8-25-2017

State v. Tryon Respondent's Brief Dckt. 44489

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44489**
Plaintiff-Respondent,	)	
	)	**Canyon Co. Case No.**
vs.	)	**CR-2016-2267**
	)	
GRACIE JEAN TRYON,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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Nature Of The Case

Gracie Jean Tryon appeals from the judgment entered upon the jury verdict finding her guilty of unlawful possession of a controlled substance (methamphetamine) and possession of drug paraphernalia.

Statement Of The Facts And Course Of The Proceedings

The following facts are based on testimony presented at Tryon's jury trial on the charges of unlawful possession of a controlled substance (methamphetamine) and possession of drug paraphernalia. (See R., pp.18-19.)

Detective Matt Richardson testified that, before recently joining the Nampa Police Department, he had been a detective in the Caldwell Police Department's "Street Crimes Unit" for three years. (Tr., p.127, L.9 – p.128, L.5; p.129, L.25 – p.130, L.3.) The Street Crimes Unit is a proactive unit that "seeks out street level drug traffickers and gang members." (Tr., p.128, Ls.14-18.) While in the Street Crimes Unit, Detective Richardson investigated offenses involving methamphetamine, marijuana, heroin, pills, and cocaine. (Tr., p.130, Ls.7-12.)

Detective Richardson has had specialized training in four different interdiction courses and "went through" the DEA narcotics school. (Tr., p.129, Ls.1-4.) In his drug interdiction training, Detective Richardson was taught to identify people and vehicles that travel across state lines with narcotics, and the DEA school trained him in long-term drug investigations, mainly dealing with undercover and confidential informant operations. (Tr., p.129, Ls.10-16.)

Detective Richardson had dealt with methamphetamine "almost on a weekly basis" during his three years in the Street Crimes Unit, and worked on about 100 cases involving the seizure of methamphetamine. (Tr., p.130, L.24 – p.131, L.18.) He testified that he is familiar

with (1) how methamphetamine looks (white crystallized substance, small crystals and some powder), (2) what it smells like (little odor to it), (3) how it is packaged (large sandwich baggies, smaller zip-lock baggies, and "tear-offs" of plastic shopping bags that are melted at the end), (4) how it is typically ingested (smoking by using glass tubes with a ball on one end, injecting, or snorting), and that (5) used methamphetamine pipes have white residue inside and could also be black on the bottom of the ball. (Tr., p.168, L.6 - p.171, L.6.) The detective explained that marijuana has a unique smell that he can recognize, and that marijuana is generally smoked using a glass pipe, but can also be smoked with an E-cigarette. (Tr., p.171, L.15 – p.172, L.12.)

On the night of February 1, 2016, Detective Richardson was in the area of a residence in Caldwell, watching it to see if there was any drug activity. (Tr., p.173, Ls.6-11; p.174, L.8 - p.175, L.5.) The detective had been at the house on four previous occasions to assist in misdemeanor probation office visits, and he had encountered drugs and drug paraphernalia at that house. (Tr., p.175, Ls.9-20.) While observing the house, Detective Richardson saw a Ford truck that was parked on the street leave, so he followed it. (Tr., p.176, Ls. 1-18.) After watching the truck fail to make a complete stop at two stop signs, the detective pulled the truck over. (Tr., p.176, L.15 – p.178, L.13.) The driver of the truck was Carl Ringcamp, and Tryon, the only passenger, informed the detective that she and Ringcamp were boyfriend and girlfriend. (Tr., p.178, L.14 - p.180, L.7.)

