

NO. 33671-9
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON

RESPONDENT

V.

CHERRYL GRANT

APPELLANT,

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was there sufficient evidence for a jury to find each element of the charged offenses beyond a reasonable doubt?

B. STATEMENT OF THE CASE

The North Central Washington Narcotics Task Force conducted a series of “controlled buys” in July and August 2014. Report of Proceedings July 23, 2015 (hereinafter referred to as “RP1”) 65-68, 153; Report of Proceedings July 24, 2015 (hereinafter referred to as “RP2”) 205-206; CP 117-120. They utilized a confidential informant named David Swanberg. RP1 86; RP2 195.

Mr. Swanberg signed a contract to act as a confidential informant in lieu of a possible charge of a possession of .2 grams of heroin located during a traffic stop. RP1 86, 87-88, 89; RP2 195-196.

The informant identified James Grant and a specific residence located at 623 Index Street, where drugs could be purchased. RP1 95-96, 120-121. Within the six months prior to the Task Force’s controlled buys, the informant had been introduced to

the defendant (by her son James Grant), and had obtain methamphetamine from the defendant in exchange for marijuana. RP2 199-201. The exchange with the defendant occurred inside the residence, and the defendant weighed and packaged the methamphetamine. RP2 200-201. Only a few times was the informant able to obtain drugs directly from James Grant. RP2 203. On all other occasions, James Grant would obtain the drugs from the defendant inside the residence; and if she were not home, the informant and James Grant would have to wait until she returned. RP2 202-203. The informant observed James Grant obtaining drugs from the defendant in the same manner for delivery to many other people. RP2 204-205.

The informant did not initially identify the defendant from a photomontage because of the age of the photo and change in her appearance. RP1 122-124; RP2 217. However, the information was able to identify the defendant from a montage using a more recent photo. RP1 124-125; RP2 126, 217-218. The defendant's vehicle was also present at the residence during the transactions. RP2 127.

On each transaction, James Grant left the informant in the trailer or an outbuilding (referred to as "bunkhouse") and went into the residence to obtain the drugs. None of the transactions could be completed without the defendant being present in the residence. RP2 143, 231. The defendant lived full time in the residence. RP 275. When the informant would arrive at the residence the defendant would typically come out of the back door of the residence and check to see who had shown up, speak with James Grant, then go back inside the residence. RP2 212

On July 24, 2014, the Task Force conducted a controlled buy at 623 Index Street for methamphetamine with James Grant, who obtained the drugs from the defendant inside the residence. RP1 97-111; RP2 154-156, 168-171, 206-209. The informant waited in a travel trailer next to the residence while James Grant went to the main residence to obtain the drugs. RP1 108. The informant was able to communicate with Task Force officers during the time he was at 623 Index. RP2 109.

On July 31, 2014, a second controlled buy was conducted at 623 Index Street for methamphetamine. RP1 115-119; RP2 171-174, 209-214. The informant had to wait for the drugs because

James Grant told him that he had to wait for the defendant to get home. RP2 213.¹ The informant was able to communicate with Task Force officers during the time he was at 623 Index. RP2 117, 208-209, 216.

On August 19, 2014, a third controlled buy was conducted at 623 Index Street for methamphetamine with James Grant. RP2 128-132, 156-159, 174-176, 182-188, 218, 222-226, 237-239.

During a phone call to set up the transaction, James Grant told the information he would call his mother (the defendant) to return to the residence, and told the informant to wait. RP2 130-131, 222-223.

The transaction was also recorded, and included a discussion between the informant and James Grant about obtaining an additional amount of drugs in the future after the defendant gets back from a trip to Spokane. RP2 232-234, 239.

After the initial call between the informant and James Grant, the defendant was surveilled travelling from a shopping center back to 623 Index. RP2 130-31 174-176, 182-188. After the defendant

¹ James Grant's various statements to the informant over the course of the deliveries, were as a coconspirator and were admissible as substantive evidence. See, e.g. *State v. Sanchez-Guillen*, 135 Wash. App. 636, 643, 145 P.3d 406, 409 (2006); ER 801(d)(2).

arrived, the informant was then told by James Grant to come to the residence to complete the drug transaction. RP2 131-132, 194.

The controlled buys occurred only when the defendant was present at, or after she returned to, the residence. RP2 149.

