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COA NO. 67874-4-I

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

REC'D
JUL 30 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Appellant,

v.

KEITH BLAIR,

Respondent.

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

The Honorable Susan J. Craighead, Judge

BRIEF OF RESPONDENT

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A. ISSUE

Whether the State produced insufficient evidence of an actual bilateral agreement between Keith Blair and Christopher Yates, necessitating vacature of the conspiracy conviction?

B. STATEMENT OF THE CASE

The State charged Keith Blair with conspiracy (count II) and attempt to introduce contraband into the King County Jail (count III). CP 1-2. The conspiracy charge alleged "That the defendants *Keith Thomas Blair and Christopher Boe Yates*, and each of them, in King County, Washington, on or about February 20, 2011, with intent to commit the crime of Violation of the Uniform Controlled Substances Act, to-wit: Possession with Intent to Deliver Marijuana, *did feloniously agree with each other*, and, with persons known and unknown, to engage in and cause the performance of such conduct, and, one of the parties so agreeing did perform an overt act pursuant to such agreement[.]" CP 1-2 (emphasis added).

Evidence at trial showed Blair was incarcerated in the King County Jail. RP 53. Detective Coblantz monitored a jail call between Blair and Rachel Dunham, which took place on February 19, 2011. RP 34, 52-54; Ex. 2, 8, 24. The call was recorded and admitted into evidence at trial. Ex. 2.

After mundane talk and partly unintelligible conversation, the following exchange took place:¹

Blair: Somebody is getting released tomorrow.
Dunham: Yeah.
Blair: (unintelligible) I need you to come down here at 5:30 p.m. and get that quart . . . of
Dunham: Of?
Blair: Green.
Dunham: Green?
Blair: Yeah
Dunham: I'm sorry.
Blair: Okay. Can you do that?
Dunham: Yeah.
Blair: I'll give him (unintelligible) number to get a hold of you.
Dunham: He's gonna be released at 5:30?
Blair: Yeah, p.m.
Dunham: Why 5:30?
Blair: I don't know. That's when they release people. So I need you to be here okay?
Dunham: Okay. But . . . okay.
Blair: Okay. Thank you.

Ex. 2 (2:32-3:20).

Detective Coblantz testified that "green" typically refers to marijuana in the context of controlled substances. RP 76. Later in the call, the following exchange occurs:

¹ A transcript of the call was admitted as an illustrative exhibit. Ex. 8; RP 56. As acknowledged at trial, the transcript is imperfect. RP 55, 293. The recording itself is imperfect, as it is difficult or impossible to hear what is being said at times. RP 55; Ex. 2. Undersigned counsel, in listening to the recording and setting forth relevant contents of the phone call in this brief, has made a good faith attempt at accuracy.

Blair: (unintelligible) phone call. I'm going to give dude your phone number right now, so make sure you're here at 5:30.

Dunham: What's his name.

Blair: I don't know. He'll call you.

Dunham: You don't know?

Blair: (unintelligible)

Dunham: Dude, it's a set up Keith. Serious. Hello? I can't hear you.

Blair: Hold on. (unintelligible) But uh (unintelligible)

Dunham: It's a set up.

Blair: No it's not.

Dunham: Yeah, it is.

Blair: It's not.

Dunham: You don't even know his name.

Blair: Alright, I'll find out right now. Just trust me okay?

Dunham: Okay.

Ex. 2 (9:20-10:27).

After some small talk, Blair says, "His name is Chris." Ex. 2 at

11:11. Dunham says "Huh?" and Blair says "Chris." Ex. 2 at 11:14.

After some more small talk, the following exchange occurs:

Blair: Um, shred that up and put it in a rubber.

Dunham: Huh?

Blair Shred that up and put it in a rubber.

Dunham: Shred what?

Blair: When you come here at 5:30. Tear it up, put it in a rubber.

Dunham: Tear what up?

Blair: What are you coming here for tomorrow?

Dunham: What do I tear up? I don't get it.

Blair: Forty.

Dunham: Yeah, I understand.

Blair: Okay. Got it?

Dunham: Kinda.

Blair: (unintelligible)

Dunham: Can you call me?

