5-4-2017

State v. Tryon Appellant's Brief Dckt. 44489

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44489**
Plaintiff-Respondent,	)	
	)	**CANYON COUNTY NO. CR 2016-2267**
v.	)	
	)	
GRACIE JEAN TRYON,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE JUNEAL C. KERRICK
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
State of Idaho
I.S.B. #6555

BEN P. MCGREEVY
Deputy State Appellate Public Defender
I.S.B. #8712
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

Gracie Jean Tryon appeals from her conviction for possession of a controlled substance, following a jury trial. On appeal, Ms. Tryon asserts the district court erred when it permitted the admission of certain statements touching on the identity of the substance at issue, because that violated her constitutional right to confront the witnesses against her. Ms. Tryon also asserts the State did not present sufficient evidence to support her conviction for possession of a controlled substance.

Statement of the Facts and Course of Proceedings

The State charged Ms. Tryon by Information with one count of possession of a controlled substance, felony, I.C. § 37-2731(c)(1), and one count of possession of drug paraphernalia, misdemeanor, I.C. § 37-2734A. (R., pp.18-19.) Ms. Tryon entered a not guilty plea to the charges. (R., pp.20-21.)

The case proceeded to a two-day jury trial. (R., pp.44-67.) During the trial, Detective Matthew Richardson testified that, before changing police departments, he had worked for the Caldwell Police Department. (*See* Tr., p.127, L.7 – p.128, L.2.) He had been a detective in the street crimes unit (Tr., p.128, Ls.3-5), and had dealt with methamphetamine almost on a weekly basis, in approximately a hundred cases (Tr., p.130, L.24 – p.131, L.18). The detective testified he knew methamphetamine was "a white crystallized substance" through his training and experience. (Tr., p.168, Ls.6-9.) He had seen methamphetamine packaged in a few different ways, including in small baggies. (Tr., p.168, Ls.17-25.) One could inject methamphetamine with a syringe or smoke it with a glass pipe. (Tr., p.170, L.4 – p.171, L.6.)

Detective Richardson then testified that one evening he had been monitoring a residence in Caldwell for drug activity. (*See* Tr., p.173, L.6 – p.175, L.5.) He had been there previously to assist with misdemeanor probation home visits, and had encountered drugs or drug paraphernalia at the residence. (*See* Tr., p.175, Ls.9-20.) The detective saw a truck that had been parked outside the residence leave. (Tr., p.175, L.25 – p.176, L.13.) He followed the truck and saw it go through two stop signs without coming to a complete halt. (*See* Tr., p.176, L.14 – p.177, L.20.)

Detective Richardson testified he activated the emergency lights on his unmarked patrol vehicle and stopped the truck. (Tr., p.177, L.21 – p.178, L.13.) He contacted the driver of the truck, Carl Ringcamp. (*See* Tr., p.178, L.14 – p.179, L.9.) Ms. Tryon was the passenger in the truck. (Tr., p.179, Ls.12-14.) While talking to Mr. Ringcamp, Detective Richardson noticed a faint odor of marijuana coming from the truck. (Tr., p.180, Ls.8-12.) He had Mr. Ringcamp exit the truck, and spoke with him at the back of the truck. (Tr., p.180, Ls.13-16.) As a result of the conversation with Mr. Ringcamp, Detective Richardson placed him into custody and put him in the back of the patrol vehicle. (Tr., p.180, L.22 – p.181, L.3.)

The detective testified he then approached the passenger side of the truck. (Tr., p.181, Ls.7-9.) Another officer had arrived at the scene, and Ms. Tryon had left the truck. (*See* Tr., p.181, Ls.9-23.) Detective Richardson testified he overheard Ms. Tryon state she was not going to allow them to search her purse. (Tr., p.181, L.24 – p.182, L.1.) He spoke with her about the marijuana odor and a pipe that had possibly been left on the seat of the truck by Mr. Ringcamp. (*See* Tr., p.182, Ls.7-13.) The detective testified Ms. Tryon told him the pipe that had been left on the seat was in her pocket.

