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WASHINGTON STATE
SUPREME COURT

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Apr 12, 2017
Court of Appeals
Division III
State of Washington

94390-7

Supreme Court No. ______
(CoA No. 33700-6-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

TIMOTHY G. KENDALL,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Carrie L. Runge, Judge

PETITION FOR REVIEW

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A. <u>SUMMARY OF APPEAL</u>

Mr. Kendall was tried on charges of rape and delivery of methamphetimine. He was acquitted of the rape allegations, but convicted of the delivery. On appeal, Mr. Kendall challenged the sufficiency of the evidence that he delivered methamphetimine, however, the Court of Appeals affirmed in the face of no definitive physical evidence and conflicting and inconsistent testimony from the complaining witness. The Court of Appeals opinion is inconsistent with the decisions of this Court, other Court of Appeals' opinions, and presents a significant question of consitutional law which warrants further review.

B. <u>IDENTITY OF PETITIONER AND THE DECISION BELOW</u>

The petitioner, Timothy G. Kendall, through the undersigned attorney, David L. Donnan, requests this Court grant review pursuant to RAP 13.2(b) and RAP 13.4(b)(1), (2) and (3), of the unpublished decision of the Court of Appeals, Division Three, in *State v. Kendall*, No. 3370-6-III, filed February 14, 2017. A copy of the opinion is attached hereto as an Appendix A. A copy of the order denying reconsideration on March 14, 2017, is attached hereto as Appendix B.

C. ISSUE PRESENTED FOR REVIEW

Due process requires proof beyond a reasonable doubt that the accused knowingly delivered a controlled substance. Here the evidence about the source and nature of the allegedly controlled substance was inconsistent and contradictory, the complaining witness was uncertain what the substance was, and blood tests failed to establish when she consumed the drugs found in her system. Is the Court of Appeals opinion affirming Mr. Kendall's conviction on such a record inconsistent with the decisions of this Court and other Court of Appeals' opinions, raising a significant question of constitutional law?

D. FACTS RELEVANT TO PETITION

1. Procedural history.

Timothy G. Kendall appealled from his Benton County Superior Court conviction for delivery of methamphetamine based on the insufficiency of the evidence to support the jury's verdict. CoA No. 33700-6-III. The Court of Appeals affirmed the trial court by unpublished opinion filed on February 14, 2017. Appendix A. The Court of Appeals denied reconsideration on March 14, 2017. Appendix B.

2. Trial testimony.

Alena Inman testified she was 22 years old and had started using methamphetimine two years earlier. RP 18-19, 36. During this period, Ms. Inman described herself as using methamphetemine "[e]very day, all the time, nonstop." RP 36. She estimated she was consuming "about a quarter ounce" per day, which she described herself as "a lot." RP 36-37.

Ms. Inman acknowledged she has memory problems as a result of her continuous use of methamphetamine. RP 37. With regard to her memory, she further acknowledged that she had used methamphetamine right up to the day before the events underlying these charges. RP 37. When asked what portions of her memory were a blur and which were not, she ackowledge "[p]retty much everything. It's more memory issues, I have a hard time remembering." RP 51.[1]

Mr. Kendall testified that he lives in Richland Washington and recieves disability for a broken neck. RP 148. He was acquainted with Ms. Inman. RP 122-25. Around November 3rd 2015, Mr. Kendall decided to visit his son in Seattle and see his grandson. RP 95-98. Ms. Inman went

[1] Although Ms. Inman also indicated "recently my memory came back," these forms of "recovered memories" are notoriously unreliable. RP 51; see e.g. E. Loftus and K. Ketcham, *The Myth of Repressed Memory,* (St. Martin's Press, 1994). Ms. Inman's memory was stretched to the point that she could not recall driving Mr. Inman's car off the road. RP 42.

along because "she wanted to go to Seatle to see her father's grave and see her cousin..." RP 125. In Seattle, Mr. Kendall spent several hours with his family and Ms. Inman was able to meet her cousins. RP 39, 95-99, 126.

Although Ms. Inman alleged she and Mr. Kendall smoked methamphetimine while driving from Richland to Seattle and back, she could not remember where they were. RP 39. Mr. Kendall testified he did not give Ms. Inman methamphetamine. RP 124, 155. Mr. Kendall did acknowlege purchasing marijuana which was legal at the time. RP 124-26. He also acknowledged smoking some methamphetamine "at the motel. [Ms. Inman] said she ... got from a friend." RP 124. Ultimately, Mr. Kendall was emphatic that he did not give Ms. Inman methamphetamine. RP 129, 155. "I'm on a fixed income. I can't afford to buy that stuff." Id.