After the August 19, transaction was completed; Task Force detectives executed a search warrant at 623 Index. RP2 132-133. The defendant and James Grant were found on the property when the warrant was executed, as was the defendant's vehicle. RP2 133, 176-177, 188.² James Grant was found in the bunkhouse. RP2 240. The defendant was found inside the main residence on a couch. The couch faced a video monitor connected to a live surveillance camera monitoring the area of the driveway and travel trailer. RP2 134- 137, RP2 177.

Methamphetamine was found in a pouch near the defendant, and identified as methamphetamine by the defendant. RP2 137, 145, 149-150, 166, 235. The defendant said it was her methamphetamine. RP2 243-244. The defendant stated she got

² A person named Max Lezard, who had been with the defendant in her car on August 19, was located in the travel trailer at the time of the search warrant, and arrested. Mr. Lezard was the subject of a Task Force investigation for selling heroin to the same informant. RP2 185, 192, 203, 211, 246, 252.

the meth from a person named "dough boy". RP2 235-236, 244. The buy money issued to the informant for the drugs that were purchased earlier in the day was found in the defendant's purse. RP2 150.

Officers also found a collapsible asp near the defendant and a bulletproof vest in the adjoining master bedroom. The vest was originally issued to a County Sheriff's Deputy. RP2 137-139, 163-164. In the master bedroom, officers located pipes associated with drug use, pills, a drug sale ledger, digital scales, and unused baggies. RP2 139-140-142, 162-163. Officers also found in the master bedroom documents bearing the defendant's name. RP2 162-163.

In the travel trailer, officers located multiple cell phones. RP2 144-145, 161, 179, 190. Drugs were not found in the trailer or bunkhouse. RP2 145, 161-162, 166, 178-179. Neither drugs nor buy money was found on the person of James Grant. RP2 160.

When James Grant was brought into the residence by law enforcement, the defendant told James that they were in trouble, and that she had told James to get rid of the stuff. RP2 160, 164-166, 177.

At the time of the search warrant, James Grant told Det. Pitts that he was an addict, and that after the person who was his source of methamphetamine was arrested, he began obtaining his drugs from the defendant. RP2 311. James Grant also told the detective that he helped facilitate the drug deals for his mother by getting the drugs from her to deliver to others. RP2 311.

James Grant said he paid the defendant rent to live in the trailer and bunkhouse. RP2 274, 283, 290.³ James Grant testified that both he and the defendant were unemployed. RP2 289, 290.

James Grant testified for the defendant. During his testimony, he stated he lived in the bunkhouse and the trailer, and that he stored *his* drugs in a safe belonging to the defendant that was located on a shelf inside the master bedroom in the residence, that the defendant had access to the safe, but that she had no knowledge of the drugs or James' dealing. RP2 274-275, 277, 286-

³ The defendant did not testify in her trial. The defendant did testify in the July 23, 2015, CrR 3.5 hearing, in which she confirmed to the judge that her home was 623 Index prior to the residence being torn down. RP1 27. The defendant claimed her boyfriend, Brian Morris, owned the residence and that rent from James Grant ultimately went to Mr. Morris. RP1 30, 38. These claims in the 3.5 hearing about ownership and rent were not evidence at trial. The assertions were also contradicted by evidence at trial, including James Grant's testimony, at Det. Barcus' testimony indicating the actual property owners were Dennis and Peggy Morris, neither of which was present at, or resided in, the residence at 623 Index. RP1 106. Additionally the night prior to trial, the defendant asked James Grant to try to get paperwork to show that she lived somewhere else. RP1 32.

287. However, no safe was ever observed or found during the execution of the warrant and the search of the bedroom. RP2 310.

James Grant also said the security cameras were at the property because he had been robbed in the past while staying in the trailer or bunkhouse. RP2 285. However, the only monitor for the cameras was in the living room of the residence where the defendant stayed. RP2 285-286. James Grant also testified he was given a \$50 bill by the informant for the drugs on August 19, which he then gave to the defendant for rent. However, the recorded buy money used on August 19, and recovered from the defendant was not a \$50 bill. RP2, 150, 283-284, 297, 308.

James Grant had prior convictions for burglary and theft second degree. RP2 290. James Grant also pled guilty to three counts of delivery as an accomplice in his case that had been joined with the defendant's case RP2 290-292, CP 156-157.

James Grant did not make any assertions that the drugs in the house were his, or the defendant had no knowledge of the drug dealing, until after he was sentenced on his delivery charges. RP2 292-293, 300, 305, 310. However, in jail calls the defendant had

previously told the defendant that he would take the blame if she got him out of jail. RP2 307-309.