Blair: Can I call you?
Dunham: Yeah, like the morning.
Blair: (unintelligible) maybe.
Dunham: Before you go to work.
Blair: I'll try to, why?
Dunham: Just so I can be . . . I dunno.
Blair: You know like when we go to . . .
Dunham: Yeah.
Blair: Yeah.
Dunham: That's what you want?
Blair: Yeah. Okay?
Dunham: Okay. Does (unintelligible) monetary.
Blair: (unintelligible) yeah, 40 dollars worth.
Dunham: Yeah. What, what's my benefit?
Blair: Ummm, don't worry about it.
Dunham: Is he . . .
Blair: Don't worry about it —
Dunham: Do I —
Blair: — I'll tell you later.
Dunham: (unintelligible)
Blair: No.
Dunham: Just get it² . . .
Blair: Just get it ready and give it to him, yeah. Okay?
Dunham: Okay.
Blair: Thank you.
Dunham: (unintelligible) Should I, um, not do this?
Blair: Say what?
Dunham: Really should not, shouldn't discuss things that . . .
Blair: Yeah, I know.
Dunham: So.
Blair: Well, I'm not doing shit.
Dunham: Yeah, but dude do you understand what you just did.
Blair: Yeah.
Dunham: For me.
Blair: No, don't worry about it.
Dunham: Okay.
Blair: (unintelligible) took a bus all the way out (unintelligible) fucking Billings, man.

² Or "Just give it . . ."

Dunham: Billings?
Blair: Yeah, Billings Montana.
Dunham: Oh really? Wow. That's a long ways.
Blair: Yeah.
Dunham: Older, younger?
Blair: Young, young white kid.
Dunham: (unintelligible).
Blair: (unintelligible) So if it happens it happens, if it don't
it don't (unintelligible).
Dunham: Yeah.
Blair: I don't know him though.
Dunham: What are you talking about . . .
Blair: Yeah.

Ex. 2 (11:35-14:57)

Detective Coblantz testified "40" usually refers to a dollar amount for something. RP 76. Coblantz said it was rare for narcotics to be packaged in condoms, but he had seen it in the past. RP 76

Sergeant Hicks searched a jail database for all individuals with the first name of "Chris" who were to be released on February 20, 2011. RP 39. Christopher Yates was to be temporarily released from 10 a.m. to 6 p.m. on February 20. RP 24. Yates was the only "Chris" or "Christopher" to be released on that date. RP 39-40. Yates and Blair were housed on the same floor of the jail. RP 38.

Detective Coblantz and other officers set up surveillance outside the jail on February 20th, taking up their positions at 5:15 p.m. RP 79. Coblantz positioned himself at Fifth Avenue and Jefferson Street, the southwest corner of the jail. RP 80.

Nothing happened for roughly the first 45 minutes. RP 80. At about 5:55 p.m., a black Acura pulled up and parked for about five minutes across from the intake doors to the jail. RP 81-82. Christopher Yates and a female then got out of the car. RP 81.

Yates stood there with the female, smoked a cigarette and looked around for a few minutes. RP 82. At just before 6 p.m., Yates and the female ran across the street up to the intake doors of the jail, at which point Coblantz lost sight of them. RP 82.

As that was happening, Dunham drove past Coblantz at the corner of the Fifth and Jefferson bus stop. RP 82-83. She stopped at the red light, then turned up the hill and parked next to the jail intake doors on Jefferson. RP 83.

As Dunham pulled up and parked, the female who had accompanied Yates walked past Dunham's car back, continued across the street, and entered on the passenger side of the Acura. RP 83-84. There was no contact between the female and Dunham. RP 83-84. The Acura drove off. RP 84.

Dunham stayed in her car for roughly 10-15 minutes, during which time she did not contact anyone. RP 84. Coblantz then impounded Dunham's car. RP 84-85. A cigarette package was found in the center console. RP 92-94. The package was glued shut. RP 95. A condom

containing a baggie of marijuana was inside the cigarette package. RP 95-97, 101-02, 128. The marijuana weighed 2.5 grams. RP 128. Yates was strip searched, but no contraband was found on him. RP 84.

After the State rested its case, the defense moved to dismiss the conspiracy count on the ground that there was insufficient evidence to support it. RP 132, 134, 136-39. The defense also moved to dismiss the attempted introduction of contraband count due to insufficient evidence. RP 137-38. The court ruled there was sufficient evidence to take the conspiracy charge to the jury. RP 140. After lengthy discussion, the court also denied the motion to dismiss the attempted introduction of contraband charge. RP 159.

