

FILED
Court of Appeals
Division II
State of Washington
3/19/2025 11:41 AM

FILED
SUPREME COURT
STATE OF WASHINGTON
3/19/2025
BY SARAH R. PENDLETON
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Supreme Court No. 103984-1
Court of Appeals No. 57929-4-II

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.

LUIS REYES,

Petitioner.

PETITION FOR REVIEW

PETER B. TILLER
Attorney for Petitioner
THE TILLER LAW FIRM
118 North Rock Street
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. IDENTITY OF PETITIONER

Petitioner Luis Reyes, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Mr. Reyes seeks review of the unpublished opinion of the Court of Appeals in cause number 57929-4-II, 2025 WL 603043, filed February 25, 2025. A copy of the decision is in Appendix A at pages A-1 through A-14.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review where the evidence was insufficient to support the conviction for delivery of a controlled substance where the State failed to prove "constructive delivery" beyond a reasonable doubt?
2. Should this Court grant review where the evidence was insufficient to prove beyond a reasonable doubt the conviction for introduction of contraband in the second degree?

3. Should this Court grant review where the evidence was insufficient to support the conviction for conspiracy to deliver a controlled substance where the evidence was insufficient to establish that Mr. Reyes controlled or otherwise directed others to bring drugs into the Olympic Corrections Center?

D. STATEMENT OF THE CASE

Mr. Reyes appeals his convictions for (1) delivery of a controlled substance, (2) second degree introduction of contraband, and (3) conspiracy to deliver a controlled substance.

On direct review Mr. Reyes appealed the convictions on the basis that the evidence was insufficient to support convictions for all three charges, and that the trial court abused its discretion by admitting Mr. Reyes' statements on the prison phone calls because they were not adequately authenticated. By unpublished opinion filed February 25, 2025, the Court of Appeals, Division II, affirmed the convictions and held that sufficient evidence supported Mr. Reyes' convictions, and the trial court did not abuse its discretion in admitting the transcripts into evidence. See unpublished opinion, *State v. Reyes*, No. 57929-4-II, 2025 WL

603043, slip op. at 1. Mr. Reyes relies on the facts as presented in the Court's Opinion and as contained in his Brief of Appellant at 9-16.

Mr. Reyes petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this Court should accept review because the decision of the Court of Appeals is in conflict with a decision of the Supreme Court or is in conflict with a published decision of the Court of Appeals. RAP 13.4(b)(1), (2).

1. RESPECTFULLY, THE COURT SHOULD GRANT REVIEW BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT DELIVERY OF A CONTROLLED SUBSTANCE BECAUSE THE STATE FAILED TO PROVE "CONSTRUCTIVE DELIVERY" BEYOND A REASONABLE DOUBT.

Evidence is sufficient to support a verdict if the jury has a factual basis for finding each element of the offense proven

beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222 616 P.2d 628 (1980). The State bears the burden of proving each element of the charged offense beyond a reasonable doubt. The State had to prove that Mr. Reyes (1) delivered a controlled substance, and (2) knew the delivered substance was controlled. *State v. Evans*, 80 Wn.App. 806, 814 n. 17, 911 P.2d 1344, review denied, 129 Wn.2d 1032, 922 P.2d 97 (1996); RCW 69.50.401. Washington's Uniform Controlled Substances Act (UCSA) provides: “‘Deliver’ or ‘delivery,’ means the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.” RCW 69.50.101(q).

Because the statute does not define “transfer,” the court looks to its common dictionary meaning. “Transfer” has been previously interpreted to mean “to cause to pass from one person or thing to another,” as well as “to carry or take from one person or place to another.” *State v. Campbell*, 59 Wn.App. 61, 64, 795

P.2d 750 (1990), (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2426–27 (1971)).

Constructive transfer is not defined in the UCSA. However, looking to its common dictionary meaning, this Court has interpreted “constructive delivery” to mean “the transfer of a controlled substance belonging to the defendant or under the defendant's control, by some other person or manner at the instance and direction of the defendant.” *State v. Martinez*, 123 Wn.App. 841, 99 P.3d 418 (2004); see also *Campbell*, 59 Wn. App. at 63. Therefore, to prove constructive transfer of a controlled substance when the defendant is alleged to have used a “middle man” to perform the transfer, the State must prove that (1) “the controlled substance either belong[ed] to the defendant or [was] under the defendant's control,” and (2) the delivery occurred “at the instance and direction of the defendant.” See *Campbell*, 9 Wn. App. at 63.

