. Further, the state contends that, when defendant was arrested along with Ropp and Young several days later, he possessed several of the criminal instrumentalities of the Johnson episode including, (1) firearms, (2) syringes, (3) thermite, (4) zip ties, and (5) a Washington County animal shelter jacket.

The state's reliance on defendant's association with Ropp and Young, however, is misplaced.

> "Intimate association with the accomplice *** at or about the time of the commission of the crime, and in the neighborhood of the place where the crime was committed, may sometimes be sufficient, especially where the defendant and the accomplice were not only together, but had the fruits of the crime in their possession."

Brake, 99 Or at 315. Here, defendant's participation in the Blumenthal's episode on April 15, 2014, is too temporally distant from the Johnson episode on April 2, 2014, for this court to conclude that the association is sufficiently "at or about the time of the commission of the crime."

As to the instrumentalities of the Johnson episode, there, too, the state's extrinsic evidence is insufficient. With respect to the zip ties, those found in the Suburban in which defendant was a passenger were unused. The Astro van,

in contrast, had seats removed and zip ties tied into the floorboard. However, the state offered no evidence—other than the accomplice testimony—connecting defendant to that Astro van. In fact, a review of the record shows no evidence of where or when the Astro van was seized, how it was searched, whether the unused ties in the Suburban matched the ties used in the Astro van, or if defendant had ever been seen in, or near, the Astro van.

With respect to the items actually found in the Suburban after the Blumenthal's episode, there is nothing inherently criminal about the possession of a firearm, a syringe, unused zip ties, or thermite.[4] Those are all lawful items and we do not import to them an intrinsic criminal nature. When viewed on their own, and not through the lens of the accomplice testimony, there is nothing about those items that draws any logical connection, even slight or circumstantial, to the charged crime.

The animal shelter jacket presents a more difficult question. There is no reason for defendant to possess the jacket as he was not an employee of the shelter. Further, on March 14, 2014, there had been a report of animal shelter vehicles being broken into and a variety of items stolen. It can reasonably be inferred then that defendant was in possession of the proceeds of *a* crime, just not proceeds of *this* crime (the Johnson episode).

Possession "of the fruits of the crime has been held of itself sufficient corroboration of the accomplice to sustain a conviction." *Brake*, 99 Or at 315. The question for us then becomes this: Can possession of the fruits of a crime allegedly committed as part of a plan for the commission of another crime sufficiently corroborate an accomplice's testimony as to the second crime? We hold that, at least in this case, it cannot.

The state relies on two cases from outside Oregon for the proposition that extrinsic evidence of one portion of

[4] As noted above, thermite is not an explosive, but rather a product of a chemical reaction that creates very high temperatures over a small area. Thermite, which can be made using a variety of materials, is frequently employed in welding. It is a popular science experiment with even a cursory internet search yielding thousand of home science instructions and "how to" videos.

an ongoing plan or scheme suffices to corroborate accomplice testimony for the entire scheme. *See People v. Goldfeld*, 60 AD2d 1, 6, 400 NYS2d 229 (NY App Div 1977) (Where "a common scheme or plan is established which includes the crimes charged, evidence corroborating the accomplice's testimony as to one crime may be used to implicate the defendant with the other crime contained in a separate charge") and *Green v. State of Alabama*, 61 So3d 386, 395 (Ala Crim App 2010) ("*** [W]hen an individual and an accomplice commit a series of crimes as part of a common scheme or plan, evidence corroborating the accomplice's testimony regarding one of the offenses tends to connect the accused with the other offenses, *** that were committed in a similar manner and as part of the common scheme or plan." (Brackets and internal quotation marks omitted.)).

The state has presented no Oregon authority adopting these holdings, and we are aware of none. At least in the context of this case, we find those cases unpersuasive. Oregon's rule is grounded in the policy that the testimony of one implicated in the crime is inherently untrustworthy. An accomplice's inducement to testify falsely against a person with whom he or she committed the crime, by promises of leniency or immunity, does not diminish as the number and severity of the crimes increases. If anything, as the scope of the accomplice accusations grow, implicating the defendant in this, that, and everything, so too grows the potential for fabrication in exchange for greater leniency. In such circumstances, the rationale behind the rule comes into greater focus.