When he went to the truck, Detective Richardson noticed a faint odor of marijuana coming from it, and had Ringcamp go to the rear of the truck to speak to him. (Tr., p.180, Ls.8-16.) Based on their conversation, the detective placed Ringcamp into custody and put him into his patrol vehicle. (Tr., p.180, L.22 – p.181, L.6.) When Tryon got out of the truck from the

passenger side, Detective Richardson "overheard her say that she's not going to allow us[1] to search her purse." (Tr., p.181, L.19 – p.182, L.1.) Detective Richardson talked to Tryon about a marijuana pipe that Ringcamp had left on the seat, and she admitted it was a "weed pipe" and that she had it in her pocket. (Tr., p.182, L.7 – p.183, L.4.) The detective retrieved that pipe, which was a "long cylinder pipe or E-cigarette," from Tryon's pocket. (Tr., p.187, L.22 – p.189, L.9.)

Detective Richardson searched the truck and found (1) a small coin purse with stems and bits of black residue located in the passenger side door panel (2) a large ladies purse that was open and packed full of items, which sat on the passenger side floorboard, (3) a black case that sat on top of everything in the open purse, (4) two hypodermic syringes and two glass pipes in a purple Crown Royal bag that was inside the black case; one of the pipes had white residue in its burnt bottom, and (5) a small blue plastic case next to the Crown Royal bag that held a baggie with a white crystallized substance. (Tr., p.183, L.16 – p.185, L.22; p.206, Ls.14-16; p.213, L.17 – p.214, L.14.)

According to Detective Richardson, 75 to 80 percent of the time when he finds methamphetamine during an investigation, he also finds syringes or pipes, and here, the syringes/pipes and the white crystalline substance were "right next to each other." (Tr., p.191, L.10 – p.192, L.3.) When asked, "Is the substance – the white crystalline substance that we previously mentioned, does that look akin to methamphetamine?" the detective answered "Yes." (Tr., p.193, L.25 – p.196, L.5.) On re-direct examination, Detective Richardson testified that the white crystalline substance does not look like "kosher salt," but that it does look like methamphetamine. (Tr., p.232, L.21 – p.233, L.1.)

[1] Another officer arrived at the scene after Detective Richardson initially made the traffic stop. (Tr., p.181, Ls.9-18.)

Over an objection by Tryon (based on hearsay and the right to confrontation) and after an offer of proof by the state outside the presence of the jury (see generally Tr., p.148, L.16 – p.166, L.19), the trial court permitted Detective Richardson to testify about statements made Ringcamp when he was in the back seat of the patrol car. The detective first testified, "I asked him whose meth it was and he stated it wasn't hers." (Tr., p.194, Ls.10-19.) The detective further testified that Ringcamp gave a couple other responses; "He again said it wasn't hers. And then, he later said, "It was mine. Okay."[2] (Tr., p.195, Ls.13-17.)

The state charged Tryon with unlawful possession of a controlled substance (methamphetamine) and possession of drug paraphernalia. (R., pp.18-19.) Tryon pled not guilty and proceeded to trial at which a jury found her guilty of both charges. (R., pp.66-67.) The district court imposed a unified four-year sentence with one and one-half years fixed, and suspended the sentence and placed Tryon on probation for three years. (R., pp.88-91.) Tryon filed a timely notice of appeal. (R., pp.81-84.)

[2] The state did not call a forensic scientist as a witness, or introduce a lab report, to prove that the white crystalline substance was methamphetamine. Instead, the state presented circumstantial evidence to show that the substance was methamphetamine. See State v. Mitchell, 130 Idaho 134, 136, 937 P.2d 960, 962 (Ct. App. 1997).

ISSUES

Tryon states the issues on appeal as:

> 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?

(Appellant's Brief, p.6.)

The state rephrases the issues as:

1. Has Tryon failed to show any error in the district court's admission of Ringcamp's statements because: (a) she waived any objection to their admission by telling the jury in her opening statement that Ringcamp told the officers, "it was mine, Okay," and (b) she failed to show that Ringcamp's statements were "testimonial" for purposes of the Confrontation Clause?

2. Has Tryon failed to show the evidence was not sufficient to support her conviction for unlawful possession of a controlled substance (methamphetamine)?

ARGUMENT

I.