(*See* Tr., p.182, L.20 – p.183, L.4.) He found a cylinder pipe or e-cigarette on her person. (Tr., p.188, Ls.8-10.)

Detective Richardson testified he searched the truck. (*See* Tr., p.183, Ls.16-18.) He found a small coin purse containing some stems and a black residue in the passenger side panel door. (Tr., p.183, Ls.21-23.) On the floorboard on the passenger side was a large purse, with a black case on top. (Tr., p.183, L.23 – p.184, L.1.) Detective Richardson testified the purse was open and the black case was inside and on top of the items that were in the purse. (Tr., p.185, Ls.7-22.) He opened the black case and found a Crown Royal bag. (Tr., p.184, Ls.2-3.) The detective testified he found two hypodermic syringes and two glass pipes inside the Crown Royal bag. (Tr., p.184, Ls.3-4.) He further testified that the black case also contained a smaller blue plastic case, and inside the blue case was "a baggy containing a white crystallized substance." (Tr., p.184, Ls.4-8.)

Detective Richardson testified that, in his experience, he had found methamphetamine coupled with syringes or pipes about seventy-five to eighty percent of the time. (*See* Tr., p.191, Ls.18-23.) He testified the white crystalline substance looked akin to methamphetamine. (Tr., p.193, L.25 – p.194, L.5.)

The State, outside the presence of the jury, had told the district court it intended to ask Detective Richardson about statements made by Mr. Ringcamp. (*See* Tr., p.148, Ls.20-25.) The State had attempted to subpoena Mr. Ringcamp, but informed the district court, "[w]e haven't been able to get him here." (Tr., p.151, Ls.20-25.) Over Ms. Tryon's objection on the basis of her right to confrontation (*see* Tr., p.159, Ls.2-7), the district court permitted Detective Richardson to testify on Mr. Ringcamp's

statements touching on the identity of the substance (*see* Tr., p.160, Ls.11-15, p.166, Ls.16-19). The district court determined the statements were nontestimonial. (*See* Tr., p.160, Ls.11-15.) The detective testified that he asked Mr. Ringcamp "whose meth it was and he stated it wasn't hers," while Mr. Ringcamp was in the back of the patrol vehicle. (Tr., p.194, Ls.13-19.) According to Detective Richardson, Mr. Ringcamp "gave me a couple other responses as well. . . . He again said it wasn't hers. And then, he later said, 'it was mine. Okay.'" (Tr., p.195, Ls.12-17.)

On cross-examination, Detective Richardson testified Mr. Ringcamp had been arrested. (Tr., p.215, Ls.3-7.) He thought the pipe that was found on Ms. Tryon's person had been used to inhale marijuana. (*See* Tr., p.217, L.20 – p.218, L.9.) The detective testified he followed the truck for about three or four blocks before it pulled over, and Mr. Ringcamp had been in a position where he could have placed the black case on top of the purse. (*See* Tr., p.218, Ls.19-25.) He did not submit the glass pipes, syringes, or baggies for DNA testing or fingerprinting. (Tr., p.221, L.21 – p.22, L.25.) Detective Richardson also did not get a blood or urine sample from Ms. Tryon to see if she had methamphetamine in her system. (*See* Tr., p.224, Ls.16-22.) He testified that kosher salt and other substances could look like methamphetamine. (*See* Tr., p.230, Ls.12-22.) During redirect examination, Detective Richardson testified the substance at issue did not look like kosher salt, but looked like methamphetamine. (*See* Tr., p.232, L.21 – p.233, L.1.)

The State did not present any laboratory test results on the identity of the substance at issue.[1] (*See* Tr., p.234, Ls.23-25.) After the State rested, Ms. Tryon requested dismissal of the possession of a controlled substance count, under Idaho Criminal Rule 29 ("Rule 29"), for lack of sufficient evidence. (Tr., p.234, L.5 – p.236, L.6, p.240, Ls.9-12.) The district court denied her Rule 29 motion for judgment of acquittal, "finding that the State's evidence is not so insubstantial that jurors could not help but have a reasonable doubt as to the proof of that—of any elements." (Tr., p.241, L.16 – p.242, L.2.) Ms. Tryon did not testify in her defense. (*See* Tr., p.242, Ls.14-18.)