The defendant was charged with three counts of delivery of a controlled substance – methamphetamine, as a principal or accomplice; one count of possession of a controlled substance with intent to deliver – methamphetamine; and unlawful use of a building for drug purposes. CP 117-120.

Regarding counts 1, 2, and 3, the jury was instructed on accomplice liability in jury through instruction 21. CP 76.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Regarding count 5, the jury was instructed on the elements of unlawful use of a building for drug purposes through instruction 14. CP 69.

(1) That on or between July 24, 2014 and August 19, 2014, the defendant had under his or her management or control a building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee

(2) That the defendant knowingly rented, leased, or made available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, delivering, selling, storing, or giving away any controlled substance or imitation controlled substance; and

(3) That the acts occurred in the State of Washington.

Following the trial, the jury found the defendant guilty of all counts. CP 49-50.

C. ARGUMENT

There was sufficient evidence for a jury to find the elements of each of the charged offenses. The standard of review for a sufficiency of the evidence challenge in a criminal case is “whether, after reviewing 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.” *State v. Bingham*, 105 Wash. 2d 820, 823, 719 P.2d 109 (1986) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A defendant challenging sufficiency of the evidence “admits to the truth of the State's evidence and all inferences that can reasonably be drawn from that

evidence.” *State v. Gentry*, 125 Wash. 2d 570, 597, 888 P.2d 1105 (1995), *aff’d sub nom. Gentry v. Sinclair*, 693 F.3d 867 (9th Cir. 2012), and *aff’d sub nom. Gentry v. Sinclair*, 705 F.3d 884 (9th Cir. 2013). Courts must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wash. 2d 821, 874–75, 83 P.3d 970 (2004); *State v. Camarillo*, 115 Wash. 2d 60, 71, 794 P.2d 850 (1990). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wash. 2d 1, 16, 309 P.3d 318 (2013).

It is a general rule that the elements of a crime may be proved by circumstantial evidence. E.g., *State v. Dugger*, 75 Wash. 2d 689, 690, 453 P.2d 655, 656 (1969). No distinction exists between circumstantial evidence and direct evidence, as both are equally reliable. *State v. Bencivenga*, 137 Wash. 2d 703, 711, 974 P.2d 832 (1999); *State v. Delmarter*, 94 Wash. 2d 634, 638, 618 P.2d 99 (1980). Additionally, circumstantial evidence need not be inconsistent with any hypothesis of innocence. It need be sufficient only to convince a reasonable jury of guilt. E.g., *State v. Zunker*, 112 Wash. App. 130, 135, 48 P.3d 344, 346 (2002) (citing *State v. Gosby*, 85 Wash. 2d 758, 764–65, 539 P.2d 680 (1975) (1975

A court does not weigh the evidence to determine whether the necessary quantum has been produced to establish some proof of an element of the crime; it may only test or examine the sufficiency thereof. *See Dugger*, 75 Wash. 2d at 690; *State v. Randecker*, 79 Wash. 2d 512, 517, 487 P.2d 1295, 1298 (1971). The jury, as trier of fact, is the sole and exclusive judge of the weight of evidence, and of the credibility of witnesses. The court must concern itself only with the presence or absence of the required quantum. *Randecker*, 79 Wash. 2d at 517.

1. There was substantial evidence for a jury to find the elements of delivery of controlled substances as a principal or accomplice.

There was sufficient evidence to find the defendant guilty as a principal in the drug deliveries, or as an accomplice. To be found guilty as an accomplice, the State had to show that defendant aided James Grant in the crimes. Per RCW 9A.08.020, a person is an accomplice of another person in the commission of a crime if with knowledge that it will promote or facilitate the commission of the crime, he/she aids or agrees to aid such other person in planning or committing it. The liability of the accomplice is the same as that of the principal. *RCW 9A.08.020; State v. Toomey*, 38 Wash. App. 831, 839–40, 690 P.2d 1175 (1984).

Appellant cites to *State v. Luna*, 71 Wash. App. 755, 759, 862 P.2d 620, 623 (1993) to assert the defendant was merely present and thus, not an accomplice.⁴ *Luna* stated: Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime. *Luna*, 71 Wash. App. at 759 (citing *State v. Rotunno*, 95 Wash. 2d 931, 933, 631 P.2d 951 (1981); *In re Welfare of Wilson*, 91 Wash. 2d 487, 491, 588 P.2d 1161 (1979)).