To prove constructive delivery as charged in Count I, the

State first needed to prove beyond a reasonable doubt that Mr. Reyes either owned or controlled the drugs that were found in the Hoh Unit shared bathroom on December 16, 2021. But there was no evidence show conclusively where the drugs came from. Two people related to Luis Reyes were discovered on the Hoh Mainline near the facility early on December 16, 2021, and a headcount, inmate search, and lockdown of inmates started almost immediately. The drugs were found in the Hoh Unit bathroom shortly thereafter. The Cadillac was still running and Fernando Reyes was out of the car. Even assuming that he had thrown drugs over the fence, there is no showing how the drugs could be retrieved and taken to the Hoh Unit so quickly if Fernando Reyes had actually thrown them over for retrieval by another party. Moreover, no video or witness testimony was presented establishing that someone picked up the drugs from near the fence and took them to Hoh Unit or that someone was even seen in the vicinity of the fence, and in fact there is no evidence that anyone

even approached the perimeter fence. In short, no connection exists between the drugs and Mr. Reyes to support a theory of constructive delivery. The evidence is not sufficient to prove that Mr. Reyes had transferred or had control over the drugs found in the bathroom.

In addition, “delivery” necessarily involves another person. In this case, another person, even an unknown person, is not present. Otherwise, the meaning of “delivery” would be absurdly overbroad. A person dropping contraband on the ground—even accidentally—which is then picked up by another person, would be guilty of “delivery” when that was clearly not the defendant’s intent. Here, there is no showing that drugs were thrown over the fence and even if Fernando Reyes did throw drugs over the fence, there is no showing the drugs were received by any person and then recovered in the bathroom.

Even assuming *arguendo* that Fernando Reyes or Donelique Spillers threw drugs over the fence, there is no

evidence that the drugs found in the Hoh Unit were the same drugs presumably delivered by Fernando Reyes or Spillers. No one saw the drugs being picked up. There is no showing that the drugs found in the Hoh Unit were controlled by Fernando Reyes and not by some “other” illicit drug distribution operation inside the prison. To be sure, there was testimony presented that drugs were rampant in the OCC as well as other prisons, and that they were smuggled into facilities through a variety of methods. There is no evidence conclusively linking the drugs found in the toilet with drugs that may have been discussed in the prison phone calls. Rather, the drugs discovered in the bathroom could have been introduced through any manner of methods including the mail, as an example of the various methods that were described in the testimony. Even if the drugs found are believed to be the drugs “ordered,” that the State argues is reflected in the prison phone recordings, drugs are fungible and the drugs found were of the type commonly seen smuggled into prison: heroin, suboxone

to forestall opioid withdrawal, methamphetamine, and tobacco. In other words, the drugs could have come from “another” drug smuggling operation unknown to any of the alleged co-conspirators in this case that succeeded in getting drugs into the OCC and were secreted in some location in the housing unit until the prison went into lockdown after the discovery of the Cadillac in the ditch.

In *Campbell*, 59 Wn. App. 61, 795 P.2d 750 (1990), Division One held that constructive transfer was proved beyond a reasonable doubt when the defendant used a “middle man” to physically hand the cocaine to an undercover officer. In *Campbell*, the defendant was charged with delivery of cocaine after he sold cocaine to an undercover police officer. Apparently, the delivery occurred in a vehicle, at which time “Campbell placed the cocaine on a car seat, where at his direction a third person, B., picked it up and handed it to” the undercover officer. *Campbell*, 59 Wn.App. at 64.

This case is not controlled by *Campbell* because in that case, it was not disputed that Campbell both “directed” the straw man to hand the cocaine to the undercover officer and the “control” over the cocaine before it was delivered; Campbell simply handed the cocaine to another person (a straw man) who then handed it to the undercover officer. The evidence in that case, according to Division One, was enough to establish that Campbell directed or controlled a constructive transfer of cocaine.

