

FILED

E FEB 29 2016
WASHINGTON STATE
SUPREME COURT

Supreme Court No. 92829-1
COA No. 46899-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AMY LYNN BROOKS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is Amy Lynn Brooks, the Defendant and Appellant in this case, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Brooks seeks review of Division Two's Order Denying Motion to Modify in *State v. Brooks*, No. 46899-9-II, filed January 20, 2016. No Motion for Reconsideration has been filed.

C. ISSUE PRESENTED FOR REVIEW

1. Principles of due process require the State present sufficient evidence to prove each of the elements of a criminal offense beyond a reasonable doubt. Should this Court grant review and hold that the State has failed to sustain its burden of proving guilt beyond a reasonable doubt that Brooks delivered a controlled substance, where the appellant was not "targeted" by a confidential informant, but instead appeared unexpectedly during a "controlled buy" arranged by the informant with another person? RAP 13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

On June 10, 2015, Brooks filed a brief alleging that the trial court had erred in regards to the above-indicated issue. The brief set out facts and law relevant to this petition and are hereby incorporated herein by

reference.

1. Proceedings on Appeal.

On appeal, Brooks challenged the sufficiency of the evidence. Brief of Appellant at 9-14. The Court Commission granted the State's Motion on the Merits to Affirm on November 20, 2015. The Court denied the appellant's motion to modify the Commissioner's ruling, on January 20, 2016. For the reasons set forth below, Brooks seeks review.

E. **ARGUMENT**

It is submitted that the issue raised by this Petition should be addressed by this Court because the decision of the Court of Appeals raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b).

1. **THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THAT BROOKS DELIVERED METHAMPHETAMINE**

Principles of due process require the State to prove all essential elements of the crime charged beyond a reasonable doubt. U.S. Const. amends. 5, 14; Const. art, I, § 3; *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Baeza*, 100 Wn.2d 487, 490,

670 P.2d 646 (1983).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and requires it be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, at 201; *Craven*, at 928. In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rationale trier of fact to find guilty beyond a reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (citing *State v. Weaver*, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

In order to be guilty of delivery of a controlled substance, the

accused need only know that the substance was a controlled substance. *State v. Nunez-Martinez*, 90 Wn.App. 250, 255–56, 951 P.2d 823 (1998). He or she need not know the specific nature of the proscribed substance. On appeal, a defendant may challenge the sufficiency of evidence of an element in the “to convict” instruction, even if that element is not part of the underlying statute. *Hickman*, 135 Wn.2d at 102, 954 P.2d 900; *State v. Ong*, 88 Wn.App. 572, 577–78, 945 P.2d 749 (1997).

Here, the State charged Ms. Brooks with unlawful delivery of a controlled substance---methamphetamine---in violation of RCW 69.50.401. The statute provides as follows:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

RCW 69.40.401(1).

The trial court's "to convict" instruction set forth the following element: "That the defendant knew that the substance delivered was a controlled substance." CP 47.

To sustain charges of delivery of a controlled substance, the State need not present direct evidence. “The elements of a crime may be established by either direct or circumstantial evidence, and one type of evidence is no more or less trustworthy than the other.” *State v. Rangel-Reyes*, 119 Wn.App. 494, 499, 81 P.3d 157 (2003); *State v. Green*, 94

Wn.2d 216, 220, 616 P.2d 628 (1980).

Under Instruction No. 10, the State was required to prove that Ms. Brooks knew the baggie she was alleged to have delivered to the informant contained a controlled substance rather than an innocuous, legal substance or other benign item. *Ong*, 88 Wn. App. at 577. In *Ong*, the State accused Steven Ong of giving a morphine tablet to a child. The State presented evidence of the following: (1) Ong's five felony convictions; (2) Ong's drug paraphernalia of syringes, a straw, smoking device, and cotton; (3) the small numbers marked on the tablets; (4) his testimony that he knew the pills were "pain medication"; (5) his testimony that he stole the pills; and (6) his flight to Bremerton, showing consciousness of guilt. However, nothing in the record evidence pointed to knowledge that the substance was morphine rather than any other controlled substance. Therefore, viewing the evidence in a light most favorable to the State, it was insufficient to support Ong's conviction for delivery of a controlled substance. *Ong*, 88 Wash.App. at 577-78, 945 P.2d 749.

Here, the State presented even less evidence than in *Ong*. No circumstantial evidence in this case showed that Ms. Brooks knew she delivered a controlled substance, let alone methamphetamine. The only evidence that even remotely ties Ms. Brooks to knowledge of methamphetamine is the testimony that the informant arranged to meet

Ms. Graves to buy methamphetamine, and Ms. Brooks appeared at the designated time and place of the arranged transaction. In contrast to the facts in *Ong*, no evidence was presented that Ms. Brooks acted furtively while in the parking lot, that she attempted to flee, that she had prior convictions, that she knew Ms. Graves, that she had involvement with drugs or was known to the police as a drug dealer, or that she and the CI agreed to buy and sell the specific illicit item.

The record contains no evidence that Ms. Brooks knew what was in the baggie, or that it was a controlled substance. The State's circumstantial evidence is comprised of the following—the CI made a call and arranged to meet with Ms. Graves, and Ms. Brooks showed up at the Big Lots parking lot at the approximate time that Ms. Graves was expected. Ms. Brooks parked next to the truck occupied by the informant, got out of her car and leaned into the truck's open window. A package was obtained by police from the informant that contained methamphetamine.

