

No. 43339-7-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

MANUEL MERINO,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 11-1-02573-1  
The Honorable John McCarthy, Judge

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OPENING BRIEF OF APPELLANT

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STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

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## **I. ASSIGNMENTS OF ERROR**

1. The State failed to present sufficient evidence to convict Manuel Merino of delivery of a controlled substance as charged in count two.
2. The State failed to present sufficient evidence to establish that Manuel Merino was an accomplice to another person's act of delivering a controlled substance.
3. The trial court erred when it denied Manuel Merino's motion to dismiss at the close of the State's case because the State's evidence was insufficient to establish the elements of the crime of delivery of a controlled substance charged in count two.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where the State's evidence showed at most that Manuel Merino was aware of and did not prevent his co-defendant from delivering a controlled substance to a confidential informant, did the State fail to present sufficient evidence to prove that Merino acted as an accomplice to the delivery?  
(Assignments of Error 1, 2, & 3)

## **III. STATEMENT OF THE CASE**

In early June of 2011, the Tacoma Police Department

received numerous complaints about high traffic volume and possible drug dealing from a house located on South 7th Street in Tacoma. (RP 26-27, 27-28, 31-32)<sup>1</sup> After conducting surveillance for several days, Officer Al Shultz decided to send a confidential informant into the house to attempt a controlled drug buy. (TRP 33, 34) He contacted Tamika Foley, a confidential informant who had done similar jobs in the past. (RP 36)

On June 14, 2011, he met with Foley and conducted a thorough search of her person and belongings for drugs, weapons and money. (RP 37-38, 39) He then gave her pre-recorded bills to use in the transaction. (TRP 37) Shultz also showed Foley a picture of the targeted seller, Malcolm Hampton. (TRP 140-41, 169, 205, 249)

After surveillance units were in place around the house, Foley approached and knocked on the front door. (TRP 40-41, 44) A woman opened the door and let Foley inside, then the officers lost sight of Foley. (TRP 45, 85-86) Shultz subsequently watched as Foley exited the house and walked to the pre-arranged meeting spot, where she gave Shultz a substance that was later determined

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<sup>1</sup> The transcripts containing the trial proceedings, labeled volumes 1-6, will be referred to as "TRP." The transcript containing the sentencing hearing will be referred to as "SRP."

to be crack cocaine. (TRP 46, 281, 284)

Foley testified that she was not familiar with Hampton or Manuel Merino before the controlled buy on June 14. (TRP 136-37) She testified that she entered the house with only the money provided to her by Shultz. (TRP 140) While she was chatting with the woman who opened the door, Hampton entered the room and asked Foley to explain how they knew each other. (TRP 141-42) She pretended that they had met previously, but she could sense that Hampton did not believe her. (TRP 141-42)

Foley testified that she asked Hampton if she could buy drugs. (TRP 144) Hampton then left the room and returned with Merino, who told her not to come to the house again. (TRP 142, 144, 178) Merino told Foley she could call him, and gave her a phone number. (TRP 142, 178) Hampton and Merino left the room together, then returned about five minutes later. (TRP 145, 180) Hampton handed Foley some drugs and she handed Hampton her money, then she left the house. (TRP 142, 143, 146, 186)

On June 20, 2011, Shultz directed Foley to call the phone number that Merino provided to arrange for another controlled buy. (TRP 53-54, 148) Foley and Merino agreed to meet in a Safeway parking lot. (TRP 55, 150) Before sending Foley to the meeting,

Shultz again searched Foley for drugs and money, then gave her pre-recorded bills. (TRP 54-55, 150) Shultz then watched as Foley and Merino met in the parking lot. (TRP 56, 58) After the meeting, Foley returned with a substance that was later determined to be crack cocaine. (TRP 60, 281, 284) Surveillance units also followed Merino as he drove back to the South 7th Street house. (TRP 558-59)

Foley testified that the man she met at the Safeway was Merino, and that he gave her drugs in exchange for money. (TRP 150) A surveillance video also showed Merino and Foley meeting in the Safeway parking lot. (TRP 65, 69)