In this case, in addition to the arguments made above, the State failed to show that Mr. Reyes had any “control” whatsoever of drugs, and in particular the drugs ultimately found in the HOH Unit. In short, the State failed to prove beyond a reasonable doubt that Luis Reyes constructively delivered drugs.

2. RESPECTFULLY, REVIEW SHOULD BE GRANTED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO FIND MR. REYES GUILTY OF SECOND DEGREE INTRODUCTION OF CONTRABAND.

A person is guilty of second degree introduction of contraband if the “person is guilty of introducing contraband in the second degree if he or she knowingly and unlawfully provides contraband to any person confined in a detention facility or secure facility under chapter 71.09 RCW with the intent that such contraband be of assistance in an escape or in the commission of a crime.” RCW 9A.76.150(1).

Mr. Reyes was in segregation in another unit and had no access to Hoh Unit starting on December 15, 2021. The stuck Cadillac and Fernando Reyes on the Hoh Mainline were not discovered until 24 hours after Mr. Reyes was put in segregation. As argued in Section One above, the evidence does not support the conviction for delivery in Count 1 because Mr. Reyes could not have delivered the contraband or placed it in the bathroom,

and there was insufficient evidence to support constructive delivery.

3. RESPECTFULLY, REVIEW SHOULD BE GRANTED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE BECAUSE THE STATE FAILED TO PROVE THE EXISTENCE OF A CONSPIRACY BEYOND A REASONABLE DOUBT.

A conspiracy requires three people, one who delivers the controlled substance, who receives the controlled substance and a third person who has also agreed to engage in or cause the performance of such conduct.

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RCW 9A.28.040(1). "A conspiracy is a plan to carry out a criminal scheme together with a substantial step toward carrying

out the plan.” *State v. Williams*, 131 Wn. App. 488, 496, 128 P.3d 98 (2006).

Conspiracy to deliver a controlled substance specifically requires the involvement of at least three people, because the delivery itself involves two people and a conspiracy must involve a third person other than those involved in the delivery. *State v. McCarty*, 140 Wn.2d 420, 426, 998 P.2d 296 (2000). A defendant must know that the co-conspirator intended to commit that crime. *State v. Stein*, 144 Wn.2d 236, 245-46, 27 P.3d 184 (2001).

A formal agreement is not necessary for the formation of a conspiracy; rather, “[a]n agreement can be shown by a ‘concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.’” *State v. Smith*, 65 Wn.App. 468, 471, 828 P.2d 654 (1992) (quoting *State v. Casarez–Gastelum*, 48 Wn.App. 112, 116, 738 P.2d 303 (1987)). A “substantial step” in a conspiracy context requires a manifestation “ ‘that the conspiracy is at work, and is

neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence.’ “ *State v. Dent*, 123 Wn.2d 467, 475, 477, 869 P.2d 392 (1994) (internal quotation marks omitted) (quoting *Yates v. United States*, 354 U.S. 298, 334, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957)). Preparatory conduct which furthers the ability of the conspirators to carry out the agreement can be “a substantial step in pursuance of [the] agreement.” *Dent*, 123 Wn.2d at 477.

The evidence presented at trial is insufficient to show Fernando Reyes actually agreed to commit the crime of delivery of drugs. Mr. Reyes traveled with Donelique Spillers in the Cadillac to the area near the facility where he was arrested and ultimately convicted, but there was no showing that he had taken the required “substantial step” of procuring drugs to bring to the facility. He was found in an unusual place to be sure, but no one could say if he had acquired drugs. The State did not have enough evidence, leaving a trier of fact left to guess at whether they had

made an actual agreement to commit the crime.

The State failed to prove the existence of a conspiracy. There was no evidence that any third party had agreed to engage in or cause the performance of such conduct—it is true that Luis Reyes' brother was caught outside the OCC and eventually pleaded guilty, but said that he did so because he wanted drug treatment and thought would be a way to achieve sobriety. Although he pleaded guilty to the offense, no physical evidence was presented that he had actually delivered drugs to the prison or that the drugs found in the Hoh Unit can conclusively be said to have come in via Fernando Reyes.