Notwithstanding this conflicting and inconsistent testimony regarding methamphetimine, the jury returned a guilty verdict and the Court of Appeals affirmed. CP 11.[2] Mr. Kendall now seeks review in this Court.

[2] The jury found Mr. Kendall not guilty of a charge of rape in the third degree. CP 10.

E. ARGUMENT

THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS' OPINION IS INCONSISTENT WITH THE DECISIONS OF THIS COURT, OTHER OPINIONS OF THE COURT OF APPEALS, AND PRESENTS A SUBSTANIAL QUESTION OF CONSTITUTIONAL LAW

1. Washington courts have clearly held the state and federal constitutions require proof of all the elements of the offense beyond a reasonable doubt.

The Due Process Clause of the Fourteenth Amendment and Article 1, section 3 of the Washington Constitution require the government to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). This reasonable doubt standard is indispensable, because it "impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." Hundley, 126 Wn.2d at 421-22 (quoting Winship, 397 U.S. at 364). Appellate review of sufficiency challenges is critical to ensuring our criminal law is not be diluted by a lower standard of proof that "leaves the public to wonder whether innocent persons are being condemned." Winship, at 364.; State v. DeVries, 149 Wn.2d 842, 72 P.3d 748 (2003).

Mr. Kendall was accused of violating RCW 69.50.401 which provides that "it is unlawful for any person to ... deliver, or possess with intent to manufacture or deliver, a controlled substance," including methamphetamine. CP 1-2. The essential elements of the offense are (1) delivery of the controlled

substance, and (2) knowledge that the substance delivered was a controlled substance. State v. DeVries, 149 Wn.2d 842, 850, 72 P.3d 748 (2003); State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Mr. Kendall has argued the evidence was insufficient to establish "delivery" or the nature of the controlled substance he allegedly provided. RP 124, 155.

2. The State's evidence was so fundamentally inconsistent and contradictory it could not support a reasonable inference Mr. Kendall delivered methamphetamine.

The Court of Appeals reiterates Ms. Inman's conclusory assertion that she and Mr. Kendall "shared methamphetamine supplied by Mr. Kendall," but the Court goes on to acknowledge, "she was uncertain what the two had smoked." Slip op at 2. This was critical because she did so after describing her extensive experience with methamphetamine over the preceding two years; candidly admitting she used "Every day, all the time, nonstop." CP 19, 24, 36. She estimated her own daily consumption at "about a quarter ounce" right up to the day of her trip with Mr. Kendall. CP 36-37.

Based on her extensive experience, A.I. explained that unlike the substance Mr. Kendall allegedly shared with her, methamphetamine "[i]t's not powdery. It's crystally and it's hard." RP 24. For that reason, A.I. was uncertain what the substance was,

> Q: Can you tell the jury if this item that the defendant was giving you was definitiely methamphtetamine?
> A: To be honest, I'm not sure. It was really powdery and didn't look like regular crystal meth.

RP 24. Furthermore, Ms. Inman testified the effects were inconsistent with her extensive experience with methamphetamine because "it made me really, really tired and I couldn't comprehend anything." RP 25. Moreover, Ms. Inman acknowledged her memory of this period was incomplete. RP 51-53. In light of her inconclusive and contradictory testimony, the evidence was simply insufficient to support a reasonable inference that Mr. Kendall provided her with methamphetamine.

3. The Court of Appeals opinion is inconsistent with the decisions of this Court and other opinions of the Court of Appeals.

Washington cases finding sufficient evidence of the delivery of a controlled substance based on circumstantial evidence have not been grounded on such inconsistent and equivocal evidence. Compare State v. Hernandez, 85 Wn.App. 672, 675, 935 P.2d 623 (1997); State v. Smith, 104 Wn.2d 497, 707 P.2d 1306 (1985); State v. Hutton, 7 Wn.App. 726, 502 P.2d 1037 (1972).

In Hernandez, for example, the suspected customers and merchandise were gone, but officers observed transactions with high power binoculars, arrested Hernandez and second person for whom he was acting as accomplice. The officers testified about their extensive experience surveilling drug dealing operations in the area known for the availability of cocaine and explained that drug dealers often worked in pairs. The officers also recovered money from Hernandez consistent with sales and his

accomplice admitted bag recovered from him contained cocaine. Finally, a chemist testified that bag contained nine similarly packaged cocaine bindles. 85 Wn.App. at 675. In Mr. Kendall's case, however, there no physical evidence recovered and Ms. Inman's blood and urine tests failed to directly implicate Mr. Kendall.

In Smith, evidence was sufficient because a witness testified he saw Smith spoon white powder into plastic bag which police later discovered had cocaine and another witness testified Smith gave her a folded piece of paper police later determined to have held cocaine. Officers also observed large number of visitors and telephone calls to the location. 104 Wn.2d 497.