The cases relied upon by the state cannot be reconciled with the clear holdings of Oregon cases that are binding on this court. Those cases dictate that evidence that must be supplemented by testimony of accomplices in order to connect the defendant with the crime is insufficient. *Caldwell*, 241 Or at 360. Here, there is no *independent* logical connection between the animal shelter jacket and the Johnson episode. This is not a situation where the predicate crime was stealing a bank uniform, and the ultimate planned crime is the robbery of the bank to which that uniform corresponds. Under that scenario, one might not need the accomplice testimony to logically connect the theft of the

uniform to the planned bank robbery—the uniform's particularity could speak for itself. But here, there is no independent self-evident connection between the animal shelter and the kidnapping of a jewelry store employee.[5]

When viewed in totality, the items are certainly suspicious. Unquestionably, a trial court could reasonably conclude that the items evidence something nefarious. But, again, it is not enough that the extrinsic evidence establish general criminality. It must tend to connect the defendant with *the* offense alleged. *Foster*, 221 Or App at 113. In this case, the items must connect not just to a kidnapping, but to *the kidnapping of Johnson*. *Id*. at 114 (finding that possession of money, scales, and a rental car might tend to connect defendant to some drugs, but not to the possession or delivery of or conspiracy to deliver the drugs found in a car that formed the basis of the indictment); *Ortiz-Rodriguez*, 229 Or App at 384-85 (holding that evidence that accomplice "had bought methamphetamine from defendant in the past, [plus] telephone conversations between the two of them on particular dates" were insufficient to corroborate narcotic sales on the dates alleged in the indictment).

The only way we can draw a line of connection between the theft of a Washington County animal shelter jacket on March 14, 2014, and an attempted kidnapping and robbery of Johnson on April 2, 2014, is by supplementing our knowledge with the accomplice testimony. The same holds true for the other items on which the state relied. Neither Johnson nor any nonaccomplice witness testified to seeing firearms, syringes, or thermite. No evidence of those items was found in the parking garage. The only way anyone would know that the planned kidnapping and robbery would utilize those items is from the accomplices themselves. For that reason, the purported extrinsic evidence of the Johnson episode made "the connection only when supplemented by certain testimony of the accomplice" and accordingly did "not satisfy the law." *Reynolds*, 160 Or at 458.

[5] While the accomplices testified that they targeted the animal shelter to obtain ketamine, no ketamine was actually found in their possession. No nonaccomplice witness testified about seeing syringes or needles. No one testified about hearing words or statements related to needles, syringes, ketamine, or sedation. And there were no reports of other crimes employing ketamine around this time.

We turn next to the T-Mobile episode. There, the accomplices testified that they had planned a strongarm robbery of the store, but aborted it when a bicyclist was spotted nearby. According to the state, that testimony was corroborated by evidence of defendant's association with Ropp and Young during the Blumenthal's burglary which occurred later that same night. The state notes that when defendant was arrested for the Blumenthal's burglary he was taken into custody from a Suburban, which the accomplices claimed was used in the aborted T-Mobile episode. Further, the state contends that, when defendant was arrested along with Ropp and Young, he possessed several of the criminal instrumentalities of the T-Mobile episode including (1) firearms, (2) walkie-talkies, and (3) thermite. Finally, the state points to two key pieces of evidence, a video of defendant and the accomplices experimenting with thermite in Ropp's backyard, and a note found in Ropp's apartment with the words "T-Mobile" and "cash" written on it.

We need not address whether that evidence tends to connect defendant to the charged crime, however, if we determine that there is insufficient corroborative evidence of a crime at all. *See Scott*, 28 Or at 336-37. In the Johnson episode, there was independent evidence of the attempted kidnapping itself: the testimony of the victim, Johnson. Johnson testified to witnessing the smoke as the elevator doors opened. His testimony is some evidence, however slight or circumstantial, that the crime actually occurred. In contrast, here there is no evidence, independent of the accomplice testimony, that the T-Mobile attempted robbery *occurred at all*.