For these reasons, this Court should accept review and reverse and vacate the convictions.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

Certificate of Compliance: This document contains 2453 words, excluding the parts of the document exempted from the word count by RAP 18.17. the petition exempted from the word count by RAP 18.17.

DATED: March 19, 2025.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over a horizontal line.

PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Luis Reyes

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant, hereby certifies that one copy of this Petition was e-filed by JIS Link to Mr. Derek M. Byrne, Court of Appeals, Division 2, James Kennedy, Jefferson County Prosecuting Attorney's office, a copy was also mailed to Luis Reyes, appellate pre-paid on March 19, 2025, at the Centralia Washington post office addressed as follows:

James Kennedy
Jefferson County Prosecutors
Office
jkennedy@co.jefferson.wa.us

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
909 A Street, Ste. 200
Tacoma, WA 98402-4454

Mr. Luis Reyes
DOC# 417203
Clallam Bay Corrections
Center
1830 Eagle Crest Way
Clallam Bay, WA 98326
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 19, 2025.

Dated: March 19, 2025.

 THE TILLER LAW FIRM

PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

February 25, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LUIS NATANEL REYES, aka LUIS N.
MARAVILLA REYES,

Appellant.

No. 57929-4-II

UNPUBLISHED OPINION

CRUSER, C.J.—Luis Reyes appeals his convictions for (1) delivery of a controlled substance, (2) second degree introduction of contraband, and (3) conspiracy to deliver a controlled substance. Reyes argues that the evidence was insufficient to support a conviction for all three charges, and that the trial court abused its discretion by admitting Reyes’ statements on the prison phone calls because they were not adequately authenticated. We hold that sufficient evidence supported Reyes’ convictions, and the trial court did not abuse its discretion in admitting the transcripts into evidence. Accordingly, we affirm Reyes’ convictions.

FACTS

I. Background Incident

In late November and early December 2021, many inmates at the Olympic Corrections Center (OCC) tested positive for drug use; some required medical attention; and one inmate was

found unresponsive and required Narcan. The severity of the drug problem prompted OCC staff to initiate an investigation into the source of contraband.

During the investigation, an informant notified Department of Corrections (DOC) staff that inmate Luis Reyes was potentially involved in introducing contraband, including controlled substances, into the OCC. The DOC assigned Investigator Brittnee Rooney to monitor Reyes' phone calls, because she is bilingual in English and Spanish, and many of Reyes' calls contained Spanish. Reyes' calls were made using his personal identification number (PIN) and were frequently made to his sister, Patricia Lemus, whose number was on file as his emergency contact. Based on Reyes' calls from November 25, 2021 to December 6, 2021, Rooney determined that at least one delivery of contraband had already occurred in late November 2021, and that another delivery was being planned.

Over the course of multiple calls to Lemus, Reyes instructed her on where, how, and when to deliver the substances and contraband. Reyes used code words like "chocolate," "nighttime," "water," "orange," and "chew" to instruct Lemus on which types of drugs and contraband to include in the delivery. Verbatim Rep. of Proc. (VRP) at 1211-12, 1233-34. "Water" can refer to heroin or methamphetamine, "orange" refers to suboxone, and "chew" refers to chewing tobacco. Clerk's Papers (CP) at 7; VRP at 680-81, 1206, 1218-19. Reyes also specified the quantity of the substances he requested. For example, Reyes directed Lemus to "go by the store and maybe two, three cans of that—of that stuff." VRP at 1211-1212. Reyes later clarified that the "stuff" was "chew" but he did not want to discuss that on the phone. *Id.* Reyes also instructed Lemus on how to deliver the contraband into the prison. Reyes told Lemus where along the perimeter of the prison fence line to throw the package—near a greenhouse, and he told her how to conceal the package

by painting it to blend in with the ground. Reyes' phone conversations also indicated that Reyes coordinated with another unknown inmate who "works in the morning" and would retrieve the drugs where they landed. *Id.* at 1211. And Reyes discussed logistical issues related to drug prices, reimbursement, and travel to the OCC with Lemus.