Tryon Has Failed To Show Any Error In The District Court's Admission Of Ringcamp's Statements Because (1) She Waived Any Objection By Telling The Jury About The Statements During Opening Statement, And (2) The Statements Were Not Testimonial For Purposes Of The Confrontation Clause

A. Introduction

Tryon contends the district court violated her constitutional right to confront witnesses "when it permitted the admission, through Detective Richardson,[3] of Mr. Ringcamp's statements touching on the identity of the substance at issue." (Appellant's Brief, p.7.) Tryon argues that the admission of such testimony constitutes reversible error.[4] (Appellant's Brief, pp.16-17.) Tryon's arguments fail.

First, Tryon waived any objection to Ringcamp's testimony because, prior to any argument or ruling on its admissibility, her trial counsel informed the jury during opening statement that Ringcamp told the officers "The evidence will show that Carl later took – later told the officers, 'it was mine. Okay.'" (Tr., p.125, Ls.2-4.) Moreover, the district court correctly determined that admission of Ringcamp's statement did not violate Tryon's right to confrontation because the statement was not "testimonial" under the Confrontation Clause.

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[3] Tryon argues, in effect, that because Ringcamp did not correct Detective Richardson's reference to "methamphetamine," he made an adoptive admission that the substance was methamphetamine. At trial, the state used Ringcamp's non-objection to the detective's "methamphetamine" reference as one of the circumstances that showed the substance was methamphetamine. (Tr., p.155, L.12 – p.156, Ls. 12-24; p.158, L.15 – p.159, L.1; p.194, L.13 – p.195, L.17; p.289, Ls.8-17; p.328, L.24 – p.329, L.18.)

[4] Tryon does not challenge the district court's determination that the statement Ringcamp made in response to Detective Richardson's question -- in which he took responsibility for the "methamphetamine" seized from Tryon's purse – constituted a statement against interest, or that Ringcamp was "unavailable" for trial. (Tr., p.166, Ls.12-19); see I.R.E. 804(b)(3).

Finally, even if this Court finds that Tryon has met her burden of showing error in relation to the admission of the challenged testimony, any error is harmless.

B. Standard Of Review

When reviewing a claimed violation of the Confrontation Clause the appellate court defers to the trial court's factual findings unless clearly erroneous, but gives free review to the trial court's legal determinations. State v. Hooper, 145 Idaho 139, 141, 176 P.3d 911, 913 (2007).

C. Tryon Waived Any Objection To The Admission Of Ringcamp's Statements

Prior to jury selection on the day trial began, the prosecutor informed the court that he had one additional motion: he intended to call Officer Richardson to testify that Ringcamp told him the "meth" belonged to him, and the state anticipated "a hearsay objection and a confrontation clause objection." (Tr., p.24, L.12 – p.25, L.3.) The court decided that it would be better to consider the matter when they reached "that point" in the trial and to "take it up outside the presence of the jury[,]" allowing the state to "make an offer of proof and whatever argument they may have." (Tr., p.25, Ls.15-20.) During his opening statement – before any argument or ruling had been made regarding the admissibility of Ringcamp's statements – Tryon's trial counsel told the jury, "The evidence will show that Carl later took – later told the officers, 'it was mine. Okay.'" (Tr., p.125, Ls.2-4.)

When the issue of the admissibility of Ringcamp's statements arose during the state's case-in-chief, the prosecutor stated:

> Your Honor, we intend to ask the officer about statements made by Carl Ringcamp, the statements referenced by Mr. Smethers [defense counsel] in his opening. Mr. Ringcamp was asked something along the lines of, whose methamphetamine is it. He says. "it's mine." Number one, we think that defense counsel putting that statement in his opening is a waiver of his hearsay objection and also his confrontation clause objection. You simply can't reference a statement in whole or in part in your opening and then complain about it being admitted later.

