

NO. 46899-9-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

AMY LYNN BROOKS,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUES

1. Did the State present sufficient evidence that Ms. Brooks knew she was delivering a controlled substance?
2. Did the State present sufficient evidence to support Ms. Brooks' conviction for delivery of a controlled substance?
3. Did the trial court err when imposing legal financial obligations upon the Appellant?

II. SHORT ANSWERS

1. Yes, the State presented sufficient evidence to the trier of fact that Ms. Brooks knew she was delivering a controlled substance.
2. Yes, the State presented sufficient evidence to the trier of fact to support Ms. Brooks' conviction for delivery of a controlled substance.
3. No. The Appellant did not object to the imposition of legal financial obligations at the time of sentencing; therefore, this court is not obligated to review this claim.

III. FACTS

In 2013, Dale Nease agreed to work with the Cowlitz-Wahkiakum Narcotics Task Force ("Task Force") as a confidential informant. 2RP 41. Mr. Nease agreed to work the Task Force in order to get a reduced sentence for his own criminal charges. 2RP 41-42. Part of Mr. Nease's responsibilities as a confidential informant was conducting controlled buys for the Task Force. 2RP 41.

One such controlled buy occurred on July 25, 2013. 2RP 67, 98-99, 116. On that day, Mr. Nease met with Task Force Detectives James

Hanberry and Phil Thoma. 2RP 43, 68. While with the detectives, Mr. Nease contacted Danielle Graves and arranged to purchase \$140 worth of methamphetamine from her. 2RP 45-46, 72. The drug transaction was to occur at the Big Lots parking lot in Longview, WA. 2RP 46.

After the deal was arranged, Det. Hanberry searched Mr. Nease's person. 2RP 47, 69. The search was thorough. 2RP 48, 69. Det. Hanberry did not locate any controlled substances, money, or contraband on Mr. Nease's person. 2RP 47-48, 69-70. While this search occurred, Det. Thoma searched Mr. Nease's truck. 2RP 48, 100-02. The search was methodical and thorough. 2RP 48, 100-02. Det. Thoma did not locate any controlled substances, money, or contraband within Mr. Nease's truck. 2RP 48, 102.

Det. Hanberry provided Mr. Nease with \$140 in recorded buy money. 2RP 49, 72. Mr. Nease then left the detectives location and drove to Big Lots. 2RP 49, 73. Det. Hanberry and Det. Thoma followed Mr. Nease. 2RP 73. At no point while Mr. Nease was driving to Big Lots did he come into contact with any person, stop at any location, or making any unusual gestures. 2RP 50, 74. Mr. Nease arrived at Big Lots and parked his truck in a parking space at the end of an aisle. 2RP 50. Det. Hanberry and Det. Thoma parked in location where they could still observe Mr. Nease. 2RP 74. Additionally, Task Force Det. Jeff Brown, who was acting

as a surveillance unit, was also parked at Big Lots and could observe Mr. Nease. 2RP 119.

A short time after Mr. Nease arrived, Amy Brooks, the Appellant, arrived to the parking lot in a four-door Saturn arrived and parked next to Mr. Nease. 2RP 51, 74. Ms. Brooks walked up to Mr. Nease's truck. Mr. Nease remained inside of the truck. 2RP 52, 76. Ms. Brooks told Mr. Nease that "Danielle couldn't make it." 2RP 52. Ms. Brooks then reached inside of Mr. Nease's truck, handed him a bag of methamphetamine, and took the \$140 from Mr. Nease. 2RP 52-53. Ms. Brooks then left. 2RP 53. Mr. Nease drove his truck back to meet with Det. Hanberry and Det. Thoma. 2RP 54. Mr. Nease was followed back to the pre-determined location by Det. Hanberry and Det. Thoma. 2RP 78. Mr. Nease did not have contact with any other person, did not stop at any location, and did not make any unusual movements. 2RP 54, 78.

Upon re-contacting the detectives, Mr. Nease provided them with the bag of methamphetamine that Ms. Brooks had delivered to him. 2RP 54, 78-79. Mr. Nease's person and truck were searched in the same fashion as before. 2RP 54-55, 79, 107. Mr. Nease did not have any controlled substances, money, or contraband on his person or in his truck. 2RP 55, 79, 107. The methamphetamine Ms. Brooks delivered to Mr. Nease was later

tested by the Washington State Patrol Crime Lab and determined to be methamphetamine. CP 33-34; RP 8-9, 127.