Reyes' conversations with Lemus indicated that at least one successful delivery had occurred. Reyes told Lemus that "everything was good" and that he would send her the money today. *Id.* at 1198. Reyes also prompted future deliveries saying that "the same thing can be done. . . . [t]he same way each time" and offered suggestions for how to improve future deliveries. *Id.* at 1198-99. For example, Reyes told Lemus to "Tell him that when he goes, not to go round and round so much" and to wait a little while and then come back to where Lemus would be hiding on the side of the road where no one could see her. *Id.* at 1199.

Then on December 14, 2021, Reyes told his brother, Fernando Reyes,¹ to "[d]o it tonight" or "tomorrow," and explained that someone else would show him "exactly where she did it" the previous time. *Id.* at 1249. After this call, OCC staff moved Reyes out of the Hoh Unit of the prison where he had been living into segregation in a separate unit, the Ozette Unit, while DOC and local law enforcement waited for the delivery to occur.

On the morning of December 16, 2021, OCC staff observed a gold Cadillac idling in a ditch in the vicinity of the prison. Reyes' phone calls to Lemus indicated that she may drive a Cadillac ("[T]he Cadillac is yours now." *Id.* at 1201.), so the gold Cadillac got the attention of an OCC staff member. The OCC staff member approached the car and found the driver, Dongelique Spillers, slumped over in the running vehicle. The vehicle was registered to Lemus. Shortly after

¹ Because Fernando shares a surname with the appellant, we refer to him by his first name.

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the vehicle was discovered, Fernando emerged from the woods near the OCC and was taken into custody by officers.

After finding the gold Cadillac, OCC staff initiated a lockdown during which inmates were allowed to use the common bathroom. OCC staff then transferred the inmates to another facility. During the evacuation, OCC staff checked each bathroom to ensure they were clear of inmates. Staff discovered a plastic bag containing suboxone strips, tobacco, heroin, and methamphetamine in a toilet in the common bathroom. Prison staff conduct hourly walkaround searches of the facilities, including the bathrooms. Staff did not find drugs in the toilet during the previous walkaround.

OCC staff testified that it was unusual to find that quantity and variety of drugs in the facility. Suboxone typically comes in strips which are cut up into tenths before being sold. The suboxone strips found in the Hoh Unit bathroom and had not been cut into tenths.

As part of the investigation, investigators executed a warrant to search Reyes' CashApp account. Several payments between \$200 and \$500 were sent to Reyes' account between November and mid-December 2021. One of the payments had a message stating "for Bishop." *Id.* at 1046. Bishop was one of the inmates who was found to be under the influence of drugs in late November 2021.

Finally, Lemus' phone records showed movement of her phone consistent with having travelled to the OCC on November 21, and 26-27, 2021. These dates roughly correspond with the dates that investigators believed the previous drug deliveries into the OCC took place, based on Reyes' phone calls with Lemus.

The State charged Reyes with delivery of a controlled substance and second degree introduction of contraband on the theory that Reyes was an accomplice to his siblings. The State also charged Reyes with conspiracy to deliver a controlled substance. The case proceeded to a jury trial.

II. Trial

At trial, the State's witnesses testified consistently with the above facts.

As the basis of its case, the State sought to admit certified translated transcripts of recorded prison phone calls attributed to Reyes pertaining to the alleged drug deliveries. Prior to trial, Reyes objected to admission of the phone call recordings and transcripts arguing that it was impossible for the State to authenticate them where there was no identified speaker or date. The court reserved the issue for trial.

The parties discussed the admissibility of the phone call recordings and transcripts outside of the presence of the jury. During the hearing, Rooney testified that she accessed the calls for Luis Reyes using his unique DOC identification number. Rooney was asked to target calls made to Lemus' phone number because that number was associated with conversations related to the introduction of drugs into the facility. Rooney knew the number belonged to Lemus because Lemus was listed as Reyes' emergency contact using that number. Each call that is pulled by an investigator has a file number which includes the date and time that the call was made as well as the phone number the call was made to. The conversations were in both English and Spanish. All but two of the conversations were between a man and a woman. In the conversations between two men, both men referred to the same person as their sister. After reviewing the phone calls, Rooney

interviewed Reyes. During the brief interview, Rooney recognized Reyes' voice as the voice in the phone calls.

