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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 337006

BENTON COUNTY SUPERIOR COURT NO. 14-1-01265-2

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY GARLDAND KENDALL,

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Mr. Kendall of Delivery of Methamphetamine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was there insufficient evidence to convict Mr. Kendall of Delivery of Methamphetamine?

C. STATEMENT OF THE CASE

On November 5, 2014 Alena Inman and Timothy Kendall made a spur of the moment decision to travel to the Seattle area together. 07/20/2015 RP 22. Ms. Inman testified that she was a heavy methamphetamine user during the two years leading up to November 2014. 07/20/2015 RP 19-22 &36. Ms. Inman testified that on the trip to Seattle, she and Mr. Kendall would occasionally stop and smoke “meth.” 07/20/2015 RP 22. Ms. Inman testified that it was Mr. Kendall who provided the “meth.” 07/20/2015 RP 22.

Ms. Inman testified that she had used methamphetamine before, and was asked to describe what the substance looked like. 07/20/2015 RP 24. Ms. Inman stated “[i]t’s not powdery. It’s crystalline and it’s hard.” 07/20/2015 RP 24. The State asked Ms. Inman “[c]an you tell the jury if this item that the defendant was giving you was definitely methamphetamine?” 07/20/2015 RP

24. Ms. Inman responded “[t]o be honest, I’m not sure. It was really powdery and didn’t look like regular crystal meth.” 07/20/2015 RP 24. Ms. Inman continued to discuss her opinion of the substance indicating “[w]ell, I thought I was doing methamphetamine until it made me really, really tired and I couldn’t comprehend anything.” 07/20/2015 RP 25. Ms. Inman later testified that she “knew” the substance she was given was not methamphetamine but was unsure of what exactly it was. 07/20/2015 RP 40.

Ms. Inman and Mr. Kendall began their return trip to the Tri-Cities on November 6, 2014, ultimately arriving back in Richland in the early morning of November 7, 2015. 07/20/2015 RP 26 & 29. Ms. Inman testified the two continued smoking this “meth” throughout the return trip. 07/20/2015 RP 26-29. Ms. Inman alleged Mr. Kendall sexually assaulted her after their return to Richland and reported to the Emergency Room at approximately 11:42 am. 07/20/2015 RP 34. At this time a blood and urine sample was taken from Ms. Inman. 07/20/2015 RP 35. These specimens were tested at the Washington State Patrol Crime Lab by Dawn Sklerov. 07/20/2015 RP 82-83.

Ms. Sklerov testified that the blood specimen was tested for a number of substances and nothing was detected in Ms. Inman’s blood. 07/20/2015 RP 85. The basic drug screening that was performed on the urine sample indicated there was amphetamine and methamphetamine detected. 07/20/2015 RP 86.

Ms. Sklerov indicated that the reason for detection of amphetamine and methamphetamine in the urine but not the blood was as follows:

A majority of the time if you are a chronic user of methamphetamine it actually will stay in your system a little bit longer. It could be between one to four days of actually the methamphetamine being in your body...”

07/20/2015 RP 86.

Ms. Sklerov further testified:

[T]he half life of methamphetamine is between six to fifteen hours so that would mean that within this time frame the amount that was used between six to fifteen hours that that elimination about half of the drug would also be detected in the blood.

07/20/2015 RP 87-88.

Ms. Sklerov went on to clarify that the last use of methamphetamine could have been as far back as November 2nd or 3rd. 07/20/2015 RP 91.

Mr. Kendall was charged with Rape in the third degree and Delivery of a controlled substance, methamphetamine. CP 1-2. The Jury returned a verdict of not guilty on the charge of Rape in the third degree and Guilty on the delivery of methamphetamine charge. CP 10-11. Mr. Kendall now appeals his underlying conviction of delivery of a controlled substance.

D. ARGUMENT

1. ***The evidence was insufficient to sustain a conviction for delivery of methamphetamine***

In reviewing a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the State and asks whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Hepton*, 113 Wn.App. 673, 681, 54 P.3d 233 (2002). Circumstantial and direct evidence are equally reliable. *State v. McNeal*, 98 Wn.App. 585, 592, 991 P.2d 649 (Div. 2, 1999), *aff'd*, 145 Wn.2d 352, 37 P.3d 280 (2002). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. McPherson*, 111 Wn.App. 747, 756, 46 P.3d 284 (2002) (quoting *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

Generally, “a chemical analysis is not vital to uphold a conviction for possession of a controlled substance.” *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Circumstantial evidence and lay testimony may be sufficient to establish the identity of a drug in a criminal case. *State v. Hernandez*, 85 Wn. App. 672-75, 935, P.2d 623 (1997). Lay witnesses may testify if they are familiar with the substance through prior use, trading, or law enforcement. *Id* at 676. Circumstantial evidence may include the substance's packaging as well as its physical characteristics. *Id* at 677.