These facts do not support that Ms. Brooks delivered drugs and does not support an inference that Ms. Brooks knew what was in the package.

Even assuming *arguendo* that Ms. Brooks handed the baggie to the informant, the evidence is insufficient to prove that Ms. Brooks had knowledge that the package contained an illegal substance, which was a required element under Instruction 10. Therefore, her conviction must be

reversed and the case dismissed with prejudice. *Ong, supra*.

In evaluating the sufficiency of the evidence, the court reviews the evidence in the light most favorable to the State. *State v. Ehrhardt*, 167 Wn.App. 934, 943, 276 P.3d 332 (2012) (citing *State v. Drum*, 168 Wash.2d 23, 34, 225 P.3d 237 (2010)). The Court inquires “whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.” *Drum*, 168 Wn.2d at 34–35, 225 P.3d 237 (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). An appellant who claims that insufficient evidence supports his conviction “admits the truth of the State's evidence and all reasonable inferences therefrom.” *Ehrhardt*, 167 Wn.App. at 943, 276 P.3d 332 (citing *Drum*, 168 Wn.2d at 35, 225 P.3d 237). Inferences drawn from circumstantial evidence “must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In applying these rules, a reviewing court must “defer to the fact finder on issues of witness credibility.” *Drum*, 168 Wash.2d at 35, 225 P.3d 237.

In this case, the detectives collectively testified that after searching the informant's clothing and the cab of his borrowed pickup truck and after giving him \$140, they saw him park the truck in the Big Lots parking lot and then saw a woman later identified as Ms. Brooks park next

to the truck, get out, and lean inside the truck window. Several photographs were taken of the alleged exchange, but no audio or video recording was made. When he returned to the police, the informant had methamphetamine in his possession. No money was recovered from Ms. Brooks at the time of her arrest.

No evidence suggests that Ms. Brooks was involved in the discussion that the informant had with Ms. Graves about buying drugs. Moreover, although detectives saw Ms. Brooks appear in the parking lot, no witness saw her actually possess or deliver methamphetamine or even exchange anything with the CI.

Under these critical facts, there were many potential sources for the methamphetamine the informant gave to the detective. For example, the methamphetamine could have been placed in the truck by the owner from whom the informant borrowed it and simply not discovered by police when they searched the truck cab. Similarly, Ms. Brooks' approach to the truck may have been purely happenstance. Ms. Brooks may have known Mr. Nease, seen him while in the parking lot at Big Lots and approached him in order to talk. This is corroborated by the detectives, who stated that they saw her lean into the truck's window and talk with the informant for approximately two minutes. 2RP at 105.

A trier of fact may therefore conclude that the methamphetamine did

not come from the informant's person, given the detective's testimony concerning his search of the CI. However, the fact that the truck was borrowed, that Ms. Brooks was not the intended target, the unknown relationship between Ms. Brooks and the CI, the choice of law enforcement not to make a visual recording of the meeting other than a few still photographs, and the absence of police testimony that Ms. Brooks physically handed the baggie to the CI creates a situation in which the police could only suspect that Ms. Brooks was the source of the methamphetamine.

The State's case rests entirely on the testimony of a single informant, with no further forensic or recorded corroboration. The CI's claim is corroborated by the observation of detectives, but only to the extent that they saw Ms. Brooks approach the truck and lean into the open window and put her arms on the truck door for a short duration. 2RP at 77, 105, 123. Her hands were not visible to the detectives at that time. 2RP at 77, 105, 123.

Evidence that only gives rise to suspicion or speculation does not constitute substantial evidence sufficient to meet the requirements of due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this Court should reverse the conviction and remand with instructions to dismiss.

The Court of Appeals' affirmance of the conviction conviction was

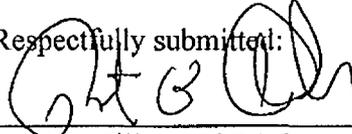
based on a cursory assessment of the facts and merits review by this Court.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and reverse and dismiss Brooks' conviction consistent with the arguments presented herein.

DATED this 18 day of February, 2016.

Respectfully submitted:



Peter B. Tiller (WSBA 20835)
Attorneys for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AMY LYNN BROOKS, Appellant.

No. 46899-9-II

ORDER DENYING MOTION TO MODIFY

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

APPELLANT filed a motion to modify a Commissioner's ruling dated November 20, 2015, in the above-entitled matter. Following consideration, the court denies the motion.

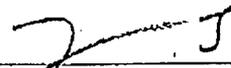
Accordingly, it is

SO ORDERED.

DATED this 20th day of January, 2016.

PANEL: Jj. Sutton, Melnick, Lee

FOR THE COURT:



PRESIDING JUDGE

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Comments:

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

AMY LYNN BROOKS,

Appellant.

COURT OF APPEALS NO.
46899-9-II

COWLITZ COUNTY NO.
14-1-00145-0

CERTIFICATE OF E-FILING
AND MAILING

The undersigned attorney for the Appellant hereby certifies that one original Petition for Review was e-filed to the Court of Appeals, Division 2, and one copy of the Petition for Review was mailed to Amy Lynn Brooks, Appellant, and Sean Brittain, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on February 18, 2016, at the Centralia, Washington post office addressed as follows:

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Cowlitz County Prosecutor's Office
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