

67874-4

67874-4

NO. 67874-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

KEITH THOMAS BLAIR,

Respondent.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIV I  
2012 APR -2 PM 3:56

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

**BRIEF OF APPELLANT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

JAMES M. WHISMAN  
Senior Deputy Prosecuting Attorney  
Attorneys for Appellant

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
B. <u>ISSUES PRESENTED</u> .....	1
C. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	4
3. DISMISSAL OF CONSPIRACY CHARGE.....	9
D. <u>ARGUMENT</u> .....	13
1. THE COURT ERRED IN DISMISSING THE CONSPIRACY CONVICTION.....	14
a. The Court Erred As A Matter Of Law; A Conspiracy Does Not Require Evidence Of An Express Agreement Between Each Participant In The Conspiracy .....	14
b. The Court Erred By Substituting Its Assessment Of The Facts For The Jury's Assessment Of The Facts And By Drawing Conclusions Adverse To The Evidence And The Jury's Verdict .....	18
i. The trial court's own rulings are contradictory.....	20
ii. The trial court's consideration of the evidence was flawed .....	21

2.	THE TRIAL COURT ERRED BY GRANTING A NEW TRIAL AFTER IT SPECIFICALLY REJECTED THE BASIS FOR THAT MOTION .....	28
E.	<u>CONCLUSION</u> .....	32

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Borrero, 147 Wn.2d 353,  
58 P.3d 245 (2002)..... 31

State v. Delmarter, 94 Wn.2d 634,  
618 P.2d 99 (1980)..... 18

State v. Gentry, 125 Wn.2d 570,  
888 P.2d 1105 (1995)..... 18

State v. Goodman, 150 Wn.2d 774,  
83 P.3d 410 (2004)..... 18

State v. Hosier, 157 Wn.2d 8,  
133 P.3d 936 (2006)..... 18

State v. Jensen, 164 Wn.2d 943,  
195 P.3d 512 (2008)..... 31

State v. Longshore, 97 Wn. App. 144,  
982 P.2d 1191 (1999), aff'd,  
141 Wn.2d 414, 5 P.3d 1256 (2000)..... 19

State v. Salinas, 119 Wn.2d 192,  
829 P.2d 1068 (1992)..... 18, 19

State v. Stein, 144 Wn.2d 236,  
27 P.3d 184(2001)..... 31

State v. Stewart, 32 Wash. 103,  
72 P. 1026 (1903)..... 16, 17

State v. Williams, 96 Wn.2d 215,  
634 P.2d 868 (1981)..... 19

Rules and Regulations

Washington State:

CrR 3.5..... 30  
CrR 3.6..... 30  
CrR 7.4..... 18, 28, 29  
CrR 7.5..... 11, 28

Other Authorities

13A Seth A. Fine & Douglas J. Ende,  
Washington Practice:  
Criminal Law § 603 (2d ed. 1998) ..... 16  
2 Wayne R. LaFave & Austin W. Scott, Jr.,  
SUBSTANTIVE CRIMINAL LAW  
§ 12.2(a) (2d ed. 2003)..... 16

A. ASSIGNMENTS OF ERROR

1. The trial court erred by entering an order vacating the jury's guilty verdict and dismissing the conspiracy charge.

2. The trial court erred by failing to excise from its written order a proposed alternative ruling granting a new trial, where that proposed ruling was orally rejected by the court.

3. Even if considered as part of its written ruling, the order granting new trial was in error.

B. ISSUES PRESENTED

1. Did the trial court hold the State to an incorrect legal standard when it ruled that the State must show an agreement tantamount to a meeting of the minds in order to establish an "agreement" for conspiracy purposes?

2. Did the trial court err in applying the legal standard for granting a new trial where it first found a conspiracy in pretrial rulings, then denied a motion to dismiss after the State presented

its case, but then vacated the jury's verdict after the jury found Blair guilty, and in spite of evidence to support a reasonable inference of a conspiratorial agreement?

3. Did the trial court err by including a decision in its written order that it had rejected in its oral ruling?

4. Even assuming the rejected ruling is a part of the written order, did the trial court err by entering an order granting a new trial simply because an accomplice instruction was given in a case charging inchoate offenses?