(Tr., p.148, L.20 – p.149, L.6 (explanation added).) Although the district court rejected Tryon's confrontation clause argument (Tr., p.160, Ls.11-15), it did not make any ruling in regard to the prosecutor's "waiver" argument.

However, the prosecutor was correct -- the doctrine of invited error estops a party from asserting an error when his own conduct induced the commission of the error. State v. Atkinson, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993). A party may not complain of errors he has consented to or acquiesced in. State v. Caudhill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985); see State v. Lankford, 35617, 2017 WL 2838135, at *16 (Idaho July 3, 2017) (Defense counsel's opening statement challenging the veracity of the state's witnesses allowed the prosecutor to tell jury during closing argument that the state had presented witnesses who were good and honest people.). By telling the jury that "[t]he evidence will show that Carl . . . later told the officers, 'it was mine. Okay'" (Tr., p.125, Ls.2-4), Tryon waived any argument that her Sixth Amendment right to confrontation was violated by the subsequent admission of such testimony. Although the district court did not make a ruling on whether Tryon had waived her confrontation clause issue, the court's ruling admitting Ringcamp's statements should be affirmed on this alternative basis. See State v. Morris, 119 Idaho 448, 450, 807 P.2d 1286, 1288 (Ct. App. 1991) (on appellate review, the lower court's ruling must be upheld if it is capable of being upheld on any theory).

D. The District Court Correctly Determined That Admission Of Ringcamp's Statement Did Not Violate Tryon's Right To Confrontation Because It Was Not "Testimonial"

1. Factual Background

During a hearing outside the presence of the jury, when the trial judge asked why Ringcamp's statement was "nontestimonial" for purposes of a confrontation clause analysis, the prosecutor explained:

> I think 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. 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. I don't think that is a thought that went through his head. I don't think that's a thought that any reasonable person would have went through his head.
>
> The reason you, when stopped with your girlfriend, tell an officer, "that's my meth," is to get her out of trouble, not to get her into trouble.

(Tr., p.155, L.19 – p.156, L.3.)

Toward the end of the hearing, the district court stated that, similar to a statement at issue in United States v. Johnson, 581 F.3d 320 (6th Cir. 2009), the challenged statement in Tryon's case was nontestimonial and presented no "confrontation" issue. (Tr., p.160, Ls.11-15.) The court asked for an offer of proof "as to exactly what – what the statement was and how it occurred." (Tr., p.160, Ls.16-18.) Detective Richardson testified that when he asked Ringcamp "whose meth it was,"[5] Ringcamp first said "it wasn't hers[,]" then he "told [the detective] it was his." (Tr., p.161, Ls.4-10.) When the detective resumed his testimony before the jury, he testified that, while Ringcamp was in the back of his detective car, "I asked him whose meth it was and he stated it wasn't hers," and Ringcamp "again said it wasn't hers. And then, he later said, 'It was mine. Okay.'" (Tr., p.194, Ls.17-19; p.195, Ls.16-17.)

Relying mainly on Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), Tryon argues on appeal that because Detective Richardson's testimony about Ringcamp's statements was presented as an adoptive admission to help prove that the white crystalline substance seized from the Crown Royal bag was methamphetamine, it violated her confrontation rights because Ringcamp was not available for cross-examination at trial, nor had she been given a prior

[5] On cross-examination during the hearing on the "confrontation" issue, Detective Richardson affirmed that he used "the exact verbiage whose meth is this." (Tr., p.162, Ls.11-13.)

opportunity to cross-examine him. (Appellant's Brief, pp.8-15.) Tryon's argument fails. Correct application of the law to the facts of this case supports the district court's determination that the challenged statements were not testimonial, and, therefore, their admission did not violate Tryon's confrontation rights.