Based on this information, the trial court ruled that while the State authenticated the calls as to Reyes, the court could not admit the phone calls in their entirety because the State had not established who Reyes was talking to in the calls. Reyes' statements from the phone calls were read into the record. At the close of trial, Reyes moved to dismiss the charges, arguing that the State presented insufficient evidence of delivery of drugs or conspiracy to deliver drugs. After hearing argument on the matter, the court denied the motion.

The jury convicted Reyes on all three charges. After the verdict, Reyes moved for a new trial, citing improper admission of the phone call transcripts into evidence on the grounds that they were not properly authenticated. The trial court determined that "[t]here was no prejudice to the defendant" and denied the motion. *Id.* at 1427. Reyes was sentenced to a total confinement of 90 months with 12 months on community custody.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

We hold that the evidence was sufficient to find Reyes guilty beyond a reasonable doubt on all counts. Reyes orchestrated the delivery of controlled substances into the OCC through coordinated efforts with Lemus, Fernando, and an unknown inmate, satisfying the elements of delivery of controlled substances, second degree introduction of contraband, and conspiracy to deliver controlled substances.

A. Legal Principles

Whether evidence is sufficient to support a conviction is a constitutional question that we review de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). The test for sufficiency of the evidence is “ ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” *Id.* (emphasis omitted) (internal quotation marks omitted) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion)). We assume that the State’s evidence is truthful, and we deem both direct and circumstantial evidence to be equally reliable. *State v. Ozuna*, 184 Wn.2d 238, 248, 359 P.3d 739 (2015).

B. Delivery of a Controlled Substance and Introduction of Contraband

i. Legal Principles

To convict on delivery of a controlled substance, the State must prove beyond a reasonable doubt that the defendant knowingly delivered a controlled substance. *State v. Evans*, 80 Wn. App. 806, 814, 911 P.2d 1344 (1996); RCW 69.50.401.² Delivery is the actual or constructive transfer from one person to another of a substance. Former RCW 69.50.101(i) (2020). Constructive delivery is “ ‘the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person or manner at the instance or direction of the defendant.’ ” *State v. Campbell*, 59 Wn. App. 61, 63, 795 P.2d 750 (1990) (quoting *Davila v. State*, 664 S.W.2d 722, 724 (Tex. Cr. App. 1984) (interpreting a parallel provision of Texas code that is also derived from the Uniform Controlled Substances Act)).

² RCW 69.50.401 was amended in 2022. Because this amendment does not impact our analysis, we cite to the current version of the statute. See LAWS OF 2022, ch. 16, § 84.

To convict on second degree introduction of contraband, the State must prove that the defendant “knowingly and unlawfully provide[d] contraband to any person confined in a detention facility or secure facility under chapter 71.09 RCW with the intent that such contraband be of assistance in an escape or in the commission of a crime.” RCW 9A.76.150(1). It is a crime for any person serving a sentence in any state correctional institution to knowingly possess or carry any narcotic drug or controlled substance while in the institution. RCW 9.94.041.³

A person is guilty of a crime committed by the conduct of another person with which he is an accomplice. RCW 9A.08.020(1), (2)(c). A person is an accomplice of another if he or she “[s]olicits, commands, encourages, or requests” the other person to commit the crime or “[a]ids or agrees to aid such other person in planning or committing it” and they know that these actions will promote or facilitate the commission of this crime. RCW 9A.08.020(3).

ii. Application

Reyes argues that the evidence failed to prove that Reyes constructively delivered drugs because there was no evidence that Reyes owned or controlled the drugs found in the Hoh Unit bathroom. But Reyes’ convictions were predicated on a theory of accomplice liability. Thus, Reyes could be convicted so long as he requested that someone else deliver drugs into the prison or aided them in planning to deliver or delivering drugs knowing that this action would facilitate the delivery. RCW 9A.08.020(3). Here, sufficient evidence proved that Reyes aided Fernando and Lemus in delivering drugs and contraband to the prison.

³ RCW 9.94.041 was amended in 2022. Because this amendment does not impact our analysis, we cite to the current version of the statute. *See* LAWS OF 2022, ch. 16, § 3.