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Keith Blair was charged with one count of Conspiracy to Commit Violation of the Uniform Controlled Substances Act – possession with intent to deliver marijuana (count II) and with Attempted Introducing Contraband in the Second Degree (count III)

for his conduct on or about February 20, 2011.<sup>1</sup> A jury trial was held and the trial court judge denied a motion to dismiss the conspiracy charge after the State rested. RP 140. The jury subsequently convicted Blair of the conspiracy charge, CP 125, but acquitted him of the attempted introduction of contraband charge. CP 126. On September 30, 2011, the court granted Blair's motion to vacate the jury verdict and entered an order dismissing the case. CP 177. The written order also provided that a new trial should be granted "for the reasons set forth in the defense memorandum," although the trial court's oral ruling rejected that ruling. CP 177; RP 301.

---

<sup>1</sup> Co-defendant Christopher Yates was charged with Conspiracy to Commit a Violation of the Uniform Controlled Substances Act – possession with intent to deliver marijuana, and with Attempted Introducing Contraband in the Second Degree. CP 1-2. He failed to appear for a hearing on 7/6/11 and a bench warrant was issued for his arrest. CP 14. Co-defendant Rachel Dunham (Blair's wife) was charged with Violation of the Uniform Controlled Substances Act – possession with intent to deliver marijuana, and with Conspiracy to Commit Violation of the Uniform Controlled Substances Act – possession with intent to deliver marijuana, and with Attempted Introducing Contraband in the Second Degree. CP 1-2. She pleaded guilty to one count of Attempted Introducing Contraband in the Second Degree on 7/6/11. CP 41-48. In her statement of defendant on plea of guilty Dunham admitted that she tried to give marijuana to Yates who would bring it into the jail, at Blair's direction. CP 47.

## 2. SUBSTANTIVE FACTS

Keith Blair was incarcerated in the King County Jail awaiting trial on multiple burglary charges. CP 5. Because of these crimes and other open investigations in which Blair was a suspect, Detective Coblantz of the Criminal Investigative Unit of the King County Sheriff's Office was monitoring Blair's telephone calls. CP 5.

On February 19, 2011, Det. Coblantz heard a conversation between Blair and his wife, Rachel Dunham, that sounded as though they were planning to smuggle marijuana into the jail. RP 53, 77-78. The conversation had been recorded by the jail, was admitted at trial as an exhibit, and was played for the jury. RP 53-54; Ex. 2. It was stipulated that the voices on the recording were Blair and Dunham. RP 54, 184; Ex. 24. A redacted transcript of the recording was used at trial and admitted for illustrative purposes only. RP 56; Ex. 8; CP 122.<sup>2</sup>

---

<sup>2</sup> Although places in the transcript are marked "inaudible," the speaker's words at a number of those "inaudible" points are actually decipherable on the recording. Det. Coblantz testified that "...there were...some things that [the transcriber] was unable to hear on her recording that at least I was able to hear from my recording." RP 55. The actual recording, Exhibit 2, has been designated so that this Court can hear what the jury heard, rather than rely on the imperfect transcript.

In the telephone call, Blair and Dunham discussed a variety of personal topics but interspersed with mundane conversation are snippets of information relevant to this charge. At 2 minutes, 13 seconds into the recording, after the standard warnings have been issued by the telephone system, and after Blair and Dunham have exchanged greetings, Blair asks Dunham if she can come down tomorrow. Ex. 2 (2:10 - 2:17). Dunham says she cannot hear him and Blair asks, "Can you hear me now." When Dunham replies, "Yeah," Blair says that someone is getting released tomorrow, and he needs her to come down at 5:30 with something. Ex. 2 (2:30 - 2:44). Dunham asks, "Of..." and Blair replies, "Green," and Dunham says, "O.K." Ex. 2 (2:45 - 2:55). Dunham then says, "I'll give him a number to get a hold of you." They confirm that he's going to be released at 5:30 and Blair said, "So, I need you to be here, okay?" Dunham says, "O.K." Ex. 2 (2:55 - 3:21).

Later in the call, after discussion about routine personal matters, Blair says, "I'm going to give dude your phone number, so make sure you are here at 5:30." Dunham asks, "What's his name?" When Blair cannot immediately provide a name, Dunham says, "Dude, its a set up, Keith." They argue briefly about that and Dunham says, "You don't even know his name?" Blair replies, "I'll

find out right now. Just trust me, okay?" Ex 2 (9:20 - 10:28). About fifty seconds later, Blair says, "His name's Chris." Ex. 2 (11:09). They discuss Blair's plans for the evening and then Blair abruptly says, "Shred that up and put it in a rubber." Ex. 2 (11:35). Dunham says, "Huh?" and Blair repeats, "Shred that up and put it in a rubber." Dunham asks, "Shred what" and Blair replies, "When you come here at 5:30. Tear it up put it in a rubber." Dunham asks, "Tear what up?" and Blair answers, "What are you coming here for tomorrow?" Dunham then asks, "What do I tear up? I don't get it." Blair answers, "Forty." Dunham says, "Yeah, I understand," but she apparently is not quite clear what he means, because she asks him to call in the morning. Blair then clarifies, "You know, like when we go to . . ." Although his voice trails off, Dunham seems to suddenly understand, and she replies, "Yeah, that's what you want?" Blair then confirms, "forty dollars worth." Ex. 2 (11:36 - 13:05). Shortly thereafter their conversation ended.