The jury found Ms. Tryon guilty on both counts. (R., pp.66-67; Tr., p.335, Ls.4-22.) For possession of a controlled substance, the district court imposed a unified sentence of four years, with one-and-one-half years fixed, suspended the sentence, and placed Ms. Tryon on probation for a period of three years.[2] (R., pp.88-91.)

Ms. Tryon then filed a Notice of Appeal timely from the district court's Judgment and Commitment and Order of Probation on Suspended Execution of Judgment. (R., pp.81-84.)

[1] The district court had sustained Ms. Tryon's objection to Detective Richardson's testimony on NARK presumptive tests. (*See* Tr., p.131, L.19 – p.132, L.3, p.147, L.2 – p.148, L.14.)

[2] For the paraphernalia count, the district court ordered Ms. Tryon to serve two days in jail, with credit for two days served. (R., p.80.)

ISSUES

1. Did the district court err when it permitted the admission of Mr. Ringcamp's statements, because that violated Ms. Tryon's constitutional right to confront the witnesses against her?

2. Did the State present sufficient evidence to support Ms. Tryon's conviction for possession of a controlled substance?

ARGUMENT

I.

The District Court Erred When It Permitted The Admission Of Mr. Ringcamp's Statements, Because That Violated Ms. Tryon's Constitutional Right To Confront The Witnesses Against Her

A. Introduction

Ms. Tryon asserts the district court erred when it permitted the admission, through Detective Richardson, of Mr. Ringcamp's statements touching on the identity of the substance at issue. The admission of the statements violated Ms. Tryon's constitutional right to confront the witnesses against her. The district court determined there was no confrontation issue because Mr. Ringcamp's statements were nontestimonial. (*See* Tr., p.160, Ls.11-15.) However, Mr. Ringcamp's statements were actually testimonial, because the circumstances objectively indicate that the primary purpose of the interrogation in this case was to establish or prove past events potentially relevant to later criminal prosecution. Because Ms. Tryon did not have a prior opportunity to cross-examine Mr. Ringcamp, his statements were inadmissible. The State will be unable to prove that the admission of Mr. Ringcamp's statements is harmless beyond a reasonable doubt

B. Standard Of Review

The Idaho Supreme Court has held, "[w]hether admission of evidence violates a defendant's right to confront adverse witnesses under the Sixth Amendment's Confrontation Clause is a question of law over which this Court exercises free review." *State v. Stanfield*, 158 Idaho 327, 331 (2015).

C. The Admission Of Mr. Ringcamp's Statements Violated Ms. Tryon's Constitutional Right To Confront The Witnesses Against Her

Ms. Tryon asserts the admission of Mr. Ringcamp's statements violated her constitutional right to confront the witnesses against her.

The Sixth Amendment to the United States Constitution guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. amend. VI. "The right to confrontation is fundamental and applies equally to state prosecutions." *Stanfield*, 158 Idaho at 332 (citing *Pointer v. Texas*, 380 U.S. 400, 403 (1965)). The Idaho Supreme Court has noted, "[o]ur state constitution does not contain a confrontation clause similar to that found in the United States Constitution; therefore, this issue is analyzed solely under the United States Constitution." *Id.* (citing *State v. Sharp*, 101 Idaho 498, 502 (1980)).