In Hutton evidence was sufficient where an informant testified Hutton gave her a white flaky substance which she ingested and felt a "tingling feeling" and psychiatrist's testified regarding effect upon nervous system. 7 Wn.App. 726. In contrast, Ms. Inman's testimony was that the effects she experienced were inconsistent with methamphetamine. CP 24-25. It was not in the form she had seen over the preceding two years, and there were no other meaningful observations from which to infer the nature of the substance in light of her history. Id.

In the face of A.I.'s conflicting testimony, the absence of methamphetamine in her blood test while it did appear in the urine test was explained by A.I.'s chronic use over the previous two years. RP 86-88. For

that reason, the last use of methamphetamine detecting in the urine sample could have been as far back as November 2nd or 3rd. RP 91. The Court's reliance on this remaining thread of circumstantial evidence was misplaced as it is insufficient to sustain the conviction. See State v. Hundley, 126 Wn.2d 418, 895 P.2d 403 (1995).

The evidence here is similar to other cases in which Washington appellate courts have found insufficient evidence to support delivery convictions. State v. Shupe, 172 Wn.App. 341, 289 P.3d 741, review denied 177 Wn.2d 1010 (2012) (evidence insufficient to support delivery of marijuana where the marijuana supposedly sold was never recovered, no buyer was specifically asked about the identity of the seller, police never saw defendant sell marijuana); State v. Martinez, 123 Wn.App. 841, 99 P.3d 418 (2004) (defendant did not relinquish control of bag of cocaine and alleged recipient's involuntary touching of it was temporary); State v. McPherson, 111 Wn.App. 747, 46 P.3d 284 (2002) (evidence of methamphetamine residue alone is insufficient to support conviction for possession of methamphetamine with intent to manufacture or deliver). The Court of Appeals' affirmance of Mr. Kendall's conviction on this record is, therefore, inconsistent with the decisions of this Court and other opinions of the Court of Appeals.

4. Due process precludes cherry picking facts from inconsistent trial testimony.

While the trier-of-fact is responsible for determining the credibility of the witnesses and weight of the evidence, it is not consistent with due process to arbitrarily cherry-pick from internally inconsistent testimony. Evidence is only sufficient to support a finding of guilt if the necessary and reasonable inferences can be drawn from the evidence. State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002) (naked possession is generally insufficient to establish an inference of an intent to deliver). A reviewing court cannot disregard inferences contrary to the verdict where they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. See e.g. State v. Glass, 439 S.W.2d 838, 842 (Mo. App. E.D. 2014) It is not for the appellate courts to "give the State the benefit of unreasonable, speculative or forced inferences." Id.

This point is illustrated most clearly by the Court's decision in State v. Hundley, 126 Wn.2d 418, 895 P.2d 403 (1995). There the evidence was insufficient to support conviction for possession of a controlled substance despite the fact that gas chromatograph spectrometer (GCMS) test performed by the crime laboratory tested positive for controlled substances, because other tests were negative. The Court found that where the evidence directly conflicts and therefore "could" support conviction, as it does here, it does not provide proof beyond a reasonable doubt. 126 Wn.2d at 421.

That the evidence "could" support conviction here does not mean the evidence was sufficient to support a guilty verdict, beyond a reasonable doubt. Id.

Finally, the strained evidence on the element of delivery also warrants more rigorous examination of the identity of the substance as well. RCW 69.50.101(f) defines "deliver" as "the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship." Because the statute does not define 'transfer,' courts look to its common dictionary meaning. State v. Martinez, 123 Wn.App. 841, 846-47, 99 P.3d 418 (2004). Courts have, therefore, interpreted 'transfer' to mean "to cause to pass from one person or thing to another,' as well as 'to carry or take from one person or place to another." Id. at 846-47 (quoting Webster's Third New Int'l Dictionary 2426–27 (1971)). But 'a person who buys drugs does not 'transfer', and hence does not 'deliver',' because to 'deliver' drugs, a person must undertake the active task of relinquishing control to another. State v. Morris, 77 Wn.App. 948, 951, 896 P.2d 81 (1995).

Even accepting Ms. Inman's testimony, the shared consumption of these suspected drugs does not establish the relinquishment of control which the law requires. Washington courts which have found sufficient evidence of delivery traditionally include testimonial evidence that the

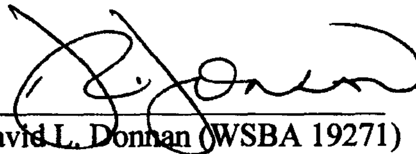
defendant sold drugs to another person. Where the recipient in an alleged delivery does not provide contemporaneous physical evidence, the inferences which may be drawn are limited. See Darden, supra. In Mr. Kendall's case, the record was insufficient to support the necessary inference that he delivered methamphetamine to Ms. Inman under Washington law.

