

68348-9

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NO. 68348-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

GARY A. CROW,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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TABLE OF CONTENTS

I. ISSUE..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT 4

 A. AN OWNER OF A BUILDING COMMITS A CRIME WHEN HE KNOWINGLY MAKES IT AVAILABLE TO ANOTHER PERSON FOR ILLEGAL DRUG PURPOSES, WHETHER OR NOT THE OTHER PERSON IS ALSO AN OWNER. 4

 B. A PARTICIPANT IN A COMMITTED INTIMATE RELATIONSHIP ACQUIRED AN EQUITABLE CLAIM TO PROPERTY, NOT OWNERSHIP. 8

IV. CONCLUSION 10

TABLE OF AUTHORITIES

WASHINGTON CASES

Butler v. Craft Engineering Co., 67 Wn. App. 684, 843 P.2d 1071
(1992).....7
Graffel v. Honeysuckle, 30 Wn.2d 390, 191 P.2d 858 (1948).....7
In re Kelly & Moesslang, 170 Wn. App. 722, 287 P.3d 12 (2012)8, 9
Olver v. Fowler, 161 Wn.2d 655, 168 P.3d 348 (2007)4, 8
State v. Robinson, 92 Wn.2d 357, 597 P.2d 892 (1979)5
State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994)5

WASHINGTON STATUTES

RCW 64.12.020.....7
RCW 69.50.505(1)(h).....7
RCW 69.50.....5
RCW 69.53.010.....4
RCW 69.53.010(1)8

I. ISSUE

The defendant was charged with making a building available for unlawful drug purposes. Evidence showed that he had allowed his girlfriend to grow marijuana in a building that he owned. The defendant proposed instructions stating that the girlfriend was a co-owner of the building if it was acquired during a “meretricious relationship.” Were these instructions properly refused because (1) the girlfriend’s co-ownership status was irrelevant to the crime charged or (2) a participant in a “meretricious relationship” acquires only an equitable right, not ownership?

II. STATEMENT OF THE CASE

On January 12, 2011, police served a search warrant on a house in Arlington that was owned by the defendant, Gary Crow. 1/10 RP 69-70. They found that a detached garage had been converted into three growing rooms for marijuana. 1/10 RP 85-86. In the garage, there were 90 marijuana plants. 1/11 RP 35-38. In the house itself, a bedroom held 28 starter plants. 1/11 RP 39.

The defendant told police that the marijuana grow was “his girlfriend’s thing.” He said that he believed she was growing the marijuana for a medical marijuana patient. According to the officer’s

testimony, the defendant said that he thought the girlfriend had about 50 plants in the garage. 1/11 RP 56-57.

The defendant testified that he began living with Rebecca Brice in 2003.¹ In 2006, he bought the house in Arlington and moved there with Ms. Brice. 1/11 RP 145-47. In 2009, she told him that she wanted to grow medical marijuana for a particular person. 1/11 RP 151-52. To allow her to do this, he built the walls in the garage, and he set up an electrical system for the grow lights. 1/11 RP 165. When she had problems with the electrical system, he fixed it. 1/11 RP 170-71. He also set up lights inside the house so that she could grow starters there. 1/11 RP 175-76. He did not tend or harvest the plants – she did that. 1/11 RP 153-54. The defendant claimed that he had told the officer there were 15 plants, not 50. 1/11 RP 158-59.

Monica Marks testified that she was an authorized user of medical marijuana. On November 15, 2010, she designated Ms. Brice as her provider. To help Ms. Brice grow marijuana, Ms. Marks

¹ The defendant's brief describes his testimony as "uncontroverted." Brief of Appellant at 3. In fact, portions of that testimony were contradicted by both other witnesses and circumstantial evidence. The verdict reflects a finding that, contrary to the defendant's testimony, he knew that the grow was unlawful.

gave her five plants. 1/11 RP 121-24.

The defendant was charged with unlawful use of a building for drug purposes. 1 CP 42. The court instructed the jury on the following elements of the crime:

(1) That on or about January 12, 2011, the defendant knowingly made available for use a building, room, space or enclosure, for the purpose of unlawfully manufacturing, or unlawfully storing, a controlled substance;

(2) That the building, room, space, or enclosure was under the defendant's management and control as an owner; and

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

1 CP 30, inst. no. 5.

The court further instructed the jury: "The State must prove that the defendant knowingly allowed use of his property knowing the purpose was the unlawful manufacturing or unlawful storing of marijuana." 1 CP 34, inst. no. 9. The instructions went on to state that manufacturing and storing marijuana is authorized by law when done by a designated provider to assist a qualifying patient in the medical use of marijuana. The court defined the relevant terms and explained the limitations on the amount of marijuana that could be possessed. 1 CP 35, inst. no. 10.

At the conclusion of trial, the defendant submitted two proposed instructions concerning a “meretricious relationship.”² One of them defined such a relationship. 1 CP 41. The other stated that any property acquired during such a relationship is presumed to be jointly owned. 1 CP 40. No instruction was proposed relating these concepts to the elements of the crime or to any defense. The court rejected these instructions as inapplicable and confusing to the jury. 1/11 RP 226.

The jury found the defendant guilty. 1 CP 22. The court sentenced him to one day of confinement, with credit for time served. 1 CP 15.

III. ARGUMENT

A. AN OWNER OF A BUILDING COMMITS A CRIME WHEN HE KNOWINGLY MAKES IT AVAILABLE TO ANOTHER PERSON FOR ILLEGAL DRUG PURPOSES, WHETHER OR NOT THE OTHER PERSON IS ALSO AN OWNER.