2. Legal Standards Applicable To The Confrontation Clause

In Ohio v. Clark, 135 S.Ct. 2173, 2179-2180 (2015), the Supreme Court set out the general landscape of Confrontation Clause law, which, although lengthy, warrants review:

> The Sixth Amendment's Confrontation Clause, which is binding on the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Ohio v. Roberts*, 448 U.S. 56, 66 . . . (1980), we interpreted the Clause to permit the admission of out-of-court statements by an unavailable witness, so long as the statements bore "adequate 'indicia of reliability.'" Such indicia are present, we held, if "the evidence falls within a firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Ibid*.
>
> In *Crawford v. Washington*, 541 U.S. 36 . . . (2004), we adopted a different approach. We explained that "witnesses," under the Confrontation Clause, are those "who bear testimony," and we defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id*., at 51 . . . (internal quotation marks and alteration omitted). The Sixth Amendment, we concluded, prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id*., at 54 . . . . Applying that definition to the facts in *Crawford*, we held that statements by a witness during police questioning at the station house were testimonial and thus could not be admitted. But our decision in *Crawford* did not offer an exhaustive definition of "testimonial" statements. Instead, *Crawford* stated that the label "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id*., at 68 . . . .
>
> Our more recent cases have labored to flesh out what it means for a statement to be "testimonial." In *Davis v. Washington* [6] and *Hammon v. Indiana*, 547 U.S. 813 . . . (2006), which we decided together, we dealt with statements given to law enforcement officers by the victims of domestic abuse. The victim in *Davis* made statements to a 911 emergency operator during and shortly after her boyfriend's

[6] See Davis v. Washington, 547 U.S. 813, 823 (2006).

violent attack. In *Hammon*, the victim, after being isolated from her abusive husband, made statements to police that were memorialized in a "'battery affidavit.'" *Id.*, at 820 . . . .

We held that the statements in *Hammon* were testimonial, while the statements in *Davis* were not. Announcing what has come to be known as the "primary purpose" test, we explained: "Statements 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. 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.*, at 822 . . . . Because the cases involved statements to law enforcement officers, we reserved the question whether similar statements to individuals other than law enforcement officers would raise similar issues under the Confrontation Clause. *See id.*, at 823, n. 2 . . . .

In *Michigan v. Bryant*, 562 U.S. 344 . . . (2011), we further expounded on the primary purpose test. The inquiry, we emphasized, must consider "all of the relevant circumstances." *Id.*, at 369 . . . . And we reiterated our view in *Davis* that, when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." 562 U.S., at 358 . . . . At the same time, we noted that "there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Ibid.* "[T]he existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry." *Id.*, at 374 . . . . Instead, "whether an ongoing emergency exists is simply one factor . . . that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id.*, at 366 . . . .

One additional factor is "the informality of the situation and the interrogation." *Id.*, at 377 . . . . A "formal station-house interrogation," like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused. *Id.*, at 366, 377 . . . . And in determining whether a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.*, at 358–359 . . . . In the end, the question is whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Id.*, at 358 . . . . Applying these principles in *Bryant*, we held that the statements made by a dying victim about his assailant were not testimonial because the circumstances objectively indicated that the conversation was primarily aimed at quelling an ongoing emergency, not establishing evidence for the prosecution. Because the relevant statements were made to law enforcement officers, we again declined to decide whether the same

> analysis applies to statements made to individuals other than the police. *See id*., at 357, n. 3 . . . .
>
> Thus, under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id*., at 359 . . . .

3. Tryon's Statement Was Not "Testimonial" Because It Was Not Made For The Primary Purpose Of Creating Evidence For Trial

Tryon argues that, "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 was methamphetamine." (Appellant's Brief, p.14.) Tryon's argument misses the main point in determining whether Ringcamp's statement is testimonial under the Confrontation Clause – whether the "primary purpose of the interrogation" was to create or develop evidence for a later trial.