F. CONCLUSION

The evidence was insufficient to prove beyond a reasonable doubt Mr. Kendall delivered methamphetamine as alleged. Because the Court of Appeals opinion is inconsistent with and contrary to the decisions of this Court and other opinions of the Court of Appeals, Mr. Kendall requests this Court accept review and vacate his conviction and sentence.

DATED this 12th day of April, 2017.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent,	)	No. 33700-6-III
v.	)	
TIM GARLAND KENDALL, Appellant.	)	UNPUBLISHED OPINION

KORSMO, J. — Timothy Kendall challenges his conviction for delivery of methamphetamine, arguing that the evidence was insufficient to support the jury's verdict. Properly viewed, the evidence permitted the jury to find each element of the offense and, therefore, was sufficient. The conviction is affirmed.

In light of the challenge presented, we need not discuss the procedural history of the case at any length. The essence of the charge was that Mr. Kendall, 61, shared methamphetamine with 22-year-old A.I. during a trip. The information came to light when A.I. went to a hospital to be examined for a sexual assault. Kendall was charged with third degree rape of A.I. and delivery of methamphetamine. The jury acquitted on the rape charge, but convicted on the delivery count.

Well settled standards govern our review of this issue. Whether or not sufficient evidence has been produced to support a criminal conviction presents a question of law

APPENDIX A

under the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Jackson v. Virginia*, 443 U.S. 307, 317-319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Specifically, *Jackson* stated the test for evidentiary sufficiency under the federal constitution to be "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. Washington follows the *Jackson* standard. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980) (plurality opinion); *id.* at 235 (Utter, C.J., concurring).

The elements of the delivery offense are that the defendant knowingly delivered a controlled substance. RCW 69.50.401(1); *State v. Boyer*, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979). Accordingly, the question here is whether the jury could have determined, as it did, that Mr. Kendall knowingly delivered a controlled substance, methamphetamine. The sole issue on appeal is whether the State established that methamphetamine was delivered. Mr. Kendall's identity and his knowledge of the substance's identity are not contested.

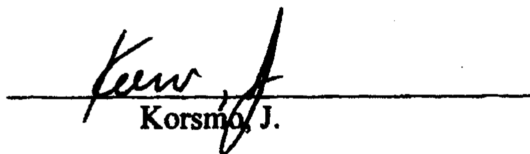
Ample evidence supported the jury's determination. A.I. testified that she was an experienced methamphetamine user and that the two of them had shared methamphetamine supplied by Mr. Kendall during the trip. She slept much of the day of the trip and did testify that some of the time she was uncertain what the two had smoked, but those uncertainties were questions of weight for the jury to consider along with her

statements that the two had used meth. More to the point, Mr. Kendall also admitted that the two had shared methamphetamine, a substance he, too, had prior experience with. In addition, testing showed that A.I. had no methamphetamine in her blood, but that her urine did show methamphetamine usage. Expert testimony informed the jury that methamphetamine leaves the blood stream after 15 hours, while it stays longer in the urinary system.

In short: both defendant and A.I. agreed that they smoked methamphetamine, A.I. testified that the defendant supplied it, and urine testing confirmed that she had used methamphetamine. This testimony could be believed by the jury and confirmed the elements of the offense: Mr. Kendall knowingly delivered methamphetamine to A.I. The evidence, therefore, was sufficient.

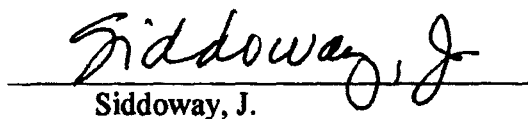
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

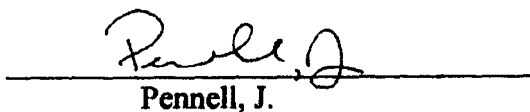


Korsmo, J.

WE CONCUR:



Siddoway, J.



Pennell, J.

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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 33700-6-III
Respondent,	)	
v.	)	ORDER DENYING MOTION FOR RECONSIDERATION
TIM GARLAND KENDALL,	)	
Appellant.	)	

THE COURT has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of February 14, 2017 is hereby denied.

PANEL: Judges Korsmo, Siddoway, Pennell

FOR THE COURT:

George Fearing

GEORGE FEARING
Chief Judge

APPENDIX B

MERYHEW LAW GROUP
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Court of Appeals
Division III
State of Washington

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Party Respresented: Timothy Kendall

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Comments:

No Comments were entered.

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