68348-9

68348-9

No. **68348-9**

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

GARY CROW,

Appellant.

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

The Honorable Judge Kurtz

APPELLANT'S REPLY BRIEF

MARK D. MESTEL
Attorney for Appellant
Gary Crow

MARK D. MESTEL, INC., P.S.
3221 Oakes Avenue
Everett, Washington 98201
(425) 339-2383

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

I. **ARGUMENT**

Can one spouse be prosecuted successfully under RCW 69.53.010(1) if the other spouse grows marijuana in their residence? Appellant contends no. Based on the emerging case law relevant to the rights of those who are in a committed intimate relationship he asserts that he cannot be held criminally liable, under this statute, for the illegal acts of his partner.

This statute legitimately criminalizes a person's failure to act. See, e.g., State v. Eaton, 168 Wash.2d 476, 482 n. 2, 299 P.3d 704 (2010) (citing RCW 9A.76.030 (criminalizing refusal to summon aid for a peace officer); RCW 9A.84 .020 (criminalizing failure to disperse)); see also RCW 9.69.100 (crime for eyewitness to fail to report violent crime against a child). Specifically, the statute criminalizes a person's failure to report to law enforcement a perpetrator conducting unlawful drug-related activities in a space the person controls and made available. RCW 69.53.010(1).

The instructions requested by the appellant would have allowed the jury to determine whether or not Mr. Crow and Ms. Brice were in a committed intimate relationship. These instructions would have allowed the defense to argue its theory of its case: that Mr. Crow did not control the property with respect to Ms. Brice, rather, they had equal control over the property. If the jury concluded that they were equitable joint owners of the property on which the marijuana was discovered, it would not have found that the State had proved the elements of the crime beyond a reasonable doubt, and would have acquitted Mr. Crow.

The testimony of Mr. Crow established that he and Brice were in a committed intimate relationship. It was sufficient to allow the jury to decide whether his testimony was credible, and should be accepted. Judge Kurtz did not hold otherwise, and the State does not argue that Mr. Crow's testimony was not sufficient to establish a committed intimate relationship.

The State argues that RCW 64.12.020 supports its position that Mr. Crow can be criminally liable under RCW 69.53.010(1) for the acts of a co-owner. 64.12.020 reads in relevant part as follows:

> If a guardian, tenant in severalty or in common, for life or for years, or by sufferance, or at will, or a subtenant, of real property commit waste thereon, any person injured thereby may maintain an action at law for damages therefor against such guardian or tenant or subtenant; in which action, if the plaintiff prevails, there shall be judgment for treble damages, or for fifty dollars, whichever is greater, and the court, in addition may decree forfeiture of the estate of the party committing or permitting the waste, and of eviction from the property.

Both the statute and case law seem to limit its application to tenants, rather than co-owners. See, Eastwood v. Horse Harbor Foundation, Inc., 170 Wash.2d 380, 241 P.3d 1256 (2010). As such the State's argument by analogy is misplaced and is inapplicable to the facts of this case.

Assets acquired during the course of a committed intimate relationship take on a status similar to community

property. In re Marriage of Lindemann, 92 Wash.App. 64, 960 P.2d 966, 971 (1998) the Court held that under Connell, a party's labor is an asset of the committed intimate relationship and any earnings during the relationship similarly belong to the marriage-like community. As stated in In re Partnership of Rhone and Butcher, 140 Wash.App. 600, 606-607, 166 P.3d 1230, 1233 - 1234 (2007).

> While the laws involving the distribution of marital property do not directly apply to the division of property following a meretricious relationship, our courts may look toward those laws for guidance. Connell v. Francisco, 127 Wash.2d 339, 898 P.2d 831 (1995). "[I]ncome and property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage. Therefore, all property acquired during a meretricious relationship is presumed to be owned by both parties." Id. at 351, 898 P.2d 831.

With regard to the State's reliance on In re Kelly and Moesslang, 170 Wash.App. 722, 737, 287 P.3d 12, 19 (2012), appellant contends that the decision by Division III supports,

rather than defeats Mr. Crow's argument. In its holding the Court in Kelly stated:

> Second, Ms. Kelly's argument presumes that the property at issue is jointly owned. Ms. Kelly relies on Olver [FN1] for the proposition that those in a CIR have a "present, undivided and fully vested interest in each and every item of community property." Br. of Appellant at 25; Reply Br. of Appellant at 1. But, again, this presumption follows only from a determination or agreement that the CIR existed in the first place. Connell, 127 Wash.2d at 349, 898 P.2d 831. In Olver, the estates of deceased partners did not dispute that there was a CIR. 161 Wash.2d at 670, 168 P.3d 348. But here there is no finding that a CIR existed. And there can be, therefore, no finding that Ms. Kelly jointly owned any of the property at issue. Ms. Kelly does not need to be ousted from property that she does not own.

170 Wash.App. at 737 (footnotes omitted).

In the case at bar Mr. Crow did establish that the residence was acquired during a committed intimate relationship. See infra.

The Court in Kelly relied in part on the Supreme Court's decision in Olver v. Fowler, 161 Wash.2d 655, 168 P.3d 348 (2007). In that decision the Court stated:

> In sum, over the past 90 years, when dealing with property distribution between partners in a committed intimate relationship, Washington common law has evolved to look beyond how property is titled, requiring equitable distribution of property that would have been community property had the partners been married. But equity is limited; only jointly acquired property, but not separate property, can be equitably distributed. Finally, as the law of committed intimate relationships has developed, we have not objected to its application even where the relationship at issue terminated with the death of one partner, rather than the dissolution of the relationship.
>
> 161 Wash.2d at 668-669.

Crow argues that he and Brice acquired this property jointly even though Crow was the only name on the title. This contention is supported by his testimony. Their relationship began in 2002 and they began to cohabitate at his Everett house in 2003 (RP 146). They lived together continuously from that time up through the time of the execution of the search warrant. (RP 147-8). With regard to the property at which the police

discovered the marijuana they purchased it in 2006. Crow described that acquisition, testifying:

> Q. Did you see this as your house, her house, or both of your houses at that point?
>
> A. Well, it was our house together. I mean, I sold my other house, and we bought that house together.
>
> Q. Even though you're the only one on the statutory warranty deed?
>
> A. Right.

(RP 152)

Their relationship already had acquired the attributes of a committed intimate relationship prior to the acquisition of the property at which Ms. Brice was growing the marijuana. Crow did not have the authority to evict Brice from the property. He had no more control over the property than Brice. He should not be held criminally liable, under this statute, for her manufacture of marijuana on their jointly acquired property.

III. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Reply Brief was served upon the following by North Sound Legal Messengers, addressed to:

1. Court of Appeals **(2 Copies)**
   Division One
   600 University Street
   One Union Square
   Seattle, WA 98101

2. Snohomish County Prosecuting Attorney
   3000 Rockefeller Avenue, M/S 504
   Everett, WA 98201

I hereby certify that a copy of the foregoing Appellant's Reply Brief was served upon the following by United States Postal Service, addressed to:

1. Gary Crow
   3814 – 226th Place NE
   Arlington, WA 98223

DATED this 14 day of February, 2013.

Brandy L. Ellis, Secretary