Det. Coblantz knew from his experience that "green" referred to marijuana and that, in the context of discussing controlled substances transactions, the term "forty" referred to "a dollar amount of the specific substance that someone would be looking for." RP 76.

Sergeant Catey Hicks works in the special investigative unit at the jail. RP 19-20. She testified that she received a call from Det. Coblantz on February 19<sup>th</sup>, indicating that he suspected someone was trying to introduce contraband to the jail. RP 21-22. Sgt. Hicks described the jail inmate telephone system and the fact that inmates are issued a special call authorization number but that they often use each other's numbers to make calls that cannot be traced to them. RP 25-28.

Sgt. Hicks testified that both Blair and a man named Christopher Yates had been housed together in 4 North, F-dorm of the King County Jail from February 12, 2011 until February 19, 2011. RP 36-40. Yates was granted a temporary release on February 20<sup>th</sup> from 10 a.m. until 6 p.m. to attend a funeral. RP 24. Yates was the only person named "Chris" or "Christopher" who was on temporary release status on that date. RP 39-40. Sgt. Hicks confirmed that marijuana is considered contraband in the jail. RP 41.

Based on this information, Det. Coblantz set up surveillance at the jail on February 20<sup>th</sup> with Sgt. Hicks and another officer named Fox. RP 79-80. At about 5:50 p.m., a black Acura pulled up at 5<sup>th</sup> and Jefferson Streets, just outside the King County Jail, to

a point directly across the street from the intake area. RP 81-82. The intake area is "a large cut-out kind of in the middle of the building which is a kind of driveway that goes up maybe about 100 feet or so to a garage door and a regular man door." RP 83-84. Yates got out of the car with a woman at about 5:55 p.m. and stood around for a few minutes smoking a cigarette and looking around. RP 82. Just before the 6:00 p.m. deadline for him to check back into the jail, Yates and the woman ran across the street and into the intake area, where the detective lost sight of them. RP 82-83.

At that moment, Dunham pulled up to the stop light right in front of Det. Coblantz at 5<sup>th</sup> and Jefferson Streets, turned left onto Jefferson Street, and parked next to the intake area of the jail and very near the car from which Yates had earlier emerged. RP 83. Shortly thereafter, the woman who had accompanied Yates into the jail returned to her car without Yates and left eastbound up Jefferson Street; there was no contact between that woman and Dunham. RP 83-84. Det. Coblantz called into the jail and asked that Yates be strip-searched for contraband upon reentry. RP 84. The search did not turn up any contraband. RP 84.

After the Acura had left, Det. Coblantz watched Ms. Dunham for about 10-15 minutes as she sat alone in her car; she had

contact with nobody during this time. RP 84. Det. Coblantz then walked over to the car, seized it in preparation for obtaining a search warrant, had the car impounded, and then conducted a search a few days later. RP 85-89. He took a series of photographs of the car as it was being searched. RP 89; Ex. 10-21. In a small trap door at the rear of the center console, the detective found a previously opened Marlboro cigarette box. RP 92-94; Ex. 14 (photo of package in trap door). The box was glued shut and inside was a tightly-wrapped condom that contained a green, leafy-type substance that smelled like marijuana. RP 96-97; Ex. 14, 16, 18. The substance was confirmed to be 2.5 grams of marijuana. RP 128. Exhibit 21 shows the marijuana after being removed from the condom. RP 100. The marijuana had been wrapped in a sandwich bag and then stuffed into a condom. RP 102.

### 3. DISMISSAL OF CONSPIRACY CHARGE

After the State rested, Blair moved to dismiss count II for insufficient evidence of a conspiracy. RP 136. The Court denied that motion, saying

I think that there is a prima facie case here in light of the contents of the phone call and the circumstantial evidence of Ms. Dunham arriving within moments of an individual named Chris going back into the jail. And then we have the contents of the car that were identified in the search warrant. So in light of all that, I do think that taking all inferences in favor of the State that a prima facie case does exist.

RP 140. Blair then rested without offering any evidence.