According to the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford*, 541 U.S. at 51. The Idaho Supreme Court in *Stanfield* explained the United States Supreme Court "has determined that this language restricts the Confrontation Clause to testimonial hearsay." *Stanfield*, 158 Idaho at 332 (citing *Davis v. Washington*, 547 U.S. 813, 823-24 (2006); *Crawford*, 541 U.S. at 51). The Confrontation Clause "only applies to statements that are 'testimonial,'" and "does not bar statements not offered to prove the truth of the matter asserted." *Id.* (citing *Davis*, 547 U.S. at 823; *Crawford*, 541 U.S. at 51, 59 n.9). As discussed by the *Stanfield* Court, "[a]ny declaration, affirmation, omission, or nonverbal conduct made for the purpose of establishing some fact, qualifies as a statement." *Id.* "If the statement is testimonial, then its admission is permitted only if

the defendant is unavailable and the defendant has had a prior opportunity to cross-examine the defendant." *Id.* (citing *Crawford*, 541 U.S. at 59; *State v. Hooper*, 145 Idaho 139, 143 (2007)).

The United States Supreme Court in *Crawford* stated, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. After declaring the Confrontation Clause applied to "those who bear testimony," the *Crawford* Court defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51 (alteration and internal quotation marks omitted). The Confrontation Clause therefore "reflects an especially acute concern with a specific type of out-of-court statement." *Id.*

The United States Supreme Court in *Crawford* then described three formulations of this core class of testimonial statements: (1) "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52 (internal quotation marks omitted).

The *Crawford* Court further held, "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Id.* at 52.

Later, in *Davis*, the United States Supreme Court clarified that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis*, 547 U.S. at 822. "They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*

Under the "primary purpose test" outlined in *Davis*, Mr. Ringcamp's statements were testimonial. Before Mr. Ringcamp gave the statements to Detective Richardson, the detective had already separated him from Ms. Tryon, placed him in custody, and put him in the back of the patrol vehicle. (*See* Tr., p.180, Ls.13-25, p.194, L.10 – p.195, L.17.) The record is devoid of any sign Detective Richardson's interrogation was intended to enable police assistance to meet an ongoing emergency. Rather, objectively viewed, the primary purpose of the interrogation was to investigate a possible crime, namely possession of a controlled substance. While the interrogation here was not as formal as the one in *Crawford*, which followed a *Miranda* warning, was tape-recorded, and took place at the station house, *see* 541 U.S. at 53 n.4, Detective Richardson's interrogation was formal enough in that it took place in his patrol vehicle and away from Ms. Tryon. *See Davis*, 547 U.S. at 830. Thus, the circumstances objectively indicate that the primary purpose of the interrogation in this case was to establish or prove past events potentially relevant to later criminal prosecution. *See id.* at 822. Mr. Ringcamp's statements were testimonial.

The district court determined that there was no confrontation issue here because the holding in *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009), "probably applies to this as well." (*See* Tr., p.160, Ls.11-15). The district court was incorrect, because the circumstances in *Johnson* are readily distinguishable from those in the present case.

In *Johnson*, the United States Court of Appeals for the Sixth Circuit held, "[b]ecause [the declarant] did not know that his statements were being recorded and because it is clear that he did not anticipate them being used in a criminal proceeding against [the defendant], they are not testimonial, and the Confrontation Clause does not apply." *Johnson*, 581 F.3d at 325. The declarant in *Johnson* unwittingly made his statements to an FBI informant while both were at the same prison facility. *See id.* at 323. Additionally, the cases cited by the *Johnson* Court in support of its holding involved statements made under similar circumstances. *See, e.g.*, *United States v. Johnson*, 440 F.3d 832, 843 (6th Cir. 2006) (holding that an unwitting declarant's secretly recorded statements to a close friend were nontestimonial); *United States v. Mooneyham*, 473 F.3d 280, 286-87 (6th Cir. 2007) (stating that a co-defendant's out-of-court statements to an undercover officer, whose status was unknown to the declarant, were nontestimonial); *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008) ("[A] statement unwittingly made to a confidential informant and recorded by the government is not 'testimonial' for Confrontation Clause purposes.")

The result in *Johnson* is also in accord with *Davis*, where the Court described the statements at issue in some pre-*Crawford* decisions of the United States Supreme Court as "clearly nontestimonial." *See Davis*, 547 U.S. at 825; see also *Bourjaily v.*

United States, 483 U.S. 171, 181-84 (1987) (statements made unwittingly to a Government informant); *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970) (statements from one prisoner to another).