Police executed a search warrant at the South 7th Street house on June 23, 2011. (TRP 71, 215, 335) Ten to fifteen people used the house as their mailing address or residence address, and there were about nine people, including Hampton and Merino, present at the house at the time the warrant was executed. (TRP 86-87) Only small amounts of marijuana and some items of drug paraphernalia were found in the home. (TRP 78, 215) But Merino's wallet contained \$1,055 in cash, and \$320 was found in Hampton's car. (TRP 81, 117-18, 223)

The State charged Merino with two counts of unlawful

delivery of a controlled substance (RCW 69.50.401). (CP 3-4, 7-8)  
The State also alleged that both offenses were aggravated because  
the deliveries occurred within 1000 feet of a school bus stop or  
school zone. (CP 7-8) The jury found Merino guilty as charged.  
(CP 16, 42-44; TRP 477) The trial court sentenced Merino within  
his standard range to 60 months of confinement to be followed by  
24 months for the school enhancement. (SRP 2, 8; CP 46, 50, 53)  
This appeal timely follows. (CP 61)

#### **IV. ARGUMENT & AUTHORITIES**

“Due process requires that the State provide sufficient  
evidence to prove each element of its criminal case beyond a  
reasonable doubt.” City of Tacoma v. Luvone, 118 Wn.2d 826,  
849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90  
S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to  
support a conviction only if, viewed in the light most favorable to the  
prosecution, it permits any rational trier of fact to find the essential  
elements of the crime beyond a reasonable doubt. State v.  
Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of  
insufficiency admits the truth of the State’s evidence and all  
inferences that reasonably can be drawn therefrom.” Salinas, 119  
Wn.2d at 201.



A person is guilty of delivery of a controlled substance if, with intent to deliver, he delivers a controlled substance, such as cocaine, and knows that the delivered substance is controlled. RCW 69.50.401; State v. DeVries, 149 Wn.2d 842, 849–50, 72 P.3d 748 (2003). An accomplice bears the same criminal responsibility as a principal. State v. Silva–Baltazar, 125 Wn.2d 472, 480, 886 P.2d 138 (1994).

A person is an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests another person to commit the crime, or he aids or agrees to aid another person in planning or committing the crime. RCW 9A.08.020(3)(a)(i-ii). Physical presence and awareness of the criminal transaction alone are insufficient to establish accomplice liability. In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). Rather, to aid in the commission of the crime the defendant must, in some way, associate himself with the undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed. State v. J-R Distributions, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973).

For example, in State v. Rangel-Reyes, a confidential police

informant contacted Jose Garcia and asked to purchase a large amount of cocaine. 119 Wn. App. 494, 496, 81 P.3d 157 (2003). The two men agreed to meet at a parking lot. When they arrived, Garcia was unable to quote the informant a price for the cocaine, and told the informant that the person who would be bringing the cocaine was on his way. 119 Wn. App. at 496. A few moments later, Rangle-Reyes arrived in his car, and he and Garcia had a conversation about prices. 119 Wn. App. at 496. After his discussion with Rangle-Reyes, Garcia told the informant the exact amount of cocaine he could sell and its price. 119 Wn. App. at 496-97. Garcia also told the informant to meet him at a nearby restaurant. 119 Wn. App. at 496-97.

Rangle-Reyes and Garcia then left together in Rangle-Reyes' car. 119 Wn. App. at 497. Later, Rangle-Reyes dropped Garcia off at the designated restaurant, where Garcia met the informant and delivered the cocaine. 119 Wn. App. at 497. On appeal, the court found sufficient circumstantial evidence to prove that Rangle-Reyes was aware of the proposed drug transaction and provided Garcia with the drugs, and acted as an accomplice to Garcia's delivery of a controlled substance. 119 Wn. App. at 500.

In the consolidated case of State v. Hernandez, police

officers arrested Ruben Soto and Juan Davila after watching them engage in what the officers believed were three drug transactions. 85 Wn. App. 672, 681, 935 P.2d 623 (1997). In the first transaction, the officers saw a woman contact and converse with Soto and Davila. Davila then pulled out a “small dark object” from his pants pocket and handed it to Soto. Soto handed the object to the woman and received money from her, which he then handed to Davila. 85 Wn. App. at 681. Next, a man who had accompanied the woman into the area approached Soto. Soto handed him an object in exchange for money, and again handed Davila the money. A short time later, another man approached Soto. They spoke and then Davila handed Soto another “small dark object.” Soto exchanged the object for currency from the third buyer. 85 Wn. App. at 681.

The police arrested Soto and Davila. Upon searching Davila, they recovered three bindles of heroin and \$160 in cash. The police recovered \$44 in cash and \$21 in food coupons from Soto. 85 Wn. App. at 681. On appeal, the court found that this evidence was sufficient to prove that Davila, acting as an accomplice to Soto, participated in three heroin deliveries. 85 Wn. App. at 682.

The evidence at trial regarding the first controlled buy at the South 7th Street house was: that Hampton was the known target; that Foley made contact with him first and asked him for drugs; that Merino later came into the room and told her not to come to the house again; that Hampton and Merino left the room and then returned a few minutes later; and that Hampton gave Foley the cocaine and she gave Hampton her money. (TRP 205, 141-46, 178, 180, 185, 186) Based on this evidence, the State asserted that Hampton was the principal and that Merino was his accomplice.<sup>2</sup> (RP 394-95, 448, 450; CP 32- 34)

Unlike in Rangel-Reyes and Hernandez, there is insufficient evidence in this case to prove beyond a reasonable doubt that Merino acted as an accomplice to Hampton's delivery of drugs to Foley at the house. Unlike in Rangle-Reyes, there was no evidence that Hampton and Merino discussed whether to sell Foley drugs or discussed the amount or price of the drugs Hampton would sell Foley. Unlike in Hernandez, there was no evidence that Merino provided Hampton with the cocaine he sold to Foley, or that

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<sup>2</sup> Curiously, the jury was unable to unanimously agree on a verdict for Hampton's charge of delivery of a controlled substance relating to the sale at the South 7th Street house, yet they were able to unanimously agree that Merino acted as his accomplice in that delivery. (CP 18, 32; TRP 475-76)

Hampton gave Merino the money received from Foley.

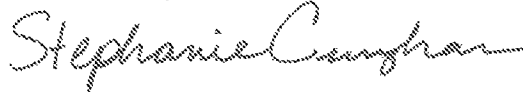
In fact, there is no evidence that Merino in any way desired the transaction to occur or acted in a way that would assist in accomplishing the transaction. To the contrary, the fact that Merino told Foley not to come to the house again and told her she could call him some other time indicates that he actually did not want a transaction to occur at the house. (TRP 142, 178)

The State's evidence establishes only that Merino was present and aware and did not object to Hampton delivering cocaine to Foley, but this does not make Merino an accomplice. There is no evidence from which a rational juror could conclude that Merino acted as an accomplice to Hampton in the delivery of cocaine at the South 7th Street house. Accordingly, Merino's conviction on this count must be reversed.

**V. CONCLUSION**

For the reasons argued above, Merino's conviction in count two for unlawful delivery of a controlled substance and its corresponding sentence enhancement should be reversed and dismissed, and his case remanded for resentencing with a reduced offender score.

DATED: July 20, 2012

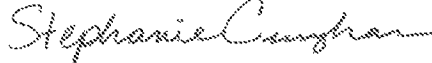


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STEPHANIE C. CUNNINGHAM  
WSB #26436  
Attorney for Manuel Merino

**CERTIFICATE OF MAILING**

I certify that on 07/20/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Manuel Merino, DOC#938008, Olympic Corrections Center, 11235 Hoh Mainline, Forks, WA 98331.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**July 20, 2012 - 3:29 PM**

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