The defendant was charged with unlawful use of a building in violation of RCW 69.53.010:

It is unlawful for any person who has under his or her management or control any building, room, space, or

² The term “meretricious relationship” is used in older cases. According to newer cases, the preferable term is “committed intimate relationship.” Olver v. Fowler, 161 Wn.2d 655, 657 n. 1, 168 P.3d 648 (2007). In discussing case law, this brief will use the preferable term. In referring to the proposed instructions, this brief will use the language of those instructions.

enclosure, either as an owner, lessee, agent, employee, or mortgagee, to knowingly rent, lease, or make 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 under chapter 69.50 RCW. . .

The trial court instructed the jury on the elements set out in this statute. 1 CP 30, inst. no. 6. This instruction has not been challenged.

The defendant claims that the trial court erroneously rejected his proposed instructions concerning “meretricious relationships.” In general, the defendant is entitled to have the jury instructed on his theory of the case. A defendant is not, however, entitled to instructions that mis-state the law. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Unless a proposed instruction deals with matters of constitutional proportions or is constitutionally required, the trial court has no duty to rewrite it. State v. Robinson, 92 Wn.2d 357, 361, 597 P.2d 892 (1979).

In this case, the proposed instructions were unhelpful to the jury. They defined a set of circumstances under which Ms. Brice would be considered a joint owner of the property. Nothing in the other instructions, however, contained any reference to Ms. Brice’s ownership status. Rather, the “to convict” instruction said that the

defendant was guilty if a building was under his control as owner, and he knowingly made it available for the purpose of unlawfully manufacturing a controlled substance. 1 CP 30, inst. no. 5. Under this unchallenged instruction, the defendant's guilt turned on *his* ownership status, not that of Ms. Brice.

For instructions on Ms. Brice's status to be meaningful, there would have to be an additional instruction explaining how that status related to the defendant's guilt. The defendant did not propose any such instruction. It was not the court's duty to write one. Consequently, the proposed instructions were properly refused as confusing to the jury.

Even if the court had a duty to fill the gap with its own instruction, no such instruction would be appropriate. The defendant claims that if Ms. Brice were a co-owner, "[n]either [the defendant's] permission nor acquiescence was needed for her to grow marijuana." Brief of Appellant at 11. This claim is incorrect.

The rights of a co-owner are not unlimited:

The rule is that each cotenant is entitled to the use, possession, and benefit of the whole of the property. The only limitation is that a cotenant may not interfere with the co-equal rights of the other cotenants.

Butler v. Craft Engineering Co., 67 Wn. App. 684, 694, 843 P.2d 1071 (1992).

By growing marijuana on the property illegally, Ms. Brice subjected the property to potential forfeiture. RCW 69.50.505(1)(h). This was a serious interference with the defendant's right to possess and use the property. She had no right to use the property in this manner without the defendant's permission or acquiescence.

A co-tenant is liable for committing waste. RCW 64.12.020. "Waste" is an unreasonable or improper use of property by one rightfully in possession which results in its substantial injury. "It is the violation of an obligation to treat the premises in such manner that no harm be done to them and that the estate may revert to those having an underlying interest undeteriorated by any willful or negligent act." Graffel v. Honeysuckle, 30 Wn.2d 390, 398, 191 P.2d 858 (1948). By using the property to grow marijuana, Ms. Brice threatened the defendant's right to possess and use the property. Her use was therefore an act of waste, which lay outside of her legal rights.

This analysis confirms the correctness of the trial court's instructions. The defendant was guilty if he controlled the property as an owner and knowingly made it available for use for the

unlawful manufacture of a controlled substance. RCW 69.53.010(1). If these facts were proved, any ownership interest by Ms. Brice was irrelevant. Whether or not she was also an owner, the defendant could not knowingly make the property available for her unlawful use. Since the defendant's proposed instructions were irrelevant to any valid theory of the case, they were properly refused.

B. A PARTICIPANT IN A COMMITTED INTIMATE RELATIONSHIP ACQUIRED AN EQUITABLE CLAIM TO PROPERTY, NOT OWNERSHIP.

The defendant's proposed instructions were also incorrect. They stated that the property was jointly owned if it was acquired during a "meretricious relationship." In reality, the existence of a committed intimate relationship gives the participants an equitable right to division of property acquired during the relationship. Olver v. Fowler, 161 Wn.2d 655, 665-66 ¶ 21, 168 P.3d 348 (2007). The participants are not, however, joint owners.

The nature of the property interest arising out of such a relationship was squarely addressed in In re Kelly & Moesslang, 170 Wn. App. 722, 287 P.3d 12 (2012).³ That case was a suit for equitable distribution of property that was allegedly acquired during

a committed intimate relationship. The issue was the applicable statute of limitations. The plaintiff claimed that she had become co-owner of the property as a tenant in common. If this were true, the statute of limitations would begin to run only when she was ousted from possession. Id. at 736 ¶ 23. The court held, however, that her right was limited to an equitable claim against the property. This being so, the statute began to run when the relationship ended. Id. at 734-35 ¶¶ 20-22, 737 ¶ 26.

The same analysis applies here. If the defendant and Ms. Brice had a committed intimate relationship, then she had an equitable right to division of property acquired during that relationship. Until that division was effectuated, however, she was not an owner. The defendant, as sole owner, had the right to prevent her from using the property – particularly when her use was illegal. Since the proposed instruction incorrectly stated that the property would be “jointly owned,” the instruction was properly refused.

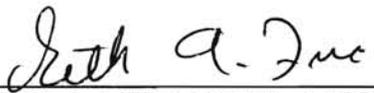
³ The Kelly case was decided after the appellant’s brief was filed in the present case.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on January 17, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Respondent