The State charged Ms. Brooks by information with delivery of a controlled substance within 1000 feet of a school bus stop. CP 4-5. Trial commenced on October 16, 2014. Ms. Brooks stipulated to the crime lab's analysis and that the Big Lots parking lot was within 1000 feet of a Longview School District bus stop. CP 33-34, 2RP 8-9. The jury found Ms. Brooks guilty as charged. 2RP 173; CP 50, CP 51.

On November 6, 2014, the trial court sentenced Ms. Brooks to 36 months confinement and 12 months of community custody. Additionally, the court imposed legal financial obligations associated with Ms. Brooks' prosecution and trial. CP 53-64. Ms. Brooks filed a timely notice of appeal. CP 65.

IV. ARGUMENT

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO THE TRIER OF FACT THAT MS. BROOKS KNEW SHE WAS DELIVERING A CONTROLLED SUBSTANCE.

“The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld.” *State v. Byrd*, 125 Wn.2d 707, 887 P.2d 396 (1995). “[A] ‘to-convict’ instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the

jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wn.2d 258, 930 P.2d 917 (1997) (citing *State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 845 (1953)). The elements of delivery of a controlled substance are “(1) delivery, and (2) guilty knowledge.” *State v. Nunez-Martinez*, 90 Wn. App. 250, 951 P.2d 823 (1998). The nature of the controlled substance delivered is not required. *Id.* at 254.

Here, the State presented sufficient evidence to establish that Ms. Brooks knew that she delivered a controlled substance. Ms. Brooks’ argument heavily relies upon the decision in *State v. Ong*, 88 Wn. App., 572, 945 P.2d 749 (1997); however, this reliance is misplaced as *Ong* is clearly distinguishable from the present matter. In *Ong*, the court reversed the defendant’s delivery of a controlled substance conviction based upon a lack of evidence that the defendant knew the controlled substance was morphine. *Ong*, 88 Wn. App. at 577-78. The to-convict instruction stated “[t]hat the Defendant knew the substance delivered was morphine.” *Id.* at 752. However, because the State had included the specific nature of the controlled substance – morphine – in its proposed to-convict instruction, they were required to prove that the defendant knew the substance was morphine. *Ong*, 88 Wn. App. at 752.

The State’s evidence at trial included the defendant’s prior felony convictions, drug paraphernalia that was in his possession, the markings on

the pills, his own admission that that the pills were “pain medication” and that he stole them, and his flight. *Id.*, 577. In viewing this evidence, the court determined that this would be sufficient evidence to prove that the defendant knew the pills were a controlled substance, but not that they were specifically morphine. “Thus, even viewed in the light most favorable to the State, the evidence only shows that Ong knew the tablets were a controlled substance, not that the tablets contained morphine.” *Id.* at 577-78.

Here, the State presented evidence that Mr. Nease arranged a drug transaction with Ms. Graves. Mr. Nease was to purchase \$140 worth of methamphetamine from Ms. Graves at a specific location – Big Lots parking lot. This conversation occurred over a phone call that was witnessed by Det. Hanberry. At the specified location at the specified time, Ms. Brooks arrived and parked her car next to Mr. Nease’s truck. She exited her car, walked right up to Mr. Nease’s car, stated “Danielle couldn’t make it,” and conducted the hand-to-hand exchange. Ms. Brooks did not have any other items in her possession (i.e. a purse or coat). The hand-to-hand exchange occurred when Ms. Brooks reached inside of Mr. Nease’s truck handed him the bag of methamphetamine and took the buy money. Ms. Brooks did not have to reach inside of her pocket to retrieve the baggie of methamphetamine prior to handing it to Mr. Nease.

In line with *Ong*, this is sufficient evidence that Ms. Brooks knew she was delivering a controlled substance. She arrived at the specific place and time that the drug transaction was to take place. She parked next to and contacted the specific party to the drug transaction – Mr. Nease. She reached inside of his truck (out of the view of the public), gave him the bag of methamphetamine and took the buy money. And, finally, she told Mr. Nease that the person he made the arrangements with – Ms. Graves – was unable to personally appear at the transaction.

This case is not about non-essential elements being added to the to-convict instruction. Likewise, this case is not about the State being required to prove that specific nature of the controlled substance. The State's evidence clearly showed that Ms. Brooks knew she was delivering a controlled substance, or, at a minimum, that a reasonable person in Ms. Brooks' shoes would have known that this was a drug transaction.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE TO THE TRIER OF FACT TO SUPPORT MS. BROOKS' CONVICTION FOR DELIVERY OF A CONTROLLED SUBSTANCE.

The standard of review 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 necessary facts to be proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628

(1980). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *State v. Jones*, 63 Wn. App. 703, 821 P.2d 543 (1992), *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 851 P.2d 654 (1993). A reviewing court need not itself be convinced beyond a reasonable doubt, *Jones*, 63 Wn. App. at 708, and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

As stated above, the crime of delivery of a controlled substance requires the State to prove that the defendant delivered a controlled substance. RCW 69.50.401. At trial, the State presented evidence sufficient to support Ms. Brooks' Conviction. Mr. Nease testified that Ms. Brooks provided him with a bag of methamphetamine in exchange for money. He detailed exactly how Ms. Brooks parked next to his truck, approached him, made contact with, reached inside of his truck, gave him a bag of methamphetamine, took the buy money from him, and left. 2RP 51-53.

Det. Hanberry testified that he was in contact with Mr. Nease prior to and after the controlled buy occurred. During both interactions, Det. Hanberry searched Mr. Nease and did not locate any controlled substances, money, or contraband. Det. Hanberry followed Mr. Nease to and from he buy location. Mr. Nease did not contact anyone but Ms. Brooks. Mr. Nease did not go to any location other than the buy location. Mr. Nease did not make any movements or gestures that would have concerned Det. Hanberry.

Det. Thoma testified that he also in contact with Mr. Nease prior to and after the controlled buy. During both interactions, Det. Thoma searched Mr. Nease's truck. Det. Thoma did not locate any controlled substances, money, or contraband. Det. Thoma followed Mr. Nease to and from the buy location. Mr. Nease did not contact anyone but Ms. Brooks. Mr. Nease did not go to any location other than the buy location. Mr. Nease did not make any movements or gestures that would have concerned Det. Thoma.

For some unexplained reason, Ms. Brooks does not even acknowledge the fact that Mr. Nease testified directly that she delivered methamphetamine to him. Her argument is simply directed at what the detectives observed. By asserting a sufficiency of the evidence claim, Ms. Brooks admits the truth of the State's evidence. Thus, she as agreed that Mr. Nease's testimony – that she delivered methamphetamine, is true.

When taking the evidence in a light most favorable to the State, the evidence shows that Ms. Brooks delivered a controlled substance to Mr. Nease.

3. THE COURT IS NOT OBLIGATED TO REVIEW THE TRIAL COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS.

For the first time on appeal, the Defendant challenges the court's imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay. Recently, the Washington Supreme Court decided *State v. Blazina*, 344 P.3d 680 (2015). It held that it is not error for a Court of Appeals to decline to reach the merits on a challenge to the imposition of LFO's made for the first time on appeal. *Id.* at 682. "Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny." *Id.* at 684. The decision to review is discretionary on the reviewing court under RAP 2.5. *Id.* at 681.

This Court should continue to apply its initial decision in *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013) ("Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal."). This is supported by this Court's recent holding in *State v. Lyle*, COA No. 46101-3-II (July 10, 2015) ("Our decision in *Blazina*, issued before Lyle's March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim

of error on appeal.”). Ms. Brooks was sentenced on November 6, 2014, well after the decision in *Blazina*. CP 53-64.

RAP 2.5(a) reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988). The Appellant did not object to the legal financial obligations at the time of sentencing. The State respectfully requests this court not review the Appellant’s claim.

V. CONCLUSION

The State presented sufficient evidence to show that Ms. Brooks knew she was delivering a controlled substance. The State presented sufficient evidence to support Ms. Brooks’ conviction for delivering a controlled substance. Ms. Brooks did not object to the imposition of LFOS at the time of sentencing; thus this Court should not review her claim. Ms. Brooks’ conviction should be affirmed.

Respectfully submitted this 1st day of August, 2015

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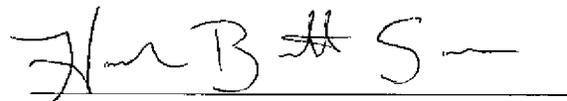
CERTIFICATE OF SERVICE

Hannah Bennett-Swanson, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 11th, 2015.



Hannah Bennett-Swanson

COWLITZ COUNTY PROSECUTOR

August 07, 2015 - 9:48 AM

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