Jury instruction number 14 on conspiracy provided as follows:

To convict the defendant of the crime of conspiracy to commit Violation of the Uniform Controlled Substances Act - Possession with Intent to Deliver Marijuana, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 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; RP 207. During deliberations, the jury asked:

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 agreement (regardless of the unknown person's belief or agreement.)[?]

CP 128 (emphasis in original). Blair asked the court to instruct the jury that conspiracy required ". . . an actual agreement between Keith Blair and another specific person . . ." CP 164; RP 257-59.

The court answered the jury's question 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 State objected to this response. RP 255, 259. The jury subsequently returned a guilty verdict on the conspiracy charge. CP 125.

On September 16, 2011, the defendant filed a motion for a new trial or for arrest of judgment. CP 165-71. The motion was premised on four legal grounds: 1) pursuant to CrR 7.5(a)(6), there was an error of law (the accomplice instruction) that required a new trial; 2) pursuant to CrR 7.5(a)(7), the verdict was contrary to law and the evidence; 3) pursuant to CrR 7.5(a)(8), substantial justice was not done; and 4) pursuant to CrR 7.5(a)(3), there was insufficient evidence to prove a material element of the crime.

CP 165-66. The sufficiency challenge focused on whether there was evidence "to prove the requisite conspiratorial agreement between Mr. Blair and another person." CP 167. The State responded that there was sufficient evidence of an agreement to justify the jury's verdict. CP 174-75.

On September 30, 2011, the court heard argument on Blair's motion. RP 265-304. Blair argued that an actual agreement between he and another person had not been shown. RP 266. After extensive discussion, the trial court indicated that it was not going to grant a new trial on the accomplice issue but it was, instead, dismissing the case for failure to prove a conspiratorial agreement. RP 302-03. The court entered a written order that provided in part as follows:

It is hereby ORDERED, ADJUDGED and DECREED, that the defense motion for arrest of judgment be, and the same hereby is, GRANTED, based upon the trial record and for the reasons set forth in the defense memorandum. The verdict on the conspiracy charge is VACATED, and the matter is DISMISSED WITH PREJUDICE.

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.

Findings of fact and conclusions of law will be subsequently entered.

CP 187. No findings and conclusions were entered. The State appealed.

D. ARGUMENT

The trial court erred in two ways when it substituted its judgment for that of the jury on a relatively straight-forward case where both direct and circumstantial evidence supported a reasonable inference that Blair was involved in a conspiracy to possess marijuana with intent to deliver. First, the court appeared to erroneously believe that the law of conspiracy required direct evidence of an explicit and formal, face-to-face agreement between Blair and Yates. However, a conspiracy can be found even if Blair had never personally met and negotiated with Yates. Thus, the trial court held the State to an improper legal standard. Second, the court allowed conjecture about possible inferences to distract it from the true standard of review, which requires the court to draw all reasonable inferences from the evidence in favor of the non-moving party. There was ample direct and circumstantial evidence which, properly considered, supports a reasonable inference that

Blair and Dunham, and others (including Yates) conspired to possess marijuana with intent to deliver.

The trial court's written order was flawed in an additional respect. The court erred by including in its written order a theory for granting a new trial that was rejected in the court's oral ruling. Even if considered a part of the order, however, the ruling granting a new trial is baseless and should be reversed. Accomplice liability applies to inchoate offenses, so it was permissible to give an accomplice instruction in a case charging conspiracy and attempt.

1. THE COURT ERRED IN DISMISSING THE CONSPIRACY CONVICTION.
  - a. The Court Erred As A Matter Of Law; A Conspiracy Does Not Require Evidence Of An Express Agreement Between Each Participant In The Conspiracy.

The trial court in this case seemed troubled that the State had not presented direct evidence that Yates and Blair had reached an express agreement between themselves that Yates would participate in the crime. However, no such requirement exists under the law of conspiracy. An "agreement" in conspiracy law need not be contract-type formal agreement; it can be an informal

agreement between many people, including some who have never met.

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. Although there continues to exist some uncertainty as to the precise meaning of the word in the context of conspiracy, it is clear that the definition in this setting is somewhat more lax than elsewhere. A mere tacit understanding will suffice, and there need not be any written statement or even a speaking of words which expressly communicates agreement. As the Supreme Court has put it: "The agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case." It is possible for various persons to be parties to a single agreement (and thus one conspiracy) even though they have no direct dealings with one another or do not know the identity of one another, and even though they are not all aware of the details of the plan of operation or were not all in on the scheme from the beginning.

Because most conspiracies are clandestine in nature, the prosecution is seldom able to present direct evidence of the agreement. Courts have been sympathetic to this problem, and it is thus well established that the prosecution may "rely on inferences drawn from the course of conduct of the alleged conspirators." This notion has been traced back to an oft-quoted instruction in an 1837 English case, where the judge told the jury: "If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at

liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object.”