The evidence permitted a reasonable trier of fact to find that, at Reyes' direction, Fernando delivered the drugs and contraband found in the Hoh unit bathroom. Over many phone conversations, Reyes asked Lemus, in code, to deliver drugs to the prison. Reyes also helped Lemus plan the delivery by telling her which types of drugs to include in the delivery and what quantity. Reyes also instructed Lemus on how to deliver the contraband into the prison. Reyes told Lemus where along the perimeter of the prison fence line to throw the package and how to conceal the package by painting it to blend in with the ground. Reyes also referred to another unknown inmate who would retrieve the packages of drugs from where they were thrown over the fence. Reyes' conversations indicated that Reyes and Lemus had been involved in at least one successful delivery prior to December 16. Reyes told Lemus that "everything was good" and that he would send her the money today. VRP at 1198. Reyes also said that "the same thing can be done. . . . [t]he same way each time" and offered suggestions for how to improve future deliveries. *Id.* The facts that Lemus' cell phone location data showed movement consistent with having travelled to the OCC on dates corresponding with the suspected drug deliveries and that Reyes received significant CashApp payments during the time period in question support the conclusion that successful deliveries occurred.

Fernando became involved in this scheme during a phone conversation in which Reyes told him to "[d]o it tonight" or "tomorrow" and explained that someone else would show him "exactly where she did it" the previous time. *Id.* at 1249. Less than two days later, OCC staff found Fernando, who was not on the approved visitors list, in the woods outside the prison walking to Lemus' vehicle. Hours later, as the Hoh unit was being evacuated, drugs of the type that Reyes requested were found in the communal bathroom. This evidence is sufficient to prove that, at

Reyes' request, Fernando delivered drugs to an unknown inmate in the manner that Reyes and Lemus had tested during previous deliveries.

Reyes argues that, even assuming that Fernando threw drugs over the fence, there is no evidence that the drugs were delivered to someone within the prison. But the evidence supports the existence of an unknown third person who retrieved the drugs. In Reyes' conversations with Lemus he references another inmate who "works in the morning" and would find the drugs. *Id.* at 1211. Moreover, the fact that the drugs were promptly found and moved to the Hoh Unit bathroom, although Reyes was in segregation, supports the existence of another, unknown inmate involved in the delivery.

Reyes contends that the drugs found in the Hoh unit bathroom could have been delivered by a different drug operation. But we must draw all reasonable inferences in favor of the State. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Here, the evidence supports the reasonable inference that the drugs had been recently delivered to the prison. During the hourly walkaround searches, prison staff found no contraband in the bathrooms. And, when prison staff found the drugs in the toilet, the suboxone strips were still intact and the other drugs had not yet been parceled out for distribution. A reasonable trier of fact could find that the drugs and contraband found in the Hoh Unit bathroom were delivered by Fernando at Reyes' direction.

C. Conspiracy

i. Legal Principles

A conviction of a criminal conspiracy requires an agreement between two or more persons to commit the crime, as well as a substantial step taken in pursuance of the agreement by any one of them. *State v. Williams*, 131 Wn. App. 488, 496, 128 P.3d 98 (2006); RCW 9A.28.040(1). For

conspiracy to deliver a controlled substance, at least three persons must be involved because delivery itself requires two parties. *State v. McCarty*, 140 Wn.2d 420, 426, 998 P.2d 296 (2000). “An agreement can be shown by a ‘concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.’ ” *State v. Smith*, 65 Wn. App. 468, 471, 828 P.2d 654 (1992) (internal quotation marks omitted) (quoting *State v. Casarez-Gastelum*, 48 Wn. App. 112, 116, 738 P.2d 303 (1987)). Preparation can be a substantial step where it furthers the ability of the conspirators to carry out the agreement. *State v. Dent*, 123 Wn.2d 467, 477, 869 P.2d 392 (1994).

ii. Application

Reyes argues that the evidence was insufficient to prove that Reyes agreed with three or more people to deliver contraband. Reyes specifically contends that no conspiracy could exist because there was no evidence that Fernando agreed to deliver controlled substances nor that he took a substantial step in furtherance of the agreement because there was no direct evidence that Fernando possessed drugs. We disagree.