In contrast, Mr. Ringcamp did not make his statements to a friend or a confidential informant whose status was unknown to him. Rather, the circumstances show Mr. Ringcamp knew he was giving his statements to a law enforcement officer. Before he stopped the truck, Detective Richardson activated the emergency lights on his unmarked patrol vehicle. (*See* Tr., p.177, L.21 – p.178, L.13.) The detective later placed Mr. Ringcamp in custody and put him in the back of the patrol vehicle. (*See* Tr., p.180, Ls.13-25.) Thus, the circumstances in *Johnson* are readily distinguishable from those in the present case, and the *Johnson* holding does not control here.

In its arguments for why Mr. Ringcamp's statements were not testimonial, the State contended the statements were made to exculpate rather than inculpate Ms. Tryon. (*See* Tr., p.155, L.12 – p.156, L.8.) The State argued "the definition of testimonial is a statement made by the declarant where he could reasonably expect the statement would be used by the State to accuse a criminal defendant of a crime." (Tr., p.155, Ls.12-16.) The State further argued, "I don't think anyone at the time would have possibly guessed that the statement, 'that's my meth,' which is made purely to exculpate this particular defendant, would be used later to prove that it was meth." (Tr., p.155, Ls.16-21.)

However, the State's argument was based on an incorrect definition of "testimonial." As seen above, the United States Supreme Court has defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving

some fact." *Crawford*, 541 U.S. at 51. Statements made in the course of a police interrogation "are testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.

The United States Supreme Court's standards for what is "testimonial" do not contain any requirement that the statements at issue accuse or inculpate any particular defendant. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), a case where the United States Supreme Court addressed whether statements contained in forensic reports are "testimonial," the Court rejected the argument that the analysts who prepared the reports were "not subject to confrontation because they are not 'accusatory' witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband." *See Melendez-Diaz*, 557 U.S. at 313. The Court explained that, to the extent the analysts were witnesses, "they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine." *Id.*

The *Melendez-Diaz* Court also examined how "the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses 'against him,'" while "the Compulsory Process Clause guarantees a defendant the right to call witnesses 'in his favor.'" *Id.* (quoting U.S. Const. amend. VI). The Sixth Amendment therefore "contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter." *Id.* at 313-14 (footnote omitted). The Court held "there is not a third category

of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 314.

Despite Melendez-Diaz, the State in this case contended, "[w]e happen to have a particular case in which an exculpatory statement is useful to us." (*See* Tr., p.156, Ls.6-8.) In other words, the State argued Mr. Ringcamp's statements fell into the third category of witnesses, as rejected by the United States Supreme Court. *See Melendez-Diaz*, 557 U.S. at 314. Further, much like the testimony of the analysts in *Melendez-Diaz*, which proved the substance was cocaine, Mr. Ringcamp's statements were against Ms. Tryon, helping to prove one fact necessary for her conviction—that the substance at issue was methamphetamine. *See id.* at 313 Thus, even though the statements were "inculpatory only when taken together with other evidence linking [Ms. Tryon] to the contraband," *see id.*, they were still testimonial.

Admittedly, the United States Supreme Court's more recent opinion in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), has muddied the waters about whether a statement must accuse or inculpate a particular defendant to be testimonial. *See Williams*, 132 S. Ct. at 2243-44 (plurality opinion) (holding a DNA profile, relied upon by a testifying expert but not entered into evidence, was not testimonial because it "plainly was not prepared for the primary purpose of accusing a targeted individual"). However, *Williams* was a fractured opinion: while the plurality held the DNA profile was nontestimonial because its primary purpose was not to create evidence against the defendant, *see id.* at 2243-44, Justice Thomas, in his concurrence, agreed the profile was nontestimonial

but solely because it lacked the requisite formality and solemnity.[3] *Id.* at 2255 (Thomas, J., concurring). The four dissenting justices rejected the plurality's accusatory requirement. *Id.* at 2273-74 (Kagan, J., dissenting).