The "to convict" instruction for the conspiracy count (Instruction 14) required the State to prove the following:

(1) That on or about the [sic] February 20, 2011, the defendant agreed with one or more persons other than Rachel Dunham to engage in or cause the performance of conduct constituting the crime of Violation of the Uniform Controlled Substances Act - Possession With Intent to Deliver Marijuana;

(2) That the defendant made the agreement with the intent that such conduct be performed;

(3) That any one of the persons involved in the agreement took a substantial step in pursuance of the agreement; and

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

CP 147.³

During deliberations, the jury sent this question to the court: "With respect to Instruction 14, Paragraph (1), Does 'agreed' mean that Keith had an explicit and mutual agreement with some unknown person or can it mean that Keith believed he had an agreement (regardless of the unknown person's belief or agreement)." CP 128.

The court interpreted the jury's question as asking whether there needed to be a "meeting of the minds" between Blair and some unknown person. RP 256. The prosecutor agreed there must be a "meeting of the minds" to establish a conspiracy. RP 256.

The defense proposed an answer to the jury's question. CP 163-64. The prosecutor objected to the proposed answer on the ground that it constituted a comment on the evidence and did not clarify the law. RP 255-56. The prosecutor preferred that the jury simply be told to refer to their instructions. RP 255-56.

The court believed the jury was struggling with the legal requirement for showing conspiracy, noting the need for an actual agreement. RP 257. The prosecutor concurred an actual agreement was needed, but that a "meeting of the minds" could be established through circumstantial evidence. RP 258. The court recognized an actual

³ The State proposed this instruction. CP 75, 93.

agreement could be proven through either circumstantial or direct evidence, but pointed out the State needed to prove such an agreement in some fashion. RP 258. The prosecutor agreed with that point. RP 258.

In response to the jury's question, the court instructed the jury as follows: "The State must prove, beyond a reasonable doubt, an actual agreement between the defendant and another person other than Rachel Dunham to engage in or cause the performance of conduct constituting the crime of violation of the Uniform Controlled Substances Act — Possession with Intent to Deliver Marijuana." CP 129.

The jury found Blair guilty of conspiracy under count II and acquitted him of attempted introduction of contraband under count III. CP 125-26. The defense subsequently moved for new trial under CrR 7.5 or for arrest of judgment under CrR 7.4. CP 165-71; RP 265-66. The basis for the motion for new trial was error in giving an accomplice liability instruction. CP 167-70; RP 265-66. The basis for arrest of judgment was insufficient evidence to support the conspiracy conviction — the State did not prove an actual agreement between Blair and Yates to commit the crime of possession with intent to deliver marijuana. CP 167, 170; RP 266-68, 280-82.

The State opposed, contending the court's instructions were not erroneous. CP 172-75; RP 273-74, 279-80. The State further argued the

evidence was sufficient to show an agreement between Blair and Yates "and potentially another in the form of an uncharged individual." CP 172-75; RP 274-79.

In addressing the State's sufficiency argument, the court expressed grave concern about whether there was enough evidence of an actual agreement between Blair and Yates. RP 282-84, 295. The court indicated there was evidence that Blair believed there was an agreement or believed he was going to secure an agreement in time. RP 295. The question troubling the court was whether the evidence showed an actual agreement between Blair and Yates. RP 287-89, 292-93, 295-98. The court ultimately ruled the evidence was insufficient. RP 299-300.

The court entered a written order granting the motion for arrest of judgment, vacating the conspiracy charge and dismissing it with prejudice. CP 177. The written order, which was prepared by defense counsel beforehand, also states "In the alternative, should the arrest of judgment be reversed, vacated or set aside, the Court hereby GRANTS the defense motion for a new trial, for the reasons set forth in the defense memorandum." CP 177; RP 300. Entry of written findings and conclusions was contemplated, but none appear in the record. CP 177; RP 300, 303-04. The State appeals from the court's order. CP 184-87.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT FOR CONSPIRACY BECAUSE NO ACTUAL AGREEMENT WAS SHOWN BETWEEN BLAIR AND YATES.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. CrR 7.4(a)(3) accordingly authorizes arrest of judgment due to "insufficiency of the proof of a material element of the crime."

The court properly granted the defense motion to vacate the conspiracy conviction under CrR 7.4(a)(3). In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The evidence does not establish an actual agreement between Blair and Yates. Convictions must be reversed for insufficient evidence where, as here, no rational trier of fact, viewing the evidence in a light most favorable to the State, could have found the elements of the crime charged beyond a reasonable doubt. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995); State v. Wade, 98 Wn. App. 328, 338, 989 P.2d 576 (1999).

