

COA No. 33671-9-III

FILED  
NOV 17, 2016  
Court of Appeals  
Division III  
State of Washington

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CHERRYL GRANT,

Appellant.

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BRIEF OF APPELLANT

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Kenneth H. Kato, WSBA # 6400  
Attorney for Appellant  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

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## I. ASSIGNMENT OF ERROR

1. The State's evidence was insufficient to support the convictions.

### *Issue Pertaining to Assignment of Error*

A. Was the State's evidence insufficient to support the convictions beyond a reasonable doubt? (Assignment of Error 1).

## II. STATEMENT OF THE CASE

Cherryl Grant was charged by amended information with count 1: delivery of a controlled substance, count 2: delivery of a controlled substance, count 3: delivery of a controlled substance, count 4: possession with intent to deliver, and count 5: unlawful use of a building for drug purposes. (CP 119-20). The case proceeded to jury trial.

The morning of trial, the court held a CrR 3.5 hearing to determine the admissibility of certain statements made by Ms. Grant to law enforcement after she was in custody. The court heard testimony and gave an oral decision finding she waived her *Miranda* rights after they were given to her and voluntarily made the statements. (7/23/15 Supp. RP 17-51). At the hearing, testimony showed that Brian Morris, Ms. Grant's boyfriend, owned the involved house. (*Id.* at 30). Although it appears the required CrR

3.5 findings and conclusions were not entered, the failure to do so was harmless in light of the oral decision of the court. *State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994).

This case arose from three controlled drug buys by an informant, David Swanberg. (7/24/15 RP 195). Those buys allegedly took place on July 24, 2014; July 31, 2014; and August 19, 2014. Mr. Swanberg knew Ms. Grant and her son James, with whom he hung out and got high. (*Id.* at 196-98). James introduced him to his mother, who traded meth for some of Mr. Swanberg's marijuana. (*Id.* at 199).

According to the informant, Ms. Grant had meth in a pencil case and weighed the drug out with scales. (7/24/15 RP 200-01). She took the meth from the case and put it into a smaller bag for Mr. Swanberg. (*Id.* at 201). He testified Ms. Grant was the one with the meth. (*Id.* at 202-03). People would contact James, who said he had to contact his mother. (*Id.* at 204).

In the first controlled buy, Mr. Swanberg went to James's place, where he stayed in a bunkhouse on property where his mother lived in the main house with her boyfriend, Brian Morris. (7/24/15 RP 205-06). Mr. Swanberg gave money to James, who went into the main house and returned with drugs. (*Id.* at 205-07).

In the second buy on July 31, 2014, Mr. Swanberg went to see James and they waited for his mother to come home. (7/24/15 RP 209-13). Ms. Grant drove a red Crown Victoria. (*Id.* at 214). Other folks showed up at the bunkhouse to buy drugs while they were waiting. (*Id.*). Mr. Swanberg gave James money for meth and he came back from the main house with it. (*Id.* at 215). James also took phones in payment for drugs. (*Id.* at 215-16).

The third time, a phone call to James by Mr. Swanberg was recorded, pursuant to court order, setting up a buy. (7/24/15 RP 156, 218). James said Ms. Grant was not there yet, but he would call when she was. (*Id.* at 130, 157, 222-23). The informant later went to see James at the bunkhouse. (*Id.* at 157-58, 224). Mr. Swanberg gave money to James, who he went to the main house and returned with meth. (*Id.* at 225). Two other people were in the bunkhouse. (*Id.*). Supposedly, Ms. Grant went to Spokane to pick up drugs. (*Id.* at 226). Mr. Swanberg signed on to be an informant to work off criminal charges. (*Id.* at 228).

The police executed a search warrant on August 19, 2014, at 623 Index, after the buy with Mr. Swanberg took place. (7/24/15 RP 126). Ms. Grant was on the couch in the main house. (*Id.* at 135-36). Meth was found there along with a ledger sheet, digital

scales, and unused baggies. (*Id.* at 137-42). In the bunkhouse, two cell phones were found along with drug paraphernalia, but no meth. (*Id.* at 145). Detective Jodi Barcus, who was involved in the investigation, noted that in all the controlled buys, the transactions waited for Ms. Grant to be there. (*Id.* at 149). Ms. Grant said the meth was hers. (*Id.* at 149, 243-44). Fifty dollars in recorded buy money was found in a black purse on the couch. (*Id.* at 150).

James was also arrested, searched, and taken to the main house. (*Id.* at 159-60). His mother commented to him that they were in trouble. (*Id.* at 160). James said he gave the buy money to his mother. (*Id.* at 243). Documents were found tying Ms. Grant to the house. (*Id.* at 163). She directed officers to meth in a pouch and told them “dough boy” provided her with the drug. (*Id.* at 235, 244). There was about 5 grams of meth. (*Id.* at 244).

James testified he lived at 623 Index before he was arrested. (7/24/15 RP 273). He was in prison for controlled buys of drugs in July and August 2014. (*Id.* at 274). He had been living in a motorhome and bunkhouse and paid rent to his mother. (*Id.* at 275). Her boyfriend owned the property and lived there in the main house along with Ms. Grant. (*Id.*). James was friends with Mr. Swanberg and they did drugs together. James was addicted to

meth, heroin, and marijuana. (*Id.* at 276). He never told Mr. Swanberg he could get drugs from his mother. (*Id.* at 277).