In State v. Stanfield, 158 Idaho 327, 347 P.3d 175 (2015), the Idaho Supreme Court reviewed several United States Supreme Court Confrontation Clause cases pertaining to forensic reports, including Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).[7] According to Stanfield, in Melendez-Diaz "the trial court admitted three 'certificates of analysis' that cocaine was present in the bags of powder seized from the defendant. The certificates were sworn to before a notary by the analysts who conducted the testing." Stanfield, 158 Idaho at 333, 347

[7] In Stanfield, the Idaho Supreme Court determined that the Confrontation Clause was not violated by a neuropathologist's expert testimony that the child-victim died from "non-accidental head trauma resulting from abuse," which testimony was based on a non-testifying lab technician's assertions that slides of brain tissue of the child (1) were labeled correctly, and (2) had the proper stain applied to samples in accordance with protocol, "thereby permitting an accurate interpretation of the samples." Stanfield, 158 Idaho at 330, 339, 347 P.3d at 178, 187. Stanfield held "that there was no Confrontation Clause violation because the technician's assertions were not made for an evidentiary purpose and thus were not testimonial. Id., at 340, 347 P.3d at 188.

P.3d at 181. Addressing the "formality" requirement for a statement to be deemed "testimonial" under the Confrontation Clause, the United States Supreme Court concluded that "the certificates were testimonial because they were 'solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact" and were "quite plainly affidavits." Id. (quoting Melendez-Diaz, 557 U.S. at 310). In addressing the second requirement for being "testimonial" – the "primary purpose of the interrogation" -- Melendez-Diaz "noted that the governing statute provided that 'the *sole purpose* of the affidavits was to provide prima facie evidence of the composition, quality, and net weight of the analyzed substance.'" Id. (emphasis original) (quoting Melendez-Diaz, 557 U.S. at 311).

Tryon correctly notes that the state's use of Ringcamp's statement to help prove that the white crystalline substance found in her purse was methamphetamine bears some similarity to the admission in Melendez-Diaz of sworn "certificates of analysis" by state lab analysts to prove the substance analyzed was cocaine. However, Stanfield pointed out that, in Melendez-Diaz, the statements (i.e. reports by non-testifying analysts) were not only made "'for the purpose of establishing or proving some fact at trial,'" Stanfield, 158 Idaho at 335, 347 P.3d at 183 (quoting Melendez-Diaz, 557 U.S. at 324), but under Massachusetts law, '"the *sole purpose* of the affidavits was to provide prima facie evidence of the composition, quality, and net weight of the analyzed substance,'" id. at 333, 347 P.3d at 181 (quoting Melendez-Diaz, 557 U.S. at 311) (emphasis original).

In contrast to the sworn certificates of analysis in Melendez-Diaz that had the sole purpose of being generated for admission into evidence, an objective review of the statements at issue in this case shows they were not elicited or made for the "primary purpose" of creating an "out-of-court substitute for trial testimony." Bryant, 562 U.S. at 358. As stated by the

prosecutor, "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.) Stated in legal terms, "the primary purpose of the interrogation," whether viewed from Detective Richardson's question, Ringcamp's answer, or both, was not to create a record for trial, or an out-of-court substitute for trial testimony, in order to prove that the substance found in Tryon's purse was, in fact, methamphetamine. See Michigan v. Bryant, 562 U.S. 344, 358 ("primary purpose of an interrogation"), 369 ("In determining whether a declarant's statements ae testimonial, courts should look to all of the relevant circumstances"); Ohio v. Clark, 135 S.Ct. 2173, 2179-2180 (2015) ("primary purpose of the interrogation"); Davis v. Washington, 547 U.S. 813, 822 (2006) (same).

