

68348-9

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No. 68348-9

IN THE COURT OF APPEALS OF  
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

GARY CROW,

Appellant.

2012 APR 17 11:11:09

COURT OF APPEALS  
STATE OF WASHINGTON

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

The Honorable Judge Kurtz

APPELLANT'S OPENING BRIEF

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## I. ASSIGNMENTS OF ERROR .....

### Assignments of Error No. 1

The Court erred when it refused to give the defendant's proposed instructions on co-ownership of the property on which the police discovered growing marijuana.

### Issues Pertaining to Assignments of Error No. 1

Two people living together in a committed and intimate relationship when one purchases the home. The other decides to grow marijuana on that property. Is the other owner of the property criminally responsible under RCW 69.53.010?

## II. STATEMENT OF THE CASE

On January 12, 2011, officers assigned to the drug task force executed a search warrant for the property located at 3614 226<sup>th</sup> Pl. N.E., Arlington, WA. During the search of the

property the police located and seized approximately 90 growing marijuana plants from a large outbuilding (RP 35-8) and starter plants and processed marijuana from various areas within the residence. (RP 38-9) The police determined that Mr. Crow was the legal owner of the property and that Rebecca Brice lived with him.

On April 15, 2011 the State charged Mr. Crow with the Unlawful Manufacture of a Controlled Substance; the substance being marijuana. CP 1. Shortly before the commencement of trial the State amended the Information to charge the unlawful use of a building for drug purposes (RCW 69.53.010), abandoning its initial charge. CP 30. The statute defines the crime charged in the amended information as follows:

It is unlawful for any person who has under his or her management or control any building, room, space, or 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 uncontroverted evidence introduced at trial through Mr. Crow was that he met Rebecca Brice in 2002 and began to cohabitate with her in 2003. (RP 146). He described their relationship as a loving relationship and that they planned to marry. He had proposed to her in 2003, and had given her an engagement ring. However, by the time of his arrest in 2011, they still had not married. In 2010 Brice told him that she was going to grow marijuana in their home for a person who had a medical marijuana authorization.<sup>1</sup> (RP 152) Mr. Crow understood that this would be allowed under the medical marijuana law. As an electrician, Mr. Crow did the wiring for the marijuana grow which was to be located in a large garage/outbuilding. (RP 153)

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<sup>1</sup> Ms. Marks testified at trial that she had been authorized to use marijuana by a physician based on a variety of physical ailments, including diabetes and three strokes. (RP 121) She also testified that she asked Ms. Brice to grow the marijuana for her. (RP 122)

At the conclusion of the trial the defense proposed two supplemental jury instructions. The first Instruction advised the jury that if it found that Mr. Crow and Ms. Brice were in a meretricious relationship that the law presumes that property acquired during the course of that relationship is jointly owned. The second Instruction defined a meretricious relationship.<sup>2</sup> Copies of the instructions are attached hereto in the Appendix. The Court refused to give the defense instructions. (RP 226) The jury convicted the defendant as charged. Following sentencing the defense filed a timely Notice of Appeal.

### III. ARGUMENT

The Court erred when it refused to give the defendant's proposed instructions which would have allowed him to argue his theory of the case: that Crow and Brice were co-owners,

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<sup>2</sup> Judge Kurtz advised defense counsel that the term to describe the relationship had been changed from meretricious to committed and intimate, but did not reject the defense instruction on that basis. RP 217. See also, *Oliver v. Fowler*, 161 Wash.2d 655, 657-658, 168 P.3d 348, 350 (2007)

residing together on the property on which Brice was growing marijuana and as a co-owner, the statute was inapplicable to Crow.

A trial court's refusal to give a proposed jury instruction is reviewed for an abuse of discretion. In re Det. of Pouncy, 168 Wn.2d 382, 390, 229 P.3d 678 (2010). The right to due process of law requires that the jury be fully instructed on the defense's theory of the case. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Jury instructions are sufficient if they allow the parties to argue their theories of the case, are not misleading, and properly inform the jury of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

Mr. Crow contends that his testimony established that he and Ms. Brice had a committed and intimate relationship. They had a “stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.” Connell v. Francisco, 127 Wash.2d 339, 346, 898 P.2d 831 (1995) (citing In re Marriage of Lindsey, 101

Wash.2d 299, 304, 678 P.2d 328 (1984); Harry M. Cross, The Community Property Law in Washington (Revised 1985), 61 Wash.L.Rev. 13, 23 (1986)). In Lindsey, 101 Wash.2d 299, 304 – 05, 678 P.2d 328 (1984) our Supreme Court listed five relevant factors to analyze when a meretricious relationship exists. Those factors are: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties. If the parties had a committed and intimate relationship property acquired by them during that relationship is presumed to belong to both parties. Connell, 127 Wash.2d at 351, 898 P.2d 831.

When one applies the Connell analytic framework to the evidence in the case one finds:

**Continuous Cohabitation:** Brice and Crow lived together from 2003 through early 2011. This is continuous cohabitation. (RP 147)

**Duration of the Relationship:** Crow and Brice's relationship spanned eight years and is more than sufficient to establish a stable, long term relationship.

**Intent of the Parties:** Mr. Crow proposed marriage in 2003 and gave Ms. Brice an engagement ring which she accepted. (RP 147) There was a mutual intent to live in a committed and intimate relationship with a realistic expectation of marriage. (RP 142)

**Pooling of Resources:** Their relationship was a traditional relationship in which one partner worked outside of the home generating an income while the other took care of the home. (RP 148-9) They pooled their resources, had a vehicle in common and jointly invested their time and effort in the day to day management of their home. (RP 150) They freely shared each other's possessions. (RP 151) He considered the house to belong to both of them. (RP 152)

**Purpose of the Relationship:** The purpose of their relationship included companionship, friendship, love, sex, and mutual support and caring.

While the amount of marijuana found on the property exceeded that allowed for a medical marijuana user, the prosecution was not based on Mr. Crow's unlawful manufacture or possession of the marijuana. The State made the decision not to prosecute Mr. Crow for growing or possessing the marijuana; instead it prosecuted him for maintaining a building. If, as asserted by Mr. Crow, there existed a committed relationship between he and Ms. Brice, she would be presumed to be a co-owner in the property. The defense theory was that the statute charged in the amended information is inapplicable to co-owners of property.

Contrast the statute in this case with RCW 9A.48.080(1)(a), malicious mischief in the second degree discussed at length in State v. Coria, 146 Wash.2d 631, 48 P.3d 980 (2002). There our Supreme Court had to decide whether a

co-owner of property could be found criminally responsible for damaging community property. Rejecting an argument that property held in common could not be the basis for a charge of malicious mischief as an owner should not be criminally liable for damaging his or her own property, the Court examined statutes enacted that changed or modified the common law. The Court noted that RCW 10.99.020(3)(m) “specifically includes malicious mischief in the definition of “domestic violence” when committed by one family member against another. RCW 10.99.010 states that “it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship.” We are especially wary of permitting any domestic relationship to become a defense in criminal prosecutions.” 146 Wash.2d 636-37. The Court went on to note several other instances in which our legislature had enacted legislation to modify the common law to allow a

person to be held responsible for acts not actionable under the common law.

Such is not the case with the statute allegedly violated in this case. The “to convict” instruction (instruction 5) read to the jury required the jurors to find in part:

(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;

If the gravamen of the “maintaining a building” charge is to “knowing make available” a space for the unlawful manufacturing and/or storing of a controlled substance one must conclude that the State needs to establish that the person who is actually manufacturing and/or storing the controlled

substance needs the permission and/or acquiescence of the owner to do so. It criminalizes the knowing action of the owner who allows one to use the owner's property illegally.

If Ms. Brice was a co-owner, under the equitable principles discussed above, she had a right equal to that of Mr. Crow to use the property. Neither his permission nor acquiescence was needed for her to grow marijuana. They stood as equals with regard to their right to use the property. This statute is inapplicable to co-owners of property who have an equal right to occupy and use the property.

#### **IV. CONCLUSION**

The defendant's proposed instructions were necessary to allow him to argue to the jury that Ms. Brice was the equitable co-owner of the property and that Mr. Crow's permission was irrelevant to her right to use the property as she wished. The Court erred when it refused to give the Defendant's Supplemental Proposed Instructions. Accordingly, this Court

should reverse the conviction, vacate the Judgment and Sentence and remand the matter for a new trial.

DATED this 16 day of AUGUST, 2012.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Mark D. Mestel", written over a horizontal line.

Mark D. Mestel, WSBA #8350  
Attorney for Appellant

V. **CERTIFICATE OF SERVICE**

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

1. Gary Crow  
3814 – 226<sup>th</sup> Place NE  
Arlington, WA 98223

DATED this 16 day of August, 2012.

  
\_\_\_\_\_  
Brandy L. Ellis, Secretary

# APPENDIX “A”

## INSTRUCTION NO. \_\_

If you find that Mr. Crow and Ms. Brice had a meretricious relationship as defined in Instruction, the law presumes that property purchased during the course of that relationship is jointly owned, and you are bound by that presumption unless you find that it has been overcome by clear and convincing evidence.

## INSTRUCTION NO. \_\_

A meretricious relationship is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist. To determine whether a meretricious relationship existed between Mr. Crow and Ms. Brice you may consider the following factors: (1) the continuity of cohabitation, (2) the duration of the relationship, (3) the purpose of the relationship, (4) the pooling of resources and services for joint projects, and (5) the intent of the parties.