James testified it was his meth on the property and he kept it in a pouch locked in his mother's safe without her knowing about it. (7/24/15 RP 277). He did not tell her where he kept the meth and did not tell police he got it from his mother. (*Id.* at 277-78). James could not get into the main house to get drugs because it was locked and Ms. Grant had to be there to let him in. (*Id.* at 278). He would call and tell his mother he needed her home so he could get his "valuables," *i.e.*, meth. (*Id.* at 279). Ms. Grant did not supply him with meth and he was the one who sold drugs to the informant. (*Id.* at 281-82). James testified he sold meth to Mr. Swanberg in the three controlled buys. (*Id.* at 280-81). The meth was kept in the main house. (*Id.* at 282). Just before the August 19, 2014 bust, James revealed to his mother that his "valuables" were meth. (*Id.* at 284). Ms. Grant told him to get it out of her house. (*Id.*). James said it was all him from the beginning. (*Id.* at 252-53).

Following the State's rebuttal testimony that James did not tell officers on August 19, 2014, the meth was his and revealed the contents of a jail call from him to his mother saying he would take the blame if they would let him out, both sides rested. (7/24/15 RP

305, 308, 310). No exceptions were taken to the jury instructions. (*Id.* at 313-14). The jury convicted Ms. Grant of all counts. (CP 342-43). The court sentenced her within the standard range to 50 months. (7/28/15 RP 358; CP 5). This appeal follows.

### III. ARGUMENT

A. The State's evidence was insufficient to support the convictions beyond a reasonable doubt.

The State must prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

As to the three delivery counts, no one saw Ms. Grant deliver, much less furnish, drugs to anyone. She was there at the property, but mere presence without more does not prove accomplice liability and there was no proof she was ready to assist in the crimes. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Moreover, the State must prove the identity of the perpetrator beyond a reasonable doubt. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). The only perpetrator identified was James. For the jury to convict Ms. Grant of the three deliveries in this absence of evidence, it must have resorted to guess, speculation, and conjecture to find the existence of facts. The jury may not do so. *Hutton, supra*. The delivery convictions should be reversed and the charges dismissed.

With respect to the conviction for possession with intent to deliver relating to the August 19, 2014 buy, the State's evidence did not prove the "intent to deliver." Even if Ms. Grant said the meth was hers, possession alone does not show an intent to deliver. *State v. O'Connor*, 155 Wn. App. 282, 290, 229 P.3d 880, *review denied*, 169 Wn.2d 1018 (2010). The police found scales, some sort of ledger, and plastic baggies in the main house. But there was neither other evidence, aside from their mere existence and

presence, nor any testimony linking those items to suggest an “intent to deliver” meth. *Id.* Furthermore, even large quantities alone are insufficient to prove an “intent to deliver.” *Id.* Without any evidence or testimony that these items were indicia of an “intent to deliver,” the jury necessarily had to speculate or guess Ms. Grant had the requisite intent beyond a reasonable doubt. *Hutton, supra.* The evidence was insufficient to support the conviction of count 4, so the charge should be dismissed.

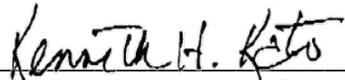
Likewise, the State’s evidence was insufficient to support the conviction for unlawful use of a building for drug purposes under RCW 69.53.010. To prove Ms. Grant guilty, the State had to show she had under her management or control a building “either as an owner, lessee, agent, employee, or mortgagee.” But she neither had management or control of the property as she merely stayed there with her boyfriend, the owner, and thus was not an owner, lessee, agent, employee, or mortgagee of 623 Index. The State failed to prove guilt under RCW 69.53.010. *Cf. State v. Ceglowski*, 103 Wn. App. 346, 351, 12 P.3d 160 (2000) (house not maintained for the purpose of using drugs when main purpose was to reside in it, the drug use simply being incidental to that purpose); *State v. Davis*, 176 Wn. App. 385, 395-96, 308 P.3d 807 (2013), *review denied*,

179 Wn.2d 1023 (2014). Having failed to establish the essential elements of RCW 69.53.010, the State's evidence was insufficient to show guilt beyond a reasonable doubt. *Id.* The conviction should be reversed and the charge dismissed.

#### IV. CONCLUSION

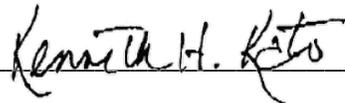
Based on the foregoing facts and authorities, Ms. Grant respectfully urges this Court to reverse her convictions and dismiss the charges.

DATED this 17<sup>th</sup> day of November, 2016.

  
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Kenneth H. Kato, WSBA # 6400  
Attorney for Appellant  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

#### CERTIFICATE OF SERVICE

I certify that on November 17, 2016, I served a copy of the brief of appellant by USPS on Cheryl Grant, # 384547, 9601 Bujacich Rd NW, Gig Harbor, WA 98332; and by email, as agreed, on Karl Sloan at ksloan@co.okanogan.wa.us.

  
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