In sum, because no reasonable person would have expected that Ringcamp's answer to Detective Richardson's question (whose meth is this?) would later be used as a substitute for testimony by a forensic scientist, such future use was not, under any objective evaluation, the "primary purpose of the interrogation."[8] See Bryant, 562 U.S. at 359 ("We objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties."); Stanfield, 158 Idaho at 337, 347 P.3d at 185 ("The only consistent requirement that can be distilled from these decisions is that in order for a statement – forensic or otherwise – to be deemed testimonial, it must have been made with a primary objective of creating an evidentiary record to establish or prove a fact at trial."). Therefore, the district court correctly concluded

[8] During a discussion between the trial judge and counsel at the bench, held outside the hearing of the jury, when it became clear that the state was not going to present testimony by a "lab witness," Tryon's trial counsel exclaimed, "If they don't have a lab witness here, I don't know what the hell we're doing here." (Tr., p.133, L.25 – p.134, L.2.)

that Ringcamp's statement was not "testimonial" under the Confrontation Clause, and properly admitted it.

E. Any Error Is Harmless

A trial error can be declared harmless if the appellate court concludes on *de novo* review it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). To show harmless error the state has "the burden of showing that it was clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Premo v. Moore, 562 U.S. 115, 130 (2011) (internal quotations omitted). Where the error placed impermissible evidence, argument or information before the jury the Supreme Court has required the prosecution to show beyond a reasonable doubt that the error did not contribute to the conviction. Chapman, 386 U.S. at 24 (admission of confession that should have been suppressed); Arizona v. Fulminante, 499 U.S. 279, 295-96 (1991) (argument for guilt from defendant's silence); Deck v. Missouri, 544 U.S. 622, 635 (2005) (visible shackles without cause at jury trial). An "otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). In conjunction with the review of the whole record, review of the strength of the state's evidence is appropriate. Neder v. United States, 527 U.S. 1, 16-20 (1999); see also Premo, 562 U.S. at 129-31. The analysis ultimately focuses "on the underlying fairness of the trial." Neder, 527 U.S. at 18-19.

At trial, the state presented circumstantial evidence to show that the white crystalline substance seized from Tryon's purse was methamphetamine. (Tr., p.133, Ls.2-24; p.147, Ls.2-9; p.166, Ls.9-12; p.193, Ls.10-11; p.236, L.11 – p.238, L.24.) In doing so, the state relied on State v. Mitchell, 130 Idaho 134, 136, 937 P.2d 960, 963 (Ct. App. 1997), which held "that

circumstantial evidence may be sufficient to prove the identity of a substance where laboratory analysis is not available."[9] Due to the strength of the circumstantial evidence showing that the white crystalline substance found in Tryon's purse was methamphetamine, even if this Court finds error in the admission of Ringcamp's statements, it should conclude that, beyond a reasonable doubt, the statements did not contribute to the verdict.

Detective Richardson was highly trained and experienced in investigating methamphetamine crimes (including its appearance, smell, packaging (here: the corner of a small baggie which was melted closed), and means of ingestion (here: two pipes – one with tell-tale white burnt residue -- and two syringes). Moreover, Tryon's statement that she was not going to allow the officers to search her purse shows there was something more legally jeopardizing in her purse than marijuana -- since the marijuana pipe had already been taken from Tryon's person. Finally, the close proximity of the white crystalline substance to the two glass pipes and two syringes in Tryon's purse supports the only reasonable conclusion possible, that the substance found in Tryon's purse was methamphetamine.

For its response to Tryon's "harmless error" argument (see Appellant's Brief, pp.16-17), the state fully relies on its "Statement of Facts," pages 1 through 3 in this brief, and incorporated herein. Based on those facts, which were established through trial testimony, this Court should find that, beyond a reasonable doubt, any error in the admission of Ringcamp's statement did not contribute to Tryon's conviction and is, therefore, harmless. See Chapman, 386 U.S. at 24.

[9] The state is unable to ascertain from the record why a "laboratory analysis" expert was not available for trial in this case.

II.