The State complains the trial court applied the wrong legal standard in granting the motion to arrest judgment based on insufficiency of the evidence. Brief of Respondent (BOR) at 13-14. The State is mistaken. The court did not apply the wrong legal standard. It recognized the general standard for determining sufficiency of the evidence: "I'm trying to bend over backwards to take every last fact in favor of the State, which is what I'm supposed to do." RP 284-85, 292-93. It also correctly recognized an actual agreement could be proven by circumstantial evidence. RP 288, 294-96. It did not, as the State contends, require the State to establish an explicit, formal, face-to-face agreement through direct evidence. BOR at 13-14, 17.

In the end, though, it does not matter how the trial court reached its conclusion. This Court can affirm the trial court's resolution of a matter on any basis supported by the record. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). The issue comes down to whether there is sufficient evidence in the record to support the conviction. This is an issue of law. State v. Drum, 168 Wn.2d 23, 33, 225 P.3d 237 (2010).

Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d

628 (1980). This standard applies to motions for arrest of judgment under CrR 7.4. State v. Robbins, 68 Wn. App. 873, 875, 846 P.2d 585 (1993). The reviewing court engages in the same inquiry as the trial court. State v. Huynh, 107 Wn. App. 68, 76-77, 26 P.3d 290 (2001).

RCW 9A.28.040(1) provides "A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement." Jury instruction on the definition of conspiracy was consistent with this statutory definition. CP 141 (Instruction 8).

The State alleged in the information that Blair and Yates agreed with each other. CP 1-2. The "to convict" instruction makes clear that the State must prove Blair entered into an agreement with someone other than Dunham. CP 147. There is no additional candidate for the agreement other than Yates. The issue then is whether the evidence, looked at in the light most favorable to the State, established an agreement between Blair and Yates.

The essence of a conspiracy is the agreement to commit a crime. State v. Pacheco, 125 Wn.2d 150, 156, 882 P.2d 183 (1994). The law is clear that an actual agreement must exist. Pacheco, 125 Wn.2d at 151

("We hold RCW 9A.28.040 and RCW 69.50.407 require an actual agreement between two coconspirators[.]"); see also State v. Stark, 158 Wn. App. 952, 962, 244 P.3d 433 (2010) ("The State must show an actual, rather than feigned agreement with at least one other person to prove conspiracy.").

The conspiracy statute does not define the term "agreement," but the dictionary and common law definitions of the term are consistent with the rule that a conspiratorial agreement must be a genuine, bilateral agreement. Pacheco, 125 Wn.2d at 153-55 (citing Black's Law Dictionary 67 (6th rev. ed. 1990) (defining agreement as "[a] meeting of two or more minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition."), Webster's Third New Int'l Dictionary 43 (1986). (defining agreement as "1a: the act of agreeing or coming to a mutual agreement . . . b: oneness of opinion[.]")).

Such an agreement need not be formal. Stark, 158 Wn. App. at 962. Proof may be circumstantial. Id. The State may prove the existence of an agreement by a "concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." State v. Smith, 65 Wn. App. 468, 471, 828 P.2d 654 (1992) (quoting State v. Casarez-Gastelum, 48 Wn. App. 112, 116, 738 P.2d 303 (1987)).

The subject crime of the conspiracy is an element. Stark, 158 Wn. App. at 962. Here, the subject crime is possession with intent to deliver marijuana. CP 1-2, 141, 147. A defendant must know that the co-conspirator intended to commit that crime. State v. Stein, 144 Wn.2d 236, 245-46, 27 P.3d 184 (2001). The State needed to prove a genuine, bilateral agreement existed between Blair and Yates to possess marijuana with intent to deliver.

The evidence is insufficient to show Yates actually agreed with Blair to commit the crime of possession with intent to deliver marijuana. The trial court cogently recognized "it could be that any agreement was made after that phone call or that it never actually happened. We just don't have enough evidence." RP 288-89. The State acknowledges, "the precise details of how Yates was brought into the circle was not explored." BOR at 17. In fact, the trier of fact was left to guess at whether Yates and Blair made an actual agreement to commit the crime.

Blair and the person identified as "Chris" in the phone call did not know each other. Ex. 2. Evidence in the record must establish Blair and Yates reached a genuine, bilateral agreement despite their lack of acquaintance.

The State suggests an agreement was reached through an intermediary. BOR at 17. It cites State v. Stewart, 32 Wn. 103, 109, 72 P.

1026 (1903) for the proposition that "[i]t is not necessary to show that conspirators actually come together, or that they are acquainted with each other." BOR at 16-17. Stewart, however, undermines the State's sufficiency argument.