In light of the fractured opinion in *Williams*, the Idaho Supreme Court has held, "[b]ecause no position received support from a majority of the justices, *Williams* does not provide us a governing legal principle and this Court views the decision as limited to the unique set of facts presented in that case." *Stanfield*, 158 Idaho at 336. Thus, *Williams* does not impose a requirement that a statement must accuse or inculpate a particular defendant for the statement to be testimonial. Under the "primary purpose test" outlined in *Davis*, Mr. Ringcamp's statements were testimonial.

Because Mr. Ringcamp's statements were testimonial, their admission was permitted under the Confrontation Clause only if Mr. Ringcamp were unavailable and Ms. Tryon had a prior opportunity to cross-examine him. *See Stanfield*, 158 Idaho at 332. Here, even assuming Mr. Ringcamp was unavailable, Ms. Tryon did not have a prior opportunity to cross-examine him. Thus, Mr. Ringcamp's statements were inadmissible. The district court erred when it permitted the admission, through Detective Richardson, of Mr. Ringcamp's statements, because that violated Ms. Tryon's constitutional right to confront the witnesses against her.

[3] No other justice has joined with Justice Thomas in support of the "indicia of solemnity" test, since he first proposed it in his partial concurrence in *Davis*. *See, e.g.*, *Davis*, 547 U.S. at 834-42 (Thomas, J., concurring in part and dissenting in part); *Michigan v. Bryant*, 562 U.S. 344, 378-79 (2011) (Thomas, J., concurring in the judgment).

D. The State Will Be Unable To Prove That The Admission Of Mr. Ringcamp's Statements Is Harmless Beyond A Reasonable Doubt

Ms. Tryon asserts the State will be unable to prove that the admission of Mr. Ringcamp's statements is harmless beyond a reasonable doubt.

Where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). *See State v. Perry*, 150 Idaho 209, 227 (2010). "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp,* 101 Idaho 498, 507 (1980) (citing *Chapman*, 386 U.S. at 24).

Here, the State did not present any direct evidence, such as laboratory test results on the identity of the substance, showing the substance at issue was methamphetamine. (*See* Tr., p.234, Ls.23-25.) Thus, the State's case relied entirely on circumstantial evidence. Mr. Ringcamp's statements, which suggested the substance was methamphetamine, were important circumstantial evidence for the State. For example, in its closing argument, the State advised the jury to consider "how they talked about it." (Tr., p.288, Ls.24-25.) The State emphasized that when Detective Richardson asked whose methamphetamine it was, Mr. Ringcamp "says, 'It's mine.' Okay? He doesn't say, 'It's not meth.' That's not what he's saying. 'It's mine.'" (Tr., p.289, Ls.8-17; *see* Tr., p.290, Ls.19-21.)

Further, in the State's reply during closing argument, the State told the jury, "don't forget what Carl Ringcamp said." (Tr., p.328, Ls.24-25.) The State argued,

alongside the other circumstantial evidence, "also you've got the other guy who's there saying—and he's jumping on a grenade, essentially, right? He's trying to jump on the grenade, saying 'it's mine, it's mine.'" (*See* Tr., p.329, Ls.2-10.) The State questioned why Mr. Ringcamp would do so if the substance were rock salt or another crystalline substance. (*See* Tr., p.329, Ls.10-15.) According to the State, "[t]he only reason, the only logical explanation is it's exactly what the context of the question implies, which is that it was meth." (Tr., p.329, Ls.16-18.) Still later in the reply, the State argued it "[d]oesn't make any sense that Ringcamp is willing to jump on this grenade if there's no grenade. Doesn't make any sense." (Tr., p.331, Ls.22-24.)

Because Mr. Ringcamp's statements were important circumstantial evidence for the State, there is a reasonable possibility the statements contributed to Ms. Tryon's conviction. *See Sharp,* 101 Idaho at 507. Thus, Ms. Tryon asserts the State will be unable to prove that the admission of Mr. Ringcamp's statements is harmless beyond a reasonable doubt.