2 Wayne R. LaFave & Austin W. Scott, Jr., SUBSTANTIVE CRIMINAL LAW § 12.2(a), p. 266-67 (2d ed. 2003) (footnotes and citations omitted). Washington law follows this liberal interpretation as to the meaning of "agreement" in a conspiracy.

For there to be a conspiracy, the conspirators must agree to commit a criminal act. A formal agreement is not necessary. The agreement can be shown by concert of action, all the parties working understandingly, with a single design for a common purpose. The conspirators need not reach their agreement by personal negotiation. They can act through an intermediary. The existence of the agreement can, and often must, be proved circumstantially. The agreement can be proved by the conspirators' declarations, acts and conduct done in pursuance of it. Once the conspiracy has been established, evidence of a defendant's slight connection to it, if proven beyond a reasonable doubt, is sufficient to convict the defendant of participation in the conspiracy. . . .

\* \* \*

A conspiracy requires that the defendant reach a genuine agreement with at least one other conspirator. Case law had held that if the only other “conspirator” was a police agent who secretly intended to frustrate the crime, then no conspiracy had been committed. This was legislatively abrogated in 1997.

13A Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 603, at 121-22 (2d ed. 1998) (footnotes and citations omitted); State v. Stewart, 32 Wash. 103, 109, 72 P. 1026,

1027 (1903) ("It is not necessary to show that conspirators actually come together, or that they are acquainted with each other").

Under the circumstances of this case, as explained more fully below, the evidence clearly showed that Blair and Dunham conspired to have Dunham give marijuana to Yates so that Yates could later deliver the substance to others. Although the precise detail of how Yates was brought into the circle was not explored with this jury because key witnesses were not available, and although it is likely that there was an intermediary between Yates and Blair, it was reasonable for the jury to infer that Yates, one way or another, was a part of a conspiracy to possess marijuana with intent to deliver.<sup>3</sup> This is obviously what the jury concluded in its deliberations.

To the extent the trial court seemed to require proof of a formal, personal agreement between Blair and Yates, the court erred by applying the wrong legal standard. The trial court's order granting the motion to dismiss should be reversed for this reason alone.

---

<sup>3</sup> Dunham was Blair's wife and was not available as a witness, and Yates was on warrant status.

- b. The Court Erred By Substituting Its Assessment Of The Facts For The Jury's Assessment Of The Facts And By Drawing Conclusions Adverse To The Evidence And The Jury's Verdict.

Beyond holding the State to an incorrect burden, the trial court erred in its post-trial ruling by failing to draw all inferences in the light most favorable to the State and by, instead, impeaching the jury's verdict by drawing adverse inferences contrary to the evidence.

Under CrR 7.4(a)(3), a judgment may be arrested on motion of the defendant if there is insufficient proof of a material element of the crime. "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Hosier, 157 Wn.2d 8, 133 P.3d 936 (2006). "All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant." State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). Circumstantial evidence and direct evidence are equally probative. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A directed verdict or arrest of judgment is appropriate only if, when viewing the evidence in the light most favorable to the State, the court finds, as a matter of law, that there is no substantial evidence or reasonable inference to sustain a verdict for the State. State v. Longshore, 97 Wn. App. 144, 147, 982 P.2d 1191 (1999), aff'd, 141 Wn.2d 414, 5 P.3d 1256 (2000). The motion must be denied if there is *any* competent evidence from which a rational trier of fact, viewing the evidence in a light most favorable to the State, could have found that the essential elements of the charged crime had been proved beyond a reasonable doubt. Id. at 147 (emphasis in original); see also Salinas, 119 Wn.2d at 201. Whether an element of the crime has been proven is “a matter better left to the unanimous, contemporaneous assessment of twelve jurors than to the retrospective guesswork of a single judge acting as a thirteenth juror.” State v. Williams, 96 Wn.2d 215, 227, 634 P.2d 868 (1981).

Review of a trial court decision denying or granting a motion for arrest of judgment requires the appellate court to engage in the same inquiry as the trial court. Longshore, 141 Wn.2d at 420. Because the court never entered written findings of fact and conclusions of law, the court's oral rulings must be examined.

The error in the court's post-trial ruling is evidenced in two ways: ii) its own rulings are contradictory; and i) it focused on possible adverse inferences from disputed evidence instead of making inferences in favor of the evidence.

- i. The trial court's own rulings are contradictory.