Tryon Has Failed To Show The Evidence Was Not Sufficient To Support Her Conviction For Unlawful Possession Of A Controlled Substance (Methamphetamine)

A. Introduction

After the state rested its case, Tryon's trial counsel made a motion to dismiss the case pursuant to Idaho Criminal Rule 29, which was denied.[10] (Tr., p.234, L.3 – p.242, L.2.) On appeal, Tryon again challenges the sufficiency of the evidence supporting her conviction for unlawful possession of a controlled substance (methamphetamine). (Appellant's Brief, pp.18-22.) Specifically, she contends the state failed to present sufficient evidence from which the jury could find beyond a reasonable doubt that "the substance at issue" -- the white crystalline substance found in the Crown Royal bag in her purse -- "was methamphetamine." (Appellant's Brief, p.18.) Tryon's argument fails. Application of the correct legal standards to the evidence

[10] The district court ruled:

> The test of the sufficiency of the prosecution's evidence on such a motion is whether there is substantial evidence upon which rational triers of fact could find the defendant guilty beyond a reasonable doubt. That's state versus Barlow, 113 Idaho 573 [746 P.2d 1032 (Ct. App. 1987)]. As noted by Mr. Spalding [the prosecutor], the Court is required to view the evidence in the light most favorable to the State, recognizing that full consideration must be given to the right of the jury to determine the credibility of the witnesses and the weight to be afforded evidence, as well as the right to draw all justifiable inferences from the evidence. In cases where the inculpatory evidence is so insubstantial that jurors could not help but have a reasonable doubt as to the proof of that element, judgment of acquittal should be entered.
>
> In this case, I do not believe, at the close of the State's case in applying the view of the evidence that I'm required to do, I don't believe that a judgment of acquittal is appropriate. I will deny that motion, 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. And I think there are two elements in doubt in this, one, the possession, and two, the substance. So I will deny that motion for judgment of acquittal without prejudice to being renewed at a later time.

(Tr., p.240, L.24 - p.242, L.2 (bracketed material added).)

presented shows the state presented sufficient evidence from which the jury could find Tryon was guilty of unlawfully possessing methamphetamine. Tryon has failed to show she is entitled to an acquittal on that charge.

B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury's verdict. State v. Hughes, 130 Idaho 698, 701, 946 P.2d 1338, 1341 (Ct. App. 1997); Hart, 112 Idaho at 761, 735 P.2d at 1072.

C. The State Presented Sufficient Evidence To Prove The Essential Elements Of Unlawful Possession Of A Controlled Substance (Methamphetamine)

Tryon argues that the state failed to present substantial evidence upon which a rational trier of fact could conclude, beyond a reasonable doubt, that the white crystalline substance seized from her purse was, in fact, methamphetamine. (Appellant's Brief, pp.19-22.) Tryon compares the very strong, but non-scientific, evidence presented in State v. Mitchell, 130 Idaho 134, 937 P.2d 960 (Ct. App. 1997), with the evidence in her case, and concludes that the evidence presented here was not sufficient to prove the substance was methamphetamine. (Appellant's Brief, pp.20-22.) However, Mitchell did not establish the threshold that must be

met in order to determine whether the state has presented substantial evidence of the nature of a controlled substance in the absence of forensic analysis and testimony.

For its response to Tryon's "insufficient evidence" argument (see Appellant's Brief, pp.18-22), the state fully relies on its "Statement of Facts," pages 1 through 3 in this brief, and incorporated herein. In making a "sufficiency of the evidence" determination, this Court considers all of the evidence presented to the jury – including the evidence Tryon claims was erroneously admitted. See State v. Moore, 148 Idaho 887, 894, 231 P.3d 532, 539 (Ct. App. 2010).

Based on the testimony and evidence presented at trial, the state provided substantial evidence upon which a rational trial of fact could conclude, beyond a reasonable doubt, that the white crystalline substance found in Tryon's purse was methamphetamine. Therefore, Tryon has failed to show that her conviction for unlawful possession of a controlled substance (methamphetamine) was not supported by sufficient evidence.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the jury verdict finding Tron guilty of possession of a controlled substance and possession of drug paraphernalia.

DATED this 25th day of August, 2017.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 25th day of August, 2017, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

JCM/vr