In the present case, the issue was not the defendant's mere presence. The defendant was actively engaged in the drug transactions, and the transactions were dependent on her presence and involvement.

The defendant's aid, or even her agreement to aid, in the planning or commission of the crimes would be sufficient. As an accomplice, the defendant need not have been physically present at the crime to be found guilty. A person who is accomplice in commission of crime is guilty of that crime whether present at

⁴ In *Luna*, 71 Wash. App. 755, the Court found although the defendant knew, after the fact, that the co-defendant took the truck without permission, there was no evidence that Luna knew of, or even suspected, the co-defendant's intent before the theft occurred. *Luna* at 75-760.

scene or not. *E.g.*, *State v. Jackson*, 87 Wash. App. 801, 944 P.2d 403 (1997), *aff'd*, 137 Wash. 2d 712, 976 P.2d 1229 (1999).

In deciding guilt under accomplice liability, a jury is free, to disbelieve the principal's testimony that defendant did not assist him and was not even aware of his activities in defendant's home. *State v. Gallagher*, 112 Wash. App. 601, 51 P.3d 100 (2002). In the present case, James Grant's trial testimony seeking to disavow the defendant's knowledge of the deliveries and drug activity not only defied common sense, it was contradicted by the evidence at trial, and even his own prior statements.

Appellant cites to *State v. Hutton*, 7 Wash. App. 726, 728, 502 P.2d 1037, 1039 (1972), to assert the defendant was not sufficiently identified as a perpetrator. However, *Hutton's* sufficiency of evidence issue involved whether there was sufficient evidence to identify a controlled substance (not a person), where the evidence of the substance was not based on any physical evidence or laboratory test, but only on a description by a witness and a psychiatrist who testified about the general effects of amphetamine. *Hutton*, 7 Wash. App. at 728–729. *Hutton* is inapplicable to the present case.

Appellant also cites to *State v. Hill*, 83 Wash. 2d 558, 560, 520 P.2d 618, 619 (1974), to assert the defendant was not sufficiently identified as the perpetrator. Appellant claims only James Grant was identified as a perpetrator. However, the Court in *Hill*, 83 Wash. 2d 558, 83 Wn.2d at, 560, correctly noted that identity is a question or fact for the jury; who may consider any relevant fact, whether direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, of the identity of a person. *Id.*

In the present case, the evidence was sufficient to find the identity of the defendant. Although the informant's identification of the defendant would alone be sufficient to support conviction, the Appellant's argument appears to ignore the identification of the defendant as a participant by law enforcement, who identified both the defendant and her vehicle; the identification by the co-defendant James Grant's, who made statements regarding identity and presence: to the informant during multiple transactions; in his statements captured in the recorded call and body wire, in his statements to the detectives at the time of the search warrant, and in his statements at trial. Additionally, other evidence also supported a finding that the defendant was a principal or

accomplice, including: the recovered drugs, the drug ledger, the possession of buy money, and the defendant's admissions at the time of the warrant.

2. There was substantial evidence for a jury to find the elements of possession of a controlled substance with intent to deliver.

Although mere possession of a controlled substance is generally insufficient to establish an inference of intent to deliver, a large amount of a controlled substance is not required to convict a person of intent to deliver. E.g., *State v. Goodman*, 150 Wash. 2d 774, 782–83, 83 P.3d 410, 414 (2004); *Zunker*, 112 Wash. App. at 133. The fact that the amount of drugs is small does not invalidate a jury verdict of an intent to deliver if corroborating circumstances exist. *Zunker*, 112 Wash. App. at 137–38. Examples of corroborating circumstances include quantities of cash, or paraphernalia (such as scales, cell phones, address lists, and the like). E.g., *Zunker*, 112 Wash. App. 130.

In the present case, in addition to the methamphetamine in the residence, officers found a drug sale ledger, digital scales, and unused baggies. Officers also found the Task Force's buy money

from a drug deal completed earlier in the day, surveillance equipment, and body armor.

Contrary to Appellant's assertion, there was also extensive testimony regarding the defendant's involvement in the drug deals that preceded the controlled buys, regarding the defendant's involvement in the controlled buys, and about future sales of drugs.

There was ample evidence to find the defendant possessed the methamphetamine with the intent to deliver.