The trial court found by a preponderance of the evidence during pretrial hearings that Blair and Dunham were conspiring to introduce marijuana into the jail.<sup>4</sup> This finding is wholly supported by the evidence. If this finding is correct, it necessarily follows that Blair and Dunham needed a third person to bring the marijuana into the jail population. To the extent that the trial court's grant of a new

---

<sup>4</sup> The trial court ruled that statements of Ms. Dunham on the jail recording were admissible in the State's case in chief under the co-conspirator exception to the hearsay rule. CP 181. The court's findings and conclusions make plain that the State had demonstrated a conspiracy between Blair and Dunham to bring marijuana into the jail.

[The] Court concludes . . . the State as (sic) made a prima facie showing of the existence of a conspiracy involving the defendant and Dunham, independent of the statements of Dunham on February 19, 2011.

[The] Court finds that the defendant and Dunham were members of a conspiracy at least between February 19, 2011, and February 20, 2011 . . .

[The] Court concludes the statements of the defendant and Dunham [during a taped telephone discussion] on February 19, 2011, were made in furtherance of a conspiracy . . .

CP 181.

trial suggests there was no conspiracy, it undercuts the court's pretrial finding of a conspiracy.

The court's post-trial ruling also conflicts with its half-time ruling. After the State rested, the court ruled that the State had established a prima facie case of a conspiracy involving Blair, Dunham, and Yates. RP 140. Blair presented no evidence to undermine this conclusion and the jury returned a verdict of guilty. The trial court then ruled that there was insufficient evidence to convict. These contradictory rulings cannot be reconciled.

- ii. The trial court's consideration of the evidence was flawed.

As set forth above, there can be little question that Blair and Dunham conspired to get marijuana into the jail for delivery. However, Blair was inside and couldn't get out, and Dunham was out and couldn't get in. They needed someone who could get into the general population from the outside. That person was Christopher Yates, who had lived with Blair in the same part of the jail for about a week, and who was granted a temporary release for eight hours on February 20<sup>th</sup>. RP 29. He was the only person named "Chris" on temporary release (meaning he would leave the

jail and then return) on that date. RP 39-40. Blair specifically asked Dunham in their telephone conversation to bring "green" wrapped in a condom and to give it to "Chris" outside the jail on February 20<sup>th</sup> at about 5:30 p.m. Ex. 2. Christopher Yates was scheduled to reenter the jail no later than 6:00 p.m. RP 24. Yates appeared outside the jail at about 5:50 p.m. and lingered for about 10 minutes, looking around as he smoked a cigarette, until the last moment before his return time, at which point he ran to the entry door to the jail. Almost immediately thereafter, Dunham showed up, parked adjacent to the inmate receiving area of the jail, and sat waiting in her car for about fifteen minutes. In a small drawer in the rear of her center console was a carefully packed cigarette box holding 2.5 grams of marijuana wrapped in cellophane and placed in a condom, or "rubber" as Blair had requested.

From these facts, most reasonable jurors would conclude, as this jury did, that Yates and perhaps others, had at least an informal agreement with Blair and Dunham to possess marijuana with intent to deliver it.

The trial court seems to have gone astray by focusing on an alleged discrepancy in the testimony. Blair's lawyer stated, and the court seemed to agree, that it was significant that Blair told Dunham

on the telephone that "Chris" was to be released at 5:30 p.m., whereas Yates was actually released at 10:00 a.m. and had to return by 6:00 p.m. RP 267; CP 170 n.2. For several reasons, it was error for the court to overturn the jury's verdict on adverse inferences from this alleged discrepancy.

First, it appears that the jury had, itself, noted this fact. CP 170 n.2. Yet, the jury still found that Blair conspired with others to possess marijuana with intent to deliver. Thus, the jury did not overlook some key fact; it factored that information into its decision and concluded that the information did not undermine the conclusion that there was a conspiracy to bring the marijuana into the jail. The trial court simply weighed the information differently.

Second, Blair's lawyer misrepresented the evidence in a way that may have confused the trial court.<sup>5</sup> Counsel argued that Yates returned to the jail at 5:30 p.m. RP 268. In truth, the testimony was that Yates returned to the jail just before 6:00 p.m., as required by his temporary release. RP 82-84 (return time); RP 24 (temporary release schedule). Thus, to the extent the trial court was relying on

---

<sup>5</sup> The court did not remember whether Blair had said on the recording that Chris would be leaving at 5:30 p.m. RP 293.

a misunderstanding of the testimony, it may have overvalued the claim that the evidence was conflicting.