In that case, Stewart and Larson were charged and convicted of conspiracy to defraud the State Medical Examining Board. Stewart, 32 Wn. at 106-07. Lawson was not legally entitled to practice medicine and did not have the requisite qualifications to pass the examination required by law. Id. at 108. Stewart and Lawson entered into an agreement wherein Stewart was to obtain the questions and answers for the upcoming licensing examination, which would enable Lawson to pass the examination and receive a certificate entitling him to practice medicine. Id. The intent of Stewart and Lawson was to unlawfully obtain the medical certificate for Lawson and the crime was completed when they entered into the agreement to defraud the State Medical Board in the manner described above. Id.

Lawson and Stewart dealt with each other through an intermediary named Braid. Id. Stewart represented to Braid that he would obtain the questions and answers from the Medical Board. Id. Stewart and Lawson "actually arranged the terms and conditions of the unlawful combination through the aid of the go-between, and they are as responsible as though

they had dealt with each other in person. It is not necessary to show that conspirators actually come together, or that they are acquainted with each other." Id. at 109.

Stewart highlights the deficiency of proof in Blair's case. Under the State's theory, Dunham acted as an intermediary between Blair and Yates. The evidence shows Blair reached an agreement with Dunham. But there is insufficient evidence to show Yates and Dunham actually communicated with one another and reached an agreement in accord with the agreement between Blair and Dunham. There is a hole where evidence should be. The State is entitled to reasonable inferences from the evidence, but such inferences do not stretch far enough to show an actual agreement between Yates and Blair on the facts of this case.

In Stewart, the evidence showed Stewart and Lawson "actually arranged the terms and conditions of the unlawful combination through the aid of the go-between." Stewart, 32 Wn. at 109. The evidence here does not show Blair and Yates actually arranged the terms and conditions of the agreement through Dunham. Evidence on the Yates side of the equation is sparse — too sparse to support a finding that Yates and Blair reached an agreement to commit the crime of possession with intent to deliver marijuana.

In accordance with his temporary release from jail, Yates arrived at the jail at about 5:55, shortly before his check-in time of 6 p.m. RP 81-82. If Yates had entered into an agreement with Blair, he would be expected to arrive at 5:30 to meet up with Dunham in accordance with the plan outlined in the jail call. In the jail call, Blair insisted to Dunham that 5:30 was the relevant time. Ex. 2. But Yates did not show up at 5:30. This fact does not support the State's theory of the case.

Again, the State may prove the existence of an agreement by a "concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." Smith, 65 Wn. App. at 471. Concert of action is lacking because the timing is off. Yates did not show up at the appointed time.

The only "Chris" scheduled for release from jail on February 20 was Yates. RP 39-40. Blair clearly stated in the jail call that the man he identified as "Chris" was to be *released* from jail at 5:30 p.m. Ex. 2. Yates, however, was released at 10 a.m. and was due to return at 6 p.m. RP 24. This fact is problematic for the State because it does not support the notion that Blair and Yates entered into an agreement. The release time of the man identified in the phone call by Blair does not coincide with the release time of Yates.

In regard to the fact that Blair told Dunham that the person was to be released from jail at 5:30, the State asserts, "there is no basis in the record to conclude that Blair was either correct or truthful in his remarks to Dunham." BOR at 24. That is a curious assertion. The record is the recording of the phone call. Ex. 2. Blair makes a number of statements during the course of the jail call. The State relies on the phone call as the articulation of the conspiracy. In arguing for sufficiency of the evidence, the State assumes everything said in the call is correct and true, except for the piece of evidence that undermines its theory of the case. The State opines Blair was either mistaken or concocted the story. BOR at 24. The State engages in speculation.

The State also maintains that whether Blair was correct or not, telling Dunham to appear at 5:30 would still have meant that Yates and Dunham could meet for an exchange. BOR at 24. But they did not in fact meet. The concert of action is missing in this regard as well. Yates did not arrive at the appointed time of 5:30. RP 81-82. Neither did Dunham. RP 82-83. Yates and Dunham did not contact one another and the woman who was with Yates walked right past Dunham's car and made no contact with her upon leaving the jail area. RP 83-84. These facts militate against a "concert of action" inference.