The district court erred when it permitted the admission of Mr. Ringcamp's statements touching on the identity of the substance at issue, because that violated Ms. Tryon's constitutional right to confront the witnesses against her. Thus, Ms. Tryon's conviction for possession of a controlled substance should be vacated, and the matter should be remanded to the district court for a new trial.

II.

The State Did Not Present Sufficient Evidence To Support Ms. Tryon's Conviction For Possession Of A Controlled Substance

A. Introduction

Ms. Tryon asserts the State did not present sufficient evidence to support her conviction for possession of a controlled substance. Ms. Tryon asserted the State had not proven the substance at issue was methamphetamine. (*See* Tr., p.235, Ls.7-14.) The district court denied Ms. Tryon's Rule 29 motion for a judgment of acquittal, "finding that the State's evidence is not so insubstantial that jurors could not help but have a reasonable doubt as to the proof . . . of any elements." (*See* Tr., p.241, Ls.16-23.) However, the jury could not properly find that the substance here was methamphetamine.

B. Standard Of Review And Relevant Law

Idaho Criminal Rule 29 provides a district court may grant a defendant's motion for acquittal after the evidence on either side is closed, "if the evidence is insufficient to sustain a conviction . . . ." I.C.R. 29(a). As part of the right to due process guaranteed by the Fourteenth Amendment to the United States Constitution, "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *State v. Adamcik*, 152 Idaho 445, 460 (2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 316 (1979)) (internal quotation marks omitted).

When an appellate court determines whether a conviction should be upheld, the inquiry 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." *See id.* (internal quotation marks omitted) (emphasis in original). In conducting this analysis, an appellate court "is required to consider the evidence in the light most favorable to the State," and will not substitute its "judgment for that of the jury on issues of witness credibility, weight of the evidence, or reasonable inferences to be drawn from the evidence." *Id.* (citing *State v. Oliver*, 144 Idaho 722, 724 (2007)).

C. The Jury Could Not Properly Find That The Substance At Issue Here Was Methamphetamine

Ms. Tryon asserts the jury could not properly find that the substance at issue here was methamphetamine. Idaho Code § 37-2732(c)(1), the statute under which Ms. Tryon was convicted, generally prohibits the possession of controlled substances included in schedule I, such as methamphetamine. *See* I.C. §§ 37-2705(d)(5) & 37-2732(c)(1). Thus, one of the essential elements the State had to prove beyond a reasonable doubt here was that the identity of the substance was what the State purported it to be, namely, methamphetamine. *See* § 37-2732(c)(1).

Because the State did not present laboratory test results showing the substance was methamphetamine, the question is whether the State presented sufficient circumstantial evidence to prove its identity. In *State v. Mitchell*, 130 Idaho 134 (Ct. App. 1997), the Idaho Court of Appeals held "circumstantial evidence may be sufficient to prove the identity of a substance where laboratory analysis is not available."

Mitchell, 130 Idaho at 136. The *Mitchell* Court based its holding on the general long-held stance in Idaho that "the government's burden to prove the elements of an offense may be met with wholly circumstantial evidence," *id.*, as well as cases from other jurisdictions concluding "the burden of proving a controlled substance may be met with circumstantial evidence," *id.*

However, the *Mitchell* Court was also careful to emphasize its "holding does not alter the State's burden of proof; it remains incumbent upon the State to provide evidence that meets the standard of proof beyond a reasonable doubt." *Id.* "Chemical analysis of a substance remains the preferable and the most reliable evidence of its identity, and the sufficiency of less direct evidence must be evaluated on a case-by-case basis." *Id.*

The *Mitchell* Court held "[t]he entirety of the evidence, when viewed in the light most favorable to the State, is sufficient to support the jury's inference that the substance delivered by [the defendant] was methamphetamine." *Id.* at 137. The informant who purchased methamphetamine from the defendant in *Mitchell* provided testimony that established he was familiar with methamphetamine. *Id.* at 136-37. The informant had purchased and used methamphetamine before, and the substance he purchased from the defendant was packaged by a method commonly used to package methamphetamine. *Id.* at 136. The informant had also testified he had made at least three prior purchases of methamphetamine from the defendant. *Id.* The informant testified that, with respect to the purchase at issue, the defendant had offered to sell "methamphetamine" to him, he gave the defendant the same price he had previously

paid for methamphetamine, and the substance given to him by the defendant looked like methamphetamine. *See id.* at 136-37.