When determining whether circumstantial evidence proves the identity of the substance beyond a reasonable doubt, courts have considered the following non-exhaustive list of factors:

(1) testimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible; (2) corroborating testimony by officers or other experts as to the identification of the substance; (3) references made to the drug by the defendant and others, either by the drug's name or a slang term commonly used to connote the drug; (4) prior involvement by the defendant in drug trafficking; (5) behavior characteristic of use or possession of the particular controlled substance; and (6) sensory identification of the substance if the substance is sufficiently unique.

Colquitt, 133 Wn. App. At 801, citing, *State v. Watson*, 231 Neb. 507, 514-17, 437 N.W. 2d 142 (1989).

Ordinarily, to be guilty of delivery of a controlled substance, the accused need only know that the substance was a controlled substance, he need not know the nature of the forbidden substance. *State v. Hudlow*, 182 Wn. App. 266, 285, 331 P.3d. 90 (2014). However, under the law of the case doctrine, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the “to convict” instruction. *State v. Hudlow*, 182 Wn. App. 266, 285, 331 P.3d. 90 (2014), citing, *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). In such a case, the defendant may then challenge the sufficiency of evidence of an

element in the “to convict” instruction, even if that element is not part of the underlying statute. *Hudlow*, 182 Wn. App. At 285.

In the instant case, the to-convict instruction presented to the jury, without objection by the State, indicated:

(1) That on or about November 6, 2014 to November 7, 2014, the defendant delivered a controlled substance; (2) That the defendant knew the substance delivered was a controlled substance, methamphetamine; and (3) That this act occurred in the State of Washington.

07/22/2015 RP 10.

As such, the State was required to prove beyond a reasonable doubt that the substance delivered was methamphetamine. In this case, the actual substance Ms. Inman alleged Mr. Kendall had provided to her was never presented to law enforcement, collected as evidence, or subject to any testing. Ms. Inman, as a heavy methamphetamine user, surely was in a position to provide the lay testimony contemplated by the court in *Colquitt*. *Colquitt*, 133 Wn. App. At 801. However, Ms Inman’s testimony clearly indicates she did not believe the substance she was provided with to be methamphetamine:

Q: What does it look like?

A: It’s not powdery. It’s crystalline and it’s hard.

07/20/2015 RP 24.

Q: Can you tell the jury if this item that the defendant was giving you was definitely methamphetamine?

A: To be honest, I'm not sure. It was really powdery and didn't look like regular crystal meth.

07/20/2015 RP 24.

Q: I'm Sorry. What drug did you think you were using, doing?

A: Well, I thought I was doing methamphetamine until it made me really, really tired and I couldn't comprehend anything.

07/20/2015 RP 25.

Q: Do you have any reason to believe Mr. Kendall gave you anything beside methamphetamine, something in addition to the methamphetamine?

A: I knew.

Q: What do you think it was?

A: To be honest I'm not sure. I never fell asleep on methamphetamine before. It was real powdery.

07/20/2015 RP 40.

The testimony provided by Dawn Sklerov only seemed to cloud the issue. There were no controlled substances detected in Ms. Inman's blood.

07/20/2015 RP 85. This finding indicates that there was no recent use – within the last 15 hours- of methamphetamine. 07/20/2015 RP 87-88. If Ms. Inman had been using methamphetamine provided by Mr. Kendall on the trip home there would have been methamphetamine in her blood given the timeline provided by Ms. Sklerov.

Further, the drug screening that was performed on the urine sample indicated there was amphetamine and methamphetamine detected. 07/20/2015

RP 86. Methamphetamine and amphetamine have different chemical compositions. See Random House Dictionary 70, 1209 (2d ed. 1987). Pursuant to the express definitions found in RCW 69.50.206(d)(1) and (2), these substances are considered as two different Schedule II controlled substances. Ms. Sklerov indicated the reason for amphetamine could be that it is the metabolite that the body produces from methamphetamine and that it is not a separate drug. 07/202015 RP 89. However, they are clearly different substances under RCW 69.50.206 which lists both substances individually and differently. Additionally, the existence of methamphetamine in Ms. Inman's urine does not equate to a timeline of when she may have ingested methamphetamine 07/20/2015 RP 88 & 91.

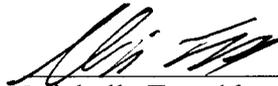
Given Ms. Inman's testimony that based on her experience as a heavy and frequent methamphetamine user that the particular substance provided to her by Mr. Kendall did not have the same appearance or effect of methamphetamine, combined with her testimony that based on those experiences the substance clearly was not methamphetamine it is clear that circumstantial evidence presented was not sufficient to convict Mr. Kendall of delivery of methamphetamine.

E. CONCLUSION

Based on the forgoing, Mr. Kendall respectfully requests that this Court reverse his conviction for delivery of methamphetamine.

May 24, 2016

Respectfully submitted,
TROMBLEY LAW PLLC.



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PROOF OF SERVICE

I, Michelle Trombley, being over the age of 18, hereby declare that on the 24 day of May, 2016, I caused a true and correct copy of the Brief of Appellant on Div. III Case No. 337006 to be served on the following in the manner indicated below:

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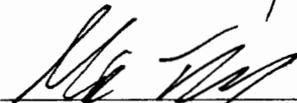
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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 24 day of May, 2016

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