In arguing the evidence was sufficient to show Blair and Yates made an agreement, the State on appeal asserts the trial court incorrectly ruled the State needed to show an agreement tantamount to a meeting of the minds.⁴ BOR at 1, 15 (citing 2 Wayne LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 12.2(a), p. 266-67 (2d ed. 2003)). The State's argument reflects the *dissent's* position in Pacheco, which criticized the majority's holding on the need for bilateral agreements in conspiracy cases. Pacheco, 125 Wn.2d at 162 n.2 (Durham, J., dissenting) (citing 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 6.4, at 71 (1986) ("One might suppose that the agreement necessary for conspiracy is essentially like the agreement or 'meeting of the minds' which is critical to a contract, but this is not the case.")).

The majority opinion in Pacheco, not the dissenting opinion, is the law in Washington. Indeed, the Washington Supreme Court has a long history of recognizing the meeting of the minds standard as the appropriate one for conspiracy cases. See State v. McGonigle, 144 Wn. 252, 257, 258 P. 16 (1927) ("It is true, there need be no evidence of a formally expressed agreement between the alleged conspirators. Conspiracies are seldom susceptible to such proof. But if there is

⁴ The prosecutor below agreed with the trial court that the correct standard was a meeting of the minds. RP 256.

evidence, circumstantial even, of a meeting of the minds and unity of design and of co-operative conduct which could only mean that there was such an agreement, that would be sufficient foundation for the admission of evidence of subsequent independent acts and declarations of each of the parties as against any one of them.") (citing State v. Wappenstein, 67 Wn. 502, 121 P. 989 (1912)).

The State points to the arrival of Yates at the jail at roughly the same time as Dunham and Dunham's possession of the marijuana. That is insufficient to show Yates had already agreed with Blair to obtain the marijuana from Dunham in light of the other facts addressed above. "[T]he reasonable-doubt standard is indispensable, for 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). In the end, the existence of a bilateral agreement between Blair and Yates rests on guess, speculation, or conjecture, which is insufficient to prove the fact of such agreement under a sufficiency of evidence standard. Colquitt, 133 Wn. App. at 796. "No reasonable trier of fact could reach subjective certitude on the fact at issue here." Hundley, 126 Wn.2d at 422. This Court should affirm the trial court's order vacating the conspiracy conviction due to insufficient evidence.

2. THE COURT DID NOT INTEND TO ACTUALLY RULE ON WHETHER IT ERRED IN INSTRUCTING THE JURY ON ACCOMPLICE LIABILITY.

Because there is insufficient evidence to support the conspiracy conviction, any issue arising from the court's written order granting a new trial in the alternative is moot. The State, hoping this Court reverses the trial court on the insufficiency of evidence issue, contends the trial court erred in entering a written order that includes an alternative grant of a new trial. BOR at 1-2, 28-30.

When the superior court enters an order granting the motion in arrest of judgment, CrR 7.4(d) requires the court at the same time and in the alternative to decide a motion for new trial. The written order tracks that requirement. CP 177.

The State suggests the court rejected the motion for new trial in its oral opinion. BOR at 2, 30. That is untrue. A review of the record shows the trial court expressly disclaimed ruling on Blair's motion for new trial. RP 302-03. In addressing the CrR 7.4(d) requirement and the written order presented by defense counsel, the court stated "I am not, I have not made a ruling concerning whether or not the accomplice liability instruction was proper or not . . . because I don't need to." RP 302. When pressed by the prosecutor on the matter, the court reiterated that the basis for its ruling was insufficient evidence of an agreement. RP 302-03.

Under CrR 7.4(d), the court probably should have made a ruling on the motion for new trial, but it did not in fact intend to do so. In light of the record, the inclusion of such a ruling in the written order is a ministerial error. See State v. Hendrickson, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009) (ministerial error is one made by judicial officer in writing or keeping records). Because the court did not actually rule on the motion for new trial predicated on the accomplice liability issue, it is not ripe for review. See Meresse v. Stelma, 100 Wn. App. 857, 867, 999 P.2d 1267 (2000) (an appellate court generally will not review a matter on which the trial court did not rule). In the event this Court reverses the court's ruling on the motion for arrest of judgment under CrR 7.4, the court on remand will be in a position to issue a ruling on Blair's motion for new trial under CrR 7.5.

D. CONCLUSION

For the reasons stated, Blair requests that this Court affirm the trial court's order vacating the conspiracy conviction and dismissing the charge with prejudice.

DATED this 7th day of July 2012

Respectfully Submitted,

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Attorneys for Respondent

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67874-4-1
)	
KEITH BLAIR,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF JULY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEITH BLAIR
DOC NO. 345896
STAFFORD CREEK CORRECTION CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JULY 2012.

x *Patrick Mayovsky*

2012 JUL 30 PM 4:41
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON