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## State v. Lemmons Appellant's Brief 1 Dckt. 41278

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STATE OF IDAHO,	)	
	)	Nos. 41278, 41279
Plaintiff-Appellant-Cross	)	
Respondent,	)	Twin Falls Co. Case Nos.
	)	CR-2011-14836, CR-2012-10131
vs.	)	
	)	
BRYANN KRISTINE LEMMONS,	)	
	)	
Defendant-Respondent-Cross	)	
Appellant.	)	

BRIEF OF APPELLANT-CROSS RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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District Judge

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Entered on ATS by \_\_\_\_\_

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PLAINTIFF-APPELLANT

ATTORNEY FOR  
DEFENDANT-RESPONDENT

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## STATEMENT OF THE CASE

### Nature of the Case

The state appeals from the district court's order granting a new trial.

### Statement of the Facts and Course of the Proceedings

Police used a confidential informant to conduct two controlled buys of an ounce of methamphetamine from Bryann Kristine Lemmons. (Trial Tr., p. 160, L. 15 – p. 171, L. 7; p. 173, L. 21 – p. 182, L. 19; p. 184, L. 16 – p. 185, L. 12; p. 212, L. 10 – p. 218, L. 15; p. 230, L. 7 – p. 254, L. 12.) Both times Lemmons represented the amount she delivered was an ounce. (Trial Tr., p. 240, Ls. 8-16; p. 248, Ls. 12-17.) The actual weight of each of the deliveries was slightly less than 28 grams. (Trial Tr., p. 184, L. 16 – p. 185, L. 8; p. 196, Ls. 17-23; p. 286, Ls. 4-16.)

The state charged Lemmons with two counts of trafficking by delivering or aiding and abetting the delivery of 28 grams or more of methamphetamine, based on the represented (as opposed to actual) weight. (R., pp. 122-23.) At trial the detective testified that there are “[a]pproximately 28” grams in an ounce. (Trial Tr., p. 342, Ls. 3-4.) The prosecutor requested the court to take judicial notice that an ounce equals 28.35 grams, but the judge declined to do so because he personally did not know that. (Trial Tr., p. 346, L. 24 – p. 347, L. 21.<sup>1</sup>) A jury convicted Lemmons on both counts, including a specific finding that

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<sup>1</sup> The district court later took judicial notice that an ounce is 28.35 grams because that is “mathematical scientific fact.” (Trial Tr., p. 485, Ls. 5-7.)

the represented weight of the methamphetamine was more than 28 ounces. (R., pp. 380-81.)

Lemmons moved for a post-verdict acquittal or, alternatively, a new trial because the state “failed to introduce evidence or testimony as to the conversion of an ounce into grams.” (R., pp. 416-18.) The district court denied the motion for acquittal, but granted a new trial on the amount of methamphetamine delivered. (R., p. 452; see also R., pp. 889-99, 954.) The state timely appealed that order. (R., pp. 885-88.)

ISSUE

Did the district court err by granting a new trial because the verdict was not "contrary to law or evidence"?

## ARGUMENT

### The District Court Erred Because The Verdict Was Not Contrary To Law Or Evidence

#### A. Introduction

In ruling on the motion for a new trial the district court found the following “salient facts”: (1) the testimony was “clear” and the evidence “ample” to support the jury’s finding that Lemmons delivered methamphetamine; (2) the evidence established that Lemmons had stated that the amount of methamphetamine was an ounce but the actual weight delivered was less than 28 grams; and (3) the detective testified that an ounce is “approximately 28” grams. (Trial Tr., p. 482, L. 25 – p. 483, L. 20.) The district court further found as “mathematical scientific fact” that “28.35 grams is an ounce.” (Trial Tr., p. 485, Ls. 3-8.) However, the court concluded that the jury could not “reasonably infer that one ounce is more than 28 grams” because the judge did not believe that all 12 jurors would have known this “mathematical scientific fact.” (Trial Tr., p. 485, L. 5 – p. 487, L. 2.)

The district court did not apply the correct legal standard. A new trial motion may only be granted where a statutory ground for a new trial is shown and the statutory ground, once established, demonstrates a new trial is in the interest of justice. Having failed to find either of the prerequisites to granting a new trial, the district court erred when it granted Lemmons’ motion for a new trial. Review shows that there is neither a statutory ground for a new trial nor is a new trial in the interest of justice.

B. Standard Of Review

The ruling on a motion for a new trial is reviewed for an abuse of discretion. State v. Cantu, 129 Idaho 673, 674, 931 P.2d 1191, 1192 (1997); State v. Howell, 137 Idaho 817, 819, 54 P.3d 460, 462 (Ct. App. 2002). “The trial judge does not abuse his or her discretion unless a new trial is granted for a reason that is not delineated in the code or unless the decision to grant or deny a new trial is manifestly contrary to the interest of justice.” State v. Davis, 127 Idaho 62, 65, 896 P.2d 970, 973 (1995). Where an error at trial is harmless the interest of justice is not served by a new trial, so it is an abuse of discretion to grant a new trial in the absence of reversible error. Howell, 137 Idaho at 820, 54 P.3d at 463.

C. The Verdict Was Not “Contrary To Law Or Evidence” And A New Trial Is Not In The “Interest Of Justice”

The only grounds for granting a new trial are found in I.C. § 19-2406. State v. Cantu, 129 Idaho 673, 675, 931 P.2d 1191, 1193 (1997). The Idaho Criminal Rules provide that a new trial may be granted if required by “the interest of justice.” I.C.R. 34. “Rule 34 does not create additional grounds for granting a new trial but, rather, provides the standard for determining whether a new trial should be granted when one or more of the statutory bases are present.” Howell, 137 Idaho at 819, 54 P.3d at 462. Therefore, I.C. § 19-2406 “limits the instances in which the trial court’s discretion may be exercised.” Cantu, 129 Idaho at 675, 931 P.2d at 1193 (trial court abused discretion by granting new trial on grounds

of ineffective assistance of counsel, which is not ground provided by I.C. § 19-2406). See also State v. Gomez, 126 Idaho 83, 86, 878 P.2d 782, 785 (1994).

There are seven statutory grounds for granting a new trial, six of which are obviously inapplicable.<sup>2</sup> The only arguably relevant statutory basis for a new trial in this case is thus that “the verdict is contrary to law or evidence.” I.C. § 19-2406(6). The law provides that delivery of 28 grams or more of methamphetamine is trafficking and “the weight of the controlled substance as represented by the person selling or delivering it is determinative if the weight as represented is greater than the actual weight of the controlled substance.” I.C. § 37-2732B(a)(4)(A) and (c). The evidence showed that Lemmons represented that the methamphetamine she delivered weighed an ounce. (Trial Tr., p. 240, Ls. 8-16; p. 248, Ls. 12-17.) That an ounce is a unit of weight greater than 28 grams is a “mathematical scientific fact.” (Trial Tr., p. 485, Ls. 5-7.) Thus, Lemmons’ conviction is not contrary to the law or evidence, and the district court erred by granting a new trial.

Likewise, the district court made no specific finding that a new trial is in the interest of justice, and review of its analysis does not support any such implicit finding. Whether an ounce is equal to or greater than 28 grams is not an element of the crime, I.C. § 37-2732B(a)(4)(A), and a jury could not find that the represented amount of an ounce is in fact less than 28 grams. To the extent there was any error here, it could not have contributed to the verdict and so was

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<sup>2</sup> The inapplicable grounds are (1) the defendant was not present at the trial; (2) the jury received evidence out of court; (3) jury misconduct; (4) verdict by lot; (5) legal error by the court; and (7) newly discovered evidence. I.C. § 19-2406.

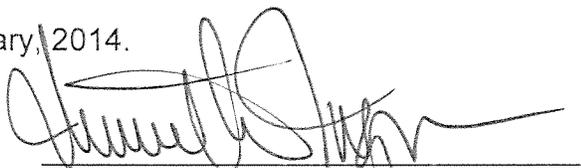
necessarily harmless. Howell, 137 Idaho at 820, 54 P.3d at 463. A new trial so a jury can determine whether the represented weight of an ounce is 28 grams or more simply serves no purpose, and is therefore not in the interest of justice.

The district court failed to find a statutory ground for granting a new trial, and the record fails to support any implied finding that the verdict was contrary to law or evidence. Likewise, even if a statutory ground for a new trial were supported by the record there is nothing suggesting the interest of justice would be served by a retrial because the amount of grams in an ounce is not a jury question. The district court therefore abused its discretion by granting a new trial.

#### CONCLUSION

The state respectfully requests this Court to reverse the district court's order granting a new trial and to remand for sentencing proceedings on the convictions for trafficking in methamphetamine.

DATED this 28th day of February, 2014.

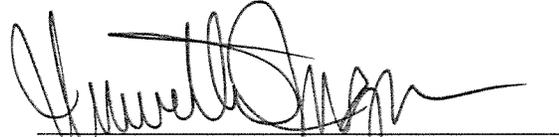


KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of February, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DANIEL S. BROWN  
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KKJ/pm