Sufficient evidence proved that Reyes, Fernando, Lemus, and an unknown inmate inside the OCC agreed to deliver drugs and contraband into the prison. Over the phone, Reyes requested that Lemus and Fernando deliver drugs to the prison. Reyes also explained that another inmate would retrieve the drugs after they had been thrown over the fence. While planning future deliveries with Fernando and Lemus, Reyes indicated that previous deliveries had been successfully accomplished.

Reyes contends that there was no evidence that Fernando took a substantial step because there was no direct evidence that Fernando ever possessed drugs. But a conspiracy is established

at the time that *any* conspirator takes a substantial step *in pursuance of the agreement*, not a substantial step toward the commission of the crime. RCW 9A.28.040(1). Thus, a telephone conversation planning the crime is a substantial step for conspiracy. See *Dent*, 123 Wn.2d at 477. Here, the evidence established that Lemus, Fernando, and Reyes planned to deliver controlled substances over multiple phone calls.

Moreover, sufficient evidence established the existence of an agreement and a substantial step taken in furtherance of that agreement because, as discussed above, the evidence supported a finding that Fernando actually delivered the drugs that were found in the Hoh Unit bathroom. Accordingly, the evidence is sufficient to sustain Reyes' conspiracy to deliver a controlled substance conviction.

II. ADMISSIBILITY OF THE PHONE CALLS

We hold that the trial court did not abuse its discretion when it admitted Reyes' statements from the prison phone calls, as Reyes' participation in the phone call was properly authenticated through PIN usage, voice identification, and corroborating contextual details.

A. Legal Principles

We review the trial court's decision on the authenticity of evidence for an abuse of discretion. *State v. Williams*, 136 Wn. App. 486, 499, 150 P.3d 111 (2007). "A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *Id.*

Authentication of evidence under ER 901 " 'merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be.' " *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003) (quoting *United States v. Jimenez Lopez*,

873 F.2d 769, 772 (5th Cir. 1989)). The proponent “ ‘need not rule out all possibilities inconsistent with authenticity or conclusively prove that evidence is what it purports to be; rather, the proponent must provide proof sufficient for a reasonable juror to find the evidence is what it purports to be.’ ” *State v. Andrews*, 172 Wn. App. 703, 708, 293 P.3d 1203 (2013) (quoting *State v. Thompson*, 777 N.W.2d 617, 624 (2010)).

B. Application

Reyes argues that the trial court abused its discretion by admitting Reyes’ statements from the prison phone calls because Reyes’ participation in the calls was not properly authenticated. We disagree.

First, Reyes contends that Rooney’s brief contact with Reyes was insufficient to reliably identify his voice. However, Rooney was familiar with the voice in the calls after listening to more than 20 calls multiple times, and she verified that Reyes’ voice matched the voice in the calls during an in-person interview.

Next, Reyes contends that, because inmates can share PINs, the calls made using his PIN might not have been made by him, and no witnesses with personal knowledge of the calls testified about their authenticity. But the State is not required to rule out all possibilities inconsistent with admissibility. *Id.* Here, the circumstances surrounding the calls support a finding that Reyes was using his own PIN. The calls were made to his sister, Lemus (who was his emergency contact) and all but two of the conversations were between a man and a woman. On one occasion where a man answered the phone, both the caller and the recipient referred to the same person as their sister, indicating that the call was between Reyes and his brother, Fernando. The calls were made in both English and Spanish, the languages in which Reyes is fluent. And Rooney confirmed that the

callers' voice matched Reyes' voice during her conversation with him. This evidence supports the conclusion that Reyes was the speaker in the recordings. Accordingly, the trial court did not abuse its discretion.


CONCLUSION


The State presented sufficient evidence for a rational trier of fact to find Reyes guilty beyond a reasonable doubt of delivery of controlled substances, second degree introduction of contraband, and conspiracy to deliver controlled substances. The evidence demonstrated that Reyes coordinated with Lemus, Fernando, and an unknown inmate to deliver drugs and contraband into the OCC. And the trial court acted within its discretion in admitting Reyes' statements from the prison phone calls because the evidence established that the statements were attributable to Reyes. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


CRUSER, C.J.

We concur:


MAXA, J.


PRICE, J.

THE TILLER LAW FIRM

March 19, 2025 - 11:41 AM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v Luis N. Reyes, Appellant
Superior Court Case Number: 22-1-00061-4

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