Third, the alleged discrepancy between what Blair said on the phone and what Yates actually did does not undermine the logic of the jury's decision that an agreement to possess with intent had been reached. Although, Blair did tell Dunham in his cryptic comments that "Chris" Yates was to be *released* at 5:30, when in fact, Yates was released at 10:00 a.m. and was to return at 6:00 p.m., there is no basis in the record to conclude that Blair was either correct or truthful in his remarks to Dunham. Blair may have simply misunderstood the precise parameters of Yates' release; Blair may have genuinely thought that Yates was *leaving* the jail instead of *returning* to the jail at the appointed time. Whether he was correct or not, telling Dunham to appear at 5:30 would still have meant that Yates and Dunham could meet for the exchange. This inference from the evidence is wholly consistent with guilt. The trial court erred by drawing an adverse inference where a positive inference was wholly reasonable.

Alternatively, Blair may have been concerned that Dunham was going to be late, so he concocted a story that would cause her to arrive a half hour before Yates had to reenter the jail so that

there would be less room for error. The only thing Blair needed to communicate (in his cryptic remarks in a telephone call he knew was being recorded) was that Dunham should be outside the jail at about 5:30 on February 20<sup>th</sup> to meet with Yates. Whether Yates was on his way out of the jail or back into the jail was not important. The important fact was that Yates and Dunham meet.

Misunderstandings and missteps are common in life and in conspiracies. The fact that Blair provided *some* incorrect information to Dunham hardly defeats the jury's reasonable conclusion that conspiracy rather than chance caused Dunham to appear outside the inmate entrance to the jail with "green" wrapped in a "rubber" at nearly the same moment as Yates, who was housed in the jail with Blair for the preceding week, was re-entering the jail from a temporary release, especially given Exhibit 2, which made the agreement between Blair and Dunham quite plain. Blair's description or understanding of Yates' situation may have been imperfect, just as Dunham's execution of the plan was imperfect, in that she arrived late. Neither fact defeats the conclusion that Blair, Dunham and Yates were part of a conspiracy. Again, the State's inferences from the evidence are entirely reasonable, so the trial court erred when it instead drew negative inferences.

The court made other mistakes in its ruling, some based on memory lapses. For instance, it said, "But the discrepancy between the time that the defendant thought that he would be leaving the jail, which seems to have been almost reversed from the time that he was actually returning there, makes me really question whether there is evidence that there actually was an agreement between them." RP 297-98. There is no basis to conclude that the time was "reversed." The *time* that Blair was going to be outside the entrance to the jail was correct within a half-hour; at worst, a fact that was arguably "reversed" was whether Yates would be coming or going from the jail. For purposes of meeting Dunham and getting marijuana to deliver, that discrepancy is of no moment.

Nor does the "discrepancy" show that some other "Chris" was meant to be the carrier. Chris Yates and Blair had been housed together for about one week before this event. RP 36-40. The testimony also unequivocally established that there was only one "Chris" scheduled for a temporary release on February 20<sup>th</sup>. RP 39-40.<sup>6</sup> Chris Yates ultimately was waiting around just outside

---

<sup>6</sup> The trial court had apparently forgotten that there was only one "Chris" on temporary release from the jail. RP 297.

the jail and looking around<sup>7</sup> moments before Dunham showed up at the jail with marijuana packaged just as Blair had ordered. The most logical inference, and the one likely drawn by the jury, was that Yates was there pursuant to an agreement to meet with Dunham.

The trial court erred by second-guessing these inferences based on its faulty memory of the testimony, and on strained inferences that run counter to the legal standard. If competing inferences can be drawn, the standard of review requires that the court err on the side of the non-moving party. There was competent evidence from which a rational trier of fact, viewing the evidence in a light most favorable to the State, could have found that an "agreement" had been proved beyond a reasonable doubt.

The trial court struggled to remember the facts, it drew adverse inferences where logical competing inferences were more likely, and it may have been influenced by its expectation that the jury would not convict. RP 284 ("I was quite surprised that there was a conviction, and I'm really struggling with that"). In short, the

---

<sup>7</sup> The trial court had forgotten that Chris was looking around during the time just before he returned to the jail. RP 291.

trial court essentially became the thirteenth juror on the case. Its ruling was erroneous and should be reversed.

2. THE TRIAL COURT ERRED BY GRANTING A NEW TRIAL AFTER IT SPECIFICALLY REJECTED THE BASIS FOR THAT MOTION.

The trial court erred by entering a non-specific written order that granted a new trial "for the reasons set forth in the defense memorandum." CP 187. Defense counsel had requested a new trial based on alleged error in submitting an accomplice instruction. CP 167. But the trial court expressly rejected defense counsel's invitation to rule that the giving of the accomplice instruction was a basis for a new trial. RP 30-03. The relevant passage is quoted below in its entirety, after the court had ruled that the conspiracy verdict must be vacated and the case dismissed.