3. There was substantial evidence for a jury to find the elements of use of a building for drug purposes.

In RCW 69.53.010, the legislature intended to punish those managing or controlling property who allowed renters, lessees, etc., to manufacture, sell, store, or deliver drugs from the property with their knowledge. *State v. Davis*, 176 Wash. App. 385, 395–96, 308 P.3d 807, 812 (2013).

The Appellant cites to *Davis*, where the Court found that nothing established that the defendant acted as a landlord or, herself, allowed others to deal drugs from a space of which she maintained control. *Davis*, 176 Wash. App. at 395–96. However, *Davis* is

unlike the present case where the defendant controlled both the residence, the trailer and the bunkhouse. The defendant charged rent to her co-defendant for the use of the trailer and bunkhouse, and monitored the comings and goings from the residence physical and by use of electronic surveillance.⁵ The defendant's knowledge of the drug activity in the trailer and bunkhouse was obvious, based on her own involvement in drug dealing with the co-defendant James Grant.

Appellant also erroneously cites to on *State v. Ceglowski*, 103 Wash. App. 346, 12 P.3d 160 (2000) in support of her argument.⁶

⁵ The evidence at trial was that the defendant rented the use of the trailer and bunkhouse to James Grant. The claim that she merely stayed at the residence, or that she passed on the rent to from James Grant to her boyfriend, was *not* evidence. However, even if it were evidence, the defendant would still have been acting as an agent, and been culpable under the statute.

⁶ In *Ceglowski*, 103 Wash. App. 346, the police executed a search warrant on a bait and tackle shop and found: a rolled up bill of currency, a small tray with traces of brown powder, a marijuana pipe, \$600, a baggie containing 0.9 grams of methamphetamine, a small scale, and 10 pages of pay and owe sheets. *Ceglowski*, 103 Wash. App. at 348. Mr. Ceglowski had money in his pockets from an earlier controlled drug buy, and a police dog alerted for narcotic odor on the currency found in the desk and in the store's cash register. *Id.* The court concluded that there was insufficient evidence to establish more than a single drug buy and insufficient evidence to support the reasonable inference that selling drugs was a substantial purpose for maintaining the premises. *Id.* at 353. The court concluded that a conviction under former RCW 69.50.402(a)(6) (currently codified as RCW 69.50.402(1)(f)) was based on keeping or selling controlled substances required a showing (1) that the drug activity was continuing and recurring in character, and (2) that a substantial purpose of maintaining the premises was for the illegal using, keeping, or selling of drugs. *Id.* at 352–53.

In *Ceglowski*, 103 Wash. App. 346, the defendant's conviction for maintaining a drug house was reversed and dismissed for insufficient evidence. *Ceglowski*, 103 Wash. App. at 348. The conviction, however, was based on RCW 69.50.402 which prohibits a defendant from maintaining a space in order to use, keep, or sell drugs. The statute under which the defendant was convicted is different. RCW 69.53.010 prohibits the defendant from knowingly making available a space used for drug related purposes. Thus, unlike *Ceglowski*, it was not the *defendant's* purpose in maintaining the space that the jury considered, it was the defendant's knowledge of her son's use of the space she made available.

RCW 69.53.010 is perfectly plain in declaring it is unlawful to "knowingly rent, lease, or make available" the building, room, or space. *State v. Sigman*, 118 Wash. 2d 442, 447–48, 826 P.2d 144, 147 (1992); RCW 69.53.010(1). Read as a whole, RCW 69.53.010 provides that when the person in control of a space, makes the space available to another person, who then uses the space for illegal drug-related activities, he or she will be found in violation of RCW 69.53.010(1).

The statute does not require that the defendant's purpose in making space available was so that her son could distribute drugs; it required only that once the space was made available, that the defendant does not knowingly allow her son to conduct illegal drug activity from the space. See *Sigman*, 118 Wash. 2d at 446–47.⁷

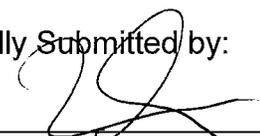
The defendant did make the space available, charged rent for it, and knew it was being used for illegal drug activity.

D. CONCLUSION

The defendant's convictions should be affirmed where the evidence supported a finding of guilt on each offense.

Dated this 10 day of March 2017

Respectfully Submitted by:


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⁷ There is no support for the Appellant's proposition that RCW 69.53.010 requires the *primary* purpose of the building, room, or space, be illegal drug activity.

PROOF OF SERVICE

I, Karl F. Sloan, do hereby certify under penalty of perjury that on March 10, 2017, I provided email service of a true and correct copy of **Brief of Respondent**, to:

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