No witnesses saw any of the men near the T-Mobile store. Their vehicle was not captured on video. No T-Mobile employees or customers observed anything suspicious. The T-Mobile episode is analogous to *Scott*, 28 Or at 336-37 ("Tested by this rule, we are unable to discover any evidence, aside from [the accomplice's testimony], which, taken by itself, leads to the inference that a crime even has been committed."). Apart from the testimony of the accomplices, there is no evidence that the men were ever at, or approaching, or intending to approach, the T-Mobile store, or that any attempted robbery of that store ever occurred.

Neither the video nor the note provides the necessary corroboration. First, the state offered the video into evidence, but elicited no testimony about when it was made. Even if we assume from the other testimony concerning still photographs that the video was made a few days prior to the T-Mobile episode, there is nothing inherently criminal in the video. Again, it is not a crime to make thermite. And nowhere in the video is there any indication of a plan to use it in a criminal manner. Certainly, there is nothing about the video that provides any evidence, even slim, that there was an aborted attempted robbery of a T-Mobile store on April 15, 2014, three days (potentially) after the video was made.

The note, likewise, offers little in the way of corroboration. The entire testimony regarding the note is contained in six lines of transcript:

> "[STATE]: I'm going to hand you State's Exhibit 25, which has been [pre]admitted, and ask you if this is something that was recovered from your residence.
>
> "[ROPP]: Yes.
>
> "[STATE]: And what is that?
>
> "[ROPP]: A bunch of thoughts, plan, graph type thing.
>
> "[STATE]: Put it another way. Are these potential targets that you all had discussed hitting?
>
> "[ROPP]: Yes."

The state, and Ropp, characterized the note as containing "potential" targets for crimes. And therein lies the problem with using the note as *corpus delicti* corroboration that a crime actually occurred. Ordinarily, to corroborate a crime under the *corpus delicti* rule, evidence must tend to show (a) the injury or harm specified in the crime occurred, and (b) that injury or harm was caused by someone's criminal activity. *See generally* *State v. Chatelain*, 347 Or 278, 284, 220 P3d 41 (2009) (describing those two requirements for *corpus delicti* corroboration). In the case of an inchoate crime, the application of that test is more complicated. *Id.* at 284-85 (explaining that, in the case of "attempt crimes, for example—determining the extent of the injury or harm

produced by the given crime is more difficult than it is with crimes like homicide and arson").

The gravamen of an attempt crime is a "substantial step" toward the injury or harm described in the offense; hence, for purposes of *corpus delicti* corroboration, the evidence must tend to show that someone took a substantial step toward the charged crime. Here, to the extent the note describes "potential" targets, it is merely prepatory, and we have held mere prepatory planning is not a substantial step for purposes of showing an attempted crime. *See generally* *State v. Carlton*, 361 Or 29, 45, 388 P3d 1093 (2017) (explaining that "[m]ere preparation will not suffice" to constitute a substantial step toward commission of the crime); *State v. Kimbrough*, 285 Or App 84, 90, 395 P3d 950, *rev allowed*, 362 Or 38 (2017) (analyzing whether defendant's conduct in writing and delivering a letter to a hitman "exceeded mere preparation" to solicit the murder, and concluding that it did "because defendant had done all that he could have done under the circumstances to cause the murders of his intended victims").

In this case, the note found at defendant's residence lists locations and individuals but does not tend to establish that defendant or anyone else took any step, let alone a substantial step, toward committing any specific crimes with regard to the listed locations or people, let alone what crimes those were or would be. As such, the note is not corroborative that the offense charged—attempted robbery—actually occurred at all.

We therefore conclude that insufficient evidence independent of the accomplice testimony exists for the Johnson or T-Mobile episodes and that the trial court erred in denying the motion for judgment of acquittal on Counts 21 and 26 (T-Mobile) and Counts 22 through 25 (Johnson).

Judgment of conviction on Counts 21 through 26 reversed; remanded for resentencing; otherwise affirmed.