Further, the confidential informant in Mitchell testified that after the defendant learned the informant was wearing a wire, the defendant reached into the informant's car, pulled out his hand in a closed fist, and ran away. *Id.* at 137. The *Mitchell* Court held the jury could conclude from that evidence the defendant fled with the canister containing the substance. *See id.* According to the Court, that conduct by the defendant "allows a further inference that he had indeed delivered methamphetamine to [the confidential informant] and was anxious to recover and dispose of it when he became aware of [the informant's] body wire." *Id.* In sum, the *Mitchell* Court held substantial evidence was presented at the trial from which the jury could properly find that the substance the defendant delivered was methamphetamine. *Id.*

Conversely, here the State did not present sufficient evidence from which the jury could properly find that the substance was methamphetamine. Outside the improperly-admitted statements of Mr. Ringcamp, the only evidence submitted by the State as to the identity of the substance came from the rest of Detective Richardson's testimony. The detective testified he had dealt with methamphetamine on almost a weekly basis, in about one hundred cases. (*See* Tr., p.131, Ls.1-18.) He was watching the house from which the truck left to see if there was any drug activity. (*See* Tr., p.174, L.18 – p.175, L.5.) He also testified he found methamphetamine coupled with syringes or pipes about 75% to 80% of the time. (*See* Tr., p.191, Ls.10-23.) The substance here was found right next to the syringes and pipes. (*See* Tr., p.192, L.25 – p.193, L.3.) Detective Richardson testified the substance looked akin to methamphetamine. (Tr., p.193, L.25

– p.194, L.5.) However, on cross-examination the detective testified kosher salt and other substances could look like methamphetamine. (*See* Tr., p.230, Ls.18-22.)

Ms. Tryon submits the above evidence, even when considered in the light most favorable to the State, was insufficient to show the substance at issue was methamphetamine. In contrast to *Mitchell*, where the alleged drugs at issue had not been recovered by the police, *see* 130 Idaho at 135, the State admitted the substance here as an exhibit and published it for the jury. (*See* State's Ex. 4; Tr., p.201, L.14 – p.202, L.15.) But the State did not present any laboratory test results on the identity of the substance. (*See* Tr., p.234, Ls.23-25.) Further, unlike the defendant in *Mitchell*, *see* 130 Idaho at 136-37, there was no evidence presented that Ms. Tryon had a history of selling methamphetamine. Additionally, while Detective Richardson testified the substance looked like methamphetamine, as opposed to kosher salt (*see, e.g.*, Tr., p.232, L.21 – p.233, L.1), he also testified other substances could look like methamphetamine (*see* Tr., p.230, L.20-22). Thus, the jury could not properly find that the substance here was methamphetamine.

The State did not present sufficient evidence to support Ms. Tryon's conviction for possession of a controlled substance. Thus, the judgment of conviction for possession of a controlled substance should be vacated, and the matter should be remanded to the district court for the entry of a judgment of acquittal on that charge.

CONCLUSION

For the above reasons, Ms. Tryon respectfully requests this Court vacate her judgment of conviction for possession of a controlled substance, and remand the matter to the district court for a new trial. Alternatively, Ms. Tryon respectfully requests this Court vacate her judgment of conviction for possession of a controlled substance, and remand the matter to the district court for the entry of a judgment of acquittal.

DATED this 4th day of May, 2017.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of May, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

GRACIE JEAN TRYON
310 ASH ST
CALDWELL ID 83605

JUNEAL C KERRICK
DISTRICT COURT JUDGE
E-MAILED BRIEF

DAVID J SMETHERS
CANYON COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BPM/eas