Prosecutor: Thank you. But the court is making this finding under [CrR] 7.4(a)(3). Is that correct?

Court: I believe the order provides for in the alternative. So the order that was handed up is [CrR] 7.4(a)(3) and in the alternative, [CrR] 7.5, and there are three provisions set forth.

Prosecutor: And the court's finding all of those are satisfied?

Court: It doesn't say why the new trial would be granted, it's in the alternative. Did you want to, have you reviewed the order, because if you haven't --

Prosecutor: I have. But I'm just wanted to nail down exactly what the findings are because there were several bases. So is the court granting --

Court: I was focusing on the sufficiency of the evidence of the agreement. That's what I'm really focusing on. I am no, I have not made a ruling concerning whether or not the accomplice liability instruction was proper or not --

Prosecutor: Right. So --

Court: -- because I don't need to.

Prosecutor: The State would ask that that be stricken from the order. I don't know if that's appropriate if the court's not ruling --

Court: Mr. Muenster suggested that I needed to address both of those in the alternative. Is that -- what's the basis for saying that, Mr. Muenster?

Defense: Your Honor, what I'd like to do is invite the court's attention to [CrR] 7.4(d).

Prosecutor: Right. [CrR] 7.4(d), right. So we need to have a finding as to whether or not the court is granting a new trial as well. That's what I'm trying to get at.

Court: If the evidence of an element is insufficient, dismissal is the remedy, it's not --

Defense: Yes. That's right.

Prosecutor: And so the court's making, is grounding (sic) that specifically?

Court: In the lack of evidence of an agreement. I'm focusing in on that. (Pause) Okay. I've signed the findings of fact with respect to the [CrR] 3.5 and the [CrR] 3.6, so that's done. Is there anything further at this time?

Defense: Not from the defense, Your Honor. Thank you.

Court: So you'll submit some findings to Mr. Wynne for his review?

Defense: I will.

Court: All right.

Prosecutor: Thank you, Your Honor.

RP 301-03. The trial court rejected the defense motion insofar as it was predicated on the accomplice argument, and instead focused solely on the sufficiency of the evidence showing a conspiratorial agreement. To the extent the written order failed to track the oral ruling, it is plainly incorrect, and should be reversed.

Even if this court were to treat the written order as reaching this issue, however, it is plainly unsupported by the law for three reasons.

First, the jury was instructed on accomplice liability as it pertains to count III, the attempted introduction of contraband charge. The order of the instructions and the State's closing argument makes that plain, even if it is not expressly stated in the instruction itself. CP 156-57 (Instructions 23 and 24 on accomplice liability and on Attempted Introduction of Contraband); RP 225-26 (closing argument); RP 250-52 (rebuttal closing argument). The trial court noted this fact in considering the motion for new trial. RP 269 ("The State's theory was that the accomplice liability applied to the charge that he was found not guilty of"). Thus, since Blair was acquitted of Attempted Introduction of Contraband, Blair's accomplice argument is inapposite.

Second, even assuming the jury may have considered the accomplice instruction as applied to the conspiracy charge, Blair's argument was that "the case law requires a completed crime for there to be accomplice liability". RP 269. That argument is simply incorrect. Accomplice liability applies to inchoate offenses. State v. Stein, 144 Wn.2d 236, 27 P.3d 184(2001) (distinguishing Pinkerton doctrine from accomplice for conspiracy); State v. Borrero, 147 Wn.2d 353, 58 P.3d 245 (2002) (accomplice to attempted murder);

State v. Jensen, 164 Wn.2d 943, 952, 195 P.3d 512, 517 (2008)

(a person can be an accomplice to a solicitation).

Because there is no legal basis for Blair's argument, and because the trial court did not rely on the argument in her oral ruling, the written order is flawed, and should be reversed.

E. CONCLUSION

For the foregoing reasons, the State respectfully asks that the trial court's ruling vacating the jury verdict and dismissing the case be reversed, and the matter remanded for sentencing.

DATED this 2nd day of April, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
JAMES M. WHISMAN, WSBA #19109  
Senior Deputy Prosecuting Attorney  
Attorneys for Appellant  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nielsen Broman & Koch, the attorney for the respondent, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Appellant, in STATE V. KEITH BLAIR, Cause No. 67874-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame

Name

Done in Seattle, Washington

4/2/12  
Date 4/2/12